REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

MARCH 21, 1972

PART III
SUBPART C (Comparative Law)
POLICY QUESTIONS

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REFORM OF THE FEDERAL CRIMINAL LAWS

PART III

SUBPART C (COMPARATIVE LAWS)

TUESDAY, MARCH 21, 1972

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant, to notice, at 10 a.m. in room 2228, New Senate Office Building, Senator Roman Hruska (acting chairman) presiding.

Present: Senator Hruska.

Also present: G. Robert Blakey, chief counsel; Malcolm D. Hawk, minority counsel; Kenneth A. Lazarus, Robert H. Joost, and Elizabeth Bates, assistant counsels; and Mrs. Mable A. Downey, clerk.

Senator HRUSKA. This morning the subcommittee will focus its attention on the relation between the proposed code and foreign law. We are fortunate in having two distinguished scholars. In addition, we have a number of letters and several studies from the Library of Congress which will be inserted into todays record. Our first witness is Prof. Gerhard Mueller of New York University.

You have submitted some material to the committee, Professor. It is quite extended and will be included in the record, because it will lend itself much more as a matter of reference and study than it will for current comment.

(The material follows:)

MEMORANDUM: SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
U.S. SENATE, COMMITTEE ON THE JUDICIARY

Re: Response to questionnaire memorandum containing twenty questions for a Comparative Law evaluation of the proposed final draft of a new Federal criminal code. Title 18, United States Code.

Submitted by: Prof. G. O. W. Mueller, Director, Criminal Law Education and Research Center, NYU.

INTRODUCTION

The Criminal Law Education Research Center of New York University obtained a detailed questionnaire, composed of approximately 50 questions, pertaining to provisions of the Draft of the Federal Criminal Code. In the extremely limited time available, the Criminal Law Education Research Center has done its best to provide some answers to the very difficult questions posed. The CLEAR Center has been in consultation with the National Commission on Reform of Federal Criminal Law at an earlier stage and at that time advised

the Commissioners on a range of subjects, including mistake, regulatory, offenses, assault, crimes, consent, duress, necessity, immaturity, jurisdiction and some other provisions. At that time we tried to urge upon the Commission the need to make a major commitment toward the assembly of comparative law data and on the experience of other nations, so as to get the best possible input for the American Federal Code. In this respect we did not succeed, since contact with the Comparative Criminal Law Project of the Criminal Law Education and Research Center of New York University remained minimal and no further specific requests for comparative evaluations were received.

In this connection we would like to point out that all of the major continental penal codifications recently produced have operated with the comparative method. Particularly the codifiers of Japan, Germany and Sweden have undertaken considerable comparative research on solutions adopted by foreign legal systems.

There are special departments in several Ministries of Justice, concerned with matters of comparative criminal law. As for Germany, considerable federal funds are made available to maintain the Institute of Foreign and International Criminal Law at the University of Freiburg, Germany, as an adjunct of the government's reform effort, in criminal justice.

It would not be amiss to point out to the National Commission, that while we have done our best to provide it with some comparative data, the Commission ideally is entitled to more and better data. Consequently, we propose that the National Institute of Law Enforcement and Criminal Justice be urged or instructed to create a research branch competent in the area of comparative criminal law and criminology or, in the alternative, to sub-contract for such services with an Institute like the Comparative Criminal Law Project of the Criminal Law Education and Research Center. A funded and well staffed agency, which is constantly at the disposition of federal government agencies, is needed, so as to aid legislative reform efforts by means of reliable experience data from other countries.

Q.1. The National Commission, following the lead of the American Law Institute in its Model Penal Code (1962), has proposed what is primarily a code of substantive criminal law. The proposed Code is divided into the Part A, General Provisions; Part B, Specific Offenses; Part C, Sentencing. Is such a tripartite division followed in the foreign codes? How are foreign codes structured?

A. It is almost universal practice for nations of the civil law system to divide their penal codes into two parts: (1) the General Part, (2) the Special Part. The General Part deals with those provisions that have general applicability regardless of the nature of the crime; for example the temporal and territorial applicability, attempts and accessoryship, justifications and excuses, etc. In England in 1953, with the publication of Glanville William's work "Criminal Law: The General Part," the thinking now likewise goes in terms of dividing problems of substantive Criminal Law into a General Part and a Special Part. Note that all procedure are being dealt with in separate Codes of Criminal Procedure.

Only one Code of Europe has a tripartition in terms of General Part, Special Part and provision on sentencing and corrections. This is Europe's most recent penal code, the Royal Swedish Code of 1965. Consequently, the scheme of the Federal Draft Penal Code, envisaging a tripartition into General Provisions, Specific Offenses and Sentencing, is paralleled by Europe's most modern penal code. We are entirely in aggreement with the draft code's tri-partition.

Parenthetically, it is to be noted that some codes of Europe purport to have a partition into three or four parts. This, however, is purely the result of dividing the Special Part into several sub-parts. For example, the French Penal Code divides the Special Part into separate parts for felonies and misdemeanors.

Q.2. The proposed code contains 350 sections (Part A: 73; Part B: 238; Part C: 39), but the numbering system runs from Section 101 to Section 3601. Is it customary in foreign codes to leave so many blank numbers for future statures? What is the usual numbering system?

A. The Code's proposed 350 sections appear to be at a par with the standard number of provisions in foreign penal codes. For example, the French Penal Code has 477 sections. The Norwegian Penal Code has 436 sections. The Ger-

man Penal Code has 370 sections. The relationships between General Part and Special Part, likewise, are quite comparable. In the proposed Code there are 73 sections in the General Part and 39 sections in the Corrections Part or a total of 112 sections, comparing with the General Part of the French Penal Code of 74 sections, the Norwegian Code of 82 sections and the German Penal Code of 87 sections. Of course, the number of sections alone does not give us a proper basis of comparison, since sections may be wordy or terse, may have sub-divisions or none, may cover little or may cover a lot. Prima facie, however, we have comparability.

In foreign penal codes, it is not customary to have blank numbers between sections. The majority of foreign jurists consider the penal code to have an almost immutable permanence. The very idea of "adding" anything to it once it is promulgated is quite antithetical. This is not to say that the whole *corpus juris* stands still, but rather that either new laws are added by means of subsections or sections marked "a" "b" "c", etc., or "bis", or that they are placed in special legislation outside the penal code. The question of immutability of the code, however, does not strike us as an overpowering factor. The fact is that penal codes are not immutable, that they all have a limited life expectancy, which in the modern and age probably is no more than half a century, and that during the first years after promulgation any penal code will have to undergo a considerable amount of interpretation. Most of that interpretation will be by adjudication, some of it may have to be by legislation. It is to be expected and cannot be avoided. Consequently, provisions may have to be made for a proper way of inserting amendments into the code. The code itself and its amendments are meant to serve a very modern society, which in the immediate, foreseeable future will be governed largely by computer programing. Consequently, a system for the numbering of penal code provisions ought to be adopted which is capable of the most rational system of computerization. Neither the European nor the American modes seem to be particularly suitable for that purpose. It would seem to appear that a modified version of the decimal system should be used, according to which each major chapter has a decimal number, the section thereunder has a sub-decimal number, and each particular provision under which has a sub-sub-decimal number, for the best possible computerization.

Of course, the number of sections in itself is not indicative of the actual coverage of a penal code. Conceptually, a code of less than one hundred sections (like the Swedish Code) can cover as much as a code of over four hundred sections like the German Penal Code. What counts is whether a code does, indeed, cover substantially all of the criminal law material of a given country. What counts also is in how many words the penal code is capable of expressing these conceptions. That last point I have explained in another connection, (infra).

Q.3. Combined with Q10 The proposed Code defines the various "intent" requirements or the mental elements necessary for criminal conduct in §302(1). The Code would establish four different kinds of culpability: intentionally, knowingly, recklessly and negligently. How do the foreign criminal codes regard and use the element of the defendant's state of mind? Is it used to determine guilt or innocence? Degree of guilt? Sentence? How do the kinds of culpability proposed in the draft code compare with foreign provisions.

A. In our view, this is the most crucial question of the entire penal code. We at once recognize the progressive approach of the Draft Penal Code, but also notice a fundamental inconsistency within the code itself, to be noted (infra).

1. The forms of culpability: The forms of "culpability" proposed by the penal code are not totally different from European forms of culpability. Of course, most European penal codes speak of only two "forms" of culpability: (1) intent (dolus), and (2) negligence (culpa). In European and other civil law countries, it is left to the judiciary to define the exact meaning of these terms, and particularly to find a place for what in American Law we call "recklessness." Thousands of dissertations have been written in all civil law countries about the forms of culpability and, in particular, about the placing of recklessness either within the form of intent or the form of negligence. No useful purpose would be served in even attempting to summarize them here. In passing, it might merely be noted that the commission of a crime "knowingly"

is universally regarded as tantamount to the commission of the crime "intentionally". We suggest that no particularly useful purpose seems to be served by utilizing two terms in the draft code where one could do.

2. Significance of forms of culpability: We are now turning to the second paragraph of your question number three. There is a vast literature in continental countries on the topic of that question, the relevance of the differentiation between more and less intense attitudes toward the harm created, as measured by intention, recklessness or negligence, does play a significant role in a number of contexts in all continental countries:

(1) The basic requirement in most penal codes of the world is that of §302(2) namely, that intentional or willful commission of the harm is necessary and that the intent must, indeed, cover every element of the crime. Consequently, where there is no such intent or willfulness, the defendant will not be held liable for the commission of the harm. In this sense then, the absence of intention amounts to impunity. This is expressed by the Latin American Model Penal Code, Article 24, which pretty well codifies the law of most Latin American countries.

(2) In all foreign penal codes, the form of mens rea is used to determine the degree of guilt. Thus, universally the intentional production of the harm is threatened with more severe punishments than the negligent production of the harm. *Nota bene*, that recklessness, as previously stated, is not a commonly used form of mens rea in continental countries. A high degree of risk-taking with respect to the production of the harm, and a prospective approval of the harm on the part of the actor, should the harm follow his reckless conduct, is regarded as tantamount to an intention in virtually all civil law countries (this is the so-called *dolus eventualis*).

(3) The state of the defendant's mind is also taken into account for the purposes of sentencing. The intensity of the defendant's desire to produce the harm is regarded as aggravating or mitigating circumstance, particularly in crimes where the defendant's emotions have played a significant role, for example, in crimes of passion. Many foreign codes, especially those Latin American ones having their origins in the Spanish codes of the last century, deal separately with mitigating and aggravating circumstances. In effect this amounts to saying that a mere intent, recklessness or negligence alone is never quite adequate to measure the crime or to assess the perpetrator. What is needed is an additional evaluation of motivations. While American law supposedly refuses to consider the defendant's motives and motivations at sentencing motives and motivations do, in fact, play a significant role as well.

3. Awareness of wrongdoing—the essence of culpability: The "forms" of "culpability" are quite sensible, and in particular, the requirements of §302(2), that willfulness is required unless some lesser form of culpability is specified, is quite in accord with the best thinking all around the world. What is disturbing about the requirement of culpability is the provision of §302(5) to the effect that, unless otherwise provided, "knowledge or belief that conduct is an offense is not an element of the conduct constituting the offense." It has been fundamental throughout this history of Anglo-American Criminal Law, as well as Continental Criminal Law, that criminal liability is imposed on persons who commit a wrongful act knowing that they are doing something wrongful, in other words, acting with "*an awareness of wrongfulness.*"

The very idea of exculpation based on the existence of mental illness rests on freedom from liability of those who could not harbor an *awareness of wrongdoing*. Likewise, when it comes to the exculpation of persons laboring under a mistake of fact, only those are exculpated who by reason of the mistake had no *awareness of wrongdoing*. Consequently, the provision of subsection (5) of §302 is inconsistent with the basic commitment of Anglo-American as well as Continental Law, namely to punish only *guilty* parties.

Moreover, §302(5) is also inconsistent with the provision of §304 to the effect that "a person does not commit an offense if, when he engages in conduct, he is ignorant or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for commission of the offense." Section 304 is a superb provision, in line with the most established thinking on the European continent, to the effect that anybody who labors

under such a mistake that he does not recognize wrongfulness of his act, whether due to an error of fact *or* law, should not be held guilty. When a person labors under a mistake of fact or law with respect to his right to commit a homicidal act, he is not intending to commit the *wrong of a criminal homicide*, even though he may be intending to cause the death of a human being.

The matter can be easily remedied by striking subsection (5) of §302 of the Draft Code. This would be totally in accord with established Anglo-American Criminal Law. When the rule was framed that ignorance of law is no excuse, the common law of crimes was restricted to those offenses which were universally known to be wrong. Consequently, nobody could be heard to maintain that he was unaware of the law outlawing the conduct in question. Consequently, it was true at common law that every intentional or knowing commission of an offense included within it the idea that the perpetrator was aware of the wrongfulness of his action. Liability was excluded when the awareness of the wrongfulness of action was wiped out either by mistake of fact or by mental illness, or some other such cause.

As a matter of comparative law, it is interesting to note that the Supreme Court of the German Federal Republic in a fundamental decision of March 18, 1952 ruled that every case of criminal liability requires the awareness of wrongdoing. Criminal liability cannot be imposed unless the defendant was aware that he was doing something wrong, or, in the case of a crime committed by negligence, that the defendant was under an obligation to investigate the potential wrongfulness of his action.

4. Exculpation in case of lacking awareness of wrongdoing: In the preceding sub-section I have already moved into the question of exculpation due to lacking awareness of wrongdoing. This question is inextricably interwoven with criminal intent and negligence. Theoretically, most foreign penal codes subscribe to the same theory which we supposedly have in America, to the effect that ignorance of of criminal law is no excuse. But nearly all legal systems provide a much more pragmatic answer to the question of mistake or ignorance of law. While in nearly all systems, including ours, mistake of private law has always been regarded as a defense, and while, indeed, there are decisions in virtually all countries, including ours, that absolutely invincible ignorance of the law serves as a defense, there is a growing realization all over the world that in this modern day and age, with its proliferation of regulatory statutes, it is no longer possible to administer a system of criminal justice justly, which does not allow for excusable and explainable ignorance of certain regulatory penal laws. Consequently, there is a growing recognition that where the awareness of wrongdoing is dependent on knowledge of a given prohibition, and there is error or ignorance in this regard, the *criminal intent* of the actor is missing. Among others, this is now recognized in the Latin American Model Penal Code, Article 27, and in the new version of the German Penal Code, Section 17, which reads as follows:

> §14—Error of Law
>
> If the perpetrator while committing the act lacks the awareness that he is doing something wrong, he acts without guilt if the error is not attributable to his own fault. If the perpetrator could have avoided the error, his punishment may, nevertheless, be reduced in accordance with §49(1).
>
> (Section 49 provides for considerable mitigation of sentences under special circumstances.)

While it is not customary in foreign penal codes to combine mistakes of fact and law in one section, we think that §304 in combining error or mistake about a matter of fact or law is well-drafted and understandable. Its succinctness is particularly praiseworthy. In our view, however, §302(9) falls out of the pattern and is totally inconsistent with the contents of §304.

5. Mistaken belief in the existence of exculpating circumstances: Similarly, §303 is quite inconsistent with the general principle embodied in the penal codes of the entire world—including our own—that where there is no awareness of wrongdoing, criminal punishment would be misplaced. As being in fundamental conflict with §304, §303 should be stricken. The matter of mistake is fully covered by §304.

As regards the shifted burden of proof of §303, all codes of the world, except ours, treat mistake of fact pertaining to the existence of a defense in the same manner in which other mistakes of fact are treated. In view of the fact

that Anglo-American law does have the institution of affirmative defenses, a concept which does not exist in civil law countries, it may be justifiable to put the burden of proof on the defendant when he claims that he erroneously assumed the existence of facts which permitted him to exercise one of the defensive measures authorized by law. But it is inconsistent even with American theory of law to state flatly that mistaken belief in the existence of an affirmative defense it not a defense unless otherwise expressly provided. Section 303, therefore, is totally inconsistent with §304 and ought to be revised.

6. Mistaken law vs. mistake of law: Moving on to §610, which is called "Mistake of Law", we have difficulty reconciling §610 with §304. It occurs to us that 304 says everything there is to be said about mistake of law. Section 610 is not needed, since 304 covers all situations but one mentioned in §610. And that one is §610(d), which excuses an illegal act committed in reliance on an official interpretation of the law by a public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime. Under those circumstances, it is not the defendant at all who acts under a mistake of law, but rather it is the public servant or body interpreting the law that is mistaken. Under those circumstances, we have the classical case of a mistaken, but nevertheless, positive law. According to proper theory even in the United States (espoused by Jerome Hall and others) it is then the law which is wrong but not the actor. Consequently §610 is not needed for that particular point either.

7. "Marginal transgression of limit of justificiation": As regards "marginal transgression of limit of justification", the language used is extremely difficult to comprehend. We would propose a solution like that contained in §53(3) of the current German Penal Code "excessive self-defense or defense of another is not punishable if the perpetrator has exceeded the limits of defense by reason of consternation, fear or fright." These words are clear and stick to the mind and memory of the persons addressed, and allow reasonable interpretation of a myriad of conceivable fact situations that may come before judges.

8. Concluding remarks on mens area provisions: The specific drafting of the mistake provisions, except for §304, is not particularly skillful and could certainly be improved. To some extent it leaves holes. For example, under §609 a person who acts in a mistaken belief that he engages in justifiable conduct may nevertheless be found guilty for the negligent or reckless commission of the crime he has committed if his mistake was due to negligence or recklessness. But §609 is silent with respect to the situation where the negligent or reckless commission of the crime is not provided for. What is to be the rule under those circumstances? Should there be a mitigation of punishment? Should the mistake be immaterial? Either of those two solutions have been adopted in different states.

The drafting of the various provisions dealing with mens rea aspects shows differential talents on the part of the various draftsmen, lack of coordination, and inadequate agreement on fundamental premises. All relevant provisions should be resubmitted to the drafting committee with the provisio to redraft all provisions, consistent with the basic premise—superbly stated—of §304, and the basic form requirements of §304, and the basic form requirements of §302 (excepting sub(5) which is inconsistent).

Q.4. The proposed Federal Criminal Code includes a section (§ 305) which defines the causation requirement of casual connection which must be proved between the defendant's conduct and the result. How is causation handled by foreign codes?

A. While there are a few foreign codes which have a specific codified causation formula, e.g., Article 40 of the Italian Penal Code, it is rare to put a causation formula into the code. Causation is largely left to the judiciary for determination. There are probably as many causation formulas in existence in the world as there are scholars who have thought about the problem. It may be doubted whether a code will succeed in imposing a formula. The Federal Draft Criminal Code in §305 has adopted the "conditional" theory of causation. The formula of the Model Penal Code, §2.05, likewise rests on that theory and has been criticized as too stringent. I, myself, would advocate any one of a number of *broader* formulas, as I have explained on the basis of a large-scale comparison of foreign law in my essay "Causing Criminal Harm," of which I am including a copy for the Committee's use.

If the causation formula of §305 is to be retained, I would urgently propose that a subsection (3) be added thereto, namely the provision which is now contained in §302(3)(b) to the effect that "if conduct is an offense if it causes a particular result, the required kind of culpability is required with respect to the result." That provision pertains more to causation than it does to culpability, although, of course, the two hang intimately together. In general, however, it is fair to say that provisions on causation will be rarely used, have limited practical value in making sure that causation requirements have as their purpose, after all, the proof of a connection between the mind of the perpetrator and the result he has produced.

Q.5. The Draft proposes that mental disease or defect at the time of the criminal conduct be a defense and defines that defense in proposed §503. Is there any insanity defense to criminal charges under foreign codes? How do the foreign provisions compare with that of the Draft Code? Do any foreign codes provide that the insane defendant may be found guilty, but that upon conviction he must be accorded medical rather than penological treatment? How do they handle the procedural aspects of the insanity defense; is there provision whereby the Judge selects a psychiatrist to examine the defendant or do both the government and the defense lawyers bring in their own medical witnesses? Is there provision whereby the defendant found not guilty by reason of insanity is automatically committed to a mental institution for observation and treatment?

A. Mental disease or defect is a "defense" in all penal codes of the world. It must be explained immediately, however, that the idea of a defense—in the nature of imposing a burden of proof—does not exist in any of the continental countries. When the suspicion of mental illness exists, or the potential existence of mental illness on the part of any defendant has been raised by anybody, it becomes the obligation of the judge presiding (or the arraigning magistrate) to take the necessary steps for the investigation of that fact question, which may or may not include preliminary hospitalization for purposes of tests. There is no burden of proof on the part of anybody to establish mental illness.

When it comes to the test itself, §503 is the formula used by the German Imperial Penal Code of 1871, which, in turn, was copied from the Prussian Penal Code of 1851, where, in fact, this particular test originated. It was the first "functional" test in European countries. All other tests, primarily those based on the French Penal Code of 1809, simply referred to the existence of "madness" as excluding liability.

It may be doubted whether in 1972 the defense of 1851 still is entitled to the same prominence, although it should be added immediately that in most countries whose penal codes are not based on that of France, the test of §503 is still substantially in effect, for example, in the Swiss Penal Code, and most prominently in the German Penal Code §51.1. It should be noted immediately that as §503 and its Europan counterparts are phrased, it exculpates only for that kind of a mental illness which deprives the defendant of his capacity to form the requisite mens rea ("substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law"). Where the mental illness is of a slightly different kind and renders a person incapable to engaging in voluntary conduct, then under §301 of the Draft Penal Code a different rule of evidence would seem to apply, and the defendant merely has to go forward with evidence indicating that his mental illness deprives him of the capacity to engage in voluntary conduct. Query, was that intended? Would it not be preferable to have the same evidentiary requirement regardless of whether the mental illness deprived the defendant of the voluntariness of his conduct or of his mens rea? If it were to be regarded as desirable to have the same evidentiary test applicable regardless of the impact of the mental illness, then I would urgently propose to heed the advice of now Chief Justice Warren Burger, given in *Campbell v. United States* (307 F. 2d 597, 1962):

> "The precise words to be used . . . are not too important so long as the charge conveys an explanation of the product test in terms that make clear that it is directed to exculpating: (a) those who do not understand what they are doing, (b) those who do not understand the unlawfulness of what they are doing, and (c) those who cannot control their conduct even when they know it to be unlawful."
>
> The test adopted in the Missouri Revised Statutes, Supp. 1963, §552.030.1 would seem to meet this precise requirement:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he did not know or appreciate the nature, quality or wrongfulness of his conduct, or was incapable of conforming his conduct to the requirements of the law."

This test is, in fact, an extreme modernization of the McNaughton test with which it shares the logic of exculpating equally all those incapable of fulfilling the necessary actus reus requirements ("knowing or appreciating the nature and quality of the act") as well as those incapable of fulfilling the necessary mens rea requirements ("knowing or appreciating the wrongfulness of the conduct"). It has the additional advantage of spelling out what was only vaguely implicit in the old McNaughton test, namely, that persons who act under a psychopathological compulsion so that they are incapable of fulfilling the necessary intent requirement of the act ("conforming his conduct to the requirements of law") are likewise exculpated.

In our search of European and Latin American penal codes, we have found no formula which is as comprehensive, as logical and as succinct as the Missouri formula.

But, the matter does not end there, since we feel obliged to call attention to the fact that the more modern European penal codes frequently have made the same discoveries that have been made in a number of states recently, namely, that mental and emotional disease, disorder or defect does not divide mankind into two parts, the sane and the insane, but rather that there is a large group of persons situated somewhere in the middle, who act under what might be called diminished responsibility. Thus, the Swiss and German penal codes have the following provision (§51.2 of the German Penal Code):

> "If the ability to appreciate the unlawfulness of the deed or to act in accordance with such appreciation was substantially impaired at the time of commission, for one of these reasons, the punishment may be lowered . . ."

Procedurally what happens is that when a person is found to have committed the act with diminished capacity, he may be sentenced to a very much mitigated term of confinement, or he may be institutionalized for the purpose of treatment, or both may be done in succession, although frequently there simply is a confinement in an institution for treatment, after which the defendant is discharged if he is no longer a danger to himself or others. We would strongly urge that the Federal Penal Code follow the trend of modern legislation by recognizing the existence of persons who act with diminished responsibility, by insertion of a provision which will lower the blame, lower the punishment, and substitute more appropriate treatment for persons acting with such diminished responsibility.

Where, of course, a defendant is found completely exculpated by reason of mental illness, so-called measures of "safety and rehabilitation" may be imposed. These measures, however, do not automatically follow an acquittal by reason of "insanity". (Technically, there is such a thing as an "acquittal" in European countries). Institutionalization, following an "acquittal," can be had only if the judge, upon trial, finds that the public safety requires institutionalization in an institution for cure or care. Occasionally a code will also provide that institutionalization may not be ordered where the acquittal by reason of mental illness was of a petty misdemeanor charge (see §42(b) German Penal Code; for the most advanced provisions, see Article 99-110 of the Polish Penal Code of 1969).

The remaining questions under point 5 are of a procedural nature and are in foreign penal codes treated almost entirely in the codes of criminal procedure. In summary, it may be said that since, as previously explained, it is the obligation of the judge to determine whether a defense of insanity will lie, it is ordinarily the judge who will appoint one or several experts who will make the defendant's examination. Almost universally a defendant has a right to presence of his own psychiatrist. Some codes have complicated structures for the obtaining of an arbiter's psychiatric opinion, if there is disagreement among the court-appointed and private psychiatrists. A so-called battle of the experts in court is almost entirely unheard of, and it may be surmised that the end of the battle of experts may have arrived even in the United States, if capital punishment is abolished, for it was really only the existence of the potential use of capital punishment which made the issue of "insanity" such a contested one at trial. Moreover, the recognition that all persons placed in a correctional institution require "treatment" no longer makes it all that impor-

tant whether the defendant is sent to a correctional institution for treatment or to a treatment institution. This, of course, presupposes that treatment itself will become a reality.

Q.6. Although the defendant who "lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" because of mental illness has a defense under §503, the defendant who is similarly situated because of alcohol, or drug intoxication has no defense under *§502 (except in limited situations). How do foreign codes handle the problem of the defendant who is intoxicated? Is he given a defense to criminal liability? Is he handled differently upon sentencing? (i.e., sent to a hospital rather than a prison?) If foreign law is similar to American, how do theorists defend different treatment, for example, for the alcoholic and the mentally-ill* person?

A. Intoxication, whether due to alcohol or drugs, is relevant in most but not all foreign penal codes. The Swedish Penal Code of 1962 proclaims in Chapter One, section 2.2 that "if the act has been committed during self-induced intoxication, or if the actor had otherwise himself brought about the temporary loss of the use of his senses, this shall not cause the act to be considered non-criminal." Obviously, the matter of intoxication may, nevertheless, be taken into account when it comes to sentencing. A more frequent solution, however, is that intoxication which in fact leads to a removal of the capacity to form the requisite intent does have an exculpatory effect. But, a defendant who forms his intention to commit the crime before getting intoxicated and who subsequently acts out the intent previously formed, will not be exculpated.

Whenever self-induced intoxication does lead to an exculpation for the crime that the defendant committed while in the state of intoxication, there may, nevertheless, be criminal liability imposed on some other theory. A typical example is §330 (a) of the German Penal Code which provides:

> (1) Anybody who by indulgence in intoxicating liquers or other intoxicants intentionally or negligently places himself in a state of irresponsibility (§51 (para. 1) shall be punished by imprisonment or a fine, if in the state he commits a punishable act.
>
> (2) This punishment, however, may not exceed in kind or degree the punishment imposable for the intentional commission of the punishable act.

In effect, a crime of getting one's self intoxicated has been created. The punishability of this crime, however, depends on the commission of what would be a crime had the defendant been sober at the time of action, with the limitation that the punishment may not exceed in kind or degree the punishment the defendant would have received if he had been sober, and subject to the further limitation that the punishment cannot exceed five years, since that is the maximum term of "imprisonment".

We find this solution unduly complex and sophisticated, albeit logical. Basically, we find the approach of §502 adequate, but we would have stated the formula rather positively, to the effect that, in accordance with all our American case law experience, self-induced intoxication is a defense if in fact it deprives a defendant of the capacity to form any of the mental requirements of the crime, and provided that the defendant did not place himself into the intoxicated condition for purposes of committing the crime subsequently. By the same token, it has always been the rule of American common law that involuntary intoxication—which is likely to be more and more frequent with the use of modern drugs—may serve as a complete defense if, once again, it deprives the defendant of the requisite mental elements.

We find the wording of §502 unduly complex, restricting and confining and a rather poor example of progressive draftsmanship. Section 502 is more like a portable law library than the succinct kind of principle statement which penal codes ought to contain in order to be understood by the public which is to be governed thereby.

In all countries of the world with modern penal codes, there is a provision that persons who have committed their crime in a state of intoxication and who are chronic alcoholics, may be detained in an institution for cure or care for a specified period (see §42(c), German Penal Code), but the foreign institutions have been just as unsuccessful as our own, since the normal "drying out" process is not adequate to go to the root problems of alcoholism.

A word may be due on the chronic alcoholic. A chronic alcoholic, incapable of conforming his conduct to the requirement of law, in most continental countries would be regarded as a status offender, who can only be committed to an institution for chronic alcoholics, but not to a correctional facility. In this case the Supreme Court decision in *Powell v. Texas* is contrary to European law.

Q.7. The Draft Code contains a rather elaborate and detailed group of sections on self-defense and use of force, etc. (§603—Self-Defense; §604—Defense of Others; §605—Use of Force by Persons with Parental, Custodial or Similar Responsibilities; §606—Use of Force in Defense of Premises and Property; §607—Limits on the Use of Force; Excessive Force; Deadly Force.) How do these detailed rules compare with the equivalent provisions in foreign codes? Do the foreign codes enunciate specific rules or set general standards?

A. We shall start with the two specific questions at the end of Question 7. It is crystal-clear that the detailed rules of the Draft Code compare very badly with the provisions contained in comparable foreign codes. Foreign codes enunciated general standards of law which are meant to be consonant with the prevailing standards of the community, or, indeed, as they are commonplace among most civilized societies today. The draftsmen of the Federal Draft Code, however, have used enormously detailed and elaborate provisions in an effort to provide for every conceivable contingency without, however, coming anywhere near to a coverage of the myriad of variations that may arise in self-defensive or justifiable human behavior. It may be feared that such a fruitless effort to say it all will lead to needless interpretation problems, without leaving anybody with a popular guideline. This code rambles on for page after page in its effort to cover all the accumulated case law that may be relevant to the issue of the various justifications and excuses. It ultimately succeeds only by adding to specific enumerations the usual clause "or otherwise", thereby ultimately admitting the impossibility of listing all possibly foreseeable cases. The consequence of such a casuistic approach, which endeavors to list virtually everything, by reason of its enormous length and elaborate content coverage, escapes the comprehension of all persons who ought to be guided thereby, particularly police officers, custodians and persons in distress generally. One might ask to whom is such a code addressed? Surely in an emergency situation nobody can remember thousands of words with sub-clauses and preambles. The best that can be hoped for is a succinct statement which corresponds to the prevailing standards of the community. The Code, in other words, ought to be addressed to, and ought to be expressive of the feelings of, the populace which is meant to be governed by it. A code should not be addressed to Supreme Court justices, since they have a library in which to find the details of criminal law. This is where the Draft Code goes wrong. On the basis of the European experience, the casuistic approach adopted by the Draft Code, is Supreme Court law, but not people's law. The most unhappy example of this casuistic approach is in Chapter Six, Defenses Involving Justification and Excuse.

Comparative Law offers us a contrasting example. The entire problem range of justifications, self-defense and defense of others is covered in two relatively brief sections of the Norwegian Code. One of these two sections, §48, covers self-defense as well as use of force in law enforcement. It fully covers all points which the Draft Federal Criminal Code seeks to cover. It reads as follows:

> Nobody may be punished for an act committed in self-defense.
>
> Self-defense exists when an otherwise punishable act is committed for the prevention of, or in defense against, an unlawful attack, as long as the act does not exceed what is necessary; moreover, in relation to the attack, the guilt of the assailant, and the legal values attacked, it must not be considered absolutely improper to inflict so great an evil as intended by the act of self defense.
>
> The above rule concerning the prevention of unlawful attack applies also to acts performed for the purpose of lawful arrest or for the prevention of a prisoner's escape from prison or custody.
>
> Anybody who has exceeded the limits of self-defense is nevertheless not to be punished if the excess is due solely to emotional upset or derangement produced by the attack.

This section adequately describes the feelings of the people of Norway with respect to the amount of force that can be used in that society for the purpose of self-defense or for law enforcement purposes. It adequately codifies the values with respect to excessive self-defense due to emotional upset or stress produced by the attack. It codifies a limit in terms of values threatened and values taken. The provision of §48 can be remembered by a grade school kid. Surely, the same is not true of §§601, 602, 603, 604, 605, 606, 607 and 608, all of which are at best appellate interpretation guides. In particular, the detailed provisions of §607 on the limits of the use of force are hopelessly complicated and will lead to fruitless appeals, which ultimately will have little if anything to do with the real issues that ought to be covered at trial; namely, whether the defendant committed the act with the requisite mens rea or not, whether the defendant committed a justifiable act or not. This statment amounts to the following: It is fundamental in both common law and American law that criminal liability depends on (1) the fulfilling of the definitional elements of the crime (which includes the conduct called for under the definition), (2) the requisite mens rea, (3) the absence of any justifying or excusing circumstance, which would exempt the particular conduct in question from the coverage of the penal code, even though, prima facie, the elements of the crime have been fulfilled. At stake here is the last point, the absence of any justifying or excusing circumstance. It is the experience of continental criminal law codification efforts, that it is humanly impossible to envisage and to describe in detail all of those excusing and justifying circumstances, and that the best that can be done is to list those most frequently recurring; namely, self-defense, defense of others, use of force in law enforcement, necessity, duress and perhaps very few others. Would it ever be possible to list the many types of consent and customs that could be used as justifications for what otherwise would be crime; for example, the custom of subjecting one's self voluntarily to being pushed and shoved in crowded means of public transportation? Nor is it customary to mention the exercise of parental rights or obligations, or the rights and duties of physicians and nurses. Provisions on justification and excuse must be (1) succinct enough to be remembered and understood, (2) popular so as to correspond to the feelings of the community, and (3) above all, be totally consistent with the fundamental purpose of criminal law, which is the imposition of sanctions on persons who intentionally violate the penal law.

We very much fear that by going into extreme and excessive detail, the provisions on justification and excuse do not measure up to these European standards and rank at a level which continental codification had reached in the middle of the 18th Century. That is not to day that the contents of these sections are necessarily wrong. We believe that the draftsmen probably tried honestly to provide for the same range of excuses and justifications that have been more successfully provided for under foreign penal codes.

Q.8. Near the end of the Code proposal, in §3002, the system of classification of offenses is set forth. There are six categories: Class A, Class B and Class C Felonies, Class A and Class B Misdemeanors and Infractions. This is a system of classification for purposes of sentencing. How and for what purposes do foreign codes classify offenses.

A. The classification system of §3002 has no direct counterpart in foreign criminal law. The system of classifying crimes as felonies and misdemeanors is peculiar to the common law, and was abandoned in England in 1968. The purpose of this classification system was procedural and additionally was meant to convey different opprobria which, in turn, were meant to be expressed by different penal sanctions, formerly capital and non-capital. Where capital punishment no longer exists, the differential opprobrium has also largely disappeared. In the German Federal Republic, it was realized a few years ago that it made little difference whether a prisoner was found guilty of a misdemeanor and sentenced to a jail term, or guilty of a felony and sentenced to a penitentiary term, because, for all practical purposes, the standards in the two classes of penal institutions were identical. Consequently, Germany has abolished the differentiation between the two different types of correctional facilities, and as taken the next logical step of reducing the tripartition of crimes to a bi-partition (new §12).

That is not to say, however, that some good may not come from a classification system. The effort of the draftsmen in §3002 is, of course, to provide a convenient means of invoking a different set of sanctions, depending on the type of crime committed. In a bureaucratic sort of way, the draftsmen succeed in this respect. The Code provisions become shorter if it is no longer necessary to list all of the sentencing alternatives at the end of each prohibitory section. On the other hand, it may be surmised that the prohibition may lose something of its intended efficacy if it is no longer clear what the sentencing range is, unless, of course, a legislator were to succeed in educating the general public about the exact meaning of the dire consequences that follow from the commission of a crime classified as a Class A, B or C Felony or Class A or B Misdemeanor.

The efficacy of this kind of "advertisement of the sanction" is reduced by the fact that it takes considerable searching in the Code itself to find the exact sentencing alternatives. From the prohibitory section in question, one will have to go to §3002 in order to find the meaning of the designation. The sentencing ranges and alternatives are then to be found distributed over two chapters. Unhappily, these chapters do not list the sentencing ranges and alternatives by the designation of the crime (i.e., whether a Class A, B or C Felony or Class A or B Misdemeanor), but rather in terms of types of sentences. Consequently, in order to ascertain the sentencing alternatives for any given class of crime, one will have to search the text of two chapters. In our view, this method is far too cumbersome, and violates what would be a precept of continental criminal law, that the person addressed by the prohibition be clearly informed of the consequences of the violation. We realize that the Federal Draft here follows the Model Penal Code. That, however, simply means that the Model Penal Code suffered from the same weakness. We would urge the draftsmen to provide a simpler system for explaining to potential law violators and those who have to deal with them, a clear-cut reference to sanctions and sentencing alternatives and ranges.

We have mentioned that there is no counterpart in continental legislation for the system adopted by the draftsmen. Almost universally, foreign penal codes list the basic sanctions at the end of each prohibitory section. There are some exceptions. Thus, for example, in a given code the sentence may simply be referred to as "imprisonment or probation." This, then, would require a cross-reference to the General Part, in which it is explained that imprisonment is always of a limited period of time and may never exceed a given number of years. Basically, however, continental criminal code sections advertise the sentencing range and alternatives.

European codes, for the most part, still classify crimes in a tripartition system, first introduced by the French Penal Code, into felonies, misdemeanors and violations, or felonies, gross misdemeanors and petty misdemeanors. To some extent this tri-partition corresponds to a triple level of jurisdictions. Felony courts are an upper court of primary jurisdiction, gross misdemeanors are within the jurisdiction of a medium court of primary jurisdiction and petty misdemeanors are within the jurisdiction of a county court or a minor court of jurisdiction.

Q.9. A. How do foreign code provisions on sentencing of convicted defendants compare with the sections in Part C of the proposed Federal Code?

B. Do foreign code sections on suspension of sentences provide for suspension of imposition of sentence and/or suspension of execution of sentence?

C. Do the foreign codes provide for a sentence of probation or is probation a form of suspension of sentence?

D. Is a person so released under supervision by probation officers, police officers or no one?

E. Do the foreign codes provide for indeterminate or determinate sentences of imprisonment?

F. Are there special extended term prison-sentence provisions for dangerous special offenders similar to §3207?

G. How do the authorized prison sentences for a representative group of crimes compare with the authorized prison sentences for the same offenses under foreign codes?

H. Are there mandatory minimum prison sentences under the foreign codes?

I. If foreign nations employ systems of release on parole, how do they compare with the provisions in Chapter 34 of the Draft?

J. Are prisoners released on parole by an administrative agency such as the United States parole board or by the Court?

K. Does foreign law have any equivalent to proposed §3007 under which an organization convicted of an offense may be required to give notice or appropriate publicity to the conviction?

L. Is giving publicity to a conviction (a different colored license plate for persons convicted of drunken driving, for example) used as a sanction or sentence under foreign codes?

M. Do the foregn codes have any equivalent to proposed §3003 (Persistent Misdemeanant)?

N. Do foreign codes require Judges to give reasons in writing for sentences imposed?

O. Are sentences subject to review on appeal by a higher court? If so, may the appellate court raise as well as lower the sentence?

P. May the government appeal a sentence or only the defendant?

Q. What standards do the Codes require for sentencing review?

R. If appellate review of sentences is not authorized under foreign penal or criminal procedure codes, how is uniformity of sentencing amongst the judges secured?

S. How does §3204 (Concurrent and Consecutive Terms of Imprisonment) compare with foreign code provisions on multiple offenses? Some European codes provide for a joint sentence rather than concurrent or consecutive sentences. How are terms computed under joint sentencing provisions? Under a "joint sentence," What happens if one but not all of the convictions is reversed on appeal?

T. Regarding the imposition of fines, do any foreign codes have provisions similar to §3301(2)?

U. In the United States many imposed fines are never collected and, therefore, of limited value either as a punishment or deterrent to others; how do foreign codes provide for collection of fines?

V. What is the "day fine" system and how are provisions regarding it formulated?

W. Is the day fine a fixed amount depending upon the gravity of the offense of which the defendant is convicted or is the amount fixed based upon the ability of the defendant to pay?

A. Since Question 9 really is composed of 23 sub-questions, we have identified these in terms of the alphabet from A to W.

An introductory comment is in order. Generally, our sentencing ranges and experiences in the United States are more advanced than European and Latin American methods. This is due primarily to the greater willingness of Americans to experiment in the area of criminology and corrections. Our superiority in this field, indeed, dates back to the middle of the 19th Century and is universally acknowledged. At the same time, some European systems, for example, the Scandinavian and Dutch and German systems, have caught up with our standards, have frequently surpassed them, and, above all, have been more precisely and succinctly dealt with in codes. It should be remembred that the provisions on sentencing and corrections must fulfill two purposes: (1) address themselves properly to the person who is about to engage in an unlawful act, and (2) be a proper guide to those who have to deal with those who did not respond. We fear that the sections on sentencing and corrections are too verbose and involved to be fully effective, at least as to (1).

Q.9.A. How do foreign code provisions on sentencing of convicted defendants compare with the sections in Part C of the proposed Federal Code?

A. It is only fair to say that this part of the proposed Federal Code is much more involved than what is found in most foreign codes, and it is less systematic in the sense that it seeks to incorporate a large number of disparate ideas that are distributed in various ways in European codes:

(1) In foreign penal codes, the basic sentencing alternatives and ranges are usually covered: (a) generally in the General Part, (b) specifically as an addition to each one of the prohibitory sections.

(2) Administrative provisions with respect to the imposition and execution of sentences are found: (a) in codes of criminal procedure, (b) in special correctional codes, which are addressed solely to administrators. This has the advantage of providing enough detail for administrators in a code addressed primarily to them, and thus leaving basic sanction statements succinct and popular, namely, in the body of the penal codes themselves.

Q.9.B. Do foreign code sections on suspension of sentences provide for suspension of imposition of sentence and/or suspension of execution of sentence?

A. Just as in the United States, European and Latin American penal codes may provide both for the suspension of the imposition of the sentence, or suspension of the execution of the sentence. Thus, France and the German Federal Republic have both systems, although, perhaps, a nose-count might reveal that the suspension of the execution of the sentence is the preferred method in continental countries. This system makes the sentence a matter of record, and its execution can be subsequently called for under certain conditions. It is a kind of sword of Damocles. Rules relating to suspension are often very limited. In the case of most Latin American codes, only a sentence of up to six months of imprisonment can be suspended. Article 74 of the Latin American Model Penal Code says a suspended sentence of up to two years imprisonment may be imposed. It is the legislative intent that suspension be coupled with continued supervision by the court and the measure is essentially a correctional one thought to be non-punitive.

Q9.C. Do the foreign codes provide for a sentence of probation or is probation a form of suspension of sentence?

A. The institution of probation as it is known in the United States has only found reluctant entrance into European penal systems, unjustifiably so. However, regardless of what the suspended sentence is called, what counts is the type of condition under which the sentence is suspended and the extent to which the defendant is given aid making it on his own on the outside. Probation has been generally accepted in the Scandinavian countries (e.g., Swedish P.C. Ch. 28). Further comments follow below.

Q.9.D. Is a person so released under supervision by probation officers, police officers or no one?

A. In some European penal codes, probation is known only for juveniles or offenders sentenced for minor offenses. It should be borne in mind that many countries have a separate code relating to the execution of sentences and provisions are to be found therein for the supervision of parolees and persons on suspended or partly served sentences. The service set-up for this purpose usually is part of the correctional services and is roughly correspondent to the probation services in Anglo-American countries. It will, of course, be noted that there are even vast organizational and functional differences between the probation services in England and Wales and that to be found in most state jurisdictions of the United States. By and large it may be said that under foreign codes release is had into the charge of an officer of the court. In France, the police supervise the execution of the sentence of "probation."

Q.9.E. Do the foreign codes provide for indeterminate or determinate sentences of imprisonment?

A. Penal codes in Europe and Latin America have been extremely reluctant to introduce the indeterminate sentence, the determinate sentence being by far preferred. Scandinavia, which earlier adopted the system of indeterminate sentences, now makes a trend away from indeterminate sentences, in favor of newer types of control and rehabilitation. With regard to juveniles, many legal systems have gone over to the indeterminate sentence.

Q.9.F. Are there special extended term prison-sentence provisions for dangerous special offenders similar to §3207?

A. The idea of providing an extended term for certain offenders arrives from the fact that most penal sentences are determined with a view toward

retribution for the crime committed and the harm caused. The legislator's "conscience" will not permit him to impose sentences which are in excess of this retributive ideal. However, when reasons of public protection require the detention of a person who has served the retributive part of his sentence and is still dangerous, the need for an extended term arises. The model used in §32(7) basically is not bad, although it is somewhat cumbersome. Nearly all foreign penal codes have provisions for "dangerous or habitual criminals," who are frequently defined as persons who have been twice before committed of serious felonies and who upon overall evaluation of their deeds are proved to be habitual criminals. These persons are ordinarily sentenced to extended terms. In general, we are not aware of any penal system which is basically superior to the approach adopted in §32(7). We only urge that the provisions in this Section be simplified. It may be of interest to the Committee to know that the Criminal Law Education and Research Center of New York University has just obtained initial funding for a major international and comparative interdisciplinary study on means of dealing with the violent and dangerous offender. But it will be some time before research data becomes available for use in legislation. Currently, we have no information available.

Q.9.G. How do the authorized sentences for a representative group of crimes compare with the authorized prison sentences for the same offenses under foreign codes?

A. For the Committee's information, we are including a table showing a number of sentencing ranges for selected countries, from Scandinavia, the German speaking countries, the Socialist countries, the Balkan countries, the Mediterranean countries, one Latin American country, and New York, Indiana and the Model Penal Code. The chart indexes the range of prison sentences for three selected offenses under the codes of the selected countries. The offenses selected are: murder in the first degree, forceful rape and undifferentiated larceny (i.e., the lowest form of felonious larceny). For the most serious form of homicide the Federal Criminal Code Draft envisages capital punishment or life imprisonment (§36.02). Basically, the authoritarian countries of the world and the Asian countries provide for capital punishment. Thus, the German Democratic Republic (East), Chechoslovakia, Hungary and the USSR have capital punishment, as do Japan, Korea and China. The Northern and Central European countries have abolished capital punishment for homicide, with the exception of France. In Sweden, while possible life imprisonment is provided for the most severe form of homicide, in practice no sentence exceeds 8 years, which has been found sufficient for the reintegration into civilian life.

For rape, the maximum sentence provided for under the Federal Draft is 30 years. Of the countries compared, only Spain has such a potential maximum, and only Greece exceeds this potential maximum (potential life imprisonment). Denmark provides for a possible therapeutic care detention of life imprisonment. All other countries of the world have a sentencing range for rape which is approximately 1/3 of that provided for under the Federal Draft, actual sentences being much lower than that.

For the evaluation of larceny offenses, we have selected types of larceny which most clearly correspond to the type of larceny covered by §1732—as a Class C felony under §1735. The Federal Draft's possible maximum is 7 years. Such a high sentence is reached only in the Asian countries, with European countries being universally lower.

The sentencing ranges are difficult to compare since the parole provisions in the various countries differ from those of American jurisdictions. Our more liberal parole laws take some of the edge off our harsher sentences. On the other hand, since sentences imposed in continental countries are considerably lower than those imposed under American law, we are forced to conclude that, on the whole, the sentences provided for under the Federal Draft Code are probably twice as harsh as those envisaged under European law.

SENTENCING RANGES FOR SELECTED COUNTRIES

Area	Country	Murder I (years)	No.	Rape (years)	No.	Undifferentiated larceny (years)	No.
Scandinavian	Norway	6 to life	233	1 to 10	192	1 to 3	257
	Denmark	5 to life	253	1 to 16 (life)	216	Maximum 2	276–285
	Sweden	Maximum 10 or life	3.1	2 to 10	6.1	Maximum 2	8.1
Principally Germanic	Germany (draft)	Life	135	Maximum 10	204	Maximum 3	235
	Germany	do	211	1 to 15	177	1 day	242
						5 years	16
	Austria	Life	134		125	6 month to 1 year	171
			136	5 to 10	126	1 to 5	178
	Switzerland	5 to 20	111.1	1 to 20	187	Maximum 5	137.1
			35.1		35.1		
Socialist	Germany, Democratic Republic of	Death	211	1 to 15	177	1 day	242
		Life	24		14	5 years	16
	Czechoslovkia	(Death) 1 to 15	216	5 to 10	238	Maximum 2	247
	Hungery	(Death) 15 to life	253	2 to 8	276	6 month to 3 years	296
	U.S.S.R	(Death) 8 to 15 plus exile.	102	5 to 10, 3 to 7 maximum 3.	118	Maximum 2	144
	Yugslovia	Minimum 10	135	Maximum 10	179	Minimum 3 months maximum 5.	249
Mediterranean	Greece	Death or life	229	Life	336	Minimum 3 months	372
	Turkey	24 to 30	448	7 months	416	6 months to 3 years	491
				25 years	13		
	Italy	21 to life	575–576	3 to 10	519	Maximum 3	624
	France	Death	296	5 to 25	332	1 to 5	379
			302				401
	Spain	Life	405	20 to 30	440	1 month	514
			406		30	1 day	515
						6 months	30
South America	Argentina	Life	80	6 to 17	119.3	1 month to 1 year	162
Asian	Japan (draft)	Death/life minimum 15	268	3 to 15	311	Maximum 7	337
	Japan	Death/life Minimum 3	199	Minimum 2	177	Maximum 10	235
	Korea	Death 5 to life	250	3 to 15	29	Maximum 6	329
	China	Death 10 to life	271	Minimum 5	221	Maximum 6	320
American	New York 1967	Death (life)	125.25	Maximum 25	130.35	Maximum 1	155.05
			125.35			(4 years)	155.25
			70.00				70.15
							70.00
	Indiana	(Death) life	10–3,401	2 to 21	10–4,201	1 to 10	10–3,001
	MPC	(Death) 1 to life	210.2	1 to 3	213.1	1 to 2 maximum 5	223.1
				Maximum 10	6.06	1 to 3	6.06

Q.9.H. Are there mandatory minimum prison sentences under the foreign codes?

A. The short answer to this is "yes, almost invariably", except of course that "suspended sentences" have become institutionalized in some foreign countries.

Q.9.I. If foreign nations employ systems of release on parole, how do they compare with the provisions in Chapter 34 of the Draft?

A. A correct answer to this question would require much more research than we have been able to complete in the limited time at our disposal. Parole is linked inevitably to the indeterminate sentence, which, as noted, is not ordinarily a feature of foreign systems. There is a slight comparison with Chapter 34, except for Britain and the Scandinavian countries and to some extent West Germany, all of whom have a fairly well-developed system for after-care comparable to parole. More usually, in the rest of the countries, sentenced persons are released after they have served a determinate part of their respective sentences, usually two-thirds. This is ordinarily a right which is administered by the court and subject to judicial review. (For an example of a parole law in one of the more advanced continental systems, see §26, German Penal Code which reads as follows:

"Section 26—Release on Parole.

(1) The court may conditionally discharge a convict sentenced to a limited term of punishment by deprivation of liberty, with his consent, if he has served two-thirds of his punishment, and at least three months, and if it can be expected that henceforth he will lead a lawful and orderly life.

(2) The period of parole may not be less than the remaining sentence, even in case of a mitigation of the term.

Q.9.J. Are prisoners released on parole by an administrative agency such as the United States parole board or by the Court?

A. For the reasons already outlined, parolees are most ordinarily released by the courts rather than by an administrative agency. In many countries, an executive decision in this matter would be in conflict with the principle of the separation of powers and would pose a constitutional problem. There are, however, a number of systems in which release by the court is the rule and supervision is undertaken by an administrative officer, usually from a branch of the correctional service. The conditions for release in the Draft are generally similar to those of foreign codes. But the crucial problem is not the placing of the decision-making process into the hands of either the court or an administrative agency. Rather, it is the question of *supervision*. In Scandinavian countries, particularly in Sweden, it has long been recognized that neither the court nor a separate administrative agency should be the sole administrator of parole conditions. In Sweden there is today general agreement that care in liberty for convicts is merely part of the total system of the extension of welfare services and care to those in need. Consequently, an effort is made in the Scandinavian countries to tie the administration of probation and parole services closely in with the social security system of the country, so that persons serving a term in liberty may receive the same comprehensive care with respect to housing, employment and other social services, which are provided to the other clientele of the social welfare administration.

Q.9.K. Does foreign law have any equivalent to proposed §3007 under which an organization convicted of an offense may be required to give notice or appropriate publicity to the conviction?

A. In civil law countries, there is no equivalent to §3007 of the Draft Code, since nearly all the continental countries do not impose criminal liability on organizations or corporations, but have found it more efficient and effective to place all criminal liability on the actual human perpetrators of crime. Even the most highly industrialized countries employ the method of criminal sanctioning only in connection with violations of an economic or regulatory sort. In such rare instances, corporations may be fined; otherwise, they are not subject to criminal liability. For the Committee's convenience, I have appended a published comparative law study of this whole problem range.

Q.9.L. Is giving publicity to a conviction (a different colored license plate for persons convicted of drunken driving, for example) used as a sanction or sentence under foreign codes?

A. In all countries with a free press, there is a likelihood that the more important convictions and sentences are reported in the press. In authoritarian

countries there is a specific, determined effort to publish only certain types of convictions and sentences. Sanctions of marking or branding persons convicted of crime was widely practiced in the Middle Ages. The last remnants of such nefarious systems were to be found in Nazi Germany where Jews were compelled to wear the star of David, to mark them as outcasts. The marking or branding of convicts, by whatever means, is a violation of the most fundamental human rights and would be totally inconsistent with a re-socialization policy, by all principles known to correctional specialists today.

Q.9.M. Do the foreign codes have any equivalent to proposed §3003 (Persistent Misdemeanant)?

A. Foreign penal law codes do have equivalents to §3003, requiring persistent misdemeanants, variedly defined, to undergo additional sanctions. However, there is general disillusionment with the deterrent effect of such extended terms. Indeed, there is disillusionment with all relatively short periods of imprisonment. By their very definitions, persistent misdemeanants are not exactly a threat to the established order. Consequently, the purpose of the more modern type of extended term for misdemeanants usually is the effort to rehabilitate such offenders, particularly when rehabilitation can be effected outside established penal institutions, occasionally in half-way houses, homes, care centers, or in freedom. If §3003 is serious about rehabilitating efforts, then this section would be comparable to similar provisions, e.g., under the German Penal Code (§20a.2). It must be remembered, however, that persistent misdemeanants frequently are status offenders, whose behavior patterns are not affected by the threat of punishment.

Q.9.N. Do foreign codes require Judges to give reason in writing for sentences imposed?

A. Most foreign Codes of *Criminal Procedure* contain the basic requirement that the judge, when imposing a sentence, must give detailed reasons in writing for the sentence imposed. This is regarded as fundamental, since the "right and proper" sentence is mandated by law. Consequently, failure to impose the right sentence would be a violation of law leading to appeal and reversal. For the Committee's use we are including a reprint of an article entitled "Appelate Review of Legal but Excessive Sentences: A Comparative Study."

We would like to add, in this connection, that the older foreign penal codes require a relatively mechanical consideration of factors pertaining to the "guilt" of the perpetrator. The more modern codes require considerably more judicial sophistication and presuppose an investigation of facts and factors. Thus, §13 of the new German Penal Code, requires the following: §13—Principles of Sentencing:

(1) The culpability of the perpetrator is the basis for the composition of the punishment. The potential effects of the punishment upon the life of the perpetrator within society must be considered.

(2) In sentencing, the court weights the circumstances for and against the perpetrator, especially the following:

The motivations and goals of the perpetrator,

The attitude which speaks from the deed and efforts made toward perpetration of the deed,

The background of the perpetrator, his personal and economic conditions,

His behavior after the deed, especially his efforts to make up for the harm caused.

(3) Circumstances which already are definitial elements of the offense may not be considered.

This new provision of the German Penal Code strikes us as particularly suitable in guiding the judiciary in the finding of the right kind of sentence. While obviously the criteria developed by modern correctional research are far from conclusive, under such provisions the judge, nevertheless, is forced to weigh the factors which the legislation has deemed relevant on the basis of human experience. A judge who refuses to consider these factors, or attributes improper weights to these factors, may have a sentence reversed.

There are no counter-parts of guidance for the judiciary in the proposed Draft Penal Code, except, to some extent, in §102. Here the general purposes of the Code are outlined. The sentencing judge seems required to *construe* all provisions of the code, including the sentence provisions, to achieve the following objectives:

(a) To insure the public safety through (i) the deterrent influence of the penalties hereinafter provided, (ii) through rehabilitation of those convicted of violations of this Code, and (iii) such confinement as may be necessary to prevent likely recurrence of serious criminal behavior;

(b) By definition and grading of offenses, to limit official discretion (in and) punishment and to give fair warning of what is prohibited and of the consequences of violations;

(c) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;

(d) To safeguard conduct that is without guilt from condemnation and criminal;

(e) To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses; . . .

This legislative guide to the judiciary is more retrogressive than the comparable provisions of Scandinavian and West German law, but at least it constitutes some guidance to the judiciary. Unhappily the code does not make it clear that judges must act in accordance with these guidelines and are *required* to assign reasons for their sentence in writing. In our view, the legislation should make it quite clear that judges are required to consider these aims of legislative policy.

In addition we would urge that provisions like §13, Subs. 1 and 2, of the new German Penal Code be added. If judges were required to consider such detailed factors when imposing sentence, it is likely that the sentencing phase of federal criminal trials would improve considerably. Counsel for both sides would be required to be prepared on these absolutely relevant questions of personal characteristics and background of the petrator and would be required to agree on them before the judge in all cases. This just might result in a sentence which can be expected to provide the best possible rehabilitation of the offender and protection of the public. Moreover, appellate decisions on questions of sentencing are likely to raise the niveau and uniformity of sentencing policies.

As an incident to §1291 of the Draft Code, we regard it as absolutely necessary that District Courts be required in all cases to state the reasons for their sentence and, in particular, to consider a certain set of criteria, which must be included in the draft code, patterned after § 13 of the new German Penal Code.

Q.9.O and 9.P. Are sentences subject to review and appeal by a higher court? If so, may the appellate court raise as well as lower the sentence? May the government appeal a sentence or only the defendant?

A. To some extent the answers to the questions ave been provided in the preceding answer. It remains to be added that criminal sentences are universally subject to review in civil law countries. The question of the "right" sentence is a question of law, thus entitling either party to an appeal. Civil law countries subscribe to the so called system of *reformatio in pejus*, according to which, on the defendant's appeal of his sentence, the sentence may only be lowered. The prosecution, however, may appeal to have the sentence lowered or to have it raised, and the Appellate Tribunal has the right to do either.

Q.9.R. If appellate review of sentence is not authorized under foreign penal or criminal procedure codes, how is uniformity of sentencing amongst the judges secured?

A. Since sentence review is universally provided for in foreign criminal law systems, and is used to achieve uniformity of sentencing, in accordance with the standards of laws set out in the codes, the question is inapplicable.

Q.9.S. How does §3204 (Concurrent and Consecutive Terms of Imprisonment) compare with foreign code provisions on multiple offenses? Some European codes provide for a joint sentence rather than concurrent or consecutive sentences. How are terms computed under joint sentencing provisions? Under a "joint sentence", which happens if one *but not all of the convictions is reversed on appeal?*

A. This is not an easy question. Most countries have had some difficulty in providing for an appropriate system in the case of multiple or repeated offenses, or for the concurrence of different crimes in the same transaction. France and Germany both have a system under which a joint sentence is formed. Bas-

ically it works like this: If the same offender violates several penal laws, only the law which provides for the most severe punishment is applied. When, by several independent acts, several offenses are committed, or the same offense is repeated, and several potential terms are incurred, a joint or compound sentence is formed, which is basically an aggravation of the most severe punishment incurred. There usually is a limitation on such a compounded or joint sentence in that it may not exceed a given number of years, e.g. 10 or 15 years (§4, German Penal Code). There has been considerable discussion in European countries as to whether or not the deterrent effect may not be lost if the sentence for several offenses is potentially little more than the maximum term for the most severe crime committed. But neither in Germany nor in the United States are there any available research data to answer that particular question.

When on retrial or appeal the conviction of one of the crimes charged is reversed, the case is sent back to the trial court for resentencing, but the same judge will not be charged with the task of resentencing (German Code of Criminal Procedure, §354).

Q.9.T. Regarding the imposition of fines, do any foreign codes have provisions similar of §3301(2)?

A. The provision of dealing with authorized fines depending on the seriousness of the crime is not totally dissimilar to comparable provisions in some foreign penal codes.

Q.9.U. In the United States many imposed fines are never collected and, therefore, of limited value either as a punishment or deterrent to others; how do foreign codes provide for collection of fines?

A. Foreign legislators, likewise, have struggled with the question of the uncollectable fine. The Swedish government in 1969 appointed an expert with the responsibility of investigating the possibility of removing imprisonment as a sanction for failure to pay a fine. Research conducted in this connection, however, showed that, except for parking tickets, the payment record on Swedish fines is excellent, namely 93%, and the income from fines contributed a substantial portion of the national budget.

In Sweden the sheriff has the responsibility to receive fines imposed by the court. If the fine cannot be collected, the country administration has to decide whether it should be written off or reduced. If the person who is supposed to pay the fine is financially unable to do so, the sheriff may give him an extension of time, or allow him to pay in installments.

In Finland much energy is devoted to finding new sanction alternatives. In the German Federal Republic fines may be paid in installments if the convict's economic situation requires it. Likewise, persons sentenced to fines may be permitted to satisfy the uncollected fine by free labor for a government department. In most countries, if a defendant refuses to pay the fine, he may be imprisoned. But the more progressive codes provide that, if the fine cannot be collected through no fault of the convict, the court may dispense with the execution of the substituted punishment. (See §29.6 German Penal Code. This is a fairly typical provision).

Q.9.V. What is the "day fine" system and how are provisions regarding it formulated?

A. The day fine system is a commutation of a pecuniary penalty in unremunerated day labor in favor of a public body. The nature of the work is determined by the public body responsible for supervising the execution of the sentence. It has been used very successfully, for many years, in Spain as well as in the Scandinavian countries, and is an extremely effective device for two reasons: One, it makes the use of a fine in lieu of prisonment possible, even in the case of members of the lowest economic population strata. Two, it equalizes the burden of the fine in direct relation to the earning power of the perpetrator. It has been incorporated into the Model Penal Code for Latin America (Article 45.47).

Under the day fine system the gravity of the sanction is expressed in terms of numbers of days' earning capacity. Thus, for the same offense, both the rich and the poor may be fined an equal number of day fines. For the poor man this corresponds to a very low amount of money, namely his earning capacity for "x" days. To the rich man the fine is, likewise, the earning capacity of "x"

days. Since his earning capacity is much higher, the actual fine paid is much higher.

Whether such a system can be introduced into the United States depends upon an interpretation of the Equal Protection Clause. In Scandinavian countries, however, it is regarded as a requirement of equal protection that the day fine system be used.

Q.9.W. Is the day fine a fixed amount depending upon the gravity of the offense of which the defendant is convicted or is the amount fixed based upon the ability of the defendant to pay?

A. The question has been basically answered in Section 9.V., above. But, to be specific, and taking once more the system used under the Latin American Model Penal Code, the fine is fixed by reference to the computed daily earnings of the convicted person, taking into account gross receipts, economic situation, and, in general, by reference to his obligations, etc. The amounts so set are converted into day fines by reference to the equivalent labor of the sum so set as a pecuniary fine. An upper limit is set under the amount of the Model Penal Codes for Latin America, of 500 day fines. The gravity of the offense determines the number of day fines to be imposed.

Q.10. Is mistake of law a defense under foreign codes? Mistake of fact? How do foreign provisions compare if §§303, 304, 609?

A. This question has been answered in connection with question 3 supra.

Q.11. One significant change in the proposed Code from present Federal criminal law is the separation of the jurisdictional base upon which federal prosecution rests from the definition of the offense as to which the defendant is prosecuted. Are there analogues to this differentiation between crime and jurisdiction in any of the foreign codes?

A. There are no analogous problems or solutions in any foreign penal code. It should be noted that the United States is the only federal country which does not have a *national* criminal code. Both Germany and Switzerland have national criminal codes, which are administered by state or cantonal courts. The Soviet Union, basically, has a Union federal penal code which, except for a few provisions is uniform throughout the USSR. In reviewing this section, however, the Draft's solution strikes us as an ingeneous resolution of a very difficult problem.

Q.12 How do the Draft Code's provisions on extraterritorial jurisdiction (§208) compare with the foreign provisions on extraterritoriality and jurisdiction over crimes committed outside national boundaries?

A. We are not in a position to answer this question at this time. The Criminal law Education and Research Center of New York University has agreed to serve as consultant to an American Bar Association Committee which has the question of the code's extraterritorial jurisdiction under review. In general, however, we can say that American law has always been extremely conservative in using extraterritorial jurisdiction and even under §208 there is a wide margin between the actual use of extraterritorial jurisdiction under national, and what is admissible under international law.

Q.13. How is the problem of criminal conspiracy handled under foreign codes?

A. Basically, foreign penal codes do not use the concept of conspiracy, restricting themselves to the use of the law of accessoryship. Under a few foreign penal codes conspiracy is made punishable only in connection with murder. There are, however, some exceptions to this general non-use of the conspiracy concept, e.g., under Article 8 of the Chilean Code and Article 7 of the Uruguayan Code. The Chilean Code uses the concept of conspiracy or instigation to commit a crime, but only where the law specially so provides. Conspiracy exists when two or more persons agree to commit a crime. Under German law there is a rarely used provision (§49(a)(2) to the effect "Anybody who agrees with others to engage in an act punishable as a felony, or who accepts the offer of another, or declares his willingness to engage in such act, shall be punished as an instigator." Basically, however, civil law countries have not found it necessary to use the conspiracy concept.

Q.14. How do foreign codes handle the problem of "felony-murder" (murder committed by one party to a felony)? (See §1601[e]).

A. The concept of "felony-murder" is not known in continental countries, and is, as widely known, in general disrepute in Anglo-American countries as

well. The awkward construction of Section 1601 gives an indication of the "guilt complex" with which the draftsmen try to solve this problem. The felony-murder concept, basically, deviates from the idea that every perpetrator should be punished in accordance with the guilt which he himself has occurred (See §102(e) of the instant Draft). §50 of the German Penal Code simply provides:

(1) If several persons are participating in one deed, each shall be punished for his own guilt, regardless on the guilt of others.

(2) Where the law provides for the aggravation, mitigation or exclusion of punishment for personal characteristics, these are applicable only to the principal perpetrator or accomplice in whom they inhere.

The basic issue in the felony-murder situation is that of the imposition of liability for an unforeseen or unintended consequence. §302(3)(a) states the fundamental rule of American law regarding culpability: Culpability is required with regard to *every element* of the conduct and attendant circumstances. That would seem to include the death caused during the commission of a felony. Consequently, to the extent that the felony-murder rule deviates from this principle of culpability, it ought to be abolished.

The causation and intent difficulties of the felony murder complex are not peculiar to homicide situations. They, in fact, inhere in all situations which require *causation of a given result.* Consequently, in continental codes one is more likely to find general provisions which attempt to solve this kind of problem once and for all.

§56 of the German Penal Code: "If the law threatens a higher penalty for a specified consequence of a deed, the perpetrator shall be subjected to this aggravated punishment only if he has caused the consequence at least negligently." In other words, if a felon was negligent with respect to the causation of a death during the perpetration of a felony, then the homicide is attributable to him, otherwise not.

Consequently, we would propose that all reference to felony-murder be removed from section 1601. All problems of the causation of a basically unintended result can be solved by the general provision §302(3)b.

Q.15. In those nations which have a Federal system (e.g. West Germany, Switzerland) does the Federal government have concurrent or exclusive jurisdiction over riots, mass demonstrations and crimes or is jurisdiction limited in a way similar to proposed §1801(4)? How do the Code provisions in this area (§1801—Inciting Riot; §1802—Arming Rioters; §1803—Engaging in a Riot; §1804—Disobedience of Public Safety Orders under Riot Conditions) compare with foreign code sections dealing with similar problems?

A. Inasmuch as all foreign countries have only one penal code, all riot type offenses are covered in that penal code. Problems of Federalism do not arise.

Q.16. Do any of the foreign codes have a section similar to §1104 (Para-Military Activities)?

A. Yes, some foreign penal codes have sections on para-military activities comparable to §1104. However, most of these are dating back to the middle of the 19th Century, when absolute monarchies were being threatened by democratic uprisings. Typical is the still existing section 127 of the German Penal Code, in which the type of conduct described in §1104 of the Draft is subjected to a two year term of imprisonment.

Q.17. A number of sections and subchapters of the proposed code deal with an area which is often referred to as "crimes without victims"; i.e. crimes in which the victim either consents or is a willing customer of the defendant. See e.g., *§§1841-1849 (prostitution), 1851 (obscenity), and homosexual activity between consenting adults. How do the foreign codes approach these problems?*

A. While there generally is a movement under way to remove so-called crimes without victims from the general sweep of the criminal law, the process has been relatively slow. Prof. Antilla of Finland recently reported:

> The crime catalogues of the criminal laws are continually changing. In recent years, the so called "moral" offenses had been the object of special attention. Denmark and Sweden have lifted the ban on pornography and Finland will probably follow that example. The abortion law reform carried out in Denmark and Finland and which soon will be brought before the Swedish Parliament, aim at a system which is fairly close, but still

some distance from so-called "free abortion". Public drunkenness is in most cases no longer an offense in Finland and Norway, and Sweden will soon pass a similar law.

There is generally much interest in decriminalization—even in such areas as property crimes. The feasibility of decriminalizating petty larceny is seriously being considered in a report by a Swedish state committee which was made public in the beginning of this year.

The decriminalization is, naturally, balanced by adding new offenses to the crime catalogues. Race discrimination is now a crime in some [Scandinavian Countries]. Soon all the Scandinavian countries will have legislation against the invasion of privacy, e.g .by the means of electronic devices is now in the way of becoming a crime. There is a trend toward providing stiffer punishments for tax offenses.

It may be added that many countries have removed consensual sodomy from their crime catalogues. A major government report of the Netherlands has proposed a new policy for decriminalization of most drug offenses. Many of the European countries no longer use their criminal sanctions for the control of prostitution and gambling. But legislative amendment has been somewhat sluggish.

Q.18. How do foreign code provisions on firearms and explosives compare with §§1811 to 1814 and the Commission's controversial recommendation in the introductory note to the subchapter?

A. The Criminal Law Education and Research Center is currently engaged in a study of firearms laws of foreign countries. Thus, we are not yet ready to report. Basically, however, it may be said that all foreign countries have stringent laws for the control of firearms, requiring the licensing of all firearms and prohibiting the possession of all unlicensed firearms. This is a universal rule in all countries which we have investigated so far. Basically, the rule works well, although frequent mass violations have been reported recently for Italy as well as the Soviet Union.

Q.19. Which foreign jurisdictions provide for capital punishment? For which offenses? Do any foreign codes provide for a separate proceeding to determine sentence in a capital case? (See §3602). Are separate hearings on sentencing authorized in any cases or does the absence of a jury system make separate hearings not bound by restrictive rules of evidence superfluous?

A. As we have stated above, France is the only basically democratic European country left with capital punishment. Other than that, only authoritarian countries maintain capital punishment, including Spain, Greece and the USSR.

Due to the fact that European government proceedings are not divided into a fact finding and into a sentencing phase, all questions of liability and punishment are decided in one proceeding. A separate sentencing hearing is unknown in Europe. Consequently, in capital as well as non-capital cases, there is no such thing as a sentencing stage (see Mueller and Bescharov "The Two Phase System of Criminal Procedure in the United States, 15 *Wayne Law Review*, 613, 1969).

Q.20. How do the codes' provisions on multiple prosecutions and trials (§ 703—Prosecution for Multiple Related Offenses; § 704—When Prosecution Barred by Former Prosecution for Different Offense; §706—Prosecutions Under Other Federal Codes; §707—Former Prosecution in Another Jurisdiction: When a Bar; §708—Subsequent Prosecution by a Local Government: When Barred; §709—When Former Prosecution is Invalid or Fraudulently Procured) compare with the relevant sections of foreign codes?

A. In foreign penal codes, questions pertaining to multiple prosecutions and trials are covered exclusively by codes of criminal procedure. It is safe to say, however, that in civil law countries there is a requirement that the prosecution make all efforts to prosecute in one proceeding all criminal charges arising out of the same act or transaction.

This is to avoid the harassment of the defendant which results from being subjected to a continuing series of prosecutions. In some countries the rules are so stringent that failure on the part of the prosecution to prosecute a then pending charge results in a virtual bar to prosecute such charge later. The details are too complicated for discussion in this context.

1860

Causing Criminal Harm

BY

GERHARD O. W. MUELLER

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GERHARD O. W. MUELLER, J.D., LL.M.

The author is Professor of Law and Director of the Comparative Criminal Law Project of New York University. He is a member of the editorial boards of the Journal of Criminal Law, Criminology and Police Science, and the Quaderni di Criminologia Clinica, and has published and lectured on matters of Criminal Law and Criminology in America and Europe.—Ed.

7

CAUSING CRIMINAL HARM

For want of a nail the shoe is lost,
for want of a shoe the horse is lost,
for want of a horse the rider is lost.
—POOR RICHARD'S ALMANAC, 1757 [1]

For want of a rider the message is lost,
for want of a message the battle is lost—
the war is lost—the fatherland is lost.

I. COMMON LAW

WOULD anyone contend that the horseman who had failed to inspect the hoofs of his mare was not a link in the causal chain which led to the loss of the fatherland? And what of the horseman's corporal who lacked in proper supervision? or the sergeant who was lax on his corporals? or the lieutenant who suffered all this laxness? They all may be said to have caused the loss of the fatherland. Suppose now that a military tribunal were charged with the unenviable task of having to affix criminal liability to rider, corporal, sergeant, lieutenant, etc., for having caused the loss of the fatherland:

It might be contended that an authoritarian state would have little difficulty in assessing blame in our case, and that it would swiftly deal out harsh punishments, whereas a democratic state would be rather reluctant to impute such serious liability to a simple horseman who merely failed to check the hoofs of his mare, or, for that matter, to his immediate superiors, low in the hierarchy of military command. And thus it might be concluded that in the art or science or craft of criminal law one set of causation principles might recommend itself to an autocracy, another to a democracy, and others yet to all the other forms of government.

[1] Benjamin Franklin took the quote for *Poor Richard's Almanac* from George Herbert, *Jacula Prudentum*.

But must we not concede that in *Poor Richard's Case* an authoritarian court would be perfectly justified in calling the sequence of events a causal chain? And if the democratic court will not impute liability for having set the causal chain into motion, does it not permit itself to be governed by considerations other than those of factual causation—perhaps a feeling of tenderness toward human liberty, or whatever else it might be?

The question arises, therefore, what criteria are available to us, or the courts of any country, to make a determination that *for purposes of the criminal law* a certain event is the effect of a certain cause. It should hardly be necessary to state that there must be a relative degree of certainty, regularity, uniformity, and predictability in such cause-and-effect attributions, for modern criminal law cannot operate but by telling the law-governed citizenry in advance that legal consequences, sanctions, will follow the causation of certain effects or events, harm, in the hope of thereby stimulating the citizenry into abstaining from such causations.

Let us ascertain, therefore, how the causation problem is solved in our courts and what standards, if any, are applied. A swift survey shows that while, on the whole, our common law judges have faithfully labored to reach acceptable solutions, sometimes even by simply ignoring policy-frustrating causation issues, the results have not always been uniform and predictable.

There seem to be three traditional ways for American courts to handle the causation problem in criminal law:

1. Courts may shun the problem altogether, and instances of this, unfortunately, are not isolated. One recent example may demonstrate the point: Wilson assaulted his wife by shooting her with a ·22 calibre rifle. He was promptly charged with assault, tried, convicted and sentenced to several years of imprisonment in the penitentiary. While Wilson was in prison, and within a year and a day from the assault, Mrs. Wilson died of an acute purulent meningitis. She had " declined to permit removal of the slug which was lodged at the base of her sinus." The defendant now was reindicted for murder and convicted in due course. On appeal, the appellate court was gravely concerned about the double-jeopardy aspects of the case—resolving them soundly against the defendant, in accordance with established common law practice—but did not say a word about the causation issue. Nor does it appear that the

defendant had even raised the issue.[2] It is regrettable that the court ignored the causation issue. Perhaps it stumbled into the right conclusion, nevertheless it stumbled.

2. The second way of handling the causation issue consists of simply referring it to the sound discretion of the jury.[3] This portrays a somewhat defeatist attitude, frequently resorted to in treating theoretically difficult issues at common law.[4] It would be unfair to contend, however, that all our judges have been consciously or unconsciously remiss in their duties with respect to the treatment of the causation problem. Indeed, many have endeavored to develop a body of rules on causation and a certain theory has thus been developed. The application of such a theory is the third American method of solving issues of causation in criminal law.

3. A concise and accurate description of this theory or theories—products of case law—may be found in Wingersky's excellent new treatise.[5] I find there three basic propositions:

(1) "The ultimate harm suffered is linked, by causal relation, to the perpetrating act."

(2) "The resultant harm is imputed to an accused if it is the proximate consequence of his act or omission."

(3) "A sane actor is presumed to intend the natural, probable and reasonable consequences of his own deliberate, voluntary acts."[6]

Point one contains a statement beyond dispute, though unquestionably rather a vague one, and point three a proposition, right or wrong, which has long been used by our courts in the determination of any mental element of crime. It need not receive any further attention in this connection. The controversy centers principally on point two. And here, indeed, is the center of gravity of case law on causation.

A recent example may demonstrate the difficulties inherent in this so-called proximate cause concept (difficulties, incidentally,

[2] *State* v. *Wilson*, 335 P. 2d 613 (Ariz. 1959).

[3] The most recent wholesale instance was the *product test* of *Durham* v. *United States*, 214 F. 2d 862 (D.C.Cir. 1954), making it the responsibility of the jury to determine whether mental disease, etc., was the *cause* of the crime. See Ryu, "Causation in Criminal Law," 106 U.Pa.L.Rev. 773, 805 (1958).

[4] For cases on the province of the jury in the determination of causation, from opinion evidence, see 23 C.J.S. Criminal Law, § 878 (a).

[5] Wingersky, Clark and Marshall, *Law of Crimes*, § 4.01 (6th ed., 1958), quoting text at 184, with reference to the leading cases.

[6] *Ibid.* at 184, 185; classification and numbering mine.

which are multiplied in those courts where the issue is left entirely to the relatively unguided discretion of the jury).

Defendant and decedent, both somewhat intoxicated, engaged in an automobile race on a three-lane public highway, at times exceeding speeds of 90 m.p.h. On a bridge where the highway narrowed to two lanes, and where the vision ahead was obstructed, decedent attempted to pass defendant. Pulling out into the left-hand lane, he fatally crashed head-on into a truck, coming from the opposite direction. The defendant was convicted of involuntary manslaughter, and the appellate court affirmed, stating:

"The question whether the unlawful conduct of a defendant is a proximate cause of the death is almost always one of fact for the jury. . . . The jury found that the defendant's unlawful act of racing was a proximate cause of [decedent's] death. The evidence supported the finding. The unlawful act of the defendant in racing with the deceased continued up to the moment of collision. . . . [The trial judge] ably and adequately charged the jury on proximate cause." [7]

The charge to the jury cannot be gleaned from the appellate opinion which is phrased entirely in terms of proximate cause, substantial factors, and lacking remoteness. The jury mustered its common sense accordingly and returned a verdict of guilty of manslaughter. Few would quarrel with the result if the issue at stake were the liability on the part of defendant's insurance company for the compensation of deceased's pregnant wife and seven fatherless children, *i.e.*, tort,[8] but since the issue was the stigma of criminal guilt for homicide, the decision must leave a critical observer somewhat dissatisfied.

There is widespread agreement in the cases that a cause is the proximate cause of an effect if it is not remote [9] and if but for the defendant's cause, the (effect) harm would not have followed, and—according to some authorities—if no intervening cause, entirely independent of the defendant's activity, alone produced the only legally material effect (harm).

The second requirement, it appears immediately, is necessarily

[7] *Commonwealth* v. *Root*, 156 A. 2d 895 (Pa.Super. 1959). The opposite result was reached in *People* v. *Lemieux*, 176 Misc. 305, 27 N.Y.S. 2d 235 (1941).

[8] Indeed, the opinion cited Prosser as the outstanding living authority on this subject, *ibid.* note 4.

[9] This amounts to saying that a proximate cause is proximate if it is proximate, as to which see text below.

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included in the first and really needs no further repetition.[10] The "but for" requirement has been called the *factual element* of causation.[11] Factual causation is not identical with mechanical or physical causation. While it may be strictly mechanical (stab—wound—gangrene—death), it may also be physically or psychologically stimulative, as where a mechanical stimulation causes a psychological response or a psychological stimulation causes a mechanical or psychological response, and, indeed, chain reactions are included on ancient authority, as *causa causati*.[12]

This rule of causation, unfortunately, tells us nothing about its limitations. I submit that our juries would do equally well without any instruction whatsoever on any such thing as proximate cause, but by merely relying on their intuitions—which is probably what they are doing anyway. What is *proximate*, thus, is an entirely intuitive matter not subject to any scientific or logical limitation. The only certain element in the above causation rule is the "but for" aspect of the defendant's conduct. Uncertain is all the rest, especially the problem of "how far the principle of *mens rea* will be pressed" in causation,[13] and the weight to be given to the form or nature of the defendant's conduct in the composite picture of causes and conditions all of which have somehow contributed to the production of the effect.

The first step in determining a causal connection does not seem to be an overly difficult one: it is simply the determination of the *sine qua non*, *i.e.*, the establishment that but for the defendant's conduct, the event in question, the harm, result in question, would not have occurred. Difficulties arise only with the further step or steps to be taken for limiting the imputation of liability to such a degree that the goals of criminal law can be maximally achieved. It is here where confusion reigns. Ryu in a recent article has subordinated all causation imputations to the goals of a "free society"

[10] *E.g.*, although D acts to kill V, and wounds V severely (mortally), if an entirely independent (*i.e.*, in no way dependent on or related to D's act) agent, human or other, intervenes with an impact on V alone sufficient to cause death, D is *cheated out of his homicidal triumph*, and is at best guilty of attempted murder. D's act is not a *causa sine qua non* of the death.

[11] Williams, "Causation in Homicide" [1957] Crim.L.Rev. 429, 431.

[12] First used by Hale, *Pleas of the Crown*, I, 428 (1678). Recently applied in *Frazier* v. *State*, 112 S. 2d 212 (Ala. 1958), where D beat his 18-month-old son eight to ten times, and the child died from traumatic pneumonia, because the contusions had lowered the child's resistance.

[13] Wingersky, *op. cit.*, at 184.

in which "human dignity is the ultimate goal."[14] What are the implications of such a limitation on causation?

Let us return to *Poor Richard's* rider and determine why he should not be punished for some sort of statutory sabotage in a democratic society. Leaving aside the largely archaic and medieval aims of vengeance, talionic or other, it must surely be conceded that criminal law serves this one grand purpose: the prevention of crime, especially of repeated crime. Now, it is obvious that authoritarian society is just as much interested in winning its battles as is democratic society. Both will or should, therefore, aim at creating those stimuli which will best insure the winning of battles or, generally speaking, which will prevent unlawful-undesirable conduct, whatever it may be that is regarded as unlawful-undesirable in any society. Since in all forms of human society the recipient of the stimuli with which criminal law operates is the human psyche—stimulable by pains and pleasures or the expectation of either, and intent upon guiding its master's purposes—would it not follow that cause-and-effect attribution, as a means for the proper application of the stimulus, must be the same all over the world? (I concede, of course, that the stimulus must be one which is effective in a given society, and that effectiveness may depend on innumerable variants among different societies.)

A theory of causation in a criminal law which aims at prevention of whatever may be decreed as unlawful can be constituted only in one manner, no matter where it is to be applied.

As an aside, it is important to note the limitation to criminal law, for a tort causation theory may well have to be differently constituted by reason of a combination of two aims, prevention of undesirable conduct and compensation of those aggrieved, *i.e.*, loss distribution. Where the compensation goal is recognized, a theory of causation founded on the prevention goal alone must be materially tempered. I shall take no further note of causation in torts or any other field of law save criminal law.

Since criminal law operates principally in a teleological fashion in seeking to dissuade persons tempted to do so from engaging in conduct which will bring about a certain legally recognized harm —including the creation of a state of danger—it must rest on the assumption that at least most members of society so tempted

[14] Ryu, *op. cit.*, at 786.

are stimulus-responsive (responsible). This assumption necessarily includes a hypothetical knowledge of cause-and-effect relationships, *i.e.*, the ability to predict that certain results will flow from certain consequences. Two techniques are employed for insuring the popular effectiveness of criminal law with respect to this causation assumption:

1. The law exempts, or should exempt where it does not already do so, all those from liability (as "insane") who cannot muster the intelligence or rationality necessary for predicting ordinary cause-and-effect sequences with which the criminal law operates. This can be achieved most effectively in those jurisdictions which have modified the M'Naughten Rules of incapacity by excluding those unable to appreciate the nature and *consequences* of their acts.[15]

2. The law endeavors—and should endeavor more than in the past—to create only such crimes which will spare the individual the onerous burden of speculating about cause and effect. Thus, the law will prohibit the sale of certain types of literature because of the feared effect which such literature is believed to have on the minds of the public, especially certain members of the public, like young and immature or otherwise suggestible persons. By such a direct prohibition the law avoids difficult causation issues which might arise, for example, on the trial for accessoryship before the fact to murder of one who had sold a homicide-suggesting brochure to a suggestible minor who had murdered, it might be argued, as a result of having read the brochure.

But while this second limitation may solve some problems of causation, it immediately raises others. A legislator who habitually moves the point of attack of the threat of sanction away from the ultimate harm he seeks to prevent, also invites a causal argument to connect the prohibited specific harm with the more remote ultimate harm, in terms of necessary consequence. Thus, the driving of an automobile without proper headlights, in violation of statute, is obviously an offense created in order to prevent possible injury in traffic, especially human death. If now a driver causes

[15] *People* v. *Marquis*, 344 Ill. 261; 176 N.E. 314; 74 A.L.R. 751 (1931). The M'Naughten Rules were originally phrased to exculpate only for (inability to form) *actus reus* (inability to know nature and quality of act) and *mens rea* (inability to know wrongfulness of act) in general. Although causation is part of the *actus reus*, it is useful for an incapacity test to make a specific reference to an inability to comply with the causation and harm requirement, by changing "nature and quality" to "nature and consequences."

human death at night, and if, upon inspection, his headlights are found to be violative of the statute, a prosecutor in a homicide trial may well be tempted to make a causal argument without much ado. Worse yet, a presumption, rebuttable or irrebuttable, is sometimes employed for the imputation of the ultimate harm to the creator of the earlier minor harm. The result is an arbitrary solution of the problem of causation in terms of preclusion of further fact inquiry, once the coincidence of the infraction of the minor norm and the occurrence of the ultimate harm have been established. The law abounds in examples: armed robbery and death of a human being, as constituting murder; or, possibly, the commission of any felony and human death, as constituting murder. Such typified extensions of liability upwards are as arbitrary a limitation on causal fact inquiry as are the typified limitations downwards, as, *e.g.*, the artificial one year and one day limitation on homicide imputation.[16]

Anglo-American law, it seems to me, has always *endeavored* to keep its consideration of causality in terms which are understandable to the man for whom criminal law exists. It has, many especially recent examples to the contrary notwithstanding, wisely tried to limit causal imputations to situations where the "causer" did foresee or predict the consequences of his conduct,[17] even though such teleological element has not always been made part of the causation formula. Such foreseeing or predicting would seem to be necessary for liability for intentional criminality. As a matter of fact, however, even for intentional crime many convictions do rest on causing the harm without actually foreseeing it, but under circumstances where the offender should, or an ordinary reasonable or prudent person in his place would, have foreseen or predicted the consequences. Under traditional common law principles there could at best be liability for negligent production of the harm in such cases—where negligence suffices for liability (*e.g.*, negligent homicide, under statute, but rarely arson under statute)—but not otherwise.

In imputing foreseeability, it is relatively easy to attribute knowledge of the likelihood and nature of certain consequences in

[16] Oklahoma has just had its first pronouncement to that effect: *Elliot* v. *Mills*, 335 P. 2d 1104 (Okla. 1959).

[17] *R.* v. *Saunders*, 2 Plow. 473, 474; 75 Eng.Rep. 706, 708 (1575), started the welcome doctrine.

mere physical cause-and-effect relationships, *e.g.*, the impact of a bullet on a human body. It is much more difficult where the cause acts as a stimulant to the reaction of another, be it reflex behavior or rational conduct, which behavior, in turn, leads to the effectuation of the harm. Perkins, in his recent treatise, quite properly talks of normal and abnormal reactions of the stimulated person, and he explains, on the basis of decisions, that the liability will vary accordingly.[18] I submit, however, that expected and anticipated reactions would make for intentional production of the harm, whereas a mere awareness that the reaction might occur (chance taking) would at best make for reckless production of the harm. It follows that if the reaction be wholly unpredictable and abnormal, it cannot lead to imputability.

This is, in fact, the utilization of the forms of *mens rea* as forms of the mental process within the *actus reus* part of the crime,[19] for adjustment of the foreseeability element of causation. Although not infrequently overlooked by the courts, this effective limitation of the " but for " rule of causation has now been incorporated into the Model Penal Code,[20] which requires that the result be within the purpose or contemplation of the actor, if the offense requires that the harm be produced purposely or knowingly,[21] and that the result be within the risk of which the actor is aware, if the offense requires that the crime be produced recklessly,[22] a splendid solution. Hall achieves the same result—and, unfortunately, goes beyond it—by fusing *mens rea* with causation or employing *mens rea* as a check on causation.[23] Williams should be able to achieve the same result by using *mens rea* as an independent subsequent check on an otherwise completely factual causation concept.[24]

Either solution is in general accord with the traditional crime

[18] Perkins, *Criminal Law*, 622 (1957). Here it is the proper province of the jury to think themselves into the defendant's situation.

[19] For the distinction between form and substance of *mens rea*, see Mueller, " On Common Law *Mens Rea*," 42 Minn.L.Rev. 1043 (1958).

[20] American Law Institute, Model Penal Code, Tentative Draft No. 4, § 2.03, comments at 132–135 (1955). Also discussed by Hart and Honoré, *Causation in the Law*, 353–361 (1959), but at 356 erroneously cited as § 2.01.

[21] American Law Institute, *op. cit.*, subs. (2), also including results entirely similar to those contemplated.

[22] American Law Institute, *op. cit.*, subs. (3), with similar exceptions and analogous rules as to criminal negligence.

[23] See text at note 48 *et seq.*, *infra*.

[24] Williams, *op. cit.*, at 433; *ibid. Criminal Law—The General Part*, 106 (1953): " The question is whether the hurt to the victim should have been foreseen."

concept of American criminal law.[25] Causation links conduct and harm. But conduct has a physical aspect—the physical motion or rest observable in the external world—and a mental aspect, a mental process without which conduct would be little more than a spasm. Since conduct has these two aspects, and since conduct is linked with harm through causation, it follows that the link itself must have two aspects. Factual causation (usually physical, sometimes psycho-physical) links the physical event with harm, but only foresight, awareness, intention, purpose—of whatever intensity required by law—can link the mental process with the required harm.

Our causation concept as limited so far should now be tested on a well-known example: "Shooting back" at robbers is a natural and predictable consequence of robbing victims, especially those in hazardous occupations who are likely to be armed, so that, no matter who gets shot in the mêlée in satisfaction of the factual (physical or psycho-physical) causation requirement, one might conclude that all robbers—or at least those who survive—have caused the death of whoever died in the gun battle. Such, indeed, was the result achieved in the recently (at least partially) overruled[26] line of Pennsylvania felony murder decisions. But in repudiating its prior stand, the Pennsylvania Supreme Court was unable to find a logical, theoretically sound ground on which to reverse. Nevertheless, it deserves credit for mustering the courage to reverse and overrule itself anyway. If we limit our causation inquiry to factual-teleological causation, but for which the harm would not have occurred, we might be driven to the awkward position of having to approve the now overruled cases.[27] While with respect to *sine qua non* it might be argued that factually the shot came entirely from a source other than the defendant, it is nevertheless true that but for the defendant's act the deceased would not have been shot to death by a defending victim. If we carefully add a limitation in terms of the forms of the mental process (like the forms of *mens rea*), we are much more likely to achieve an acceptable result: if D neither desired any death, nor foresaw it as certain, but merely risked its occurrence, he would have the recklessness sufficient for

[25] Mueller, *op. cit.*

[26] Mueller, "Criminal Law and Administration," in 1958 *Annual Survey of American Law*, 125–126 (1959).

[27] At least in repudiating so much as warranted the conviction where the deceased was a co-felon, as distinguished from a bystander. *Commonwealth* v. *Redline*, 391 Pa. 468; 137 A. 2d 472 (1958). *Cf.* Hart and Honoré, *op. cit.*, at 297, 299.

manslaughter, but not the intention required for murder. But perhaps D aimed to kill.[28]

The solution is still unsatisfactory, but nothing within our causation formula itself, as so far developed, hints at a solution.

Suppose that in *Poor Richard's Case* the important lost message directed the general to withdraw to a certain safe position because of a likely onslaught of superior fresh enemy troops. The loss of the message might not have been so bad, had it not been for the fact that the quartermaster failed to get his supply wagons with ammunition through a muddy passage, so that these could not reach the front in time, because, in turn, the scouts had been wrong in their judgment in choosing this route over another which was dry. And suppose further that because some officers had carelessly conversed in camp about the strength or weakness of their troops, the enemy had gained this vital information. Who is now the causer of the defeat? The rider and his hapless superiors? the quartermaster? the scouts? or the careless officers? But for the conduct of all of our potential defendants the fatherland would not have been lost. Again and again they had been told of all the possible serious consequences which might arise out of violations of military discipline and duty. In fact, all might have foreseen, or at least regarded as possible, the serious consequences of their wrongdoing. Should they all be subjected to liability for (recklessly causing) the harm? or at least for causing it negligently? Of course, to all of them we would unhesitatingly attribute liability for the specific violations of military discipline. But what of the statutory sabotage which we supposed our state might recognize? Are they all guilty of that? Should we punish them equally and fully as if each one alone had fully caused the harm? Should punishment be allotted in an equitable manner according to the contribution which each one had made to the common disaster? Again, our formula alone would lead us to the conclusion that all defendants would have equally caused the national disaster. It permits no other result, though one might feel more and more uneasy about these cases of chain reactions or multiple contributions. And the difficulties are bound to increase in proportion to the number of contributors to the effect.

[28] Of course, the felony-murder doctrine as understood in Pennsylvania does impute murder liability, and because it does so, cannot be *logically* limited. The soundness of the felony-murder doctrine—which was supposed to solve problems of causation—is therefore in question as inconsonant with the mandates of causal imputation.

Rarely are multiple contributions capable of exact measurement. One such case, however, was recently discussed by Williams.[29] At least two of three causal contributors added measurable causes to the effect—but unfortunately it was the third one who was prosecuted: Defendant, foreman of a railroad work gang, misread the train schedule and ordered a rail replacement although a train was due. But he complied with standard safety procedure by ordering a flagman to take a position 1,000 yards away from the work place to stop possibly oncoming trains. The flagman moved only 540 yards away. A train approached. The engineer should have been able to see the flagman 500 yards ahead, but had failed to maintain a proper lookout. He should have been able to stop the train at 1,000 yards. The flagman's 460 yards shortage of moving, and the engineer's 500 yards shortage in applying the brakes combined in causing a fatal accident.[30] The foreman was tried and convicted of manslaughter. His contribution is not capable of measurement, although his negligent act is clearly a factual cause as well: But for his act of ordering the replacement when it should not have been ordered, no accident could have occurred. Williams criticized the decision and regards the law as not finally settled. This decision, in accord with our causation formula,[31] leaves us with the same feeling of dissatisfaction as the Pennsylvania felony-murder cases, *Poor Richard's Case*, and many others.

We are, therefore, squarely faced with the task of determining the nature and extent of any further limitations upon causal imputation (*i.e.*, within the causation formula) or upon liability (*i.e.*, outside the causation formula). This task has always been regarded as the most difficult challenge in the creation of a causation formula. I am not aware of any piece of American scholarship which does not propose some such further limitation within the causation formula itself. Despite many attempts at solving the problem, all suggested solutions are devoid of certainty. The very inquiry into the problem means treading on swampland, in the opinion of those who like utter certainty of legal rules; it means return to the swamps in the opinion of those who like the rules of past American case law and who regarded the first two or three steps out of the

[29] Williams, *op. cit.*, at 437–438.
[30] *R.* v. *Benge*, 4 F. & F. 504 (1865).
[31] The ideological element, likely to be objectively judged in a negligence case, may have been satisfied.

swamps as futile to begin with. The prevailing view, nevertheless, takes this step, and regards it as necessary despite the already achieved restriction of the causation concept in terms of factual and teleological limitations.

The enlightened opinions of the day may vary somewhat in expression, but they all aim at the same type of a limitation. Hall postulates, in line with philosophical theory,[32] that an otherwise acceptable cause will lead to liability only if it was *effective*.[33] Wechsler, in the Model Penal Code, and following earlier probings together with Michael,[34] puts the emphasis on the result by excluding an effect which is "*too accidental* in its occurrence to have a *just bearing* on the actor's liability."[35] Ryu, seizing upon the essential justness or unjustness of any possible imputation, would resolve the issue of ultimate limitation of cause and effect by reference to the ideals current in a given society, *i.e.*, the democratic ideal "in which human dignity is the ultimate goal."[36] Williams excludes otherwise eligible factual causes which are too remote in law, and the standard of remoteness seemingly is the currently prevailing opinion of society.[37]

The closeness of Hall's and Wechsler's views are readily apparent if we keep in mind that Hall relied for his effectiveness limitation on Edgerton who used the words ". . . legal cause is *justly* attachable cause,"[38] and Ryu's view falls right in line therewith. Wechsler's words, "*just* bearing," probably refer to nothing but the relation of causation (in homicide) to the prevailing criminal law policies, including the public demand for retribution,[39] and Williams' view is distinguishable therefrom only by its retention of the proximate cause phraseology familiar from the days antedating our current systematization and codification efforts.

[32] MacKay, *Causality and Effectuality, Causality*, 15 U.Calif.Pub. in Philo., 132 (1932).
[33] Hall, *Studies in Jurisprudence and Criminal Theory*, 186 (1959).
[34] Michael and Wechsler, "A Rationale of the Law of Homicide," 37 Col.L.Rev. 701 at 723–724; 1261 at 1294–1298 (1937).
[35] American Law Institute, *op. cit.*, § 2.03 (2) (b) and (3) (b). Emphasis mine.
[36] Ryu, *op. cit.*, at 785–786.
[37] Williams, *op. cit.*, at 518–519. His sample case is *R.* v. *Wrigley*, 1 Lew. 171 (1829): D commits battery on V, who is placed on a form from which he rolls and dies. It was proper for the first aid squad to place him on the form. "It is true that the deceased would never have been lying on the form if he had not been injured, but this type of causation between the defendant's act and the death is too remote in law—the second injury does not follow from any dangerous condition created by the first injury." Williams found the causal imputation in *Wrigley* "too strict for present opinion."
[38] Hall, *op. cit.*, at 186, citing Edgerton, *Legal Cause*, 72 U.Pa.L.Rev. 211 (1924), emphasis mine.
[39] See *supra*, notes 34–35.

Hart and Honoré criticize this approach.[40] "Such an approach," they say, "is open to one major criticism: it does not provide *specifically* for those cases where causal problems arise, because, although the accused did not intend it, another human action besides accused's is involved in the production of the proscribed harm."[41] One could go further by adding cases of causes precedent, concurrent or subsequent, and regardless of whether or not the intervenor is a human agent. The problem is the same. Moreover, might it not be argued that one who wishes to reduce causation to a concept of juridical certainty and exactitude is foolish if he introduces limitations of certainty and thereafter proceeds to destroy this certainty by superimposing an elastic concept which will destroy his earlier endeavors?

It is submitted that in many causation cases this last limitation may never come into play, most of them being disposable in terms of the previously stated restrictions. At least, such would seem to be borne out by the pattern of past causation cases. When the "effectiveness"[42] limitation does come into play, it is as a restriction rather than extension of causal imputation. Even so, it must be granted that in the really tough problem cases we are now confronted with the task of measuring with a yardstick other than that heretofore applied, a yardstick without precise markings. The "just effectiveness" limitation does rely on a human ability of measuring something like justness, the living law, the democratic ideal or the sense of injustice—and this latter probably describes the situation best, especially since it is negatively phrased.[43]

The vagueness so introduced certainly is no greater than that which we find in many other cases in which our law makes its judgment rest on an imprecise standard: reasonable searches and seizures, appreciation of right and wrong, etc. These vague standards of the penal law have gained meaning only through the dynamic process of judicial interpretation. They are left vague purposefully to permit adjustment to gradually changing community attitudes. But is *causation* such a concept which should be elastic to accommodate change? Can what was causation yesterday be no

[40] Unfortunately, neither Ryu's paper nor Hall's latest position seems to have been before Hart and Honoré.
[41] Hart and Honoré, *op. cit.*, at 357.
[42] In short, but meant to include the Model Penal Code and Ryu limitations as well.
[43] Cahn, *The Sense of Injustice* (1949); *ibid.* "The Consumers of Injustice," 26 Soc.Res. 175, 188-194 (1959).

longer causation today? And if we subject the ultimate causation limitation, *i.e.*, just effectiveness, to judicial and jury discretion, are we not in effect returning to precisely that which we are trying to leave behind as unscientific and lacking in juridical certainty and thus incapable of maximally achieving the utilitarian goals of penal law? "Effectiveness" is a vague concept, and the criterion by which "effectiveness" is to be judged is even more vague: justness, contemporary standards, etc.

Hart and Honoré feared that "nothing is gained by fusing these considerations of policy or expressions of moral judgment with the causal elements in responsibility."[44] For this Hall took them to task,[45] and I joined in the criticism.[46] This requires an explanation. It would lead too far to discuss all the precepts of axiological jurisprudence as against those of pure positivism and its kin. But whatever the merits of a policy-oriented or axiological jurisprudence, we are here confronted with a rather practical problem. Wechsler wrote a code, and Hall's theory also looks toward codification.[47] We have then, on the one hand, practical considerations of codification, and the codifier's viewpoint, as opposed to those of the case law advocate with his traditions, on the other. If Hart and Honoré could manage to list all the specific instances of effectiveness through which causal imputation must be limited, they might achieve greater certainty than those employing a short code formula, but surely, the public whose conduct is meant to be governed by the law would benefit little by 1,001 rules stored in the law library. It can benefit only by a relatively concise and simple standard of the law. If the only compromise possible between the aims of the codifiers and the aims of the common lawyer were the addition of a "just effectiveness" limitation upon a factual-teleological *sine qua non* causation concept, I should not hesitate to subscribe to this compromise. But is this the only way out of the dilemma?

While no suitable further limitation upon causal imputation suggests itself immediately, a limitation upon liability is quite obvious: the application of the *mens rea* concept.

[44] Hart and Honoré, *op. cit.*, at 362.
[45] Hall, *Studies*, *op. cit.*, at 187–199.
[46] Mueller, "Criminal Theory: An Appraisal of Jerome Hall's *Studies in Jurisprudence and Criminal Theory*," 34 Ind.L.J. 206, 224 (1959).
[47] Compare Hall, "Revision of Criminal Law—Objectives and Methods," 33 Neb.L.Rev. 3 (1954), now *Studies*, *op. cit.*, Chap. 14.

So far not much has been said about the relation of causation to *mens rea*. *Mens rea*, not having been included in the above causation concept, would seem to be no part thereof, *i.e.*, not a check on imputability, but on criminal liability. But there is dispute on this point.

Hall, with whom up to this point I am otherwise in substantial agreement,[48] has chosen to include *mens rea* within his concept of the cause-in-law. " [T]he fact finding of a cause-in-law means the finding of a cause which is a substantial factor and includes certain voluntary conduct signifying a required *mens rea*." [49] I can subscribe to the proposition that voluntary conduct is a significant limitation upon cause-in-law. I differ with Professor Hall on the conclusion that such involves *mens rea*. As I discussed elsewhere in greater detail, *mens rea* " is the ethico-legal negative value of the deed (appearing in various legally prescribed forms)." [50] Thus, it is nothing but the defendant's awareness, of the required intensity, that what he is doing is not approved by the community—whether he likes it or not. (Some would add " potential awareness," to accommodate criminal negligence as a species of *mens rea*.) As far as I can see, *mens rea* in that common law sense is too far removed from causation to be part thereof by construction.

Of course, we have already used the forms of *mens rea* (broadly speaking, intention and recklessness) within our concept of causation *as forms of the mental process*. But such amounts to no more than a directing of the beacons of *mens rea* on the *actus reus*, true to an age-old tradition of the common law. (Whether we should *therefore* attach blame and impose liability without further ado is another matter.) I can see no justification for fusing *mens rea*, *i.e.*, the awareness of wrong-doing, with the principle of causation. To the contrary, the separation of the two seems to entail certain advantages, quite apart from the advantage of clarity. The separation would preserve a causation concept which is equally applicable to both the cultural criminal law with its traditional felonies and misdemeanors, and to regulatory criminal law, where absolute liability frequently—though unfortunately—prevails.

In the former group of offenses, upon the fulfilment of the *actus reus*—including causation—and absent the proof of defenses

[48] Mueller, *Criminal Theory*, *op. cit.*, at 224.
[49] Hall, *Studies*, *op. cit.*, at 187.
[50] Mueller, " On Common Law *Mens Rea*," *op. cit.*, at 1055.

on the part of the defendant, the presumption of *mens rea*, and thus the presumption of guilt, arises, *i.e.*, D acted (produced harm) despite awareness of wrong-doing (substance of *mens rea*). The defendant, in fact, is now proven guilty, for he cannot claim that he believed in the innocence of killing a human being or setting fire to a dwelling. But the guilt disappears upon a showing that he acted under bona fide error or ignorance of fact, under duress, necessity, in self-defense, etc., which wipe out the awareness of wrong-doing.

If, however, the offense is one of so-called absolute liability, then his belief in the lawfulness of his acting and causing, although justifiable and bona fide, is as immaterial as his error of fact, etc., *i.e.*, criminal liability needs no *mens rea* in such cases. Only causation must be proven. If, now, causation were merely the first part of a multi-part *mens rea* concept, we would arrive at a possible absolute liability which dispenses even with the causation concept.[51] While a few cases have gone that far, it can hardly be said that these illgotten offsprings of judicial thought, or lack thereof, represent the law of the land. The Model Penal Code, unfortunately, would sanction this practice in part, *i.e.*, by limiting causation in absolute liability offenses to a *causa sine qua non*, and it has properly been severely criticized for doing so.[52]

It would seem to follow that causation must be kept, as it always has been, separate and apart from *mens rea*; though, for the establishment of criminal liability only the establishment of *mens rea* after the establishment of conduct, causation and harm, can make for a sound law. I am happy to note that Hart and Honoré also consider *mens rea* apart from the causation issue,[53] as seems to be the *general* position of the Model Penal Code.[54]

The principle of *mens rea* constitutes indeed a most necessary corrective for the imposition of criminal liability. Unfortunately, I

[51] Vice versa, by arguing that *mens rea* is part of causation, specifically that in explicitly requiring the "causing" of the harm the legislature meant to require *mens rea*, one might succeed in narrowing the area of useless and harmful absolute liability. This would be a demonstration by a *reductio ad absurdum*, which may well be successful. Edwards may have been so motivated in *Mens Rea in Statutory Offenses*, Chap. 6 (1955). But see Hart and Honoré, *op. cit.*, at 326–333, differing from Edwards.

[52] American Law Institute, *op. cit.*, § 2.05; Hart and Honoré, *op. cit.*, at 361.

[53] Hart and Honoré, *op. cit.*, at 326.

[54] This requires an explanation. My guess is based on this: In treating of *sine qua non* causation, the statement may be found that the draft "proceeds upon the view that problems of this kind ought to be faced as problems of the culpability required for conviction and not as problems of 'causation.'" American Law Institute, *op. cit.*, at

am unable to see how it can possibly lessen the harshness of many cases in which there simply is no *mens rea* problem but seemingly only a causation problem, *e.g.*, the Pennsylvania felony-murder cases, the rail gang case and *Poor Richard's Case*.

Although, up to this point, the problem of causation has not yet been satisfactorily solved, a summary of findings is called for. The current American scholarly position on causation appears to be this:

Within the criminal law, an event (harm) is imputable to a perpetrator's conduct, when it is joined thereto by causation. Causation exists when:

1. but for the conduct, the harm would not have occurred;
2. provided, that the harm was actually purposed or foreseen as certain [or, possibly, entirely of the same nature as that purposed or foreseen], for intentional offenses—or, within the awareness of risk [or, possibly, entirely of the same nature as that risked], for offenses of recklessness; and
3. provided further, that the conduct was effective, *i.e.*, not too accidental in producing the harm, especially with relation to other factors, to have a just bearing on imputability,[55] justness being determined by reference to prevailing community standards, which might be expressed in terms of legal precedents.

There is substantial agreement among American scholars, who have studied the problem, on this concept of causation. But I personally reject the third limitation in the present form as unsuitable to solve the problem in a sound scientific manner. There is some disagreement among scholars on the place of *mens rea* in relation to causation. The view is here advanced that the establishment of a cause-in-law in accordance with the above formula does

132. This may be an acceptable short-cut way of stating that *mens rea* is a matter separate and apart from causation, and the further cause qualification through the teleological element does not in and of itself make causation a matter of "culpability." Completely unclear remains the effort to make subs. (1) sound as if it covered the ordinary case (only mechanical, *i.e.*, *sine qua non* causation) and as if the introduction of the teleological element is merely an afterthought, in subs. (2), *i.e.*, "when purposely or knowingly causing a particular result is a material element of an offense." It is submitted that at common law intention (purposefulness or knowledge) is always required, and the rule can be varied only by express exceptions. Thus, it might have been better to raise the mechanical and the teleological element to equal rank.

[55] The Model Penal Code uses the words "actor's liability": American Law Institute, *op. cit.*, § 2.03. I would prefer saving the term liability to cover the aggregate of conduct, causation, harm and *mens rea*.

not entail any consideration of *mens rea*. But while causation makes for imputability of harm to conduct, only the further consideration of *mens rea* makes for ultimate liability.

II. Civil Law

While paying due homage to the Model Penal Code draft, Hart and Honoré understandably expressed their preference for the " common sense " approach, which has marked past American (and British) judicial practice in the field of causation (and elsewhere), though they do, obviously, insist on reconciliation of inconsistencies which, after all, need not exist. The final part (III) of their superb study is devoted to a presentation of Continental law on causation, especially in criminal law. Theirs is the second such study, after Ryu's pioneering performance.[56] Hart and Honoré managed well in treating an elaborate and complicated piece of Continental legal theory, and even succeeded in showing, in essence, that stripped of its doctrinal jargon, some Continental doctrine supports the very common sense approach which our courts have practised and which Hart and Honoré prefer, while probably the rest of it does not seem to point to a more suitable solution.[57]

The following comparative treatment of the subject-matter cannot aim at duplicating Ryu's and Hart and Honoré's splendid description of foreign theory. I can accept both studies *in toto* for purposes of this inquiry.[58] Nevertheless, I feel compelled to restate as much of civil law theory as is necessary to demonstrate the evolution of the causation theory in civil law countries. Moreover, I deemed it necessary to go beyond Ryu's and Hart and Honoré's description of foreign law in an effort to demonstrate that Continental theory started with rather different premises and today, indeed, is quite dissatisfied with the so-called common sense approaches in their variegated garbs, that Continental practice feels uneasy about them, that theory has ultimately turned away from them and returned to nearly the same premises with which it began, and that these premises are kin to, if not in large part identical

[56] Hart and Honoré, *op. cit.*, Part III, in consultation with Dr. H.-H. Jescheck, Professor of Criminal Law and Director, Institute of Foreign and International Criminal Law, University of Freiburg i. B., Germany, and Dr. H.-H. Heldmann, formerly of the same institute. See *ibid.* v.

[57] See Ryu, *op. cit.*

[58] Cross-references are made in the text where appropriate.

with, current American scholarly thinking on causation. Beyond that, it will appear that the new Continental approach suggests answers to our "ultimate limitation" puzzle which are totally consonant with the basic structure of our common law of crimes.

The historical beginning

Many aspects of Continental criminal theory are directly traceable to Anselm von Feuerbach, the great Bavarian codifier and theorist of the early nineteenth century. And so we find that with respect to causation it was von Feuerbach who raised causation from the level of obscurity to that of theoretical-conceptional refinement. In his famous treatise he treated of causation in connection with intention and negligence. Finding no problem with the cases in which a defendant wants to achieve a certain result and does so by setting in motion whatever he deems necessary therefor, Feuerbach solved the problem of the risk taker in similar fashion. Where a defendant engages in a risky activity, aware that any one of several consequences may follow, any such consequence which does follow is imputable to him as within his intention.[59] Implied in this recognition are the causation elements of the *conditio sine qua non* and of foreseeability, of a degree corresponding to the required form of guilt, or nearly so, *i.e.*, intention in its various forms and, possibly, negligence.[60] This basic theory was further developed in Mittermaier's edition of von Feuerbach's treatise, where we find express elaboration of these fundamental recognitions.[61] Mittermaier made it clear that remote consequences are not imputable to the actor, as not within his foreseeability, direct consequences are imputable as caused intentionally, and those risked may be imputable as having been caused through criminal negligence.[62]

This first Continental doctrine of criminal causation does indeed come close to modern American thinking on causation, as discussed in Part I. For reasons which need not be elaborated upon here,

[59] Von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, § 58 (6th ed., 1818).

[60] *Ibid.* § 59.

[61] Von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (14th ed., Mittermaier, 1847). Mittermaier became well known in English-speaking countries through a number of significant publications in English, *e.g.*, "The Present State of Criminal Legislation in Germany," 24 Am.Jur. 62 (1840); *Effect of Drunkenness upon Criminal Responsibility* (Edinburgh, 1841); *Capital Punishment* (London, 1865).

[62] *Ibid.* §§ 58-60.

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this psychologized criminal causation theory of von Feuerbach–Mittermaier did not gain recognition in the German Reich. Nearly from the outset, the scholars and courts of the Reich attempted to keep causation strictly apart from anything smacking of *mens rea*. So great, indeed, was the belief in the magic of *mens rea* that, so it was thought, causation could be handled strictly on an objective basis, since *mens rea* would provide the necessary corrective—and the result would be perfect justice!

The objective theory of causation

Throughout the Reich, causation was regarded as a condition precedent to the determination of guilt, *mens rea*, and thus criminal liability.[63] The causation inquiry was viewed as a strictly objective matter. Absent the finding of objective causation—we would call it factual causation—a trial court could never even reach the issue of *mens rea* and the case would have to be dismissed.[64]

There was a variety of versions of the objective theory of causation[65]:

1. *The theory of condition*[66]

The theory of condition was formulated and advocated by the Austrian Glaser[67] and the German von Buri.[68] It corresponds in all significant respects to our Anglo-American *sine qua non* theory[69]: every condition which cannot be imagined absent without a corresponding failure of the result, is a necessary condition or cause for the production of the harm. The theory was adequately explained by Hart and Honoré and needs not much elaboration here.[70]

This theory has been the favorite of the German Supreme Court in criminal matters.[71] The Spanish Supreme Court has followed

[63] As such recognized in M. E. Mayer's first publication, *Der Causalzusammenhang zwischen Handlung und Erfolg—eine rechtsphilosophische Untersuchung* (1899).
[64] *E.g.*, S.Ct. Dec. of 3-19-1937, 66 J.W. 3087 (1937). Traeger, *Der Kausalbegriff im Straf- und Zivilrecht*, 10 *et seq.* (2nd ed., 1929).
[65] For attempted classifications see von Liszt, *Lehrbuch des deutschen Strafrechts*, I, 161–169 (26th ed., 1932); Givanovitch, *Du principe de causalité efficiente en droit penal* (1908); Mezger, *Strafrecht, Ein Lehrbuch*, 109–129 (1933).
[66] Ryu, *op. cit.*, 787–788; Hart and Honoré, *op. cit.*, 391–410.
[67] Glaser, *Abhandlungen aus dem österreichischen Strafrechte*, I, 298 (1858).
[68] Von Buri, *Teilnahme und Begünstigung* (1860) and other works.
[69] Perkins, *op. cit.*, 598–600.
[70] Hart and Honoré, *op. cit.*, 391 *et seq.*
[71] Ref. at Wegner, *Strafrecht, Allgemeiner Teil*, 93 *et seq.* (1951), see also 4 B.G.H. St. 360 (1953).

suit.[72] Steadfastly it has maintained that the causal *nexus* is not impaired or altered by any pre-existing conditions, like the pathological condition of the victim [73]; predispositions,[74] or the physical constitution of the victim [75]; nor is it affected by any concomitant or related subsequent events, such as lack of medical treatment,[76] supervening causes like tetanus,[77] pneumonia,[78] or gangrene.[79]

Of the relatively few foreign penal codes with express provisions on causation, the Italian Penal Code adopted the condition theory:

Article 40: No one may be punished in respect of an act deemed by the law to be an offence, if the injurious or dangerous event upon which the existence of the offence depends is not the consequence of his act or omission. Not to prevent an event, which it is legally obligatory to prevent, is equivalent to causing it.

Article 41: The concurrence of pre-existing or simultaneous or supervening causes, even though independent of the act or omission of the guilty person, does not exclude the relation of causality between the act or omission and the occurrence.

Supervening causes exclude the relation of causality only when they have been by themselves sufficient to determine the occurrence. In this case, if the act or omission previously committed constitutes of itself an offense, the punishment prescribed in respect of it shall be applied.

The preceding provisions shall also apply when the pre-existing or simultaneous or supervening cause consists of the unlawful act of another person.[80]

The Brazilian Penal Code likewise adopted the condition theory. Its Article 11 deals with subsequently intervening causes. No distinction is made between causes and conditions, and everything which actively contributes to the result is regarded as a cause, regardless of the weight of the causal contribution.[81]

The condition theory, though widely accepted in various

[72] Cuello-Calon, *Derecho Penal*, I, 328 (1956). For Spanish language references I am indebted to Sr. Pompeyo R. Realuyo, Esq., of Manila, Phil., a former student of Prof. Cuello-Calon and myself.

[73] Dec. of 10-29-1887.

[74] Dec. of 11-26-1888, 10-26-1829.

[75] Dec. of 3-10-1871, 3-3-1876, 10-4-1886, 6-25-1913, 4-14-1933, 2-5-1940.

[76] Dec. of 11-21-1873, 10-30-1891, 4-20-1892, 4-25-1894, 11-28-1895, 30-9-1901, 4-2-1903, 4-8-1903, 5-19-1903, 6-23-1903, 2-15-1916, 1-31-1934.

[77] Dec. of 3-2-1887, 6-21-1924.

[78] Dec. of 2-1-1877.

[79] Dec. of 2-18-1889, 11-6-1894.

[80] *Italian Penal Code*, English translation (H.M.Stat.Off., 1931). On the wide scope of causal imputation under these sections see Prof. Nino Levi's footnotes to the reproduction of this translation in Michael and Wechsler, *Criminal Law and its Administration*, 1292-1293 (1940).

[81] Codigo Penal, Republica dos Estados Unidos de Brasil, Spanish translation in Jiménez de Asúa, *Codigos Penales Ibero-Americanos*, I.

jurisdictions, has been subjected to much criticism.[82] Its major defect lies in the extension of causal imputation *ad infinitum*, flowing from the very nature of phenomenal conditions which succeed one another in an unlimited sequence. It is the establishment of a limit which creates the major problem for the proponents of this theory. The refusal of this theory to accept, with rare exceptions, interruptions of the causal chain either through the voluntary intervention of a third party or through the occurrence of abnormal or incidental events, or of grossly negligent acts, has rendered its application unreasonably rigid. The rigorous application of this theory tends to produce unjust decisions of sometimes monstrous dimensions, especially in cases of result-qualification, as in Anglo-American law under the felony-murder doctrine. To demonstrate the point, suppose that A inflicted a blow upon B which caused him serious injuries. B is taken to the hospital. While there, a fire breaks out in which B suffocates. A is considered the author of the suffocation death, for if A had not injured B, the latter would not have been brought to the hospital in which he died. Binding reduced this theory *ad absurdum* by arguing the necessity of punishing for adultery not only the man who sleeps with the woman and the woman, but also the carpenter who made the bed.[83]

To overcome this logically boundless extension of effect imputations, and to avoid the use of arbitrary limitations so as to prevent at least the most flagrant injustice, a number of more refined objective theories have been developed with the aim of singling out from the total set of causes, the one cause which really matters, the *real cause*. All these subsequent theories admit, of course, that the "but for" test must be satisfied in any event, but their claim is that a particular cause is so outstanding as to qualify as cause alone. Of these theories, the following have become prominent:

2. *The theory of the most effective cause*

According to this theory, propounded by Birkmeyer,[84] Reinach[85] and others, the judge has to select from all causes which contributed

[82] Binding, *Die Schuld im deutschen Strafrecht, Vorsatz, Irrtum, Fahrlässigkeit; kurzes Lehrbuch* (1919).

[83] Binding, *Die Normen und ihre Übertretung*, I (1922). For further discussion and examples see Rümelin, *Die Verwendung der Kausalbegriffe*, 39 *et seq.* (1900); Reinach, *Über den Ursachenbegriff im geltenden Strafrecht*, 12 *et seq.* (1905).

[84] Birkmeyer, *Ursachenbegriff und Kausalzusammenhang im Strafrecht* (Rektoratsrede, Rostock, 1885), Gerichtssaal 37, 257, 264 (1885), as cited by Ryu, *op. cit.*, note 65.

[85] Reinach, *Über den Ursachenbegriff im geltenden Strafrecht* (1905).

toward the creation of the result that cause which ranked foremost.[86] If this cause is the act of the defendant, the judge must consider it the legally sufficient cause and impute the harm to him.[87] All other causes then become legally irrelevant. This theory found its critics as well and remained without substantial influence on adjudication. Its greatest weakness was, of course, its failure to provide a standard for the determination of the most effective cause.[88]

Among the followers of this theory is the Argentine Court of Appeals which labels the segregated cause the " direct cause." [89]

3. *The theory of preponderance*

According to Binding, the really relevant cause is the last or ultimate cause, because it is this which breaks the equilibrium between the positive and negative conditions of the result. Binding theorized that in the external world there are always two kinds of conditions which oppose each other. Given a natural course, they are in an equilibrium. " To cause a change is to change the equilibrium between the conditions which impede change and those which tend to produce it. . . ." [90] Thus, he who alters the balance either in favor of the negative or the positive is deemed to have caused the result. Binding, who, incidentally, rejected the doctrine of *sine qua non* and reduced the question of causation to a practical juridical problem distinct from that of philosophy, came close to making his theory center on the forms of perpetration, *i.e.*, intent to produce the harm or reckless or negligent production thereof.

Indeed, the next logical progression in the further development of causation theories toward greater sophistication was bound to be the introduction of subjective factors.

[86] Thus allowing the judge full and unfettered discretion in determining the causal quality of a concrete event, Birkmeyer, *op. cit.*, at 18.

[87] But if two or more acts contributed to an equal extent, each will be regarded as a cause. See Hart and Honoré, *op. cit.*, 388.

[88] Von Buri, *Die Kausalität und ihre strafrechtlichen Beziehungen*, 7–9 (1885), advanced the major criticism which subsequently led to the defeat of this short-lived so-called individualizing theory.

[89] J. J. Danet, 4–17–1936; I. Goldman, 5–20–1938; R. Calisi, 5–9–1939. In a 1938 decision the court required the result to be the immediate and direct consequence of the perpetrator's culpable act. X La Ley (Buenos Aires) 883.

[90] Binding, *Die Normen und ihre Übertretung*, I, 370 (1922).

The objective-subjective theories of causation

Besides the peculiar French theory of proximate cause, discussed by Ryu [91]—not identical with our Anglo-American theory of like designation—the best-known objective-subjective theory of causation is the theory of adequate causation.

1. *The theory of adequate causation* [92]

The theory of adequate causation came as a thorough reform of the proximate cause theory. It was conceived by a natural scientist, the Freiburg Professor Von Kries [93]—who relied to some extent on the preliminary studies of von Bar—and was propagated by Merkel, Thon, Helmer, Rümelin and Liepman.[94] Radbruch was its ardent supporter.[95] While consistently applied by the German Federal Supreme Court in tort cases,[96] it was only infrequently resorted to in criminal matters,[97] and recently rejected by the new German Supreme Court as "implying the inclusion of a guilt element in causation." [98]

This theory solves the causality problem by posing the question: what were the facts known to the actor, from which he must be presumed to have made—*i.e.*, has made, or ought to have made—a probability calculation as to the likelihood of causing the harmful result? [99] While operating with a presumption, which always carries a danger with it, this theory has the advantage of a more subjectivistic evaluation of the causal relations, as opposed to the strictly objectivistic *conditio sine qua non* theory.

The theory attributes the quality of cause only to that condition which is *generally appropriate* to produce a given result, *i.e.*, only

[91] *Op. cit.*, 789.
[92] Ryu, *op. cit.*, 791–793; Hart and Honoré, *op. cit.*, 410–439.
[93] Von Kries, *Die Prinzipien der Wahrscheinlichkeitsrechnung* (1886); *ibid. Über den Begriff der objektiven Möglichkeit, etc.* (1888); *ibid.* "Über die Begriffe der Wahrscheinlichkeit und Möglichkeit und ihre Bedeutung im Strafrechte," 9 Z.ges.Str.W. 528 (1889).
[94] Ref. at Hart and Honoré, *op. cit.*, note 92, *supra*.
[95] Radbruch, "Die Lehre von der adequaten Verursachung," in I *Abhandlungen des kriminalistischen Seminars an der Universität Berlin* (n.F.) No. 1 (1902).
[96] Mühlmann and Bommel, *Das Strafgesetzbuch an Hand der höchstrichterlichen Rechtsprechung für die Praxis*, 5 (1949).
[97] In a few flagrant cases of result-qualification of liability, the court applied this theory *sub rosa*, *e.g.*, 44 R.G.St. 137 (1910); 65 R.G.St. 143 (1930). Several of the state courts in what is now the Federal Republic applied the theory with greater frankness in the first post-war years, *e.g.*, Dec.Sup.Ct.Heidelberg, of 7–24–1947, with comment, Engisch, 3 S.J.Z. 207 (1948).
[98] 1 B.G.H.St. 332 (1951).
[99] Mühlmann and Bommel, *op. cit.*, 5.

to the adequate condition of the result, as propounded by von Bar.[1] It is not sufficient for the condition to produce the result in the concrete case, but it is further necessary that in all cases abstractly possible such result would probably follow in accordance with a judgment passed on the basis of the general physical laws. To qualify a condition as cause "two kinds of knowledge are required: knowledge of the particular facts ('ontological knowledge') and knowledge of the pertinent general laws of nature ('nomological knowledge'). The latter supplies the basis for the judgment as to whether a particular condition was 'adequate' to produce the particular effect." [2]

This theory admits of the existence of concurrent or pre-existent causes which in the normal course of analogous events are not derivable from the action of the perpetrator. When these concur it is said that the causal nexus is interrupted. Thus, the victim of of car accident who dies in a hospital fire is not a victim of an event regularly encompassed within car accidents; the event produced was not adequate to cause death by fire and its author therefore is not responsible therefor. The hospital fire is a concause which interrupted the relation between the car accident and the death of the victim. However, the endeavor to establish an unfailing "routine course of events in analogous situations" is a mental feat of no mean dimensions.

There are several varieties of this theory, each one using a different standard for judging the "routine" question.

(a) Von Kries maintains that we should imagine ourselves in the position of the author of the act and should consider all circumstances which he knew or should have known when commencing the act. The theory has been objected to by those cherishing clear-cut theories as introducing the subjective element of knowledge into the field of causation and bringing the latter within the orbit of guilt.[3]

(b) Rümelin assumes that adequacy must be wholly determined by a judicial retroactive prognosis on the basis of all knowledge available at the time of adjudication, considering all the circumstances which a normal person ought to have foreseen. Knowledge

[1] Von Bar, *Über Ursachenbegriff und Kausalzusammenhang* (1880).
[2] Ryu, *op. cit.*, 791–792. Ryu subscribes to this theory to some extent, *ibid.* at 798, as, indeed, does the common law.
[3] Von Kries, *op. cit.*

is projected back to the time of the act and the question is posed what prognosis should the actor reasonably have made had he then had such knowledge.[4]

(c) Traeger suggests as the basis of judgment the knowledge of the conditions which could be observed at the time of the act, or of the effect, by the keenest observer in the light of total experimental knowledge.[5]

All versions are definitely subjective in relating the causation issue to foresight or foreseeability. Neither, it is submitted, actually incorporates *mens rea* fragments into the causation concept.

(d) Radbruch's theory of adequate causation: Viewed from the legislative point of view, Radbruch's theory of adequate causation is interesting in suggesting a way to cut down on possible arbitrary findings that a defendant did or could foresee the consequences of his conduct. Radbruch synthesized the theory as a problem of the proximity of causal nexus between forbidden conduct (cause) and harm (effect). Thus, the closer the ordinary physical nexus between unlawful conduct and harm, the smaller is the problem of imputation, *i.e.*, the psychological aspect of causation. The problem becomes more difficult the further the legislator has removed the possible or envisaged harm from the prohibited conduct. For example: the law declares a result Z undesirable (harm). Defendant has engaged in conduct A which has brought about result Z. Let us presume that it can be established by experience or experiment that in one-fourth of the cases of conduct A the result has been X. The adequate causation theory would view X adequately caused by A. Let us presume further that experience or experiment also shows that in one-fourth of all X results Z will develop out of X. Again, Z would have been adequately caused by X. But it follows that conduct A produces result Z, the harm, only in one-sixteenth of the cases, thus no longer adequately. The legislator who wishes to outlaw Z should therefore not prohibit conduct A. And if a defendant produces Z by conduct A, even if A is not specifically prohibited, he should not be deemed to have *caused* (*i.e.*, adequately caused) Z.[6]

The theory of adequate causation thus has approached the

[4] Rümelin, "Die Verwendung des Kausalbegriffs im Straf- und Zivilrecht," 90 Arch. ziv.Prax. 171 (1900).
[5] Traeger, *op. cit.* The first edition, not available for this research, appeared in 1904.
[6] Radbruch, *op. cit.*, 19 *et seq.*

realm of knowledge, by making causality dependent on the amount of actual or potential awareness or foreseeability of the consequences. Knowledge is also the smallest common denominator of *mens rea*, but by using the mere value-free *forms* of *mens rea*, the substance of *mens rea* and therefore an inquiry into the guilt of the defendant, after the harm has been imputed to him, remains a separate matter.

2. *Löffler's theory of mathematical probability*

Löffler, pioneer of the German *mens rea* concept, had developed a theory of causation which relied even further on the actual or potential knowledge of the defendant.[7] Löffler combined the concepts of knowledge and duty, creating a causality theory which depended on both these concepts. With him the forms of *mens rea* became degrees of intensity of knowledge and duty. But by incorporating duty into the causation concept, Löffler effected a merger of causation and *mens rea*. An example can best demonstrate this theory. The question is: Is a shipowner guilty of murder or manslaughter or neither (in other words, which form, if any, of *mens rea* did he have) when he sends an unseaworthy ship on a voyage, thereby endangering the lives of the passengers and the crew? Let *a* be the degree of valuation of the protected legal interest (lives). Let $3/4$, $1/2$ and $1/4$ be the probability of loss of the lives. Risk, then, is the intensity of knowledge about the probability of loss of lives. The amount of risk will correspond to the form of *mens rea*, that is, *mens rea* is nothing but a known or knowable degree of likelihood of relation between cause and effect, *i.e.*, risk.

If $r = \frac{3a}{4}$, the risk is high, coming close to intention, undoubtedly amounting to recklessness.

If $r = \frac{a}{2}$, the risk is medium, undoubtedly constituting negligence.

If $r = \frac{a}{4}$, the risk is low, and perhaps beyond the recognition of the law, perhaps it ought to be considered carelessness.

The drawing of the borderline between the areas of liability and no liability, as well as between the various degrees of liability, is an arbitrary one. It depends on a (usually legislative) balancing

[7] Löffler, *Die Schuldformen des Strafrechts* (1895).

between the protection of the risk-creating interest—out of societal utility—and the absolutely protected higher interest (*i.e.*, lives, in the above example). The law has a certain interest in permitting any socially useful activity, even at the risk of the occurrence of some loss. The higher the law's (the state's) interest in the dangerous activity the more lenient it will be in excusing harm to absolutely protected rights (*e.g.*, lives) incident to the activity.[8] The standard is, therefore, an arbitrary one, but every infringement of absolute interests which is below these standards is beyond the recognition of the criminal courts.[9] Not only may these standards vary in different societies but even within the same society the standard may change within a very short period of time. For example—to get back to our ship case—while perhaps normally a shipowner may not send his vessel over the high seas when the risk of loss is $\frac{a}{4}$, or more—otherwise he would be liable for homicide, if loss occurs—in times of national emergency he may be permitted to take a risk as high as $\frac{3a}{4}$, and not be liable if loss occurs.

This will indicate the boundary between liability and no liability under Löffler's theory. The forms of *mens rea*, here in the nature of degrees of knowledge or foreseeability, will then be distributed over the area of intensity of knowledge in which liability is not excluded. Thus, intention will correspond to a 100 per cent. knowledge or foreseeability; carelessness, the lowest form of *mens rea* (if subjective), will correspond to the agreed lowest intensity of knowledge or foreseeability.[10]

Löffler's use of the term " knowledge " is not particularly fortunate. At times it is apparent that he is more concerned with knowledge in the sense of foreseeability of the events on account

[8] *E.g.*, mining, test piloting, etc.

[9] The classic maxim of the Roman criminal law, *minima non curat praetor*, indicates that anything too remote, too insignificant for employment of the state machinery, lies beyond the recognition of the criminal judge.

[10] Löffler, *op. cit.*, 5 *et seq.* An interesting point for further inquiry would be the reciprocal relation between the absolute value of the protected interest and the degree of foreseeability which will suffice for liability. Thus, life, as the highest value on the scale of values, is protected by the lowest possible degree of foreseeability, carelessness. Property, which ranks somewhat lower on the scale of values, does not have an equal protection, *viz.*, the careless or negligent taking away of the property of another ordinarily is not a violation of public law. Inconsistent with this pattern of reciprocal relations between foreseeability or awareness and form of liability, is the position of many regulatory offenses, clearly interests of the lowest order, which require the lowest degree of foreseeability or awareness for liability, rather than the highest, as theoretically they ought to. See Binding, *Die Normen und ihre Übertretung*, II, 1195 *et seq.* (2nd ed., 1914-16); *contra*, Röder, *Schuld und Irrtum in Justiz- und Verwaltungsstrafrecht*, 156 (1938).

of knowledge, which by use of the proper terminology I have tried to make clear in the above. Knowledge itself is merely the basis of foreseeability. Foreseeability depends on at least two kinds of knowledge, *i.e.*, the knowledge of the plain facts, and the knowledge of the causal consequences that follow a certain course of conduct under these facts. Knowledge of the laws of physics, for instance, will be part of the second sphere of knowledge involved. Löffler himself wished to use a community standard for both kinds of knowledge, unless the actor, by having been licensed to perform special activities, was duty bound to have a higher standard of knowledge than the "ordinary reasonable man," which is an inherently sound approach.[11]

Löffler's theory is to be classified as a theory of objective-subjective causation. It is not unlike Beling's theory which holds that "intention" has the ingredient of the actor's "imagination" or "realization" that the harmful result will occur.[12]

While it cannot be denied that a combination of the concepts of causation and guilt, as attempted by Löffler, entails a number of advantages, there have been more voices against than for the combination.

3. *Theory of relevancy* [13]

In seeking to limit the scope of the *conditio sine qua non* concept, and without mixing causation and *mens rea*, the theory of relevancy optimistically asserts that the only relevant limitation upon *sine qua non* causation is to be found in the penal norm itself. The statute, so it is said, gives us the clue as to what conditions are or should be deemed relevant as causes, and these, therefore, vary from statute to statute.

The most vigorous and original exponent of this theory is the Nestor of German criminal theory, the Munich professor Mezger.

[11] Example of the community average of knowledge: Every man knows that a stone held in hand will drop to the ground if let loose and that the stone will hit the ground, or an object thereon, with considerable impact if the distance travelled by the stone is large. He may not know that free fall is determined by the law of gravity $g=980$ cm./sec./sec., nor does the law insist on such knowledge. But if D drops a stone from a fifth-floor window upon a man on the street below, he ought to appreciate that bodily injury or death is likely to occur, depending on the weight of the stone. There is, therefore, both factual and teleological causality in this case. See Rümelin, *Das Verschulden im Straf- und Zivilrecht*, 10 *et seq.* (1907).

[12] Beling, *Grundzüge des Strafrechts*, 44 (1925); similarly Sauer, *Grundlagen des Strafrechts*, 561 (1921).

[13] Ryu, *op. cit.*, 793-796; Hart and Honoré, *op. cit.*, 421.

Mezger begins his causal inquiry with the *conditio sine qua non* quality and raises the relevancy question thereafter. *Mens rea* is kept strictly apart from causation. He avoids even the use of the bare forms of *mens rea* in the belief that the norm of the code will provide the necessary limitation upon the otherwise limitless *sine qua non* imputability.[14] Thus, the teleological aspects of imputability are rather de-emphasized. But instead of basing liability on only two (plus) major principles of criminal law, the relevancy theory bases it on three (plus): (1) the causal nexus of the voluntary conduct with the result; (2) the culpability (*mens rea*) of the perpetrator; (3) the normativity of the total occurrence, *i.e.*, as far as causation is concerned, the juridical relevancy of the causal connection for each different offense, or, the answer to the question whether the causal nexus is relevant for the attribution of criminal liability to the perpetrator, in accordance with the structure of the penal norm.

To demonstrate this theory in operation, Jiménez de Asúa related the case of the devoted mother who suffered from a grave cardiac ailment. Her death was purposefully produced by her son who had caused a death notice about himself to be sent to her, fully expecting that her weak heart would not survive the shock of the message.[15] Jiménez de Asúa maintains that the mode of killing resorted to, terrorizing, is not of the type envisaged by the penal norm, *i.e.*, physical death causation. Whatever moral culpability the degenerate son may have incurred, whatever social menace he may be, all this is irrelevant to his liability under the murder statute. Although, objectively—factually—speaking, causation and *mens rea* are present, the prosecution would fail for lack of normativity.[16]

One cannot help a certain feeling of frustration about this reasoning. After all, the code speaks of "killing," or "causing death," without specifying the mode of killing, and if death through causing fright, shock, fear or any other emotional state does in fact not lead to criminal liability in a particular jurisdiction, that is so only because this is what courts have said—usually because they regarded death from emotional causes as too "remote" a consequence.

[14] Mezger, *Strafrecht, Allgemeiner Teil*, 69–71 (8th ed., 1958).
[15] Jiménez de Asúa, "Causalidad y Responsabilidad" [1950] *El Criminalista*, 129 (2nd ser.).
[16] *Ibid.* 179–180.

Might this theory not throw us back to the frustratingly vague theory of proximate cause?

Obviously, normativity is an element of all criminal liability in Anglo-American law and virtually the entire civil law, under the postulate of the principle of legality. As such it is also applicable to causation.[17]

The finalistic theory of conduct and causation [18]

After von Feuerbach and Mittermaier had failed to create a readiness among the European judiciary to embrace a thoroughly psychological (factual-teleological) causation concept, and after similar failures by later scholars who drew smaller or larger slices of the *mens rea* into causation, it was a bold effort indeed for anybody to make still a further attempt. But after the Second World War the conditions in Germany were propitious for any attempt to abandon anything smacking of pure positivism which, rightly or wrongly,[19] was blamed for the excesses of Nazi Germany.[20] A theory which would succeed in abandoning the valueless *conditio sine qua non* theory of causation, and which would succeed further in creating a limitation upon factual causation in terms of, or consonant with, the abstract sense of injustice, however expressed, was to stand a good chance of universal acceptance. An attempt to do just that was made by Professor Welzel, then of Göttingen University. His theory became known as the theory of finality of conduct.[21]

In brief, Welzel and his followers, the "finalists," argued that it is senseless to look at human conduct as if it were a phenomenon in itself and—for purposes of judging conduct, even under a given penal norm—to look at causation with its results as if it were a matter wholly separate and apart from conduct. They posited,

[17] Ryu, *op. cit.*, 800, uses it skilfully as an ingredient of his own causation theory. "The general theory of criminal law predicates responsibility upon the existence of a criminal 'act.' . . . What constitutes a criminal act depends on specific legal provisions. . . ."

[18] Not discussed by Hart and Honoré. Ryu, while not employing the term, nor relying on Welzel in his causation study, nevertheless has approved of the finalistic theory. In earlier writings he expressly professed essential agreement with Welzel. Ryu and Silving, "*Error Juris*: A Comparative Study," 24 U.of Chi.L.Rev. 421, 448-458 (1957).

[19] Mueller, "The Problem of Value Judgments as Norms of Law: The Answer of a Positivist," 7 J.Legal Ed. 567 (1955).

[20] Würtenberger, *Die geistige Situation der deutschen Strafrechtswissenschaft* (1957), but also pointing to the dangers inherent in swift readiness to discard proven concepts of criminal law, especially in causation and *mens rea*.

[21] Welzel, *Um die finale Handlungslehre* (1949).

therefore, that all human conduct is purposed and thus "finalistic," *i.e.*, purpose-minded or result-directed, and that one cannot possibly keep causation in law apart from purpose or its equivalents.[22]

The finalists built on previous similar attempts to absorb the forms of *mens rea* into the causation concept, *i.e.*, intention, recklessness and the like.

Finality may be regarded as a consciously-purposefully setting in motion of a cause-and-effect reaction for the purpose of achieving a certain result, in itself constituting a harm, or producing such a harm as a side effect and not minding it—in any event, anticipating a harm. The theory is, therefore, based on a thought anticipation of the result and its incidental consequences. Finality, thus, consists of (a) the perpetrator's purpose; (b) the means used to accomplish this purpose; and (c) the incidental consequences connected with the use of the means. These factors enable a perpetrator to arrive at the correct thought anticipation of the legally relevant results, provided he does not labor under error or ignorance of law or fact. Knowledge is, therefore, the guiding star of a thought anticipation or, as it is in practice, the valuation of others (judge or jury) of the perpetrator's thought anticipation.[23]

Two examples may explain the concept of finality:

1. *As to factual matter.* A nurse gives a patient a morphine injection as a sedative. She does not know that the phial containing the morphine bears a wrong label, stating a less potent concentration. The finality of her act covers only the relief of the patient from unrest and pain, by giving a proper morphine injection. The death of the patient is a causal result, but not covered by the nurse's finality, since it is not within the nurse's purpose, nor in itself a means to accomplish the intended result (relief), nor is it an incidental consequence to the use of her means, *within the realm of what could be foreseen* with the knowledge of the facts at her command.[24] The finalists would conclude here that a finalistic act was lacking (there was no intention to kill, nor a risk-taking

[22] Welzel, *Das Deutsche Strafrecht*, 28-33 (6th ed., 1958).

[23] It is generally agreed that a general community average of knowledge or knowability ought to be the standard of expectation. Compare note 11, *supra*, unless a person is engaged in a special activity or calling which imposes a duty of particular circumspection, and knowledge and observance of fact or special regulation upon him, whether by custom or by law, or unless a person happens to be in possession of particular knowledge.

[24] Compare Welzel, *Um die finale Handlungslehre*, 9 *et seq.* (1949).

sufficient for negligent homicide), so that the harm is not imputable to the actor and liability cannot arise. A criminal charge failing already for want of finalistic causation, the question of *mens rea* does not even arise.

2. *As to legal matter.* A merchant consults the local police commissioner whether a certain merchandising stunt would constitute a coupon raffle as prohibited by law. On the negative reply of the commissioner the merchant carries out the stunt. In proceedings instituted by the state's attorney, the court rules that the stunt does in fact constitute a prohibited coupon raffle. The merchant acted with finality as far as the act is concerned which amounted to the stunt; he did not act with finality as far as the legal consequences are concerned.[25] Hence, although the definitional elements of the crime of conducting a coupon raffle are effected, liability cannot attach for lack of *mens rea*, for any result not achieved by finality lacks *mens rea*.[26] The case must be reversed.

Negligence fits into the theory of finality, as negligence itself is nothing but the potential consideration of finality by the perpetrator, which, if it had been made, could and should have moved him not to undertake the commission of the act.[27]

It has been charged that under this theory the *mens rea* is even more separated from its degrees, *i.e.*, intention and negligence, than under any previous theory. The main ingredient of *mens rea*, the actual or potential knowledge of facts and norms which make the desired act an unlawful one, and the wish to act in such a manner for the purpose of achieving the unlawful result, or not minding it, definitely remains unaffected. But *mens rea* is not so much any more the relation between the actor and his act, of which previous theories had spoken; rather, it is here the knowledge or knowability of a true value judgment itself.[28]

Finalism has not won the upper hand yet. A dogma battle is raging over the issue with an intensity hardly ever witnessed before in Germany. The principal remaining bone of contention is the

[25] Negligence not being an issue under these circumstances.
[26] Under the facts indicated, and overruling prior Federal Supreme Court decisions, the new Ct.App.Oldenburg so held by dec. of 6-28-1950, 3 N.J.W. 795 (1950), under Penal Code, § 286.
[27] Welzel, *Um die finale Handlungslehre*, 19 (1949).
[28] Welzel, *Das neue Bild des Strafrechtssystems*, 45 *et seq.* (1953).

question where to draw the borderline between causation and *mens rea*. Welzel has now made his position quite clear: "The criminal intention [the *mens rea* concept]—although a 'carrier' of the blame of guilt—is first of all an element of conduct." [29] This amounts to a recognition that after establishment of the *conditio sine qua non* quality of a given cause (D's conduct), the purpose or foreseeability in conducting oneself to achieve a certain result, must be considered as a limitation. Intention and recklessness, *i.e.*, conscious risk-taking that a certain result might happen, are incorporated into the causation concept. They have been *borrowed* from the *mens rea* concept. The remaining substance of *mens rea*, *i.e.*, its negative ethico-legal value,[30] appears almost incapable of separate existence and, therefore, has been annexed to, but not incorporated into, the causation concept.

Mezger, who bitterly opposed finalism, has now reached the point where even he speaks of causation as finalistic, *i.e.*, goal directed or goal envisaging. But although, *contra* to Welzel, insisting that causation must be found within the specific normativity of the statute—not unlike the wording of the Model Penal Code [31]—he resists the incorporation of either form or substance of *mens rea* into causation, in opposition to Welzel and the Model Penal Code who rightly, in my opinion, use the *mens rea* forms as limitations upon factual causation within the causation concept itself. But one does not have to conclude with Welzel that the forms of *mens rea* are *therefore* entirely withdrawn from the *mens rea* concept. Quite to the contrary, after establishing the ethico-legally entirely flavorless fact that D has caused, by intention or conscious risk-taking,[32] harm X, it is now necessary to establish whether there was any guilt, *mens rea*, for such causing, and whether such guilt or *mens rea* was of the intensity or form required by the statute.[33] Under a properly constructed and properly handled penal system, the latter (*mens rea*) inquiry may indeed amount to an inquiry whether although D achieved the harm

[29] Welzel, *Das deutsche Strafrecht*, 121 (6th ed., 1958).

[30] Details, text at note 49 *et seq.*, p. 184, *supra*.

[31] "Conduct is the cause of a result when: . . . (b) the relationship between the conduct and result satisfies any additional causal requirements plainly imposed by law." American Law Institute, *op. cit.*, § 2.03 (1).

[32] Forms of the mental process equivalent to forms of *mens rea*, American Law Institute, *op. cit.*, § 2.03, causal relationship between conduct and result.

[33] Minimum requirements of culpability, American Law Institute, *op. cit.*, § 2.02.

intentionally, as required by statute, he actually had full knowledge (tantamount to intentionally producing the *harm*, *viz.*, a legal concept!) of the wrongfulness of his conduct. Thus, in *United States* v. *Curtin*,[34] the United States Court of Military Appeals ruled correctly that in an offense requiring intentional rather than reckless production of the harm, actual knowledge of the order violated is necessary and that not knowing the order by reason of culpable ignorance would at best be recklessness and could not suffice for intention liability. And in *United States* v. *Palermo*,[35] the Court of Appeals for the Third Circuit correctly overruled the District Court for instructing the jury that the offense of wilful late tax payment may be committed " by a careless disregard whether or not one has the right so to act."

While, as these two decisions—and many others—indicate that American practice is turning away from a rigid application of the maxim *ignorantia legis neminem excusat* and toward a logical use of the principles of *mens rea* and causation,[36] the Model Penal Code does not take this ultimate step. Instead, although using forms of the mental process (causation) equivalent to the forms of *mens rea*, it prohibits all inquiries into the awareness of wrongfulness in so far as it depends on a knowledge of law.[37] But this is not of particular significance for purposes of the instant inquiry. What is important is the fact that the Model Penal Code does use forms of the mental process equivalent to the forms of *mens rea* in its theory of causation. It does not, like Welzel, merge practically all of *mens rea* with causation. Mezger is right in attacking Welzel for virtually incorporating the inquiry into the substance of *mens rea*, the awareness of wrongfulness, into the causation concept,[38] leaving *mens rea* little more than an objective value judgment imposed by others upon the perpetrator. As has been pointed out earlier, *mens rea* is more than the judgment of others that the defendant is blameworthy: " it is a community value of which the perpetrator knows the existence and that it will materialize [in the form of punishment] when the deed becomes known,"[39] " and this concept

[34] *United States* v. *Curtin*, 9 U.S.C.M.A. 427; 26 C.M.R. 207 (1958).
[35] *United States* v. *Palermo*, 259 F. 2d 872 (3d Cir. 1958).
[36] As consistently advocated, Mueller, "*Mens Rea* and the Law Without it," 58 W.Va. L.Rev. 35 (1955); *ibid.* "On Common Law *Mens Rea*," 42 Minn.L.Rev. 1042 (1958), and other writings.
[37] American Law Institute, *op. cit.*, § 2.02 (9). [38] Mezger, *Strafrecht*, *op. cit.*, 51–52.
[39] Mueller, "On Common Law *Mens Rea*," *op. cit.*, 1061.

appears in a number of different forms,"[40] namely, intention, recklessness, etc., as to the quality (value) of the effect which D's conduct produces.[41]

It follows that, although Welzel is absolutely right in employing the forms of *mens rea* as forms of the mental process, which is part of *actus reus*, he goes too far in concluding that these very forms are no longer needed within the concept of *mens rea*. As I understand the Model Penal Code, it does not follow Welzel's error in this respect but, essentially, preserves the forms of *mens rea* on the one hand, while employing these very same forms as limitations upon, or part of, the causation concept within the *actus reus*, though, as said, it falls short in other respects.

In any event, it is now clear that the most recent and most advanced Continental theory of causation is in substantial agreement with the modern American approach, outlined in Part I. Both have abandoned the so-called common-sense approach and have created a factual-teleological causation theory which is much more in accord with logic than the so-called common-sense approach. But the finalistic causation theory does not speak of any limitation in terms of a separate requirement of effectiveness as judged by contemporary standards, whereas the American theory does. No such separate limitation is needed, the finalists assert, if the theory is properly applied. It remains to be established in the last part whether the finalists are correct. (Further necessary details of the finalistic theory will be supplied in context, *infra*.)

III. Testing the Modern Theory

The finalists, as indicated, proceed on the basis of the *sine qua non* inquiry. But it appears that they posit a formulation of the term *sine qua non* which solves both the problem of the effectiveness of the conduct as a causal factor, and the criterion of evaluation, though both solutions are not necessarily related.

1. "Cause" implies effectiveness, *i.e.*, a necessarily bringing about of the result, or contributing thereto. If, therefore, what

[40] *Ibid.* 1056.

[41] Mueller, "On Common Law *Mens Rea*," *op. cit.*, uses a more refined system of *mens rea* forms, *i.e.*, commensurate, additional, adequate and independent forms of *mens rea*, which do not call for explanation in this context. See now Mueller, "Where Murder Begins," 2 N.H.B.J. 214 (1960).

appeared as cause was neutralized or set at naught by subsequent events which of themselves are of judicial significance,[42] we are no longer concerned with it as cause, and this is a logical-factual, not an axiological question. The famous or infamous *Lewis* case may serve us to demonstrate the point:[43]

The defendant inflicted a serious wound upon the decedent who subsequently terminated his own life by cutting his throat. There was no difficulty with the teleological element. The court held the defendant guilty under either of two hypotheses: (a) the decedent committed suicide (*i.e.*, as a fully responsible agent); (b) the decedent was so crazed by the effects of the wound that he terminated his life as a result of and in such craze. In case (a), however, the defendant's conduct was not an effective cause. In fact, the defendant's efforts in producing death were frustrated by the decedent's fully responsible, *i.e.*, juridically significant act, and the decedent's motives for terminating his life are quite immaterial, as motives usually are in criminal law. While the defendant is guilty of attempted murder, the completed crime fails for lack of *effective* causation. In case (b), on the other hand, the defendant's cause became effective and operative, though not precisely in the manner in which he envisaged it, which also is quite immaterial.[44]

The *Wilson* case is similarly solvable.[45] That case led to the murder liability of the husband who had shot his wife with a shot gun. The intention of the defendant was not discussed. If it was defendant's intention to kill, the teleological component of the test formula is satisfied. But death occurred only because the victim refused removal of the slug. That the defendant is morally guilty of murder, no one will contest, but whether he legally became guilty depends on whether his conduct qualifies as a true (*i.e.*, effective) *causa sine qua non*, or whether it was rendered ineffective by a juridically significant event, *i.e.*, neutralized.

(a) If the victim decided to end her miserable life (merely a possible motive) in full expectation of death as a result of the non-removal of the slug, she now becomes guilty of suicide by any

[42] I submit that since our criminal law is based on the principle of legality, we are never concerned with anything not of legal significance, *i.e.*, facts and factors not part of the definitional elements of an offense.

[43] *People* v. *Lewis*, 142 Cal. 551; 57 Pac. 470 (1899).

[44] For correct result see *State* v. *Angelina*, 73 W.Va. 146; 80 S.E. 141 (1913).

[45] Text at note 2, p. 171, *supra*.

definition of that term, including the ancient common law definition.[46] Neither suicide nor accessoryship to suicide are punishable any longer. If the victim has thus consciously terminated her own life—that she used a tool supplied by her husband, the slug, makes no difference—the husband cannot be guilty of murder, but only of attempted murder. With respect to the death itself, the husband is no more liable than the razor blade manufacturer who produced the blade with which the decedent in *Lewis* cut his throat. Nor does it make any difference whether the weapon or tool is supplied lawfully or unlawfully. (The slug as a suicide tool might be said to have been supplied unlawfully!)

(b) The outcome would be different if the wife died in ignorance that rescue was easily possible. In that case the husband's conduct has resulted in fruition. That the slug did not produce death by loss of blood or the like, but, rather, by an acute purulent meningitis does not alter his liability. No perpetrator can ever predict the causal train in its most minute concrete details. While I must concede that if, under (a), the husband is found guilty of murder, he cannot complain, for the liability is just as he expected, it is nevertheless true that, logically speaking, it was not he who succeeded in terminating his wife's life, but, rather, it was the wife herself. The husband is nevertheless guilty of attempted murder.

With this *caveat*, on the meaning of cause as effective, *i.e.*, not neutralized, cause, in mind, it is also easy to solve the (*Benge*) case of the railroad foreman who was found guilty of manslaughter.[47] The foreman's negligently reading the timetable and removing the tracks when it was improper to do so, clearly is a *conditio sine qua non*, a condition which cannot be imagined absent without failure of the result. But the question is: did the condition which the foreman interposed become effective, *i.e.*, was it a cause to begin with? The answer is that it did not become effective or operative, by reason of the fact that the defendant foreman himself neutralized it—set it at naught—immediately upon creating it, by interposing safety measures fully capable of averting any harm. It took an independent causal constellation to produce the harm.[48] (The liability of engineer and flagman will be discussed below.)

[46] Blackstone, 4 *Commentaries*, 189.
[47] Text at note 30, p. 180, *supra*.
[48] Causation would fail, furthermore, for lack of the teleological element, *quae vide*, text under (2), *infra*.

2. The finalists have solved the problem of the evaluation once and for all in a general way which obviates the necessity of making separate individual inquiries in each particular case. This can be demonstrated by *Poor Richard's Case*, as presented with a variety of contributing causes.[49] We had assumed that all the actors (rider and superiors, scouts, quartermaster, officers) considered the possibility of the harm and acted nevertheless as they did. They would, therefore, incur liability for recklessness (there would be even less difficulty if negligence sufficed), provided, however, that the conduct of each is a *sine qua non*. Whether it is or not is a question of fact which can be simply answered by reference to the meaning of *sine qua non*. Much of our own confusion at common law stems from the fact that we have never fully realized that there are indeed two possible ways of defining the *sine qua non* formula:

(a) Conduct is causal if, without it, and considering all remaining actually present circumstances, the result would not have occurred.[50] Under this formula none of our defendants could be deemed to have caused the harm since, imagining the conduct of each one absent, successively, there still would remain a sufficient amount of activity amply sufficient in the aggregate to have produced the result. This *sine qua non* formula might recommend itself to a democratic society in which human dignity is a goal in itself.

(b) Of several causes which can be imagined absent alternatively but not cumulatively without failure of the result, each one is a *conditio sine qua non*.[51] Under this formula clearly all of our defendants would be deemed to have caused the result. This formula might recommend itself to societies with less stress on human dignity as a goal in itself.

It can be seen that after having made the original choice as to either of these two possible *sine qua non* formulas—a choice which our law has not made—the result achieved with the factual-teleological causation formula stands a good chance of winning the day through its independence from vague correctives.

One might wish to subject this new causation concept—the *modern theory of causation*—to a further test, for which the *Benge*

[49] Text *post* note 28, p. 179, *supra*.
[50] This is the formulation of Spendel, *Die Kausalitätsformel der Bedingungstheorie für die Handlungsdelikte*, 81 (1948).
[51] Welzel, *Das Deutsche Strafrecht*, 42 (6th ed., 1958).

case may serve us.[52] We are here no longer concerned with the foreman, whom previously I found not liable for lack of proper causation. The question now arises whether the engineer, or the flagman, or both, have caused the harm. The teleological element (probably a relatively objective foreseeability sufficient for manslaughter) gives us no trouble. The problem centers solely around the *sine qua non* requirement.

As to the flagman, under *sine qua non* formula (a), we must imagine the flagman's 460 yards shortage in moving ahead, absent, *i.e.*, absent the negligent conduct in question, the flagman would stand at 1,000 yards. All other factors remain constant, *i.e.*, the negligent engineer spots the flagman only when the engine is alongside the flagman. This gives the engineer exactly 1,000 yards to stop the train, and this the train can do in fact. The harm would not have resulted, but for the flagman's shortage in moving. The flagman's conduct was causal of the harm.

Similarly, under *sine qua non* formula (a), we must imagine the engineer's 500 yards shortage in spotting the flagman absent, which would mean that the engineer would have spotted the flagman at 1,040 yards, which would have given him ample time to stop the train. Without the engineer's negligent conduct in question, the harm would not have occurred. The engineer's conduct was causal.

In this particular case the same result of liability for both actors would follow under the more stringent *sine qua non* formula (b).

There is one limitation upon the causation formula of the finalists, as indeed there is on any other causation theory: Causation can never be viewed as an isolated principle. It functions, and can function only, in the entire body of criminal law, comprised of all the principles. If it is this which the relevancy theory of causation [53] meant when it required conformity with the penal norm as part of the causation concept, it certainly scored a valid point. This must be briefly demonstrated:

The King v. *De Marny* led to the conviction of a newspaper editor for "aiding and abetting the publication in England of obscene literature, and the sending through the post in England a packet the sending of which is prohibited by the Post Office (Protection)

[52] Text at note 30, p. 130, *supra*.
[53] Text at note 13, p. 198, *supra*, for comparison.

Act, 1884."[54] The defendant had published in his newspaper advertisements offering books, catalogues and photographs for sale by the advertiser. His conduct was the *sine qua non*, under either formula, for the subsequent publication, mailing and dissemination in England of the materials in question. Moreover, it was proved that the defendant had knowledge that such unlawful dissemination, etc., would be the consequence of his conduct. Thus, the teleological element was present as well, *i.e.*, the defendant acted "finally," with the result in mind. But is causation the only element on which criminal liability rests? No: The finding of causation is but one prerequisite for conviction, for unless *mens rea* —here *scienter* of the obscene nature of the disseminated publication—be established in addition, the crime is not complete. And so the court in effect held.

A difficult case, previously discussed in this paper, likewise led to an incorrect result because of the failure of the court to consider the case within the totality of criminal law principles and doctrines:

Root's conduct in agreeing to and engaging in a race with the decedent was causal in the *sine qua non* sense. If he consciously considered the decedent's death as possible or likely, he might be credited with the necessary recklessness for involuntary manslaughter. Causal imputation would seem to follow.[56] On closer analysis, however, criminal liability (though not causal imputation) would have to be excluded for reasons which have nothing to do with causation:

Neither suicide nor self-mutilation nor self-endangering acts are unlawful as such. Both actors committed a self-endangering act in concert. But co-principalship in a lawful self-endangering act cannot raise to unlawfulness what is lawful if done singly (barring application of the conspiracy concept). Nobody, legally speaking, is his brother's keeper, unless the law imposes a legal duty of care and protection. There was no such duty in the instant case. Truly, both have violated the traffic laws, and the survivor will be made liable for his violation. But homicide liability can follow therefrom only if we arbitrarily decree that every self-endangering act or every

[54] *The King* v. *De Marny* [1907] 1 K.B. 388; 21 Cox C.C. 371; repr. Hall, *Cases and Readings on Criminal Law and Procedure*, 73 (1949).
[55] See also *Smith* v. *California*, 80 S.Ct. 215 (1959).
[56] Accord, a decision of the German Federal Supreme Court, 7 B.G.H.St. 112.

traffic offense resulting in death should constitute involuntary manslaughter. Such I do not understand to be the law. It follows that the decision in the *Root* case was wrong for reasons which have nothing to do with causation.

Lastly, we should test the modern causation theory on the challenging Pennsylvania felony-murder cases:

If causation were the only requirement for criminal liability, murder liability would have to be affirmed in these cases if, indeed, the defendants meant to inflict death or foresaw it as certain; manslaughter liability would seem to follow if the defendants merely took a gambler's risk that death might follow,[57] provided however, in either case, that the defendants' conduct would qualify as *causa sine qua non*. We have here a course of conduct constituting a psychological stimulation directed at the victim, or the police, to use deadly force. The defendants' conduct cannot be imagined absent without failure of the homicide. In effect, the defendants stimulated the killing of a co-felon or an innocent bystander, which act of killing constitutes justifiable homicide on the part of the robbery victim or police officer who fired the shot. The law provides that to incite, etc., another to commit a crime, amounts to accessoryship before the fact to that crime, if the other actually perpetrates the crime and the instigator is absent. Here, however, neither was the instigator absent, nor did the other commit a *crime*, for justifiable homicide is no crime. Since presence of the inciter makes for co-principalship, it might be argued that the police officer or the robbery victim are co-principals with the robbers. Not only is this an absurd suggestion, but it also fails technically for the reason that what police officer or robbery victim has committed simply is not criminal. The law, however, also provides that killing through intentional employment of an innocent agent makes for liability as a principal in the person who employed the innocent agent. But the defendants did not intentionally employ an innocent agent to procure human death. It follows that, under proper considerations of all the principles and doctrines of our criminal law, while the defendants have *caused* death, they are not guilty of murder—

[57] But under the archaic wide-open felony-murder doctrine, all teleological considerations would be immaterial and murder liability would follow as a matter of course if robbery coincides with death. Pennsylvania has such a statute or, at least, the majority of the court interpreted it that way. See Musmanno J., dissenting, in *Commonwealth* v. *Bolish*, 391 Pa. 550, 563; 138 A. 2d 447, 454 (1958).

except under an inflated felony-"death" (not even felony-"murder") concept. Obviously, they are guilty of attempted murder.

Summary

I hope to have shown that it is no longer necessary to operate in criminal law with causation either in an intuitive fashion, under the so-called common sense approach, or to subject each causal inquiry to an evaluation whether or not a particular causal imputation would comport with fair play, democratic ideals, or any other such standard. Causation is a juridical concept, the structure of which could here be developed on the basis of comparative study.

The principle of causation comes into play most conspicuously in offenses which require a specific harm in the nature of a physically observable detriment, as in homicide, arson and the like. But it is also applicable to offenses in which seemingly conduct alone constitutes a prohibited harm. Under strict application of the legality principle, however, it has repeatedly been held that even in these offenses liability does not attach unless the conduct is productive of that actual harm for the prevention of which the legislature had passed the statute.[58]

For any conduct to qualify as a juridical cause in the production of criminal harm, it is necessary that it fulfil two basic requirements, (1) its nature as a *causa sine qua non*, (2) the teleological element.

Ad (1). (a) It is necessary that the conduct be a *conditio sine qua non*, *i.e.*, an element which cannot be imagined absent without failure of the result (harm). There are two ways of expressing the *sine qua non* formula:

(i) conduct is causal if, without it, and considering all remaining actually present circumstances, the concrete result would not have occurred;

(ii) of several causes which can be imagined absent alternatively but not cumulatively without failure of the result, each one is a *conditio sine qua non* of the result.

Formula (ii) is more inclusive than formula (i). I do not think that it is possible to make a preference in utilitarian (deterrent) terms as between the two formulas. While formula (ii) caters more

[58] *e.g.*, desecration of the American flag, *People* v. *von Rosen*, 147 N.E. 2d 327 (Ill. 1958); uttering obscenities in public, *State* v. *Bruns*, 143 N.J.L. 398; 48 A. 2d 571 (1946); *cf.* obstructing interstate commerce, *United States* v. *Shirey*, 79 S.Ct. 746 (1959).

to retributism, it also caters more to resocialization in subjecting to detention a larger number of potentially dangerous persons. Formula (i) recommends itself more to a democratic society willing to take an occasionally uncompensated (by punishment) loss for the sake of greater protection of human dignity and liberty. In any event, a policy decision will have to be made only on this level, and it is a general policy decision which, once made, will obviate the necessity of making individual policy decisions in each and every separate causal inquiry.

(b) The quality of being a cause implies effectiveness. Conduct and causal chains which are arrested, neutralized, set at naught, cannot qualify as causal. Since effectiveness inheres in the concept of a cause, it is not necessary, logically speaking, to constantly reaffirm the requirement of effectiveness as a separate causation element. The Latin noun *conditio* does not sufficiently express the effectiveness quality of the legally relevant cause. It is proposed, therefore, to describe the legally relevant cause as the *causa sine qua non*.[59]

It should be observed that the *causa sine qua non* is not identical with a mechanical or physical cause. It may indeed be a strictly physical-mechanical causal chain which qualifies as a *causa sine qua non*, but it may also be a psychological or psycho-physical nexus.

Ad (2). Conduct is a phenomenon which man has wrested from the blind causal occurrences of nature. It is purposed and goal-directed. This means that the human psyche maintains a teleological nexus to the outside world. The norm of law tells us of what intensity this teleological nexus with the legally relevant product of conduct, namely harm, must be. In crimes of intention the nexus must be that of purpose, intention or full expectation, wish, awareness, etc., that the effect will be produced. In crimes of recklessness a gambler's consciousness or awareness of great risk of the consequences will suffice. In crimes of negligence even less intensity is required, though I made no effort to solve the problem of negligent criminality in this paper.

Since mortal beings cannot predict the precise concrete causal trains of their actions, it is not necessary that the harm was brought about in precisely the manner envisaged. Subject to the general principles of criminal law, and in accord with the causation

[59] *State* v. *Baller*, 26 W.Va. 90; 53 Am.Rep. 66 (1885).

formula here advocated, deviations from the envisaged causal train are immaterial.

It must be remembered that causation, as one principle of the criminal law, like the principles of conduct and harm, can function only within the totality of the principles and doctrines of the criminal law. It is incapable of isolated and detached existence. Thus, merely by way of example, the doctrines of accessoryship, the principle of legality and the principle of *mens rea* constitute a check on causation, since they all come into play before causal imputability can lead to criminal liability.

The check which *mens rea* constitutes on criminal liability is of particular significance. While the forms of *mens rea*, broadly speaking intention and recklessness, are duplicated as forms of the mental process, thus as ingredients of the *actus reus*, their function as *mens rea* forms is unimpeded. They must remain as yardsticks for measuring the required intensity of the awareness of wrongfulness, and awareness of wrongfulness is the very essence or substance of *mens rea* and always has been.

In fine. The concept of causation as here developed is by no means a novel and original one. It is based on the scholarly achievements of those who have previously worked thereon—our courts and a long line of scholars on both sides of the Atlantic, to all of whom I am indebted, Professors Hall, Hart, Honoré, Ryu, Wechsler, Welzel, Williams and many others, all of whose proposals I cannot accept *in toto*, but who have significantly contributed to the causation concept as it here emerged.

The position here advocated is not positive law anywhere, although I respectfully submit, it is the only position consonant with the general principles of criminal law which evidence the positive law of our country. Thus, the causation concept here advocated commends itself not only by its greater certainty, but also by its consonance with the age-old standards of Anglo-American criminal law, the large measure of support it draws from enlightened criminological scholarly opinion both here and abroad, and the soundness in terms of psychological theory which, I submit, it enjoys.[60]

[60] There is no occasion in this legal-technical paper to deal with the fundamentals of psychological theory. In lieu of many, see Gault and Howard, *An Outline of General Psychology*, Chap. 12 (2nd ed., 1934), on the nature of voluntary conduct and the circumstances of its functioning.

Senator HRUSKA. Nevertheless, we want you to go ahead and make such comment at this time, within the time limitation, as you choose.

STATEMENT OF PROF. GERHARD MUELLER, INSTITUTE OF COMPARATIVE CRIMINAL LAW, NEW YORK UNIVERSITY

Mr. MUELLER. Thank you, Senator Hruska. May I say that once again it is an honor and a pleasure to appear before you and the committee, as we have done in years past, aiding the Congress in legislation pertaining to criminal matters.

Senator Hruska, we answered the committee's questionnaire composed of 20, and if you count tightly, 43 questions. It was not an easy task. We have tried to give you an indication of the position of this proposed piece of legislation within world development.

In other words, we have tried to perform the function in a civilian matter which military counterintelligence is performing in the military field. We have tried to tell you what other nations have that may be better than what we have to offer.

Senator HRUSKA. Now, Professor if you will yield, there will be placed in the record the text of the questionnaire which was sent to professors of comparative law under date of February 3, 1972. By having that text there, the reference can be made back and forth from your respective statements to the questionnaire.

(See p. 1920)

Mr. MUELLER. Very good. Thank you. That would be most appropriate. We have repeated each question at the beginning of our answer.

Senator Hruska, basically this code is a vast improvement on American codification efforts over previous codes. I am referring particularly to the Model Penal Code. Still, by world standards, the code does not quite measure up to the standard achieved in some of the European countries. I will point to some specifics.

But, basically, Europeans always have regarded Americans as fabulous, pragmatic problem solvers, but as pretty lousy when it comes to making general code statements, which are meant to govern human beings for the future, or at least for a predictable future.

Since we have specific answers to all of the questions, I will restrict myself to five points, and I thought I would start out with one point which I know, Senator Hruska, is of interest to you because you and I, both, contributed to the Nebraska Law Review on that issue, and that is the issue of the very aims and purposes of criminal law, particularly in reference to sentences.

May I call your attention to section 102 of the draft, which states the legislator's ideas on the purposes to be served thereby. In there we have a specific reference to the prescription of penalties, which are meant to have different purposes, such as rehabilitation of individual offenders. Deterrent is mentioned therein as "the prescription of excessive punishment," and so on. I would like to raise the question of whether or not this preamble-type statement is meant to be only a pious statement, or whether it is supposed to have legislative effect, in terms of guiding the judiciary.

And here I think I have some examples in continental legislation where it has been the effort of the draftsmen or the legislators to state these code purposes in connection with the obligation of the judiciary to impose that right kind of sentence, and thereby to prevent the further commission of crime.

Unhappily, the two sentencing chapters in this code do not give the judiciary much guidance in terms of the purposes and in terms of the input data that are supposed to go into sentences.

I would like to call to the committee's attention a statement from section 13 of the Penal Code of the German Federal Republic. This section which was just passed, states the purposes of the code in terms of the obligation of the judiciary to impose sentences, and it says:

> The culpability of the perpetrator is the basis of the composition of the punishment. In particular, the potential effects of the punishment upon the life of the perpetrator within society must be considered.

The section goes on by giving the judicial branch, the judiciary, specific guidance when it comes to sentencing. I would suggest, on the basis of continental experience, that you could do better in your own code if the general purposes were phrased in terms of an obligation for the judiciary to select the right kind of sentence. This may require the insertion of a further provision, somehwere further back in the sentencing chapters, which perhaps could be patterned after section 13 of the new German Penal Code which I just read.

I might add that the right measure and type of sentencing is of immense significance. I am at the moment director of the criminal justice and corrections education program of the National College of State Trial Judges where I am constantly in a quandary as to how to advise the trial judiciary of the United States when it comes to matters of sentencing. Legislative guidance is badly needed, and I think we have enough research experience to give our judiciary the guidance to which they are entitled.

I am now coming to a most difficult part of the draft, Senator. I am referring to sections 302 and 304, which are the basic culpability provisions. My answer actually arises out of questions 3 and 10 of the committee's list of questions, which I found it necessary to combine.

The question posed to me was whether or not the terms of culpability contained in section 302 are adequate in terms of world standards and experience abroad. The answer is yes. All of the world knows these forms of culpability, intentionally, knowingly, recklessly, and to some extent negligently. But, we are disturbed by finding subsection 5 in section 302. Subsection 5 would seem to be inconsistent with the entire experience of continental criminal law, and I might add of our own criminal law.

It seems also to be inconsistent with the broad policy statement on section 304. I mean the following: It has been basic, as all of us lawyers know, that at common law the awareness of wrongdoing is part of culpability. In fact, the mere intent to produce the result cannot even be called culpability. It is at best a bare form of culpability. It is of the essence of criminal liability at common law that the defendant has an awareness of wrongdoing when he commits a

crime. That is why we impose liability. In fact, when it comes later on to the exculpation for mental illness, we exculpate only when there was no awareness of wrongdoing.

When we talk about mistake of fact, we are again exculpating people who did not have an awareness of wrongdoing by reason of error. I would propose, therefore, that section 304 be maintained as an absolutely beautiful policy statement, as an absolutely perfect provision which codifies the common law, and which codifies Federal and State experience in the United States. Section 304 is succinct and precise, and also in accordance with the best legislative draftsmanship of the continent of Europe. But, subsection 5 of 302 is quite inconsistent with it, and in my opinion ought to be stricken.

I would like to refer next, Senator, to the sentencing range. One of the questions refers to the sentencing policies of other nations. I have provided the committee with a chart which, on page 1852 shows the corresponding and comparable sentencing provisions of other nations. This chart gives us some Scandanavian countries, some Germanic countries, some Socialist countries and some Mediterranean countries and Asian countries.

You will notice, Senator Hruska, that among the civilized Western Democratic nations it is only France which has retained capital punishment for homicides. All other democratic Western nations have abolished capital punishment for homicides.

That leaves us with only Asian countries imposing capital punishment and authoritarian regimes like Spain, Greece, the U.S.S.R., Hungary, Czechoslovakia, Romania, and Bulgaria. I wonder if the time has not come for this draft to make a very straight forward proposal that we do away with capital punishment because surely our criminalologists tell us that serious threats of imprisonment are as good, or perhaps as bad, a deterrent as captial punishment.

When it comes to prison sentences, I note that almost universally throughout the world the sentences for rape, or for undifferentiated larceny are only about one-third in length of what this code proposes.

In view of the fact that we lack sufficient data to tell us that an increase in the threat of the sanction causes a decrease in the amount of crime committed thereunder, I would propose that the shorter sentences are preferable, particularly since shorter sentences are more ideal for the purposes of rehabilitating those who are apprehended and convicted.

My third point pertains to the provisions on mental illness. I am referring to section 503 of the draft, which my memorandum covers on page 19.

Senator Hruska, the draft provides for a definition of the exculpation for mental disease, disorder or defect, frequently called insanity, which is almost verbatim the text of the provisions of the Prussian Penal Code of 1851. The Prussians, to the extent that they still exist, have improved over this language.

It is correct, of course, that this precise text has ultimately been taken over by the American Law Institute, but the good Dr. Freud has come and gone in the meantime, and we have learned a lot about the functioning of the psyche. I would propose this draft section is outdated even in the United States.

I have called the attention of the committee to the tests that have been developed in the United States recently. For example, the test applied in Missouri, which has all the logic of the original M'Naghten test, but which is adequate in terms of permitting psychiatrists free testimony, and in terms of covering the whole range of mental elements in crime. After all, what is the test of mental illness supposed to do but to exculpate those who were incapable of forming the requisite mental elements of the crime?

And in this connection I would also like to call attention to the fact that the now Chief Justice of the United States, himself, has been a pioneer in the formulation of new tests, and I would suggest that the tests recommended or adopted by Missouri, and recommended by the Chief Justice of the United States are much more advanced than the test of section 503.

But, there is something else wrong with it. The test of 503 presupposes that all mankind falls into two groups, the sane and the insane, the mentally ill and the mentally sane. We now know that this is not so. Many human beings operate on the borderline of mental illness.

Consequently, many Central European countries have recognized the concept of diminished responsibility. A person who is not quite mentally ill so as to fulfill the formula of the code, and who is not quite normal like the rest of us who can respond to normal stimuli, is given a break by continental legislation.

For example, under the Swiss Code and the German Code, and some others, the response of the legislature has been that persons laboring under a diminished responsibility will be given a mitigation of sentence and a preferential treatment in a special treatment facility.

I might mention that once again Missouri has adopted a test of diminished responsibility. Unhappily this is only for murder. Some other States by judicial legislation have likewise set up tests of diminished responsibility, for example, New Jersey.

My last point, Senator Hruska, if I have a moment left, pertains to the art of drafting, altogether. It grieves me somewhat that American draftsmen, with some exceptions, still have not mastered the art of stating their code provisions in succinct terms, in terminology which can be understood by the persons that are to be governed thereby.

Let me call your attention to sections 603 et seq, dealing with justifications and excuses. The text of each of these sections rambles on page after page after page with clauses, and subclauses, and buts and fors, and provisos. The provisions are meant to govern human beings who have to make split-second decisions in moments of danger.

A police officer who is confronted by a crowd, who has only a split second to decide whether to use his handarm or not; a threatened citizen who has a burglar on his premises who must decide in a split second what to do.

These human beings, Senator Hruska, cannot remember 2,000 words. They must be told in succinct, precise memorable terms what they can do and what they cannot do, and these clear words must be

found in the mentality and the practices of the people themselves. The legislator must go out and find out and learn from the people what is customary in our country when it comes to the defense of one's self, of one's loved ones, of one's property, when it comes to the use of force by law enforcement officers.

There is not one code in Europe that uses more than about 40 or 50 words for the guidance of human beings in emergency situations. All of those codes provide, incidentally, that a human being who honestly errs about this right under those circumstances will be exculpated. Moreover provisions are contained in those codes to the effect that people who are frightened, or act in frightened consternation, will likewise be exculpated.

I have given the committee some sample provisions, for example those of the Norwegian Penal Code. In our text we recommend as possible alternatives for the drafts' language, some other language. I might point out, incidentally, that not all sections of this code are drafted in such a verbose manner. Section 304, in which the basic error provision is stated, is drafted succinctly and precisely, and very beautifully. The trouble with that provision is that other tie-in provisions, for example, section 609, which also supposedly deals with mistake of fact, is drafted by a different draftsman, who had different ideas about the notions of culpability. The draftsmen did not sufficiently coordinate their work with each other.

I would propose, therefore, that all provisions pertaining to culpability be reviewed for the purpose of finding the consensus, and for drafting provisions which stick, which are memorable, and indeed, which can govern the conduct of human beings.

Thank you very much, Senator, and if you have any questions, I will be very glad to answer them.

Senator HRUSKA. Well, we appreciate your very comprehensive statement, Professor. You have covered a great many issues in it and, of course, your verbal narrative dealing with it during this morning will also be helpful.

It is kind of hard to know where to begin, but you do want to get a start somewhere. I would like to get your opinion, at least on one question. I am sure you are aware that a number of foreign jurisdictions make "Law Reform Commissions" a permanent part of their system of justice. Do you think it might be advisable to set up, when we enact this code, a permanent law reform commission that would have as its duty to conduct a continuous objective, nonpartisan review of the operation of the code, making recommendations to the Congress and the Supreme Court for specific laws or changes in rules of evidence and in rules of procedure that might enhance either the efficiency or the fairness of our system of criminal justice?

Mr. MUELLER. Yes, Senator Hruska. Every major European nation has a standing commission or government office whose task it is to constantly advise the legislatures on developments in criminal justice.

These commissions usually are composed of three agencies; one, a watchdog agency; two, an internal research organization; and three, a comparative law research organization.

Sweden, for example, has an office in its ministry of justice which with competent persons versed in criminal law whose sole task it is to advise the Swedish Parliament on innovations and developments in other countries.

The same is true for the German federal republic, for example, and they perform research in their research center at the federal government's expense and are constantly charged with the task of reporting to the Parliament developments in criminal justice.

You may be pleased to know that many innovations that we have made in the criminal justice system in the United States were immediately spotted abroad. For example, the Miranda rules were spotted almost immediately, and with some modification introduced in German legislation. There is not one thing that we do in terms of innovation in criminal justice that is not picked up on the continent of Europe immediately for possible incorporation in legislation.

I would highly recommend the creation of such a commission, and particularly I would recommend that such a commission be equipped with a research center, or that provision be made contractually with a research center, perhaps through the National Institute of Law Enforcement and Criminal Justice, so as to get the data to the Congress for purposes of constantly keeping this code up to date, because there is no such thing as a code with a permanent life expectancy. Each code has a very limited life expectancy, and each code is a dynamic phenomenon that constantly needs updating.

Senator HRUSKA. Well, that is a thought to be considered quite seriously. In 1948 we had a revision of our Federal criminal code, and nothing has happened since, and that was a quarter of a century ago.

Mr. MULLER. That is right.

Senator HRUSKA. Thank you very much for your appearance here and your contribution. Thank you.

Mr. MUELLER. Thank you for hearing me, Senator.

Senator HRUSKA. If we feel your statement needs further amplification, would you please receive communications from our counsel and favor us with some additional thoughts?

Mr. MUELLER. Very good. Indeed. Thank you, Senator.

Senator HRUSKA. Our next witness is Professor Ved P. Nanda of the College of Law at the University of Denver. We are glad to know that learnedness in the law is not confined to the Eastern Seaboard of America. We welcome you to these hearings.

STATEMENT OF PROF. VED P. NANDA, DIRECTOR OF THE INTERNATIONAL LEGAL STUDIES PROGRAM, UNIVERSITY OF DENVER COLLEGE OF LAW

Mr. NANDA. I am privileged and honored to be here, and I appreciate your kind invitation to appear before the subcommittee.

Senator HRUSKA. Now, the full statement which you have submitted to the committee will be inserted in the record at this point.

(The statement follows:)

STATEMENT MADE BY VED P. NANDA, PROFESSOR OF LAW AND DIRECTOR OF THE INTERNATIONAL LEGAL STUDIES PROGRAM, UNIVERSITY OF DENVER COLLEGE OF LAW

Mr. Chairman, I appreciate your kind invitation to appear before the Subcommittee and to comment on the comparative and international law aspects of the proposed Federal Criminal Code and I feel privileged to be here. I will confine my remarks to the provisions of the Code which deal with the exercise of extraterritorial jurisdiction, §§ 201a, 208, 210 and 212.

Let me preface my remarks by paying a tribute to the National Commission on Reform of Federal Criminal Laws for their skillful and competent treatment of the subject. Also I would like to express to you and the members of your subcommittee and through you to the 92nd Congress, the debt of gratitude of the scholar and the layman alike for undertaking the enormous task of appraising the existing body of Federal Criminal Laws and for your efforts toward reforming and modernizing these laws, and toward enacting a "modern, clear, comprehensive and workable Federal Criminal Code," as was outlined by the then Attorney General in his statement before your subcommittee on February 10, 1971.

At this point, I would like to make a few comments on the assertion and exercise of extraterritorial criminal jurisdiction in the proposed Code and compare the Code provisions with similar provisions in a few selected Codes and under international law.

THE CODE PROVISIONS

The Code provisions, especially in § 208, are fairly comprehensive. A successful attempt has been made to meet the needs and demands of the modern problems of crimes committed outside national boundaries. Glaring gaps in present law have been filled, especially by the language of 208(f). Henceforth jurisdiction would extend to those persons, who, under Supreme Court rulings, would not have been amenable to court martial proceedings. Such cases include offenses committed abroad either by civilians while they were members of the armed forces or by those who accompany the armed forces abroad. [*See* cases cited in 1 *Working Papers of the National Commission on Reform of Federal Criminal Laws* 75 (1970)].

Also, the United States diplomats would no longer be able to avoid prosecution simply by invoking diplomatic immunity for offenses committed abroad, for they could henceforth be prosecuted in the United States. However, § 208(f) extends its reach to cover members of a diplomat's household as well, which incidentally might include not only U.S. citizens but also aliens. It also covers alien federal employees and aliens accompanying the U.S. military forces. Such a broad extension of U.S. jurisdiction as to include *all offenses* committed by aliens abroad, falling in the aforementioned categories, might raise some serious questions, for it is hard to argue that such a broad assertion of authority is compatible with the objective of creating healthy precedents under international law.

Under § 208 the Code seeks to break some new ground. The desire to provide adequate protection to the government is apparent. Subsection (a) seeks to assert jurisdiction over citizens and aliens alike if the "victim or intended victim of a crime of violence" is a high government official. Subsection (b) goes beyond current law by including espionage and sabotage in the same category as treason, but jurisdiction is limited to U.S. nationals. A case could, however, be made that it would be permissible to assert jurisdiction over aliens as well. Subsection (c) is applicable to nationals and aliens alike in case of certain enumerated offenses, as its objective is to deter and punish offenses against governmental functions and property abroad. *United States v. Bowman* [260 U.S. 94 (1922), cited in 1 Working Papers, at 71–72] had certainly called for explicit expansion and enumeration. Subsections (d) and (e) clarify existing law and subsections (g) and (h) are self-explanatory.

Under § 201(a), one of the jurisdictional bases to assert Federal jurisdiction is that the offense be committed "within the special maritime and territorial jurisdiction of the United States as defined in section 210." § 210 defines this jurisdiction. The enumeration of offenses covers a broad spectrum and meets

present needs. The only notable point is that subsection (g) could not have reflected the status of current law, for a new "Convention for the Suppression of Unlawful Seizure of Aircraft" [the text is conveniently contained in 10 *International Legal Materials* 133 (1971)] which was signed at the Hague on December 16, 1970, has been ratified by the U.S. Senate as of September 8, 1971. Article 1 of the Convention provides that any person who on board an aircraft in flight:

> (a) Unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
>
> (b) Is an accomplice of a person who performs or attempts to perform any such act, commits an offense (hereinafter referred to as "the offense").

Under Article 2 of the convention, each contracting state "undertakes to make the offense punishable by severe penalties." Under Articles 3, 4, 6, 7, 8 and 10 of the convention, appropriate measures by a state are to be taken to deal with a situation in which an alleged offender is found in its territory, notwithstanding the fact that the offense was not committed there.

§ 212 outlines the situations in which Federal piracy jurisdiction will be asserted. The definition is derived from the Convention on the High Seas, ratified by the United States Senate in 1960 [(1962 13 U.S.T. 2313, T.I.A.S. 5200] and a basis is identified for the exercise of Federal jurisdiction. The jurisdiction extends to ships and aircraft "on or over the high seas." The extension of jurisdiction and the treatment of piracy on Federal jurisdictional base are desirable steps.

EXTRATERRITORIAL JURISDICTION IN INTERNATIONAL LAW

Almost forty years ago, Professor E. D. Dickinson reported for a Harvard research project that there were five generally accepted bases for a state's assertion of extraterritorial criminal jurisdiction. In his introductory comments to the study [*Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 *American Journal of International Law* Supp. 435 (1935)], Professor Dickinson succinctly summed up these bases:

> . . . first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most states, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely, though by no means universally, accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of states and contested by others, is admittedly auxiliary in character and is probably not essential for any state if the ends served are adequately provided for on other principles.

To this list one could perhaps add another basis, usually called the "Floating Territory" principle. Under this principle, a ship or aircraft operating under the flag of a state is amenable to the exercise of that state's assertion of legislative authority. [See *Restatement (Second) Foreign Relations Law of the United States* §§ 28–29, 31–32 (1965)]. Such assertion could perhaps also be considered permissible if a ship or aircraft was "under the substantial private ownership" of a state's nationals. To use the term "floating territory" to describe ships, aircrafts and spacecrafts, of course, amounts to relying on a fiction, but the usage has been supported on pragmatic grounds.

These principles, broad in scope, are still the ones nations invoke to assert extraterritorial criminal jurisdiction on nationals and aliens for various offenses committed abroad.

Obviously, there may be competing and conflicting claims made by two states regarding the same offense. However, since there are no organized international arenas to provide an adequate mechanism of third party decision-making to resolve these conflicts, nations have usually shown remarkable restraint in not asserting extraterritorial criminal jusisdiction unless the commission or attempted commission of the offense would affect them in a substantial way or there was close connection between the nation asserting jurisdiction and the offense committed abroad.

THE U.S. PRACTICE

The United States has, in the past, relied on all the principles mentioned here (see 1 *Working Papers*, at 73). The United States federal system poses a special problem since, theoretically, the federal government, especially Congress, can act only in specifically delegated areas while residuary powers remain with the states and the people [see generally B. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 *Michigan Law Rev.* 609, 614–28 (1966)]. However, the fact remains that under broad powers granted to Congress by the Constitution (U.S. Const. Art. 1, § 8, clauses 1, 3, 4, 6, 7, 8, 10, 18), Congress has sufficient power to legislate extraterritorially, and the only real question is if it actually did intend the legislation to have extraterritorial effect. In cases where Congressional intent is not clear, courts have construed statutes in question liberally, relying, in part, on international law principles, and inferring jurisdiction "from the nature of the offense."

§ 208 COMPARED WITH SELECTED FOREIGN CODES

The Italian penal code

The Italian Penal Code provides for extraterritorial criminal Jurisdiction in the following situations:

1. Crimes against the State (including acts against the sovereignty or independence of the State; espionage and sabotage). This corresponds basically to § 208(b) of U.S. Federal law. However, jurisdiction under Italian law is not limited to crimes committed by a citizen, but extends to those committed by foreigners as well.

2. Forgery or counterfeit of the State seals, currency, instruments of credit and stamps. This provision corresponds to the first sentence of § 208(c).

3. Crimes committed by public officers in violation of their duties or misuse of their powers. This corresponds to § 208(f), but is more limited as it does not include members of the public officials' household, nor persons accompanying the military forces.

4. Where such jurisdiction is provided by treaty. Same as § 208(g).

In other cases, jurisdiction is not absolute, but is conditioned upon a request by the Department of Justice. A distinction is made between political crimes and common crimes. Political crimes are defined as crimes violating a political interest of the State (e.g., its territory, form of government, etc.) or a political right of a citizen. They also include common crimes politically motivated, such as crimes of violence against the President of Italy, and acts of terrorism and anarchism. The Italian code provisions on political crimes committed abroad by a citizen or a foreign national correspond to § 208(a), but there are considerable differences between the two.

With regard to common crimes (i.e., other than political crimes) committed abroad, Italian law distinguishes between those committed by a citizen and those committed by a foreign national, as noted below. It may, however, also be noted that in both cases jurisdiction exists only if the accused is present within the national territory.

1. Common crimes committed by a citizen abroad. Absolute jurisdiction exists if the crime is punishable with imprisonment of three years or more under Italian law. On the other hand, for lesser crimes a request of the Justice Department or the victim's complaint is required. No jurisdiction exists for crimes punishable only by fines. If the victim is a foreign state or a foreign national, the accused can be tried in Italy only when his extradition has been refused.

2. Common crimes committed by a foreign national abroad. If the victim of the crimes is the Italian government or an Italian national, jurisdiction exists if the crime is punishable with at least one year imprisonment. If the victim is a foreign state or a foreign national, the crime must be punishable with at least three years imprisonment.

The main difference between Italian and U.S. laws concerning common crimes is that Italian law determines jurisdiction on the basis of the seriousness of the crime. On the other hand, U.S. laws determine jurisdiction upon the classification of the crime (Federal) and the fact that crime will have some effect within the U.S. (conspiracy to commit a federal offense within the U.S., entry of persons or property within the U.S., § 208(d) and (e)).

Under Italian law, a crime having consequences within the national territory might be considered as committed within the national territory and therefore outside the scope of extraterritorial jurisdiction. This would occur under the principle that a crime is deemed committed within the national territory if the results of the crime occur within the national territory.

A brief reference to selected provisions in two other codes follows:

The Turkish Penal Code

Article 3 of the Code provides that anyone committing a crime in Turkey is subject to Turkish law and that nationals, "even if sentenced in a foreign country for the commission of a crime, shall be retried in Turkey."

Article 4 provides that in crimes against the security of the Turkish Government and its instrumentality, a national and alien alike could be tried and punished.

Article 5 extends jurisdiction to a national committing crimes abroad if it would entail a sentence of at least three years. Article 7 provides that if a foreigner commits a felony in a foreign country against a Turk or the Turkish Republic and he has been tried in the foreign country, regardless of the outcome of the case, the case "shall be reviewed" by the Turkish courts.

The French Criminal Code

Under Article 689 of the French Code of Criminal Procedure, a French citizen committing abroad an act "qualified as a felony punished by French law" may be prosecuted and tried by French courts. If the act is a misdemeanor according to French law, the French jurisdiction extends only if it is punishable by the legislation of the country where it was committed or if it concerns the security of the state or counterfeiting the seal of the state or of current national monies.

Under Article 691, if a misdemeanor is committed against an individual, official complaint or denunciation by foreign authorities is a prerequisite to the exercise of extraterritorial jurisdiction.

Articles 75 to 108 of the French Penal Code deal with felonies and misdemeanors against the external and internal security of the state. These articles are broad in scope and in specified offenses, both nationals and aliens are subject to the French extraterritorial jurisdiction.

Conclusion

The proposed Code relies on all the principles of international law permitting extraterritorial jurisdiction. A special merit of §208 is that it would no longer be necessary for courts to infer jurisdiction "from the nature of the offense" construing the legislation in light of implicit Congressional purposes, for § 208 explicitly states the jurisdiction base.

The proposed Code favorably compares with foreign codes insofar as its provisions show considerable restraint in the exercise of Federal extraterritorial criminal jurisdiction even over United States nationals. Certainly, under existing international law guidelines even a much broader exercise would have been permissible.

However, on one minor point, I am not sure that the extension of jurisdiction is all that necessary. I specifically refer to §208(f), which extends the jurisdiction to all offenses committed by alien public employees, alien members of a diplomat's household and aliens accompanying the armed forces. Obviously, in view of the decentralized structure of the international community, the United States would not be precluded from making such an assertion. But, the point is: should it do so?

The desirable answer would be that the United States should assert jurisdiction over aliens only in specific instances, such as in case of offenses committed by an alien federal employee in connection with his official duties, and an alien member of the armed forces who is amenable to be tried by court-martial. But beyond these limited categories, the United States defer to the assertion of jurisdiction by the foreign state.

Thank you very much.

Mr. NANDA. Thank you. I will confine my comments to only one area of the proposed code, that deals with extraterritorial jurisdiction. I refer to sections 208, 210, 212 and 201(a).

Given the decentralized structure of the international society, that is, since there are no centralized bodies—there is no centralized judiciary or executive or legislature—each state participates in making law, law that governs the conduct of nation states. Thus, a state has the right to legislate concerning events and conduct so long as it does not transgress upon the authority of other nation states.

Traditionally the United States has not utilized all of the international bases and principles which grant nation states or authorize nation states or authorize nation states to assert criminal jurisdiction over offenses committed abroad.

Senator, traditionally there have been five such international principles, which are widely used. The universality principle is the oldest, and it has been historically used in piracy. No matter where piracy was committed, it was considered such a heinous offense that a common interest was discerned in bringing the offender to task and, therefore, any nation state could apply its own laws, and could bring the offender to task for piracy.

Nationality has traditionally been another principle utilized by all nation states to prescribe and apply their own laws to nationals, no matter where they are, and therefore, if a national committed an offense outside of the country, no matter what offense, international law does permit and authorize a nation state to extend jurisdiction extraterritorially. This includes criminal jurisdiction over a national.

The United States, again, has not utilized this authorization fully. As a matter of fact, the United States has extended its jurisdiction extraterritorially over the U.S. nationals quite narrowly and a case could be made to broaden this jurisdictional base.

The third principle is the protected interest principle and treason is traditionally an area where a nation state feels its own interests being jeopardized or threatened to such an extent that no matter where the offense began, or who is involved in it, it could be brought under the extraterritorial jurisdiction of a nation state.

We do find in section 208, subsection (b) that if the offense of treason is committed by a national of the United States, the code applies but the code does not even today extend the U.S. jurisdiction to non-nationals in this area.

There has been another ground to extend jurisdiction, and that has been called the passive personality principle, the principle based on the nationality of the victim. Under this principle, if a U.S. national is a victim of a crime committed abroad, the United States might have a basis to extend its criminal jurisdiction extraterritorially.

And finally, the so-called "floating territory" principle, under which a state's extraterritorial jurisdiction might be exercised over a vessel, or aircraft or spacecraft which is under the flag of that nation state, or perhaps we could extend further the principle, which is fictional anyway, and say that if the nationals of the state have a predominant interest, a preponderance of interest in a vessel, or aircraft, or spacecraft, that the state can extend extraterritorially its criminal jurisdiction.

Well, traditionally the United States has applied all of these principles invariably, but in a very narrow way, and in an ad hoc fashion, on a case-by-case basis.

I would like to commend the Commission for outlining these new provisions which are succinct, which are precise, and unlike many of the other provisions in the code that Professor Mueller has mentioned as being verbose, I must say that all of these provisions are sufficiently succinct and precise, and they deal with the situation as it presently exists in terms of our decentralized structure of international society.

May I make just two brief comments on these provisions. First, I do not intend to go into the constitutional aspects of extraterritoriality in any detail. I think that based upon the inherent sovereignty doctrine, or based upon the fact that the Constitution does give Congress power to legislate extraterritorially, and I refer especially to the Constitution—article 1, section 8, clause 18, and various other clauses, for instance, in article 1, section 8, the clause on taxation and various other clauses by which the Constitution does grant Congress power to enact in the areas, for example of foreign commerce, or to enact uniform rules of naturalization, or for punishment of counterfeiting of money, securities of the United States, establishment of post office, patent, and copyright laws, piracy, felonies and punishment pertaining thereto, and there is reference also to the law of nations—the Congress has the necessary power to legislate extraterritorially.

It will suffice to say that the only point that we are concerned with is if it was congressional intent or purpose to extend the specific legislation in question to activities, events and conduct abroad.

My second comment is on section 208(f). That is the subsection that applies if the offense is committed by a Federal public servant who is outside of the territory of the United States, or by a member of a household of a U.S. diplomat abroad, or by a person accompanying the military forces of the United States. I think it is desirable to extend the Federal criminal jurisdiction in some cases and this subsection fills certain gaps, because the Supreme Court had decided in earlier cases that perhaps Federal jurisdiction might not extend to cover some of the situations mentioned in this particular subsection.

But the jurisdiction desired to be exercised is rather broad. For, it might affect aliens who do not perform any official function and who are subject to U.S. jurisdiction just because they are members of a U.S. diplomat's household abroad.

It might also affect an alien who merely accompanies the military forces of the United States and who has committed an offense completely unassociated with his official or public functions.

It might also affect the Federal employee who is an alien and who is performing any duty as a public function. And, Senator, I do not feel that it is perhaps necessary or desirable that the Federal criminal jurisdiction should extend that far.

Certainly, the United States has a broad right and a broad power under international law authorization. However, there are various other national codes that do not go that far and I do not feel that it is desirable for the U.S. Code to extend its jurisdiction to that extent either.

I have earlier mentioned that the code, under 208(b), does not envisage reaching out to a nonnational even if the offense committed abroad by a nonnational is treason, and I feel that under subsection (f) also, the code might say that Federal jurisdiction would be extended in certain specific instances, such as in the case of offenses committed by an alien Federal employee in connection with his official duties, or in a situation where an alien member of the Armed Forces is amenable to be tried by court martial.

But, beyond those categories, which are rather limited, I think the United States should defer to the assertion of jurisdiction by a foreign state.

However, a case can be made that under 208(b), Federal criminal jurisdiction should also extend to an alien. I would prefer extension of 208(b) and curtailment of 208(f).

I know that I should not take too long since you wish to adjourn at 12:45. Therefore, I will draw your kind attention to my prepared statement and a few comparative aspects I have touched upon in that statement. In conclusion, I feel that section 208 is fairly comprehensive, and I feel it meets the needs and demands of modern problems in criminal law. Since national boundaries are no longer any limiting factor on crimes, I do feel that the code sections on extraterritoriality fill some gaps in the U.S. law, because as you know, the judiciary had all along to construe the legislative intent, and had to fall back upon the nature of the offense, and now by providing a jurisdictional base in section 208, I think the code will resolve that problem. Section 210, as I have mentioned in my prepared statement, will have to be brought up to date.

That, Senator Hruska, would be just a summary statement of my comments on extraterritorial jurisdiction. If there are any questions, I will be happy to answer them.

Senator HRUSKA. Well, we want to thank you, Professor Nanda, and also you, Professor Mueller, for your insight concerning criminal law in foreign lands. Certainly those members of the committee who have a great void of understanding and of information on this subject are going to be greatly helped by the papers that you have presented, and also your personal appearance here.

And, I am sure that we can learn much from the experiences of other countries who in some instances have lived with criminal codes that have evolved over the centuries, and yet that have become modernized.

At this point in the record I should like to insert materials on foreign comparative criminal law prepared by various professors of comparative law and other experts on foreign criminal law, including an article on the proposed Federal Criminal Code by a distinguished French Judge. Following this material, for the Appendix of the record, I should like to insert a rather voluminous collection of materials on foreign comparative criminal law prepared by the staff of the Law Library of the Library of Congress, and other foreign law materials received by the Subcommittee.

We are adjourned, subject to the call of the Chair.

(Thereupon, at 12:50 p.m. the hearing was adjourned, subject to call of the Chair.)

(The material follows:)

STAFF NOTE: The following letter-questionnaire was sent by the chairman to all Professors of Comparative Law in North America, soliciting information on

foreign criminal codes and comparisons of such codes with the proposed Federal Criminal Code drafted by the National Commission. A large number of responses were received, including manuscripts and articles on various of the point raised in the questionnaire. A cross-section of the most illuminating responses and documentation received by the Subcommittee is reprinted in this hearing.

DEAR PROFESSOR: As you know, the Subcommittee on Criminal Laws and Procedures is conducting a continuing examination of the proposed Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws as a "work basis" for revision and reform of Title 18 of the United States Code. Since the Federal Government has never had a penal code, only an aggregation of loosely joined statutes supplemented by court decisions and common law doctrines, the proposed codification and revision would represent an enormous development in American criminal jurisprudence.

Foreign nations, especially the continental European nations, have had many years of experience in drafting, construing and applying criminal codes; therefore the Subcommittee, as it evaluates and formuates a penal code for the government of the United States, wishes to draw upon the law, practice, theory and experience of other nations.

This letter details a number of questions and areas in which information of a comparative nature is desired. I solicit your help and expertise in comparative law in responding to one or more of these questions or others which may occur to you in comparing the Draft Code to foreign law. Please do not feel constrained to respond to the entire questionnaire, which is quite long, and do not feel limited or restricted by this list if you think of other subjects or alternatives that may be of interest and useful in the Federal Code. The answer need not be comprehensive or exhaustive in the manner of a Law Review article, since we are searching for ideas and possibilities rather than material for a treatise or encyclopedia.

We should like information on the following points:

1. The National Commission, following the lead of the American Law Institute in its Model Penal Code (1962), has proposed what is primarily a code of substantive criminal law. The proposed Code is divided into three Parts—Part A, General Provisions; Part B, Specific Offenses; Part C, Sentencing.

Is such a tripartite division followed in the foreign codes? How are foreign codes structured?

2. The proposed code contains 350 sections (Part A: 73; Part B: 238; Part C: 39), but the numbering system runs from section 101 to Section 3601.

Is it customary in foreign codes to leave so many blank numbers for future statutes? What is the usual numbering system?

3. The proposed Code defines the various "intent" requirements or the mental elements necessary for criminal conduct in §302(1). The Code would establish four different kinds of culpability: intentionaly, knowingly, recklessly and negligently.

How do the foreign criminal codes regard and use the element of the defendant's state of mind? Is it used to determine guilt or innocence? Degree of guilt? Sentence? How do the kinds of culpability proposed in the draft code compare with foreign provisions?

4. The proposed Federal Criminal Code includes a section (§305) which defines the causation requirement or causal connection which must be proved between the defendant's conduct and the result.

How is causation handled by foreign codes?

5. The Draft proposes that mental disease or defect at the time of the criminal conduct to be a defense and defines that defense in proposed §503.

Is there an insanity defense to criminal charges under foreign codes? How do the foreign provisions compare with that of the Draft Code? Do any foreign codes provide that the insane defendant may be found guilty, but that upon conviction he must be accorded medical rather than penological treatment? How do they handle the procedural aspects of the insanity defense: is there provision whereby the Judge selects a psychiatrist to examine the defendant or do both the government and the defense lawyers bring in their own medical witnesses? Is there provision whereby the defendant found not guilty by reason of insanity is automatically committed to a mental institution for observation and treatment?

6. Although the defendant who "lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" because of mental illness has a defense under §503, the defendant who is

similarly situated because of alcohol, or drug intoxication has no defense under §502 (except in limited situations).

How do foreign codes handle the problem of the defendant who is intoxicated? Is he given a defense to criminal liability? Is he handled differently upon sentencing? (i.e. sent to a hospital rather than prison?) If foreign law is similar to American, how do theorists defend different treatment, for example, for the alcoholic and mentally-ill person?

7. The Draft Code contains a rather elaborate and detailed group of sections on self-defense and use of force, etc. (§603—Self-Defense; §604—Defense of Others; §605—Use of Force by Persons with Parental, Custodial or Similar Responsibilities; §606—Use of Force in Defense of Premises and Property; §607—Limits on the Use of Force; Excessive Force; Deadly Force.)

How do these detailed rules compare with the equivalent provisions in foreign codes? Do the foreign codes enunciate specific rules or set general standards?

8. Near the end of the Code proposal, in §3002, the system of classification of offenses is set forth. There are six categories: Class A, Class B and Class C Felonies, Class A and Class B Misdemeanors and Infractions. This is a system of classification for purposes of sentencing.

How and what purposes do foreign codes classify offenses?

9. How do foreign code provisions on sentencing of convicted defendants compare with the sections in Part C of the proposed Federal Code?

Do foreign code sections on suspension of sentences provide for suspension of imposition of sentence and/or suspension of execution of sentence?

Do the foreign codes provide for a sentence of probation or is probation a form of suspension of sentence?

Is a person so released under supervision by probation officers, police officers or no one?

Do the foreign codes provide for indeterminate or determinate sentences of imprisonment?

Are there special extended term prison-sentence provisions for dangerous special offenders similar to §3207?

How do the authorized prison sentences for a representative group of crimes compare with the authorized prison sentences for the same offenses under foreign codes?

Are there mandatory minimum prison sentences under the foreign codes?

If foreign nations employ systems of release on parole, how do they compare with the provisions in Chapter 34 of the Draft?

Are prisoners released on parole by an administrative agency such as the United States parole board or by the Court?

Does foreign law have any equivalent to proposed §3007 under which an organization convicted of an offense may be required to give notice or appropriate publicity to the conviction.

Is giving publicity to a conviction (a different colored license plate for persons convicted of drunken driving, for example) used as a sanction or sentence under foreign codes?

Do the foreign codes have any equivalent to proposed §3003 (Persistent Misdemeanant)?

Do foreign codes require judges to give reasons in writing for sentences imposed?

Are sentences subject to review on appeal by a higher court? If so, may the appellate court raise as well as lower the sentence?

May the government appeal a sentence or only the defendant?

What standards do the Codes require for sentencing review?

If appellate review of sentences is not authorized under foreign penal or criminal procedure codes, how is uniformity of sentencing amongst the judges secured?

How does §3204 (Concurrent and Consecutive Terms of Imprisonment) compare with foreign code provisions on multiple offenses? Some European codes provide for a joint sentence rather than concurrent or consecutive sentences. How are terms computed under joint sentencing provisions? Under a "joint sentence", what happens if *one* but not all of the convictions is reversed on appeal?

Regarding the imposition of fines, do any foreign codes have provisions similar to §3301(2)?

In the United States many imposed fines are never collected and, therfore, of limited value either as a punishment or deterrent to others; how do foreign codes provide for collection of fines?

What is the "day fine" system and how are provisions regarding it formulated?

Is the day fine a fixed amount depending upon the gravity of the offense of which the defendant is convicted or it the amount fixed based upon the ability of the defendant to pay?

10. Is mistake of law a defense under foreign codes? Mistake of fact? How do foreign provisions compare with §§303, 304, 609?

11. One significant change in the proposed Code from present Federal criminal law is the separation of the jurisdictional base upon which federal prosecution rests from the definition of the offense as to which the defendant is prosecuted. Are there analogues to this differentiation between crime and jurisdiction in any of the foreign codes?

12. How do the Draft Code's provisions on extraterritorial jurisdiction (§208) compare with the foreign provisions on extraterritoriality and jurisdiction over crimes committed outside national boundaries?

13. How is the problem of criminal conspiracy handled under foreign codes?

14. How do foreign codes handle the problem of "felony-murder" (murder committed by one party to a felony)? (See §1601 [c].)

15. In those nations which have a Federal system (e.g. West Germany, Switzerland) does the Federal government have concurrent or exclusive jurisdiction over riots, mass demonstrations and crimes or is jurisdiction limited in a way similar to proposed §1801 (4)3 How do the Code provisions in this area (§1801—Inciting Riot; §1802—Arming Rioters; §1803—Engaging in a Riot; §1804—Disobedience of Public Safety Orders under Riot Conditions) compare with foreign code sections dealing with similar problems?

16. Do any of the foreign codes have a section similar to §1104 (Para-Military Activities)?

17. A number of sections and subchapters of the proposed code deal with an area which is often referred to as "crimes without victims"; i.e. crimes in which the victim either consents or is a willing customer of the defendant. See, e.g., §§1821–1829 (drugs), abortion, §§1831–1832 (gambling), §§1841–1849 (prostitution), §1851 (obscenity), and homosexual activity activity between consenting adults. How do the foreign codes approach these problems?

18. How do foreign code provisions on firearms and explosives compare with §§1811 to 1814 and the Commission's controversial recommendation in the introductory note to the subchapter?

19. Which foreign jurisdictions provide for capital punishment? For which offenses? Do any foreign codes provide for a separate proceeding to determine sentence in a capital case? (See §3602). Are separate hearings on sentencing authorized in any cases or does the absence of a jury system make separate hearings not bound by restrictive rules of evidence superfluous?

20. How do the codes' provisions on multiple prosecutions and trials (§703—Prosecution for Multiple Related Offenses; §—When Prosecution Barred by Former Prosecution for Different Offense; §706—Prosecutions Under Other Federal Codes; §707—Former Prosecution in Another Jurisdiction: When a Bar; §708—Subsequent Prosecution by a Local Government: When Barred; §709—When Former Prosecution is Invalid or Fraudulently Procured) compare with the relevant sections of foreign codes?

It would be helpful if as much material as possible could be made available to the Subcommittee no later than March 17, so that at least some of it may be inserted into the hearings of the Subcommittee, now planned for the end of that month, and made available to the American academic and legal communities interested in criminal law.

If you have any questions in reference to this request, please contact Mr. G. Robert Blakey, the Chief Counsel to the Subcommittee at Area Code 202/225-3281. Should you not have access to a copy of the Commission's Final Report, I will be happy to send you one upon request.

With kindest regards, I am

Sincerely yours,

JOHN L. MCCLELLAN,
Chairman.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, N.Y., March 15, 1972.

G. ROBERT BLAKEY, ESQ.
Chief Counsel, Subcommittee on Criminal Laws and Procedures, U.S. Senate Committee on the Judiciary, Washington, D.C.

DEAR MR. BLAKEY: In response to your letter of February 3rd, 1972, I had hoped to be able to write you at some length. Unfortunately, it has been hard to find the time, as I am not now teaching criminal law, and must devote the bulk of my time to the matters for which I am now responsible. As you may know, I did teach criminal law for two years in Ethiopia, a country whose recent penal code is modeled on the most advanced European thinking. Much of what I know about that code and its interpretation is embodied in a monograph which I am enclosing for your possible interest, originally published in the Journal of Ethiopian Law. The English version begins at page 375. In addition, I would refer you, as I am sure others have done, to the outstanding work of Professor Johannes Andenaes of Norway, in particular a book entitled *The General Part of the Criminal Law of Norway* (1956). The Ethiopian Penal Code is available in an English translation and there is a fairly persuasive commentary on its general part, also available in English, written by Dr. Philippe Graven [*An Introduction to Ethiopian Penal Law* (1965)].

If I had one exhortatory response to make to your subcommittee in response to your inquiry, it is that every effort be made to deal comprehensively with the theoretical as well as the substantive problems of criminal law in the body of the code. This need not mean fulsome detail. I find the provisions governing self-defense, defense of others, and the like, for example, to be somewhat excessive in their detail. There is a difference between clearly expressed principles set in the framework of a cogent and understandable organization, to me the essence of code writing, and statements so elaborate as to appear to attempt to solve every factual problem which might arise. The sections on self-defense tend, unfortunately, to over-detail. For example, if in the midst of a fist fight between two young men in a crowd one unexpectedly draws a knife, will the other's response of equal force be justified? Section 603(b)(2) appears to say that he has no right of defense despite the extreme escalation of force; can this be right? Yet the very detail of other subsections suggests that it must be, because the case is unprovided for. While the code might seek to set out examples—for example, deadly force is unjustified in the protection only of property—such examples should be limited and early identified as such; in general, its statement should be limited to a brief and clear indication of the principles involved.

The more upsetting deficiencies, in my view, are those which go in the direction of understatement, by which I mean continuing to leave important matters of principle for decision by judges in individual cases. Thus, the Ethiopian Code provision on causality, like most European code definitions, is the *exclusive* basis for a finding of causality. Section 305 of the draft, on the other hand, provides only that "causation *may* be found" in stated circumstances, and the commentary to its suggests that the drafters meant to leave to judges the definition of other circumstances in which causation is present. To do this is essentially to withdraw from the code idea. However difficult it may be to define the relationship of cause and effect, it is the statute which ought to accomplish that definition. To leave this or other similar matters partially in judicial hands is in a significant way to give up the enterprise.

As I see it, the difference between the usual European approach and our frequent approach to statute writing is that we often tend to write statutes with an eye to resolving a particular problem; in the code tradition the statutes are written explicitly to impose a structure or framework on a whole area of legal concern. To be successful, particularly with judges who are used to and command power to construe and shape our codes, a code must be clear and cogent in its organization and statement. This is not a matter of foreseeing all contingencies; such casuistic drafting is impossible to do and only invites judicial troubles. There will always be interstitial issues of judgment. The principal job is to build a strong, complete and readily understandable skeleton within which those interstices will appear. It is on clarity and thoroughness of organization and statement that the code's success will depend, and so I think it is

to that question as much as the actual solutions to substantive problems posed by the code that your efforts should be directed.

Again, I regret not being able to respond to your inquiry in detail, and hope that the enclosed may be of some assistance to you.

Yours truly,

PETER L. STRAUSS,
Associate Professor of Law.

STAFF NOTE: Following are selected passages from Professor Strauss' article on the Ethiopian Code.

ON INTERPRETING THE ETHIOPIAN PENAL CODE

(By Peter L. Strauss*)

I. INTRODUCTION [1]

The aim of this article is to set out and discuss some general principles of interpreting the Ethiopian Penal Code—that is to say, of using it. Even now, ten years after it came into effect, many people have difficulty in understanding and using the Penal Code in a straightforward way. It seems complex, and many of its fundamental conceptions are unfamiliar to Ethiopian lawyers. This article, discussing at length how the code is built, may help reduce its apparent complexity and thus facilitate its day-to-day application.

Since the article is about interpretation in general, it does not attempt to discuss in detail particular concepts, such as "negligence," or crimes, such as "homicide." The one exception is the "Principle of Legality," embodied in Article 55 of the Revised Constitution as well as in Article 2 of the Penal Code. This principle places restraints on the form and manner of interpretation of the Code, and thus has obvious relevance to our theme. For the other doctrines of the General Part, the first place for an Ethiopian lawyer to turn is the commentary of Dr. Philippe Graven, *An Introduction to Ethiopian Penal Law (Articles* 1–84 *Penal Code)*, published in English by the Faculty of Law in 1965; an Amharic version of the commentary is now in the course of preparation at the Faculty. Dr. Graven is the son of the Code's principal draftsman and was for a long time employed at the Ministry of Justice.

What follows is not as heavily laced with footnotes as many of the articles which have previously appeared in these pages. It seems that frequent reference to the sources consulted might be more confusing than helpful, and that

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*Faculty of Law, HSIU 1966–1968.

[1] Works of general interest on the subject of penal law interpretation:

J. Andenaes, *The General Part of the Criminal Law of Norway,* (Sweet & Maxwell, London, 1965), p. 96 ff.

J. Graven, "Les principes de la légalité, de l'analogié . . .," *Revue pénal suisse,* 1951, p. 377.

Hart & Sachs, *The Legal Process* (Tenth ed., Harvard University, 1958), Ch. VII.

Legal, "Les pouvoirs d'interprétation du juge pénal en France," *Revue pénal suisse,* 1959, p. 94.

Legros, "Considérations sur les lacunes et l'interprétation en droit pénal," *Revue du droit pénal et criminologie,* Vol. 47 (1966), p. 3.

S. Mahsoub, *La force obligatoire de la loi pénal pour le juge,* (Libraire général de droit . . ., Paris, 1952).

Radin, "Statutory Interpretation," *Harv. L. Rev.,* Vol. 43 (1930), p. 653.

G. Williams, "Language and the Law," *Law Quarterly Review,* (1945–46), Vol. 61, pp. 71, 179, 293, and 384; Vol. 62, p. 387.

Works especially relevant to interpretation of the Ethiopian Penal Code:

J. Graven, "The Penal Code of the Empire of Ethiopia," *J. Eth. L.,* Vol. 1 (1964), p. 267.

J. Graven, "L'Ethiopie moderne et la codification du nouveau droit," *Revue pénal suisse,* 1957, p. 398.

J. Graven, "De l'antique au nouveau droit pénal éthiopien," *La vie judiciare* (Paris), Nos. 445–446 (Oct., 1954).

J. Graven, "Vers un nouveau droit pénal éthiopian," *Revue internationale de criminologie et police technique*) 1954, p. 250.

P. Graven, *An Introduction to Ethiopian Peanl Law (Arts.* 1-84 *Penal Code),* (Faculty of Law, Addis Ababa, 1965).

A collection of unpublished documents relating to the Ethiopian Penal Code of 1957, including an *exposé de motifs,* minutes of the meetings of the Codification Commission, and preliminary drafts, in the Archives of the Faculty of Law, Haile Sellassie I University, Addis Ababa.

all discussion or explanation belonged in the text. Except for a few special cases, such as attribution of direct quotations, the sources used have been indicated as a group at the beginning of each subdivision of the article.

The problem of interpretation only arises when a lawyer or judge has a problem before him. Certain facts have come to his attention, and he wants to know what the legal consequences or implications of them might be. Given a code system such as Ethiopia now enjoys, his first reaction will be to look in the relevant code(s) for some indication of the answer to his problem. He may find that the language of the statute seems perfectly clear, and appears to give an exact answer to his problem. Then, he need go no further. But if the language is not clear or directly on point, he will have to go farther and attempt to reason out, using such aids as are available to him, what is the law applicable to his case.

This article is about all three stages of the process: looking for the relevant law in the Code (*and* how to tell what *is* relevant); deciding whether or not the meaning is "clear"; and some of the means which can be used to reason out a sensible answer if it is not. The organization of the article stresses the last two questions—what is "clear," and what can be done where a provision is not clear. Thus, it may seem to pass lightly over the vital question of finding the possibly relevant law. Once the reader understands how the Code is put together, however, and how that structure can be used in solving any particular problem, he will also have a much better sense of how and where to find the possibly relevant law. That is, in learning about interpretation, the reader will at the same time be improving his skill at finding and identifying the provisions which he has to interpret.

There are a number of special factors working in Ethiopia which limit and shape the direction of this inquiry. Perhaps the most important is the severe limitation on the resources available to the lawyer or judge who wants to find out about the law. Ideally, research tools would include the following: versions of the Penal Code in each of its three languages—Amharic, English and French, the language in which it was drafted; historical materials explanatory of the purpose of the enacters or the expected function of code provisions—such as preparatory drafts, explanations written by the drafter for the Codification Commission and records of the debates in the Codification Commission and the Parliament; cases decided by the Supreme and High Courts on questions which have arisen in the past; commentary on the Penal Code by persons familiar with Ethiopian justice and/or the sources which were relied upon in drafting it; and materials and commentary from foreign jurisdictions explaining either relevant concepts new to Ethiopian justice or the code provisions from which Ethiopian Penal Code provision were drawn.

Some of the most important of these materials are simply unavailable. Others are available only at the University Law Library in Addis Ababa, or require thorough knowledge of a foreign language to be understood. With the exception of the codes, and cases and articles appearing in the Journal of Ethiopian Law, there are virtually no Amharic-language materials. With the same exceptions, there are no legal materials which one could expect to find in most or all courts in the Empire. The significance of this limitation of resources is that one must expect that, at least for the present, lawyers and judges will have to rely almost entirely on the language and structure of the Penal Code itself, without being able to obtain substantial help from other sources. For this reason, this article will concentrate on how Code language and the structure can be used in interpretation. It will not discuss such important and difficult questions as: What weight is to be given to historical materials in the interpretation of statutes? Are previous decisions interpreting a Code provision binding upon a court which is later asked to interpret the same provision? What importance should be attached to scholarly commentaries on Code provisions or on the laws of other countries from which Code provisions were drawn?

A particularly regrettable limitation flows from the likelihood that the English and French versions of the Code are not widely available and would not be widely understood. In most cases, Amharic code provisions will have been produced by translation from an English or French draft, or perhaps both. Inevitably, there are discrepancies. Although the Amharic version controls, both by law and because this is the language which most judges and lawyers best understand, our law students assure us that the English and the French

versions are often more precise and more readily understood. In many cases, this may be because Amharic as a language lacks a settled and precise body of legal terminology. As a result, translators may have to use vague terminology, or long descriptive phrases which lose the exact meaning of the original text. Thus, it is not surprising that a comparison of provisions in their three different linguistic versions will often assist greatly in understanding them.

Such a comparison might also suggest intended limitations of application which had not been incorporated clearly into the Amharic text, as for example, in the case of Penal Code Article 472. The English text of Article 472(1) states:

"(1) Whosoever conspires with one or more persons for the purpose of preparing or committing *serious* offences against public security or health, the person or property, or persuades another to join such conspiracy, is punishable, provided that the conspiracy materialises, with simple imprisonment for not less than three months and fine.

"*For the purposes of this Article, 'serious offences' are offences which are punishable with rigorous imprisonment for five years or more.*"

The italicized portions are omitted in the Amharic. The French text is similar to the English text, and there is no available record to show that the Amharic version reflects a Parliamentary amendment of the original draft. How a judge might or must deal with such discrepancies is again, however, something best put aside until a later time.

We must also take into account another factor, which is that at the present time most of the judges and advocates who must administer the Penal Code have not had any formal legal education. The drafters of the Code have taken the difficulties this situation creates into account, for what they have written is very full in explanation and clear in its organization. Still, there must be some understanding of how to approach these explanations, of how the organization works, of how the drafters of the Code expected that their work would be understood by those responsible for applying it. And it is important not only to set out appropriate means of interpretation, but also to avoid reliance upon techniques of interpretation—however accepted they may be in countries where legal education is widespread—which are complex or sophisticated. Indeed, it may be doubly important to restrict ourselves to simple techniques of interpretation when dealing with the criminal law. In the criminal law, the common man, too, must understand what is permitted and what is forbidden; he may go to jail if he makes a mistake.

There is a final limitation, perhaps the most severe. It should be clearly understood that there are no such things as "rules" of interpretation, and that it is not the goal of this article to help judges and lawyers reason to what is "the proper" or "the correct" result in the cases they may have to deal with. Fringe areas of uncertainty, as we will shortly see, exist in virtually every statute. In these areas, the legislature has not clearly decided or perhaps even considered the appropriate meaning of the law; consequently, in these fringe areas, *any answer would be permissible and therefore technically "correct."* Certainly, in making the choice a lawyer may find one or another interpretation better for reasons of social policy or the like. But the point is that the choice is open for him to make and, whether he makes it intelligently or not, one cannot say *a priori* that his choice is impermissible or wrong. Thus, it would be more accurate to state the goal of this article as the following: to help judges and lawyers avoid *improper* or unjustified results, by suggesting guides for determinirg where legislative solutions really are uncertain, and what considerations might be helpful in making the necessary choice. It can do no more. Common sense and a feeling for "justice" are the ultimate tools on which a lawyer must rely, and, indeed, the criteria by which he and the results his decisions produce will themselves be judged.

II. FINDING THE POSSIBLY RELEVANT LAW [2]

For the moment, we concern ourselves with the limited question, how to find within the Penal Code the law which might possibly bear on a problem. It requires a preliminary investigation of the principles on which the Code is orga-

[2] J. Graven, "The Penal Code of the Empire of Ethiopia," *J. Eth. L.*, Vol. 1 (1964), p. 281 ff.

nized; we will return to a more detailed investigation of these principles when we consider the question of interpretation as such. What we are looking for now is a way of determining by their language or placing, what provisions of the Code might be relevant to a legal problem.

We could take as an example the following factual situation, to which we will frequently return later on. Certain people of Ethiopia, such as the Afar, are nomadic. Their dwellings are constructed of sticks and mats which can easily be removed from one site, packed on the back of a camel, and carried to a new place. Suppose that during daylight hours an Afar is in the course of removing the parts of his dwelling from his camel's back and putting them up, when a thief emerges from the scrub and tries to carry them away. The thief is unarmed, and does not threaten the Afar personally; he simply tries to take the unconstructed pieces from the camel's back and run off with them. Seeking to protect his property, the Afar grabs up his spear and uses it to pierce the thief. The thief dies. How would one find the penal law relevant to the question of what, if any, crime the Afar has committed?

Although the process of finding law depends a good deal on knowing, in the first place, what facts the law is likely to consider significant, knowledge of the structural principles of the Penal Code is also important. The Code is, in fact, very carefully and logically organized. This organization consists of a series of subdivisions of increasing specificity. The first subdivision of the Code, into three Parts, is probably already familiar: Part I, the General Part, contains principles which apply generally to a large number of penal offences; Part II, the Special Part, gives the specific definition of relatively serious offences—the ones we are most likely to think of as "crimes"; Part III, the Code of Petty Offences, describes criminal offences of little importance, very often violation of ministerial regulations or the like and attended with very slight penalty. Part III also states some general principles specifically applicable to these petty crimes. Each of these Parts is itself subdivided, its subdivisions are subdivided, and so forth until one gets to what is generally speaking the smallest subdivision, the individual article. Each subdivision of the Code—articles included—has a title, which reflects the place of that subdivision within the overall statutory scheme. There is thus a formal structure of relationships within the Code, which is explained or indicated to a substantial degree by the naming of its various subdivisions. This formal structure was intentionally created, and created for just this purpose—to help illustrate the meaning, purpose, and interrelationships of various Code provisions. Understanding this important fact will help to identify the provisions relevant to any legal situation; later we will see how it should also help to understand the possible purposes and meanings of those provisions when they are at issue.

The Penal Code's Table of Contents is the first place to look in seeking possibly relevant Code provisions, for it clearly sets out the organization of the Penal Code and the titles of its various subdivisions. Often, the best first step will be to look for the specific offence(s) which may be involved. Thus, we can immediately eliminate the 247 articles of the General Part from the first stages of our search, since specific offences are not described in Part I. In the problem case of the Afar, set out above, we can also eliminate Part III, the Code of *Petty* Offences; if killing the thief was an offence, it very likely is treated as a rather serious matter. The search is thus narrowed to Part II of the Code—only 442 of the Code's 820 articles.

Part II is itself divided into four "Books" each with a title indicating a broad kind of specific crime. In the case of the Afar, the only Book likely to apply is Book V, "Offences Against Individuals and the Family"; the thief was an individual, not "the State" (Book III), "Public Interest or the Communify" (Book IV), or "Property" (Book VI). Now only 126 potentially eligible articles remain. Book V is itself subdivided into four "Titles"; Title I, "Offences against life or person," seems the most promising. The thirty-one offences of Title I are further divided among three "Chapters"; Chapter I, "Offences against life," immediately suggests itself as most relevant. Chapter I is comprised of two sections: I, "Homicide and its forms" and II, "Offences against life unborn—Abortion"; Section II can thus be put aside, leaving seven possibly relevant articles. Of these two can quickly be eliminated simply by glancing at their titles: Article 525, "Instigating or aiding another to commit suicide" and Article 527, "Infanticide." The other five must be read.

On reading them, one can quickly eliminate Article 522, "Aggravated Homicide"; in the facts given, one could hardly think the Afar had premeditated the killing, or that there was anything else to show that he is "exceptionally cruel or dangerous." But from reading Article 521, "Principle," and Articles 523, 524 and 526—each dealing with a particular form of homicide—several questions arise: What is "cause"? "intention"? "negligence"? Is the crime defined in Article 523 a crime of intention? negligence? neither? What is a "state of necessity" "legitimate self-defence"? At the time of the killing, was the Afar's dwelling his "house"? To some extent, these are questions of interpretation, which we will deal with shortly. But the existence of so many questions suggest that there may still be other possibly relevant provisions to be found and considered, before the task of interpretation as such begins.

It is at this point that an understanding of Part I, the General Part, becomes important. As already stated, this part contains rules of general application throughout the Code, and so one might think that it would suggest the answers to some if not all of the questions raised above.

The General Part is itself carefully organized. It is divided into two Books, The first deals with questions influencing the question of guilt—"Offences and the Offender"—and the second, with the question of punishment. Each of these books is then subdivided, in a logical way, into Titles, Chapters, Sections, Paragraphs and Articles. To illustrate how this organization can be used for law-finding, the structure of two of the Titles of Book I is set out below: The parenthical questions are intended to show the material dealt with.

Title II: The Offence and its Commission:

- Chapter I—The Criminal Offence (In what circumstances, where and when is an offence committed?)
- Chapter II—Degrees in the Commission of the Offence (When is an offence begun to be committed, and can it then be withdrawn from?)
- Chapter III—Participation in an Offence (What persons are participants in—guilty of—offences?)
- Chapter IV—Participation in Offences Relative to Publications (What are the special rules of personal liability for illegal acts of publication?)

Title III: Conditions of Liability to Punishment in Respect of Offences:

- Chapter I—Criminal Responsibility (What persons are excused, and to what extent, from criminal liability on account of their physical or mental condition?)
  - Section I—Ordinary Responsibility (Adults)
  - Section II—Infants and Juvenile Delinquents
- Chapter II—Criminal Guilt (What state of mind renders one guilty of, justifies, or excuses in part apparently criminal conduct?)
  - Section I—Intention, Negligence and Accident (What state of mind is necessary for criminal guilt to exist?)
  - Section II—Lawful Acts, Justifiable Acts and Excuses (What conditions permit, justify or excuse otherwise unlawful conduct?)
  - Section III—Extenuating and Aggravating Circumstances (What conditions call for partial reduction or increase of the penalty for unlawful conduct?

Title II, then, deals with relatively objective questions of criminal liability—what acts, committed by whom, in what circumstances, are necessary to a finding of guilt; Title III deals with the more subjective question of blameworthiness: was the state of mind of the individual when he acted such that he deserves to be punished, and if so, to what extent?

In looking, then, to see if possibly there is more law in the Code on the issues noted in the Afar's case, one can make some prediction where it is likely to be found. The relationship of "cause" apparently required by Article 522 seems an objective condition of liability, hence likely to be described in Title II rather than Title III. Indeed, one finds in Chapter I of Title II Article 24, "Relationship of Cause and Effect." Questions of negligence, intention, necessity and self-defense—having to do with state of mind and, possibly, excuse—one could expect to find dealt with in Title III, Chapter II. Looking at the titles of the articles in that Chapter, it is easy to mark the following ones as likely to be relevant: Article 57, Principle; Criminal Fault and Accident; Article 58, Criminal Intention; Article 59, Criminal Negligence; Article 64, Acts

Required or Authorized by Law; Article 71, Necessity; Article 72, Excess of Necessity; Article 74, Self-Defence; Article 75, Excess in Self-Defence.

Finally, one can guess that a definition of the term "house," which might be important for applying Article 524 in the Afar's case, is unlikely to be found in the General Part. Although the word might appear in several places in the Code, and a uniform definition could be of substantial importance as will shortly appear, what is involved is hardly a general principle of penal law. A definition of "house" will not help us to determine, in general, the subjective or objective conditions for guilt in penal cases, nor will it be of general use in determining the degree or measure of punishment. Accordingly, it has no place in the General Part.

It remains to take this body of "possibly relevant law," four Special Part articles and a number of General Part articles, and interpret them—use them—in the case at hand. One would have to ask whether the meaning of each of the articles, or all of them together, is entirely clear; what the relationships between them are; what is the appropriate legal outcome. What follows is addressed to these interpretational tasks, first as regards individual Code articles, and then in the larger context of the Code as a whole.

III. THE VERBAL LIMITS OF A LEGISLATIVE RULE [3]

Once he has found a possibly relevant provision, the first question a judge is likely to ask is "What meaning could the words of this statute have?" In a particular case, this determination will commonly take the form of the question, "Could the words of this statute apply to this case?"

The answer to this question may often seem easy. The legislature may have spoken clearly, or the case may be one of those which would come within any reasonable meaning of the words of the statute. Still, the question is one which confronts a lawyer or judge every time he seeks to discover what legal rule to apply to the question before him. The law is a profession of words. Words are an essential means of human communication, and the only means commonly used in legislation. Whether he is conscious of it or not, the first step a lawyer takes to ascertain the meaning of some statutory rule is to read it and ask himself what the words mean.

One may ask, of course, whether and to what extent the words of a statute matter. Under some governments, the whim of an official matters more than any words written in laws. The world has known systems in which legal issues were settled by reference to custom, previous court decisions, or what the judge believed to be just. This is less arbitrary than the first case, but is still a situation where written rules are not paramount. Even if one were to agree that, in general, written rules govern, there would be the question how far one can reason with the statutes enacted. For example, if a statute forbids threatening someone with "a knife," can one apply it to a case where someone is threatened with a gun? Both are dangerous weapons which could cause a person severe fright; can one use this analogy to apply the statute to a case the wording of the statute overlooks?

The Ethiopian Constitution makes it very clear that neither whim nor judges are, in the first instance, the proper source of law. It chooses a legislative system in which the primary responsibility for stating rules rests in the Emperor and Parliament. The enactment of the code system, in which all laws are put in writing, is a natural outgrowth of that choice. One cay say that in Ethiopia the words of statutes are at least the starting point for any discussion of a legal issue.

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[3] The principal work drawn on this section was:
G. Williams, "Language and the Law," *Law Quarterly Review*, (1945–46), Vol. 61, pp. 71, 179, 293, and 384; Vol. 62, p. 387.
See also:
Andenaes, work cited above at note 1, pp. 102–103 and 110.
J. Frank, *Courts on Trial* (Princeton University, 1949), p. 295 ff.
E. Freund, *Legislative Regulation* (Boston, 1932), Ch. III, esp. pp. 160–171, 240–260.
Hart & Sachs, work cited above at note 1, pp. 1156–58, 219–21.
E. Levi, "An Introduction to Legal Reasoning," *U. Chi. L. Rev.*, Vol. 15 (1949), p. 501, 503, 520.
Payne, "The Intention of the Legislature in the Interpretation of Statutes," *Current Legal Problems*, 1956, pp. 96, 99–100, 105.
Radin, work cited above at note 1, p. 866.
J. Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press, 1964), pp. 31–34.

This leaves the question whether the words of statutes, by their possible meaning, also limit the discussion of a legal issue—whether "a knife" can also include "a gun," if the purpose of the statute seems to require or permit this. In the case of the Ethiopian Penal Code, words do impose such limits on courts, for reasons that will be examined in detail later on.[4] The application of a penal statute is, in general, limited to the cases indicated by its words, given a meaning which they will bear. Since this is the case, it is obviously quite important to know what the meaning of any given word or collection of words might be.

This will often be a much harder question that might at first appear. For it is generally recognized that words are often if not always an imprecise means of communication. They may mean one thing to the person who speaks them, something else to one who hears them, and have still a third meaning in common usage. Yet the law may make sharp differences; freedom or years in jail may turn on the meaning they are given. The imprecision exists because most words describe general concepts, at varying levels of abstraction. There is a "core meaning" of clear instances to which most men would agree that particular abstraction applies; a "fringe" area, where there might be substantial disagreement whether it applies or not; and another clear area where most would agree it did not apply.

As an example, one could take the word "house," which could be significant for the application of Penal Code provisions, for example Article 524(a). This Article applies to a person who "kills another . . . in resisting the violation, by force or trickery, of the privacy of his *house* or outbuildings, there being no true state of necessity or legitimate self-defense . . ." "House" is a fairly precise word, and there will be a large measure of agreement as to what is a "house" and what is not. A permanent, one-room chica building, in which a family is living, is within the core meaning of "house." That is, almost everyone, if not everyone, would agree that such a structure could be called a "house." And almost everyone would agree that a fenced compound, without a roof, in which animals were kept for the night is not a "house." One begins to encounter uncertainty, however, in considering whether a flat in a large apartment building in the city is a "house." Plainly one is in the fringe area of disagreement when the issue is whether an Afar's dwelling, or a tent, or a building in the course of construction is a "house." Certainly, there would be room for disagreement on this issue, if more than one man was asked for his opinion. Parliament would doubtless have discovered such disagreement among its members if it had stopped to consider the issue—which it almost certainly did not—and lawyers will discover that they disagree on the issue if it ever becomes important in court, which it may not.

Although even a fairly precise word like "house" has a fringe of uncertainty, it is not hard to find other words, also significant for some Penal Code purposes, where the fringe of uncertainty is quite large. These more abstract words, such as "gang," "numerous," and "begin," evoke very indefinite responses in the person who hears them. It may be very significant to know whether a person was a member of a "gang" or not, or acted together with "numerous" other persons. But how many are "numerous" or a "gang"? One is not. Eighteen certainly are. But what about two? three? four? five? six? seven? It can confidently be expected that among the readers of this article will be people who choose each of the above figures as "the point" at which the abstractions "gang" or "numerous" begin to apply.

Finally, there are some words which are so abstract as to be almost all fringe, to present no areas of certain agreement. These are words which call on our emotions, such as "unjust," "immoral," "reasonable," "good," and "evil." The history of mankind has been a history of often violent and rarely rational disagreement about what such words mean. Thankfully, such words do not appear often in the Penal Code, and when they do, they find some explanation in the words around them. We shall have reason later to ask whether it is ever permissible to use them in penal legislation.[5]

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[4] The discussion begins at Section IX within, p. 1951 ff.
[5] The discussion is at Section X-B within, p. 1963 ff.

The conclusion to be drawn for now is that whenever legislation uses words, as it must, it necessarily creates these fringe areas, in which different men will understand its words in different ways. In many, perhaps most, cases, there will be agreement that the statute does or does not apply. But for every statute there will be cases to which that statute could be applied or not, depending entirely upon how the words which compose it are understood. In such a case, no meaning which is logically consistent with what the legislature has said can be out of the question. The judge has a choice among the several meanings which the statute permissibly has. He has to decide which best fits the context, the jobs the statute was meant to do, the expectations of the parties or the like. Of course, if the judge does not understand that he is choosing, what choices are open to him, and what may be the consequences of each, it cannot be said that he is doing his job very well, for he will be doing it blindly.

Thus, one of the first tasks of interpretation is to be sensitive to the fringes of uncertainty which a statute always has—to be aware of the range of permissible choice within the possible meanings of the statutory words. Suppose that the Afar of the previous hypothetical was charged with homicide and argued that he should be charged under Article 524 rather than some more serious provision, because he was defending the privacy of his "house." One judge might say, "This *is* a house!"; another, "This is *not* a house." They would simply be shouting at each other if they did not realize that the word "house" itself gave no answr in this case—that either choice was open to them, and that they would have to find some basis other than the word "house" to decide what meaning the statute should be given, that is, whether or not it should be applied to the Afar's case.

These "fringe areas" of uncertainty in the meaning of words provide one source of uncertainty in statutes, but not the only one. We have been assuming that one word, like "house" or "numerous," represents only one abstraction, and have said that uncertainty comes at the edges of this abstraction, where not all men will agree whether it applies. But one word frequently represents more than one abstraction, or core meaning, and in such a case the interpreter is faced with the additional difficult task of determining which or how many of these several meanings should be given to the word. The abstract concepts of the law, such as "intent" or "act," are very often such words, just because there has been so much argument and disagreement about what they ought to mean. In the context of a criminal code, the word "intent" might mean a wish to accomplish a certain forbidden result, a willingness to do so, a wish to violate the law, a willingness to do so a wish to do "evil" or inflict "harm," a willingness to do so, and so forth. The interpreter must decide—that is to say, *choose*—how many and which of the accepted definitions are to be used. Where the word is an important one, the statute will very often help him in this by seeking to define it. Definitions of "intent," for example, are given in Article 58. Still, the judge will often be faced with a choise of possible meanings. Even if he is unaware that he has a choice, the fact that he decides the case in a certain way necessarily implies that he accepted any definition that is logically necessary for his result, and rejected any definition that is logically inconsistent with it. He cannot decide without attributing some meaning to the statute before him.

In concentrating on the inherent vagueness of language, we should not lose sight of the fact that we often do manage to communicate with each other rather well. We believe in and act on the premise that clarity of expression usually is possible. Most cases will probably involve the "core" of statutory meaning, where there will be little disagreement about what the legisiature has said regarding the case at hand. The fact that this article concentrates, as it must, on cases where the law is unclear should not make us lose sight of this truth.

Moreover, not all cases of imprecision in statutes are caused by unavoidable imprecision of language. There may be cases where the legislature simply has not adopted the clearest possible mode of expression. It may not have been able to agree precisely on some issue—for example, whether three, four, five, or six constituted a "gang"—and decided to pass its disagreement on to the

courts in the form of an uncertain word. It may not have been aware that the wording it adopted was ambiguous or vague, and could have been made more precise by a definition or more careful wording. It may have engaged in careless thinking about the dimensions of the problem before it. It may have decided consciously to make its rule vague and uncertain, perhaps to frighten people into obeying it, or to leave room for the courts to adapt the rule as society changes. For any of these reasons, the legislature may have passed on to the courts more work than, in the abstract, it was required or wise to do.

There is substantial agreement in modern thought, however, that some legislative imprecision is unavoidable. In the first place, if words by their nature are imprecise, sentences constructed out of words will also, necessarily, have areas of imprecision. A legislature can to a certain extent eliminate these areas of imprecision by preferring precise words over imprecise ones, or by adopting definitions which point in the direction of its thinking. It can never completely eliminate imprecision, however, and at some point the job of explaining what it meant would begin to take too many words. Such explanations would take time perhaps better given to other tasks, and could themselves be a source of confusion. Secondly, a legislature necessarily works in the abstract. It does not have the advantage of the concrete cases which come before the judge, but deals with the general problems of society that are called to its attention. It would be unreasonable to expect the legislature to consider and decide in advance every hypothetical case that might arise under its enactment; it is hard work enough to frame language which will deal satisfactorily with the major problems with which it is concerned. Statutes which attempted to do more would be unmanageably large, and might introduce more difficulties than they solved.

One comes to the conclusion, then, that not only do difficult problems of interpretation arise more often than one might think, but that this job is an entirely natural one for courts to perform. At one point, political theorists were fond of saying that "The courts should be only the mouth that speaks the law," and that judicial creation of law was an abuse of power to be sternly avoided;[6] The legislature determined the law, and the courts merely applied it to the facts of cases which came before them. We see now that this cannot always be the case. The legislature's pronouncements, necessarily, will leave areas of choice, often substantial, in which the judge must decide what the law is to mean. The inability and undesirability of the legislature to perceive and settle every conceivable case in advance, the necessity that it frame its enactments to fit a few clearly seen "main cases," also imply that there will be many cases in which the judge must choose what is to be the law. In some cases—most, if the legislature has done its job well— it will be clear that the law does or does not apply, that a particular structure is or is not a "house." In others, however, the law will be unclear—the judge will be free, so far as statutory language is concerned, to choose either for application or against it. By his choice, by sending a man to jail for more or fewer years or by freeing him, he makes the law.

If this is true, then it would seem that the judge who seeks to find in statutory language a rigid, single answer to every case is closing his eyes to reality. There may be cases for which the statute provides answers but there are also cases for which it does not. When one of the latter cases is presented, it is useless to think that the answer will be found in the "true" definition of a disputed word, unless the legislature has provided one; rather, the job of the judge is to ask. How shall *I* define this word? That is, as stated above, he first seeks not the one and only true meaning of the statute, but to discover what is the range of possible meanings in the case before him. He then has to choose one, to decide the case. Before making the choice, he may ask, in the words of a Swedish jurist, "Where do I go for guidance?"[7]

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[6] Glaser, "Principe de la légalité en maitére, notamment en droit codifé et en droit coutumier," *Revue du droit pénal et criminologie*, Vol. 46 (1966), p. 899.
See also the works cited within at Section IX–B, p. 1954 ff., notably:
Mashoub, work cited above at note 1, historical introduction and p. 50.
Thornstedt, "The Principle of Legality and Teleological Construction of Statutes in Criminal Law," *Scandinavian Studies in Law*, 1960, p. 211, 213 ff.

[7] Schmidt, "Construction of Statutes," *Scandanavian Studies in Law*, 1957, p. 157.

IV. LEGISLATIVE PURPOSE AS AN AID TO UNDERSTANDING STATUTES AND MAKING CHOICES [8]

Almost instinctively, the interpreter's first response will be to ask "What is this statute all about? What was it meant to do?" That is, he will make several important assumptions: (1) that legislative activity is purposeful, that is, undertaken to accomplish some social ends or goals; (2) that the language and form of legislation are chosen to reflect these purposes; and (3) that application of a statute should be limited to the cases indicated by its purposes, so that, in connection with our earlier assumption, for a statute to apply, its words and purposes should both bear on the case at issue. These assumptions are important enough to merit examination.

The first, that legislative activity is purposeful, reflects a commonly shared attitude towards life in general. We believe that there is some reason in what we do—some goal towards which our activity is directed. Legislatures, in particular, are constituted to formulate directives—laws—on important issues of social policy. It is what we expect them to do; it would be ground for serious criticism of a legislature if it were found doing something else. Almost as soon as we see a statute, we ask "What is this for? What purpose does it have?"

The second assumption, that the words and form of legislation are chosen to reflect its purposes, is subject to the objection—as indeed is the first—that sometimes legislatures are devious, or even irrational. If the assumption were not generally true, however, the legislature, and not the assumption, would be generally held to blame. Again, this is part of what we expect a legislature *ought* to do. Indeed, when courts consistently act on this assumption, and treat the words and form of statutes as if they embody its purpose, they help to make the assumption valid. The legislature will quickly learn to make the words and form of its statutes conform to its purposes if it is aware of this court practice and wishes its purposes to be enforced.

The third assumption, that legislative purposes are binding on courts, like the assumption that legislative words are binding on courts, reflects a certain attitude on the proper relationship between courts and legislature in the Ethiopian governmental structure. Since it is in the nature of a limitation on judicial freedom, we postpone examination of it until later in this piece. For the moment, it will simply be accepted as a necessary element of interpretational choices.

Before seeing how one might discover legislative "purposes," it is important to define the term as it is to be used in this article. By "purpose" is meant the end or goal which the legislation in question has in sight—the overall regulatory impact which it appears the legislature meant the statute to have. Thus, Article 1 of the Penal Code states that the "purpose of the criminal law," using the word in this sense, "is to insure order, peace and the security of the State and its inhabitants for the public good." This use of the word purpose, and any discussion of legislative purpose, is to be distinguished from what one sometimes hears referred to as "legislative intent." Very often one hears what may be a permissible question, such as "What would the legislature have done

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[8] That legislative purpose should be consulted in determining statutory meaning is now a commonplace observation, which would be made or assumed by any reputable commentator. The argument today is over how this should be done. The following works give an introduction to some of the techniques more commonly proposed:

Ekelöf, "Teleological Construction of Statutes," *Scandinavian Studies in Law*, 1958, p. 77.

Frankfurter, "Some Reflections on the Reading of Statutes," *Colum. L. Rev.*, Vol. 49 (1947), p. 526.

Geny, *Method d'interprétation et source scn droit privé positif* (Librairie Générale . . . Paris, 1932) 2 vols., *passim*.

J. Graven, "L'analogie en droit pénal suisse," *Revue de science criminelle*, 1954, p. 653.

Hart & Sachs, work cited above at note 1, Ch. VII, *passim*.

Kantorowicz & Patterson, "Legal Science—A Summary of Its Methodology," *Colum. L. Rev.* Vol. 28 (1928), p. 679.

Mahsoub, work cited above at note 1, pp. 54–66.

Payne, work cited above at note 3, *passim*.

Radin, "A Short Way With Statutes," *Harv. L. Rev.*, Vol. 56 (1942), p. 388.

Schmidt, work cited above at note 7, *passim*.

Stone, work cited above at note 3, pp. 31–34.

Thornstedt, work cited above at note 6, *passim*.

about this problem if it had thought of it?" turn into a very dubious one, "What did the legislature intend to do about the problem before us?" In the last question, the speaker is implying that on some specific question whose answer is unclear from the statute itself, the legislative body actually intended to provide an answer, which, if only it could be found, would solve the case. This notion that there is some preordained answer which has only to be found is a very appealing one, for judges do not like to admit that sometimes they make law by their decisions. Nonetheless, it must be rejected. We have already seen that legislatures very frequently do not even think of, much less solve, specific problems which may present themselves to judges but find no clear answer in legislative words. Whether, indeed, one can ever speak of a large body of men, or a majority of them, as having an "intent" on a specific question not clearly settled by a statute's words is very dubious. It will be hard enough for the judge to determine the regulatory policies and goals of an enactment in the large, without his trying to pretend to himself that the enactment provides only one answer to a problem which his research has already shown could be answered in several different ways without departing from permissible meanings of the statute's words.

Indeed, an inquiry into legislative purposes will often do no more than help the interpreter to identify the clear cases of application and non-application, and indicate some considerations which may be helpful for resolving the cases in between. This is so, first, because purposes will often be stated or revealed at a level of generality so great that they will not be very helpful in solving any particular problem. To say, for example, that the purpose of the Penal Code is to control objectionable social behavior, or even that the purpose of the provisions regarding homicide is to distinguish on a rational basis varying degrees of culpability regarding the killing of a human being, is not very helpful for solving the particular problem of the relationship between Articles 523 and 524. Only as purposes of considerable specificity can be inferred from a statute will these purposes help materially to resolve the possibilities which face the interpreter.

Second, just as words are imprecise and may permit a wide variety of meanings, so are purposes likely to be uncertain in their formulation and scope. Very often, if not always, a legislature will be seeking multiple and partially conflicting goals; or members may have been forced to compromise or obscure the policies they prefer as individuals in order to reach agreement; or the legislature simply may not have considered the relationships and consequences, of the various policies it enacted. In the Penal Code, for example, the purpose of insuring "the security of the State" may often conflict with that of assuring "the security of . . . its inhabitants." Among the events which the latter would wish to be secure from are unwarranted punishments, or the risk of being put on trial although innocent of wrong-doing. In the short run, at least, measures to insure the security of the State might substantially infringe on these interests. Thus, there is an almost necessary inexactness and ambiguity about legislative policy, which should make the interpreter hesitant to formulate purposes too precisely, or to extend any one purpose he may find in a statute to its maximum possible extent.

These cautions, however, should not be permitted to obscure the basic point—that within the limits of common sense and justice, those who are engaged in the business of interpretation instinctively and universally find it meaningful to ask "Now what is this law all about? What policy was it enacted to enforce? What problem was it addressed to? What change or result was it to bring about?" In a case where statutory language alone is insufficient to answer the question whether a particular statute is to be applied or not, an investigation of statutory purpose carefully considered, may at least serve to narrow the areas of doubt; if it does not produce a single, "correct" answer, it may at least assist the judge to avoid an objectionable result and provide some hints as to how he may exercise his freedom to choose among the permissible ones.

To take a concrete example, suppose again the case of the Afar who killed another man when he found the other taking parts of his dwelling from the back of his camel. The Afar has been charged under Article 523, but insists he can be convicted only under Article 524, because he was "resisting the violation, by force or trickery, of the privacy of his house. . . ." Let us suppose also that you agree that the words of the statute could be given the meaning the Afar urges, and are wondering whether they *should* be given that meaning.

A reading of the two statutes informs you that both Article 523 and Article 524 deal with homicide, and that Article 523 will apply in "circumstances other . . . than those specified in Article 524." The penalty provided by Article 524 is quite a bit lower than that stated in Article 523 (although you know from your search for possible relevant law that the latter penalty might be mitigated under the provisions relating to legitimate self-defense. A clear case in which Article 524 would apply might be if the Afar had erected his dwelling and was living in it when the deceased tried to intrude. A clear case in which Article 524 would not apply, and Article 523 would, might be if the deceased was trying to take the Afar's unloaded camel. What purpose might the legislature have had in making this distinction? What characteristics does a "house" have in Ethiopian society, as distinct from a camel, which would lead the legislature to require that violent acts in its defense must be excused to a considerable degree, while the degree of excuse for violent acts in the defense of other property is left much less certain?

Here are only a few of the possible answers to these questions: There may have been a rash of murders in connection with house-breakings which had come to the attention of the legislature; they were dealing with a problem of general occurrence. The legislature might have considered that a "house" was the kind of property having the greatest monetary value to Ethiopians, and that a killing in defense of it was therefore substantially excusable. Or, it may have considered that Ethiopians had a deep emotional need for privacy, and would consider any intrusion into the place where they were dwelling as provoking; a killing thus provoked should be substantially excused. Or, the legislature may have been aware, because of one or more of the above considerations, that many Ethiopians considered such killings completely justified, and they have wished to make it clear by a special enactment that this was not true; thus, by enacting Article 524, it may have been announcing special limits on the application of the doctrine of legitimate defense to the defense of property—it may have been emphasizing that such acts were to be punished, rather than that they were to be punished only lightly.

In order to make wise choices among these or other possible policies, any of which might be embodied in the provision, it is necessary to know something both about the general characteristics of Ethiopian society and about the framework and assumptions of a code. The author knows far less about the former than his Ethiopian readers will. It is to the latter considerations, which may prove helpful in determining both purpose and meaning, that the article now turns.

V. SOME CONSIDERATIONS OF STRUCTURE [9]

A. The Penal Code Was Enacted in Code Form

The statement that the Penal Code was enacted in code form might not seem to have much significance for interpretation of any particular provision. In fact it does, because of what is implied b the use of "code" form. As used in Ethiopia and Europe, this form is usually reserved for a body of laws which are drafted at one time, by one person or a closely cooperating body of draftsmen, with the intention of stating clearly and systematically all the rules applicable in a given area of law—for example, penal law. This description certainly fits the Ethiopian Penal Code, and may be contrasted with the situation reflected in the Consolidated Laws of Ethiopia. The statutes in the Consolidated Laws were drafted at many different times, by different bodies of draftsmen, to cover a very diverse body of subjects in an essentially random manner. That is, the legislator in these laws was dealing with small problems, as they arose, and was making no particular effort to achieve unity, consistency, or thorough coverage in a broad area of law. The contrast between the characteristics of a code and the characteristics of an amorphous body of statutes such as the Consolidated Laws reveals a number of helpful assumptions which may be made in interpreting a code.

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[9] Specific justification for the positions taken in this section *vis á vis* the Ethiopian Penal Code may be found in:
Graven, work cited above at note 2, p. 281 ff.
Exposé de motifs, collection cited above at note 1.
See also: Mashoub, work cited above at note 1, p. 57 ff.
Sereni, "The Code and the Case Law, in Schwartz (ed)., *The Code Napoleon* (University Press, New York 1956), p. 55.
Stone, work cited above at note 3, p. 1930 ff.

1. It is fair to attribute consistency to the Penal Code, and thus to seek consistency in results under the Code.

The Penal Code was drafted in one effort by a body of draftsmen, principally one man, in an attempt to state clearly and concisely the complete system of penal law which was to be applied in Ethiopia. This effort suggests, further, that the draftsmen would have attempted to construct a rational framework for their code. One would expect that this framework would produce answers for the major problems of criminal law, and that these answers would accord with Ethiopian notions of justice and fair play. One would expect that the framework would not produce contradictory or conflicting answers for the same problem, and that cases which Ethiopians regarded as similar would not be treated in conflicting ways or lead to contradictory results. That is to say, given our knowledge of the circumstances which produced the Code, we feel justified in treating it as a rational system, one which will lead to results which are not contradictory and which can be explained in a manner conformable to Ethiopian notions of justice. If we could not do this, we would think the drafters had done a poor job indeed. It is what they were asked to do.

If consistency is one of the characteristics of the Penal Code—or, to put it another way, *if the achievement of a consistent system of law is one of the purposes behind enactment of the Penal Code*—then in interpreting the Penal Code one should both reason from an assumption of consistency in its provisions and seek consistency in applying it. This means, first, that one should never try to interpret a Penal Code provision in the abstract. It must always be examined in its relationship to the other provisions of the Code, in order to see what part it might play in the overall scheme. We have already seen this process, in part, in our discussion of the relationship of Articles 523 and 524 in connection with the case of the Afar. That is, we assumed that Article 523 and Article 524, both of which are concerned with a form of "homicide," are concerned with different types of homicide, and that there should be an understandable and ascertainable basis for deciding what homicide falls under which provision. A second implication which may be drawn from the Code's internal consistency is that if the meaning of one provision of the Code has been established or is clear, one can reason from the meaning of that provision to what ought to be the meaning of another. Thus, knowing the meaning of the word "house" in Article 524 and the relationship of Article 524 to Article 523 may help to establish the meaning of the word "house" in Article 542 and the relationship of Article 542 to Articles 538 and 539. Thus, one can properly look for patterns, for a structural framework, or for common features which may help to elucidate the Code's meaning. Article 524, an extenuated form of homicide, refers to resisting the violation of the privacy of a house, as does Article 542, an extenuated form of the injury. There is a strong suggestion in this fact that the provisions should be given the same meaning—that they should be interpreted consistently.

The same conclusions could not be reached under the Consolidated Laws. If a Proclamation of 1956 had a provision similar to a provision in another Proclamation, say of 1963, one would have to be very careful about reasoning from one to the other, even if the two Proclamations dealt with the same subject. Were they drafted by the same persons? Was consistency an object? Is there a common structural framework or social context? The answer to each of these questions is likely to be in the negative, and thus to refute any hypothesis of common meaning. If we find that the hypothesis of consistency is valid and helpful in the case of the Penal Code, it is because of the peculiar and important process which gave it birth.

This suggests that any case where unity of effort was lacking may be an important exception to the hypothesis of consistency in the Penal Code. For example, if one knew that there had been legislative amendments to the Code, either at the time of the draft or thereafter, one could not be certain of consistency in the areas affected by the amendments, unless a serious and thorough effort to produce it had been made. Unfortunately, the Penal Code bears evidence that in the past such efforts have been lacking. The draftsman originally provided in the General Part that the consent of an injured person was a defense to a criminal prosecution, except in certain specified cases. Other provisions of the Special Part, for example Article 542(1)(c), were written to reflect these exceptions. It was subsequently decided to change the Gen-

eral Part provision to make consent *no* defense; this decision is reflected in Article 66, which states that "the consent of an injured party . . . does not relieve the offender of criminal liability." It appears, however, that Special Part provisions such as Article 542(1)(c) were never rewritten to reflect this change. In such a case, where the legislature has apparently abandoned the effort to produce consistency, it would be foolhardy for an interpreter to assume he can find it. Of course, he may still find reason to attempt to minimize the legislative error by seeking to produce consistency, if he can, through his interpretations. But this will be an entirely creative role.

2. It is fair to assume that language usage is consistent throughout the Code.

The assumption that language usage will be consistent throughout a code is only a particular example of the overall assumption of consistency, but deserves special mention because of its importance. What the assumption means is that if a particular word—say, "house"—can be established to have a certain meaning when it is used at one point in a code, it is at least likely to have the same meaning at any other point in that code.

We saw before that most if not all words have a fringe of uncertainty about their meaning. Different men will understand them in different ways. It is at least likely, however, that any one man—or group of men working closely together on a rigidly drafted legal document—will attribute a fairly fixed meaning to any particular word; each time he uses that word, he will use it in the same way. Knowing that statutory draftsmen strive for consistency of expression and word usage, as they do, increases the confidence that can be put in this assumption. Again, the assumption could not be made about a word appearing in different items of the Consolidated Laws; in this case it will have been written at different times by different men for different purposes, so that there is no reason to attribute a uniformity of meaning.

It should be pointed out that this assumption has double consequences. One, already seen, is that if the meaning of a word is uncertain in a particular context in the Code, its meaning can be discovered from the meaning which the same word has elsewhere in the Code, if its meaning is better established by these other uses. The second consequence is that once a meaning is given to a word appearing at one point in the Code, that meaning is likely to be carried over in following cases to other points in the Code where the same word appears. Thus, the principle of consistency not only helps one draw assistance from past interpretations; it also warns that one's own interpretation is likely to be extended to other parts of the Code. Thus, interpretations should not be made in view of one provision only, but should take account of the principle of consistency by considering all appearances of the point in issue throughout the Code. What effect one must ask, will an interpretation have *elsewhere* in the Code?

It cannot be too often repeated that, as is the case for every other suggestion made in this article, the correctness of this assumption in any particular case is only probable. It is not certain. Draftsmen, like the rest of us, are human. They make mistakes. Even though they work hard for consistency, so that it is usually appropriate to assume that words are consistently used, they sometimes fail, and lapse into inconsistency. This danger is particularly great for certain words expressing legal conclusions, such as "property," "act" and "intent." These words have a great variety of accepted meanings, which depend heavily on the context in which they are used. One should always be very careful to see whether the draftsmen have succeeded at the very difficult job of using such words clearly and consistently. Moreover, in Ethiopia there is the special consideration that the Amharic codes on which the courts rely are translations from an English or French original. The draftsman's hard work to obtain consistency in using language can easily be lost if the translator or translators are not sensitive to this problem and do not themselves work hard for the same goal.

3. At least initially, one may seek solutions to all problems within the framework of the Code.

Since a Code is intended to be a complete statement of the law on a particular subject, one may assume, at least initially, that there are no large gaps or holes in it—that every problem in the area of law to which the code relates can find some solution within its framework. As an attempt to set down a comprehensive body of rules, a code is likely to take account of all the major problems on that subject, at least if it is as well drafted as the Ethiopian Penal Code was. It follows that in solving a legal problem on that subject, one can start on the assumption that a solution may be reasoned out or found within the framework of the code.

This assumption is particularly strong in the case of the Ethiopian Penal Code, in which the drafter has essayed a complete statement of doctrine in the General Part, along with the catalogue of crimes in the Special Part. Thus, while certain European Codes leave a variety of doctrinal issues to courts for elaboration—for example, the defenses of necessity and responsibility—the Ethiopian Code seeks to elaborate a rule on all issues which might arise regarding guilt or degree of punishment.

It would be a mistake to take this observation so far as to deny that judges have any creative role, to state that the Code excludes judicial creativeness. As already has been noted, the legislature is working with an imperfect medium of communication, language. The legislature does not foresee, and could not be required to foresee, every possible case to which its product might apply. It is the judge who will get such cases, and will have to decide them. All that can and should be said is that the attempt at comprehensiveness and coherency offers an incentive and rationale for seeking results within its terms.

4. It is fair to interpret the code to avoid redundancies between provisions

In a simple collection of statutes passed at many different times and for many different reasons, such as the Consolidated Laws, one might almost expect there to be a certain amount of redundancy between provisions. The legislature passing one statute might not be aware of another, passed many years before to deal with a slightly different problem. Even if they were aware of it, they might not see how someone from the outside would think the two could conflict. In the presence of such a conflict, one might have to consider whether one statute was meant to repeal the other in part or in whole; it could be very difficult to determine what the legislature intended their relationship to be, if it had any intent on that issue at all. The bulk of the work on the Consolidated Laws has been in determining just such difficult questions.

Unlike a collection of statutes, a code is written all at one time. The draftsman, who intends to be clear and concise, will have intended each provision he wrote to have some unique function. He would not knowingly include some superfluous provision or repeat something already provided for, since the only effect of this would be to confuse. Thus, just as the unitary character of a Code and the effort its authors have made to achieve consistency justify an assumption that words are used in the same way throughout, these same factors justify the assumption that apparent redundancies between provisions are unintended and may be eliminated by interpretation. Thus, when one finds two articles which seem to govern the same facts, one may look for an interpretation which will give to each a separate area of application.

For example, Article 594(2) authorizes rigorous imprisonment for the person who "*deliberately* performs (an indecent) act in (the) presence (of an infant or young person)." Article 608(2) provides only for simple imprisonment for the person who "*knowingly* performed (an obscene) act . . . in the presence of infants or young persons." It would seem that these provisions were redundant, or almost so, since in ordinary usage the words "deliberately" and "knowingly," which mark the only real verbal difference between the two provisions, have

approximately the same meaning. By hypothesis, however, we must assume that these articles were meant to have separate functions—as, indeed, the differing penalties also suggest. We must look for those functions someplace other than the language itself.

One must, however, distinguish this case, where apparent redundancy should be avoided by interpretation, from cases of intentional partial overlap among closely related provisions. The language of Articles 594(2) and 608(2) is so similar that one fails to see any element which might be required for the offense under the one, but not the other; moreover, the two articles are somewhat separated from each other in the Code's organization, which implies that they are not clearly related in function. This apparent, inexplicable redundancy should be avoided by interpretation if it is at all possible to do so. On the other hand, Articles 630 and 635, describing ordinary and aggravated theft, are a good example of the kind of partial overlap which the draftsman has often intentionally introduced into the Code's structure. He has foreseen that theft may occasionally be committed under such circumstances as to merit unusually severe punishment. It is still theft—that is, all the elements of Article 630 must be satisfied—but it is aggravated by the presence of one or more of the additional elements described by Article 635. Thus, any person who could be convicted for aggravated theft under Article 635 could also be convicted for ordinary theft under Article 630, if the prosecutor for some reason chose to charge him with the ordinary offense. There is an overlap here, in the sense that two provisions, with differing penalties, could be applied to the same criminal acts. This, however, is not a case of complete redundancy, where two statutes seem to match identically in their coverage; there is an obvious relationship between the two provisions to explain the overlap which seems to exist. Indeed, even though the prosecutor could bring under Article 630 a prosecution which properly falls under Article 635, we might consider that he was abusing his powers if he often followed this practice. Where this partial overlap among closely related provisions appears, there will always be some unique element, such as the aggravating circumstances of Article 635, to show the intended distinction.

B. The Organization of the Code

1. The formal structure

As we have seen in Part II, in drafting the Code the draftsmen created a structural framework, or organization, within which to express their conclusions regarding criminal policy. This organization consists of a series of subdivisions of increasing specificity, each with a title reflecting the place of that subdivision within the Code's structure. In Part II, we saw how to use this structure to find possibly relevant law; here, we will see how it can be used to help understand—interpret—the law.

The organization can be used in this way because the place of any article in the structure of the Penal Code gives important indications of its purposes, through the titles of the subdivisions to which it belongs. As an example of how these indications can be used, let us consider further the apparent conflict between Article 594(2) and Article 618(2). A full description of the place of each of these articles in the Penal Code could be given as follows:

Article 594(2) Penal Code:
Part II, Special Part; Book V, Offenses Against Individuals and the Family; Title IV, Offenses against morals and the family; Chapter I, Offenses against morals; Section I, Injury to sexual liberty and chastity; Article 594, Sexual outrages on infants or young persons.

Article 608(2) Penal Code:
Part II, Special Part; Book V, Offenses against Individuals and the Family; Title IV, Offenses against morals and the family; Chapter I, Offenses against morals; Section IV, Offenses tending to corrupt morals; Article 608, Public indecency and outrages against morals.

From this description, one might conclude that the two articles share certain purposes: to identify and prohibit specific offenses against individuals and the family, in particular, offenses against morals. In their more particular purposes, however, the articles seem to be distinct: the function of Article 594 appears to be to deal with acts which are injurious to sexual liberty and chastity of individuals, in particular, the sexual liberty and chastity of infants or young persons; the function of Article 608 appears to be to deal with acts which *may be* injurious to the morals of the public at large—that is, which tend to corrupt them—in particular, public indecency and acts offending public morals. One provision is quite specific and deals with what the legislature characterizes as an *actual* injury to the sexual interests of particular individuals; the other is much less specific, and deals with the *possibility* of injury to the diffuse sexual interests of the public as a whole.

This analysis suggests at least a possible distinction between the language of Article 594(2), relating to one who "deliberately performs," and the language of Article 608(2), relating to one who "knowingly performs," an indecent act in the presence of a minor. From the language of the articles would deduce that it would be necessary in both cases for the offender to be intentionally performing some sexual act on himself or a third person, in the presence of an infant or young person, knowing that that person is there. Can one go further and say that, in some cases, this activity involves a direct injury to the sexual interests of the infant or young person, (Article 594), whereas in others it will only threaten to corrupt him (Article 608)? There might be some cases where the infant was forced or enticed to be present—where the sexual acts were performed "for his benefit," or with the intention of involving him or affecting him. In other cases, the presence of the infant or young person may have been accidental so far as the offender was concerned; he may have had no desire to have the infant or young person present, or to involve him in any way, but merely failed to desist from his activity when he became aware of the other's presence. The purposes of Article 594, as indicated by its place in the Code's table of organization, suggest that it should apply to the first kind of case; those of Article 608 suggest that it should apply to the second.

2. The Relationship of the General and Special Parts

a. In general.

Perhaps the single great omission of the Ethiopian Penal Code is its failure to state expressly the relationship between its General Part, Part I, and its Special Part, Part II. Article 3, al. 2 states "that the general principles embodied in this Code are applicable to (Police regulations and special laws of a penal nature) except as otherwise expressly provided therein"; and Article 690, the first article of Part III of the Code, the Code of Petty Offenses, states that "In all cases where the provisions of this Book (the General Part of the Code of Petty Offenses) are either silent or contain no contrary indications or do not provide exceptions, the principles and rules of the General Part of the Penal Code shall apply to petty offences . . . due regard being had to the nature of the case, as well as to the spirit and purposes of the law." One is left to infer the obvious, as indeed Ethiopian courts have almost uniformly done, that the "principles and rules of the General Part of the Penal Code" *also* apply to all offenses defined in the Special Part.

The full implications of this rule are not uniformly respected, however, so that it may be helpful to illustrate them by means of a common example. Article 523, seen before in another context, states that "whosoever commits homicide in circumstances other than (aggravated or extenuated circumstances, dealt with in Articles 522 and 524) is punishable with rigorous imprisonment from five to twenty years." Does this article state an intentional offense? Must the intent to commit the offense include an intent to produce death? What does "intent" mean in this case?

The answer to the first question is "Yes, the article *does* state an intentional offense, even though it does not use the word intent." The General Part, which

we have said applied to this and any other article in the Special Part, states, Article 57(1), that an offense must be either intentional or negligent. Article 59(2) of the General Part adds that a negligent act is punishable as an offense "only if the law so expressly provides." This suggests that the word "negligence" must be used someplace in a statute if negligent offenses are to be punished under it, and indeed Article 526 uses this word in connection with homicide. Both because Article 523 does not use the word "negligence" and because that word appears in another article dealing with homicide, which we would presume Article 523 was not meant to duplicate, it must be concluded that Article 523 does not deal with negligent offenses. It therefore must state an intentional offense; that is to say, intent is a necessary element of the offense. The General Part requires this, even though the Special Part provision makes no direct reference to it.

According to the official Amharic version of Article 58(1) and the French draft, the answer to the second question is also "Yes, the notion of intention includes the attitude of intention towards the specific result, in this case death." The answer under the English version is less certain, because of a discrepancy; but as stated at the beginning of this article, we will assume that the Amharic controls. (Indeed, one would argue it should, where it faithfully reflects the French draft, as here.) Thus, the General Part requires not only that there be "intention"—whatever that may be—for a violation of Article 523, but this "intention" must include the happening of a specific result, death. It is possible to cite many cases in which there appears to have been no awareness of this effect of the General Part upon a frequently used provision of the Special Part.[10]

The final question was, "What does the word 'intention' mean in this case?" This is not a question that can be briefly answered, or that will be answered in this article; it is one of those questions on which P. Graven's commentary can be most helpful as a starting point for learning or analysis.[11] But several important points can be made. First, the drafter has made a start at a definition in Article 58. This definition will not convey the same meaning to everyone who reads it, and will have to be interpreted in the cases. The author is not yet aware of any case in which this task of interpretation has been undertaken. Second, because the definition of intention appears in the General Part, and given our assumption of consistency, whatever "intention" means for the

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[10] The following examples can all be found at the Haile Sellassie I University Faculty of Law Library, and in Strauss, *Supplementary Materials for Penal Law* 1967–68 (unpublished, Faculty of Law, Haile Sellassie I University):

Crown v. Osman Omar, A.A.H.Ct., Cr. C 255–58 (accused pushed deceased after drinking with him; "it is evident that (accused) was only relaxing and was not trying to harm the deceased. . . . The Court finds the accused guilty of violating Article 523 . . . since he has caused the death of his friend through his carelessness.").

Crown v. Ibrahim Adams Abatiku, Fed. H.Ct. (Assab), Cr. C. 1–51 (accused struck assailant with a "not large" stick; court concluded that the blow caused death, that "the accused did not commit the act of striking with intention," but acted in excess of self-defense and therefore was guilty under Art. 523).

Crown v. X, Asmara H. Ct., Cr. C. 238–57 (accused struck deceased with stick under provocation; no indication of intent to kill; court convicted, apparently under Art. 523).

Public Prosecutor v. Fikru Birru, H.Ct.A.A., Cr. C. 761–56 (accused hit and then kicked deceased after allegedly being insulted; no indication of intent to kill; conviction under Art. 523).

Crown v. Bekele Kidane, Jimma H.Ct., Cr. C. 7–57 (accused and deceased, both youths were fighting with small sticks at deceased's instigation; no indication of intent to kill; because of deceased's provocation, charge reduced to Art. 524).

Haddis Gebre Igziabher v. Public Prosecutor, Sup. Imp. Ct., Cr. Ap. 28–58 (accused hit deceased with a stick on the back of his neck while trying to recover some grass which deceased allegedly had stolen; deceased apparently hit his head on a stone while falling; no evidence of intent; "in view of the fact that there has been proof as to appellant's killing the deceased (i.e., causing his death,)" conviction under Art. 523 affirmed).

[11] P. Graven, work cited above at note 1.

purposes of Article 523, it will also mean for any other article of the Special Part to which it is relevant. The "intended result" may vary with the crime—death for Article 523, injury for Article 539, etc.—as may other particulars; but the general formula or criteria will have to be the same. This is the second edge of the consistency sword, that the judge must interpret with an eye to the results his interpretation would produce in other cases; he must take account of the demands of consistency as well as use the inferences it makes available to him. Finally, any judge who does undertake to interpret this important concept will find that the words of the definition offer him a fairly wide range of choices of possible meaning. If the techniques suggested by this article are relevant at all, they are as relevant to this task as any other.

b. "In case of conflict, the provision of the Special Part prevails over that of the General Part."

The above phrase, or something like it, is frequently referred to as a maxim of code interpretation. It is, indeed, perhaps the most frequently referred to maxim. This fact tends to reinforce the validity of the maxim, since it means that draftsmen, too, are likely to be aware of it. Knowing that the maxim is likely to be applied, they will put the exceptions to their general rules into more specific provisions, confident that when judges find these exceptions they will say, "The specific prevails over the general," and thus interpret the statute as the draftsmen expected. This fact, in turn, should make judges more confident of the rule.

The rule thus has convenience to recommend it. It also reflects a common sense notion of draftsmanship. Any general rule is likely to have a few special exceptions. But if, as in the Penal Code, a statute is divided into General and Special Parts, it may be quite unwise to list the exceptions in the General Part. Referring to specific cases there will detract from the organization of the whole, and may tend to obscure the purport of the general rule behind the exceptions; the reader will be unable to judge how universal these exceptions are.

The rule is also a sensible accommodation to the likelihood that the drafters will not be able to avoid inconsistencies completely in their work, however hard they try for consistency. In choosing the specific provision over the general one in such a case, one is making the common sense judgment that the drafters were likely to have been thinking more precisely about the narrower issue.

It is very important, however, to hesitate before concluding that there is some inconsistency between the General Part and a provision of the Special Part, and thus leaping to application of the maxim. The overriding assumption frequently mentioned above is that the provisions of the Code are internally consistent. Unless a Special Part provision expressly refers to its exceptional status, this assumption requires that every effort be made to achieve consistency before an "inconsistency" is found. For example, the silence of a Special Part provision should rarely if ever be taken to indicate inconsistency with the General Part. Thus, the fact that Article 523 is silent about "intention" is not in itself reason to conclude that the article is inconsistent with Articles 57–59 and should be applied without reference to intention, despite them. The article can be interpreted consistently with the General Part without distorting its language, and there is no reason to suppose a contrary legislative purpose. Consequently, consistency must be favoured; Article 523 must be construed as embodying an intentional offense.

It is sometimes possible to consider an apparently superfluous or inconsistent Special Part article as in fact explanatory of the General Part provisions it seems to contradict. That is, the Special Part article may serve to illustrate or limit the operation of the General Part provision in an instructive way. One possible example of this may be seen in Article 524, which was discussed at

some length above in connection with the "house" of an Afar tribesman. We may now be in a better position to suggest answers to some of the questions put there.

The General Part of the Penal Code includes provisions on legitimate defense and excess of legitimate defense, Articles 74 and 75. These articles recognize that defense of property may be "legitimate defense," entailing no punishment, or "excess of legitimate defense," entailing apparently complete freedom on the part of the judge to reduce penalty. Whether it will be one or the other depends on a judgment whether the person "exceeded the limits of self-defense by using disproportionate means or going beyond the acts necessary for averting the danger." Acts within these "limits" are not published at all; acts outside them are punished to a degree which appears to be entirely at the discretion of the judge.

Dr. Graven, in his commentary on the Penal Code, has complained that Article 524 unnecessarily duplicates Articles 74 and 75, and by providing a specific range of penalties, is inconsistent with them. One readily sees that the crime defined by Article 524, killing "in resisting the violation, by force or trickery, of the privacy of his house . . .," could as easily be characterized as an act of legitimate defense, or perhaps in excess of it; the individual kills while defending property against the unlawful assault of another. Thus, it would appear that the Afar in our hypothetical could as easily be prosecuted under Article 523, and then raise the issue of legitimate defense. If he did this, a judge interpreting Articles 74 and 75 might decide that he had not "exceeded the limits," and so could not be punished at all; or that he had "exceeded the limits." and so could be punished by any penalty from a $1.00 fine to 20 years rigorous imprisonment. Since the General Part provisions seem adequately to cover the case, Dr. Graven concluded that Article 524 was unnecessary; it is inconsistent with the General Part to the extent that it provides a more restricted range of penal alternatives.[12]

A more helpful approach, in the author's view, is to look at Articles 74 and 75 and ask if it is very clear what they mean. Where are the "limits" of legitimate defense? How is a judge to exercise his discretion if he finds they have been exceeded? Have they been exceeded if an Afar kills a man who is trying to steal his house from the back of his camel? If he kills a man who is trying to enter his erected house? If he kills a man who is trying to steal his camel? It should be apparent that if these questions were to be answered by reference to Articles 74 and 75 alone, there might be a great deal of disagreement as to what the answers should be. With this in mind, look again at Article 524. Is it accurate to say that this describes a case or cases in which many Ethiopians—possibly including judges—would feel that killing in retaliation was completely justified? In the author's judgment, such a statement would be accurate. That being so, it appears to him that the function of Article 524, and other articles like it, is not to contradict Articles 74 and 75, *but to explain them.* The rather abstract language of the General Part provisions—"exceeded the limits." "disproportional means," beyond the acts necessary"—could easily be understood in different ways by different persons or in different parts of the country. As was mentioned at the beginning of this article there is no settled and widely available body of cases, commentary, or other source material which might help to produce uniform results in cases decided at different times and places. To make the language of the General Part more concrete, what the legislature has done is to fix a reference point. It has taken a very common case, and has decided it. It has decided that this case represents an excess of self-defense, and that it deserves the stated range of punishment. This both fixes and emphasizes a moral norm—that killing in the defense merely of property is not justified; it also serves to explain the general articles about legitimate defense in a way that should help a judge to make decisions under them.

[12] *Id.*, pp. 216–17, 229–30.

As an example, consider the case of an Afar who kills a man who is trying to steal his camel, *not* his house. He is prosecuted under Article 523, and pleads legitimate defense. Has he "exceeded the limits"? A judge can look at Article 524 and reason from it that the legislature has concluded that someone who killed another in defense of his house exceeded the limits of legitimate defense. He might then conclude that, from an Ethiopian and probably the legislature's point of view, killing someone while defending your house is more excusable than any other killing in the defense of property. If killing in defense of a house is more excusable than killing in defense of a camel, and still is punishable as an exceeding of the "limits," then the Afar's act in killing someone who was stealing his camel must have exceeded the "limits." One limit is known; the taking of life in defense of property exceeds it. If the judge wants to know, "How severely shall I punish him?" Article 524 again serves as a guide. Here is a case where, by hypothesis, the killing is rather understandable: the legislature has provided a penalty of up to five years simple imprisonment. If there were no extenuating circumstance, on the other hand, the judge would condemn the Afar to five to twenty years rigorous imprisonment. It would be reasonable, would it not, to find a penalty in between—calculated by some kind of comparison, however difficult, among social attitudes towards killing over a house, killing over a camel, and killing without excuse?

It is interesting to note that in adopting this interpretive approach, of treating Article 524 as simply an example of a highly flexible general provision, any practical consequence of the questions raised about the meaning of the word "house" in Article 524 has disappeared. Even if the rolled-up dwelling on the camel's back is not a "house" for the purposes of Article 524, the same result can be obtained—i.e., a sentence to the same number of years of simple imprisonment can be imposed—by using Article 523 and the applicable general principle of excess of legitimate self-defense. Indeed, by seeing Article 524 as having as one purpose the indication of a terminal point for the exercise of sentencing discretion under Article 75, it becomes possible to put the question in a much more meaningful form that "Was this a house?" It becomes, "To what extent does the importance of this property to this man excuse his criminal act?" The law often seems to embody distinctions much sharper than those which occur in life, on which substantial questions of liberty depend. When it is possible, as it may be here, to turn a legal question from one of sharp distinctions—"house" or "not house"—into one of how much punishment should be imposed, one makes possible a more meaningful correspondence between the law and the facts of life to which it applies.

3. Interrelationships of provisions regarding particular crimes

There are other, unexpressed organizing principles which can be deduced from a study of the Code, and which may also be helpful in solving particular problems. Only some of them will be mentioned here, and the most important point to be noted about them is this: like almost all of the suggestions of this article, they proceed from assumptions about the rationality and consistency of code drafting—assumptions which were shared by and acted upon by the drafters of the Code. The ultimate and overriding principle of code interpretation is that one always be aware of the context in which a code provision appears, and ready to use that context to illumine the provision in any consistent and rational way.

One such principle is that particular types of common crimes, such as "homicide," "injury," or "theft," are often grouped together in such a way that it will be helpful in determining the meaning of any one article to study the whole group. Even in dealing with as limited a subject as homicide, the legislature is faced with a continuum of possibilities. One person kills out of revenge, another in a barroom fight, a third in response to an insult, a fourth while driving his automobile, and so forth. A reading of all the provisions may

suggest the general principles by which the legislature tried to divide this continuum into particular crimes, and thus help in placing a doubtful case or determining the meaning of a doubtful provision. There may be a general article—Article 521, in the case of homicide—which will provide common definitions and help to indicate the legislative approach. One can expect that the individual provisions will be arranged in some logical order, such as from the more serious offense to the less serious; from the most common offense of the given type to the less common; from the general offense to particular varieties of it.

The organization of "homicide" offenses, for example, tends to reinforce the conclusion already reached, that although no mention of intent is made in its words, Article 523 deals only with *intentional* homicides. The penalties provided in the articles beginning with 522 and ending with 527 generally go from the more to the less severe; as we shall see in more detail shortly, this gives some reason to believe that the offenses are listed in an order which generally goes from the more to the less serious, in the legislature's view. The succession of titles of these articles gives the same impression: "Aggravated Homicide—Homicide in the First Degree"; "Homicide in the Second Degree"; "Extenuated Homicide"; "Instigating or Aiding another to commit Suicide"; "Homicide by Negligence"; "Infanticide." Article 521, which professes to state the "principle" regarding homicide, defines homicide as causing the death of a human being intentionally or by negligence and adds that "the nature and extent of the punishment awarded to him who commits intentional homicide shall be determined according to whether the homicide is simple, or aggravated or extenuated by the circumstances specified in the following Articles." This tells us, first, that our inference that homicide must be either intentional or negligent is correct; second, that our inference that the degree of punishment represents the seriousness of the crime is correct; and third, that the legislature has dealt with three kinds of intentional homicide: simple, aggravated, and extenuated. Article 522 deals with "Aggravated Homicide"; Article 524 deals with "Extenuated Homicide"; Article 523 comes between these articles and imposes a penalty which is less than that of Article 522 but more than that of Article 524. The inference is strong that this is the missing case of "intentional homicide" which "is simple."

4. Cross-references within the Code

Another occasionally helpful organizational feature is the use of parenthetical references to other articles in the Code's text. These references may be taken as an indication by the legislature that these other articles are relevant to the article in which the references are made, so that a reading of the articles it refers to may help one to understand it. Not infrequently, these references are to an entirely different part of the Penal Code, and thus may help reveal relationships which the organizational structure of the Code would otherwise obscure. In other cases, the references may be to a series of provisions for which the article making the reference serves in some respect as a general article.

An example of the latter type of provision is Article 598. This article, entitled "Aggravations to the Offense," comes at the end of the section relating to "Injury to Sexual Liberty and Chastity," comprising Articles 589–598. Article 598 states that "in all cases involving a charge of sexual outrage" the punishment is to be quite severe in the presence of enumerated circumstances, including "(a) where the offender uses violence, intimidation or coercion or in any other way renders the victim incapable of resisting (Articles 591–595) or subjects his victim to acts of cruelty or sadism." Rape, Article 589, and forced abnormal heterosexual sexual behavior, Article 590, are both "cases involving a charge of sexual outrage," since both fall in the section to which Article 598 applies. Both Articles 589 and Article 590 require as an element that the offender use violence, intimidation, or coercion to require a victim to submit to

the sexual act described against his will. The questions which might then arise are whether violations of Articles 589 and 590 are subject to the special penalties of Article 598, because of the quoted language of Article 598(a); or whether, on the other hand, the parenthetical reference to Articles 591–595 is meant to exclude application of Article 598(a) to Article 589 and Article 590, insofar as it refers to violence.

The penalties provided in Articles 589 and 590 are different from those stated in Article 598. The parenthetical reference to Articles 591–595 in Article 598(a) would seem to support an interpretation that the penalties of Article 598 do not apply in cases of ordinary violation of Articles 589 and 590. The use of violence, intimidation, or coercion to render a victim incapable of resisting is a necessary element of both offenses; it would not seem consistent to treat it also as an aggravating element. A reading of Articles 591–595, to which Article 598(a) refers, shows that violence, etc., is not a necessary element of any of these offenses; it would therefore be appropriate to treat it as an aggravating element. On the other hand, the use of cruelty or sadism is no more an element of Article 589 and Article 590 than of Articles 591–595; it would thus be appropriate to consider such use as aggravating for *any* case of sexual outrage. The parenthetical reference to Articles 591–595 applies only to the question of violence; it does not limit the application of Article 598 where cruelty or sadism has been employed. It thus avoids the apparent conflict in penalty provisions in the case where only violence is employed, forwarding the goal of consistency, while allowing the court to apply the penalties of Article 598 to violations of Articles 589 or 590 in the other cases, such as use of cruelty or sadism, which do not seem to be restricted by the parenthetical reference.

5. Where more than one Special Part provision applies to a particular criminal act

The meaning of the Penal Code's provisions relating to concurrence of offenses, chiefly Articles 60–63, 82, and 189–192 of the General Part, is much too complex to be set out in this article. However, it is important to note that these articles, in particular Articles 63 and 189, indicate that in some cases a particular act or result will involve not one, but two or more crimes, and that in such cases, the punishment may be increased over that which could be imposed for any one of the crimes. In considering the purpose, scope or meaning of any one article of the Special Part this possibility that it can be joined with another article to warrant a greater penalty should be kept in mind.

A very common case in which considerations of this sort might be relevant is the following: A and B get into a fight. A hits B, who falls to the ground and hits his head on a rock. The result of this is that his skull is fractured and he dies. A is charged with homicide under Article 523. In such cases, it is very doubtful that A has actually foreseen that B's death would result from his blow, and desired or at least was willing to accept that result. That is, A appears not to have "intended" to kill B within the meaning of Article 58(1). But as has already been noted, Ethiopian courts fairly frequently have overlooked the requirement of intention under Article 523, and have convicted persons such as A and sentenced them to long terms in jail.[13] This no doubt reflects the strong feeling which Ethiopians have against any killing. Nonetheless, one must seriously doubt that the word "intent" can be given a meaning which is consistent both with the definition given in Article 58 *and* with conviction under Article 523 in such cases. Thus, any Ethiopian judge who agrees that "intent" is a necessary element under Article 523 (and Article 524, for that matter), either will be unable to use Article 523 in such cases, or else will risk giving the word "intent" a meaning which the words of Article 58 will not support.

[13] See the cases cited in note 10, above.

The concurrence of offenses might come into play in such a case in the following way: Even though the judge may not be satisfied that the accused "intended" to kill the deceased, because he is convinced that accused did not foresee that the deceased might die as a result of their fight, he may be able to find that the accused "intended" to *injure* the deceased, so that he could be convicted under Article 538 or Article 539. He may also be able to find that the accused was "negligent" in failing to foresee that the fight might result in the deceased's death, so that he could also be convicted under Article 526. Article 63(1) (b) and Article 189(1) (b) may then permit him to convict the accused of both offenses, and sentence him accordingly. The possibility that this alternative will be available should itself encourage interpreters to refrain from stretching the notion of "intent" too far; there is this other way to deal with the case which troubles them.

VI. PENALTY PROVISIONS AND THEIR RELATIONSHIP TO STATUTORY MEANING [14]

We have already had occasion to mention the apparent relationship between the penalty provided by the Code for a particular offense and the seriousness with which that offense was viewed by the legislature. There are countless indications in the Code that this relationship is an intentional one, that the range of punishments provided accurately reflects the legislature's estimate of the seriousness of the crime to which it applies. Thus, in the presence of aggravating circumstances—circumstances which make the crime seem worse—the court is instructed to increase the penalty; in the presence of extenuating circumstances—circumstances which in part excuse or justify the crime or the criminal—the court is instructed to lower the penalty. Simple imprisonment is "applicable to offenses of a not very serious nature committed by persons who are not a serious danger to society" (Article 105); rigorous imprisonment is "applicable only to offenses of a very grave nature committed by offenders who are particularly dangerous to society" (Article 107); and for "minor offenses" the court may simply appeal to the honour of the accused or apply the very slight penalties of the Code of Petty Offenses (Articles 87, 121). It is not hard to deduce from this pattern that a crime subject to sentence ranging from five to twenty years rigorous imprisonment (Article 523) was considered by the legislature as more deserving of punishment than another crime which it made punishable by one to five years rigorous imprisonment (Article 530).

It can be observed that in almost every case the legislature has provided for a range of sentencing alternatives, rather than imposing a single mandatory punishment. The explanation for this is that the legislature is attempting in the Penal Code to compromise between two different points of view regarding criminal policy. On the one hand, it wishes the penalty to reflect the repugnancy of the offense and the measure of harm which has been done or threatened to public or private interests. On the other hand, as reflected in many other parts of the Code, especially Article 86, it wishes the penalty to suit the individual who committed the crime: his personal circumstances, the opportunity for his reform, the dangerousness of his disposition, etc. If only the former consideration were important, one might expect fixed penalties to be imposed for each offense. If only the latter were important, one might expect the judge to be given complete discretion in deciding how to treat a criminal, once convicted. By way of compromise, the legislature has set upper and lower limits on the measure of punishment in accordance with its view of the ugliness of the abstract crime, and delegated to the judge the task of setting a particular disposition within these limits, according to the concrete circumstances of the particular criminal.

If, then, one is faced with a case in which it is uncertain which of several possibly applicable statutes might apply, one line of inquiry which may be very helpful is to consider how seriously Ethiopian society views the type of

[14] J. Graven, work cited above at note 2, p. 288 ff.

act with which the defendant is charged. If the choice is between provisions imposing different penalties, one can fairly infer that the provision carrying the most serious penalty was meant to apply to the most heinous offense, and so forth. For example, let us look again at the problem raised earlier about the relationship between Articles 594(2) and 608(2). Article 594 authorizes rigorous imprisonment: Article 608 does not. This tends to indicate that in the former the legislature's purpose was to deal with a more serious offense than in the latter. In the earlier discussion two hypotheticals were developed: (a) a young child is brought to a public place for the purpose of having him witness sexual activity, in the expectation that his watching it may soon entice him to participation: (2) a young child comes across a person engaging in sexual activity in a public place; the person becomes aware of the child's presence, but does not stop. Both hypothetical (1) and hypothetical (2) can be brought within the linguistic meaning of both statues, Articles 594(2) and 608(2). But in view of the assumption that the legislature meant each provision of the Code to have a unique function, we would seek an interpretation that will give each of these provisions a different function.

It would seem that most Ethiopians would view the act in hypothetical (1) as being of "a very grave nature" and the person who committed it as being "particularly dangerous to society." Here is a person who has deliberately sought to involve a young person in sexual activity. On the other hand, Ethiopians might be more likely to view the act in hypothetical (2)—at least in so far as it concerned the young eye witness—as "not very serious" and the individual who committed it as "not a serious danger to society." The involvement of the young person is almost accidental; the sexual activity of the accused was not "for the benefit" of the young person, or meant to affect him in any way. That is, the rigorous imprisonment of Article 594(2) is appropriate in the case of hypothetical (1), but only simple imprisonment, as in Article 608(2), is appropriate in the case of hypothetical (2).

We have thus interpreted Article 594(2) as implicitly requiring as one of its elements that the accused have the purpose of working a specific sexual injury on a specific young person or persons. This was done in order to reconcile it with Article 608(2) and to give each article a sensible role in the overall structure of the Code. This is the same result we reached before by considering the relative placement of these two articles in the formal structure of the Code. The fact that two or more interpretive techniques lead to the same result can increase our confidence that the result is a good one.

Careful attention to penalty provisions may also help the judge arrive at a sound result in a particular case, even where he cannot be sure of the proper interpretation of conflicting statutes in the case before him. This may be particularly helpful in those cases where the facts are not easily brought within the sharp distinctions of legal definitions. For example, one can readily imagine cases less clear than the two hypotheticals we posed in discussing Articles 594(2) and 608(2). In such a case it could be very difficult, even with the distinction we have made, to decide which of the two articles should apply. But that is perhaps like saying, that such cases will involve either a less important violation of Article 592(2), or a more important violation of Article 608(2). Less important violations of Article 594(2) can be punished by "simple imprisonment for not less than three months"; violations of Article 608(2) are punishable by any term of simple imprisonment. The judge who is aware of this overlap avoids any practical necessity of choosing between the two articles by imposing a sentence which falls within the overlap—simple imprisonment from three months to three years—when in a particular case he finds it hard to decide which of the two provisions to apply. When he would reach the same result—the same penalty—under either provision he applied, the job of deciding which of two possibly applicable provisions actually provides the legal basis for his decision is obviously less important than it would be if his choice had practical consequences.

Thus far we have been considering the relevance of the duration or type of punishment to interpretation of the Penal Code. It is also relevant to take instruction from the degree of freedom given to judges in particular circumstances to decide on what measure of punishment to impose. As has already been noted, provisions of the Special Part commonly afford judges a range of punishments from which to choose. Comparison of the punishments provided for in various Special Part provisions gives some indication of the relative importance attached by the legislature to the crimes concerned. Now, one may also note that there are many provisions of the General Part which serve to increase the range of punishments available, or to guide the judge in making his choice over that range. Thus, Article 79, "General Extenuating Circumstances," and other articles of the General Part authorize judges to reduce punishment by one step, according to a scale set out in Article 184. Article 81, "General Aggravating Circumstances," deals with cases in which the judge is to apply a relatively high penalty within the scale provided for by the Special Part definition of the offence. Articles 67, 68, 70, 72, 73, 75, and 78, among others, specify circumstances in which the judge may "freely mitigate" the punishment, reducing it without limit.

A common sense judgment which might immediately be made is that the greater the freedom Parliament has given the judge to reduce a sentence, the less blameworthy it considers the situation described; conversely, the more Parliament has indicated that a sentence is to be increased, the more blameworthy it considers the case. This rather simple observation is likely to be significant in a case where the statutes present a range of alternatives as to how a given act might be characterized. For example, Article 67 completely exempts from punishment someone who committed an offence under "an absolute physical coercion" and authorizes such exemption "when the coercion was of a moral kind." Under Article 68, the court may freely reduce the punishment (Article 185) according to the circumstances "if the coercion was not irresistible." Under Article 79(1) (c), the court may reduce the punishment by one step (Article 184) if an offender "acted in a state of great material or moral distress or under the apprehension of a grave threat or a justified fear, or under the influence of a person to whom he owes obedience or upon whom he depends." What is "coercion"? What is the line between "absolute moral coercion" (Article 67) and "resistible moral coercion" (Article 68)? Resistible moral coercion" and the circumstances described in Article 79(1)(c)? The circumstances of Article 79(1)(c) and simple commission of the offense?

We are again in a situation where the words used will convey different meanings to different people reading them. But looking at them as a whole, one can readily see a legislative purpose to cover the whole scale of blameworthiness regarding coercion, and to direct the judge to impose sentence in accordance with the position of the particular offender on that scale. In such a case, it may be less important as a practical matter to decide upon an exact meaning of the particular words or phrases involved than to note their relationship to the determination of punishment. Confronted by the facts of a particular case and aware that the purpose of these provisions is to enable him to reduce sentence in proportion to the degree of excuse shown by these facts, the judge may be acting in a more straightforward manner if he sets the sentence first and makes the characterization of the facts after.

This, of course, is not to advocate complete freedom on the part of the judge to set sentences, independent of the statutory scheme. On the contrary, he must be aware of the legislature's purpose—that a consideration such as "coercion" is to serve as a complete or partial excuse, depending on the circumstances—and must be guided by this awareness. The point is, rather, that the words used by the legislature to characterize this purpose create what are, in themselves, rather artificial and imprecise distinctions. It is not a fruitful use of judicial time to attempt to determine into which of several aribtrary word formulas particular facts fit. The important job, and the job which one may be confident the legislature was primarily interested to have done, is to determine, *given the legislative attitude toward "coercion,"* how much if any punishment the particular facts call for. The answer to this question will suggest the proper category, rather than *vice versa*.

As one might expect, Article 79 can be read to provide an intermediate step not only for Articles 67 and 68, dealing with "coercion," but for virtually all of the "Justifiable Acts and Excuses" discussed in Articles 66–78. Similar series can

also be found in the Chapters on Attempt, Articles 26–31, and on Participation, Articles 32–40. The gradations in punishment indicated by these articles, again, are a measure of Parliament's view of culpability; in a case where the language of the articles does not make the proper category clear, a judge could rely on the relationship between culpability and punishment to determine the article to be applied if he finds the judgment as to culpability more easy to make.

Finally, it may be appropriate to remind the reader that the relationship between penalty provisions not only may help the interpreter to determine the meaning of substantive provisions of the Penal Code, but may also be of assistance in reaching a decision in a particular case on the penalty to be applied. Thus, where an article involving free mitigation under Article 185 is invoked in preference to one involving limited mitigation under Article 184, it will in most cases be appropriate to reflect the greater degree of mitigation—the lesser degree of culpability—by imposing a sentence less than might have been imposed using Article 184. Thus, unmitigated second degree homicide, Article 523, is punishable with a term of from five to twenty years rigorous imprisonment; using Article 184, a sentence as low as one year rigorous imprisonment is possible (Article 184(c)); this would suggest that in cases where Article 185 is to be applied, a sentence to some term of simple imprisonment will be appropriate. Of course, it is true that the legislature has rarely *required* that sentence be mitigated to any particular degree; it has merely permitted it. But if it is valid to view the various alternatives for mitigation as establishing a continuous scale of punishment, as the author believes it is, it should also be generally valid to regard a particular alternative as suggesting a sentence within the comparatively narrow range which is its particular contribution to the whole scale.

Another example of the usefulness of penalty provisions in interpretation, already discussed, is the case where an extenuated crime specifically defined in the Special Part can be used as a guide to sentencing similar crimes extenuated under some provision of the General Part. The example of this kind of reasoning given was that of Article 524, which fixes a range of punishment—up to five years simple imprisonment—for killing in defence of a particular property interest, the privacy of a house. It was suggested that this range could be used as a reference point in cases involving killing in defence of other property interests which, because not specifically mentioned in Article 524, would have to be dealt with in the general context of Articles 74 and 75.

F. Case 4

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IX. ARTICLE 2 OF THE PENAL CODE—A LIMITATION ON INTERPRETATION?[17]

Thus far, we have been discussing interpretation without explicity considering whether there are any legal limitations on the process. There are such limits. They are set by Article 55 of the Revised Constitution of 1955 and Article 2 of the Penal Code. Much of the remainder of this article will be devoted to a discussion of the principle they embody, which is known as the principal of legality. We can start this discussion by using some of the techniques developed earlier in this article, but we will find that they do not take us very far. In dealing with the fundamental doctrines of the General Part, Book I, it is almost always essential to have some understanding of the sources of the doctrine and the other interpretations it has received, in order to obtain a clear understanding of its functions. Since the principle of legality is of central importance to interpretation of criminal law, we will in this one case abandon some of the limitations mentioned at the beginning of this article. Through an examination of its history, development, and present status, we may be better able to understand just what job it is that the principle is to perform, and what modifications or cautions, if any, are therefore necessary regarding the techniques discussed above.

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[17] Works extensively treating the principle of legality:
Ancel, "L'Analogie en droit pénal," *Revue Internationale du droit pénal*, 1955, p. 277.
Glaser, work cited above at note 6.
J. Graven, "Les principes de la légalité . . .," cited above at note 1.
J. Hall, *General Principles of Criminal Law* (2d ed., Bobbs-Merill, Indianapolis, 1960), Ch. 2.
Mahsoub, work cited above at note 1.
Thorastedt, work cited above at note 6.
G. Williams, *Criminal Law, The General Part*, (Stevens, London, 1961), Ch. 12.
Exposé de motifs, collection cited above at note 1.

One limitation which does continue to apply is that brought about by the general unavailability of legislative materials. This denies us knowledge of the specific histories of Revised Constitution Article 55 and Penal Code Article 2. It also means that we have no opportunity to discuss certain questions about the use of legislative materials in the interpretation of penal statutes—for example, whether they may be used to correct an "obvious mistake" in the official version of a statute, consistently with the principle of legality. Discussion of those questions has involved European jurists in heated debate. Our discussion would be much more complex if they were here; the problem is one which would have to be resolved in Ethiopia should legislative materials even be published.

A. A First View of the Principle of Legality

Revised Constitution of Ethiopia (1955):

Chapter III: Rights and Duties of the People, Article 55

"No one shall be punished for any offence which has not been declared by law to be punishable before the commission of such offence, or shall suffer any punishment greater than that which was provided by the law in force at the time of the commission of the offence."

Penal Code of Ethiopia (1957):

Part I: General Part; Book I: Offences and the Offender; Title I: Criminal Law and its Scope; Chapter I: Scope of the Law.

"Article 1—Object and Purpose.

"The purpose of criminal law is to ensure order, peace and the security of the State and its inhabitants for the public good.

"It aims at the prevention of offences by giving due notice of the offences and penalties prescribed by law and should this be ineffective by providing for the punishment and reform of offenders and measures to prevent the commission of further offences."

"Article 2—Principle of Legality.

"(1) Criminal law specifies the various offences which are liable to punishment and the penalties and measures applicable to offenders.

"The court may not treat as a breach of the law and punish any act or omission which is not prohibited by law. It may not impose penalties or measures other than those prescribed by law.

"The Court may not create offences by analogy.

"(2) Nothing in this Article shall prevent interpretation of the law.

"In cases of doubt the court shall interpret the law according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view.

(3) Nobody shall be punished twice for the same act."

One could justifiably infer a number of helpful propositions from the language and context of the above provisions.

Taking Article 55 of the Revised Constitution of 1955 first: The provision appears in that part of the Constitution which deals with the rights and duties of the citizen. Its language does not relate to a duty, something which a citizen is legally required to do. Quite clearly, rather, it is meant to describe some right of the citizen, something in which he is to be protected. Since the requirement stated can only be satisfied by government action, one would infer that he is to be protected against government action of some kind. Presumably it was concluded that the action could be unfair to him or endanger him in some way. The particular government action prohibited is that of conficting a person and/or punishing him for a crime without statutory authority. Then, it must have been considered that convicting or imprisoning a person for crime without statutory authority was unfair, or that the power to do so was dangerous. It is unlikely that this judgment was one made from the perspective of purely criminal policy. "Citizens' rights" and constitutions both relate to politics and political concepts, that is, to the rules and structure of government generally. The principle announced is one of constitutional, not criminal, law. We may suppose its purpose to be political, even though its particular effects will be felt in the administration of criminal law.

The second and third sentences of Article 2(1) of the Penal Code seem to contain the same instruction as Article 55 of the Revised Constitution. Since the Penal Code was adopted after the constitutional provision came into force, it is appropriate to believe that these sentences refer to the same principle. At

least, they should be interpreted to conform with the constitutional principle, since the constitutional rule is a superior one. But Article 2 goes further than the Constitution in that it appears to explain what the legislature considered to be conviction or punishment in the absence of statutory authority. It says that the court "may not impose penalties or measures other than those prescribed by law" and "may not create offences by analogy," but that the court is not forbidden to engage in "interpretation of the law," and that interpretation of the law is to be "according to its spirit, in accordance with the meaning intended by the legislature so as to achieve the purpose it has in view." While these phrases have no single necessary meaning, they appear to be attempts to define the limits of the "authority" conferred by any particular statute. Interpretation of the statute, in accordance with its spirit, intended meaning and purpose, is within these limits; judicial creation of offences "by analogy" is not.

One possible purpose for Article 55 of the Revised Constitution and Penal Code Article 2 which thus emerges is subordination of the judiciary to the legislature in formulating Ethiopian society's rules of conduct. The judiciary is not to create offences. It is to observe the spirit, intended meaning, and purpose with which the legislature has endowed a statute. This subordination must be considered as politically important, for the protection of citizens' rights. Since one can observe from the overall structure of the Constitution of 1955 that legislative authority is principally confined to Parliament acting together with the Emperor and that the courts are principally restricted to the adjudication of cases under the law, it is also possible to state that the courts are generally subordinated to legislative authority. This general subordination is also a matter of political structure, reflecting decisions about the type of jobs various institutions of government are best fit to do: the legislative institutions, to make general rules; the judicial institutions, to decide particular disputes in accordance with these rules. Since a special rule for subordination of the judiciary appears in the case of criminal law, it must have been considered that this division of authority was particularly important here.

What is it about criminal law which makes division of authority between legislatures and courts particularly important? Article 1 of the Penal Code appears to supply at least a partial answer to this question. It states, "(Criminal law) aims at the prevention of offences by giving due notice of the offences and penalties prescribed by law and should this be ineffective by providing for the punishment and reform of offenders and measures to prevent the commission of further offences." This states a particular theory of criminal law—that prevention of offences is the primary role, and punishment and reform in case of failure only secondary. In order to prevent offences, one must make it known in advance what constitutes an offence, and what the punishment for each offence will be. Courts, deciding particular cases after particular events have already occurred, could not expect to do an efficient job of prevention in advance. This job requires a concise and systematic body of written rules, uniformly available and applicable throughout the Empire—namely, a code. The special emphasis of criminal law on prevention, indicated by Article 1, is one reason for putting a special emphasis on the subordination of courts to legislatures in the area of criminal law.

A second rationale for requiring legislative definition of crimes and punishments is to safeguard the citizen against arbitrariness by the government as a whole and, in particular, by its judges. When the government is required to announce in advance what are the rules of conduct, it is not possible to condemn after the fact what seemed to be innocent behaviour at the time; judges are not free to follow their whims or personal dislikes, as they might be if they were permitted to define the offences of which they convicted accused persons. The protection afforded by a requirement of prior notice is especially important in the case of criminal law, because of the special impact which a criminal case has on the citizen. In a civil suit, one citizen is most likely to be engaged in legal conflict with another citizen. The government participates chiefly as a referee; it does not directly threaten his liberty. In a criminal suit, however, the individual is most often pitted against the government, and the issue is always whether the government may deprive him of his life, liberty, or property on account of some act he is alleged to have done. May one not infer the judgment that to deprive an individual of life, liberty, or property for an act without first warning him that this act will be so treated, is

unfair in itself, and involves the risk of further unfairness through judicial arbitrariness at trial? An eminent English scholar of criminal law has written:

"That there must be no crime or punishment except in accordance with fixed, predetermined law—this has been regarded by most thinkers as a self-evident principle of justice ever since the French Revolution. The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for a breach of that law is purposeless cruelty. Punishment in all its forms is a loss of rights or advantages consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects." [18]

It could easily be inferred that the author of the Ethiopian Constitution has reached the same judgment.

If "prior notice" is important both for effectuation of the criminal law and for protection of the citizen against unfairness by his government, then it is possible to suggest tentative meanings for the "interpretation" which is permitted and the "(creation) of offences by analogy" which is forbidden by Article 2. When a criminal statute provides a warning that a certain act is considered criminal and may be visited with a certain punishment, then that statute may be applied to punish that act in that way. When no statute provides a warning, either by direct statement or by wording which the reader would think might apply, then the court may not punish that act. "(Creation of) offences by analogy" would then be the finding of an offence where a person, reading the statutes, would think none existed. The right to interpret is the right to give a statute any meaning which the reader would think it reasonably might have, even if this is not the most obvious meaning, as long as the meaning given is in accordance with legislative purpose and spirit and in this sense is what the court believes to have been the intended meaning.

It is not hard to see that this "interpretation" is very much the same as the process discussed at length above. Article 2 thus appears to have the effect of reinforcing some of the self-imposed limits of the previous discussion: that interpretation should respect the limits set by the possible meanings of statutory words; that interpretation should respect the limits set by ascertainable statutory purposes; that purposes are to be ascertained from the words, context and formal structure of the Code, as illumined by an understanding of modern Ethiopian values. It is now time for a more detailed examination of Article 2, against the background of its historical development abroad.

B. A Brief History of the Principle of Legality

1. Origins [19]

The principle that there should be neither crime nor punishment except in accordance with written law first became prominent at the time of the French Revolution, towards the end of the eighteenth century. A statement of the principle was included in the French Declaration of the Rights of Man. Then, as in Ethiopia today, the principle was viewed as one of political rights, as a protection of the citizen against his government, more than as a rule of criminal policy only. Under the *ancien régime*, the pre-Revolution government of France, judges were closely tied to the king or feudal lords, and were thought to exercise an arbitrary power to define crimes and punishments in a way which benefited the political power of the ruler. That is, the king and the nobility were able to oppress their enemies and use the criminal law as an instrument of politics through the capacity of their judges to invent crimes and punishments as the need arose. The judges had a tool for repression and arbitrariness which, apparently, they were willing to use. The principle of legality was a specific reaction against this repressive device, intended to end its use by requiring the government to announce in advance the rules of conduct it would enforce by criminal law.

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[18] Williams, work cited above at note 17, pp. 575–76.

[19] Glaser, work cited above at note 6, p. 899 ff.
J. Graven, "Les principes de la légalité . . ." cited above at note 1, p. 383 ff.
Hall, work cited above at note 17, p. 30 ff.
Mahsoub, work cited above at note 1, historical introduction and p. 50 ff.
Thornstedt, work cited above at note 6, p. 213 ff.

As in Ethiopia today, the principle also reflected a general view of the proper distribution of powers within government. The same political philosophers who gave voice to the specific demand that judges should be denied the power to create crimes at will also developed the general theory known today as "separation of powers." For protection of the citizen and efficiency in government, they insisted that the roles of judiciary, legislature, and executive be carefully distinguished, and that the bodies responsible for each of these functions be made independent of the others. Thus, while a specific statement of principle was made in the case of criminal law that courts could act only on the basis of statutory authority, in fact this principle was believed to apply and was generally acted on in other areas as well. Courts were to be courts (deciders) not legislatures (rule-makers) whether the matter before them was civil or criminal. Civil codes as well as criminal codes were adopted, and it was generally accepted that court decisions required the authority of the civil code as much as that of the criminal code. In their opinions, courts expressed unwillingness to depart from or even extend any statutory text. They insisted that they could act and were acting only as the "mouth that speaks the law."

At the same time there developed a view of criminal policy, apparently independent of political considerations, which tended to reinforce the legality notion. This view, reflected to some degree in Article 1 of the Ethiopian Penal Code, identified the prevention of offences as the first goal of criminal law. It assumed that men were rational, and could be induced to obey the law by a threat of sufficient penalty for disobeying it. If a potential criminal was clearly warned what acts would violate the law, and what penalty would be imposed for violation, it was believed that he could and would calculate whether he could expect to achieve a net gain of pleasure over the pain of punishment for his act. If penalties were properly set, it was thought that he would always calculate that he could not expect to gain; therefore, he would be dissuaded even from attempting the crime. Of course, it is essential for such a theory that crimes be defined and penalties set in advance of the potential criminal's decision to act. Only then can the criminal *know* that he will not profit. If one leaves definition of the crime and its penalty until after the event, one has only the general terror of arbitrariness—a terror felt by the good citizen as well as the potentially bad—and not the precise warning that will leave the former unperturbed and dissuade the latter.

There was also a general body of belief that the task of complete and effective codification could be accomplished. These doctrines had their inception before the massive impact of industrial change and the urban society it brought about in Europe. Change was still relatively slow, and social structures and standards were relatively simple. It still seemed possible to draft codes, civil *and* criminal, to order human existence in a comprehensive way. Because common values were shared, or at least thought to be shared, throughout a particular society, it was thought that a small body of carefully drafted rules could completely express the conditions of social existence. In the particular case of the criminal law, there was an assumption that the moral values underlying its prohibitions would be shared by all; in a stable and relatively simple society, few "crimes" needed definition; and careful use of language, it was believed, could succeed in making each case clear.

In the legal system as a whole, then, there was considerable emphasis on the division of authority between legislature and court. The legislature was only to make rules; the court was only to apply them. As a result, the early codes, both civil and criminal, were looked upon as the only source of law, which judges were bound to respect; there must be the authority of a written rule for *any* decision. This attitude was emphasized for criminal law by the principle of legality, which sought to protect the citizen from arbitrary or repressive action by the courts in matters affecting his liberty, and by a view of criminal policy which stressed the need to deter potential criminals by the threat of definite punishment. The result was a system which today appears overly rigid and naive. Crimes were defined in very careful and precise detail. Penalty provisions specified a fixed penalty for each crime which was invariably to be imposed, rather than a range from which the judge might choose according to the facts of the case. When the necessity for interpretation was recognized at all, which was rarely, interpretation was carried out in accordance with strict logical rules. Not the least important of these rules was one requiring that any doubt regarding interpretation was to be resolved in favour of the accused. The judge was, indeed, "only the mouth that speaks the law."

2. Growth of the doctrine [20]

The seeds of destruction of this rigidly legalistic view of codes in general, and the criminal code in particular, could be found in the French Civil Code itself. Portalis, one of the drafters of that code, had stressed his view that leg-

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[20] Regarding the development of civil law interpretation:

Ekelöf, work cited above at note 8.

Franklin, "M. Geny and Juristic Ideals and Method in the United States," *Recueil d'études sur les sources du droit en l'honneur de Geny,* Vol. 11, p. 30.

Geny work cited above at note 20.

Schmidt, work cited above at note 7.

Sereni, work cited above at note 9.

Stone, work cited above at note 3, p. 212 ff.

Because so many works were consulted in connection with the development of penal law interpretation, an effort is made below to characterize the exact contribution made by each:

M. Ancel, "Creation des infractions par le juge," *Bull. Société Legis. Comp.,* 1931, p. 91 (shows that in 1931, role of European judges in interpreting penal statutes was much more active than traditional view of legality principle suggested).

Ancel, work cited above at note 17 (a contemporary review of the doctrine in Europe; shows general relaxation of restrictions on penal law interpretation, and that the policy basis of the doctrine today is entirely political).

M. Ancel, *Social Defence* (Routledge & Kegan Paul, London, 1965) pp. 115–116 133–34 (in the context of a general discussion of modern European views of penal policy, indicates that "legality" is to be retained because of its political importance—protection of the individual against government—rather than for any reasons of strictly criminal policy).

Andenaes, work cited above at note 1, p. 105 ff. (contemporary Scandanavian view of legality, emphasizing the need for sufficient warning to the citizen).

J. Andenaes, "The General Preventive Effects of Punishment," *U. Pa. L. Rev.*, Vol. 114(1966), p. 949 (discusses the present vitality of deterrence notions in criminal policy).

Dalloz, *Encyclopédie Juridique, Droit Criminel* (Paris, 1953), "Droit Criminel," ss. 13–22, and "Infraction," ss. 2–22 (current French jurisprudence on permissible breadth of penal law interpretation).

Declercq, "L'analogie en droit pénal," *Revue de droit international et de droit comparé,* Special Issue, 1954, p. 294 (brief review of the current Belgian position).

Gegout, "L'interpretation literale des lois pénales," *Recuicl d'études sur les sources du droit en l'honneur de Geny,* Vol. III, p. 305 (contrasts neutrality of judge in civil case with role in criminal cases; finds correspondingly less freedom of interpretation; but still, considerable scope of Geny's techniques).

Gaiser, work cited above at note 6 (demonstrates basis of rule in political rather than criminal policy, legislative trends away from the precision of expression inherent in "legality," and permissibility of fairly wide judicial latitude in interpretation of penal laws).

J. Graven, work cited above at note 8 (an extensive review of current Swiss doctrine, showing its flexible approach).

J. Graven, "Les principes de la legalité . . .," cited above at note 1 (showing how attitudes toward interpretation have changed, so that a limited use of analogy and flexible statutes are now acceptable).

P. Graven, work cited above at note 1, pp. 9–12 (brief review of the Ethiopian provision in light of contemporary Swiss views).

Hall, work cited above at note 17, p. 27 ff. (a skeptical approach, viewing the principle as a means of limiting the generality of legislative and judicial expression).

Legal, work cited above as note 1 (shows political theory sources of legality; admits necessity of flexible interpretation; but compares legislative attitudes in civil law, where intention is to be comprehensive and government is "neutral" to the parties, with the exceptional nature of penal law).

Legros, work cited above at note 1 (argues against any distinction between penal and civil law interpretation; "free scientific research" for their current sense, with objective limits, should be the rule for each).

Mahsoub, work cited above at note 1 (extensive review of history and development; among the matters discussed: p. 34 ff., speedy growth of legislative and judicial flexibility in penal aspects of criminal law; p. 54 ff., modern methods of penal interpretation; p. 57 ff., traditional methods of interpretation; p. 60 ff., teleological (goal oriented) interpretation; p. 64 ff., the current Swiss position; p. 75 ff., a discussion of "creation of offences by analogy," including the German, Soviet, and Danish experience).

Mannheim, *Criminal Justice and Social Reconstruction,* (K. Paul, London, 1946), p. 204 ff. (takes position that in a modern world, more flexible rules are a necessity, as society becomes more complex and social obligations rather than individual rights predominate).

Marchal & Jasper, *Droit Criminel* (Brussels, 1965) ss. 4X11 (current Belgian jurisprudence on legality and the permissible breadth of statutory interpretation).

Schwartz & Orleans, "On Legal Sanctions," U. Chi. L. Rev., Vol. 34 (1966), (sociological research into the deterrent effect of sanctions, as compared to other modes of obtaining compliance with law).

Thornstedt, work cited above at note 6 (shows how criminal policy aspect of legality—deterrence—has reduced in importance; flexible legislative drafting negates the remaining, political considerations; argeues for relatively narrow scope of interpretation, conceding that this is not the modern view).

Williams, work cities above at note 17 (political basas of legality implies legislature must work for certainty in drafting; but the principle does not require strict construction so long as judge stays within permissible meaning of the provision).

islatures could not forsee or answer all questions.[21] Accordingly, he called upon judges to recognize that there would be unprovided cases and to deal with them in the spirit of the code. Judges must decide a case which comes before them, whether or not the legislature has provided for it. It was more honest and necessary, in his view, to recognize the cases that were not provided for and deal with them as such, rather than pretend that they came within the explicit provisions of the code. But judges of the time apparently could not see how this innovating or rule-making role could be reconciled with the doctrine of separation of powers which, they were taught, set the limits to their proper function. Accordingly, they turned their faces from this advice, and set for themselves the task of finding direct legal authority for each decision in the code.

Toward the end of the nineteenth century, a number of French scholars, notably Geny,[22] provoked a swift and successful revolution against this very legalistic approach. They pointed out what we discussed at some length much earlier in this article—that judges inevitably "make law." This was so, they said, both because language is inevitably imprecise, so that in choosing a meaning the judge affects the content of a rule, and because the legislature, being human, can neither foretell the problems which future developments may bring, nor take account of all the concrete cases which might arsie even under present circumstances. It was more realistic, they argued, to consider that the legislature had in effect delegated authority to handle these unforeseen issues to the courts, than to pretend that the legislature had definitively answered questions which in fact had never occurred to it. They still considered courts to be subordinate to the legislature in rule-making: a court could not refuse to adopt the legislative solution to a problem when that solution existed, and should not decide cases against ascertainable legislative purpose. But when the answer was not expressly provided for, they argued that it was the court's express function to "make law" for that case.

These scholars evolved their own body of interpretive doctrine to reflect their views. This technique, known as "free scientific research," reflects the continued theoretical subordination of courts to legislatures by its high degree of emphasis on considerations of legislative policy and purpose. Courts are to use existing legislation, and other materials where relevant and available, to infer the legislative purposes or goals in dealing with problems similar to the one presented to the court. They are then to decide the case by considering whether, in light of the existing practical consequences, the legislature would have been likely to have extended one or another purpose to that case, had it considered the issue. The technique was not one to be used only to decide cases where the meaning of statutory language was unclear. It could also be used to extend a legislative solution to a case which the statutory words did not cover, by "analogy," where there was a congruence of purposes and the result of the decision would be practical and just in view of present-day realities and the overall legislative scheme.

It can be observed that this system of "free scientific research" is in many respects similar to the methods of interpretation described in the previous sections of this article. But the scholars who proposed it assumed—indeed stated—that it would be inapplicable in the area of criminal law. Civil codes contain explicit instructions for judges that they may not refuse to decide a case on the ground that it is not provided for in the code.[23] This is tantamount to an express requirement that they make law when they cannot "find" it ready-made. Criminal codes contain another instruction: the principle of legality, that a judge can neither convict nor punish another without statutory authority. Here is an instruction that if the case is not provided for in the code, it must be decided in favour of the accused. There is a special subordination of court to legislature in criminal cases, motivated by the special political considerations already discussed. In a civil case, the court is likely to be deciding be-

[21] Quoted, *inter alia*, in Sereni, work cited above at note 9, p. 62.
[22] Work cited above at note 8.
[23] The Ethiopian Civil Code contains no such article, although a similar legislative attitude could be inferred. The contrast made in the text is best brought out in:
Gegout, work cited above at note 20.
Legal, work cited above at note 1.
Stone, work cited above at note 3, p. 212 ff.

tween private litigants; plaintiff and defendant each must either win or lose; no principle of justice or citizens' rights seems to command that the plaintiff must always lose in cases the legislature has not been foresighted enough to provide for. In a criminal case, the court will be deciding a claim of the government against the life, liberty, or property of the accused. The principle of legality embodies the view that it is unjust to deprive the accused of these rights in the case which has not been provided for.

It did not take long, however, for scholars of criminal law to note that this differentiation between civil and criminal code interpretation concealed an important question: What *is* the unprovided case? The language used in the writing of criminal law statutes is no more precise than the language used to write civil law statutes, although the latter may tend to use more abstractions. Legislatures passing criminal laws are neither less fallible nor better able to foresee the future than legislatures passing civil laws. Was it necessary or wise still to choose the construction of penal statutes most favourable to the accused? If this was not *always* required, then within what limits was the court free to find that a case *had* been decided by the legislature, and that therefore penal sanctions could be applied?

The historical climate provided many impulses toward recognition of a broader scope of discretion for judges in the interpretation of criminal law. One, of course, was that already mentioned: the relization that, for a variety of reasons, judges inevitably have a hand in the making of law. A second was to include the notion of legislative delegation to the judiciary of authority to the consequent recasting of the "separation of powers" doctrine in civil cases decide the unprovided case. A third influence was a slackening of the fervor with which the principle of legality was viewed as protection of the citizen from abuse by government. Finally, there were striking changes in criminal policy and the "style" of criminal statutes which made precise warning of specific punishments seem less important to the battle against crime.

The principle of legality came to appear somewhat less important as a safeguard to the citizen as it succeeded in regularizing the courts and, at the same time, the legislature began to seem the more likely source of oppression through its hegemony of the rulemaking function and the explosion of statutes consequent upon the Industrial Revolution. Courts came to be looked upon as the protectors of the citizen rather than his potential oppressors, and while this may have been due in large measure to rules such as the principle of legality it nonetheless resulted in a lessened emphasis on the need for the rule. This lessened emphasis also resulted from a realization that the political or constitutional aspects of the rule in protecting the citizen from arbitrariness are of limited importance so far as ordinary crimes, such as murder, rape and theft are concerned. Prosecutions for such acts, whether rigidly defined by written law or not, are unlikely to have political overtones, and will be expected whether or not the law provides expressly for them. In the area of political crimes, legality may have its effect; simple publication of repressive laws may lead citizens into better knowledge of them and, accordingly, may lead them to bring pressure against the regime which has adopted them. Even here, however, it has come to be recognized that it is the character of the men who govern, as much as any restrictions on what they may do, which safeguards the citizen's liberty. The doctrine is readily and effectively circumvented, in any but a technical sense, in a number of ways: proliferation of statutes to such an extent that no citizen can expect to know his rights or be aware of what his government is doing; enactment of statutes embodying sweeping and vague language which leaves courts free to do more or less as they please; and labelling various political measures, such as "preventive detention" laws, as not "penal" in character.[24] Finally, the relation between respect for the principle by a government and political justice in that govern-

[24] Article 77 of the Ethiopian Penal Code seems to be a good example of this last kind of provision. Although someone who mistakently believes he is violating the Penal Code (when there is no provision making his conduct illegal) is not a criminal and can not be punished, Article 77 states that he can be required to give a security for his future good behavior—at pain of imprisonment if he refuses or forfeiture if he later breaks his bond—and can be required to give up any "dangerous objects" in his possession. These are "measures," not "punishments," and so do not formally violate the requirements of Article 2. But it should be clear that the liberty and property of the person involved are being interfered with in a manner not usual with citizens, and rather like the processes of the criminal law.

ment has been shown to be, at best, imperfect. Of the two fascist powers, Nazi Germany abandoned legality while Mussolini's Italy retained it; on the other hand, one has the example of a politically "just" state such as Denmark, which permits its judges to create offences "by analogy" in criminal cases where statutory policy appears to justify such a step.

The criminal theory of the early nineteenth century viewed the criminal as a rational man, measuring pains and pleasures and therefore to be influenced by a statute which described what was forbidden and imposed a penalty in excess of any reward to be obtained from the crime. Theorists today take a different view. The predominance of warning in criminal theory has been undercut, first of all, by a proliferation of criminal statutes so vast that no citizen could be expected to have notice of them. Thus, the first assumption, that the potential criminal could obtain the information he needed for calculation of his pains and pleasures, is no longer valid. The ordinary man can obtain such information today only with great difficulty, and even then at substantial peril of its being incomplete, or of misreading what he finds. Second, there are those who take issue with the proposition that a warning must be exact to have effect. Precise definition of crimes, they argue, may simply lead criminals to seek a way to evade the definition while accomplishing what is substantially the same objectionable result. General wording will also have a warning effect, as long as the putative criminal can reasonably understand from it that his conduct is likely to come within the words used. Indeed, the effect may be greater if it induces him to avoid what is forbidden by a wide margin, rather than to calculate what is forbidden and then tread the verge.

The major change which has occurred in criminal theory, however, is even more sweeping: it has been the rejection of the assumption that the ordinary criminal is a rational, calculating man, and that his crime creates a calculable "debt" which must be repaid. Increasingly, one finds the criminal viewed as a weak or abnormal person, subject to greater or lesser degree to influences from his environment which warp his ability to make rational judgments, or appreciate or conform to social norms. Rather than calculate what may happen to him in the future, he is more likely to respond to the pressure of his past and present, to genetic or environmental defects and to wants, their product, which "normal" society may not share. Correspondingly, there is a growing focus on the "dangerousness" of the particular criminal, rather than the repugnancy of his acts, as the appropriate basis for deciding how he is to be dealt with. That is, one no longer is concerned with the question how much punishment must be inflicted to redress the abstract concept, rape; rather, one asks, how shall we deal with *this* man who committed *this* rape. And in answering this last question, the inquiry again is recast. It is not "How much punishment does he deserve?" but, "How can he be re-educated to observe social values in the future?" or, if that be impossible, "How can he be prevented from violating them again?"

The effect of this last change is particularly observable in provisions regarding penalty. Instead of imposing a fixed penalty for a particular offence, as was initially contemplated, legislation soon began to define ranges of penalty which might be imposed, depending on the facts of the case. The provision of Article 524 allowing the judge to impose any sentence from five to twenty years rigorous imprisonment is a good example of such a provision; the rules regarding extenuation and aggravation of punishments may be similarly explained. The criteria by which judges were instructed to make decisions in imposing sentences came to be phrased in terms of the criminal and his "dangerousness" or prospects for reform. (The corresponding provision in the Ethiopian Penal Code is Article 86.) Special dispositions were provided for special classes of criminals as to whom the legislature concluded there were greater or lesser chances of rehabilitation as useful members of society. Then, on the one hand, the dispositions regarding juveniles, the possibility of suspension of sentence, and a preference for medical treatment over prison treatment in those whose acts were explained in part by mental defect or disease; on the other hand, internment, and severe aggravation of punishment for the recidivist. All in all, the judge is given a very wide discretion on the question of disposition. The principle of legality has been reduced to the proposition that any measure imposed by the judge must be one which has been authorized by the legislature. This no longer reflects any uniquely *penal* policy; it is, rather, only a weak statement of the political policy that, to protect the citizen, the author-

ity of the judge to act in any penal matter must be drawn from a legislative enactment.

Insofar as substantive criminal law is concerned, however, the notion of deterrence—and thus, the need for notice—has not yet been abandoned by the majority of theorists. First, while the theory of dangerousness may help to explain why some commit crimes despite the law, it does not prove that others would lead lives free of crime regardless of the law. While we can observe that some are not deterred, we have no proof that none are. Second, there are reasons for insisting that the proponents of this new theory demonstrate that it can be applied with precision and certainty. The concept of "dangerousness" seems so broad and malleable that one must have substantial fears for the liberty of the citizen if he can be confined or compelled to undergo treatment on the basis that he is "dangerous." The administration of such a concept would inevitably depend to a tremendous degree on the character and aims of its administrators; it could easily be put to political or personal uses. The demonstration that these dangers can be avoided has not been made. Finally, one of the assumptions of the "dangerousness" theory seems to be that "punishment" as opposed to rehabilitative "treatment" is no longer to be considered a valid purpose of criminal law. It is extremely doubtful whether society could or should give up entirely the notion that a disposition in a criminal case helps to retribute or repay for the harm which has been done. The theory of deterrence, on the other hand, carries with it the notion that at least some of those who are not deterred are responsible for their acts and may be punished for them.

Most jurists continue to opt, then, for a system of "crimes" in which the citizen is given warning that certain acts will lead to imposition of a stated range of penalties. But the effect of the considerations discussed above has been to modify their view of how precise a warning must be given. First, there is somewhat less insistence on precision in the formulgation of statutes than there was in the past: the statutes must be definite enough to make the citizen aware that his conduct is of questionable legality, but they may also be general enough to permit judges to adjust them to changing circumstances in accordance with their purpose. Second, it is no longer necessary, if it ever was, to require interpretation of criminal statutes invariably to be favourable to the accused in cases of doubt. In place of this rule, the rule of Article 2 has been generally accepted. "Interpretation" of the law is permissible, but "(creation of) offences by analogy" is not.

3. The limitations on interpretation, as presently understood [25]

The distinction between "interpretation" and "(creation of) offences by analogy" has been formulated, generally speaking, in one of two ways. The earlier formulation characterized "interpretation" as the application of a statue to a situation to which, it is found, the legislature meant the statute to apply; and "analogy" as the application of a statute to a situation to which, it is found, the legislature did not foresee the statute would apply, but to which the policies of the statute do apply. The second formulation characterizes as "interpretation" any application of the statute which can be brought within the meaning of the words used in the statute (as illuminated by context, purposes, etc.); and as "analogy" any other application of the statute, for example one based on the conclusion that its purposes apply although its words to not.

It can be seen that these two formulations differ in the criteria they refer to. The first relies on a judicially derived catalogue of the cases a provision was "intended" to cover, that is on its purposes. It is interpretation, not analogy, to apply the statute to those cases whether or not the words of the statute have a meaning which could include them. On the other hand, it is analogy to apply the statute to a case within the meaning of its words, but which was not or could not have been foreseen by the legislature. For example, statutes passed before the invention of the automobile often used the word "vehicle," to refer to wagons and the like. Under the first formulation, an automobile would come under such statutes only by "analogy," since the legislature could not have foreseen that such a thing as an automobile might come into existence.

The second formulation, on the other hand, uses words rather than purposes as the criterion. If the words of a statute can apply to a fact situation, it is "interpretation," not "analogy," to apply the statute to those facts, even if the

[25] Works cited in note 20, above.

legislature did not or could not foresee those particular facts. In the case given an automobile could come under old statutes referring to "vehicle" by interpretation, if "automobile" was within the accepted meaning of "vehicle." Of course, this interpretation would not be *required*.

To the author, the second formulation seems preferable. The "interpretation"-"analogy" distinction is important because of its relationship to the principle of legality. The principle of legality, we have seen, rests on political and criminal policies stressing the importance of prior notice by government of the criminal law. To be meaningful, the distinction should reflect these policies. That is, it should have some relationship to the giving of notice, and the concomitant prevention of large-scale judicial innovation. By relying on the possible meaning of statutory words as its criterion, the second formulation would permit application of a statute where warning had been given, and forbid it where it had not. This does not mean a judge *should* apply a statute to every case its words might reach: the decision to apply or not within word boundaries rests on considerations of purpose, rationality and consistency, discussed at such length above. But by enforcing word boundaries as the outer limit of interpretation, one ensures that the functions of the principle of legality have been respected. The first formulation permits no such assurance. Perhaps for this reason, the second formulation is finding increasing favour.

The limitations imposed even by this formulation are less than might at first appear. First, it is necessary to distinguish between the creation of offences "by analogy" and other uses of analogy in the criminal law. Only the former is forbidden by the principle of legality. To the extent the principle of legality requires more caution in applying criminal law than is ordinarily observed in applying other types of law, such as the Civil Code, it does so, as we have seen, to protect the accused. If an application of the Code will work to the advantage of the accused—as, for example, if the accused wishes to argue by analogy that some situation not mentioned in Article 79 should nonetheless be considered a mitigating circumstance in his case—it can be made, if justified, without regard to the principle of legality. In this case, warning to the accused and protection of him from arbitrary or repressive government action are not at stake. An offence is not being created. The provision may be interpreted as freely as any other provision of law, without any special limitation imposed because it is concerned with criminal law.

Second, one must distinguish between the formal reasoning process called "analogy" and the prohibition of Article 2 against the "(creation of) offences by analogy." The formal process called "analogy" is a process of reasoning from like to like. As scholars have noted, it is probably the central pillar of legal reasoning, and reflects fundamental democratic values. A prominent situation in which the Penal Code actually *requires* reasoning by analogy can be found in those statutes which list circumstances and then close with a phrase such as "or any similar circumstances" or "or any other object." Article 488, already discussed, is one such provision, since it refers to "buildings or structures of any kind, crops of agricultural products, forests, timber *or any other object*." It was suggested that the italicized phrase should be interpreted to mean only objects *like* those specifically described, in order to avoid application of the article to such cases as the burning of a book. The process by which one would chooose what objects are like those described is the process of "analogy"—a process of deriving relevant general characteristics and then using them as a criterion for application. This formal reasoning process is not forbidden; here indeed the statute gives warning that it will be used. What is forbidden is the "(creation of) offences by analogy"; we now see that this does not mean using the process of analogy, as such, but using the process to find that an offence has been committed under a statute although the citizen would not reasonably have expected this decision from reading the statute's words.

As presently understood, the principle goes no farther than this. It does not require that a particular punishment be specified for each crime; only that available punishments and the conditions for their availability be established. It does not require a narrow or artificial method of interpretation; only that in defining offences the limitations of the language used by the legislature, as well as its purposes, be respected. If it is understood that the principle today as at its birth reflects principally political policy, not criminal policy these limitations on its scope should be readily perceived. So far as the "war against crime" is concerned, courts should be and are free to interpret legislative directives as fully as language and purpose *together* suggest. It is only where

the scope of the authority delegated or of the interpretation sought has negative implications for the structure of government or the political life of the citizen that caution is called for.

C. Application of the Principle in Ethiopia [26]

The principle of legality was first introduced into Ethiopian law in the Revised Constitution of 1955. The Constitution of 1931 had already made clear, however, that the principal legislative authority lay with the Emperor and His Parliament. While the Penal Code of 1930 included a provision to the effect that cases not provided for under the Code should be decided by analogy, it also controlled the use of this technique by restricting it to the Supreme Imperial Court. If it is reasonable to suppose that this court had ready access to the views of the principal legislative force under that constitution, His Imperial Majesty, one might surmise that even here the division of authority between legislature and court was in the main respected; the Supreme Imperial Court would not have acted on such a question without first seeking the legislature's views. Regardless of this, the provision of the 1930 Code appears designed as a smooth transition from the era of the Fetha Negast, when many cases were decided through extrapolation of principles more than interpretation of fixed rules, to a future state of "legality." Indeed, the 1930 Code as a whole provides such a transition. While it is not nearly so detailed or precise as most European codes, it acquainted Ethiopian lawyers with the code form and provided them with an initial basis for code reasoning.

As further explained by the Penal Code of 1957, Article 2, the principle of legality adopted in Ethiopia appears to have been the principle as it is presently understood, rather than the principle as it might have been in the early nineteenth century. Thus, Article 2 is at pains to distinguish between interpretation, which is permitted, and creation of offences by analogy, which is not. "Interpretation" is to be in accordance with the "spirit" and "purpose" of the legislation, in accordance with the "meaning intended by the legislature." That is to say, one may legitimately give the words of a provision any meaning they will bear, if that meaning will tend to effectuate the apparent purpose of Parliament in enacting the particular provision in issue. While the Code does not define "(creation of) offences by analogy," perhaps a regrettable omission, one may understand by this word the current view of most European commentators: a process by which a statute is extended to a case not fairly within the meaning of its words, but thought to be within its purposes. It follows that the answer to the question posed at the head of this section is essentially negative: the principle of legality does not require any substantial modifications or cautions in the techniques discussed above, so long as the limits assumed in connection with those techniques are carefully observed; an interpreter has the power to use any of these techniques he finds helpful.

X. THE PRINCIPLE OF LEGALITY—A LIMITATION ON LEGISLATIVE ACTION? [27]

The principle of legality, particularly in the version of it which appears in Penal Code Article 2, appears to be directed particularly to judges. Its history shows that it was adopted at a time when judges were feared as potential wielders of an arbitrary power over citizens' lives. It was meant to enforce their subjugation to the legislature, in particular by requiring that there be a definite legislative "warning" to justify each criminal conviction and criminal sentence. But, historically, this relationship has turned into a form of partnership, in which it is recognized that courts have the function of applying the general principles announced by the legislature to specific causes, and in the process, shaping them somewhat to fit modern circumstances. In criminal

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[26] J. Graven, work cited above at note 2.
P. Graven, work cited above at note 1, pp. 9–12.
Exposé de motifs, collection cited above at note 1.
Ethiopian Penal Code of 1930, Arts 11-12.

[27] See, regarding the existence of varying degrees of specificity in legislative expression:
Ancel, work cited above at note 17.
Glaser, work cited above at note 6, pp. 902, 910–912.
Hall, work cited above at note 17, pp. 27–28.
Mahsoub, work cited above at note 1, pp. 34 ff., 47 ff.
Mannheim, work cited above at note 20, p. 206.
Thornstedt, work cited above at note 6, pp. 211 ff., 224.

cases, the only prohibition forbids them to apply a statute in a manner not predictable from its wording; we have seen that the legislature has worded some statutes so as not only to permit, but to require the courts to use their partnership role to apply statutes to causes it has not explicitly mentioned. Since legislation necessarily involves the delegation of some legislative, or rule-making, authority to judges, one question which arises is "Are there any constitutional limits on legislatives delegation of rule-making power to courts?" Are there limits to what legislatures can do as well as to what judges may do?

In asking these questions, the author does not mean to discuss the related question whether Ethiopian courts are ever empowered to declare legislation unconstitutional. That is a difficult and important question, which cannot concern us here. If Ethiopian courts have this power generally, they will be in a position to enforce any limits on legislative action which may appear from the following discussion. Even if they lack power to declare legislation unconstitutional for delegating too much authority to them, they could control such legislative acts by refusing to exercise the discretion given them, or construing the grant as narrowly as possible. In this way, they might be able to force the legislature to be more explicit or detailed without actually declaring null and void what the legislature has already done. Finally, one may rely on the good intentions of Parliament and the Emperior to observe for themselves any limits which the constitution imposes. If this discussion prompts legislative awareness of any limits, and consequent self-restraint, it will have served an ample purpose whether or not Ethiopian courts are in a position to make the limits meaningful through enforcement.

A. Retroactivity [28]

The most universally accepted limit on legislative action regarding crimes is often, as in Article 55 of the Revised Constitution, included in the wording of the principle of legality itself: a legislature cannot make its rule retroactive in time, to make criminal an act which was not criminal at the time it was performed. Obviously, such a rule is implicit in the notion that the citizen must be warned what conduct will be considered criminal, so that he can decide how he will behave. In the absence of such a rule, legislatures could play the arbirtary role it was thought judges once took, and define some act which had already been committed as a criminal offence. Someone whom the government wished to see put away, a political opponent, for example, could be quickly dispatched if this expedient were possible.

It should be noted that the judge, when he interprets a statute, is subject to no limitation of retroactivity. Even though it was not clear in advance of his decision whether a particular statute would apply to the conduct in a case submitted to him, if he decides the statute does apply, he will apply the statute in that case. He will apply it even though the conduct preceded his decision by some months, and even though the defendant may have acted in the mistaken belief that the conduct was not forbidden by the statute. Indeed, Article 78 of the Penal Code is quite clear about this. The Court is to reduce—but not eliminate—the punishment of "a person who in good faith believed he had a right to act *and had definite and adequate reasons for holding this erroneous belief*." (Emphasis supplied). A person *without* "definite and adequate reasons" for his mistake, one must assume, is entitled to no reduction at all.

B. Statutory Vagueness [29]

Another recognized limitation, which is enforced in the United States as a matter of constitutional doctrine, is that the legislature may not phrase its prohibitions too broadly—may not delegate too much rule-making power to the

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[28] Ancel, "Création des infractions . . .," cited above at note 20, p. 91. P. Graven, work cited above at note 1, p. 17.

[29] Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court," *U. Pa. L. Rev.*, Vol. 109 (1960), p. 67.
Andenaes, work cited above at note 1, p. 110.
Glaser, work cited above at note 6, pp. 902, 910–16.
Hall, work cited above at note 17, pp. 27–28, 36 ff.
Levi, work cited above at note 3, p. 520 ff.
Mahsoub, work cited above at note 1, pp. 34 ff., 47 ff.
Thornstedt, work cited above at note 6, p. 224 ff.
Williams, work cited above at note 17, p. 578.

judge. This principle is obviously related to the doctrine of separation of powers, since by delegating a great deal of its rule-making authority to courts the legislature is threatening to obliterate one of the major lines of separation. It has refused to perform its function of deciding what conduct should be punished. On the other hand, constitutional analyses of the problem are most frequently made under the Due Process Clause of the American Constitution (which corresponds to Article 43 of the Ethiopian Constitution). This is no doubt because of the dangers which statutory vagueness present to the citizen: he is unsure what conduct is made illegal, and hence may desist from valuable conduct or be inadequately warned of what will be considered wrongful; to the extent vague statutory language leaves the judge free to improvise, the citizen is unprotected from the judicial whim and fiat which it was originally the function of the principle of legality to prevent.

The notion that legitimate activity may be deterred by a vague statute is particularly important to the American doctrine of vagueness. It can be understood by recalling the observation made above, that a judge is not obliged to follow the rule against retroactivity in applying his interpretations of the law. The practical effect of retroactive application of interpretation is that a citizen will fear to engage in any activity which *might* fall under the prohibition of the statute, *as interpreted*. That is, the possibility that a statute will be interpreted to apply to and forbid certain conduct will hinder that conduct, even if the interpretation is unlikely or is never made. This effect might be acceptable if only objectionable conduct were inhibited by a uncertain language or a particular statute or if the uncertainty was reduced to the minimum by careful drafting. The danger, however, is that language which is very vague may inhibit—and may even be used or designed to inhibit—activities which are legitimate or which enjoy special protection under the law, as in the case of religious worship and other freedoms protected by the constitution. This possibility, that the threat of future interpretations of overly uncertain language may inhibit people from engaging in legitimate or specially protected activities, is a particularly unacceptable consequence of vague statutory language. Where an American court finds this possibility, it will nullify the statute under the Due Process Clause as unconstitutionally vague, unless it can quickly eliminate the uncertainty by interpretation. As might be expected, such nullification is more likely where the activities being hindered by the uncertainty of the law are highly protected, as in the case of political activities.

It may be easier to understand the rule against statutory vagueness and the reasons for it by considering a specific example. Suppose that in place of the present Part II of the Penal Code, the Special Part, Parliament proposed to enact the following provision:

> Art. 248: Whoever intentionally or negligently acts to harm the state, national or international interests, the public interest, the community, individuals, the family, or property shall be punishable with one or more of the penalties described in the General Part, Book II, in accordance with the needs of the case.

Now suppose that someone charged under this provision protests that it is unconstitutionally vague, relying on the principle of legality. If the principle of legality were applicable only to judges, and simply forbade them to go outside the written law, the principle would be inapplicable in this case; the provision does constitute written authority defining a crime, even if the definition is a very vague one. But the principle is also applicable to legislatures; it requires them to attain a certain standard of precision and detail in their instructions to judges. A provision such as the above would fail to meet any such standard. The area of uncertainty in its application is limitless. The citizen would not know what it was that he was forbidden to do, he might fear to engage in valuable social activities; he would be essentially without protection against judicial whim and fiat, since the legislature has essentially delegated to the judge broad rather than limited, judicial power to declare conduct criminal. If courts have authority to declare statutes unconstitutional, they could surely declare *this* statute unconstitutionally vague.

Let us consider another example, which is perhaps not so extreme, but which may help to understand why more precision is generally expected of penal than civil legislation Title IX, Chapter I, of the Ethiopian Civil Code deals with the problem of "Extra-Contractual Liability." Generally speaking, this is the Civil Code analogy of the law of crimes. Article 2027(1) provides that "Irrespective of any undertaking on his part, a person shall be liable for the damage he causes to another by an offence." An "offence" is then defined

in several general provisions. For example, Article 2030(1) states that "A person commits an offence where he acts or refrains from acting in a manner or in conditions which offend morality or public order"; Article 2033(1) states that "A person commits an offence where he turns to his own advantage powers conferred on him in the interest of another." Although Articles 2038–2065 then state specific examples of "offences," such as physical assault (Article 2038), an act need not fall within these particular provisions to constitute an offence. It is sufficient that it meet one of the general definitions of "offence," such as those stated in Articles 2030(1) and 2033(1).

As a mattter of civil code drafting, these provisions are well constructed. If an individual can show that he has been harmed by another person, it is already established that a tangible loss has been suffered, and that the defendant is its cause. The issue in a civil trial is, who is to bear this loss? Is the loss to be borne by the person who suffered it, the plaintiff? Or are there reasons to require the person who caused the loss, the defendant, to make it good—that is, to bear the loss himself? Since the question is one of allocating a financial loss which has already occurred, since the loss *must* be borne and the question is only who is to bear it, it may be fair to state the rules of liability in a very general way. The judge then has maximum freedom to allocate responsibility according to the apparent justice of the individual case.

In a criminal case, on the other hand, it is not at all certain or necessary that any actual harm has occurred. For example, persons are punished for attempts, without any consideration whether damage of any sort was done. Moreover, even where harm *has* occurred, the criminal prosecution is not intended to make that harm good; any suit for reparation is to be brought separately by the injured party, although it can be joined with the criminal prosecution under Article 100 of the Penal Code. The purposes of the criminal prosecution, punishment and/or rehabilitation, are to vindicate a public interest in social order, not to redress private injuries. The government is pitted directly against the individual defendant and seeks to take away his life, liberty or property. If it succeeds in convincing the court to penalize him it will have introduced a *new* element of loss to the cause: the defendant will be required to give up a life, liberty or property or property which no other person need have lost, and which in any event does not go to reimburse any victim who may exist for whatever damage he may have suffered. Because, first, it is the government which is involved and, second, the government is seeking to impose a *new* loss or penalty on the accused, much higher standards of certainty are appropriate in penal legislation than in civil. In the criminal area, statutes such as Articles 2030(1) and 2033(1) of the Civil Code would be much too uncertain; they do not define the limits of possible government action with a precision sufficient to warn the citizen what he may not do, and to protect him against arbitrariness.

How much uncertainty is "too much" is an extremely difficult question. Uncertainty which can be avoided by a more precise use of language is more likely to be found objectionable than uncertainty which is largely unavoidable. Thus, words of infinite scope, such as "immoral" or "evil" are particularly suspect. As has already been suggested, the answer also may vary with the type of activity which is being inhibited by the peripheral vagueness of the statute. A statute inhibiting, for example, religious practice might be more closely examined than one inhibiting questionable forms of sexual conduct. More important social values may be at stake in the first case than the second; there is more to be lost if they are inhibited. One suggested guideline attempts to distinguish between permissible interpretation and an impermissibly broad statute by examining the result of the judicial process on the statute: if a court can eliminate the area of uncertainty by interpreting the statute in one case, then the statute is not "too broad." If, on the other hand, the uncertainty cannot be eliminated by interpretation, then the statute is "too broad" and should not be applied. The legislature should be required to try again, more carefully this time.[30]

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[30] Articulated by the United States Supreme Court in:
Dombrowski v. Pfister, United Sates Supreme Court Reporter, Vol. 380 (1965), p. 479.
Shuttlesworth v. Birmingham, United States Supreme Court Reporter, Vol. 382 (1965), p. 87.
Compare the test for distinguishing interpretation from analogy suggested in:
P. Graven, work cited above at note 1, p. 11.

The limits on the legislature as well as those on the court, then, respond to the same considerations: the essentially political policies of affording sufficient notice to enable the citizen to make a reasonable prediction about what action the government might take affecting his freedom, and to protect him against arbitrary infringements of his liberty. If this is a valid generalization, then one may recast the analysis of "legality" into the terms suggested by an American criminal theorist, Jerome Hall: that the question involved is one of the proper "girth" of legislative statement and of judicial application of such statements.[31] At what level of generality can a legislature or a court operate in search of solutions impinging on the citizen's liberty? Thus seen, the principle of legality is an exhortation to both legislative and judicial attitudes. In effect, it says: "Be specific!" Particularization, concreteness, concern for methods and rules which will enable the citizen to predict where he stands and which will protect him against whim or fiat are the essential demands of the rule.

XI. IMPLICATIONS OF THE PRINCIPLE OF LEGALITY FOR INTERPRETATION

We concluded that under the principle of legality, the judge retains the *power* to adopt any interpretation of a statute which a reader of the statute would think possible from its words (subject to the possibility that he will refuse to adopt *any* interpretation, because he finds it too vague). The question then arises that implications can be drawn from the principle to guide the interpretive process.

A. Indispensability of Statutory Elements[32]

We earlier discussed at length the relationship between the General and Special Parts of the Penal Code, and remarked that the General Part would frequently define or even state elements of an offence in a way that would not be clear from the Special Part provision alone. The example used was the requirement of "intention" for a violation of Article 523, which is not mentioned in Article 523 itself but clearly must be inferred in view of Articles 57–59 of the General Part and the overall arrangement of the homicide provisions. By stressing the duty of the court to ascertain and respect legislative purposes in criminal matters, the principle of legality makes it clear that courts must find *all* elements of a crime to be present for a conviction to be justified—elements which are implied from the General Part as well as those specifically mentioned in the Special Part. If further evidence of this elementary principle were necessary, it could be found in Article 23(2): "The criminal offence is only completed when *all* its legal, material and moral ingredients are present." (Emphasis supplied.)

B. Ordinary Usage Over Special or Technical Meanings[33]

Since the judge always assumes legislative regularity, he is entitled to assume that the legislature has acted, in regard to any particular statute, with the principle of legality and its purposes in mind. That is to say, he is entitled to assume that the legislature intended its enactment to give adequate warning of the circumstances in which it would apply. Of course he, too, is under an injunction to interpret and apply a criminal statute in a way which might have been expected from its language and context.

One of the criteria by which the judge chooses among the available, possible word meanings, then, should be a consideration of those meanings which were likely to occur to the persons to whom this warning was directed. If the statute is a criminal statute of general application, he may properly hesitate before giving some word a special or technical meaning, if this will operate to the prejudice of the defendant. If the legislature proposed its statute to have general application, it probably also chose words which could be used in the same sense in which they are generally understood to express its purpose. It would

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[31] Work cited above at note 17, p. 36.
[32] J. Graven, "Les principes de la légalité . . .," cited above at note 1, p. 393.
[33] Freund, work cited above at note 3, pp. 180–184.
Hall, work cited above at note 17, p. 36 ff.
Hart & Sachs, work cited above at note 1, pp. 1219 ff., 1411 ff.
Radin, work cited above at note 1, p. 867 ff.
Stone, work cited above at note 3, pp. 31–34.

not have meant to trick the ordinary man by using common words in some special sense. On the other hand, where a statute seems to be directed to a special group—as is the case with Article 520, "Refusal to provide Professional Services," for example—it is proper to give uncertain words a meaning which would be understood by members of that group, even if these are not the words' ordinary signification.

This criterion is not exclusive if the judge is convinced by considerations of context, purpose, or the like, that the legislature assigned a different meaning to a word or phrase than the subject of the rule was likely to, he is free to adopt that special meaning; he does not violate the principle of legality thereby. But the purposes of the principle of legality suggest that in determining what the statute actually means it is appropriate to consider how the subject of a statute is likely to understand it.

To a certain extent this suggestion resembles the once popular doctrines that penal statutes must always be interpreted to favour the accused, or that the "plain" or "literal" meaning of criminal statutes must always be adopted. Given the law's acceptance of "warning" as an important function of criminal law, there is reason to favour the meaning a provision is likely to have to those who are governed by it over other possible meanings, in the absence of compelling considerations to the contrary. Such favoritism could be called adopting a "plain meaning," and is in a meaningful sense "favouring the accused." But the principle "*in dubio pro re*" far overstates the force which can properly be ascribed to the ordinary meaning of statutory language. The judge has the *power* to choose among *any* of the possible meanings of a statutory word or phrase, however "plain" one of them may be. The question is how he should exercise his power in order to attain justice. The meaning most likely to occur to an interest reader of the statute is an obvious choice.

C. Ignorance of the law as an excuse [34]

Even though some provision of the law may give clear warning that a particular act or omission may be treated as an offence, a citizen may be totally unaware of the criminal nature of his act. This need not be due to deceitful action on the part of the government in hiding the law once passed. Indeed, if the government ever did act in such a reprehensible manner, it would seem entirely within a judge's authority to refuse to enforce the statue in question. Rather, the citizen's ignorance of the law may occur whenever the "crime" is not an act which the citizen regards as immoral (and therefore likely to be a crime); criminal law today is so complex that few citizens are likely to learn of any "warning," unless it received special prominence because of newspaper stories, the advice of their lawyer, or the like. This is perhaps especially likely to be true in a country such as Ethiopia, where the complexities of modern life are new, where codes, court decisions, and legal information are not widely available, and where not all citizens understand the languages in which they are published.

A consequence of this situation is that several theorists now appear to be arguing for reconsideration of the long-standing doctrine that "ignorance of the law is no defence." If warning of the law's penalties is important, they urge, the law must be prepared to take account of the many cases where citizens do not know the law and could not be expected to surmise it, because the law is highly technical and deals with what are sometimes called formal or statutory wrongs rather than moral wrongs.

Article 623, penalizing failure to register the birth of an infant, is a good example of the kind of regulation they have in mind. Provision for registration of births may be important to a modern nation; enforcement of such a provision by a criminal penalty is commonplace. But the average citizen would not think a failure to register the birth of his child was likely to be a crime, for he would not consider it immoral; his view—whether correct or not—is

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[34] Ancel, *Social Defence*, cited above at note 20, pp. 126–28.
Andenaes, work cited above at note 1, p. 105.
Boni, "La mise en pratique des lois dans les nations en voie du developpement," in *Twelfth International Course in Criminology* (Hebrew University, Jerusalem, 1965), p. 88.
Glaser, work cited above at note 6, p. 935 ff.
Hart & Sachs, work cited above at note 1, pp. 1225–26.
Marchal & Jasper, work cited above at note 30.
Thornstedt, work cited above at note 6, p. 223, n. 3.

that the criminal law and morality largely coincide. Nor will he know of the obligation in any real sense simply because it appears in the Penal Code. Few citizens, even lawyers, have carefully read the Code. Unless the provision has been forcefully called to his attention in some way, any punishment inflicted upon him will be punishment for an act or omission which he did not know to be wrong and, realistically speaking, which he had no way of sensing might be wrong. This consideration may explain why, although "ignorance of the law is no defense" under Article 78 of the Penal Code, there are provisions in that article and Article 79(1) (a) for liberal reduction and even limination of sentence in cases of good faith ignorance or mistake. In the case of technical or regulatory offences, the principle of legality may not be protection enough.

Another appropriate reaction to a situation of this kind might be to prefer a relatively narrow meaning for the offence in question. Where a new offence essentially unrelated to previous criminal regulation has been created by the legislature, not only is the citizen unlikely to be aware of the offence, but the legislature, also, is unlikely to have considered as carefully as it otherwise might the extent it wishes the new regulation to have. Where the statute clearly applies to a given factual situation, of course one must assume it was meant to apply. But there is less reason to assume that the legislature meant the statute to apply in any uncertain cases, since the moral judgment made is a new one, and therefore may not have been fully explored. The suggestion that a new rule be narrowly construed is particularly appropriate for statutes touching on conduct previously accepted as legitimate, because of the considerations mentioned above in connection with the discussion of statutory vagueness. That is, legislatures as well as courts have a responsibility to be definite. This responsibility is greatest where enactments may threaten or inhibit legitimate or protected activities. By giving such a statute a narrow construction, the court at the same time assumes that the legislature has obeyed its responsibility, and acts to enforce that responsibility in case it has not.

D. Community Moral Standards as a Supplement to Statutory Warnings [35]

In the case of serious crimes, sometimes described as "infamous" or "bad in themselves," one might expect the situation to be exactly opposite from the birth registration case. Here, it could be argued that no formal warning is really necessary to apprise the citizen that his act will be subject to penalties. Regarding these crimes, most citizens—certainly the great majority of those who could be deterred by a written rule—will know that they are prohibited *not* because they are included in the written law, but because they are "wrong," "evil," or "immoral" according to a shared set of moral precepts. This suggests that it is the bounds of the moral precepts, rather than the bounds of the written law, which are the more important to be observed. Accordingly, some jurists have suggested that interpretation can be very free when the law in issue is one which refers to shared morals of this sort.

A number of cautions have to be observed regarding this statement, however; it can be seen that all of these relate back to the political functions of the principle of legality in establishing and protecting relationships between courts, legislatures and the citizen. First, there may be cases where the legislature has consciously decided not to punish as criminal certain acts which many regard as immoral. Obviously, any such decision must be respected; the legislature is the primary policy-maker here. Thus, fornication and prostitution are not, generally speaking, crimes under the Code's provisions dealing with sexual relations. While there might be no serious danger of unfairness to the citizen if courts "interpreted" the law to determine that such acts were crimes, any such "interpretation" would give serious offence to the legislative decision that they should not be punished as crimes. Second, all Ethiopian citizens may not share the same set of moral standards, coming as they do from so many diverse backgrounds. Parliament, in recognition of this, seems to have been particularly careful to spell out a number of offences which might not be recognized as such by various of Ethiopia's citizens. Article 524, discussed above, seems to be a good example of such a provision. Ethiopian courts, in turn,

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[35] Franklin, work cited above at note 20.
Hart & Sachs, work cited above at note 1, pp. 1225–26.
Glaser, work cited above at note 6, pp. 935–37.
Mahsoub, work cited above at note 1, p. 60 ff.
Williams, work cited above at note 17, pp. 601–602.

should recognize this factor by relying on statutory language to a greater degree than some of their European counterparts might now feel it necessary to do. Finally, it may be noted that considerations of "immorality" tend at the same time to founder and to work their gravest damage in those cases describable as "polititcal crimes." Here the danger of inhibiting valuable activity through imprecise wording of statutes is great. The threat of free interpretation in this area is equally great, particularly when one considers how ephemeral the "morality" of political acts is likely to be. Here, then, there is also a specific reason to restrain the judge's hand in interpretation, just as there is to restrain the legislature's hand in drafting.

XII. CONCLUSION

It is possible to rephrase the discussion above into a series of questions which the interpreter might ask himself when facing the task of understanding any statutory provision:

What could the words of this statute mean? That is, what choices does the statutory language leave open?

What job was this statute meant to do? How does it fit into the overall scheme? How might its function be different from the apparent functions of other provisions of the scheme?

How is this statute likely to be understood by the persons to whom it is directed? Will it be an entirely new standard of conduct for them, or something they more or less expect because of internal moral standards?

What are the practical effects of applying the statue to this case? Does the degree of severity in punishment seem to be about what one would expect an Ethiopian legislature to impose for this act? Will punishing this act imperil those who perform acts the legislature probably did not wish to forbid? Will it imperil acts the legislature is constitutionally forbidden to forbid? Does applying the statute to this case *require* applying the statute to another case, where its hypothetical purpose is not fulfilled?

Can the decision to apply or not to apply the statute to a particular case be rationally explained? Does it make sense in terms of its language, apparent purposes, and application or non-application to other cases?

The principle of legality requires that if the judge is deciding a case in favour of conviction, he must be able to conclude, "The language of the statute could mean this." The constitutional subordination of the judge to the legislature in statutory matters according to the separation of powers doctrine requires that in every case, civil as well as criminal, he must be able to conclude, "The language of the statutes does not require me to reach another conclusion." These are the only constitutional limitations on his interpretive power, on his freedom of choice. But a sense of his subordination to the legislature and of the policies represented by the principle of legality will make an interpreter anxious to assure that his interpretation satisfies at least some of the following criteria:

Consistency with ascertainable statutory purposes;
Uniqueness of function within a rational legislative scheme;
Sensibility of punishment in the context of contemporary moral standards;
A meaning which could be ascertained or at least expected by those who will be subject to the provision;
A meaning which does not threaten legitimate or protected acts;
Distinctions which can be explained in terms of believable hypotheses of legislative policy.

It should not be so surprising that the concrete limitations on judicial choice are so few. The so-called rules of interpretation are only verbal expressions, slogans which may represent useful policy but often overstate it. Choices exist, and always will exist, for judges to make. It is more honest to accept this fact and attempt to state a spirit or series of goals which might motivate choice than to attempt to conceal the fact of choice behind a camouflage of "rules." The major limitation will inevitably be found in the attitude which the judge—and the legislators—maintain towards their task. The principal role of the principle of legality is to suggest an appropriate attitude for both legislator and judge in the area of criminal law. It "can do no more than implement the attainment of the maximum possible certainty resulting from the operation of specific rules in a social milieu. It means no less." [36]

[36] Hall, work cited above at note 17, p. 47.

RIO PIEDRAS, P.R.,
March 15, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: In response to your letter of February 3, 1972, in which you expressed an interest in suggestions drawn from comparative law that might help in drafting a Federal Penal Code for this country, I am sending you enclosed a Memorandum composed of two parts: A. An Introductory Part dealing with certain principles which I believe to be essential in utilizing foreign materials; B Comment on More Specific Topics. Since it is my belief that no foreign rule or solution should be considered apart from a context, I should appreciate it if this Memorandum were to be reproduced in its totality rather than partially or in parts.

Very sincerely yours,

HELEN SILVING.

STATEMENT BY HELEN SILVING, PROFESSOR OF LAW, UNIVERSITY OF PUERTO RICO, COMPARING STUDY DRAFT OF PROPOSED NEW FEDERAL CRIMINAL CODE TO EUROPEAN PENAL CODES

GENERAL PRINCIPLES

I am gratified to find that a Subcommittee of a Committee of the Senate wishes to include in its deliberations concerning a Draft Study of the Proposed New Federal Criminal Code lessons to be derived from experiences of foreign nations, especially those of the European Continent.[1] I have been stressing the need for cross-cultural fertilization of legal thought for many years, and I should be pleased to cooperate to the best of my abilities with the Subcommittee in its commendable task. But the time allotted to my reply is much too short for anything but a most cursory consideration.[2] I shall, therefore, limit myself to a few remarks of a general nature. Such limitation is also justified by the fact that most of the specific questions addressed to me have already been ably answered by Professors Andanaes and Damaska.[3] Moreover, I am glad to note that, as your letter of February 3, 1972 indicates, you are "searching for ideas and possibilities rather than material for a treatise or encyclopedia." Nevertheless, certain preliminary matters of a comprehensive nature should be taken into account by way of introduction to anything said thereafter.

I. *Nature of Comparative Law*

Comparative law does not—at any rate, should not—consist of ad hoc comparisons of disparate individual rules, principles or case-solutions. For each rule, principle or solution plays its crucial role within an integral system; it is not truly "functional," perhaps not even "relevant," outside of the system. Professor Paul K. Ryu of Seoul, Korea has demonstrated this feature of law and culture in his "field theory of culture."[4] Each "system," in turn, forms part of an ideology, which has its roots in a specific history of ideas, ideologies and attitudes, evolving an overall ethical, legal, sociological, political, in fact, also epistemological, project of thinking. As an illustration of a basic political-epistemological approach I might mention the fact that Marxist law proceeds from the ontological view of "naive realism" which eliminates epistemological doubts regarding the possibility of reliability of official access to knowledge of truth or justice. According to this ideology, which has its parallel in the Marxist view of economic value as inherent in the things themselves rather than determined by market valuations, there appears to be no need to formulate legal rules (especially those of evidence) in terms of "probabilities" stemming

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[1] This evinces from the letter to me of the Honorable John L. McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, dated February 3, 1972, and the inclusion of comments by Professor Andanaes and Professor Damaska, in the Working Papers of the National Commission on Reform of Federal Criminal Laws (Established by Congress in Public Law 89–801, see Volume III (1971), pages 1451–1505.

[2] According to the above-cited letter of February 3rd, my reply was to reach the subcommittee before March 17th.

[3] See the Memoranda cited above, note 1.

[4] Paul, K. Ryu, *"Field Theory" in the Study of Cultures: Its Application to Korean Culture*, in Symposium on the Occasion of the Third East West Philosophers Conference (Univ. of Hawaii Press, pp. 648–669 [1962]).

from epistemological doubt: in this view, the law and its organs are deemed infallible, and thus, the individual must yield.[5] Our own doctrine of judicial review of the constitutionality of statutes, as well as our institution of an autonomous "law of evidence," which take account of the fallibility of law and of judges[6] incorporate different epistemological ideas. An ideological line of thought similar to that underlying the mentioned American institutions may be found in the recent acceptance in some countries of the European Continent of the exemption or mitigation for "error of law," which on a verbal level has been also adopted in the Soviet Union,[7] but is outright rejected in this country.[8] But, as will be shown, in the mentioned European countries, that policy is believed to originate in the ideology of "legal science," next to be discussed.

Another example of an ideological underpinning of legal approaches is the continental European jurists' belief in "Criminal Law Science" as a source of law interpretation and unavowed law-creation. In earlier periods of our own law there obtained a remotely similar ideology that a specifically "legal science" can reveal what "*is*" law or proper law. But when we speak of "science" today, we have in mind disciplines that substantially assume a "causative" orientation, such as physics, chemistry, biology, anthropology, psychology, sociology. The so-called "science of law" of civil-law imprint might at best qualify as a systematization of a chosen policy scheme, as a specific type of axiology, hardly a "science" as we use this term. There is no denying the fact that the continental European jurists' "science of criminal law" affords certain legality safeguards which we would simply classify as considerations of a constitutional order. On the other hand, it has introduced into the law of civil-law countries a rigidity utilized by jurists in—often unconscious—schemes of manipulating symbols rather than determining consistent policy choices.[9]

The fact that we proceed from constitutional policy guidelines rather than from would-be "scientific considerations" of the described nature, is an asset which we should not readily abandon. Thus, I must warn as emphatically as I can against leaving determinations of any issues of criminal law interpretation to "legal science." Wherever such reference is made, it will ultimately result in judicial legislation, as the statute thus subject to be interpreted is to the extent of such interpretative gap "vague and uncertain."

Marginally, it should be noticed that the inductive "common-law" approach to legal solutions, proceeding from specific issues rather than dispositions based on a *Weltanschauung*, itself represents a choice of "system" and is by no means wholly chaotic or indeed inchoate.[10] But when code-drafting is planned, there is need for an overall policy-choice, in the light of which each individual rule should be formulated. In the specification of such rules, there is every reason to draw on the experience of other nations. However, that experience is barren unless such rules can be rationally integrated in our chosen policy scheme.

II. *The Place of Definitions in a Code*

Contrary to predominant assumptions, a "definition" in law is not a cognitive assertion but a normative, constituent part of the legal rule for which it is being formulated. This is true whether or not the definitional portion of the rule refers in ultimate analysis to some genuine "science;" for the point in

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[5] On this, compare Silving, Essays on Criminal Procedure 286–288, and footnote 6 (1964).

[6] On the fallibility of judges, see particularly the illuminating writings of the late Judge Jerome Frank, *"Are Judges Human?"* 80 U. Pa. L. Rev. 17 (1931); If Men Were Angels (1942); Courts on Trial; Myth and Reality in American Justice (1949).

The belief in the "infallibility" of judges in Marxian ideology forms part of the official Marxian interpretation of the continental European doctrine of "free evaluation of proof." On this interpretation, deviating from that of the Western democracies, see Silving, *op. cit., supra*, at 154–155.

[7] See on the theory and practice of "error of law" doctrine in the Soviet Union, Ryu & Silving, *Error Juris: A Comparative Study*, U. Pa. L. Rev. 421, at 434, 466 (1957). The Soviet acceptance of this doctrine—even though practically only verbal—is inconsistent with its official ontological approach.

[8] See the Study Draft § 610, which admits such error only on the basis of a sort of "fault of government" basis, while one might well ask whether the government (including, if course, State Governments) is free of blame for not teaching criminal law in public schools.

[9] On this see Ryu & Silving, *Toward a Rational System of Criminal Law*, Seoul National University Law Review 1962, pp. 1 et seq.; also 32 University of Puerto Rico Law Rev. 119 (1963); in part reproduced in Silving, Criminal Justice, Volume 1, in the here pertinent part, at pp. 301–305 (1971).

[10] See on this Silving, Sources of Law, at pp.97–124 (1968).

issue might be controversial in the respective science itself, and the legislator should certainly be aware of the fact that in referring the judge to "science," he is actually permitting him to resolve a scientific controversy. Certainly, however, delegating to the judge disposition of an issue of the so-called "legal science" is opening the door to "judicial legislation," delegating legislative functions to the judicial branch, and in all likelihood creating "vague and uncertain" legislation.

The question of whether a Penal Code should or should not have definitions of general concepts, such as causation, intent, negligence, is controversial in civil-law countries. To be sure, experiences with some penal code definitions, particularly those of the Italian Penal Code, have been most disappointing, since these definitions do not actually indicate any legislative choice of policy; they lend themselves to inconsistent interpretations and often amount to useless "*idem per idem*" translations, as in defining "negligence" by "imprudence." (Art. 43, par. 3, Italiam Penal Code; for translation see Silving, Criminal Justice, vol. 2, 1971, at 683). In Germany, statutory law (including the latest version, Law of July 4, 1969. BGB1. I 717) does not define either intent, negligence, or causation, the theory being that these concepts can be best defined by "legal science". Actually, projects submitted by various groups in the preparatory stages of the German Code did define "intent" and "negligence" (see §§ 16–18 of the Draft of 1962, and §§ 17–18 of the so-called "Alternative Draft" [1969 version]), but these definitions were omitted in the final Act, along with the definition of "causation". As the preparatory drafts were the creature of the representatives of so-called "legal science" (mostly law-professors), one might assume their definitions to have been "scientific" enough for adoption in the Code. Indeed, it seems strange to expect judges to define "scientific" notions which "men of science" are unable to define in general terms.

It is a postulate of our constitutional "legality" barring "vagueness and uncertainty" of statutory terms as well as enjoining "separation of powers," that definitions in a Penal Code be made by legislators. However, utmost care should be exercised to make these definitions truly meaningful in the light of latest teachings of "language analysis." In terms of the philosophies of Charles Peirce, Wittgenstein, and others, these definitions must convey to judges the legislative choice reached by legislators.

III. *Constitutional Substantive Criminal Law*

"Constitutionalism" is perhaps the greatest American contribution to the world's legal culture. Our principle of judicial review of the constitutionality of statutes served as a pattern for the so-called "professorial constitutions" of Professors Preuss in Germany (Weimar Constitution) and Kelsen in Austria (1919 Constitution). But the incidents of constitutionalism have developed in a somewhat distinctive direction in these countries.[11] The differences are pertinent to the topic of the instant memorandum, but require an elaboration which would exceed its scope in terms of time and space. A few selective points of difference must suffice. In this country stress is placed on procedural legality, whereas in countries of continental Europe greater significance is attributed to substantive "legality." This is in accordance with the general preference in Europe for "substantive law" over "procedure," the latter being regarded as "instrumental" rather than "material." To it comes that, e.g., the Bonn Constitution is very much younger than ours and has developed more elaborate specified modern notions, such as "dignity," freedom of personality development," [12] which in our federal Constitution are at best implied. The fact is that our "substantive constitutional criminal law" is but incipient and as yet ill-equipped to resist the impact of archaic and ancient law survivals, supported by our traditional orientation to the past as source of wisdom.

COMMENTS ON MORE SPECIFIC TOPICS

1. *Our "Police Power" Ideology Compared with the More Restrictive Substantive Law Notions of Civil-Law Jurists*

Our prevailing ideology is that the police power of a state (also the Federal Union) in substantive criminal law matters is very wide. Only when it affects

[11] For details see Hans Spanner, *Rechtliche und politische Grenzen der Verfassungsgerichtsbarkeit*, an expert report rendered in the Proceedings of the First Austrian Jurists' Conference, Verhandlungen des ersten oesterrichischen Juristentages, Band I, 2. Teil, Vienna 1961.

[12] See on these conceptions Silving, Criminal Justice, volume 1, *op. cit, supra,* at pp. 67–68; and vol. 2, 818–819.

first freedoms is there a real tendency on the part of courts to assume jurisdiction. Peculiarly enough, so far there has been no awareness in this country that first freedoms are vitally and comprehensively restricted, if not eliminated, whenever a person is imprisoned. Our system of arrest, permitting it even for crimes which would not carry imprisonment after conviction,[13] our bail system which clearly discriminates against the poor, our prevailing belief in the state's power to define as crime anything that displeases a legislature or "the man in the street" (the "Clapham bus commuter" in England),[14] our notion of the total power of the state to impose sentences not proportionate to the significance of the precipitating offense, our allowing the sentencing process to turn "administrative," our failure to subject sentence enforcement to adequate legality safeguards, are features of our criminal law, which have no counterpart in the systems of continental Europe.[15] These features are challengeable under our own Constitution; since constitutional litigation is not and cannot be as prompt and as comprehensive as is warranted by the significance of the mentioned subjects, Congress would be well-advised to subject each and every aspect of the Draft Federal Criminal Code to elaborate, conscientious constitutional scrutiny; for "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Holmes, in *Missouri, K. & T. Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904).

There may be quite as much basis for relating the triviality of our arrest grounds to the rules on resistance to an arrest as there is for reversing a judgment because of a technical inadmissibility of the products of an illegal search. Similarly, the structure of our bail system undoubtedly bears on our substantive rules on prison escape.[16] However, discussion of these topics would lead us deep into the area of specific rules. I will rather briefly deal under separate headings with the remaining above-mentioned topics.

2. *State's Power to Define Crime*

Imprisonment carrying a total deprivation of civil rights, definition of crime sanctioned by imprisonment *ipso facto* raises a constitutional issue; since the rights involved include "first freedoms," the presumption is against constitutionality of any such definition. The Government thus has the burden of proving that the statutory definition is constitutionally proper, meaning, that there obtains an overwhelming community necessity for making a conduct as defined criminal. I submit that this principle constitutes the basis of the recent trend toward "decriminalization" of the law.[17] In this context I should like to draw attention to the fact that in Germany the influential "Alternative Draft" (Alternative to the Draft of 1962) suggests elimination of numerous crimes, among them, obscenity; incest; pandering other than "bringing about prostitution" of certain minors (§ B 10); pimping.

Structures of crime in which there obtains a gross disproportion between the requirement of actus reus and mens rea, such as crimes of specific intent (typical example, our burglary concept), known in Germany as "crimes with an overflowing inner tendency," and crimes aggravated by consequences ("*durch den Erfolg qualifizierte Delikte*") are in disfavor.[18] The former crime structures are but one step removed from "conspiracy" which as a general category is rejected by jurists of the civil-law tradition.[19] In accordance with suggestions of the American Law Institute Model Penal Code (Section 5.03), the Study Draft, § 1004, has somewhat improved the "conspiracy" notion of our law. But this

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[13] See on this, Silving, On *"Police Brutality,"* 37 Univ. of Puerto Rico Law Rev. 279, at 299–308 (1968).

[14] On this see Silving, *Philosophy of the Source and Scope of Criminal Law Prohibition*, in Crime, Law and Corrections 232, at 235–237 (Slovenko ed. 1966).

[15] See on this Silving, *"Rule of Law" in Criminal Justice*, in Essays in Criminal Science, 75–154 (Mueller ed. 1961), for a comprehensive comparison. For subsequent amendments of foreign laws, see Silving, Criminal Justice, *op. cit.*, supra., in pertinent contexts.

[16] For critique of the latter rules compare Damaska, *supra*, note 1, at 1502.

[17] As noticed by the New Jersey Criminal Law Revision Commission, existing law has "over-criminalized society." See Report of the Commission submitted to the Legislature on Dec. 1, 1971.

[18] Compare Silving, in Crime, Law and Corrections, cited *supra*, note 14, at pp. 246–251; and particularly Ryu & Silving, *Nullum Crimen Sine Actu*, Seoul National University Law Review (1964), a summary of which is contained in Silving, Criminal Justice, vol. 1, at pp. 318–321.

[19] See Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 447–448 (1949).

improvement does not meet basic objections of civil-law jurists against its "punishing thought." [20] Along with the notion of "attempt" (Study Draft, § 1001), "conspiracy" is due for a complete overhaul.[21] In this connection, there also obtains an urgent need for reassessment of our "burglary" concept, which has no parallel in civil-law penal codes,[22] and similarly, of all crime structures of the category known in European law as "versari in re illicita." [23] Subjectivism, characteristic of the National Socialist "criminal law punishing the evil mind" ("will") has no place in a democratic criminal law. Nor is "responsibility for results not related to guilt" consistent with such law.

3. *Constitutional Vagaries in Sentencing and the Need for New Ideas*

A most peculiar feature of our constitutional system is the lack of coordination between trial and sentencing safeguards. One might query to what end, if not for the purpose of potential sentencing, defendants are being tried. If our constitutional system of criminal law is to survive, *Williams* v. *New York*, 337 U.S. 241 (1949), must be overruled or Congress and State legislatures must revise all legislation that survives under the protection of its ruling. I cannot dwell upon this matter at this time, but wish to refer to my criticisms of this case in various publications.[24] Perhaps, to demonstrate the absurdity of this decision, it may suffice to refer to its grotesque assertion of the rehabilitative ideal in affirming a death sentence. *Supra*, at 248. The ruling is quite incomprehensible to civil-law jurists, trained in the belief that punishment must be reasonably proportionate to the crime to which the defendant is sentenced.[25] In recent German legislation, proportionality to the significance of the act is required also for measures of security and cure. Compare German Act of July 4, 1969 (BGBl. I 717), § 62.

I wholeheartedly approve of the Draft's systematization of punishment scales (§ 3002), as contrasted with the civil-law specification of a scale for each crime individually.[26] This systematization requires the legislators to clarify in their own minds and to others into which among the several punishment classes they ought to assign any given crime type in terms of its reprehensibleness or harmfulness. But I have grave doubts regarding the justice or rehabilitative potential of indefinite sentences (Study Draft, § 3201), as they tend to produce anxiety. In practical terms, the parole potential available in European codes renders their definite sentences perhaps also, to this extent, indefinite.[27] However, the prisoner is informed of what he may expect in the worst event, and the maxima being shorter than those of the Study Draft, the scope of uncertainty is less traumatic.

As regards punishment types, I should like to draw attention particularly to an interesting innovation introduced by the Penal Code of Poland of 1969 (Official Journal of Laws of the People's Republic of Poland, May 14, 1969, Item 94, Act of April 1969), Arts. 30–34, whereby "restriction of liberty" (*ograniczenie wolno sci*) functions as an autonomous punishment type, distinct from probation. The defendant's freedom of action is limited in his being held, (1) not to change his place of residence without court permission, (2) to perform unremunerated labor for public purposes to the extent of 20 to 50 hours a month, (3) to be barred from performing functions in civic organizations, and (4) to give account of matters relative to the course of the execution of the penalty. May I also draw attention to my own suggestion for formulation of an autonomous sanction type, consisting in an impersonal form of "supervision," to be applied in principle to all crimes other than those affecting the bodily security of persons.[28]

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[20] On this see Silving, Constituent Elements of Crime 161–163 (1967).

[21] On the ALI Model Code concept of "attempt," see Silving, *cit., supra,* note 20, at pp. 112–113.

[22] Compare Damaska, *supra*, note 14, at 248–251.

[23] For comprehensive presentation, see Silving, Criminal Justice, volume 2, at 663–681.

[24] "Rule of Law" in Criminal Justice, *supra*, note 15, at 78–97; also Criminal Justice, vol. 1, at 281–284.

[25] Notice Professor Overbeek's (Holland) constitutional objection to use of "secret" documents by the judge in sentencing, in the Third International Congress on Criminology, Sept. 12–18, 1955. See Summary of Proceedings (London 1955), at p. 74.

[26] Compare Andanaes, *supra*, note 1, at 1466.

[27] Compare Damaska, *supra*, note 1, at 1483–1484. However, I do not equate "security measures" with "punishment," provided that the "dual system" is properly structured. On this see *infra*, on "The Dual System."

[28] For this proposal see Silving, *Toward a Contemporary Concept of Criminal Justice,* 4 Israel Law Review 479 (1969).

Even within the Thyren system, fines are essentially inegalitarian, and since most prisoners are poor, grave doubts obtain as regards the function a sanction of this type may realistically perform.

4. Judicial Obligation to State the Grounds of Decision

Appellate Review of Sentences (Study Draft, § 1291) is a welcome innovation introduced by the Study Draft. However, it should be supplemented by a most heuristic institution of foreign penal laws: the judicial obligation to state the grounds of decision, including the considerations which formed the basis of reaching the given sentence. German Code of Criminal Procedure, § 267. Some believe that this obligation is of constitutional dimension. Brüggemann, Die Richterliche Begündungspflicht (1971). This institution contrasts favorably with the position assumed by our law, best exemplified by Justice Black's statement in *Williams* v. *New York*, supra, at 252: "And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death... giving no reason at all."

5. *The so-called "Dual System"*

In 1959, Professors Lasswell and Donelly wrote a paper in which they believed to have initiated the idea of "isolating the condemnation sanction," that is, punishment, by creating alongside with it a differently structured, preventive sanction. See *The Continuing Deate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 Yale Law Journal 869 (1959). This division of criminal sanctions into punitive and protective types was known in Europe at least since 1893, when Carl Stoos's Project of a Swiss Penal Code was published See *Exposé des Motifs de l'Avant Projet de 1898* (Basel-Geneva, 1893). In fact, it was adopted by several penal codes, the German, the Swiss Federal, the Italian, and the Polish Penal Code. The sanction contrasted with "punishment" is known as a "measure of security and of cure," and it is deemed not to carry a judgment of censure, but rather to function for the protection of the community and for the care and cure of the person concerned. It is, however, in principle imposed where the defendant is found to have engaged in a criminal conduct but shows certain special personal characteristics, such as insanity, alcoholism, addiction, or habitual criminality. This type of sanction is, on the other hand, also distinguished from an administrative "measure," in that it is predicated upon a judicial finding of engagement in a criminal conduct, and can be imposed only by a court. I believe this system, where properly structured to fulfill the "isolation function,"[29] to be most heuristic, as it avoids the erratic method of groping for the limits of punishment within the ambit of criminal law itself.

6. *Courts of Sentence Execution*

Jourists of the civil-law tradition would object most strenuously to any attempt at turning the criminal law "administrative." "Measures" too must be imposed by judges and judicially controlled. Precisely for the purpose of administering measures that may require revision, substitution or termination in the course of the enforcement stage of judgment and sentence, there has been introduced in Italy in 1930 the institution of the so-called "*giudice di sorveglianza*," "supervisory judge," who supervises the process of the execution of measures, as well as that of punishment. A similar institution was introduced in France in 1957, the task of the "*juge de l'application des peines*" being mainly that of individualizing punishment and its execution (since in France the system is monistic).[30] The "*Vollstreckungsrichter*" has been lately also introduced in Germany. See, e.g., Act of July 4, 1969 (BGB1. I 717) § 57, 67.

I firmly believe that a court of this type, sitting inside prison walls and determing controversies between prisoners and the prison administration, seeing to it that the prisoner receive proper "justice" and that his civil rights not be curtailed beyond necessity, determining the grant and revocation of parole,[31]

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[29] Ibid.; and see Silving, Constituent Elements of Crime, Introduction; for details of such system as known in continental European countries see Silving, Criminal Justice, volume 1, at 32–48, 133–137.

[30] See Silving, *"Rule of Law" in Criminal Justice, supra*, note 15, at 130–138, 152–154.

[31] I would abolish "parole boards" and deny any jurisdiction in the matter of parole to correctional authorities. It may be also pertinent to add that "judges of sentence execution" in Europe are not as independent as our judges are. I suggest that they be granted full independence and power to decide (not merely to advise).

supervising the administration of measures (e.g., any problems that may arise in the course of an assignment to a mental institution pursuant to a court order) is an irreducible "*must*" at this time in this country, for the preservation of human dignity and in the light of recent insights into the conditions of prison administration. This institution should be integrated into the Federal Criminal Code as part of its working apparatus.

7. *Constituent Elements of Crime*

Among the "Constituent Elements of Crime," which form the first part of the "General Part" of a Criminal Code, the second part being devoted to "Sanctions," I can mention briefly only two most essential points. One pertains to the structuring of the "mental element," meaning "intent," "recklessness" and "negligence." The definitions of the Study Draft (§ 302) are preferable to those of, e.g., the Italian Code (Art. 43), but they do not appropriately separate the subjective and the objective elements; only such analytical separation can afford a clear and precise guide to the judge.[32]

The second, crucial need of our jurisprudence today is recognition of error of law as an exemption ground. According to dominant jurisprudential opinion in this country, "law consists of predictions of what courts will do in the future" (Holmes). Where such opinion prevails, is it proper to convict a man for acting in ignorance or mistake of the criminality of his conduct, that is, for "predicting wrongly?" Much injustice could be rectified by admitting the exemption from criminal responsibility based on legal error. I have in mind such injustice as that done to Ginzburg,[33] who certainly had every reason to believe that the statute under which he was later convicted was unconstitutional and whose belief was substantiated by practically all previous and subsequent cases.[34] The fact that such belief is not protected tends to discourage constitutional challenges and thus to perpetuate the life of unconstitutional statutes. For it is hard to expect a man that he risk imprisonment as a price of testing the constitutionality of a statute.

In my own view,[35] no distinction should be made between the treatment of legal and that of factual error. However, the doctrine that is now dominant in Germany and Switzerland permits a middle of the road approach, which may perhaps be more suitable at this time for acceptance within our federal system, steeped in the doctrine of *error juris haud excusat*. According to the doctrine at present accepted by German courts (BGHSt. 2, 194), known as "doctrine of guilt" (*Schuldtheorie*),[36] a person violating a law in ignorance or mistake as to its prohibition is totally exempt from punishment for intentional crime only where his error was excusable. Where it was not excusable, he is subject to a more or less severe punishment depending on the degree of his guilt in failing to "exert his conscience" (meaning, to make an effort) in order to ascertain the law. In practice, this doctrine affords a mitigation ground for legal error, and only in extreme situations a total exemption.

This rule evolved in Germany in the course of judicial interpretation. Its statutory formulation is of recent date. In fact, the pertinent statute of July 4, 1969 (BGBl I 717), § 17 (for text see Silving, Criminal Justice, Volume 2, at 811), will not become effective until October 1, 1973.

The rules on "Complicity" (which in the Study Draft are structured solely in terms of "acting through an innocent agent"), those on "Crime Plurality," the "insanity" rule, require a total reassessment. For comparative consideration, I refer to my "Constituent Elements of Crime," "Criminal Justice," and "Essays on Mental Incapacity and Criminal Conduct." For "perjury" rules, see my "Essays on Criminal Procedure."

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[32] I suggest, with all humility, that my own definitions of the mental element (see my Constituent Elements of Crime, op. cit., supra, at 206–254) are more precise than those of the Study Draft.

[33] *Ginzburg* v. *United States*, 383 U.S. 463 (1966).

[34] As aptly pointed out by Alan M. Dershowitz, "The Court Made a Law Just For Him." See The New York Times of February 13, 1972, E 8. Dershowitz quotes Alexander Bickel stating that in the "Ginzburg case, the Court punished a man under a rule applicable to no one else, past or future. It made of Mr. Ginzburg an example that exemplified nothing." For the purpose of the discussion in the text, I assume *without admitting* that the rule in the *Ginzburg* case is per se just. My question is thus reduced to the following query: should Ginzburg be punished if he misconceived that rule (in terms of its constitutionality), which after all was enunciated *ex post facto?*

[35] Constituent Elements of Crime, *op. cit., supra*, at 358–360.

[36] On this see Ryu & Silving, *supra*, note 7; and Silving, Criminal Justice, volume 2, at 789–800.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., February 8, 1972.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Committee on the Judiciary, Washington, D.C.

DEAR SENATOR MCCLELLAN: I have your circular inquiry of February 3, 1972 requesting comparatists around the country to submit comments on your questionnaire concerning foreign criminal laws.

At the outset I should state that I cannot consider myself an expert in this area, never having taught the subject and that, I fear, very few will consider themselves qualified to report on "foreign laws as such" in view of the enormous differences existing even between civil law countries. My only qualification consists in the fact that up to 35 years ago I was an Austrian judge in criminal matters, and I am glad to state whatever minor observations I can offer on that basis. I should also add that a few weeks ago I published a book on "Psychoanalytic Jurisprudence" which contains a fairly extensive chapter on psychological problems bearing upon the administration of criminal law. Since perhaps some of my observations may be of interest to members of your staff, I enclose a xerox of that chapter for casual perusal. I am encouraged to do so by the statement in your inquiry according to which your main purpose is that of "searching for ideas and possibilities."

In studying your individual questions it struck me that, as everywhere else, the question of criminal responsibility phrased in terms of "insanity" will probably be among those creating the greatest difficulty. As no doubt known to you, Germany has been through several years of discussing drafts and counter drafts of a new criminal code and here, too, that question has remained in the center of public discussion without leading to a satisfactory solution. I truly believe that a distinction among different types of crimes as suggested in my book would offer a new approach which conceivably could remove some of the now existing difficulties. In this context thought should perhaps be given to what in some continental codes is referred to as the defense of "emergency" which, in contrast to the justifying facts of "self defense" typically offers "excuses" from responsibility.

While I have personally somewhat unorthodox views about the problems surrounding sentencing, I feel that it would be presumptuous for me to take a position in view of my lack of practical experience in this country. Merely to introduce foreign code provisions in this context would appear to me potentially misleading in view of the wholly different background in the judicial administration of foreign countries.

I might add that one of my students, Thomas Robertson, has just completed a book on a comparison between American and German criminal law reforms, together with Professor Lee of Wayne University and would no doubt be greatly honored if permitted to submit the result of his research.

Sincerely,

ALBERT A. EHRENZWEIG.

[Excerpts from Psychoanalytic Jurisprudence, by Albert A. Ehrenzweig]

Fourth Chapter

LAWS AND LAWNESSES

§176. In earlier chapters we observed the central problem of legal philosophy about the concept of "justice" resolve itself into an emotional conflict between inconsistent justnesses, which called for a prevailingly psychological analysis. Here, an attempt will be made to test in the same manner several central problems of the law which have earned their place within the traditional scope of jurisprudence by relying on justnesses anchored in the deepest layers of our minds. Since man encounters the law most frequently and most dramatically in its sanctions, criminal and civil responsibility as well as the sanctioning process itself will be discussed in this context.

A. JUSTNESSES OF CRIMINAL LAW: PUNISHMENT AND "TREATMENT"

1. *Why we punish*

a. *Social justification and motivation*

(1) "Reason"

§177. At least since Bentham's utilitarian message,[1] hornbook learning has taught us that modern punishment is determined by three rational purposes: the "general deterrence" (general prevention) of potential wrongdoers, the offender's "special deterrence" (special prevention, reformation), and the protection of society by his "rehabilitation," total elimination, or at least segregation through preventive detention. Some psychologists are even satisfied with the discussion of criminal law only in terms of these last measures, omitting not only irrational retaliatory punishment as an unavoidable institution but even general prevention by deterrence as a rational purpose.[2] Increasingly, however, we seem willing to face the fact that the

1. See Bentham, Rationale 29. On Bentham, see generally supra §33; also Pincoffs 17-25. See also Beccaria (1738-1794), passim; and on his theory, Preiser, in Todesstrafe 39-40; supra §33 note 75.

2. See e.g. Singer 409, 412, passim, paying undue respect to the behaviorism of yesteryear (413-415, 422-423). See infra §181 note 32.

classic purposes of punishment are only very imperfectly served by the administration of criminal justice. Yet, all our efforts continue to be limited to attempted improvements of this "official" structure. We rarely admit, and hardly ever face, the overwhelming impact of that "unofficial" motor of much of our criminal law, our retaliatory urge.

Almost everything that can be said in criticism of this attitude has been said in an immense number of writings in all countries, not only in law but in virtually every branch of the humanities. But one point which is essential for the present purpose is only rarely made. All leading texts deal with crime as if it were a homogeneous concept.[3] And, unhappily, current legislative proposals largely persist in a similar unitary treatment.[4] They are thus unable to resolve the ever more pressing controversy between "humanitarians" who aim at the abolition of all punishment, and "conservatives" whose creed is the preservation of the status quo with its conception of criminal responsibility.[5] Any analysis of criminal law, any diagnosis and prognosis, to be helpful, must distinguish between the several principal types of crime in accord with the enormous variations in both the rational and irrational elements of their treatment by society. Yet, even those few studies which are devoted to a psychology of the punishing society rather than of the punished offender, fail to draw the necessary distinctions.[6] Before we can explore this further, we must restate and trace those neglected irrational bases of punishment which we have preliminarily identified as retaliatory urges. Since these urges appear in criminal law as "moralized aggressions", we must begin this discussion of non-reason with the origin and function of aggression itself.

(2) Non-reason

§178. *Pregenital aggression.* That the very concept of responsibility is clearly related to the early function of the Superego has often been said and shown. In preceding sections we met this Superego in its original Freudian description as "the heir of the Oedipus complex."[7] As such, it sufficed as a working hypothesis for the origin of our sence of justice. For our present purpose, however, we shall also have to avail ourselves of post-Freudian insights and speculations concerning certain pre-oedipal aggressive reactions, some of which were anticipated by Abraham in 1916.[8] But details are likely to remain controversial due to the impossibility of analyzing the non-

3. See e.g. Hall ch. IX; Hart, Punishment 234-236. See also Andenaes, Punishment. For continental law, see e.g. Mueller.

4. For the United States, see Model Code; for Europe, Wiethölter 96-97.

5. See infra §§189, 199. See also e.g. Boas.

6. See e.g. Reiwald; Hochheimer.

7. Freud XXI 132. See supra §159.

8. Abraham, Briefe 221-222.

articulating or half-articulating infant.[9] Indeed, we may never progress beyond the study of mankind's primeval tradition which, from Zoroaster and Empedocles to classic Greece and Israel, worshipped gods whose aggressive desires exceeded those of their creatures.[10]

Perhaps it is ethology which may supply us with new insights into the origins of pregenital aggression. Konrad Lorenz sees the animal "this side of good and evil" in thoughtful juxtaposition to Nietzsche's "beyond."[11] In this sense it would be man who inbred into his own race a needless aggression based on his first deliberate revenge as a vanquished fighter who had been deprived of his chance to flee or surrender by the long-distance weapon of his victorious opponent.[12] It would thus become mankind's fateful question whether we shall in time develop those new psychological tools which will enable us to forego such aimless aggression before our final mutual destruction.

Until and unless we come to grips with this problem, we shall probably persist in our existentialist, wishful illusion which conveniently relegates all aggression to a presumably reversible postnatal experience, to "nurture rather than nature."[13] But it is difficult to doubt the instinctive nature of human violence "in spite of the occasional waves of pollyannaism and denial."[14] There is too much evidence for a pre-superego aggression "turned inward."[15] How could we otherwise account for those aggressive urges which, "without hatred and the spirit of revenge," "want the infliction of

9. See Flugel ch. IX; Glover, Trends. Cf. e.g. Loch.

10. On Empedocles' (490-430?) eternal cycle of Love and Strife, see e.g. Kirk and Raven; Russell 55-56. Yahwe's, Zeus' and Wotan's wraths are a matter of world-wide folklore.

11. Supra §150 note 8.

12. Lorenz 143-145. On man's tools as "artificial organs", see Hass ch. 9. See also supra §125 note 41; infra note 21. In our discussion, mentioned supra §150 note 8, Lorenz also suggested that animal "justice" seems limited to the mobbing of a group member staying outside the ranks, to acts of a superior leader, and possibly to reactions to parasites, of which little is known. Psychoanalysts have begun to be concerned about the parallels and distinctions between human and animal aggression. "Violence and aggression in animals of the same species is an inborn protective device, a limited discharge reaction, usually with a built-in security system for their members. But in man atavistic bestiality gets mixed up with that strange human computer called brain and mind and finally with the man-made machinery of organized brutality and warfare. Man's atavistic werewolf delusions are continually fortified by frenzied fantasies of hate and revenge, of guilt and punishment, of scorn and humiliation. Man's aggression is not innate and persistent as such. It is the result of a disorganization of drives provoked by manifold inner and outer factors and by lack of cultural transformation and control. What environmental mistakes have we made? Where did our taming and ritualization of instincts go wrong?" Merloo 55.

13. Montague 409. See also Maslow, passim. This optimistic view of aggression as a mere result of repression has been called "highly irresponsible in light of existing evidence." Eibl-Eibesfeldt 100. See also id., chs. 2, 5; id. 85-90, 97-100; and supra §129 note 87. But see also Berkowitz; Hass 170, and generally, Bitter (ed.).

14. Menninger 163. See also West; Schoenfeld, Aggression; Mitscherlich 10.

15. Cain, passim.

positive suffering"?[16] It is these urges that, extroverted, are the ancestors of that "moralized counter-aggression" of revenge by retaliation, which has remained an essential element of punishment and war.[17]

§179. *Moralized counter-aggression (revenge by retaliation).* We hardly need anthropological support for the ubiquity of retaliation.[18] "Men, like many other animals, grow angry and retaliate when they are hurt...Such retaliation when it is not immediate or spontaneous but implies some degree of deliberation is what we often speak of as revenge."[19] Contrary to an age-old assumption,[20] "brutes" and "beasts" are incapable of such a reaction. They either flee the victorious foe or they surrender. It is man, we have seen, who alone has indulged in deliberate revenge ever since his first long-distance weapon has enabled him to reach his enemy unseen and has thus prevented the vanquished foe from fleeing or surrendering to end the fight and has prevented the victor from sensing that inhibition of pity known to his brother the wolf.[21] It was thus that the loser was forced into taking revenge himself or through his group.

Group deliberation, having first turned individual revenge into the tribal "feud,"—in a more complex society became the punitive action of the state. Thus, the curse of feud and war with their threat of final self-annihilation has become man's privilege which at times has not shunned even the infliction of vicarious suffering on children and brothers, from the Bible's gruesome tales to the killing of hostages by enemies and tyrants. Following general usage, we shall speak of this revenge in the general context of retaliation,[22] although we are concerned only with the criminal law's deliberate retaliatory action.

But in due course, society's counter-aggression by such action has also adopted another vital function. It has been "moralized" by being used to

16. Menninger 143, ch. XIX. Cf. e.g. Sorel 48.

17. Freud XXII 203-215; Waelder, Conflicts; Schilder ch. 20; Coser; Franz Alexander ch. IX; infra §189.

18. See e.g. Davitt 122-124.

19. Flugel 144-145. See also Kelsen, Vergeltung ch. III.

20. See e.g. Plato, Protagoras 324.

21. See supra note 12; Lorenz 207-208. See also Tinbergen; id., War; Carrigan; D. Morris; Marcic; Kritik 196; Portman, in Todesstrafe 65, 67; Meynell 299.

22. Hegel's acceptance of this retaliation (Grundlinien §218), as contrasted with a revenge which he considered the very negation of law (id. §102), is hardly tenable. See also Marcic, Hegel 68. Such a distinction would, of course, be rationally desirable. But it is beyond the irrational irreality of our unconscious reactions.—Jeremiah (XXX 29-30) warned against vicarious punishment. And we may well proudly claim that we have ceased to punish the offender's descendants as mankind was punished for Adam's sin. (But see e.g. on Anglo-Saxon practices, Pollock and Maitland I 56.) And we may continue to attempt to de-rationalize mankind's guilt feeling for its real or imaginary first crime of killing the son of the Lord. (See Freud XIII 140-146). But have we succeeded? Shall we ever succeed? Family feuds, hereditary wars, and the killing of hostages may make us doubt even this minor achievement.

help the agressor in fighting his own temptation. By "punishing" the offender, "we are not only showing him that he can't 'get away with it' but holding him up as a terrifying example to our tempted and rebellious selves."[23] It is recognition of this mechanism that opens the way to the principal thesis of this chapter: the need of criminal law for a fundamental distinction between types of crimes. We have assumed that the superego's "punitive," moralized counter-aggression acts to reinforce the potential offender's repression of criminal urges. But the degree of such repression which the offender must overcome when yielding to a criminal impulse, and thus the degree of the superego's need for the reinforcement of this repression vary greatly with the type of the offense. To be sure, these variations of both the repression and its reinforcement remain largely unconscious in an irrational mechanism. Yet it is these unconscious variations that require a distinction between several types of crimes even where the rationalized purposes of punishment, deterrence and restraint, seem to permit unitary treatment. This distinction, it is true, must remain as vague and doubtful as both the offender's and society's motivations. But in order to state the problem and point the way to new answers, it may prove expedient to use a dramatic illustration as a tentative basis for a first analysis. We shall use as such a starting point that early infantile "complex" which, for better or for worse, has come to be identified with the tragedy of King Oedipus who slew his father and married his mother.

(3) Oedipal and post-oedipal crimes

§180. *The needed distinction.* Freud, without ever attempting to engage in psycho-legal speculation, observed: "There are countless civilized people who would shrink from murder or incest but who do not deny themselves the satisfaction of their avarice, their aggressive urges or their sexual lusts and who do not hesitate to injure other people by lies, fraud and calumny, so long as they can remain unpunished for it; and this, no doubt, has always been so through many ages of civilization."[24] These two types of crimes, according to the genesis of their underlying urges, can very roughly be distinguished as oedipal and post-oedipal, according to whether their commission presupposes repression of an urge which dates back to our oedipal period of parricidal wishes. I am very much aware that the proposed terminology is open to many attacks, from a wholesale denial of the Oedipus theory to innumerable disputes over lines of distinction. But no other terminology has been proposed that would serve the present purpose as provocatively and significantly. Refinements will have to await further study.

23. Flugel 169. To put it differently: "A man who has agreed to bargain away [by repression] instinctual desires at no small psychic cost to himself, is incensed that another may pursue his anti-social impulses without being punished." DeGrazia 760. See also infra §185. In this sense, there is a relation between guilt and fear. Niesen 27.

24. Freud XXI 12.

In our culture, the "normal" person who commits a passion murder[25] must overcome earliest and, therefore, strongest repressions which are normally imposed at the oedipal stage. Such an oedipal crime can thus occur only due to an "abnormal" absence of repression or due to an overpowering urge. In either case, fear of punishment will be ineffective to act as a rational deterrent to both the actually and potentially tempted. It is too weak both to replace the normal oedipal repression and to compete with urges strong enough to overcome it. Moreover, insofar as the process of repression remains unconscious, it is inaccessible to conscious motivation. Any punishment of such crimes, lacking rational purpose, must thus in effect be understood, at least primarily, as an irrational and largely unconscious reaction of society, unless we are satisfied, which we are not, with such punishment merely serving as a public condemnation of a "wrong" (§185). Attempts at penal reform in this area should, but do not take account of this fact.

On the other hand, there are those crimes which, like theft, "welfare offenses," or simple infractions, can be roughly characterized as postoedipal because they respond to desires whose repression occurs at a postoedipal stage. This repression is essentially weaker than that of oedipal urges. Since it is also wholly or partly conscious, punishment can often fortify it effectively. Here the administration of criminal law is, therefore, susceptible to rational improvement by effective deterrence, reformation, and restraint.

Group actions excluded. Regretfully we must exclude from this discussion many situations which, though appearing as criminal violations of valid laws, defy classification and analysis in the present context despite their crucial relevance particularly in times of social and political unrest. Mob actions of all kinds may present psychological problems fundamentally different from those involved in individual crime. Here, the effort of overcoming even oedipal repression may be left to the father figure of the leader or to the "family" of the group or nation. Moreover, initial or ultimate denial of the validity of the national or international apex norm (§§13, 132) may analytically exclude the action from the realm of criminal law altogether and transform it into an incident of an "amoral," civil or international, war. At a lower level, gang crimes or, in historical perspective, feuds and duels, might equally require re-evaluation of "crime" and "punishment". Shallowness and consciousness of the transgressor's repressions and desires may in such cases permit rationalization of punishment as deterrence where repressive measures would otherwise have been irrational retaliation. We must leave these all-important problems to others more qualified by specialized experience and knowledge and return to the only theme of the present analysis:

25. Freud included incest in this group, presumably on the pattern of the Oedipus crime. If we do not follow Freud's model at this point, this is due to the many disparate types of incest in daily judicial practice which center around intra-family crimes between nonrelatives such as the step-father and his "child."

the relation of the purposes of punishment to definitions of responsibility in the area of the individual, typical crime.

We may safely assume that non-oedipal crimes constitute the vast majority of those prosecuted in courts and other agencies.[26] We shall, therefore, discuss them first, beginning with "technical" infractions and other non-property crimes as the most obvious instances.

b. *Rational deterrence, reformation, and restraint (post-oedipal crimes)*

§181. *Technical and other non-property crimes.* There are not many among us who, without the threat of punishment, would hesitate to violate some of the innumerable, merely technical, "a-moral" prescriptions and prohibitions which surround us, be it by a parking violation or a petty theft. Here, our temptation is fully conscious and punishment can act rationally as a means of both general and specific deterrence. A former judge may presume to lighten the heavy analysis at this point by recounting from his experience in an Austrian, prevailingly rural community what he considers as two significant instances of effective punishments or threats of punishment with regard to such crimes.

In one instance, he had been faced every Monday for years, with the frustrating task of convicting and sentencing to fines or light prison terms young ruffians who, according to age-old custom, had engaged on previous Saturdays in wild brawls in a tavern, which, by accident rather than design, often resulted in serious injuries. One day, however, the judge announced on the court house door, perhaps unlawfully but with good intentions, that, in the future, he would impose the maximum sentence of six months in jail on any sabbatical fighter who, having inflicted however slight an injury, would be found to have carried a knife. Thenceforth, Saturday entertainment was continued without knives. In the other case, the judge actually imposed the maximum sentence on a very wealthy, incompetent driver who, after repeated warnings to let himself be driven by his chauffeur, was involved in his third, though harmless accident. To be sure, the sentence was commuted as expected. But our motorist never again drove himself.

As to such non-oedipal crime, then, we are able and likely to measure the severity of punishment by need and purpose and can thus in good reason and good conscience inflict hardship on the offender.[27] This proposition was

26. California felony statistics state the proportion between personal and property crimes as 3:20. But see also Norval Morris and Gordon Hawkins who properly stress that crime is not a unitary phenomenon, and that research into its "causes" is about as sensible as a project of research into "disease."

27. See e.g. Schoenfeld, Symbolism 67-77. Any deterrence must be directed to one, some, or all stages of the superego's development: fear, shame, and internalized guilt. Bernard Diamond, Ray Lectures, suggests persuasively that the ineffectiveness of most attempts at deterrence is due to the law's inability to reach beyond the first stage. Id. at note 13. For

perhaps most strongly supported by the experience of German-occupied Denmark where removal of the police resulted in the abandonment of all punitive measures. There was hardly a change in the number of oepidal crimes which, as we shall see, are largely inaccessible to deterrence (§203). On the other hand, the number of post-oedipal crimes increased enormously, quite clearly because of the absence of the needed deterrence.[28] Unhappily, the relative ineffectiveness of such deterrence for oedipal crime was not taken into account by such fundamentalists as Pufendorf,[29] such utilitarians as Bentham[30] and such other leaders of the science of criminal law as Liszt[31] all of whom saw punishment as a means of deterrence and reformation for all types of crime. This view, which still persists, could not but provoke equally overgeneralized denials of this function of punishment[32] and has contributed greatly to the current confusion[33] which has become particularly pernicious in the area of property crimes where all purposes of punishment compete.

§182. *Property crimes.* Like other post-oedipal infractions, we punish most property crimes with the primary aim to deter, with little need of retaliation.[34] Here a shallow, post-oedipal repression can often be decisively enhanced against temptation. But here in the areas of property crimes, the retaliatory element is not so generally absent as in response to most other infractions. Thus, at one time, a negligible violation of private property led the illiterate to the gallows, while unbridled class law granted the literate "the benefit of clergy" to escape secular punishment. Indeed, in this area vindictive laws have been as pervasive as their mitigation by the most varied means of statutory, judicial, and administrative evasion.[35] In any event, reason relatively unburdened by retaliatory unreason, has increasingly come to understand severe punishment of lesser crimes to be counter-productive.[36]

Ironically, those very attempts progressively to replace the retaliatory element in this area by schemes which are primarily to serve both general and special prevention effectively and humanely, have posed new difficult pro-

rare attempts at distinguishing types of crimes from this viewpoint (though without psychological foundation), see e.g. Tiedemann.

28. Andenaes 187-189.

29. Pufendorf (supra §121 note 59), Lib. VIII, Cap. III §§9, 11, 12. See also Krieger, passim.

30. See supra §33.

31. See Liszt 1-3, 17-47. But see also for an insightful, pre-psychological history of punishment as the result of mere instinct, id., at 7-17. On Franz von Liszt (1851-1919), see Symposium, Z. Ges. Strafrechtwiss. 81 (1969) 685-829.

32. For a significant sample, see Singer 409, 412, passim, who for this purpose even draws on the behaviorism of yesteryear. Id. 413-415, 422-423. See e.g. Beutel 400.

33. See generally, Packer 39-49; Rawls, Concepts. For a somewhat intemperate, but thoughtful attack on Packer's effort, see Griffith, passim.

34. For present purposes, these crimes do not include such deviant behavior as that due to pyro- or kleptomania. See e.g. Schoenfeld, Symbolism 67-77.

35. See Hall, Theft 110-111; id., ch. 4.

36. Packer 365.

blems. Increasingly such schemes seek to add to these rational purposes the equally rational aim at the same time and by the same means to advance the offender's rehabilitation.[37] Even these rational purposes of punishment, however, are typically irreconcilable with each other. "If you are to punish a man ... you must injure him. If you are to reform him, you must improve him."[38] But these problems, serious as they be to the penologist, do not concern us here in a philosophical and psychological analysis which seeks to determine the meaning and function of criminal responsibility. Indeed, the latter's concomitant, the defense of insanity, has little relevance in the entire area of non-oedipal crime, for which the incidence of this defense in the United States has been estimated at two percent.[39] Leaving aside unavoidable skirmishes in the "borderland" (§203), the discussion about the "theories" of criminal law is thus virtually limited to what I have proposed to call oedipal crimes.

c. *Irrational retaliation (oedipal crimes)*

(1) The proof: death row and elsewhere

§183. *The test case: insanity in the death cell.* "Henry Ford McCracken, 34, condemned Santa Ana sex murderer ... was morose, slovenly and full of fantasies. He imagined he had rabbits and cats in his cell, and he made a mess in pretending to feed them. [He] has been given six electric shock treatments of the kind usually prescribed for insane persons ... Since the treatments, the warden said, McCracken has again become neat in his personal habits, and he now plays the guitar and occasionally sings." Briefly, the prisoner was ready for the gas chamber and the judge so ruled.[40] This is not a parody of a medieval chronicle, a tale of totalitarian sadism, or a demented fantasy, but a clipping from the San Francisco Chronicle, dated San Quentin Prison, January 15, 1953.

At all times and in all countries there has apparently been agreement that no insane person may be executed though he was sane and responsible at the time of his deed and trial.[41] Coke found it "cruel and inhuman [to kill an insane man] because by intendment of law the execution of the offender is for example ... but so it is not when a madman is executed."[42] This pious rationale is palpably wrong. No wonder that it was rejected only half a century later. Ever since, we have been told instead that every prisoner should be able to raise "his just defense" until he dies.[43] And as late as 1962,

37. See e.g. Menninger ch. 9; Packer 53-58; Andenaes, Morality.

38. Bernard Shaw 10. See also e.g. B. Diamond, Ray Lectures at note 8, stressing the irreconcilability of tests for responsibility and reform.

39. Kalven and Zeisel 330.

40. McCracken v. Teets, 262 P. 2d 561, 564 (California 1953).

41. Solesbee v. Balkcom, 339 U.S. 9, 26-32 (1950).

42. Coke, Third Institute, ch. 1, p. 6 (1817).

43. Hawles 476.

a California commission proposed to protect any prisoner "unable to confer or consult, or ... to communicate knowledge of any fact that may have a bearing on his guilt or on the mitigation of his penalty." Yet, obviously, "it is possible to speculate endlessly about the possibilities that would rescue a condemned man from execution provided it were delayed long enough."[44]

Why then do we spare the insane prisoner in the death cell? Official theory fails.[45] Execution precludes his "reform," and deterrence could be achieved whatever his state of mind. We have chosen him as our test case for the role of retribution in penology, because as to him this facet is irrefutably the sole determinant of punishment and will remain such despite any procedural safeguards.[46] Indeed, such procedural safeguards which often lead to indeterminate imprisonment under the ever-present threat of execution, will to most observers be little more than vengeance "with a vengeance." A Mississippi court has explained, with disarming frankness, that it spared the lunatic on the ground that "amid the darkened mists of [his] mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if he were taken to the electric chair, he would not quail ..."[47]

§184. *And otherwise*? It is true, of course, that the irrational retaliatory element of punishment does not appear anywhere so clearly as in the death cell. But nobody can deny that this element is highly relevant also at other levels of this process, even where it is combined with rational motivations of deterrence, rehabilitation, and restraint. The frightening tale so often told of man's inhumanity to man need not be retold. Only he who wants to shut his ears and his eyes, can deny that retribution has always been our primary motivation, both conscious and subconsious, in our dealing with oedipal crime, and, for that matter, also such post-oedipal crimes as political[48] and many narcotics offenses. Even the great 19th century scholar Stephen knew this when he compared the role of punishment in relation to revenge, to that of marriage in relation to the sexual urge.[49] And a leading German 19th century author saw the day on which the urge for revenge would yield to reasoned punishment based on pure love for one's neighbor, as the "day on which man will cease to be man."[50] It is little short of incredible, therefore, that in 1964 an outstanding American judge could be "amazed" at the fact that "a few theorists of the criminal law have now come out into the open

44. Phyle v. Duffy, 208 P. 2d 688, 676 (California 1949), per Traynor, J., concurring.

45. See generally Ehrenzweig, Insanity.

46. As to the latter, see Hazard and Louisell.

47. Musselwhite v. State, 60 So. 2d 807, 809 (Mississippi 1952).

48. Norway, after the Second World War, reintroduced the death penalty for the specific purpose of dealing with Nazi collaborators. (I am indebted to Professor Andenaes for this information.) Similar American reaction to the political bombings of the nineteen-seventies is equally significant.

49. Stephen II 80. See also e.g. M. Adler 437 n. 26, 462.

50. Makarewicz 272.

and argued" a rationale of retribution:[51] or that in 1968 a leading continental text could insist on outlawing retaliation as denying that "even the criminal is human."[52] It is less incredible, though equally significant, that in the same year, the important new criminal code of Bulgaria thought it feasible to limit the official purposes of punishment to general and special deterrence (art. 36). These and other current efforts to extend the process of rationalization and humanization from the treatment of post-oedipal crime to oedipal crime can only cause harm insofar as these efforts ignore psychological reality (s 187). If we are to avoid this result, we must explore further the origin, growth and function of aggressive and retaliatory urges.

(2) The roots: conscious and unconscious

§185. *Conscious theory.* There have been many dialectic and moral justifications for our need of retaliation.[53] Theological reverence[54] and age-old sophistry are still reflected in Hegel's conception of "punishment as only the manifestation, the second half of crime,"[55] in Kant's categorical imperative,[56] or in Pius'XII restoration of the equilibrium.[57] Utilitarian reasoning appears in Bierling's "essential vindication of governmental authority;"[58] more covertly in Lord Denning's "emphatic denunciation of the community;"[59] and most naively in a revived "concept of Desert."[60] No less

51. Bazelon 11.

52. Baumann §372.

53. See e.g. Hall ch.IX; Sen 19; Pincoffs 2-16; Hildebrand 71; Kelsen, Ideologiekritik 217 ff. Deliberate retaliation or revenge, it seems, is a human achievement. Supra §179. Indeed, earliest death "penalties" had, like those among animals, been limited to immediate reaction. Schmidt, in Todesstrafe 26. To Plato, capital punishment appears to have been purely a method of weeding out those unfit for life in society. Plato, Statesman 293e, 308e. See also id., Gorgias 469; id., Laws 854, 862, 934; Ancel 40 ff.

54. Daube ch. III.

55. Hegel, Grundlinien §99, rejecting "trivial, psychological ideas." Elsewhere (at §100) Hegel even enlists the offender's satisfaction at thus being treated as a rational being. See Noll 5; Marcic, Kritik 195; id., Hegel 70, 85; Reyburn. See also Boëthius (infra §189 note 22) iv Prosa 3, §34. On Dante, particularly in relation to St. Augustine's teaching, see Hugo Friedrich, Komödie 112-125. Even existentialist teaching has adhered to this highly questionable "rationale." Scheler, Formalismus 375-384.

56. Kant, Lectures 55. See also id., Rechtslehre, Allg. Anm. E at §49 in apparent reaction to Feuerbach's incipient rationalism (infra §192 note 21; Radbruch, Feuerbach; Preiser, in Todesstrafe 35, 42-44). See also Flechtheim; Morris Cohen ch. 4; supra §32. For early criticism, see Naucke 30-34 in Blühdorn 27.

57. Message to the 6th Congress for Criminal Law, Z. Ges. Strafrechtswiss. 66 (1954) 1, 13. For protestant equivalents, see Bimmer 262 ff. But see Barth 499 ff., 507. The discussion turns primarily around St. Paul's controversial Roman Letters 13, 4. See generally, Rich; Althaus; also Susterhenn, in Todesstrafe 120 ("restoration of justice").

58. Bierling 26, 36-52.

59. See Hart, Punishment 2. See also Ewing 152. This denunciation is said to preserve our sense of wrong. Goodhart, Moral Law. But it reminds us too much of the Nazi rationale of the "people's sound feeling." The underlying theory is of course related to Durkheim's much earlier trust in "social solidarity." Supra §50 note 8.

60. Lewis 224. This concept is sometimes phrased as one of society's and the offender's

important a document than the German draft of a new penal code of 1962 is satisfied with similar commonplace preaching.[61] Lord Longford finds comfort in rebaptizing the discredited concept of Aristotelian retaliation as the exaction of "payment."[62] And those who disapprove of such devices find no alternative but to "outlaw" retaliation.[63]

No attempt will be made here to review again the welter of pious language that has accumulated through the ages. An analytical study would have to cut through the thin surface of conscious pretense in order to reveal the unconscious facets at the root of retribution. Such a study is still lacking. But some of these facets have become obvious.

§186. *Subconscious reality.* "Punishment dreams fulfill the wish of [society's] sense of guilt which is the reaction to the repudiated impulse."[64] Since repression of aggression creates anxiety, "unconscious guilt feeling remains a secret motive for a demand for scapegoats."[65] Thus retribution offers to the grateful agent of punishment the opportunity of "committing the same outrage [as the offender] under the colour of an act of expiation." "There is no longer any need for one to murder, since [another] has already murdered."[66] In this sense the Greek chorus identified itself with the offender as both the actor and the victim.[67] To be sure, society in this process unhappily accepts the role which the criminal's cruel superego has projected into its behavior.[68] But this sinister mechanism is often accompanied by pity[69] and gratitude. Indeed, it may account for the ancient lex talionis which may thus in part have operated to restrict rather than to legalize unlimited vengeance.[70] The same source may explain the less gratifying solemnities which have always accompanied retributory punishment.[71] Such ceremonies of atonement make capital punishment appear akin to the sacrificial killing of animals.[72] But perhaps most important, we use retribution unconsciously to

"shared responsibility." Noll 14-30, in reliance on Scheler (supra note 48) and Nicolai Hartmann.

61. See e.g. Hochheimer 36. See infra §188 note 84; §195 note 48.

62. Longford 62. Cf. Aristotle, Ethics Bk. V 112. Similar formulas may be found in such almost incredible punitive pontifications, as Maurach's in Todesstrafe 9-19 who prides himself on having "overcome purely scientific reasoning." Id. 19.

63. See e.g. Coing 243; Honderich. Cf. Hentig. See also Weihofen ch. 6.

64. Freud XVIII 32. We find this thought as early as Boëthius 112. See infra §189 note 22; also generally Reik, Myth.

65. Money-Kyrle 102, 110-111. See also Reiwald 149-153; infra §186. On our urge to lay "the vengeance of the ghost", see B. Diamond, Ray Lectures, at note 27.

66. Freud XIII 72. See also id. XXI 190; Menninger ch. 8.

67. Freud XIII 156.

68. Anton Ehrenzweig II 248 f.

69. For biblical proof, see Stockhammer, ARSP 55 (1969) 109.

70. Menninger 520-522; Reiwald 261-265; Stone I 18-20; Reik, Myth 263-268. On a related problem, see Daube, Tyranny.

71. See e.g. Nietzsche II 846-848, 852-853.

72. See Reiwald 208-213. Animals themselves have been punished as offenders. See e.g. Berkenhoff; infra §190 notes 5-7.

counteract our own unconscious temptations. Our Ego seeks "to enforce the opposition of the Superego against the pressure of its instincts."[73]

(3) The price: society's guilt and gratitude

§187. Satisfaction in aggression is always paid for by feelings of guilt. The offender, by abating such feelings in the commission of his crime, may transfer them to punishing society. Indeed, much of our criminal procedure reflects our desire for forgiveness. Anybody who has ever had a part in the investigation or trial of a crime, or for that matter of any litigated issue, knows of the relief it meant to him to receive or to witness a confession in a criminal case or even an admission of a crucial fact in a civil case. Consciously, to be sure, he will attribute this relief to having fortified his conclusions. But subconsciously he has gained freedom from his guilt, both its burden and its pleasure. The victim has turned into an ally and a co-judge.

So great, indeed, may be our relief and gratitude they may turn into genuine affection for the offender. Beginning with the extortion of confessions by the Inquisition to our day, society has mitigated punishment of the "cooperative" defendant. To be sure, rational excuses are not lacking: from an alleged recognition of the offender's promise of reform, to the promotion of quicker and cheaper justice and a justified defense against "overcharge." But such rationalizations must probably recede behind society's urge to atone for its own guilt and aggression by rewarding the victim's admission.

Disgraceful bargains such as the one between the state and Martin Luther King's assassin are common and even lawful in the United States[74] and were, as late as 1970, in sadly pious language, partly re-sanctioned by the Supreme Court.[75] But, to assure the accused of milder treatment for pleading guilty to a lesser offense is only one sordid instance of a general practice. Art. 38(9) of the Russian Code (1965) gives officially mitigating effect to "sincere repentance or giving oneself up."[76] And the codes of many other civil law countries provide for mitigation of punishment in exchange for a guilty plea. Indeed, American apologists of criminal procedure take pride in the fact that as many as nine-tenths of all convictions are based on such pleas.[77] And others even praise the purifying function of confessions. Was this the "irrationale" of feudal Japan's refusal to execute a man without

73. Alexander and Staub 214-215. See supra §§178, 179. This mechanism may have assisted the creation of our "freedom of will." Fritz Bauer 48-49. See also generally Weihofen, Urge 136-138.

74. Karlen 155; Altschuler; Griffiths 396-399. Cf. Comment, The Unconstitutionality of Plea Bargaining, 83 Harvard L. Rev. 1387 (1970); Tigar.

75. La Fave 548. See also for the attitude of the Bar and civil law analogies, id. 545, 513. For the Commonwealth, see Reg. v. Turner [1970] 2 W.L.R. 1093.

76. Berman 162. For an illuminating survey of last half-century's literature on Russian criminal law, see Zile. We are reminded of Dante's views. See Hugo Friedrich, Komödie ch. IV.

77. D. Newman 3.

confession?[78] The price which society pays for its indulgence in revenge and retaliation is a heavy one. But to seek salvation in wholesale abolition (§199) means to ignore an irrefutable need.

(4) The need: safety valve

§188. Many penal reforms are justly extolled as the expression of a growing humanization of our criminal law even in the area of oedipal crimes.[79] Thus, capital punishment, which was previously the most obvious outlet for society's aggressive instincts, is being widely dispensed with or made as "painless" as possible. Some prisons, formerly arenas of open sadism, have been turned into "internment" centers which are purportedly designed to serve the rehabilitation of "inmates." And most recently even the imposition of sentences has, however thinly, been disguised as an educational measure. In the area of post-oedipal crimes, some such improvement may prove to be more than a temporary fashion and hold promise to turn much of our penal order into a scheme of rational deterrence and rehabilitation (§182). But where retribution prevails, as it does for oedipal and some post-oedipal crimes, there looms danger. Here aggression, purportedly displaced, may return with a vengeance.[80] Even here, of course, many of our humane reforms which reflect guilt reactions of a society overfed with centuries of patent cruelty, may outlast generations.[81] But where irrational urges lurk, their threat remains. And under closer scrutiny many a step forward to reason and charity will prove to be a mere shift of an at least subconscious societal aggression. Thus the much praised "indeterminate" sentence, which purports to promise forgiveness for "goodness," may in effect, for both oedipal and post-oedipal crime, easily be turned into a novel instrument of torture by suspense. The world-famous California Adult Authority is a significant example.[82] And the reversion of communist penal law to pre-revolutionary patterns particularly in the area of sexual crime should give us pause.[83] We cannot be confident that such current reforms in this area as that under the new German Penal Code[84] and some American legislation will survive the next swing of the pendulum.

Far from supporting a plea for abolition of oedipal punishment, proof of that punishment's irrational origin and function demands recognition of such unreason as an inescapable element of our criminal process. For

78. Grassberger 157-190; Nakamura 5.

79. Menninger ch. 9.

80. See e.g. Reiwald 206, 246-261; Flugel 169. Attempts to "justify" retribution are not here pertinent. See Shuman, Responsibility 54-58.

81. See Batt 1027-1029.

82. See Pfersich; also Silving 22. Experience with "progressive" juvenile courts offers similar examples. See e.g. Polier, passim. But see e.g. Rudorf.

83. See e g. Jeschek, passim; Foldesi; supra note 75; infra §199 note 15.

84. See e.g. Lee and Robertson; infra §195 note 48.

irrational urges, of course, are as real as rational considerations. All we should seek to do—all we can do, I believe, is to weaken the standing of these urges as pseudo-rational tools, while fully accepting their continued vitality in the area of oedipal crime.[85] Only thus can we hope to reach viable conclusions as to whom we should punish (§§ 198-203), and particularly as to how we can give full play to reason in the myriad of prosecutions for post-oedipal infractions, including property and gang crimes. And only thus can we hope to rationalize the defense of insanity, that "conscious anomaly" (§§ 194-197), which, in the area of oedipal crime, rephrases the question of why we punish as one of "whom we punish", a question which, in turn, can be answered only on the basis of a conscious hypothesis of free will (§ 189) and the subconscious reality of presumed guilt (§§ 190-193).

2. *Whom we punish*

a. *Freedom of will: conscious anomaly*

§ 189. So long as we shall punish ourselves and others, we must postulate the existence of guilt[1] and thus the freedom of choice. Yet we are not readier to comprehend such guilt and freedom than we are to comprehend the possibility of their absence. Even the greatest minds have done no more than pour hollow words into the vacuum, be it to prove, as determinists, the inescapable causation of all human action or the freedom of choice.

Determinism. Equation of human action to all other happenings in nature as similarly subject to inexorable laws of causation, may be traced at least as far back as Democritus.[2] Two millennia later, it was scientific learning that again affected the issue of freedom in Descartes' work who found himself "determined" by the ubiquity of physical laws[3] in the same manner as Goethe stressed man's similarity to animals and plants as to which causation is freely accepted.[4] The same argument led Comte to deny any distinction between physics and ethics[5] and Durkheim to apply causality to all social phenomena.[6]

85. See Schoenfeld, Defense; Silving, Elements.

1. German authors justify their reincarnation of this concept in their current "reform" of criminal law as based on the "feeling of justice." See e.g. Zippelius 92, 106. For a rare attempt at escape see Chorafas' theory of guiltless "imputation." Androulakis.

2. On Democritus (470-380?), see e.g. Russell 246; Vlastos.

3. On Descartes, see supra § 136 note 61; Russell 568. For Descartes' ambivalent attitude, cf. M. Adler 474-475.

4. Goethe, Dichtung IV 216-217.

5. On Comte (1798-1857), see Cassirer 246; M. Adler 385-390 ("collective freedom").

6. Durkheim (1858-1917) 141. See supra § 176 note 59; M. Adler 382; Kurt H. Wolff 325 passim.

But the great dilemma was always alive in Hobbes' helpless trust in "true liberty from necessity,"[7] Spinoza's awe at God's inscrutable nature,[8] as well as in Kant's causality as "theoretical reason."[9] Pavlov's "reaction theory" cannot be easily divorced from the ambivalent determinism of socialist psychology.[10] And the biologist finds scant comfort in the strange "self-coined aphorism [that] nothing is outside heredity."[11] We shall hardly advance beyond Freud's resigned conclusion that, "so long as we trace the development of a chain of events from its final outcome backwards, it appears continuous, and we feel we have gained an insight which is completely satisfactory or even exhaustive,"[12] while we think otherwise before the event.[13]

The determinist creed has always been compelled to deny or at least to doubt the possibility of guilt.[14] The same denial and doubt pervades the history of theology. It is implied in Augustine's doctrine of the original sin, despite his rejection of Manichean determinism,[15] and culminated in Calvin's and Luther's teaching of man's predestination.[16] Phenomenological reconciliation of "being" and "doing," of a voluntary and a "status" responsibility, has but added a new vocabulary.[17] And Bonhoeffer's faith in the paradox of God's commanding our freedom has but movingly restated the predicament in terms similar to those of Sartre's "coerced free will."[18] It represents little more than a fateful return to the Stoic's admission of defeat.[19]

Freedom. Unavoidably, the same ambivalence appears in the thoughts of those clinging to an image of freedom. Plato would have had the insane, infants, and seniles at least pay full compensation for their crimes, or in case of homicide, would have condemned them to exile or even prison, although

7. Hobbes (supra §31 note 70) V, no. X. See e.g. M. Adler 113.

8. Spinoza II 48. On Spinoza (1632-1677), see e.g. Russell 571-572; Hampshire 150; M. Adler 258-259; N. O. Brown, Life 47; supra §31 note 70.

9. On the ambiguity of Kant's position (see supra §32), see e.g. M. Adler 480-483; Holzhauer 36-47. See also infra note 27.

10. On Pavlov (1849-1936), see e.g. Rubinstein 190-192, 628-630. See also e.g. Rodingen 224-225.

11. Trincas 10.

12. Freud XVIII 167. See Walker, Offenders; Mannoni 81-83.

13. See infra note 35. On the French theory, see e.g. Levasseur, Droit Comparé ss. 8-14. For numerous anthologies on this non-problem, see e.g. Gerald Dworkin (ed.) 215.

14. See e.g. Nietzsche II 161-163; Ferri 288-307. On Fichte, Stammler (§39), Nicolai Hartmann (§41), and in general, see e.g. Bodenheimer §15; Cairns 390-463; Friedrich 5; Holzhauer 10, 74-75, 145; Amand, passim; Julian, passim. For attempted compromise, see Radzinowicz 110.

15. Augustine Bk. V, chs. 9, 10. See Russell 365; M. Adler 414-415.

16. Erasmus-Luther Pt. II.

17. See e.g. Silber, passim; Fritz Bauer 60-62.

18. Bonhoeffer 189. On Sartre, see Jolivet. For a different interpretation, or rather selection, see M. Adler 489-490.

19. See Russell 266-268.

he considered these crimes involuntary.[20] Epicurus, though condemning "the determinism of the physicists," had to be satisfied with seeing man's freedom in his "choice to gain the gods' grace through honors paid to them."[21] Theology has never resolved or ceased to attack the riddle how man can be free and responsible for his actions if an omniscient God can foresee them, and an all-powerful God can mold them. St. Thomas saw the answer in another dimension of time,[22] Duns Scotus in God's all-goodness,[23] and a 20th century legal philosopher in God's inability to "make man a mere medium after having given him freedom."[24]

Secular philosophers did not fare better. Leibniz found a "sufficient reason" which "merely inclined without necessitating."[25] Hegel identified his central concept of volition with free will, though his dialectics may defy the dichotomy between freedom and compulsion.[26] Kant, having reserved his "theoretical reason" for causality, offered his "practical reason" for freedom and thus laid the foundation for Kelsen's distinction between causation and imputation.[27] Schopenhauer saw free will as "the Ding an sich, the essence of all existence."[28] Bergson borrowed from animal instinct his belief in an intuitive "élan vital"[29] and others have devised similarly tortured formulas.[30]

20. Plato, Laws Bk. IX 866-867. On Aristotle's views, see Nicomachean Ethics 1107a, 1111a-b; generally Hamburger.

21. Epicurus (341-270), Letters to Menoeceus §134. See Geer 58; and generally DeWitt; supra §31 note 68.

22. Thomas Aquinas, Summa Theologica Pt.I, Q.XXIII, Art.1, Obj.1; Art.2, Obj.41. See also on Erasmus, Erasmus-Luther Pt.I. Aquinas' formulas are related to Boëthius' truly moving, but equally helpless, conclusions. Boëthius Bk.V 100-118, 158-162 (German ed. 19, 145, 162); supra §58 note 62; §186 note 64. But Boëthius found comfort in the thought that "the action of man's ability to think cannot approach the unity of God's prescience." Id. 151. See also id. 146-150. In general see M. Adler ch. 22.

23. On Duns Scotus (1265-1308), see e.g. Friedmann 112-113; Auer 286, 288.

24. Messner 122. Do we learn more from the concept of a "pseudo-problem of a foreknowledge, whose quality can be altered by itself and our attitude."? C. I. Lewis 206-209. See also generally H. D. Lewis; id., Guilt.

25. On Leibniz (1646-1716), see e.g. Russell 584, 589; Holzhauer 23-25; M. Adler 549; Schiedermair. On Pufendorf's (§31 note 70) "freedom of the will," see Krieger 83.

26. On Hegel (1770-1831), see e.g. Holzhauer ch.V; Hellmuth Mayer 74-79; Riedel, Hegel §2. Perhaps the same conclusion may be drawn from M. Adler's pervasive dialectics. M. Adler Book I. On Hegel's controversy with Feuerbach (infra §192 note 21) and the latter's vacillation, see Kipper 182-189.

27. On Kant, see e.g. Hellmuth Mayer 57; Zippelius 162; supra note 9. See also Kelsen §18; also supra note 1.

28. Schopenhauer II §55. See also id. VI 242-253; id., Dokumente 325 ("feeling of responsibility").

29. See Russell 793; White 67; Sayag 19-20; supra §121 notes 59, 85; §138 note 11. See also M. Adler 511-512; Coing, Willenfreiheit 5-6 ("ego-consciousness" intended to express Bergson's and Simmel's teaching); Ofstad, passim.

30. See e.g. Branden, passim; Nicolai Hartmann, Diesseits; id., Ethik chs. 75-80; Vivas 341; Kraft, Problem; Hartshorne; Silverman; Hawkins; Zippelius ch.27; Welzel, Gedanken 91; Dauner 97; M. Adler 529-531.

Such "theories" may have reached their nadir in Frankl's vacuous "meaning,"[31] in possible competition with Simon's Thomist blessing[32] which Mortimer Adler, in his monumental work on the dialectics of our problem, has treated as the only major essay on free choice written in this century that illuminates the controversy.[33] No wonder that philosophers, finding "neither proved nor disproved by arguments outside ethics [the determinist position, feel] fully justified in rejecting it if we decide that it does really conflict with the fundamental principles of ethics" which require at least a degree of freedom.[34]

Psychoanalysis has never undertaken to break the impasse. All that Freud noted was that, if we will look forward rather than backward,[35] "we no longer get the impression of an inevitable sequence of events which could not have been otherwise determined."[36] It is certainly wrong to charge psychoanalysis with a determinism which encourages the negation of criminal guilt.[37] This charge is conclusively disproved by Freud's teaching of "overdetermination" which is "prepared to find several causes for the same mental occurrence" and admits the use of punishment as one determinant.[38] Indeed, leading analysts have expressly attributed to the ego "some possibilities of choice."[39] And Max Weber (§52), who came so close to Freud without joining him, concludes that "we associate the highest measure of an empirical 'feeling of freedom' with those actions which we are conscious of performing naturally."[40] Contemporary "phenomenological indeterminism" has attempted to give this common sense observation the dignity of a new school.[41]

Resignation. Logic seems to tell us that we must choose between freedom and constraint. Yet we shall have to acquiesce in the conclusion that it is "equally impossible to develop a consistent world picture based on complete determinism or one based on complete indeterminism; both assumptions

31. Frankl 21.
32. Yves Simon p. IX.
33. M. Adler 318-320, 345-346, 365-369, 428-429, 457-458, passim.
34. Ewing 133; id. ch. 8.
35. Supra note 13.
36. Freud XVIII 167.
37. Thus La Piere 157-160, 165, 170. See also Rieff 116; Hochheimer 49; Leites 13-14; Gerald Dworkin 10. But cf. e.g. Gimbernat 388-389; and Vergote 47 who correctly limits Freudian "determinism" to the backward look.
38. Alexander and Staub 81. See particularly Freud XI 38; Waelder, Overdetermination; Sutherland ch. XVIII; Geiger 22.
39. See e.g. Brierly 288. But cf. Zilboorg, Misconceptions 549 ("basic human megalomaniac superstition"); and Hospers for what appears as an outsider's view.
40. See S. Hughes 305. On Schopenhauer see also supra note 28. Like Schopenhauer, Croce came very close to Freud's viewpoint. See e.g. Croce 236. And here as so often, Hume had known it all before. Understanding s. 8.
41. See e.g. Holzhauer chs. X, XI. See also Erik Wolf 212.

lead to untenable, or at least unimaginable consequences."[42] Once again we must bow to the helplessness of our minds, as we must when facing the choices between finity and infinity of space and time, and the riddles of justice.[43] Let us cease as "fools of nature, so horribly to shake our disposition, with thoughts beyond the reaches of our souls." Perhaps, Heidegger, the poet, has put it most aptly for our age: Knowledge, he felt, "will be given only to him that has experienced the winging storm on the path of our Being to whom the terror of the second path to the abyss of the Nothing has not remained foreign, but who has accepted the third path, that of Appearance as his pervasive need."[44]

Few will be happy in this resignation. But fewer yet will share Camus' trust in the absurd when he applauds "that appetite for the (unattainable) absolute which illustrates the essential impulse of the human dream;"[45] or the "humanist's" praise of the "healthy man who can live in both of these worlds of freedom and the lack of it."[46] For, as Goethe said, "the word freedom sounds so beautiful that we could not do without it even if it stated an error."[47] Nor will many find comfort in the biologist's reliance on progress in "cultural evolution,"[48] or the nuclear physicist's assurance that there is "freedom" even in the causality of natural events.[49]

"*As if.*" Neither the pleasure principle's search for the fulfillment nor the reality principle's rejection of our wish have given us the answer. "We must postulate a third or magical principle that deals with the world outside as if it were governed by our wishes or drives or emotions. [This, indeed,] is the only way in which we achieve something in reality."[50] We shall have to be satisfied with the fact that we act and decide *as if* we knew freedom.[51] In this sense it is true that the "first act of free will [is] to believe in free will," and "a creature which can even suppose himself free, is free."[52] Or, to quote

42. Waelder, Determinism 23. See also Jung, Soul 192; Carr, passim.

43. See e.g. W. D. Ross 251; T. Lessing 35, 206, 228; Von Mises ch. 5; Auer 300 ("mystery for the human mind"); above all Goethe ("a problem over which I ordinarily lose little sleep," Badelt 130); supra §2. For another sample of the continuing discourse, see the controversy between Bockelmann and Schorcher, Z. Ges. Strafrechtswiss. 75 (1963) 372; id. 77 (1965) 240; id. 77 (1965) 253. See also e.g. Thornton; Hyman 35, 51, 62.

44. Heidegger, Metaphysik 84. See Troller §4 at n. 102.

45. Camus 17. On other existentialists' reliance on man's "Selbst-Sein" (Being Oneself), see Keller 209-215.

46. Maslow 193, 202. "Freedom is the transcendental relationship without knowledge where we go." Jaspers II 228; also id. I 239. See also e.g. Ehrhardt 237. To Buber (Thou 53) "destiny and freedom are solemnly promised to one another." See also id. 51-61.

47. Goethe, Dichtung 45.

48. Dobzhansky 132-135. Cf. Forssman and Hambert.

49. See e.g. Andenaes, Determinism 407; Northrop, Issues 50-51; Reichenbach 183; Diamond, Method 197; Jeans 216; Julian 378-380. But see Brecht 520.

50. Róheim, Magic 82-83.

51. Packer 132. See also Fuller, Fictions 102; R. Knight; Alf Ross, Punishment s. 3.

52. William James 47; Saydah 61, quoting from C. I. Lewis. See also Geiger 22; Gimbernat 382-405. On dialectics in this area, see M. Adler Pt. II.

Martin Buber: "The only thing that can become fate for a man is his belief in fate."[53] We shall continue to mete out punishment like Zeno of Citium. When the slave pleaded innocence because his theft had been pre-determined, his master answered that so was the punishment.[54]

Ambivalence. But this conscious working hypothesis of man's freedom leaves unresolved society's—and the psychiatrist's—ambivalence in dealing with crime.[55] Why is it that in one case we permit the psychiatrist to prove to us that the defendant's crime was unavoidably caused by mental disease (§195), while in another case we refuse to listen to such proof and proclaim the accused's freedom of choice? What seems to matter is whether, in the particular case, society's retaliatory urge will prevail over a "philosophy of exculpation."[56] This prevalence in turn expresses itself in our decision either to follow the presumptions by which we subconsciously attribute to the offender a guilty mind, a mens rea; or our conscious willingness to concede his inability of avoiding the offense. This decision, again, varies with the type of crime.

b. *Presumption of mens rea: unconscious reality*

§190. *Presumed intention.* We punish only the guilty. Only the guilty injurer is liable in damages. These principles of modern criminal and tort law we praise as moral[1] and therefore as results of progress over what is generally seen as an earlier primitive "strict" or "absolute" liability without fault.[2] This interpretation of legal history, I submit, is misleading in both areas. A child who hits the table at which he has hurt himself, is angry at the table and punishes it for guilty action. Indeed, an adult may "kick the door when it pinches his finger."[3] In the same manner, early laws punished and amerced the "innocent" offender and injurer, not becau sethey insisted on punishing innocence but because they did not believe in it.[4] The punishment of things may have a similar root. Exodus speaks of stoning the guilty ox.[5] Later law demanded the surrender of the harmful instrument.[6] And modern

53. Buber, Thou 57.

54. On Zeno (336-264), see e.g. Diogenes Laertius, in T. V. Smith I Ch. III; Pohlenz.

55. See e.g. Halleck 209.

56. Krutch 38-39.

1. See generally Perkins ch. 7. On torts, see infra §205; Winfield, passim.

2. It is this deceptive "belief in steady progress which enables us to look down on those childlike creatures of the beginning." Daube 172.

3. Holmes 3, 4.

4. See e.g. Róheim 136; infra §206. For fascinating illustrations from ancient history, taken from the neighbor's absolute liability for his spreading fire, in Exodus, through the Talmud, to Plato and Philo, see Daube 157-163.

5. Exodus XXI 28. Infra §§205, 206. See also Daube 168 for an account of Athenian proceedings against the deadly weapon.

6. See generally Holmes 7-11.

statutes, while rationalized in terms of deterrence, may provide for the impounding of the "guilty" automobile.[7]

Justice Holmes was inclined to discount such imputation of guilt. He insisted that the dog "distinguishes between being stumbled over and being kicked."[8] This may be so. But could it not be as well that man, less rational than his dog, projects into his aggressor a guilty conscience which is related to his oedipal urge and to its repression? Could it not be that it is this repression of subconscious guilt, that makes us disbelieve our fellow man's claim to innocence?[9] Oedipus' incest appeared innocent. Yet Sophocles' audience thought Oedipus' blinding just. It may be claimed that this was due to early conscious acceptance of a predestination of both crime and punishment. But is it not easier to assume an unconscious presumption of guilt, which justified the offender's punisment? As Freud said, feeling of oedipal guilt can exist even where "the violation occurs unwittingly."[10]

To be sure, owing to a growing understanding of mental processes, the presumption of intent has gradually lost at least some of its conscious impact. Beginning with early Greek and Hebrew philosophy, the defendant has been permitted to plead accident in mitigation or excuse,[11] and mens rea has since become the conscious basis of criminal responsibility. But the surviving unconscious and irrational elements of this rule have made it a playground of semantic confusion in a moral-legalistic swamp. Since Blackstone's "vicious will,"[12] the mens rea has been defined as felonious, fraudulent, or guilty intent, as malice aforethought, guilty knowledge, willfulness, guilt, or scienter.[13] Little clarity can be gained from a diagnosis of court opinions and not much more from their linguistic surgery.[14] Thus, though mens rea may have become an indispensable element of criminal law, in defining it we have hardly advanced beyond medieval belief in an

7. Ehrenzweig, Full Aid Insurance 14. For European equivalents, see e.g. Steinlin and Schreiber, Schweiz. Juristen-Zeitung 49 (1953) 254, 307. See also supra §186 note 72.

8. Holmes 3. See also e.g. Daube 172.

9. See Jung 413, 450.

10. Freud XIII 68 n. 2. See also id. XXI 188; Latte 19. Distinction between oedipal and post-oedipal crime may account for the absolute liability for spreading fire with its oedipal connotations (Freud XXII 185-193; supra note 4), as contrasted to the more lenient liability of the Biblical shepherd and bailee. Daube 158-163. The fact that seemingly innocent, though presumably intentional crime was actually never punished by death (id. 165, 169-170), may be explainable by the judges' guilt feelings.

11. See e.g. Daube 129-175. See also Latte 25-35. For older law, see id. 6. That King Hrethel permitted his son, who had "accidentally" killed his brother, to escape all punishment (Beowulf 2435 ff.), may well be explained on the ground that the king refused to retaliate against himself. But cf. Daube 173.

12. Blackstone, Vol. II, Bk. IV, Ch. II §20.

13. See Morissette v. United States, 342 U.S. 246, 251-263 (1952).

14. But see Hart, Punishment chs. III, IV; Hall ch. III; Hughes and Gross. Cf. Packer 104-108.

"evil spirit" or for that matter, beyond the ancient acceptance of mere "negligence" as sufficient guilt in a concededly non-intentional offense.

§191. *The evil spirit.* Certain African tribes have come consciously to accept a killer's excuse to have lacked intention to kill. Yet they may put him to death so as to expel the evil spirit.[15] As late as 1484, Innocent VIII, when authorizing the Malleus Maleficarum,[16] the work of his Inquisitors Kramer and Sprenger, attributed to "devils, Incubi, Succubi," such "horrid offenses" as abortion in humans and animals as well as contraception. Thus, if the offender was innocent as a lunatic, he was to be punished after all, since he "had abandoned himself" to the devil. The history of witchcraft[17] ended but yesterday—for how long?

§192. "*Negligence.*" In many concededly non-intentional offenses another mens rea has always been punished. Hammurabi's code provides: "If a man has struck a man in a dispute and wounded him, that man shall swear 'I do not strike him knowingly' and he shall pay for the doctor."[18] In medieval England, the king waived his wite in cases of "misadventure," and the killer had a "pardon of course." But the bot remained payable to the injured. "If a man have a spear over his shoulder, and any man stake himself upon it, that he pay the wer without the wite."[19] And for a long time the Church continued to punish the homicidium casuale.[20] In such cases to be sure, intention was not presumed or shifted to an evil spirit. But why then the punishment of one who had been found innocent?

The answer is simple. Even where the offender's conscious intention is not consciously presumed, he is still unconsciously charged with an at least unconscious guilt. If his deed was not malicious or "reckless," it must have been "negligent." Indeed, for oedipal crime this conclusion has remained the rule. As late as 1813, the Bavarian Penal Code based on Anselm Feuerbach's teaching,[21] presumed any unlawful act to have been intentional.[22] And even today the Model Penal Code of the American Law Institute would punish certain unintentional causations of death or bodily injury by a deadly weapon. The accused in such cases would be guilty of "negligence" if he had failed to live up to the "standard of care that a reasonable person would

15. Post, vol 2, 29.

16. Malleus Maleficarum (trans. Summers 1951). The Bull bore the title Summis desiderantes affectibus (1484). See e.g. Bromberg 49-50.

17. See generally e.g. Zilboorg and Henry; Danforth.

18. Hammurabi §206. See supra §93. On the Hittite Laws, see supra §93 note 5.

19. Laws of Alfred ch. 36. See supra §95 note 9; also infra text at §205 note 9. For a history of the King's pardon, see Hurnard.

20. See generally Kuttner ch.4, particularly on the progressive mitigation (in contrast to excuse) of punishment for unintentional killing. Id.186-187.

21. On Feuerbach (1775-1833) and his reliance on ancient sources, see e.g. Grobe; supra §185 note 66.

22. Bavarian Penal Code art. 43.

observe."[23] Some laws expressly provide to this effect.[24] But why should one be thus held guilty if he was not able to observe the standard of a reasonable person? Significantly, such penal rules which do not even purport to require guilt, are often rationalized on the ground that they are needed to convict the truly guilty whose intent cannot be proved.[25] The at least subconscious presumption of guilt thus appears obvious.[26] This true "irrationale" we see confirmed in those cases in which punishment does not even purport to require fault, however slight. It is such "strict liability" that has met growing opposition although it seems to differ little from other cases of presumed fault. Distinctions between types of crime may enable us to identify those cases where such opposition is justified because of the very absence of the unconscious presumption.

§193. *Strict Liability?* Opposition is unjustified, it will be submitted, with regard to those crimes as to which a genuine liability without fault can conceivably be defended on the rational grounds of deterrence and restraint,[27] although it might be preferable here to relieve such liability of the stigma of punishment. Indeed, in this area, strict liability has been widely recognized by denying defenses based not only on errors of law[28] but also on errors of fact.[29] That theoretical objections and constitutional attacks against such liabilities have persisted,[30] must probably be attributed to the unfortunately unitary treatment of crime[31] which identifies the justifiable, deterrent punishment in such cases for non-fault, post-oedipal infractions with the clearly objectionable, retaliatory sanction of oedipal crime which requires at least a presumption of mens rea and thus the "excuse" of errors of both law and fact.

There have been other attempts, it is true, to draw a distinction which would permit strict liability for certain crimes, though not for others. But lack of a psychological foundation has doomed such distinctions and may account for the aggressiveness of their advocates. Thus, we have been told that mens rea is indispensable only for actions which are "mala per se," i.e., actions which would "be considered wrongful even if no punisment therefor

23. Model Penal Code §§202 (2) (d). 210.4, 211 (1) (b). Aristotle, with excessive facility, saw the reason in that "men are themselves responsible for having become careless by living carelessly." Nicomachean Ethics 1114a.

24. On the Spanish Penal Code, see Cordoba Roda. On the related problem of the "dolus generalis," see e.g. Maiwald.

25. See e.g. Lauri; also infra note 34.

26. See e.g. Williams 1-2, 13-15; id., Mental Element; Hall, Negligence. Cf. Hart, Negligence; id., Punishment 136.

27. Cf. Williams 30. See also supra §§181, 182. The first pertinent, authoritative case seems to be Regina v. Woodrow [1846] M & W 404, 153 Eng. Rep. 907. See generally, Haddad.

28. See e.g. Hall 383; Perkins 920-938; Mayer-Maly, passim; Ehrenzweig, Irrtum.

29. See e.g. Perkins 939-948.

30. See e.g. Hall, Ignorance; Perkins, Alignment 331-333, 384-388; Horst Schröder.

31. See e.g. Hart, Punishment 31-32, 37-40, 132.

was provided by law."[32] This proposition has been said to vindicate natural law thinking and to condemn the presumably evil theory of "positivism" which is seen embodied in the teaching of a certain suspect "foreign philosopher" due to his ignorance of the common law.[33] But rather than a distinction between mala per se and mala prohibita, the psychological character of the crime is relevant for the permissible scope of strict liability. Oedipal crime requires at least a presumption of mens rea to make punishment bearable which here, in contrast to post-oedipal deterrable infractions, is prevailingly a retaliatory measure. Throughout this chapter, to be sure, we are met with the difficulty of drawing clear lines. Between the extreme and thus easiest example of a post-oedipal crime, the technical infraction, and the other extreme case of the truly oedipal passion murder, there is a vast borderland of all-important practical relevance. Thus, strict liability has been accepted even in such cases of unintentional killing as felony murder and manslaughter. This can perhaps in part be explained on the ground that here the punishment is primarily directed against the act that preceded the killing. Moreover, in practice, conviction in most cases of strict liability is apparently sought and imposed ordinarily only where a guilty causation is in fact assumed but cannot be proved in law.[34]

The obscure concept of mens rea, consciously or unconsciously required for most crimes, is frequently tested by the defense of insanity. But this defense inevitably offers the same problems as the concept that it is designed to test: One commiting an oedipal crime cannot rationally be punished since he is "insane" by definition, while post-oedipal crime can rationally be subjected to deterrent punishment without regard to the offender's state of mind. Nevertheless, the law has accepted this "conscious anomaly" so as to permit rational correction of the irrational working hypothesis of the freedom of will which owes much of its workability to the irrational reality of a presumption of guilt (§§189, 190).

c. *The defense of insanity: conscious anomaly*

§194. *The law's ambivalence.* Sirhan Sirhan was accused of killing Robert Kennedy. In order to prosecute him for murder, society had to assume that

32. Perkins, Alignment 334. On the history of this theory, beyond Blackstone and Coke, see Hall 337-342. See also Hart, Punishment 176-178. For other early distinctions, see e.g. Bergk 118-280; Hugo Meyer 143-153, 161-183; Hellmuth Mayer 62 (on Kant).

33. Perkins, Alignment 333-334. Hans Kelsen who was thus accused in this somewhat unusual manner, has, indeed, argued that "there are no mala in se; there are only mala prohibita, for a behavior is a malum only if it is prohibitum." Kelsen, Theory 52. But he has, of course, never precluded thereby that actions may be prohibited as mala, by rules of the civil as well as the common law which are valid whether or not expressly posited "by law." See generally supra §§22-25.

34. See also supra note 25. Cf. Hall 342-343. See also id. 343-351 against strict liability in general.

his will was free to act otherwise. Yet the law, in it pervasive ambivalence, permitted him to claim insanity or psychopathy and thus wholly or partly to deny the freedom of his choice. No wonder: except for acts approaching automation,[35] we cannot imagine an "insane" actor's complete or a "psychopath's" partial predestination any more readily than a "sane" man's freedom of choice. This ambivalence of the law, probably inevitable, accounts for the worldwide, painful confusion in both the official theory and actual practice of the insanity defense. Two excellent studies have traced the 1500 year history of attempts to conceal that confusion.[36] We can limit ourselves, therefore, to a description of the contemporary scene.

§195. *From M'Naghten to the Model Code: impotent words.* For some hundred years, in the United States, the so-called M'Naghten test of insanity ruled virtually alone. The defendant was held insane if he "was laboring under such a defect of reasoning, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."[37] So naively, and therefore effectively, did this formula reflect the law's predicament that it has been preserved in modern codifications and repeatedly defended by progressive scholars.[38] Occasionally it has even entered the almost equally confused theory of civil fault.[39] But the rapid development of psychological knowledge during the last few decades seemed to call for a change. Indeed, psychiatric experts began to refuse to testify on "rightness" or "wrongness," declaring this test to be outside their expertise in light of their advanced science.[40] Thus new tests were developed to meet this resistance and to enable the psychiatric profession to use the language of their own science.[41] Here are some of the resulting formulas. The defendant was to be held insane (1) if he had acted under an "irresistible impulse;[42] (2) if his "act was the product of mental disease or mental defect;"[43] (3) if he "as a result of mental disease or defect lacked substantial capacity" to resist doing what he did;[44] (4) if he did not have the "substantial capacity either to appreciate the criminality of his

35. See e.g. Perkins 749-750; Bresser and Fotakis.

36. Platt and Diamond, Wild Beast; id., Right and Wrong.

37. M'Naghten's Case, (1843) 10 Clark & Fin 200, 8 Eng. Rep. 718.

38. See e.g. Mueller 259 with supporting literature.

39. See e.g. Indian Penal Code §6; Quebec Civil Code §1053, discussed in Goldman v. Baudry, 170 A. 2d 636 (Vermont 1961).

40. See Ehrenzweig, Insanity 425 n. 12 for further references; and particularly Zilboorg chs. 1, 7; Hall 520-522; Goldstein ch. 4; Platt and Diamond. But cf. Livermore and Meehl 300. For a biological analysis, see also Oliver Schroeder 634-640.

41. See supra note 36; also Diamond, M'Naghten.

42. Hall ch. 5.

43. Durham v. United States, 214 F. 2d 862 (D.C. Cir. 1954). Regarding the failure of this test, see e.g. MacDonald 42; Arens, passim.

44. Unites States v. Currens, 290 F. 2d 751 (3d Cir. 1961).

conduct or to conform his conduct to the requirements of law."[45] Indeed, additional suggestions have entered the futile competition[46] and various statutes have sought inept compromise in the United States as well as in the Commonwealth.[47] Even major legislative projects have failed to seek new approaches.[48]

I shall not repeat my earlier attempts to analyze these efforts.[49] They are quickly losing the remnants of their shortlived élan and significance. For all of these tests, for some time now, have engaged lawyers and psychiatrists in a rather disgraceful game of pingpong, in which each profession attempts to leave to the other the final responsibility.[50] Indeed, the new tests, while seeking to respond to medical knowledge and demands, have in turn betrayed the law.

What the law desires to know is whether or not to punish. And this question cannot be answered by any medical test. Whenever society purports to treat the offender's "sanity" as decisive, it primarily seeks to rationalize what is likely to become the result of irrational reactions of aggression or guilt.[51] We must learn to admit to ourselves that, where a plea of insanity is permitted to succeed, society, more often than not, merely lacks or abandons a claim to retaliation. Notwithstanding purported reliance on expert testimony, such a decision is likely to be due either to pity, namely our identification with the accused, or to the absence or weakness of the retaliatory urge with regard to the particular type of the criminal or crime. Attitudes favoring or counteracting such reactions usually occur in cycles between trends toward "humanization," such as the abolition of capital punishment or the legalization of "abnormal" sexual practices, and counter-movements against "the coddling" of the criminal (§199). Such a-rational motivations, then, will ordinarily determine admission or rejection of the a-rational defense of insanity. They offer, I believe, the sole, but compelling justification for retaining, as society's mouthpiece and tool, the jury or other lay bodies which are neither qualified nor compelled to articulate pseudo-rational argument where there can be only irrational reaction. And the same a-

45. Blake v. United States, 407 F.2d 908 (5th Cir. 1969), relying on Model Penal Code §4.01(1). See Hall 472-528; Dain.

46. For an "integrative functioning" test, see Silving, passim.

47. For judicial application and discussion, see e.g. Stapleton v. R. (1952) 86 C.L.R. 358 (High Court Australia); Regina v. Borg [1968] S.C.R. 551, (1969) 6 D.L.R. (3d) 1 (Canada).

48. See e.g., California Report 48-67. For the controversy around Section 51 of the German Government Draft of a Penal Code on criminal responsibility, as well as on the private Counter-Draft which follows equally traditional lines, see Alternativentwurf; and e.g. Gallas; Roxin; supra §188 note 83.

49. See Ehrenzweig, Insanity 8-10. See also Silving 48, 56-74, 79-101, 113-120.

50. See e.g. Slovenko 395; infra §197.

51. See generally Hall chs. 7, 8. Cf. Goldstein, Insanity 11. But we must of course remember that any attempt at rationalization may result in strengthening one or the other of the countervailing irrational factors.

rational motivations must help to explain growing resort to a-rational compromise.

§196. "*Diminished responsibility:*" *bootless compromise.* We saw how society has proved its ambivalence by conciously permitting the anomaly of a defense of insanity even in the penal treatment of oedipal crime whose very commission typically implies such insanity and which yet in principle is held punishable due to a presumption of guilt and a fiction of free will. Though plagued by such ambivalence, society is faced with a choice between all or nothing, between conviction and acquittal. No wonder there has always been a search for compromise, in addition to the hybrid liabilities for negligence (§190) and "innocent" conduct (§191). Borrowing from Scots tradition and competing with English legislation as well as with continental doctrine, American courts have been intent on devising a formula under which a presumably "sane" offender, while found "guilty" due to his free will and proved or presumed mens rea, could be given the benefit of a merely partial sanity, free will and mens rea resulting in a merely "partial" or "diminished" responsibility or capacity.[52]

Sirhan's counsel and experts, whether or not they thought him to be "insane," presumably saw little prospect for such a defense against the threat of a public outcry. If they thus expected retaliation to preclude acquittal, they hoped it might at least tolerate mitigation. If they failed to prove Sirhan wholly "insane," then perhaps they could succeed partially by digging into what has been called the "wastebasket" of their diagnosis.[53] Need it really be said again that this technique is nothing but a "ploy to avoid conviction for an offense that may incur the death penalty"?[54] But often the ploy is too crude. Often the triers of the facts will be repelled rather than seduced by the magician's bag of tricks. Sirhan was sentenced to death. Indeed, a decade's English experience with the recognition of a "diminished responsibility" has added few cases in which an accused has escaped the punishment which he would have incurred if found fully responsible.[55] We can hardly expect more or less from introducing specific "medical categories" in analogy to non-age.[56] May we not suspect that such formulas may yet prove treacherous tools in the hands of juries or judges

52. Generally, see e.g. Goldstein, Insanity 194, 202; Silving 125-130. For the precursors, see for Scotland, T. B. Smith, Responsibility; for England, Homicide Act of 1957 (Goldstein, Insanity 195); for the Continent, German Penal Code §§51 II, 55 (Jescheck §40 IV). In this context we must also see the entire development of the concept and treatment of juvenile delinquency. For a scholarly review, see In re Winship, 90 S. Ct. 1068 (1970) with significant concurring and dissenting opinions by Justices Harlan and Black.

53. Bromberg, Personality 641. See People v. Nicolaus, 65 Cal. 2d 886, 423 P.2d 787 (1967), for an example of total confusion of medical testimony and judicial opinion. On the Sirhan case, see Kaiser.

54. Packer 135.

55. See Hart, Punishment 246. Cf. Walker ch. 13.

56. Hart, Responsibility 361.

who, wary of their power, would without them have resorted to acquittal but may now find comfort in a compromise, to the defendent's detriment? Psychiatry has failed the law's question. But have we not proved too much? Should we, can we, just because of such failure, halt the battle of experts?

§197. *The battle of experts: "bread and games"*. Psychiatrists, having won their Pyrrhic victory over the law (§195), had hoped that their skill would now be given free range in dispensing cure rather than punishment. Instead, juries, finding the accused fully or at least partly responsible, have continued to demand punishment rather than cure in at least unconscious response to the community's reluctance to forego vengeance for charity. And we must assume that, with this demand, they are frequently inclined to ignore both the judge's instructions and the psychiatrist's testimony. If the former may sound to them as the law's ancient, secret curse, the latter may at worst recall to them magic incantations of the medicine man,[57] at best the trickery of a physician who is more concerned with his "patient" than with justice. If "proof" be needed for these assumptions, the artist's intuition in "The Twelve Angry Men" has furnished it more persuasively than the sociologists' staged experiment.[58]

Should we then put an end to the game in the arena of the court room whenever the actors fail to follow both law and science?[59] Indeed, it has been suggested that lawmakers "should consider abolition of the insanity defense," so as to force into the open the purpose and shortcomings of criminal responsibility.[60] But it has also been conceded that such a measure would have to face "the enormous ambivalence toward the 'sick' reflected in conflicting wishes to exculpate and to blame; to sanction and not to sanction; to degrade and to elevate; to stigmatize and not to stigmatize; to care and to reject; to treat and to mistreat; to protect and to destroy."[61] The Imperator gave "panem et circenses" to his unruly plebs: Not only bread but the deadly fight between gladiators in the Colosseum.

It seems that we must continue a similar tragic game in the court room to cater to society's retaliatory urges where reason fails. But if this be so, we might wish to make it easier for the players.[62] Perhaps we can help them in their thankless task of deciding upon the mysteries of freedom and guilt without the help of either law or science. Perhaps we can do so even in an

57. See Bromberg, Psychiatrists 1344; Menninger 1091. The German judge and the communist scholar arrive at similar conclusions. See Blau; Roehl.

58. Simon 177; Cornish. But see e.g. Arval Morris 633-637.

59. This is the message of much of Szasz' voluminous writing. See e.g. Szasz, Justice 71-82; also e.g. Friedman 39-40. But cf. e.g. Macdonald 319.

60. Katz, Goldstein and Dershowitz 872. See also Zilboorg ch. 7; John Frank 168-169; Bernard Diamond.

61. Katz, Goldstein and Dershowitz 868-869. See also e.g. Murphy.

62. The problem is of course not limited to the United States. For a disturbing example from a civil law country, see German BGH Nov. 21, 1969, Neue Juristische Wochenschrift 23 (1970) 523.

adversary framework by preserving the semblance of fairness and orderly procedure in the battle of counsel and experts.[63] But we must remain wary of seeing the spectators' thumbs forced up or down by the gladiators' skill and strength. At least we must demand from judges, counsel, psychiatrists, and ourselves that we remain aware of the fact that guilt and innocence will often be determined by fluctuations in the community's irrational reactions; and that therefore the expert's role is, more often than not, no more—and no less—than that of a thirteenth juror.[64] The battle of experts will continue as will the defense of insanity. But once the battle is fought, the prisoner's fate remains at stake. Whom are we to punish?

3. *Whom we should punish*

a. *The current debate*

§198. *Past and present: "acquittal" of the "insane."* Before analysing some of the innumerable measures now being proposed for the reform of the law of criminal responsibility, we must summarize the most obvious shortcomings of our present system: (1) This system is philosophically inconsistent in that its requirement of a mens rea is based on the hypothesis of a free will, yet must rely on the disingenuous formulas of the "insanity" defense (§195). (2) All of these formulas lack the indispensable reference to the purposes of punishment (§§177-187). (3) Both denial and reduction of responsibility (§§194-197) are accompanied at best by embarrassing publicity and at worst by indefinite confinement for "treatment."[1] (4) Such treatment, despite its purportedly medical character, actually represents a severe sanction of presumably innocent conduct. Moreover, it is removed from judicial control and may thus be objectionable on grounds of procedural fairness or even due process.[2] The last point requires elaboration.

When the lunatic began to escape the stake and to be granted "asylum," this mercy all too often became a new instrument of torture.[3] Even in our day, ever more frequently, public attention is drawn to the horror of the snake pit. "Apparently terrors of bedlam exceed those of prison."[4] Ever more frequently, we learn that many a demented offender or his counsel prefers not to claim the "benefit of lunacy." A definite criminal punishment surrounded by due process of law may appear less threatening than a "mere"

63. See e.g. Goldstein, Insanity 64, 93, 122, 135-136. On the adversary process in general, see infra §223.

64. See e.g. Szasz, Psychiatry 194; Hall 464-466; infra §201.

1. See e.g. Goldstein, Insanity 20, 155, 225.

2. See infra notes 14, 17. On the "denial of right to trial," see e.g. Szasz, Justice 53.

3. See Bromberg 77, 96; Jeffrey; Slovenko, History.

4. Hazard and Louisell 382. See also Louisell and Diamond, Détente 224-225.

indefinite detention in the near absolute power of the medical profession. "Label the judicial process as one will, no resort to subtlety can refute the fact that the power to imprison is criminal sanction. To view otherwise is self-delusion. Courts should not, ostrich-like bury their heads in the sand."[5] Retaliation for crime continues, be the offender guilty or "insane."

§199. *The future: "abolition of all punishment"?* Psychiatrists, we have seen, have reproached the M'Naghten rule of "right and wrong" for ignoring the existence and impact of mental disease in terms of their new science. "Progressive" legislatures, courts and writers have attempted to respond to this reproach by devising new formulas based on that science—only to meet near general failure (§193). Should we acquiesce, then, in an outstanding judge's conclusion that, under these formulas "no man can be convicted of anything if the law were to accept impulses of the unconscious as an excuse for conscious misbehavior"?[6] There are those who would be willing to pay this price. Alexander and Staub assumed that "medical treatment and education [would] naturally [sic] take the place of punishment."[7] Indeed, Karl Menninger, invoking the tenuous authority of Protagoras and Plato, has since condemned the "Crime of Punishment" as such.[8] And Lady Wootton has taken up the gallant fight for the replacement of all criminal law by measures of education and restraint,[9] by what has at times been called the "défense sociale."[10] Others, while keeping the mechanics of punishment, would rename it atonement (Sühne) on the precarious ground that while "punishment dishonors, atonement liberates."[11] Similarly, the legislatures of a few countries, including Mexico and Greenland, have sought to implement these postulates by largely substituting, at least in terms, "sanctions" and "security" measures for punishment.[12]

But many are the arguments that can be raised against such radical general proposals: (1) Least convincing seems insistence on every "person's

5. Canon City v. Merris, 323 P.2d 614, 617 (Colorado 1958).

6. State v. Sikora, 210 A.2d 193 (New Jersey 1965), per Weintraub, C.J.

7. Alexander and Staub 90.

8. Menninger, passim.

9. Wootton chs. 2, 3. See also Reiwald ch. X; Weihofen 435-443; Al Katz 11-16; Flugel 170. But cf. e.g. Longford 57; Leonard Kaplan 190. For a "family model" of criminal law, Griffiths.

10. See e.g. Grammatica; Ferri; Del Vecchio, Essays 165; Mergen; Noll 13. On the "new défense sociale," see e.g. Ancel; Beristain, passim. See also Moberly; Shuman, Responsibility 29-33.

11. Kretschmer, in Todesstrafe 79, 89.

12. On Sweden which seems to have returned to traditional terminology, see e.g. Strahl, passim. On the Swedish "Protective Code" of 1957, see Sellin; Agges. With regard to the Italian draft of 1921, see Ferri; Ebermayer; on Mexico, Mendoza. Russia more frankly admits to "chastisement" being at least one of the purposes of socialist punishment. Russian Criminal Code (1960-1965), art. 20. See Berman 151. Since Stalin's "reform" Russian practice seems to have become indistinguishable from its "capitalist" counterpart. See e.g. Hazard ch. 16; Zile.

right to be punished rather than treated."[13] (2) But one may well claim that the determinist who, denying all guilt, advocates the abolition of all punishment, ignores like Zeno's slave (§189) the potential deterrent effect of punishment itself (§202). (3) Moreover, one might resist abolition of punishment on the weighty ground that it would necessarily have to be accompanied by measures of restraint and education and that the ensuing replacement of judicial by administrative techniques would raise insurmountable questions of due process and many others of expediency.[14] (4) Most crucial, abolition of punishment would neglect society's retaliatory urge at least in the area of oedipal crimes and would thus result in a return of aggression through the back door.[15] To inhibit the "highly compulsive behaviour on our part ... by premature reform might endanger the precarious cohesion of the social fabric."[16]

§200. *Abolition or segregation of the defense of insanity.* We have mentioned current suggestions that the defense of insanity be abolished entirely and that the issue be made part of determining the mens rea. This would result in conviction or acquittal based upon the external conduct with ignorance and mistake continuing to function as defenses. Such a procedure could, however, contravene constitutional guarantees of due process or against cruel and unusual punishment, as could the indeterminate abandonment of the offender to medical treatment in cases both of conviction and acquittal.[17] Similar objections apply to the bifurcated trial as it now operates in California. Here, the ultimate finding of the offender's sanity, although it was, of course, required for his conviction, is left for a second trial.[18]

b. *The needed distinction*

§201. It will not do, then, to resolve the innate inconsistency of criminal law by either generally denying or upholding mens rea as a requirement of punishment. Nor will it do, however, generally to maintain the status quo on the ground that "most of our commitment to the democratic values, to human dignity and self-determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or

13. Herbert Morris 485. On Fichte's and Hegel's similar "arguments," see Liszt 23. See also supra note 2.

14. See e.g. Goldstein 19, 95-96, 154, 161, 215, 217; Szasz 196; id., Law, Pt. 4; Murphy 115; Pincoffs ch. 7; Katz, Right; Halleck 218; Grant Morris; B. Diamond, Ray Lectures at n. 1819; infra note 17.

15. See supra §188 notes 82, 83. See also e.g. Hawkins, Punishment; Bazelon et al. We might speculate on whether the cruel Greek legislation of the 5th century B.C. was the reaction to Solon's abolition of state-executed punishment. See Rauschenbusch 13.

16. Anton Ehrenzweig II 227. For a general, though a-psychological, convincing refutation of the "abolition theory", see Alf Ross, Punishment.

17. See supra notes 2, 14. See also Greenwald, passim. But cf. e.g. Guttmacher 56-65.

18. See Hazard and Louisell; Goldstein, Insanity 222-223.

blamed depending on his free choice of conduct.[19] We must remain aware of the fact that at least as to oedipal crimes this argument disregards society's "wishes to neglect, stigmatize, punish and destroy" without much regard to blame.[20] It is not feasible, therefore, to limit proposals for reform to developing such general rational guidelines for the "disposition" of the convicted offender as the degree of his dangerousness, deterrability or need for treatment[21]. Such proposals ignore the crucial role of retaliation in dealing with oedipal crime. This urge requires retention of punishment for its own sake with the defense of insanity as its most important corrective.

Once we have recognized this function of the defense, we can no longer treat it as a homogeneous concept. Thirty-one areas of the law (including divorce, contract, tort, and wills) have been counted in which this concept is relevant. Needless to say, its definition must vary widely among these areas in accord with its object,[22] and similarly such variations must follow us into what only seemingly is a unitary concept of insanity in criminal law. If we agree that punishment is designed to serve conflicting purposes (§§177-187), we shall also have to agree that we must adopt as many different definitions of insanity for criminal law as are needed in light of these varying purposes. Only such a distinction will enable us to admit the continued need for often irrational sanctions of oedipal crime, while striving to eliminate from that area the most pernicious features of both punishment and insanity defenses. And only such a distinction will then permit us to devise to the fullest possible extent, rational sanctions and treatments for post-oedipal crime.

§202. *Post-oedipal crimes.* Such crimes are relatively unencumbered by irrational roots and reactions.[23] From mere infractions to most property crimes, post-oedipal crimes call for and can perhaps expect rational reform (§§181-182). Such a reform will have to seek a balance between two not always consistent, but equally rational, "justnesses:" protection for society and help for the offender. Where the first aim seems pre-eminent, we shall take into account that, with regard to such crimes, "nearly all of us are potentional criminals."[24] Punishment will thus, above all, have to be devised as an effective deterrent even in partial disregard of "justnesses" concerning the offender.[25] Thus, if the threat of punishment promises

19. Kadish 289.

20. See Goldstein, Katz and Derschowitz 871.

21. See e.g. Slovenko 408; Silving 134; Waelder, Psychiatry 390.

22. See Mezer and Rheingold, passim.

23. We may have to expect certain pre- and postnarcotic situations which require separate treatment.

24. Andenaes 182. See also supra §180 note 24.

25. See e.g. Germann 208; Fritz Bauer; Mergen; Noll 21; Liszt 34. On deterrence in general, see e.g. Oppenheim 28-31; Singer, passim; Müller-Dietz 30-33; Friedman and Macauley 280-301. See also the Norwegian high court decisions expressly based on general deterrence, Andenaes, Morality 657-660; Bruns, passim.

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general deterrence, we may have to maintain that threat even if it should prove ineffective with regard to the offender himself or inequitable because of excusable motivations of his crime. No wonder that as to such post-oedipal crime the defense of insanity will usually fail, although a conscientious and compassionate prosecutor may well forego prosecution of an "insane" offender willing to undergo "treatment."[26] Indeed, it has been said that "insanity as a defense is an exception in crimes other than murder."[27]

On the other hand, at times and places were society does not feel threatened, the law's concern with the offender can and should prevail in this area. The psychiatrist, relieved of his assignment to decide upon guilt and innocence, will be able and needed to assist us where his expertness matters—namely, in the treatment and cure of the offender and, where restraint is needed, in combining maximum effect with a minimum of cruelty. Here, and only here, "progress is possible by strengthening the role of the ego,"[28] in contrast to those crimes which we have characterized as oedipal because of their early source.

§203. *Oedipal crimes.* As to these crimes, before we can seek cure and prognosis, we must repeat our diagnosis which, in juxtaposition with post-oedipal crimes, can perhaps be restated as follows: Commission of any crime reveals the offender's legal insanity in a degree proportionate to the effort needed by a medically sane person to overcome the normal repression of that urge to which the offender must typically yield when committing the crime. Or, to put it differently, any offender is insane in a degree conversely proportionate to the effect society expects from his punishment for maintaining the repression of that urge. For most post-oedipal infractions application of these tests, we have seen, leads ordinarily to the denial of insanity in the courtroom. For in such cases the repression is absent or so superficial that the offender needs little effort in overcoming it. And, correspondingly, the threat of punishment can be expected to counteract his temptation to overcome the repression. All this is otherwise with regard to most homicides and other oedipal crimes.[29]

Killing has been characterized as oedipal because it is "always inside the family."[30] This aphorism may be too general. But earliest and therefore strongest repression is implanted against the child's Oedipus wish to kill one parent and commit incest with the other.[31] So strong is this repression that our temptation is rendered totally unconscious and powerless. And we

26. Koestler 70.

27. On the "decision not to prosecute," see generally LaFave 533-539. On the discretion left to the prosecutor by the principle of "legality" in other countries and his position as a quasi-judicial agency, see Jeschek, Power; Vouin.

28. Anton Ehrenzweig II 249.

29. But see e.g. Huth, in Todesstrafe 91, 99. Cf. Bockelmann, id. 135, 138.

30. N. O. Brown 163.

31. On the exclusion of incest from our discussion, see supra §180 note 25.

are generally inclined to assume at least temporary insanity where the temptation can nevertheless be overcome in a passion murder (§§185-187). In such cases society is quite ready to waive punishment. We do not ourselves need the offender's punishment to deter us from overcoming our repression by committing these crimes ourselves. And anybody who, overcoming his repression, should feel impelled and able to commit them, will hardly ever be deterred by the threat of punishment. The passion murderer will appear as insane by definition.

But, as we have seen, retributory urges may not only be irrational, but even unrelated to our unconscious need for support against our own temptation. Aggression and vengeance may on other grounds prevail over the plea of insanity and the clamor for punishment. So long as we insist on the "scientific" rationalization of this irrational mechanism, we shall continue to tolerate and, indeed, to require the painful and often ludicrous battle between the psychiatrists (§195). It is no doubt aggressive overstatement "to charge that their testimony is for sale."[32] But where, as is typically true in cases of oedipal crime, such testimony cannot be determined by professional knowledge, the "experts" must, like jurors, ultimately follow their own emotions as members of society. In terms of their professional language they will speak their "sane" or "insane," their "guilty" or "not guilty," according to whether or not on grounds inexpressed and inexpressible they feel that the accused should be punished. Here, professional knowledge may permit them to contribute conscious speculation as to the truly essential question whether in the case before them the public would be willing to forego retributory satisfaction without taking a grimmer toll elsewhere and elsewhen.

The borderland. We have isolated two types of crime by identifying the degree of repression which the "normal" offender must overcome in committing his crime. At the one end of the spectrum we found the post-oedipal crime (from mere infraction to property and gang crimes), where slight, superficial, and conscious repression makes punishment seem rational to the virtual exclusion of the defense of insanity. At the other end we saw oedipal crime like passion murder overcoming an early and therefore deep and subconscious repression. Here punishment, although it typically lacks rational motivation, will either be insisted upon owing to retaliatory urges or waived in "pity" for the insane. But there remains the borderland which corresponds to repressions of varying degrees in post-oedipal childhood. These we may exemplify by reference to the prohibition of many "a-social" sexual satisfactions whose repression occurs at a more advanced, post-oedipal age than that of homicide and is therefore less effective than the latter, leaving us subject to temptation throughout our lives. Insofar as this temptation remains subconscious, as with respect to most perversions, the

32. Blumberg 148.

urge to punishment will often yield to pleas of insanity almost as easily as in the case of murder. But the temptation may, owing to a less effective repression, as with regard to forbidden normal sexual relations, reach the surface of our minds. Then we shall demand punishment of those who have succumbed, and become unwilling to concede to them an irresponsibility in which we ourselves would have liked to indulge. In this twilight zone between oedipal and post-oedipal crime the psychiatrist will often be willing to put aside his professional knowledge of "disease" and "impulse" and accept the need for deterrence without much concern for the offender, as he might in cases of most infractions and property crimes. Nor will he, on the other hand, always be willing thus to give his verdict as a sociologist rather than as a physician and insist on this latter role in an attempt to persuade the jury that their victim is insane having overcome a normally unsurmountable repression. Reason and unreason will alternate and compete for the expert's conscience. Law and psychiatry will continue to share the blame and the shame—until both the creed and the need of punishment will have been forgotten—in Utopia.

In the next chapter we shall see that civil responsibility is beset by psychological problems very similar to those disturbing our law of crime. There, too, we find a "fault" law falsely pretending such rational purposes as deterrence and reform, while in fact seeking irrational retribution. But the law of civil liability, though older than the law of crimes, is less burdened by primitive urges and emotions. It will, therefore, we may hope, more easily turn to purely rational solutions. Also though lacking that emotional appeal which continues to focus public discussion on crime and criminals, the law of "tort" is so much closer to our daily lives than the hangman's or the jailer's threat. In many thousands of cases every day, without the stigma of social condemnation inherent in criminal sanction, tort law reacts to encroachments upon the spheres of our physical and proprietary safety. The running-down accident, the defective merchandise, the slippery sidewalk, though still purporting to respond to a demand for the sanction of fault, now all make us clamor for remedies other than punishment: for compensation by the hazardous yet profitable enterprise, be it "guilty" or "innocent." It is here that we most often seek and meet the law. It is here that society has progressed in psychological maturity far beyond the undirected and unlimited revenge, the eye-for-eye and tooth-for-tooth of our early days. Through a long and painful process, we have come to give ever-increasing consideration to the comparative equities of the parties. But in this process we have now, I believe, reached a stage in which some understanding of its psychological significance has become indispensable to avoid delay of further progress.

REPORT TO THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

Subject.—Proposed Federal Criminal Code for the Revision of Title 18 U.S.C.

Prepared by.—M. C. Bassiouni, Professor of Law, DePaul University, College of Law.

Question 1:

Foreign codes are divided along the lines of Part A and Part B. This division has been adapted to American criminal law in Bassiouni, *Criminal Law and Its Processes: The Law of Public Order*, 1969, (Charles C. Thomas, Publisher, Springfield, Illinois).

Question 2:

Foreign codes do not usually leave blanks in numbering. Division is by chapters, sections and paragraph are chronological. Additions and amendments are added to each section or chapter.

Question 3:

Intent is a required element but the importance lies in its proof. Proof of guilt is determined by the judge or a combination of judge and jury usually upon the personal conviction or moral satisfaction of the judge. See Bassiouni, A Survey of the Major World Criminal Justice Systems, Part III. (To appear in Handbook on Criminology, Rand McNally, 1972, ed. D. Glaser). Exhibit I.

Question 4:

Same as for Question 3.

Question 5:

Insanity is a defense. Insane defendants are accorded medical rather than penological treatment. No separate procedural aspect for treatment of defense of insanity. The court may appoint a psychiatrist. Parties may introduce expert witnesses. There is usually mandatory commitment in successful insanity defense.

Question 6:

There is no defense for voluntary intoxication but there is a defense if chronic alcoholism can be equated to insanity. No defense for drugged condition short of insanity. Theorists throughout Western Europe criticize their unscientific approach to insanity, drugged condition and intoxication. The Scandinavian countries have particular features dealing with intoxication which merit consideration.

Question 7:

All defenses stated are available. Codes usually enunciate general standards relying on judicial interpretation for specific rules. However, Western European Countries are positive and codes are specific.

Question 8:

Foreign codes classify offenses in the same manner with some variations.

Question 9:

A. Sentences are imposed but execution is suspended.

B. There is division on the question of probation and nonsupervised suspended sentences.

C. In case of supervised suspended sentence or probation, there is division as between probation officers and police officers.

D. Sentences are determinate.

E. Special extended terms for recidivists or dangerous offenders.

F. Range varies extensively.

G. Mandatory prison sentences are determined by codes depending upon crimes.

H. (Unfamiliar with parole system.)

I. No notice or publicity of conviction. To my knowledge only Germany has provision for convicting an organization.

J. No publicity for conviction of individuals.

K. Persistent misdeamant may be treated as recidivists otherwise no special provisions.

L. All sentences must be "motivated" (reasons given).

M. Sentences are reviewable. Most appeals are in the form of trial de Novo.

N Government may appeal as well as defendant.

O. Usually no general standards set for review of sentencing other than proportionality by sentence to crime and rehabilitative opportunities for the defendant (very vague if any).

P. There is practically no uniformity of sentencing other than when the codes specify mandatory sentences.

Q. Multiple offenses if part of a single criminal transaction require concurrent sentences rather than single sentences.

R. (Unfamiliar with treatment of fines).

Question 10:

Mistake of law is no defense. Reasonable mistake of fact is a defense.

Question 11:

No similar judicial approach.

Question 12:

Extraterritorial jurisdiction is much broader, See Bassiouni, Section 1—Theories of International Criminal Jurisdiction as Applied in Municipal Law. Unpublished article (Exhibit II)

Question 13:

Criminal conspiracy does not exist in civil code countries though attempt and criminal preparations may cover the same type of activity in some cases.

Question 14:

Felony murder is treated as separate from the actual crime. Specific provisions for aggravation of crime are established by creating a new category.

Question 15:

No. However, a distinction arises between riots and crimes against the state, they are differently treated in civil code countries because of the absence of a provision equivalent to the first amendment of the U.S. Constitution. See Bassiouni, *The Law of Dissent and Riot*, 1971, (Charles C Thomas, Publisher, Springfield, Illinois).

Question 16:

Yes. Some codes have specific provisions linking paramilitary activities to treason and related offenses against the state.

Question 17:

Foreign codes do not distinguish on the basis of victims of crimes. Emphasis is on type of activity sought to be controlled.

Question 18:

Provisions dealing with firearms and explosives are much more regulated as most countries have established bans which are severely enforced on firearms. Very stringent licensing requirements for those permitted to carry them.

Question 19:

Concerning capital punishment, see study by Marc Ancel prepared for the United Nations and containing information on comparative studies.

Question 20:

Single prosecution provided for offenses arising out of same criminal transaction. Defense of former jeopardy for identical conduct, no as formalistic as in the U.S. Conviction in another jurisdiction is a defense. See also European Convention on Human Rights which prohibits double jeopardy (NE BIS IN IDEM).

ST. MARY'S UNIVERSITY OF SAN ANTONIO,
San Antonio, Tex., March 1, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

DEAR SENATOR: In answer to your letter of February 3, 1972, I enclose a list of brief answers dealing with all the desired points. The best idea, of course, would be to work toward the unification of state laws, so that eventually there would be only one state law in all the fifty states. The unified state law could then be amalgamated with the federal law, so that there would be only one American law. Such law could be administered in only one system of courts. This is exactly where the matter stands in Germany. Australia and Switzerland are not much behind. On the surface it seems a very formidable endeavor but the differences in state laws are only superficial with no really fundamental justification for any of them at all. There is also no reason for the duality of state and federal law. They are only the creation of the legislator, not of customary law or of the common law.

In my answers I refer to my article entitled: A Study in the Treatment of Crime and Law Enforcement in the United States as Compared to the European Countries, which will appear in March 1972, in the St. Mary's Law Journal. The article deals with many matters referred to in the questionnaire. I shall send you a copy as soon as it appears.

I hope that my answers will be of use and I shall be happy to answer further queries you may decide to send me. I would be happy to co-operate in your work.

Sincerely yours,

GEORGE E. GLOS,
Professor of Law.

To: United States Senate, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures (Pursuant to Sec. 7 of S. Res. 32, 92nd Congress), Washington, D.C. 20510.

From: Professor George E. Glos, St. Mary's University School of Law, 2700 Cincinnati Ave., San Antonio, Texas 78284.

ANSWERS TO QUESTIONNAIRES AS PER LETTER OF FEBRUARY 3, 1972

1. Foreign codes usually provide for: A. General Provisions, and B. Specific Offenses which are given separately under 1. Felonies and misdemeanors, and 2. Infractions. No part C Sentencing exists. Provisions as to punishment for individual offenses are given directly in the section dealing with the particular offenses. The order followed in the Model resembles somewhat that of the Swiss Penal Code. No fundamental objection can be made to the separate provisions for sentencing in the Model.

2. Foreign codes start with section 1, and proceed consecutively. No space is left for future statutes. On amendment, a new version of any particular section is printed in the new edition of the code. A statute which does not really amend but expands an existing provision is printed following the section under which it falls. This is done especially in the French code.

The Model uses different technique. It numbers chapters not sections and then allots individual numbers to sections allowing thus for future expansion. No fundamental objection can be made to this system.

3. Foreign penal codes distinguish basically two types of culpability: 1. Intent (dolus), 2. Negligence (culpa). The definition of culpability is not always given in general apart from the mental element required in any particular offense. The required mental element is stipulated in the particular offenses. Intent, where present in a criminal act, is usually defined as an act committed "intentionally and knowingly." Negligence is usually defined as an act committed "out of negligence, imprudence, inexperience, or in breach of safety rules." E.g. Italian P.C. art. 43, Swiss P.C. art. 18. The codes deal with dolus malus (intentionally and knowingly), dolus eventualis (recklessly), and with culpa (negligence). E.g. Austrian P.C. para 1 and 238.

The mental element determines which section of the code will be applied. E.g. in the Italian P.C., homicide (murder) requires intent and knowledge

(art. 575), manslaughter requires recklessness (art. 584), negligent homicide requires negligence (art. 589). The punishment decreases with the lesser mental culpability from a minimum of 21 years imprisonment for murder, to imprisonment from 10 to 18 years for manslaughter, and to imprisonment from 6 months to 5 years for negligent homicide. The mental element has thus a direct relation to punishment.

The kinds of culpability in the Model compare favorably with foreign provisions. This is chiefly due to the definitions of "wilfully" art. 302 (1) (e) and "culpably" art. 302 (1) (f) of the Model.

4. Foreign penal codes do not generally define causation, with the exception of the Italian P.C. art. 40. All the codes embody, however, the same principle, namely, that the act (omission) of the actor must have been instrumental in bringing about the criminally punishable effect.

5. Insanity is a defense under foreign codes. Foreign provisions are fairly similar to the Model. Foreign codes uniformly provide that the defendant is not guilty because of insanity. Only in England under the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38) the accused was to be found guilty of the act but so insane as not to be responsible. The position was reversed in the Criminal Procedure (Insanity) Act 1964, s.1. which makes the accused not guilty because of insanity. All foreign codes provide that upon the verdict not guilty because of insanity the prisoner must be held in a mental hospital for prisoners. I refer to my article: A study in the Treatment of Crime and Law Enforcement in the United States as Compared to the European Countries, St. Mary's Law Journal 1972.

Foreign codes uniformly provide for the court to appoint a psychiatrist to examine the defendant. More than one expert may be appointed. Experts are selected from a list of approved experts kept by the court. The parties may object to the appointment for cause, just like they may object to the person of the judge trying the case and seek his disqualification. Parties may not bring their own experts nor may they suggest a particular expert to be appointed. This is done entirely by the court.

6. Foreign codes handle the situation similarly to s. 502 of the Model. Some codes, e.g. the German, the French and the Swiss do not mention intoxication expressly but it is understood that when it reaches the degree where the defendant lacks the capacity to appreciate the criminality of his conduct, he is not responsible. He would be responsible, however, if he intentionally became intoxicated for the purpose of committing the offense while so intoxicated in order to provide a defense. A reduced capacity due to intoxication will result in lighter punishment. German P.C. para 51, French P.C. art. 64, Swiss P.C. art. 10–12. Some codes, e.g. the Italian and the Austrian, deal with intoxication expressly. The Italian P.C. provides that a person is not imputable when at the time of the commission of the offense he did not have the capacity to intend and to will because he was totally intoxicated and the intoxication was brought about by accident or superior force. Where the intoxication was only partial without fully excluding the capacity to intend and will, the punishment will be decreased. (art. 91). Intoxication which is not brought about by accident or superior force does not exclude nor reduce imputability. Where the intoxication was procured so as to obtain an excuse for the commission of the offense, the punishment is increased. (art. 92). The same rules apply to intoxication due to drugs. (art. 93).

The Austrian P.C. provides explicitly that where the defendant is fully intoxicated (alcohol or drugs) so as not to realize that he is doing wrong, he is not imputable. (para. 2.c.). Where he intentionally becomes intoxicated for the purpose of obtaining a defense for the commission of the offense, he is liable. (para 2.c.). Reduced imputability due to intoxication may be taken as an attenuating circumstance and reduce the sentence. (para 46, 264, 523). The Spanish P.C. carries similar provisions. (art. 8(1), 9(2).)

All codes provide for the suppression of alcoholism and drug abuse and for the treatment of alcoholics and users of drugs. Where a person has committed an offense under such influences, the court may, and in case of felony or misdemeanor must commit the offender to a hospital for prisoners for treatment. All European countries have special institutions for that purpose. E.g. German P.C. para. 42b,c. French Code de la santé publique, Art. L. 355–1–2. Italian P.C. art. 221, 222. Swiss P.C. art. 44, 45. Austrian P.C. para. 523, StGNov. 1952, BGBl Nr 62. Spanish P.C. art. 8(1).

Mentally ill persons are detained in proper institutions with a view to their treatment and recovery. Equally, drug users and alcoholics are detained in proper institutions for the same purpose. The difference in treatment is purely medical. Legally they are treated quite identically. I also refer to my article above.

7. Foreign codes cover the same field in much the same way. They enunciate specific rules and set general standards. E.g. German P.C. para. 53. French P.C. art. 321, 322, 327–329. Swiss P.C. art. 32–34. Italian P.C. art. 51–55. Austrian P.C. para. 2g. Spanish P.C. art. 8 (4–7).

8. Foreign codes classify offenses in felonies, misdemeanors and infractions, e.g. the French, German, Austrian, and Swiss codes, or only into crimes (delicts) and infractions, e.g. the Italian and Spanish codes. No classes within a given group exist. As to punishment, there are different types of imprisonment in existence with respect to duration and type of imprisonment. The section dealing with every particular offense provides for a given type of punishment. So the German P.C. provides for Zuchthausstrafe (life, 1–15 years), Gefängnisstrafe (1day–5years), Einschliessung (1day–15 years), and Haft (1day–6weeks), and for a fine. Zuchthausstrafe means penal servitude, the other types mean imprisonment. German P.C. para. 14–18.

The French P.C. provides for the death penalty, life imprisonment of two types, stricter (reclusion), and milder (détention), imprisonment for a time, stricter (reclusion), and milder (détention). Imprisonment for infractions (emprisonnement), and a fine. art. 6–9.

Other codes follow a similar course.

The classification of felonies and misdemeanors in classes in the Model serves the same purpose. The grading of offenses is, however, very mild compared with the foreign codes, and also the terms meted within the classes are below those meted in foreign countries. So murder should be punishable with death or life imprisonment with no possibility for parole. No further grading as in para. 3602 of the Model should occur to put it at par with foreign codes. To make murder an A class felony with no meaningful minimum limit is much too mild. E.g. French P.C. art. 295–304. German P.C. para. 211. Swiss P.C. art 112. Austrian P.C. para. 136. Italian P.C. art. 576–577. Spanish P.C. art. 405–406.

The same applies to Aggravated assault, para. 1612 of Model. It should be a class A felony with a meaningful minimum limit to put it at par with foreign codes. All the sentences in the Model should be upgraded to keep them in line with foreign sentences.

9. Part C of Model compares unfavorably with foreign codes. The provisions are too elaborate and allow an unwarranted reduction of punishment. No indefinite sentences exist in European criminal law. Every offense must have a minimum and maximum term. The provision in para. 3201 (4) of Model for no minimum term for class A and B felonies is outrageous. How can crime be stopped if the penal code embodies the principle that felons may go unpunished. See my article above. Foreign codes impose meaningful minimum terms for any offense.

Suspension and probation have basically the same meaning and effect in foreign law. The terms are sursis in French P.C., sospensione condizionale in Italian P.C., remisión condicional in Spanish P.C., Bewährung in German P.C., Bedingte Verurteilung in Austrian P.C., Bedingter Strafvollzug in Swiss P.C. The meaning is always the same. The person is convicted but his sentence is suspended/probated if he behaves within a certain stipulated time. He is free but under supervision of probation officers and the police.

The whole approach of para. 3101 of Model is in contradiction to foreign provisions. The Model para. 3101 (2) provides: "The court shall not impose a sentence of imprisonment upon a person eligible for probation unless, . . ." In foreign law probation is a favor shown to convicted offenders and is with the exception of infractions purely discretionary. See my article above.

All European sentences carry mandatory minimum and maximum sentences. The court may in very exceptional cases assess punishment below the minimum, and may for good reasons exceed the maximum.

Provisions of para. 3207 of Model are unnecessarily involved. Foreign criminal law gives credit for all time spent in custody after arrest. Such time is credited toward any sentence which may be pronounced.

The punishments provided in the Model and in any state law in general are very mild in comparison with punishments provided in foreign codes for practically any offense. See my comments under 8, above, and my article above.

The Parole provisions in chapter 34 of Model are shockingly lenient compared with provisions of foreign codes. In Europe, prisoners are eligible for parole only after they have served ½ to ¾ of their sentences. Parole is generally a privilege not a right, so that the wording of para. 3402 of Model is completely out of touch with European law. See my article above. It is well known that parolees commit a significant proportion of US crime. It is hard to understand that anybody really interested in keeping crime down would come up with the mentioned provisions of Model.

Prisoners are released on parole in foreign countries by the Ministry of Justice. Parole boards are composed of officers of administration of justice. The parole board recommends, but final decisions rests with the Ministry, the Minister bearing full responsibility. Consequently, no irresponsible releases on parole occur.

My copy of Model does not contain any provisions as to publicity of offenses committed by corporations, allegedly to appear in para. 3007. No such provisions seem to exist in Europe. The situation would most likely be governed by administrative law, not penal law.

Foreign codes have an equivalent of para. 3003, but a much more effective one. Provisions of Model are much too lenient. See my article on habitual criminals above.

Foreign codes require the court to give reasons in the judgment for the sentences imposed. The judgment must be made out in writing. Failure to give reasons makes the judgment void.

The appellate court may not raise the sentence on the appeal of the convicted person, but only on the appeal of the prosecutor. If both appeal, then the court may either increase or decrease the sentence. Either party may generally appeal the sentence.

With the exception of insignificant fines, any criminal judgment is subject to appeal. In France, judgments of the Assize courts are not appealable on the ground that a jury judgment cannot be appealed. Assize trials are the only jury trials in France. The judgments are, however, subject to cassation. All judgments in any civil law country are subject to both appeal and cassation or, as in the case of Assize courts in France, only subject to cassation. Uniformity of sentencing is secured by the Court of Cassation (Supreme Court) which exercises supervisory authority over all courts and which is bound to insure uniformity of sentencing. It is admitted that it is impossible to achieve this end 100% in any system.

Foreign codes provide for joint sentences rather than for consecutive sentences. Where the offender has committed several offenses, he is generally assessed the penalty for the most serious of them with a proper increase in punishment. There is always a limit on the maximum so arrived at, stipulated in the code. E.G. Maximum of the term for the most serious offense plus one half thereof, Swiss P.C. art. 68. The German P.C. para. 74 provides for maximums. Austrian P.C. para 34–35 provides for an increased penalty. French P.C. art. 5, imposes only the sentence for the most serious offense with the rules for an increased penalty applicable.

The Spanish and the Italian codes provide for cumulation of offenses and punishments. The Spanish P.C. art. 70, imposes a limit, namely three times the term for the most serious offense. The Italian P.C. art. 78, has a limit, five times the term for the most serious offense.

If one of the elements of the sentence is reversed on appeal, the court of appeal will impose a new sentence. It may decrease the sentence pronounced by the trial court, or it may rule that the reversal has no measurable effect on the sentence pronounced and affirm it.

Foreign codes do not have provisions closely similar to para. 3301(2) of Model. There are, however, similarities. E.g. Swiss P.C. art. 48, and Italian P.C. art. 24, set upper limits for fines but allow the court to exceed them. Provisions of foreign codes are far superior to chapter 33 of Model.

In foreign countries fines must be paid at once, or security given and an arrangement for payment approved by the court before the offender is allowed to leave. If he does not pay or cannot pay, the fine is converted in a term of imprisonment and the offender is committed to jail. The argument that an

offender who is too poor to pay a fine and must therefore serve a term is being done an injustice is out of place. Poverty does not give a license to break the law. The codes carry conversion values to convert fines into imprisonment. The sum which equals one-day jail is fixed in the code, e.g. 10 Francs equal one day, with a maximum of 3 months jail in lieu of a fine. Swiss P.C. art. 49. The gravity of the offense or the ability of the defendant to pay are irrelevant.

10. Mistake of law is not a defense under foreign law. Para. 610 of the Model has, as far as I know, no counterpart in any legal system and should be deleted. Mistake of fact is a defense. Arts. 303. 304 of Model are unclear. They could simply provide that mistake of law is not a defense, and that mistake of fact is a defense to the extent of e.g. Swiss P.C. art. 19. Foreign codes are greatly superior to the provisions of the Model.

11. In all foreign countries jurisdiction is territorial and as to the subject matter. There are courts of limited jurisdiction, general jurisdiction, appelate courts and one supreme court. Every piece of national territory is covered by the entire hierarchy. Infractions are tried in the courts of limited jurisdiction, misdemeanors and felonies in the courts of general jurisdiction, specifically enumerated serious felonies in courts of general jurisdiction but in a jury trial. Territorial jurisdiction is vested in the proper court having jurisdiction as to the subject matter in the district where the offense was committed.

Chapter 2. of Model is peculiar to the US. No European country is likely to enact anything similar. Similarities may be found in the Latin American countries but they all took the idea from the US.

12. Extraterritorial jurisdiction of foreign states is more extensive. Foreign codes punish all offenses by whomsoever committed within the national territory, and by citizens abroad. They also punish foreigners for offenses committed abroad in special cases, or when they are apprehended in national territory and are not extradited. E.g. German P.C. para. 3–7. Austrian P.C. para. 36–41. Swiss P.C. art. 3–7. Italian P.C. art. 3–13. French C.C.P. art. 689–696. Spanish L.E.C. art. 824–833.

13. Criminal conspiracy is covered partly by provisions referring to accomplices and partly by independent provisions corresponding to para. 1004 of Model. Criminal conspiracy is sometimes punishable in general and with respect to offenses against the state and the public order in particular. E.g. German P.C. para. 129, 129a. Swiss P.C. art. 275 ter. French P.C. art. 87, 94. Italian P.C. art. 304–305. Spanish P.C. art. 143. Austrian P.C. para. 5.

14. The felony-murder rule is usually not expressly elaborated but any such homicide falls within the definition of murder and is punishable by death or by life imprisonment with no possibility of parole and only very exceptionally with long term penal servitude. E.g. French P.C. art. 304. Italian P.C. art. 576(1). Spanish P.C. art. 407. German P.C. para. 211. Swiss P.C. art. 111–112. Austrian P.C. para. 136, 141, 142.

Provisions of para. 1601(c) of Model are very mild compared to foreign provisions.

15. The US federal—state system was adopted in Latin America, but it never surpassed the US model. Consequently, the study of Latin American jurisprudence is not very helpful. The European federal states are such only in name as far as the legal system is concerned. They are perfectly unitary systems just like e.g. France or Spain. In Germany there is just one law and one system of courts. Switzerland has more features of a federal state, but there is just one substantive law. Laws of procedure are cantonal, not federal, but are very similar. A more pronounced federal system exists in Australia with the difference that there the states are powerful and the federation weak. Australian federal law deals only with offenses against provisions in federal statutes, like defense, mail, currency. In addition, the federation exercised its grant of power in the federal constitution and enacted uniform laws of bankruptcy and matrimonial causes. The law of bankruptcy is administered in federal courts of bankruptcy. All other federal law is administered in state courts which have been invested with federal jurisdiction, so that in Australia there is no duality of courts and no diversity jurisdiction exists. In addition to bankruptcy courts, there is the High Court of Australia which is the supreme court in federal matters on appeal from state supreme courts. The enumerated offenses are against state law and will be tried in one system of courts, as no other system exists.

In all countries the enumerated acts are punishable, but the penalties are much higher than in the Model. See my article above.

16. Provisions as to Para-Military activities in para. 1105 of Model are usually not directly spelled out in the codes except in the United Kingdom, Denmark, Norway, Canada, and Sweden, as mentioned in the working papers, and also in Germany, P.C. para. 127, in Spain, P.C. art. 173(5), and in Italy, P.C. art. 699. The field is, however, well covered by provisions relating to offenses against the state (treason) and by provisions of administrative law. Every such organisation would need a permit from the Ministry of Interior. Exercising such activities without permit is an offense.

17. Drugs are dealt with in foreign law in separate statures. E.g. French Code de la santé publique, L. 629, R. 5165. Italian L. 22 ott. 1954, n. 1041. and art. 446–448 C.P.

Again, the provisions of the Model are too complicated in comparison with foreign provisions and the penalties are too mild.

Abortion is treated in foreign penal codes and is generally punishable. The existing policy is, however, expected to change in the future.

Unauthorised gambling is prohibited, but the government gives licenses to gambling houses which are properly supervised and it licenses lotteries. Experience has shown that it is impossible to stamp out gambling. It is therefore prudent to license it on reasonable conditions, have it well supervised, and have the state take the profit which is then used to pay for hospitals and social projects. An excellent model is the system in all Australian states, e.g. Victoria and Tasmania, as well as in all European countries. E.G. French P.C. art. 410.

Prostitution cannot be stamped out. All attempts which have been made in recorded history failed badly. Common sense therefore commands that the law should not prohibit it but regulate and supervise it. This is the foreign approach. The French and Italian system used to provide for the licensing of houses of prostitution. After this system was abolished after World War II, veneral diseases began to spread so that to-day there is considerable pressure in both countries to re-introduce the system.

All other countries, and now including France and Italy, do not license but tolerate, supervise and regulate prostitution. Provisions of criminal codes prohibit and punish making profit on prostitution by persons other than the women themselves. E.g. French P.C. art. 334 and foll. German P.C. para. 180 and foll. Swiss P.C. art. 198–199. Italian P.C. art. 531–538, L. 20 feb. 1958, n. 75. Spanish P.C. art. 452 bis a.—bis f. Austrian P.C. para. 512–515.

Prostitution is regulated by administrative provisions set up by the government in the exercise of its police power. This is also the approach adopted in a number of countries within the British Commonwealth. It is interesting to note that in all countries which try to suppress prostitution there is not only a very high rate of veneral diseases but also a very high rate of sexual offenses like rape. Sexual offenses are nearly nonexistent in countries which tolerate prostitution. The moral is that the prospective sexual offender rarely materializes if he has an ample outlet.

The provisions of para. 1841 and foll. of Model are unrealistic.

Para. 1844 of Model—Patronizing Prostitutes—is ill advised. It is a world first but in the wrong direction. It is likely to produce results similar to the ill advised prohibition legislation, namely, organized crime will move into the prostitution business and its position will be greatly enhanced. I would recommend the adoption of the normal world practice on prostitution and also, consideration should be given to the system presently existing in the State of Nevada.

Para. 1851 of Model—Disseminating Obscene Material—is in line with foreign provisions. Foreign provisions prohibit trafficking in obscene material to minors, and are generally so drafted as not to punish the passing of such material privately to consenting adults. E.g. Swiss P.C. 204, 212. German P.C. para. 184, 184a. Italian P.C. art. 528 and foll. Prosecution is mainly on the complaint of the person offended.

Homosexuality is generally punishable. The United Kingdom is one of the exceptions.

18. The manufacture, distribution and possession of firearms is regulated by statutes in every foreign country. Every manufacturer, distributor and possessor must have a proper license. Possession of firearms without license is a very serious offense. This includes any firearms, excluding only airguns, i.e.

hunting rifles are included and require a license. Licenses are given as a matter of course to persons over 21, of good moral standing, who have never been convicted. The firearms statutes are administered by the Ministry of Interior and its subordinate agencies. E.g. French Décret-Loi du 18 avril 1939—Fixant le régime des matériels de guerre, armes et munitions.

Provisions with respect to explosives are yet stricter. No one may possess explosives except licensed enterprises, e.g. mines, quarries.

Provisions of para. 1811 and foll. of Model should be made stricter.

19. Practically all foreign countries provide for the death penalty. Exceptions are the United Kingdom, Germany, Italy, Switzerland, but even they retain the death penalty under provisions of military law. In all these countries the death penalty is commuted into life imprisonment without any possibility of parole. Pardon may be granted. The penalty of life imprisonment in lieu of the death penalty is a different penalty than the penalty of life imprisonment, which may be paroled after the prisoner has served some 15 years. See my article above.

Para. 3602 of Model has no counterpart in foreign law. No separate proceedings for determining sentence are held. It does not make any sense to hold them. Sentencing is an integral part of criminal proceedings.

There usually is a jury in the civil law countries in trials for serious crimes, the exception being Spain where there are no juries at all. Juries are composed of six to nine jurors only and sit usually with the court as lay judges, the judges also voting on questions of fact. See my article above. There are no restrictive rules of evidence in existence comparable to the Anglo-American rules. No hearsay rule exists, but the witnesses must stick to the topic.

20. Para. 703 of Model—Multiple Offenses—are mentioned above under 9.

Para. 704–705 of Model—Former prosecution of different offense is within the defense of autrefois acquit, autrefois convict. It applies in all countries.

Para. 706–707 of Model has no counterpart in European countries as they are unitary systems, nor in Australia as there state courts are invested with federal jurisdiction.

Para. 708 of Model—Former prosecution invalid—Unlikely to arise in foreign countries All arrangements to this effect are invalid. See my article above.

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A STUDY IN THE TREATMENT OF CRIME AND LAW ENFORCEMENT IN THE UNITED STATES AS COMPARED TO THE EUROPEAN COUNTRIES

GEORGE E. GLOS*

It is well known that crimes are being similarly treated all over the world and that the various systems differ only in details. Yet, it is equally well known that the crime rate in England and in the other European countries stands at a much lower level than that in the United States. The reasons for the high crime rate in the United States are varied and complex and they have not, to a large extent, been fully determined. They may be sociological, economic, or racial, but they may as well stem, at least in a limited way, from the difference in treatment accorded to the several crimes in the legal system of the United States as compared with that prevailing in England and the other European countries and from the difference in prosecution and treatment of offenders. The purpose of this article is to explore such differences as they exist today in the treatment of serious crimes in the leading systems of criminal law and law enforcement.

HOMICIDE

Differences in the treatment of homicide occur in the area of criminal homicide as distinguished from innocent homicide.[1] Criminal homicide is traditionally of two kinds, murder and manslaughter. The distinction between them consists in the presence or absence of malice aforethought.[2] Further, the concept of negligent homicide is becoming

* Professor of Law, St. Mary's University. B.A., Lycee College; LL.B., J.U.D., Charles University; LL.B., University of Melbourne; LL.M., J.S.D., Yale University Law School.

1 Innocent homicide is understood not to involve criminal guilt and is presented in two forms as justifiable and excusable homicide. It is not discussed in this article.

2 Malice aforethought has had different meanings at different times. It has been defined as an unjustifiable, inexcusable and unmitigated man-endangering state of mind, or as a freely

well established.[8] This approach recognizes thus a threefold division of criminal homicide; namely, murder, manslaughter and negligent homicide.[4] Apart from this basic division, several degrees and shades of guilt may be statutorily recognized within murder, manslaughter and negligent homicide with a corresponding differentiation in punishment. Significant differences also occur throughout the law of criminal homicide, especially with respect to punishment of both completed crimes and attempts. As to punishment, the penalty for murder in the several states of the United States usually ranges from imprisonment for some two years to the death penalty,[5] that for manslaughter from a fine to imprisonment for some twenty-five years,[6] and that for negligent homicide from a fine to imprisonment for some fifteen years.[7] The punishment for attempted murder usually ranges from imprisonment for about one year to a term of some twenty-five years.[8]

In English law, the traditional division of criminal homicide into murder and manslaughter is retained so that the area of negligent homicide is fully covered by manslaughter. Murder may be defined as the unlawful killing of a human being with malice aforethought.[9] Malice is either express or implied. Constructive malice having been abolished,[10] a killing will not amount to murder unless it is done with the intent to kill or to do grievous bodily harm from which malice aforethought might be implied.[11] The punishment for murder is

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formed intention of a man to pursue a course of conduct which he realizes will or may bring about the death of some person. It includes both an intention to kill, and an intention to hurt by means of an act which the actor realizes is likely to kill.

3 Negligent homicide is such homicide which would be excusable except that it results from criminal negligence. It necessarily encroaches on the area covered by manslaughter and extends to cases in which guilt is based on negligence. It usually deals with traffic accidents.

4 Even where manslaughter is statutorily abolished as e.g. in Texas, the same concept of criminal liability is covered in the statute under a different, more specialized heading.

5 *E.g.*, CAL. PENAL CODE ANN. § 190 (Deering 1971); ILL. STAT. ANN. ch. 38, § 9-1 (1964); N.Y. PENAL LAW § 125.30 (McKinney Supp. 1970); PA. STAT. ANN. tit. 18, § 4701 (1963); TEX. PENAL CODE ANN. art. 1257 (1961).

6 *E.g.*, CAL. PENAL CODE ANN. § 193 (Deering 1971); ILL. STAT. ANN. ch. 38, § 9-2 (1964); N.Y. PENAL LAW §§ 125.15, 125.20 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4703 (1963).

7 *E.g.*, CAL. PENAL CODE ANN. § 193 (Deering 1971); ILL. STAT. ANN. ch. 38, § 9-3 (1964); N.Y. PENAL LAW § 125.10 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4703 (1963); TEX. PENAL CODE ANN. arts. 1230-1243 (1961).

8 *E.g.*, CAL. PENAL CODE ANN. §§ 216-219.3 (Deering 1971); ILL. STAT. ANN. ch. 38, § 8-4 (Supp. 1971); N.Y. PENAL LAW § 110.05 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4711 (1963).

9 This is a modernized version of the definition given by Coke and later by Blackstone. According to them murder occurred "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." 3 Co. Inst. 47; 4 Bl. Comm. 198.

10 Homicide Act, 5 & 6 Elis. II c. 11, § 1.

11 Malice aforethought may also be implied when the killing is done with knowledge that the act in question would probably cause death or grievous bodily harm.

imprisonment for life.[12] Manslaughter is in effect any homicide which does not amount to murder. It covers both the concept of voluntary and involuntary manslaughter as well as negligent homicide.[13] The wide scope of criminal responsibility in manslaughter is fully reflected in punishment which may be assessed, namely, imprisonment for life or imprisonment for any shorter term.[14]

The French law makes a fundamental distinction between voluntary and involuntary homicide. Voluntary homicide is murder,[15] and murder committed with premeditation or while lying in wait is an assassination.[16] The punishment for assassination is death,[17] and that for murder is imprisonment for life.[18] The killing in the course of commission of a crime,[19] or in circumstances which have for their object to prepare, facilitate or carry out a crime, or to enable an escape, is also punishable by death.[20] A voluntary infliction of wounds without an intent to kill which, however, causes the victim's death, is punishable with imprisonment from ten to twenty years.[21] If there is premeditation or lying in wait, the penalty is imprisonment for life.[22] Involuntary homicide which is defined as killing by lack of skill, by imprudence, inattention, negligence or inobservance of rules, is punishable by imprisonment from three months to two years and with a fine.[23] Attempt is treated as a completed crime.[24]

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12 This is in consequence of the Murder (Abolition of Death Penalty) Act 1965, c. 71. Although the Act abolished the death penalty only for five years and was to expire on 31 July 1970, Parliament in accordance with the provisions of § 4 thereof resolved that the Act should not so expire. Resolution of the House of Commons of December 16, 1969. Votes and Proceedings of the House of Commons, 16th December 1969, No. 36, p. 163. Resolution of the House of Lords of December 18, 1969. House of Lords, Minutes of Proceedings, 18 December 1969, No. 26, p. 218. The Murder (Abolition of Death Penalty) Act 1965, c. 71, took thus permanent effect.

The life sentence is mandatory and no lesser sentence can be assessed. The statute abolishes the death penalty only with respect to murder, so that the death penalty is still in effect for treason, piracy with violence, and setting fire to Queen's ships, arsenals, etc.

13 The definition of manslaughter is unsatisfactory. Voluntary manslaughter comprises only those killings which are reduced from murder to manslaughter due to provocation. Involuntary manslaughter covers all other cases. The English law recognizes, however, that homicide by pure inadvertence is not manslaughter but will involve the inadvertent person in civil and not in criminal liability.

14 Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, § 5; Criminal Justice Act, 1948, 11 & 12 Geo. 6 c. 58, § 1 (1); Criminal Law Act 1967, c. 58, § 7 (3).

15 All references are to the Code pénal, Paris, Journal officiel de la République française, 1965, and to the 69e éd. Petits Codes Dalloz 1971/72. C. Pén. art. 295.

16 C. Pén. art. 296.

17 C. Pén. art. 302. Article 302 lists also poisoning causing death as a separate crime which is also punishable by death.

18 C. Pén. art. 304.

19 I.e., preceding, in the course of, or following the commission of another crime.

20 C. Pén. art. 304.

21 C. Pén. art. 309.

22 C. Pén. art. 310.

23 C. Pén. art. 319.

24 C. Pén. art. 2.

The Italian law makes a distinction between homicide, homicide under aggravating circumstances, non-intentional homicide, homicide as a consequence of another crime, and negligent homicide. On homicide it basically states that whosoever shall bring about the death of a person will be punished with imprisonment for not less than twenty-one years.[25] Homicide under aggravating circumstances is punishable with imprisonment for life.[26] Aggravating circumstances are: To cover up the commission of another crime; when committed by an escapee to avoid arrest or to obtain provisions; in the course of committing rape; when committed against an ascendant or descendant; by poisoning or by other base means; with premeditation; with cruelty.[27] On non-intentional homicide it provides that whosoever with the intent to cause bodily harm brings about the death of a person shall be punished with imprisonment from ten to eighteen years.[28] The term of imprisonment will be increased by one-third and up to one-half when there are aggravating circumstances as enumerated above, and up to one-third when the crime was committed with arms or corrosives.[29] On homicide as a consequence of another crime it provides that whenever death is brought about as an unintended consequence of a crime, the punishment is as in negligent homicide, but the term of imprisonment there prescribed is increased.[30] Negligent homicide is punished by imprisonment from six months to five years. When more than one person is killed, or one is killed and another or more persons are injured as a consequence of negligent homicide, the term of imprisonment may be increased up to twelve years.[31] An attempt to kill is punishable with imprisonment for not less than twelve years, but if there are aggravating circumstances, with imprisonment from twenty-four to thirty years.[32]

The Spanish law differentiates between parricide, homicide under aggravating circumstances, simple homicide, and negligent homicide. Parricide is defined as the killing of the father, mother, child or any other ascendant or descendant whether legitimate or not, and is punishable with imprisonment for twenty years and one day as a minimum, and by death as a maximum.[33] The same punishment is prescribed for

25 All references are to the Codice penale, Milano, U. Hoepli, 1970. C. Pen. art. 575.
26 C. Pen. art. 22. The death penalty which formerly applied to this crime was abolished by Legislative Decree of August 10, 1944, No. 224. It is still applicable under the provisions of military law.
27 C. Pen. arts. 576-577.
28 C. Pen. art. 584.
29 C. Pen. art. 585.
30 C. Pen. art. 586.
31 C. Pen. art. 589.
32 C. Pen. art. 56.
33 All references are to the Código penal. Ed. oficial. 3.ed. Madrid, Ministerio de Justicia, Boletín Oficial del Estado, 1967. C. Pen. art. 405.

homicide under aggravating circumstances. They are: Treacherous killing; for reward; by flooding, arson, poison or explosives; with premeditation; with cruelty.[34] Simple homicide is punishable with imprisonment from twelve years and one day to twenty years.[35] Negligent homicide may be caused by gross imprudence under such circumstances that had there been malice, it would have amounted to homicide. It is punishable by imprisonment from six months and one day to six years. When death is caused by simple imprudence or negligence in breach of regulations (usually safety rules), the punishment is imprisonment from one month and one day to six months.[36] An attempt to commit parricide or homicide under aggravating circumstances is punishable with imprisonment from six years and one day to thirty years. An attempt to commit simple homicide is punishable by imprisonment from six months and one day to twelve years.[37]

The German law distinguishes murder, simple homicide, homicide under attenuating circumstances, and negligent homicide. Intentional homicide under specially enumerated circumstances amounts to murder and is punishable with imprisonment for life. The circumstances are: Killing with a desire to kill; with a sexual motive; with a pecuniary motive; with any other base motive; treacherously; with cruelty; using life-endangering means; in order to facilitate or to cover up the commission of another crime.[38] Simple homicide is defined as an intentional killing under circumstances not amounting to murder. The penalty is imprisonment for five years as a minimum, but imprisonment for life may be assessed in cases of particular gravity.[39] Where there are attenuating circumstances as provocation and the homicide is committed in hot blood or under other attenuating circumstances, the punishment is imprisonment from six months to five years.[40] Negligent homicide is punishable with imprisonment from one day to five years.[41] Attempt to murder is punishable with imprisonment for not less than three years. In other types of homicide, the term may be reduced up to one-quarter of the lower limit stipulated for the completed crime.[42]

The Austrian law contains provisions for murder, homicide in the course of robbery, manslaughter, and negligent homicide. It provides

34 C. Pen. art. 406.
35 C. Pen. art. 407.
36 C. Pen. art. 565.
37 C. Pen. arts. 50-52, 73.
38 All references are to the Strafgesetzbuch, München und Berlin, C. H. Beck, 1970, (W. Ger.). StGB § 211.
39 StGB § 212.
40 StGB §§ 213, 16.
41 StGB §§ 222, 16.
42 StGB § 44.

that whosoever with the intent to kill a person acts so as to bring about the death of that or any other person, is guilty of murder and is punishable with death.[43] Homicide in the course of robbery is also punishable with death.[44] Homicide brought about with the intent to cause bodily harm, but without an intent to kill, is manslaughter. The punishment is imprisonment from five to ten years, but where there is a close family or other relationship between the offender and the victim, the term ranges from ten to twenty years.[45] Negligent homicide is punishable by imprisonment from six months to one year, but the term is extended up to three years when the act was committed in the operation of railways, ships, mines, waterworks, and any other machinery; while intoxicated; or when the offender left the scene of the accident without giving assistance to the victim.[46] Attempted murder is punishable with imprisonment from five to ten years, but in case of an attempt to commit murder in furtherance of robbery; by poisoning or other treacherous means; for hire; on relatives by blood or on a spouse; the term is from ten to twenty years, and in cases of particular gravity it is punishable with imprisonment for life.[47]

The Swiss law provides for murder, simple homicide, manslaughter, and negligent homicide.[48] Murder is defined as premeditated homicide whereby the baseness or dangerous character of the offender is manifested. It is punished with imprisonment for life.[49] Simple homicide not amounting to murder is punishable with imprisonment for a minimum of five years.[50] Manslaughter is a homicide committed while the offender's mind was inflamed by passion and is punishable by imprisonment of up to ten years.[51] Negligent homicide is punishable by imprisonment from three days to three years or with a fine.[52] Attempted murder is punishable with imprisonment for ten years as a minimum, and attempt to commit simple homicide with imprisonment from one to twenty years.[53]

Compared with the provisions of the various states of the United States, the European provisions are somewhat simpler and carry some-

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43 All references are to the Strafgesetz, Wien, Manz, 1968-70. StG §§ 134-136.
44 StG § 141.
45 StG § 142.
46 StG §§ 335-337.
47 StG § 138.
48 All references are to the Strafgesetzbuch, Zürich, Orell Füssli, 1968. StGB art. 112.
49 There is no death penalty.
50 StGB art. 111.
51 StGB art. 113.
52 StGB arts. 117, 36.
53 StGB arts. 22, 35, 65.

what stiffer penalties. This trend is quite pronounced especially in the area of attempt. It is also to be pointed out that the penalty of imprisonment in homicide in the European countries is not just imprisonment but penal servitude.[54] Although the death penalty for homicide has been abolished in a number of European countries carrying with it an obvious loss of deterrent, it has not been followed by a pronounced increase in the crime rate. In circumstances prevailing in Europe, where homicide is, percentagewise, a nearly nonexisting crime, the abolition of the death penalty can hardly effect a change in the mores, and the deterrent factor implicit in the death penalty may be abandoned. Such experiment is, however, not advisable for countries with a notoriously high rate of homicide such as the United States where the deterrent factor of the death penalty should not lightly be given away. Wherever the death penalty was abolished in the European countries, its place was taken by imprisonment for life, and the various European legal systems take it to mean life. Thus the other factor implicit in the death penalty, namely, to keep the offender out of circulation whereby society is protected against his dangerous propensities, is fully kept intact. Consequently, if the deterrent factor in the death penalty is regarded as not worthy of preservation, incarceration for life will suffice to protect society. Moreover, imprisonment for life embodies in it a considerable deterrent of its own, so that it is generally regarded as an adequate substitute for the death penalty. It must be clearly understood, however, that whenever this approach is adopted, it is imperative to see to it that the offender is actually kept behind bars for life, or for at least such a time as to give an assurance that due to his age and general disposition, there is no likelihood of his committing further crimes.

Another point worth noting is the treatment of cases where the offender's intent is of importance. The European system conclusively presumes an intent to kill in cases where the offender makes use of a weapon which is commonly known to be likely to produce a fatal result, and also, where the generally vicious character of the offender's conduct is manifested. Therefore, voluntary rather than involuntary homicide will be presumed where the offender used a firearm, an explosive, a poison, a knife, a heavy object, and virtually any means likely to cause death.

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[54] This is so everywhere in the above mentioned countries with the exception of England where penal servitude was abolished by the Criminal Justice Act, 1948, 11 & 12 Geo. 6 c. 58, § 1(1).

The human element in administering justice is also of importance, and it can be noted that the European courts show little or no sympathy to persons found guilty of homicide and assess the penalty accordingly, very close to the upper limit established by law, rather than to follow a medium course, or even to assess terms just above the permissible minimum.

Aggravated Assault

Only one type of aggravated assault is singled out for comparative evaluation, i.e., an assault involving wounding or violent injury short of homicide. The penalty prescribed for aggravated assault in the various states of the United States ranges from a fine to imprisonment of up to some ten or fifteen years.[55]

In English law, the matter is treated under the name of grievous bodily harm. The punishment is imprisonment for life.[56] The French law calls it wounding and voluntary assault. The punishment varies in conformity with the circumstances between five and twenty years of imprisonment.[57] In Italian law, it is dealt with under bodily harm with a range of imprisonment from six to twelve years.[58] In Spanish law, it is called serious bodily harm and is punishable with imprisonment from six years and one day to twelve years.[59] The German law treats the subject under the heading of bodily harm. The offense is punishable by imprisonment from two to ten years.[60] The Austrian law deals with the subject under the title of serious bodily harm. The punishment is imprisonment from five to ten years.[61] In Swiss law, the crime is termed serious bodily harm and is punishable by imprisonment from six months up to ten years.[62]

Robbery

Whatever the scope and wording of the offense in the statutes, robbery is essentially a larceny from the person by violence or intimida-

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[55] *E.g.*, Cal. Penal Code Ann. § 221 (Deering 1971); Ill. Stat. Ann. ch. 38, § 12-2 (Supp. 1971); N.Y. Penal Law §§ 70.00, 120.10 (McKinney 1967); Pa. Stat. Ann. tit. 18, § 4709 (1963); Tex. Penal Code Ann. art. 1148 (1961).

[56] Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent . . . to do some . . . grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, . . . shall be liable to imprisonment for life. Offenses against the Person Act, 1861, 24 & 25 Vict. c. 100, § 18; Criminal Justice Act, 1948, 11 & 12 Geo. 6 c. 58, § 3; Criminal Law Act 1967, c. 58, § 1.

[57] C. Pén. arts. 309-313.

[58] C. Pen. art. 583.

[59] C. Pen. art. 420.

[60] StGB § 225.

[61] StG § 156.

[62] StGB art. 122.

tion. The punishment applicable in the several states of the United States is imprisonment for a term which generally ranges from a minimum of some six months to a maximum of some twenty years.[63]

In English law, robbery is punishable with imprisonment for life.[64] In French law, it is punishable with imprisonment from ten to twenty years, but with imprisonment for life if the victim suffers a physical injury.[65] If it is committed under certain enumerated circumstances it is punishable by death.[66] Italian law punishes robbery with imprisonment from three to ten years and with a fine, but the term is increased from one-third to one-half if the crime is committed with weapons, in disguise, or by two or more persons acting together.[67] Spanish law provides for imprisonment from six months and one day to thirty years in accordance with the gravity of the crime.[68] German law punishes robbery with imprisonment from one to fifteen years.[69] Under aggravated circumstances the minimum term is increased to five years,[70] and the offense is punishable with imprisonment from ten years to life if the victim suffers bodily harm.[71] Austrian law punishes robbery with imprisonment from ten to twenty years but when the victim suffers serious bodily harm, the punishment is imprisonment for life.[72] In Swiss law, robbery is punishable by imprisonment from six months to life in accordance with the gravity of the crime.[73]

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63 *E.g.*, N.Y. PENAL LAW §§ 70.00, 160.15 (McKinney 1967); PA. STAT. ANN. tit. 18, §§ 4704, 4705 (1963); TEX. PENAL CODE ANN. art. 1408 (1953).

64 Theft Act 1968, c. 60, § 8. (1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force. (2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.

65 C. Pén. art. 382.

66 C. Pén. art. 381 provides for the death penalty if the offender is armed irrespective whether the weapon is concealed or not, or actually displayed or not. The same applies if the weapon is in a motor vehicle used by the offender to take him to the place of the crime or to take him away from it.

67 C. Pen. art. 628.

68 C. Pen. arts. 500-502. In accordance with provisions of article 501, whenever death is caused in the course of robbery, the punishment ranges from imprisonment for twenty years and one day to death. Whenever bodily harm is caused, the term of imprisonment ranges in accordance with the gravity of the injury from six months and one day up to thirty years. The terms range, however, from four years, two months and one day up to thirty years whenever the offender uses a weapon.

69 StGB § 249.

70 StGB § 250. This is so in the case of an armed robbery; when the robbery is carried out by more than one person; when it is carried out in a public place; or at night in an inhabited building; or when the offender has previously been convicted of robbery.

71 StGB § 251.

72 StG §§ 190-195.

73 StGB art. 139. Simple robbery is punishable with imprisonment from six months to twenty years. If the victim is threatened with death; is injured; the crime is committed by a gang; or where the dangerous character of the offender is manifested; the term of imprisonment ranges from five years to twenty years. If the victim dies in consequence of the act and the offender could have foreseen it, or if the crime is carried out treacherously, the punishment is imprisonment for life.

BURGLARY

Burglary has been defined as the breaking and entering of the dwelling of another at night with intent to commit a felony. If committed during the day, it is usually termed housebreaking. Today, it is a statutory offense and the term burglary generally applies regardless of the time of commission. In the several states of the United States, burglary is punishable with imprisonment that ranges generally from one up to some twenty or twenty-five years.[74]

English law punishes burglary with imprisonment not exceeding fourteen years,[75] and an aggravated burglary with imprisonment for life.[76] French law provides for imprisonment ranging from five years to life.[77] In Italian law, burglary is punishable by imprisonment from one to six years and with a fine, and an aggravated burglary with imprison-

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[74] *E.g.*, CAL. PENAL CODE ANN. § 461 (Deering 1971); ILL. STAT. ANN. ch. 38, § 19-1 (1970) (in California and Illinois the penalty may range from one year to life imprisonment); N.Y. PENAL LAW §§ 70.00, 140.00-140.35 (McKinney 1967), *as amended*, N.Y. PENAL LAW §§ 140.00(2), 140.10, 140.17, 140.25(d), 140.30 (McKinney Supp. 1970); PA. STAT. ANN. tit. 18, § 4901 (1963); TEX. PENAL CODE ANN. arts. 1389-1402 (1953).

[75] Theft Act 1968, c. 60, § 9. (1) A person is guilty of burglary if—

(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in section (2) below; or

(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein, and of doing unlawful damage to the building or anything therein.

(3) References in subsections (1) and (2) above to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

(4) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years.

[76] Theft Act 1968, c. 60, § 10. (1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for this purpose—

(a) "firearm" includes an airgun or air pistol, and "imitation firearm" means anything which has the appearance of being a firearm, whether capable of being discharged or not; and

(b) "weapon of offence" means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and

(c) "explosive" means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

(2) A person guilty of aggravated burglary shall on conviction on indictment be liable to imprisonment for life.

[77] C. Pén. art. 381 provides for imprisonment for life for any offender who commits larceny under the concurrence of four of the following five elements: 1. When committed at night. 2. By two or more persons. 3. By breaking in a building used for habitation. 4. When committed by force. 5. With use of a motor vehicle. C. Pén. art. 384 provides for imprisonment from ten to twenty years for any offender who commits larceny by breaking in a building not used for habitation. C. Pén. art. 386 provides for imprisonment from five to ten years for any offender who commits larceny in a building used for habitation either at night or when the act is committed by two or more persons.

ment from three to ten years and with a fine.[78] Spanish law punishes burglary with imprisonment from one month and one day up to twelve years in accordance with the value of the property stolen.[79] When, however, the offender is armed, or the crime takes place in an inhabited building, or a public building, or a building dedicated to religious purposes, the term of imprisonment ranges from four months and one day to twelve years. When the offense is committed in the above enumerated buildings and the offender is armed, the term of imprisonment ranges from four months and one day up to twenty years.[80] German law prescribes as punishment for burglary a term of imprisonment from one to ten years;[81] in aggravated cases from five to ten years.[82] Austrian law punishes burglary with imprisonment from six months to ten years.[83] In Swiss law, the punishment for burglary lies between three months and ten years.[84]

Riot

Riot is defined as a disturbance of the peace by three or more persons acting together in the commission of a crime by open force, or in the execution of some enterprise, lawful or unlawful, in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm. In the various states of the United States, the punishment for rioting generally ranges from a fine to imprisonment for some ten years.[85]

In English law, riot is a common law misdemeanor punishable by fine and imprisonment. If an injury to buildings, machinery, etc., is caused by rioters, it is punishable by imprisonment not exceeding seven years,[86] and when such buildings, machinery, etc., are demolished,

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78 C. Pen. art. 625, punishes larceny with imprisonment from one to six years and with a fine, when committed by breaking in a building used for habitation. Where the offender used force or fraudulent means; or where he carried a weapon without using it; or where he acted by trick; or where he acted in conjunction with two or more persons; or where he pretended to be a public officer; or where the act was committed in a station or terminal on travelers' luggage; the punishment is increased to imprisonment from three to ten years and a fine.

79 C. Pen. arts. 504-505.

80 C. Pen. art. 506.

81 StGB § 243.

82 StGB § 250(4).

83 StG §§ 174 I(4), 178-180.

84 StGB art. 137.

85 *E.g.*, CAL. PENAL CODE ANN. § 405 (Deering 1971); ILL. STAT. ANN. ch. 38, § 25-1 (1970); N.Y. PENAL LAW §§ 240.05-240.08 (McKinney 1967); PA. STAT. ANN. tit. 18, § 4401 (1963); TEX. PENAL CODE ANN. arts. 455-472 (1952), *as amended*, TEX. PENAL CODE ANN. arts. 466a, 472a (Supp. 1971).

86 Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, § 12.

each and every offender is liable to imprisonment for life.[87] In French law, a riot from which no damage to property is caused is punishable with imprisonment from three months to five years in accordance with its gravity.[88] When damage or loss of property occurs, the punishment ranges from imprisonment for ten years to death.[89] In Italian law, riot is punishable in accordance with the gravity of the offense with imprisonment from three years to life.[90] In Spanish law, penalties for rioting range from imprisonment for six months and one day to the death penalty.[91] German law punishes rioting with imprisonment from three months to ten years.[92] In Austrian law, riot is punished with imprisonment from one year up to the death penalty.[93] The penalty for rioting in Swiss law is imprisonment from three days to three years.[94]

Aggravated assault, robbery, burglary, and riot are, apart from homicide, perhaps the most serious crimes of violence known to the law. They are therefore similarly treated. The object of the protracted terms of imprisonment prescribed as punishment is not only to utilize the retribution and deterrent elements of the punishment but foremost to protect society from further crimes likely to be committed by the offender by keeping him in detention. And as in homicide, it can be noted that the terms prescribed by the various European penal codes are generally of longer duration than their counterparts in the United States. In addition, following their practice established in homicide, the European courts actually assess meaningful terms keeping closely to the upper limit prescribed by the codes. Experience has shown that persons who have already committed a violent crime are very likely to commit further crimes of that nature. This may well be attributable to their violent disposition. Naturally, attempts should be made to re-educate these offenders and also to provide medical treatment whenever medical science can offer a cure. Nonetheless, until definite results of re-education and medical treatment are shown, the offender should be isolated from contact with the general public. Experience has also established that it is especially a young and physically fit person who engages in the commission of these crimes. Quite naturally, a person of

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87 Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, § 11. The Riot Act (1714) 1 Geo. I. st. 2, c. 5, has been repealed.
88 C. Pén. arts. 104-108.
89 C. Pén. arts. 93-99.
90 C. Pen. arts. 284-285.
91 C. Pen. arts. 218-224.
92 StGB §§ 115, 125.
93 StG §§ 68-75, 83-86.
94 StGB art. 260.

more advanced age, of more mature mind, and consequently also of less fit physical attributes is less likely to commit a crime which in itself presupposes both mental and physical strain and an element which in lawful activity is rightfully called courage. If therefore a sufficiently extended term of imprisonment is assessed to keep the offender in detention for so long until he reaches a more mature age when he is both mentally and physically less fitted to engage in criminal adventures, there is a good chance that he will actually abstain from further unlawful activity. The observation can therefore be made that there is a definite likelihood that the European technique of assessing longer terms of imprisonment is conducive to keeping down the crime rate both as to first offenders and repeaters.[95]

Insanity

For several centuries insanity has been regarded as absolving the offender of criminal responsibility.[96] Both the Anglo-American criminal law and that of the European countries are in full agreement with the proposition that when a person has committed a crime while suffering from insanity, he should not be punished for having committed the

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95 As far as riot is concerned, if riots occur not as isolated events, but on a continuing basis, they are usually caused by organized groups of evildoers who conspire to incite them. The organizers generally rely on paid professional agitators whose task it is to surround themselves with gullible misguided enthusiasts whom they can incite to riot under the pretext of some seemingly legitimate grievances. Youth, due to its lack of experience, has traditionally been a favorite target for misuse by such unscrupulous elements. To bring the rioting to an end, the professional agitators must be placed in custody and vigorously prosecuted.

Whenever riots of continuing nature arose in Europe in recent years, they were designed along the above described pattern. Repeated police charges and attempts to disperse the crowds were exactly what the riot organizers desired, for it produced a new tie of attachment of the misguided persons being used to the professional agitators who directed the riot, and it enabled the professional agitators to make new recruits among the gullible, now made indignant because of alleged police brutality.

Whenever the proper technique to suppress such rioting was adopted, as e.g. in Italy in the late nineteen forties, the rioters were surrounded by concentrated police units, routes of escape were blocked by trucks and armored cars, and the rioters were arrested one by one, handcuffed, loaded in trucks and brought to barracks for questioning. There they were processed and properly prosecuted. Soon the gullible were separated from the professional agitators who in their great majority were out of town people. It appeared that they were in the tens, hundreds, and in large riots even in the thousands. They were paid not only for rioting, but had travel and living expenses paid. They traveled all over the country, sometimes in chartered vehicles, to stage riots and in the tumult were not readily recognized as out of town people. Once in custody, the rioting cycle was interrupted, the rioting decreased immediately as one group was already under arrest. As further groups were taken out of circulation, the whole rioting plan was summarily called off by the organizers because of shortage of agitators, and also because they realized that their remaining agitators faced certain arrest and prosecution.

96 3 Holdsworth, History of English Law 371 ff. (5th ed. 1942). What is meant and discussed here is insanity which relieves the offender of criminal responsibility, as contrasted with the so-called diminished responsibility which has the effect of e.g. reducing murder to manslaughter, and which is not discussed in this article.

act. The punishment would not do any good since the person was not aware that he was doing wrong, nor would the threat of punishment have any prospect of deterring such person from committing the act.

A distinction is always made between insanity existing at the time of commission of the crime and unfitness to plead due to supervening insanity. With respect to unfitness to plead, American law as well as the English and Continental law uniformly hold that if the offender was sane at the time of the commission of the offense but insane at the time of the criminal proceedings instituted against him, he should be committed to a proper institution for treatment and should stand trial upon regaining his mental faculties.[97]

A more serious problem arises in case of insanity existing at the time of commission of the crime. If a person accused of having committed a crime is found insane at the time of the criminal proceedings pending against him, it may also be assumed and should not prove impossible to establish that he was also insane at the time of commission of the crime. The converse would also seem logical, namely, if a person is found sane at trial, it does not seem likely that he was suffering from insanity at the time of commission of the crime. This is especially true when only a reasonably short time has elapsed between the commission of the act and the pronouncement on mental competency and where the accused did not have the benefit of medical treatment in the meantime. Consequently, the finding of insanity at the commission of the act together with a finding of no mental incapacity at trial is rare. The main distinction between the statutory provisions of the several states in the United States and those of England and the countries of Continental Europe in this respect lies in the fact that while such finding may be made under the statutes of the several states in the United States, it may either not be made under those of Europe or, even if it theoretically could be made, it is never so made and the offender is always committed to a proper institution.[98]

[97] *E.g.*, CAL. PENAL CODE ANN. §§ 1026, 1026a (Deering 1971); ILL. STAT. ANN. ch. 38, § 6-2 (1964), §§ 104-2, 104-3 (1970); N.Y. PENAL LAW § 30.05 (McKinney 1967); PA. STAT. ANN. tit. 19, § 1352 (1964); TEX. CODE CRIM. PROC. ANN. art. 4602 (Supp. 1971). English Criminal Procedure (Insanity) Act 1964, c. 84, § 4, 5. French C. Pro. Pén. art. 81. All references are to the Code de procédure pénale, Paris, Journal officiel de la République française, 1965, and to the 13e éd. Petits Codes Dalloz 1971/72. Italian C. Pro. Pen. art. 88. All references are to the Codice di procedura penale, Milano, Pirola, 1970. Spanish L.E. Criminal, art. 383. All references are to the Ley de enjuiciamiento criminal. Ed. oficial. 3.ed. Madrid, Ministerio de Justicia, Boletín Oficial del Estado, 1967. German StPO § 81. All references are to the Strafprozessordnung, München und Berlin, C.H. Beck, 1970, (W.Ger.). Austrian Krankenanstaltengesetz vom 18.12.1956, BGBl. Nr. 1/1957, § 50, and also StPO § 134. All references are to the Strafprozessordnung, Wien, Manz, 1968-70. Swiss, *e.g.* Kanton Zürich, StPO § 391. All references are to the Kanton Zürich, Strafprozessordnung, Zürich 1964.

[98] *Id.*

It is well known that extremely liberal provisions and practice concerning insanity lend themselves to abuses. It is not uncommon for an offender to plead insanity to a charge of having committed a serious crime, often homicide, and on the strength of a cooperative expert medical opinion, an equally cooperative jury finds him not guilty on the ground of insanity. He is thereupon committed to a proper institution; but a relatively short time thereafter (just one year or so), he is declared sane on the strength of another powerful medical opinion, and is released by another cooperative jury. In these circumstances it is quite evident that if the offender is actually sane at the time of his release, he most likely was also perfectly sane at the time of the commission of the offence and vice versa, i.e., if he actually was insane at the time of the commission of the offense, he would still in all likelihood be so insane at the time of his release.

In order to avoid these doubts and not to lend itself to abuses, the European theory and practice follows a somewhat different course. Where the defense of insanity has been accepted, the court orders the prisoner to be kept in custody during the pleasure of proper administrative authority at such place and manner as the authority may think fit. The confinement is understood to be prolonged and may well be lifelong. Consequently, the defense of insanity is rarely set up except in heinous crimes.

In English law, where the defense proves successful, the jury will return a special verdict that the accused is not guilty by reason of insanity[99] whereupon the court has the duty to make an order that the accused be admitted to such hospital as may be specified by the Secretary of State.[100] The accused is then detained in the hospital or hospitals in the discretion of the Secretary of State and may be discharged only at his direction.[101] The detention is of an extensive nature, possibly for life, and it is therefore not surprising that insanity is plead only in the most serious cases.

French law on the subject is closely similar to English law.[102] In Italian law, the penal code determines the minimum period of time the accused has to spend in a mental hospital for prisoners. Neither the court nor any other authority has power to shorten such period of confinement.[103] The term is ten years if the crime is punishable

99 Criminal Procedure (Insanity) Act 1964, c. 84, § 1.
100 *Id.* § 5.
101 Mental Health Act 1959, 7 & 8 Eliz. 2 c. 72, § 71(2).
102 C. Pén. art. 64, C. Pro. Pén. arts. 81, D. 23-26.
103 C. Pen. arts. 85, 88, 215 (2).

with imprisonment for life, five years if the crime is punishable with imprisonment for a minimum of ten years, and two years in all other cases.[104] Beyond that, the prisoner may be released only when he is declared sane and neither dangerous to himself nor to society, in special proceedings instituted for that purpose. A release may not easily be obtained under these circumstances and the confinement may extend for a long period of time, even for life. In Spanish law, when the defense of insanity is accepted by the court in prosecution for a crime, the court has to order the confinement of the accused to a proper institution for an undetermined time from which he cannot be released without a further order of the same court upon his recovery.[105] German law contains identical provisions but the release of the detained person may be ordered by any court having jurisdiction.[106] Austrian law contains similar provisions.[107] In Swiss law, the confinement of the accused in a proper institution designated by the cantonal department of justice is ordered by the court for an undetermined length of time. He is then held there in the discretion of the cantonal department of justice and can be released only at its direction. If so released, he may be recommitted by a simple order of the same authority.[108]

The element of concern for the victim of crime and for society at large is apparent from the foregoing approach. It matters little to the victim that he was injured or killed by an insane person. Since the insane cannot be punished for obvious reasons, the law owes it to the victim and to the public at large to make it absolutely certain that the insane offender is securely detained until he is declared fully in command of his faculties and will neither endanger himself nor society.

Bail

Both federal and state laws uniformly provide that any person charged with other than a capital offense shall be entitled to bail.[109] Some state laws go even further and require "evident proof"[110] or "great presumption"[111] of guilt to make a capital offense not bailable. Prisoners are entitled to bail as a matter of right, and bail is usually continued even

104 C. Pen. art. 222.
105 C. Pen. art. 8.
106 StGB § 51, 42b, f. StPO § 429a-d.
107 StG § 2. StPO § 134.
108 StGB arts. 10, 14, 17. Kanton Zürich, StPO §§ 391, 393-394.
109 *E.g.*, 18 U.S.C. § 3141 (Supp. V 1970); Ill. Stat. Ann. ch. 38, § 110-4 (1970); N.Y. Code Crim. Proc. §§ 550, 552-554 (McKinney Supp. 1971).
110 Tex. Code Crim. Proc. Ann. art. 1.07 (1966).
111 Cal. Penal Code Ann. §§ 1268-1276 (Deering 1961), §§ 1269b, 1269c (Deering Supp. 1971).

pending appeal. The present position constitutes a considerable relaxation of the rules in existence at the time of Blackstone when persons accused of murder, manslaughter (if clearly the slayer), and persons taken in the act of felony were not bailable,[112] and there was no bail pending appeal.

The entire idea of bail is predicated upon the principle that an accused is presumed innocent until convicted by a proper tribunal. As his guilt has not been established, there is no reason for his detention which would in fact be tantamount to punishment. If he is detained, it is only to secure his attendance at trial. Consequently, where the accused can be trusted to actually appear when required, he should not be detained. The purpose of bail is thus to secure attendance of the accused in the criminal proceedings instituted against him, and especially, his appearance at trial.

Bail should therefore not be excessive but commensurate with and in proportion to the penalty which could be assessed in case the accused is found guilty of the offense charged.[113] When, however, the penalty which could be assessed in a particular case is of a serious nature, such as imprisonment for a considerable time, for life, or the death penalty, then bail is not likely to serve its purpose, for then in the words of Blackstone, the accused has no other surety but the four walls of the prison.[114]

The justification for granting bail is also not present when the person was apprehended in the act or when although he was not so apprehended, the proof against him is evident. As it is unlikely that he would be acquitted at trial under these circumstances, the presumption of innocence cannot apply in all its force and the likelihood of his not appearing at trial if released on bail is greatly increased. In such cases, considerations for the rights of the victim of crime are also of special cogency. The right of a person not to be the victim of crime must be considered together with the right of the accused to a fair trial and to the presumption of his innocence. Due regard for fair treatment of the victim of crime demands that the ac-

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112 Blackstone, Book IV. 298-9. This held true from the oldest times. Glanvil says: "In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est." (In all pleas of felony the accused is usually discharged upon bail, except in the plea of murder, where, to deter others, it is otherwise decreed.) Glanvil 1.14.c.1.; Blackstone, Book IV. 298.

113 Bill of Rights, 1688, 1 Will. & Mary, st. 2, c. 2.

114 Blackstone, Book IV. 298. Says Blackstone: ". . . in felonies and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit to save his own life?" Book IV. 296-7.

cused be not granted bail in these circumstances. This is especially true when the victim suffers physical injury. It just does not make sense to let the reputed offender go free on bail while the victim lies in the hospital. To admit persons to bail under these circumstances makes a clear mockery of justice and subverts as well the element of deterrent implicit in punishment. The case for refusal of bail is even stronger if the victim is killed or dies as a consequence of the crime committed against him.

Bail should also not be granted to persons previously convicted of serious offenses because of the possibility of their committing further offenses while free. Similarly, persons previously found guilty of jumping bail should not be admitted to bail because they cannot be trusted to abide by the conditions thereof.

All the above principles are fully embodied in the criminal law in the countries of Continental Europe. These systems go even further and regard release on bail as an exceptional measure. As a general rule, bail is not granted and the accused is kept in custody until trial when further orders as to his release or custody are made. Bail is rarely granted in the case of a felony. It is purely discretionary and is in fact available only in prosecutions for minor offenses and in circumstances when it appears quite unlikely that the accused would not appear when required. As to the actual bail given, the money or value given must actually belong to the accused so that he would suffer a considerable financial loss if it were forfeited. No bonding companies exist. If the accused is penniless or if he has no steady place of abode, bail cannot be granted even in the case of a minor offense.

In England, bail is always discretionary. If it is refused or granted on terms unacceptable to the petitioner, he may petition the High Court which has the power to admit him to bail or vary the conditions on which bail was granted.[115] Although he may be admitted to bail even if he is accused of murder, bail is not readily granted where the petitioner is accused of a serious crime. Bail may, however, be continued pending the determination of an appeal from a conviction.[116]

In French law, the accused is entitled to bail only if he is accused of having committed a misdemeanor or an offense for which the maximum penalty is imprisonment for less than two years, and if he has not previously been convicted of a felony or sentenced to imprisonment for more than three months and the sentence has not been pro-

[115] Criminal Justice Act 1967, c. 80, § 22.
[116] Criminal Appeal Act 1968, c. 19, § 19.

bated. He must still satisfy the judge that he will appear when required.[117] Beyond this rule, and always in the case of felony, bail is purely discretionary and is not readily obtainable.[118]

In Italian law, bail is not obtainable whenever the accused is charged with a crime the minimum penalty for which is imprisonment for five years, or when he is charged with dealing with or possession of narcotics, or counterfeiting of currency irrespective of penalty.[119] Apart from this rule, bail is purely discretionary and is granted only when the accused gives sufficient proof that he will appear when required. A person is entitled to bail when he is accused of an offense punishable with imprisonment for less than three years as a maximum, or for less than two years as a maximum if he has previously been convicted of an offense of a similar nature, or when he is accused of an offense committed negligently if it is punishable with imprisonment for less than five years. He must, however, give proof that he will appear when required, and if he is unsuccessful in doing so, he cannot be admitted to bail.[120]

In Spanish law, bail is not obtainable whenever the accused is charged with a felony carrying a minimum term of imprisonment of twelve years.[121] Beyond this rule, bail is discretionary but is likely to be granted only in cases involving minor offenses which carry a maximum term of imprisonment of six months and when there is no likelihood that the accused would absent himself.[122]

In German law, bail is purely discretionary. It may not be granted when the accused is charged with a felony and when evidence against him is overwhelming. It is also not granted, irrespective of the nature of the offense, when the accused is under suspicion that he would remove himself from the court's jurisdiction in order to escape prosecution, and also when there is danger that he would be tampering with the evidence or that he would influence witnesses.[123] Bail is usually granted only to persons accused of minor offenses which do not carry a penalty of imprisonment for more than six weeks and who are beyond suspicion of escaping to avoid prosecution.[124]

In Austrian law, a person accused of a felony punishable with im-

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117 C. Pro. Pén. art. 138.
118 C. Pro. Pén. arts. 139-149.
119 C. Pro. Pen. art. 253.
120 C. Pro. Pen. arts. 254-256.
121 C. Pen. art. 503.
122 C. Pen. art. 529.
123 StPO §§ 112-113.
124 StPO §§ 113, 117.

prisonment for a minimum of ten years is not eligible for bail. He may be admitted to bail if the felony of which he is accused is punishable with imprisonment for a shorter term. He is entitled to bail when the felony with which he is charged is punishable with imprisonment for less than five years as a maximum. To be admitted to bail, however, the accused must in all cases establish that he will appear when required and he must give an adequate security for his appearance.[125]

In Swiss law, bail is always discretionary. It may not be granted when the accused is charged with a felony or misdemeanor and there is danger that he would be tampering with the evidence or that he would leave the court's jurisdiction in order to escape prosecution. If charged only with an offense, he should be admitted to bail unless he is likely to escape.[126]

Probation And Parole

Probation is a device which makes it possible for the court to suspend the sentence in proper cases and let a convicted offender go free on condition that he shall conduct himself well for a stipulated time. Parole makes it possible for a proper administrative authority to release a convicted offender from serving the remainder of the sentence assessed against him after he had already served part of the term. Both probation and parole are predicated upon the idea of rehabilitation; namely, to offer the offender a helping hand in the hope that he will be thus induced to keep himself out of trouble. It follows that only persons who give reasonable promise of rehabilitation may be admitted to probation or released on parole, and also that certain crimes are excepted from probation.

Probation

In general, the law of the United States and that of the various states of the Union admits to probation offenders convicted of crimes not punishable with death or life imprisonment.[127] Some states do not admit to probation persons convicted of serious crimes like murder or attempted murder or robbery with a deadly weapon,[128] some other states admit to probation only such persons who are assessed a term of

125 StPO §§ 190-197.
126 Kanton Zürich, StPO §§ 49-50, 339.
127 *E.g.*, 18 U.S.C. § 3651 (1964).
128 *E.g.*, Cal. Penal Code Ann. § 1203 (Deering Supp. 1971); Pa. Stat. Ann. tit. 19, § 1051 (1964).

imprisonment not longer than e.g., ten years, irrespective of the nature of the offense.[129] The provisions of some states are stricter than others, but in general, rules concerning probation are very liberal as compared with those existing in England and in the various countries of Continental Europe.

In the European system, persons convicted of more serious crimes are not eligible for probation. Probation is generally limited to offenders convicted of minor offenses only who have been assessed a term of imprisonment usually not longer than one year (five years as a maximum), and who have not previously been convicted. Also, offenders considered for probation must appear not to be likely to commit further offenses.

English law provides that where a person is convicted of an offense not carrying the sentence of death or life imprisonment and having regard to the circumstances, including the nature of the offense and the character of the offender, provided it is expedient to do so, the court may, instead of sentencing him, admit him to probation.[130] Although probation is thus available even to persons convicted of serious crimes, it is limited in practice to minor offenses only and to persons not previously convicted, for it would not be appropriate to admit a person to probation in more serious cases having regard to the nature of the offense and to the character of the offender.

French law provides that a person convicted of a misdemeanor or of an offense for which he could not be assessed a term of imprisonment exceeding five years, and who has not previously been convicted of a felony nor of a misdemeanor, may be admitted to probation.[131] In Italian law, only persons who have been assessed a term of imprisonment not exceeding one year and who have not previously been convicted of felony nor of a misdemeanor are eligible for probation.[132] In Spanish law, probation is available only in the case of a conviction to a term not longer than one year, and to a person not previously convicted of any offense.[133]

In German law, a person may be admitted to probation if he is assessed a term of imprisonment not exceeding nine months and if within the last five years before the conviction of the offense he has

129 *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 42.12 (1966), *as amended*, TEX. CODE CRIM. PROC. ANN. art. 42.12 (Supp. 1971). (Only certain sections were amended and codified in the 1971 Supplement).

130 Criminal Justice Act 1948, 11 & 12 Geo. 6 c. 58, § 3.

131 C. Pro. Pén. arts. 734-747, C. Pén. art. 40.

132 C. Pen. arts. 163-168.

133 C. Pen. arts. 92-93.

not been, upon conviction for any offense, assessed a term of imprisonment exceeding six months or admitted to probation.[134] In Austrian law, a person may be admitted to probation if the offense of which he was found guilty is punishable with imprisonment for less than five years, and where having regard to the nature of the offense and the character and age of the offender and to the fact that he has, whenever possible, made good the loss or damage caused, it appears to be preferable to admit him to probation rather than have him suffer the penalty of imprisonment.[135] In Swiss law, probation is available only to persons who have been assessed a term of imprisonment not exceeding one year, and who have not been convicted of a felony nor of a misdemeanor within the five years immediately preceding the commission of the offense. Such persons must also make good all the loss or damage caused, and must appear to be unlikely to commit further offenses.[136]

Parole

As a general rule, the law of the United States and that of the several states of the Union provides that a convicted offender may be paroled after having served one-fourth to one-third of his sentence of imprisonment, and in any case (i.e. life imprisonment), after having served seven to twenty years.[137] Similar to the rules governing probation, these provisions are very liberal indeed, as compared with those of the European countries.

The European provisions make a convicted offender eligible for parole after he has served one-half to three-fourths of the term of imprisonment. A person imprisoned for life may be paroled after he has served some fifteen to twenty-eight years. In each case, the prisoner must have merited parole by his good conduct in prison and must give promise of an honorable conduct after his discharge.

In English law, a prisoner serving a sentence of imprisonment for a term of more than one month may be granted remission of part of the sentence on the ground of his industry and good conduct. Such remission may not exceed one-third of the sentence.[138] Persons con-

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134 StGB § 23.

135 Gesetz über die bedingte Verurteilung 1949, BGBl. Nr. 277, I. § 1.

136 StGB art. 41.

137 *E.g.*, 18 U.S.C. § 4202 (1964); Cal. Penal Code Ann. §§ 3040-3065 (Deering 1961); Ill. Stat. Ann. ch. 38, § 123-2 (1964); N.Y. Penal Law § 70.40 (McKinney 1967); Tex. Code Crim. Proc. Ann. art. 42.12 (1966), *as amended*, Tex. Code Crim. Proc. Ann. art. 42.12 (Supp. 1971). (Only certain sections were amended and codified in the 1971 Supplement.)

138 Prison Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 52, & 25, The Prison (Amendment)

victed to imprisonment for life may also be paroled but no rule exists as to their eligibility for parole except that they may be paroled in the discretion of the Secretary of State. This discretion is rarely exercised and only after the offender has served a very extensive term of imprisonment.[139]

In French law, parole may be granted after the prisoner has served one-half of his term but not less than three months. A prisoner who has previously been convicted of a felony or of a misdemeanor may become eligible after he has served two-thirds of his term but not less than six months. In the case of imprisonment for life, the prisoner may be paroled after he has served fifteen years of imprisonment.[140] In Italian law, a prisoner may be paroled after he has served one-half of his term. He must have served, however, at least thirty months, and no more than five years of his sentence may be remitted. In case of a prisoner previously convicted, he must serve at least three-fourths of the term but not less than four years. Prisoners convicted to life imprisonment are eligible for parole after having served twenty-eight years.[141] In Spanish law, the prisoner must serve three-fourths of his term before he is eligible for parole. Only those imprisoned for a term of one year or longer are eligible.[142]

In German law, parole may be obtained after the prisoner has served two-thirds of his term and three months as a minimum. A person sentenced to life is not eligible for parole; however, the prisoner may petition for remission and obtain pardon.[143] In Austrian law, a prisoner is eligible for parole after he has served two-thirds of his term and a minimum of eight months. A prisoner serving a life sentence may be paroled after twenty years.[144] In Swiss law, a prisoner may be paroled after he has served two-thirds of his term and three months as a minimum. In the case of imprisonment for life, the prisoner may be paroled after fifteen years.[145]

Rules 1968, Stat. Instr. 1968 No. 440, (Rule substituted for Rule 5 of the Principal Rules, The Prison Rules 1964, Stat. Instr. 1964 No. 388, r. 5.).

139 Criminal Justice Act 1967, c. 80, § 61. Section 61(1) provides: "The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life . . . , but shall not do so in the case of a person sentenced to imprisonment for life or to detention during Her Majesty's pleasure or for life except after consultation with the Lord Chief Justice of England together with the trial judge if available." *See also* The Murder (Abolition of Death Penalty) Act 1965, c. 71, § 2.

140 C. Pro. Pén. art. 729.

141 C. Pen. art. 176.

142 C. Pen. art. 98. There is no life sentence in Spanish law, the maximum term of imprisonment being forty years. In such case, the prisoner is eligible for parole after having served thirty years.

143 StGB § 26.

144 Gesetz über die bedingte Verurteilung 1949, BGBl, Nr. 277, I. § 12.

145 StGB art. 38.

It is thus quite apparent that in the European countries the prisoner has to serve a much longer part of his term before he is eligible for parole. This is, however, subject to a further qualification that while in the United States a prisoner is usually paroled as soon as he becomes eligible for parole, such a rule does not obtain in the European countries. Since a prisoner must give promise of good conduct after his discharge, only very few prisoners are actually paroled as soon as they become eligible, some are paroled at a later date, and many are never paroled. Parole is purely discretionary and it is used with caution. It is interesting to note, in this connection, that many American juries are not in agreement with the liberal policy of granting parole and indicate their displeasure at a premature release of prisoners by assessing prolonged terms of imprisonment of sixty, one hundred, and even more years in the hope that the parole boards will take their advice in consideration and will not parole prisoners who do not deserve it.

Habitual Criminals

The laws of the several states in the United States provide on the average that upon third conviction for misdemeanor or felony, the offender shall be sentenced to the maximum provided as penalty for the offense for which he is then convicted.[146] Some states are stricter and increase the penalty upon a second conviction,[147] or in the case of felonies, provide for imprisonment for life upon a third conviction.[148] Although these provisions appear reasonably strict, they are still quite lenient if considered in conjunction with the provisions for bail, probation and parole and the practice of granting the same. True, habitual offenders need not be granted bail, released on probation or paroled, but in practice they are being given these benefits.

The main difference between the provisions of the several states of the United States and those of England and the other European countries lies in the ineligibility of the habitual offender to bail, probation and parole.[149]

English law provides that where an offender who was previously convicted of an offense punishable with imprisonment for a term of two years or more, is convicted of an offense punishable with imprisonment for a term of two years or more, committed before the expiration

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146 *E.g.*, Mass. Ann. Laws ch. 279, § 25 (1968).
147 *E.g.*, Tex. Penal Code Ann. arts. 61, 62, 64 (1952).
148 *E.g.*, Cal. Penal Code Ann. § 644 (Deering 1971); N.Y. Penal Law § 70.10 (McKinney 1967); Tex. Penal Code Ann. art. 63 (1952).
149 *See* Bail, Probation and Parole, *supra*.

of three years from his release from prison, the court may impose a term exceeding the maximum term authorized for the offense.[150]

French law directs the court to assess a term of imprisonment at the maximum provided for by the penal code in case of a second offense, and it gives the court authority to extend the term even further up to double punishment.[151] In Italian law, the term of imprisonment for a second offense is increased by one-sixth. It is, however, increased up to one-half if the offense is of the same type as the first offense, or if it is committed within five years from the first conviction.[152] Upon a third conviction, the offender may be declared to be a habitual criminal.[153] The effect of such a declaration is that the offender is, upon serving his term, further detained in a labor institution for a minimum of two to four years.[154] In Spanish law, conviction for a second offense is considered an aggravating circumstance and carries with it an increased term of imprisonment.[155]

In German law, a person who is convicted of a third offense and who has on both previous occasions been assessed a term of imprisonment of not less than six months, may be incarcerated for a term of up to five years if the third offense is a misdemeanor, and up to fifteen years if it is a felony.[156] In Austrian law, the fact of a second or further conviction amounts to an aggravating circumstance and exposes the offender to an increased term of imprisonment.[157] In Swiss law, a habitual criminal may be imprisoned indefinitely but for not less than three years. If the offense for which he is convicted carries a term longer than three years, he may not be released before that term has run.[158]

Devices That Simplify And Speed Up Criminal Proceedings

A typical criminal proceeding in the countries of Continental Europe in the case of more serious offenses is initiated by the office of the public

150 Criminal Justice Act 1967, c. 80, § 37. Section 37 provides that where an offender who was previously convicted of an offence punishable with imprisonment for a term of two years or more, is convicted of an offence punishable with imprisonment for a term of two years or more committed before the expiration of three years from his release from prison, and if the court is satisfied that it is expedient to protect the public from him, the court may impose a term exceeding the maximum term authorized for the offence if the maximum so authorized is less than ten years, but shall not exceed ten years if the maximum so authorized is less than ten years, or exceed five years if the maximum so authorized is less than five years.

151 C. Pén. arts. 56-58.

152 C. Pen. art. 99.

153 C. Pen. arts. 104-105.

154 C. Pen. arts. 216-217.

155 C. Pen. arts. 19 (14), 61.

156 StGB § 20a.

157 StG §§ 44, 176.

158 StGB art. 42.

prosecutor which files a charge against the reputed offender in the proper criminal court. The charge is based on information supplied by the victim, witnesses and the police. Acting on the charge, the court appoints a judge, known as an investigating judge, to take care of the matter and to carry out a thorough investigation. The judge hears the victim, the witnesses, the police, the prosecutor, the person charged and his attorney. He studies all possible leads, consults experts, makes his findings, and does all that is necessary to enable the court to reach a conclusion as to whether the person charged should stand trial or whether the case against him should be dropped. Having made his findings, the judge transmits the papers to the prosecutor for further action. The prosecutor can either abandon the matter if on the findings of the investigating judge the case appears not to be strong enough for conviction. If he requests trial, the court will rule on the request after having made a thorough study of the case. If it rules that the person should stand trial, trial will take place promptly. The trial court is composed either of a single judge or of three judges, in accordance with the seriousness of the offense charged; or in felonies, of three judges and usually of a jury of six, sitting together with the court as one unit. At trial, proof is offered by the prosecution, witnesses for prosecution and defense are examined, cross-examined and re-examined, and the accused is heard through his attorney and by himself. The trial court is required by law to study the case *ex officio* and not to rely only on the facts and law submitted by the parties. If the court is composed of three judges, or of three judges and a jury, a two-thirds majority of its members is usually required for conviction and a simple majority for the assessment of punishment. The final decision of the court is appealable as well as its intermediate rulings, usually within one week from the decision. If the appellate court disagrees with the trial court, it must render a new decision. It may remand the matter back to the trial court only when the judgment suffers from a defect (breach of the law) for which it should be quashed. In addition to an appeal, a judgment of the trial court may be quashed for breach of law by a proper cassation court. This remedy is, however, exceedingly rare.

It immediately appears that in the Continental proceeding there is no grand jury. The question whether the person charged should stand trial is answered by a court on the basis of a thorough, methodical investigation conducted by an independent investigating judge appointed for life. The proceedings of the grand jury are not only cumbersome, but in their result stand no comparison with the reasoned

finding of the investigating judge and the ruling of a court. No wonder that grand juries were abolished even in England where they were originally set up.[159]

On the strength of a proper finding by the investigating judge, the public prosecutor is bound to prosecute the person charged with the offense appearing in the finding. Any agreement between prosecution and defense to drop a more serious charge in exchange for an undertaking to plead guilty to a lesser charge so familiar in some jurisdictions, is unheard of in both Continental Europe and in England. It would not only be unethical but in direct breach of the law and would expose all parties to prosecution. Since the circumstances of the case have been scientifically examined by the investigating judge laying thus the groundwork for trial, the trial can proceed smoothly and speedily. Also, since the investigating judge has screened the evidence and separated the admissible evidence from the inadmissible, no problems of admissibility of evidence are usually encountered at trial. Consequently, no dilatory tactics are available to the defense.

In rendering judgment, both judges and jurors vote on the facts of the case, there being no reason why the judges should not be allowed so to do, as they admittedly can form an opinion on the facts just like the jurors. And since the jury sits with the judges as one unit, no special instructions to the jury are necessary. The function of the jurors is thus of an increased importance as they are elevated to members of the court and sit as lay judges.

If the decision of the trial court is guilty, the only way open to the defense to contest it is an appeal. No motion of any kind (like a motion for a new trial) is entertainable. The appeal is disposed of speedily by the appellate court, and if the decision of the trial court is modified, the appellate court renders a new final judgment. Further appeal to the highest court in the country is available only in felonies and only for breach of the law.

The entire proceeding is therefore quite speedy, consonant with the well known principle of criminal law enforcement that speedy justice provides a considerable deterrent to crime, making it clear to prospective offenders that crime does not pay. Conversely, it is evident that

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159 Grand juries were abolished in England by the Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1, and they were finally eliminated in the counties of London and Middlesex by the Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 31 (3). Commitment for trial is made in the magistrates' court after preliminary examination by justices. Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 2; Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, §§ 12, 13, 14.

if a system allows the criminal to engage the courts in a seemingly endless battle of motions, changes of site, new trials, etc., especially while the criminal is free on bail, it cannot be expected to produce a desirable deterrent to crime in the minds of likely offenders. In this connection it may safely be said that mere technicalities should not be allowed to fetter the system and give the criminal an undue advantage in criminal proceedings. Such technicalities should be discarded just as they were done away with in England and in the countries of Continental Europe. To discard these fetters on criminal procedure and to achieve suitable improvements, it is imperative to work toward such changes and modifications which would bring about a betterment of the existing system without surrendering any of the well established principles of liberty and personal freedom.

It should also be noted that any rights a person accused of having committed a crime might have with respect to fair treatment and fair trial, including the presumption of innocence until conviction, must be viewed in conjunction with the right of every person to his physical integrity and to that of his property. Also, the right of every person not to be the victim of crime should not be lost from sight. A fair and just criminal procedure must balance these interests and must pay due respect to the interests of the accused as well as to those of the victim and to those of society at large.

Conclusion

A comparison of some aspects of the American, English and Continental systems of criminal law and law enforcement reveals that the observations made by Roscoe Pound in his St. Paul address of 1906[160] have still not lost their persuasiveness. Granted that the judicial system and criminal procedure of the United States are derived from those of England, it may not be fruitless to have a look at the English and Continental systems as they stand today for possible suggestions. The English criminal law and procedure went through several periods of successful reforms both in the nineteenth and twentieth centuries which made it a modern, workable system. There are no grand juries; no excessive dilatory tactics are tolerated in the trial system; no repeated motions for a new trial or against the sentence are allowed; bail, probation and parole are confined to narrow limits; meaningful sentences are assessed; and habitual criminals are kept reasonably off the streets. A

[160] Roscoe Pound's address at the twenty-ninth annual meeting of the American Bar Association held in St. Paul, Minnesota, on August 29, 1906.

glance at the Continental system reveals suggestions for further innovations, like a vigorous system of crime investigation conducted by independent investigating judges, a system of smooth, speedy proceedings from arrest to conviction, juries only in felony cases of not more than six to nine jurors sitting usually with the court as lay judges.

It is inescapable that an improved judicial system would require a considerable increase in judicial personnel but it must be remembered that practically any meaningful improvement would have to begin with the appointment of additional judges to relieve the heavily overworked conditions presently prevailing in the administration of criminal law throughout the country. Although many aspects of the European system are clearly not readily transplantable, it is evident that some features of the English and Continental systems might be considered as suggestions for possible improvements.

International Comparative Criminal Law—Comparison of Asian Criminal Law With Proposed Federal Criminal Code

(By Chin Kim, College of Law, University of Illinois, Champaign, Ill.)

It is, indeed, my pleasure to have an opportunity to present my comments on the topic of international comparative criminal law—comparison of Asian criminal law with proposed Federal Criminal Code. In fulfilling this assigment, I have chosen the criminal law of four Asian countries, Republic of China,[1] Japan,[2] Republic of Korea[3] and Thailand,[4] because the law of these countries[5] has commanded a great deal of respect and attention.[6] Japan, especially, is highly relevant for my inquiry since the Japanese are currently attempting to revise their penal code.[7]

OMISSIONS (SECTIONS 301(2) AND 401(1)(b))

The final Report[8] lists omissions as one basis of liability for offenses, and makes a person an accomplice if he fails to make a proper effort to prevent a commission of a crime that he has a legal duty to prevent. Use of the term "legal" duty seems appropriate. This would certainly eliminate the possibility of assertion of morality or a principle of good faith as a basis of liability.

Some Japanese legal drafters were skeptical about the wisdom of inserting a provision dealing with actus reus by omission in their proposed penal code. This skepticism faded out as a strong argument was made that the insertion is necessary from the standpoint of nullum crimen, nulla poena sine lege doctrine, and is also needed to lay out a guide line for the courts in handling this type of crime.[9] The Japanese proposed provision related to crimes committed by omission as it stands now is:[10]

"A person under a duty to prevent the occurrence of facts constituting a crime who intentionally fails to prevent their occurrence when he could have done so shall be dealt with as if he had caused such facts to occur through his own action."

When the original proposed provision was printed in the 1962 Preparatory Draft for the Revised Penal Code of Japan, it began with "A person under a legal duty. . . ."[11] But the word, "legal," was eliminated and the word, "intentionally," was stressed. The above draft adopted by the Special Committee on Criminal Law, the Legal System Deliberation Council, embraces two categories of actus reus by omission known as "crimes by genuine omission" (echtes Unterlaussungsdelikt) and "crimes by pseudo-omission" (unechtes Unterlaussungsdelikt); each roughly corresponds to the category of crime by "non-feasance" and "omission in the narrower sense" in Anglo-American law.[12]

KINDS OF CULPABILITY (SECTION 302)

The final Report defines culpability into four kinds: intentionally, knowingly, recklessly and negligently. This method of defining kinds of culpability differs from that of the Continental system which requires that mens rea be an essential element of a crime. All four Asian countries that we are primarily concerned with here subscribe to this Continental method[13] and the Chinese criminal code which concisely prescribes the mens rea may serve as an example. It reads:[14]

"1. An act is not punishable unless committed intentionally or negligently.

"2. A negligent act is punishable only if specifically so provided."

As it is illustrated in the Chinese criminal code, intent stands side by side with negligence; the latter is not included in the former and both are mental elements of crimes. Thus, in most criminal cases criminal intent at minimum negligence is required. In a typical homicide case in Japan,[15] for instance, criminal intent of an accused is to be ascertained to verify two mental elements: one cognitive, the other volitional.[16]

Two civilian efforts to define the subject related to section 302 of the Final Report are worth mentioning here. First, the German legal drafters in their German Draft Penal Code of E 1962 proposed to define such terms as "intention," "purpose and scienter" and "negligence and wantonness."[17] It is my feeling that this German draft intended to bring in the well-developed American legal concept of negligence. However, this German effort did not materialize in the final text in the revision of the 1969 code.[18] Second, the Japanese legal drafters are currently concerned about the question of culpability. The

final draft adopted by the Criminal Law Special Committee, the Legal System Deliberation Council, indicates the Japanese adherence to the traditional Continental concept of mens rea. It reads: [19]

"Acts done without a mind to commit a crime are not punishable provided that this shall not apply where otherwise specially provided by law."

In the course of deliberation of this provision, "negligent acts shall be punished" was proposed to substitute "provided, that this shall not apply where otherwise specially provided by law." This proposal was rejected.[20] In this connection, it seems appropriate to briefly mention the Japanese effort to define crime aggravated by the result. Under Anglo-American legal practices, the felony-murder and misdemeanor-manslaughter doctrine is a form of absolute liability. But, in Japan, the death penalty or life imprisonment could be imposed on an original actor if a person dies as the result of robbery or rape. In this case, according to the prevailing view in Japan, such higher punishment cannot be imposed if these results were not foreseeable. In the course of deliberating this question, a prolonged debate ensued and inquires were directed to find a theoretical basis of the aggravated result. If a basis were to be found, the question was whether it should be in the negligence or in the foreseeability. The latter became the requirement.[21] As it stands before the general meeting of the Legal System Deliberation Council, the provision dealing with crime aggravated by results reads: [22]

"If aggravated punishment is prescribed on the basis of the result of a crime, but it was impossible to foresee such results, such aggravated punishment cannot be imposed."

It is highly commendable that the Commission undertook to define this complex area of criminal law. I do not have much comment on Secton 302; a few words will suffice. In view of the Civilian experiences, it is hard to conceive the term "recklessly" which is situated in an intermediary position in the structure of the kinds of culpability, especially in light of the Final Report which sets up the same test of "a gross deviation from acceptable standards of conduct" for both "recklessly" and "negligently". Needless to say, in distinguishing these two concepts, the court has to arrive at full comprehension and proof of the state of mind regarding the degrees of awareness in the actor. In a case of homicide, the court would have a less difficult task in proving the state of mind of the perpetrator, but it would be perplexing work for the court to draw the line between "recklessly" and "negligently" in proving the state of mind of actors involved in regulatory offenses.

ACCOMPLICES (SECTION 401)

Following the Continental tradition, criminal codes of four Asian countries [23] classify "parties to a crime" into three categories: Co-principals (acting), instigators (encouraging) and aiders (assisting). The Japanese draft on accomplices adopted by the Criminal Law Special Committee also follows this classification by allocating four relevant provisions. They are: [24]

Principals:

1. A person who himself commits a crime is a principal.
2. A person who accomplishes a criminal act by making use of another who is not punishable as a principal is also a principal.

Co-principals:

1. Two or more persons who join in the commission of a crime are all principals.
2. Where two or more persons conspire to commit a crime pursuant to their common design, the other conspirators are also principals.

Instigators:

1. A person who through his solicitation causes another to commit a crime is an instigator.
2. An instigator shall be treated as a principal.
3. A person who instigates an instigator shall receive the same treatment prescribed in two proceeding paragraphs.

Aiders:

1. A person who aids a principal is an aider.
2. Punishment of an aider shall be a reduced form of punishment prescribed for a principal.
3. A person who instigates an aider shall be treated as an aider.

Almost all proposed provisions reproduced above are familiar ones for those who are exposed to the civil law system. However, one provision which needs an explanation is paragraph 2 under Co-principals. This provision is an expression of the conspiratorial co-principal theory which has been developed since 1922 through a series of Japanese court decisions.[25] An author summarizes the position taken by the Japanese Supreme Court on this theory with the following words: [26]

"A recent decision of the Supreme Court seems to have ruled that it is necessary not only to prove the existence of a state of mental agreement but also to produce enough evidence to show the act of forming the conspiracy, including the time and place of formation. . . . The conspiratorial co-principal theory requires that the criminal activity progress beyond the simple overt act to a stage where actual harm is done to society before criminal liability attaches."

A perusal of subsections (1)(a) and (1)(b) of the Final Report in light of the Japanese proposed provisions on accomplices reveals that the distinction between the two subsections is blurred. If "he causes the other to engage in such conduct" under subsection (1)(a) is to cover "a person who through his solicitation causes another to commit a crime" under the Japanese provision and "he commands, induces, procures, or aids the other to commit it" under subsection (1)(b) is to deal with the "aiders" provision under the Japanese proposed draft, then the distinction between the two subsections seems to be somewhat clear. In a structural sense if the subsection (1)(a) is an instigators clause and subsection (1)(b) is an aiders clause, relevant articles of Thai criminal code are worth considering: "Whoever, whether by employment, compulsion, threat, hire, asking as favour or instigation, or by any other means, causes another person to commit any offense" [27] for subsection (1)(a) and "Whoever, by any means whatever, does any act to assist or facilitate the commission of an offense by any other person before or at the time of committing the offense, even though the offender does not know of such assistance or facilities," [28] for subsection (1)(b).

INTOXICATION (SECTION 502)

The Final Report offers two possible grounds for an affirmative defense based on either not self-induced or self-induced intoxication. The Thai Penal Code deals with this issue by providing a possible exemption from punishment on account of not self-induced intoxication. However, it specifically precludes the instances of preordained intoxication. It prescribes: [29]

"Section 66. Intoxication on account of taking liquor or any other intoxicant may not be raised as an excuse under Section 65, except where such intoxication is caused without the knowledge or against the will of the offender, and he has committed the offense at the time of not being able to appreciate the nature or illegality of his act or of not being able to control himself, he shall then be exempted from the punishment for such offense. But, if he is still partially able to appreciate the nature or illegality of his act, or is still partially able to control himself, the Court may inflict less punishment to any extent than that provided by the law for such offense."

How to punish a criminal act committed by a person while in a state of intoxication is one of the public concerns in Japan. Intoxication is often effective as a defense since it is not yet separated from insanity in the Japanese Criminal Law. This public concern was well reflected in the final draft submitted before the Japanese Legal System Deliberation Council. The draft adopted the doctrine of actio libera in causa to cover the problems arising from self-induced mental disorder.[30] Two proposed Japanese provisions relevant to this issue are: [31]

"*Article 15. Responsible Capacity*

"1. Acts committed by a person who, as a result of mental disorder, lacks capacity to discriminate as to the propriety of his conduct or to act according to such discrimination are not punishable.

"2. Punishment for acts of a person whose capacity as set out in paragraph 1 is markedly diminished as the result of mental disorder may be reduced.

"*Article 16. Self-Induced Mental Disorder*

"1. The provisions of the preceding article shall not apply to a person who intentionally induces in himself a state of mental disorder and thereby brings about the facts constituting such crime.

"2. The preceding paragraph shall apply to a person if he negligently induces in himself a state of mental disorder and thereby brings about the facts constituting such crime."

By setting up two categories of intentionally and negligently self-induced mental disorders, the Japanese draft intends to treat the issue of non self-induced and self-induced intoxication systematically within the framework of the mens rea concept. In other words, it attempts to cover this issue based on the criminal responsibility principle. As it was stated in the section dealing with kinds of culpability, this question of non self-ordained and self-ordained intoxication well illustrates different approaches to the complex issue of culpability taken by the Final Report and the Japanese code, which is based on the civil law method. However, it is relevant in this connection to raise two issues which do not offer an easy solution. First, how to determine when the commission of the crime or the substantial step to commit the crime started; and second, how to verify and determine the mistakes which occurred while the offender was in non self-induced or self-induced mental disorder prior to or during the course of committing the crime.

MISTAKE OF LAW (SECTION 609)

The traditional rule, Ignorantia facti excusat, ignorantia legis neminem excusat, was modified by the German court in 1952 to the effect that the mistake of law could constitute a defense.[32] The mistake of law as a defense seems to have become a settled matter throughout the civil law countries since 1952. The Final Report has specified four grounds under which mistake of law could be used as an affirmative defense. This approach of specifying grounds is quite contrasting to the one taken by four Asian countries, as the subsequent outline will reveal. In spelling out the contents of the provision covering the mistake of law issue, penal codes of these countries use the term "law" as an indication of "positive law" in a broader sense, definitely precluding "natural law." In the sense that the Final Report specifies the contents of "law" which could enlighten code interpreters in the civil law countries, the Final Report's approach seems to be sound.

The Chinese Criminal Code prescribes that:[33]

"Ignorance of law shall not discharge a person from criminal liability. Provided, that the punishment may be reduced according to the nature and circumstances of the case. If, however, the offender honestly believed that his act is permissible by the law and can give a good reason for his belief, the punishment may be remitted."

The Chinese provision subscribes to Ignorantia facti excusat, ignorantia legis neminem excusat. However, it opens the way for reduction of the penalty for those whose ignorance of law deserves a lesser punishment considering the nature or circumstances of the case. It also opens the avenue for remitting altogether the penalty of those whose honest belief sufficiently excuses them. The Korean Penal Code prescribes the test of the mistake of law as follows: "Where a person commits a crime in the belief that his conduct does not constitute a crime under existing law, he shall not be punishable provided that his mistake is based on reasonable grounds."[34] The Thai Penal Code also provides a provision similar to those found in the Chinese and Korean penal codes. It prescribes that:[35]

"Ignorance of law shall not excuse any person from criminal liability. But, if the Court is of opinion that, according to the nature and circumstances, the offender may not have known that the law has provided such act to be an offense, the Court may allow him to produce evidence before it, and if the Court believes that the doer does not know that the law has so provided, the Court may inflict less punishment to any extent than that provided by the law for such offense."

The final draft on mistake of law adopted by the Special Committee on Criminal Law, the Japanese Legal System Deliberation Council, reads as follows:[36]

Ignorance or mistake of law

"1. Ignorance of law shall not mean the absence of intent, provided that penalty may be reduced in light of the circumstances.

"2. A person who acts without knowing that his acts are not permitted by law shall not be punished, if there is adequate reason for his ignorance."

The first paragraph is a new version of the article 38, III, of the present code. The second paragraph is to provide a guide line for the courts in deter-

mining the degree of the consciousness of the illegality. Whether there is "an adequate reason" or not will be the subject of an interpretation.[37] In the course of deliberating drafts on mistake of law in the Special Committee on Criminal Law, there was a proposal to deal with a negligent mistake of law. It proposed that the actor should be punishable for crime by negligence if negligent commission constitutes a crime. It was rejected.[38]

CRIMINAL ATTEMPT (SECTION 1001)

Japanese legal drafters allocate three articles to treat the subject of criminal attempt. As they stand now before the Legal System Deliberation Council, these proposed articles read:[39]

"*Attempt:*

"1. A person who has commenced but failed to complete the commission of a crime commits an attempt.

"2. An attempt is punishable only when specifically so provided.

"3. Punishment of an attempt may be reduced.

"*Offense interrupted by actor:*

"1. A person who voluntarily interrupts his commission of a crime or prevents his acts from taking effect shall have his punishment reduced or remitted.

"2. The same is also true in cases where the results are not produced because of external circumstances, if the perpetrator made earnest efforts to prevent his acts from taking effect.

"*Impossible offense:*

"1. An act which cannot possibly by its nature produce the results intended is not punishable as an attempt."

In the first proposed Japanese article quoted above, "commenced in the execution" test may correspond to "a substantial step" test which the Final Report adopted. On this issue, the Thai criminal code is somewhat elaborate. It reads:[40]

"Whoever commences to commit an offense, but does not carry it through, or carries it through but does not achieve its end, is said to attempt to commit an offense."

On the subject of impossible offense (sometimes known as impossible attempt or inept attempt), the Final Report states that "factual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be." The position taken by the Final Report is somewhat different from that of the Japanese draft. However, the Thai Code contains an article which would be closer to the position of the Final Report. It reads:[41]

"Whoever does any act by aiming at the effect which the law provides as an offense shall, if his doing of the act is certainly incapable of achieving its end on account of the factors employed in the doing, or on account of the object aimed at, be deemed to attempt to commit an offense, and shall be inflicted with the punishment of not more than one half of the punishment provided by the law for such offense."

Offense Interrupted by Actor as it was drafted by the Japanese specialists does not appear in the Final Report in any form. Perhaps the Commission has considered that in principle, voluntary desistence from crime is not a ground for mitigating punishment in the Anglo-American law.[42] In the Korean criminal code, a mitigating factor plays a role in cases of desistence from a criminal conduct, of prevention of its completion,[43] of self-denunciation of a criminal conduct or of its voluntary confession.[44]

PERSISTENT MISDEMEANANTS (SECTION 3003)

The Final Report's approach to this issue is practical since it conceives that backsliding thieves, drug addicts, and gamblers are a vexing social problem in a highly industrialized and urbanized society. As in other civil law countries, the existing penal codes of four Asian countries do not cover the issue of habitual misdemeanants.[45] However, the Japanese legal drafters are quick to notice this important social issue of how to control persistent petty theft and repeated assault and battery beside traditional recidivist murders and

arsonists.[46] For this reason, it seems appropriate for my purpose to reproduce relevant Japanese proposed provisions concerning the recidivism.

The final draft on recidivism adopted by the Special Committee on Criminal Law, the Japanese legal System Deliberation Council, is as follows: [47]

"CHAPTER 7 RECIDIVISM

"*Article 59 Recidivism*

"1. A recidivist is a person who, within five years after he has been sentenced by a finally binding adjudication to confinement or a heavier punishment, commits another crime for which imprisonment or confinement for a limited term is to be imposed.

"2. The preceding paragraph shall apply to a person who was sentenced to confinement or a heavier punishment, and was suspended the execution of his sentence, commits another crime, during the period of suspension, for which imprisonment or confinement for a limited term is to be imposed.

"*Article 60 Increase in punishment*

"Sentence imposed on a recidivist may exceed the maximum term of punishment prescribed for his crime. In such case the maximum term shall be twice the maximum otherwise prescribed.

"*Article 61 Habitual recidivism*

"An habitual recidivist is an offender who has committed another crime after having been earlier sentenced to imprisonment for six months or more as a recidivist, and is to be punished again as a recidivist by a limited term of imprisonment, and whom the court finds to be an habitual offender.

"*Article 62 Imposition of indeterminate sentence*

"1. An indeterminate sentence may be imposed upon an habitual recidivist.

"2. An indeterminate sentence may be imposed in a case of accumulative crimes, in which one crime carries an indeterminate sentence and the other does not, only when the crime for which an indeterminate sentence can be imposed controls under Article 64.

"3. An indeterminate sentence pronounced pursuant to Paragraph 1 shall prescribe maximum and minimum terms within the limits, (otherwise authorized by law), provided that the minimum term of less than one year shall be considered as one year."

It was the feeling of the Japanese legal drafters that the criminal acts of habitual recidivists could no longer be deterred only by the mere pronouncement of authoritative law with a method of increasing punishment. Modern therapeutic devices and preventive measures should be utilized in coping with this type of repeated crimes. To achieve the overriding objective of correction of repeated misdemeanants, Japanese specialists recommended the adoption of the system of indeterminate sentencing, by vesting the courts with a discretionary power in pronouncing such a sentence and increase in punishment.[48]

As the translated version of the latest proposal indicates, the Japanese are to deal with habitual recidivism as a part of recidivism. Since the former and the latter are closely related each other by nature, the Japanese approach to this issue deserves giving attention to the Final Report which treats persistent misdemeanants and persistent felons under different chapters. As to the criterion of deciding persistent misdemeanant, both American and Japanese proposals follow the third conviction test against the defendant and also with the court's duty to give a reason that a person is a habitual recidivist. However, the American requirement of "the third conviction against the defendant within five years" test under Section 3003(1) seems clear, while the Japanese counterpart may run into a difficulty in figuring out the third conviction against the defendant within how many years. As to the issue of computation of prior crimes, the Japanese wording seems to be better with "sentenced by a finally binding adjudication," while the U.S. version leaves out the finalized adjudication of a sentence. Japanese specialists are continuously concerned about two issues which may enlighten us.[49] First, in a case of accumulated crimes,[50] an indeterminate sentence should be imposed only if the punishment prescribed for the most serious crime contains recognizable habitual recidivism. This proposal is an outcome of arguments that all the crimes committed by an offender may not be considered of a habitual nature. Second, the Japa-

nese propose that the minimum term of less than one year should be treated as one year. This figure of one year is derived from a persuasive opinion that the maximization of correctional treatment for the habitual recidivists need at least be of this duration.

PROVISIONAL CHAPTER 36 SENTENCE OF DEATH OR LIFE IMPRISONMENT

It is believed that in the Final Report, abolition of the death penalty is recommended with life imprisonment as the maximum penalty for treason and intentional murder. This recommendation is highly commendable in view of a strong movement for abolition of the death penalty that is now developing throughout the world. This movement seemed to gain ground when Great Britain recently abolished the death penalty for cases involving murder. However, the Final Report's position on the death penalty issue is far from the final settlement. This issue will draw public attention until the final outcome of the bill on the Federal Criminal Code comes out.

In light of the importance of the death penalty issue, it will be worth my while to outline the gist of the debate on this issue in the Special Committee on Criminal law, the Japanese Legal System Deliberation Council.

The 1961 Japanese draft adopted the two following articles to cover the issue of death penalty: [51]

"*Article 32. Kinds of punishment*

"Punishments are of the following kinds:
"1. Death;
"2. Imprisonment;
"3. Confinement;
"4. Fine;
"5. Penal detention;
"6. Minor fine.

"*Article 34. Death penalty*

"1. The death penalty shall be inflicted by hanging.
"2. A person sentenced to death shall be incarcerated in a penal institution until his execution."

These two proposed provisions drew criticism from legal drafters who advocated the abolition of the death penalty during the course of deliberation of drafts in the Special Committee on Criminal Law. The original action taken by the Committee was to adopt the two provisions proposed by the 1961 Draft, taking into consideration the national sentiment and the current situation of crimes.[52] However, the Second Subcommittee, whose primary responsibility is to handle questions related to punishment, took a stand that even if the death penalty is to be maintained, its sentence and execution should be minimized. Thus, the subcommittee studied various means to achieve this goal. Various means include 1. to place a restriction on sentencing the death penalty involving murder; 2. to require a psychiatric test for death penalty cases; 3. to require unanimous decision of judges in sentencing the death penalty; 4. to adopt the system of postponed execution or suspended execution of the death penalty; and 5. to utilize clemency (reduced sentence) for death penalty cases.[53] The proposal to adopt the system of postponed execution or the suspended execution of the death penalty became the subject of serious discussion by the subcommittee. From this discussion, a draft was prepared to promote this system for the Special Committee on Criminal Law. It consisted of three measures.[54]

"1. In sentencing the death penalty, the court can render a sentence with the postponed execution of death penalty for five years if it can recognize the circumstance which would warrant the reservation of the execution of its penalty, taking into consideration the objective of the general standard concerning the application of punishment. A person whose execution of death penalty is postponed is to be detained in a penal institution to receive correctional treatments.

"2. When the period of postponed execution of death penalty runs out, the court, upon receipt of opinions of Deliberation Committee on Death Penalty, can change the death penalty to life imprisonment or confinement unless there is a need for the execution of the death penalty.

"3. Any offender whose death penalty is reduced to life imprisonment is not entitled to ask for a parole until after the expiration of 20 years from the date of the sentence of the death penalty."

The proposed system of the postponed execution of the death penalty was rejected in the main committee.[55] As it stands now in the Japanese code revision project, the death penalty is to be maintained.

The arguments developed both pro and con on the proposed creation of the system of postponed execution of the death penalty in the revision of the Japanese penal code offer valuable information on the issue of the death penalty. Perhaps, a summary of these arguments would serve our purpose.[56]

Advocates for the establishment of the system of the postponed execution of the death penalty presented a number of arguments. First, the current world-wide movement to either abolish or limit the death penalty has humanitarian meaning and considers one leading objective of punishment as the rehabilitation of offenders. The Japanese legal drafters should carefully consider this world trend. Second, there are some cases where actually the execution of the death penalty was not necessary because of the mental status of the offender, motive of the criminal act, offender's attitude after the commission of the crime and the dangerousness of the offender in the future. Third, by prescribing the death penalty provision in the code, and by delegating a discretionary power to the judges, the deterrent effect which the death penalty purported to have can be maximized. Fourth, based on the current figure that less than one percent of the offenders falling into the category of the death penalty have actually received the death sentence, further check on the execution of the death penalty would not decrease the deterrent effect of the death penalty. Fifth, clemency for the offenders who received the death penalty is seldom extended and is also not expected to be utilized in the future. Sixth, public opinion which originally supported the maintenance of the death penalty began to show a favorable reaction in adopting the system of the postponed execution of the death penalty.

Opponents to the establishment of the system of the postponed execution of the death penalty developed extensive arguments. First, at the present time, the courts render discreet death sentences and once the death sentence is rendered, there is definitely sound reason for it. Second, courts are currently applying a strict standard in rendering the death sentences and yet to promote a measure of not to execute the death penalty for cases which really warrant such penalty, would substantially decrease the deterrent power of the death penalty. Furthermore, if the majority of persons who received the death penalty could receive the postponed execution of the death penalty, then the institution of the death penalty will lose its purpose. Third, suppose the limited application of the death penalty is desirable. This could be achieved through actual trial practices. Fourth, if there is any special circumstance which warrants the postponement of the execution of the death penalty for an offender who deserves such postponement, a reduced penalty to life imprisonment by clemency should be designed. Fifth, it is, indeed, cruel, opponents argue, for an offender to wait for another five years to find out his destiny, The creation of the waiting period is inhuman. Sixth, when the judgment is to be made after the expiration of the five year waiting period to determine if the execution of the death penalty is necessary, records on the behavior of the offender during the past five years could become the basis of this judgment, but the five years are not enough to accurately ascertain the state of mind of the offender.

The basic idea of the postponed execution of the death penalty actually originated from the People's Republic of China where this idea has been in practice since 1951.[57] In mainland China today, the execution of all death penalty cases are postponed for two years from the date of official sentence. When the waiting period of two years expires, the sentence is to be changed into either an indefinite term of imprisonment, a definite term of imprisonment or the execution of the death. The change of the sentence is based on the report prepared by an agency. Historical records indicate that this system of the postponed execution of the death penalty was widely utilized in the Ming and Tsing dynasties through the institutions known as Chan Chien hou and Chiou Chien hou. When the death sentence was rendered by the magistrate, the offender usually had one to three years of waiting period, depending on the gravity of the criminal act committed, before the execution of the actual sentence which usually meant hard labor for life or enlistment in the troops serving in the frontier area.[58]

CONCLUDING REMARK

In concluding, I would like to compliment the work of the National Commission on Reform of Federal Criminal Laws which organized scattered federal statutes, court decisions, and common law doctrines, and incorporated them into an American federal Criminal jurisprudence. The Commission also carried out well the task of establishing principles and prescriptions for acts deserving punishment with the view toward protecting society and individuals and, at the same time, provided punishments in proportion to the gravity of these acts. The Final Report in the proposed format would certainly offer better service for the practitioners and the general public in the disemination of written law.

In the foregoing statement, I have made comments on the Final Report from the comparative perspective of the criminal codes of the Republic of China, Japan, Republic of Korea, and Thailand with specific reference to the current Japanese attempt to revise their penal code. The four countries were exposed earlier to the T'ang Code and Hindu Manu Code and lately to the Continental code system. For this reason, their experience would bring useful information for the improvement of the Final Report. A perusal of the Final Report leaves a strong impression that the traditional notion of punishment as the deterrence to criminal acts is no longer a principally dominant policy, but the major emphasis is on rehabilitation of offenders based on humanitarian belief and societal responsibility. There is an old Oriental saying that "the aim of punishment is to end the punishment." In this sense, the Final Report had made an advance toward this goal.

FOOTNOTES

1. The Penal Code of the Republic of China went through a major revision in 1935 and is still effective in Taiwan. See Criminal Code, Republic of China, Promulgated on January 1, 1935 and amended on October 23, 1954 (hereafter cited Chinese Criminal Code).

2. The Japanese Penal Code was originally enacted in 1907. The main body remains generally intact with a partial revision after the adoption of the 1947 Constitution. See the Penal Code of Japan, Law no. 45, April 24, 1907 as amended Law No. 124, June 30, 1964 (hereafter cited Japanese Penal Code).

3. Koreans enacted their penal code in 1953. See the Criminal Code of the Republic of Korea, Law No. 293, Promulgated on September 18, 1953 (hereafter cited Korean Penal Code).

4. The present Thai penal code has undergone one major revision, in 1956, since the adoption of the original code in 1908. The Penal Code of Thailand and Its Amendment, The Act Promulgating The Penal Code, 13th November, B. E. 2499 (1956) (hereafter cited Thai Penal Code).

5. Jean Escarra, Chinese Law (1936); Y. Noda, Introduction au droit japonais (1966); Chin Kim, Korea: Bibliographical Introduction to Legal History and Ethnology (1970); The Thai Bar Association, The Administration of Justice in Thailand (1969); Chin Kim, The Thai Choice-of-Law Rules, 5 International Lawyer 709 (1971).

6. See Appendix A. China, Japan and Thailand, during the later part of the 19th and early 20th centuries, have all faced a thorny question of how to abolish unequal treaties which were imposed earlier by the Western military powers. These treaties contained provisions for extraterritoriality which permitted Western powers to apply their own laws to their own nationals on the soil of China, Japan and Thailand. Needless to say, extraterritorial rights exercised by foreigners were an infringement of sovereignty and an affront to national pride. The best way left for these countries to eliminate unequal treaties was to introduce a Western oriented legal system in order to achieve quickly the respectability expected of a civilized nation as regards legal rules in the western world. The introduction of a foreign legal system was carried out rapidly and en masse without a well-coordinated effort to incorporate new ideas, doctrines and institutions into the then existing means of social control which had a long historical background. During the course of importing a foreign legal system, all four countries decided to follow the civil law system instead of common law. Their basic approach in achieving justice is still based on the civilian method although there has been a noticeable introduction of Anglo-American legal ideas, doctrines and institutions, especially since World War II. Their penal codes are profoundly influenced by the Franco-Germanic codes.

7. See Appendix B.

8. Final Report of the National Commission on Reform of Federal Criminal Laws (hereafter cited Final Report).

9. Y. Suzuki, Dainizi Sankoanno Sakuseito Bukaishingi: Part II, Jurist (No. 489) 117 (1971).

10. Id.

11. The American Series of Foreign Penal Codes, A Preparatory Draft for the Revised Penal Code of 1961, B. J. George, Trans., (1964) (hereafter cited Japanese Draft Penal Code of 1961), at 23.

12. The American Series of Foreign Penal Codes, the Korean Criminal Code, Paul Ryu, Trans., 15 (1960).

13. Article 12, Chinese Criminal Code; Article 38, I, Japanese Penal Code. Thus, criminal negligence could be punished in the following cases: Articles 116, 117.II, 122, 129, 209, 210 and 211. As to the Japanese concept of negligent offenses, see George Koshi, The Japanese Legal Advisor 150–168 (1970). Article 14, Korean Penal Code.

The Korean code introduces five crimes of negligent crimes: articles 170, 171; article 181; article 189; articles 266, 267, 268; and article 364. Section 59, Thai Penal Code.
14. Article 12.
15. Article 199, Japanese Penal Code.
16. R. Hirano, The Accused and Society: Some Aspects of Japanese Criminal Law in von Mehren, Law in Japan: The Legal Order in a Changing Society 285 (1963).
17. The American Series of Foreign Penal Codes, The German Draft Penal Code E 1962, Neville Ross, Trans., Sections 16–18 (1966).
18. Erstes Gesetz zur Reform des Strafrechts vom 25. Juni 1969 (BGBl. I. S. 645); Zweites Gesetz zur Reform des Strafrechts vom 4. Juli 1969 (BGBl. I S. 717).
19. E. Kimura, Hanzai: Part III, Jurist (No. 448) 105–108 (1970).
20. Id.
21. Id.
22. Id.
23. Articles 28–31, Chinese Criminal Law; Articles 60–65, Japanese Penal Code; Articles 30–34, Korean Penal Code; Sections 83–89, Thai Penal Code.
24. E. Kimura, Seihan oyobi Kyohan, Jurist (No. 449) 85–87 (1970).
25. Id.
26. R. Hirano, supra note 16, 290.
27. Section 84 reads: "Whoever, whether by employment, compulsion, threat, hire, asking as favour or instigation, or by any other means, causes another person to commit any offence is said to be the person employing another to commit an offence. If the employed person commits the offence, the person employing shall receive the punishment as principal. If the offence is not committed, whether it be that the employed person does not consent to commit, or has not yet committed, or on account of any other reason, the person employing shall be liable to only one third of the punishment provided for such offence."
28. Section 86 reads: "Whoever, by any means whatever, does any act to assist or facilitates, is said to be a supporter to such offence, and shall be liable to two thirds of committing the offence, even though the offender does not know of such assistance or facilitates, is said to be a supporter to such offence, and shall be liable to two thirds of the punishment provided for such offence."
29. Section 66, Thai Penal Code. Section 65 reads: Whenever any person commits an offence at the time of not being able to appreciate the nature or illegality of his act or of not being able to control himself on account of defective mind, mental disease or mental infirmity, such person shall not be punished for such offence. But, if the offender is still partially able to appreciate the nature or illegality of his act, or is still partially able to control himself, he shall be punished for such offence, but the Court may inflict less punishment to any extent than that provided by the law for such offence.
30. Y. Suzuki, supra note 9, 117–118.
31. Id.
32. Decision of the Great Senate for Criminal Matters of March 18, 1952 (2 B. G.H. St. 194).
33. Article 16.
34. Article 16.
35. Section 64.
36. E. Kimura, supra note 19, 105–108.
37. Id.
38. Id.
39. Id.
40. Section 80.
41. Section 81.
42. On this issue, Section 82, the Thai Penal Code, prescribes: Whoever attempts to commit an offence, but, on his own accord, desists from carrying it through, or changes his mind and prevents the act from achieving its end, shall not be punished for such attempt to commit the offence. But, if what he has already done comes under the provisions of law as an offence, he shall be punished for such offence.
43. Article 26.
44. Article 52.
45. Article 47–49, Chinese Criminal Code; Articles 56–59, Japanese Criminal Code; Articles 35–36, Korean Criminal Code; Sections 92–94, Thai Criminal Code.
46. Y. Suzuki, Recidivism, Jurist (No. 416) 127–132 (1969).
47. Id.
48. Id.
49. Id.
50. The Japanese Special Committee on Criminal Law is following closely Article 64, the 1961 Japanese Draft, which reads: Punishment for Accumulative Crimes. 1. When accumulative crimes, one or more of which are punishable by confinement or a heavier punishment, are to be jointly adjudicated, only the punishment prescribed for the most serious crimes shall be utilized in sentencing, provided, however, that the court shall not impose a sentence lighter than the minimum punishment prescribed for any of the other crimes. 2. The court may also impose cumulatively a fine or minor fine in cases falling within paragraph 1. As to the kinds of punishment, see infra note 51. A final draft adopted by the Japanese Special Committee on Criminal Law spells out imprisonment and confinement. Article 35. Imprisonment. 1. Imprisonment shall be either for life or for a limited term; such limited term shall be not less than three months nor more than 15 years. 2. Imprisonment is incarceration in a penal institution. 3. A person who was sentenced for an imprisonment is imposed with work and with other necessary treatment for the correction. Article 36. Confinement. 1. Confinement shall be either for life or for a limited term; such limited term shall be not less than three months nor more than 15 years. 2. Confinement is incarceration in a penal institution. 3. A person who was sentenced for a confinement may perform work upon petition and shall receive other necessary treatment for the correction.
51. The American Series of Foreign Penal Codes, supra note 11, 30–31.

52. Y. Suzuki, Dainizi Sankoanno Sakuseito Bukaishingi: Part I, Jurist (479) 129 (1971).
53. Id.
54. Y. Suzuki, supra note 9, 118–119 (1971).
55. Id.
56. Id.
57. D. Ihida, Chukokuno Shikeishikouyoseido, 42 Horituziho 38–42 (1970).
58. Id.

Appendix A.—Traditional Chinese Criminal Law and Its Radiation Into Japan and Korea

The penal system of traditional China was a mesh between the moral precepts of Confucianism [1] and the framework of a set of laws with physical sanctions created by the legalists of the Ch'in dynasty (ca. 481–221 B.C.).[2] An early approach toward grouping and prescribing penal provisions emerged about 2255 B.C.[3] It was not, however, until the T'ang dynasty (ca. 618 A.D.) that a more complete code was drawn up, called "T'ang Lu Su Yi" meaning "Annotated Code of the T'ang Dynasty." [4] This code consisted of twelve parts, half of which covered criminal law and procedure. The T'ang code was not only applied in China but it was also introduced in Japan, Korea and Vietnam.[5] Its impact on the social institutions of these three countries is still felt. The expanded version of the T'ang code was "Ta Tsing Leu Lee" which contained twenty-eight parts, eleven of which were related to criminal law and procedure.[6] "Ta Tsing Leu Lee", the last penal code of traditional China, had an extensive list of crimes and punishments with the inclusion of over eight hundred capital offenses.[7]

Confucianism was a significant force in shaping the criminal law of traditional China. Basic to maintenance of the family according to Confucius was proper respect and reverence to elders. The criminal law of China sought to enforce this proper respect by punitive sanctions. A person who caused his parent's death, directly or indirectly, intentionally or accidentally, was liable to capital punishment.[8] If an offspring directly and intentionally killed a parent, he received the most severe capital punishment—being sliced to pieces. Other aspects of the social relationships outlined by the Confucian "five relations" received extensive attention in the "Ta Tsing Leu Lee." [9] Punishments for violations of rules to protect the father, sovereign, elder, brother, and friend were particularly severe. Punishment in traditional Chinese law "was the dosed retribution for disruption of the natural order. The severity of the punishment was supposed to correspond to the seriousness of the disturbance of the natural harmony." [10] This accounts for the gradation of punishment for the offenses against the parents. Although intentional and accidental causing of death were both subject to capital punishment, a sentence of being sliced to pieces for the intentional act indicated that this was a greater disruption of natural harmony than an accidental act, which carried a sentence of decapitation.[11]

The Western oriented penal code as a means of social control is not functioning fully in the Republic of China, Japan and the Republic of Korea where such social norms as the family, community, moral precepts and religious beliefs are also functioning. This seems to be true in religious Thailand where Hindu jurisprudence, the ancient Manu code, still influences the social institutions. Legal norms as expressed in Japan in its penal code imported from the West are still partially an oblique. An author's observation that "even a cursory glance that a large number of acts, particularly those involving sexual crimes and crimes against the family, fall outside the bounds of criminality in Japan although they are rather widely punished in Europe and the United States," describes this discrepancy between the law on the book and the law in action.[12]

In terms of layman participation in the administration of justice, the jury system is believed to be an ideal institution. However, the institution of jury was introduced in Japan, but defunctioned.[13] One of the reasons is that the promotion of a jury system would be the cause of hatred or strife among neighbors or friends and very few Japanese accused of crimes wished to be judged by their neighbors. The judgment by neighbors would certainly create a greater disruption of natural harmony.[14]

An illustration of resilient tradition which is somewhat alien to the strict individualistic morality of Christianity is to be found in the patricide clause

which is prescribed in the penal code of three East Asian countries.[15] Different penalties are assessed for physical assaults resulting in death against a lineal ascendant than are assesses for the same offense against all others. The constitutionality of this patricide clause was tested by involving the "all of the people are equal under the law" clause of the Japanese Constitution before the Japanese Supreme Court in 1950. This case is known as the Fukuoka patricide case, and was examined in light of the new rights granted in the 1947 Constitution. By sanctioning the traditional roles of filial piety, and the article 205, the Criminal Code, as a reasonable classification based on the character of the offender, the Court ruled with the following words:[16]

". . . the original judgment argues that the affection between parents and children is not a matter to be provided by law and there is no reasonable ground to provide for discrimination by law about the matters relating to relatives, though such matters might be considered in weighing penalties in individual cases. But, if emphasizing the filial morals towards parents is feudalist and anti-democratic and accordingly any law based thereon is unconstitutional as the original judgment concludes, we must say it is also unconstitutional to consider such filial morals as one of extenuating circumstances when weighing penalties in order to render a judgment. That is to say, if such circumstances can be considered constitutionally, we must say it is not unconstitutional to go a step further and stipulate it in the form of law."

Another illustration of resilient tradition is a typical oriental way known as "saving face" which is still preserved in the legal practice. "Saving face" is difficult to define, but central to the existence of most Asians, it is a confused mixture of dignity, pride, self-respect. It is concerned more with the form than the substance of life. Japanese courts, for instance, have the authority to restore the reputation of the injured party along with awarding monetary damages, which includes an explanation that the added remedy of restoration of reputation is awarded at the behest of the sufferer and is for the purposes of rehabilitation. The means of restoration of the reputation of the sufferer is accomplished in one of two ways, either a verbal apology by the wrongdoer in open court or a letter of apology printed in a newspaper.[17] The Japanese seems to be putting more emphasis on the relationship of the injured party with his peer group by allowing such a remedy in that it allows his peer group to be fully informed and to have knowledge of his exonoration of any wrongdoing and thus allows for the unjustly accused to be reintegrated back into society.

With the growth of industry and the cities, urbanization is in progress in Taiwan, Japan, Korea and Thailand as elsewhere. Thus, traditional family and community ties are loosened and individualism is being advanced. In this process, law is no longer a social force insuring that individuals do not upset the natural harmony in the society. As a result, the role of Western oriented criminal law as an instrument of social control will become less moralistic and more functional and also more pervasive.

Footnotes

[1] As the basis of human life, Confucianism consists of five principles. They are loyalty to the King, filian respect for one's parents, harmony of husband and wife, respect for elders, and true friendship. Confucius taught that the whole duty of man consisted in preserving the right relationship towards his fellow man. Its results were to produce cultured and urbane agnostics with a stoic tendency and a great insistence on the repression of all emotions. The outstanding contrast between Western political thought and Confucianism is the Western concept of the supremacy of law and the Confucian concept of a good ruler. While Western political thought culminates in the sovereign law-making body, representative of public opinion, Confucianism attains its richest fruition in the wise, virtuous, and just ruler. Confucious maintained that the rule of virtue is above the rule of law. The system of legal justice, however, is necessary to preserve social order in the present age of practical politics so long as humans can not be regulated voluntarily by the teaching of virtue and rectitudes as Confucious envisioned.

[2] M. J. Meijer, Introduction of Modern Criminal Law in China 3 (1967).

[3] H. M. Wang, Chinese and American Criminal Law: Some Comparisons, 46 Journal of Criminal Law, Criminology and Police Science 796, 801 (1956).

[4] Id.

[5] R. Hirano, The Accused and Society: Some Aspects of Japanese Criminal Law *in* Von Mehren, Law in Japan: The Legal Order in a Changing Society 291 (1963).

[6] Ta Tsing Leu Lee; being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China, Sir George T. Staunto, ed., (1966).

[7] Meijer, supra note 1, 28.

[8] E. Alabaster, Notes and Commentaries on Chinese Criminal Law, and Cognate Topics 158 (1968).

[9] B. Schwartz, On Attitudes toward Law in China *in* Cohen, The Criminal Process in the People's Republic of China 1949–1963, 68 1968).
[10] Derk Bodde, China's First Unifier 37 (1938).
[11] Id.
[12] R. Hirano, supra note 5, 280–281.
[13] K. Takayanagi, A Century of Innovation: The Development of Japanese Law, 1868–1961 *in* von Mehren, Law in Japan: The Legal Order in a Changing Society 21–22 (1963).
[14] H. W. Wang, supra note 3, 798; American Series of Foreign Penal Code, The Korean Criminal Code, Paul Ryu, Trans., 4 (1960).
[15] Articles 272, 280, Criminal Code, Republic of China, Promulgated on January 1, 1935 and amended on October 23, 1954; Articles 200, 205, 218, The Penal Code of Japan, Law No. 45, April 24, 1907 as amended Law No. 124, June 30, 1964; Articles 250 II, 257 II, 258 III, 259 II, 260 II, 273 II, 276 II, 277 II, 283 II, The Criminal Code of the Republic of Korea, Law No. 293, Promulgated on September 18, 1953.
[16] Supreme Court of Japan, Judgment Upon Case of Bodily Injury Resulting in Death to Lineal Ascendant Under Article 205–2 of the Penal Code (Series of Prominent Judgments of the Supreme Court Upon Questions of Constitutionality No. 3) 4 (1959).
[17] Ouchi, Defamation and Constitutional Freedom in Japan, 11 Am. J. Comp. L. 73 (1962).

Appendix B.—Current Attempt to Revise the Japanese Penal Code

In 1956, the Ministry of Justice of Japan resumed its pre-war project for the complete revision of the penal code, and "the Preparatory Commission for the Revision of the Penal Code (Keiho Kaisei Jumbikai)" was organized for this purpose. The Commission worked for over five years and completed its task in 1961 by publishing its final work entitled "A Preparatory Draft for the Revised Penal Code of Japan." [1]

The preparatory draft of 1961 preserves basic propositions underlying the articles of the Franco-Germanic oriented present penal code which was adopted in 1907 [2] and went through some changes in 1947.[3] The draft consists of two parts, that dealing primarily with general problems common to all crimes (general provisions) and that defining specific crimes and prescribing their punishment (specific crimes). The part dealing with specific crimes is arranged in a comparatively logical and systematic order in accordance with the interest protected, i.e., whether the deed is directed against the community at large and the state, or whether it is directed against the individual.[4]

In May 1963, the Minister of Justice, in light of 1961 draft, inquired the Legal System Deliberation Council, a government subsidized organ, "to investigate whether or not an overall revision of the penal code is necessary; and when the Council finds such a revision necessary, "to make a draft on the revision and present it to the Minister of Justice." [5] Pursuant to the Minister's inquiry, the Council established the Special Committee on Criminal Law which commenced its work in September 1963 by creating five sub-committees. Their primary assignments are: the first sub-committee is to deal with general requisites of crimes; the second, punishment; the third, security measures; the fourth, crimes related to the state and the society; and the fifth, crimes related to the individual.[6] By the end of 1969, each subcommittee completed its first draft which became the basic material for the deliberation of the parent committee. Most of the basic issues embodied in the first draft of each subcommittee were derived from the "A Preparatory Draft for the Revised Penal Code of Japan." Meanwhile the parent committee examined the first draft and completed its deliberation in February 1970. Taking into consideration the views presented and new issues raised during the course of deliberation in the main committee, the subcommittees began working on their second draft which were completed by March 1971. When the Special Committee on Criminal Law finishes its deliberation on the second draft, the final draft will be submitted to the general meeting of the Legal System Deliberation Council which will confine its deliberation to the basic issues. Therefore, the final decision of the Council is expected soon.[7] The final draft of the Council may become the government proposed bill on the revision of the penal code and the Diet is to pass its judgment on it. Whether the Japanese cabinet will accept the draft on the revision of the penal code proposed by the Legal System Deliberation Council remains to be seen since a younger generation of criminal law scholars has began to criticize the now almost complete Council's draft on ideological grounds.[8]

By observing the progress of the work within the Special Committee on Criminal Law, Legal System Deliberation Council, the main direction of the overall revision of the Japanese penal code can be ascertained. From the

standpoint of nullum crimen, nulla poena sine lege, efforts are made to strictly define the component elements of crimes. The text of the draft is to be written in easily readable literal style for the general public. Specific provisions are written in to spell out the general principles, but are kept within a limit so as not to deter the development of court decisions and academic theories. New provisions are created to cover the new types of crime which emerged out of the changing social conditions. Mala per se crimes which are currently controlled by way of special legislation are incorporated into the draft. In view of the development of the ideas related to the penological policy and therapeutic measures for crimes, the correctional and rehabilitative functions of the criminal law are rationalized. Throughout the work of drafting, a continuous attempt has been made to maintain a proper balance between theory and practice.[9]

As stated earlier, proposed changes are mostly derived from the 1961 draft, but some deviations are noticeable. From the point of improving the treatment of offenders, the contents and terms of Freiheitsstrafe (penal servitude) were re-examined. Security measures went through a substantial revision. Such proposals made by 1961 draft as application of fines, order to reparation and the term of parole were rejected. Furthermore, revision, deletion and addition to the special crimes proposed by the 1961 draft were made.[10]

FOOTNOTES

[1] American Series of Foreign Penal Codes, Preparatory Draft for the Revised Penal Code of Japan, E. J. George, Jr., ed., 1–18 (1964).
[2] Law No. 45, April 24, 1907.
[3] Law No. 124, October 24, 1947.
[4] American Series of Foreign Penal Code, supra note 1, 21–104.
[5] Y. Suzuki and others, Keiziho: Ho Kaiseino Doko, Jurist (No. 477) 73 (1971).
[6] Id. 74.
[7] Y. Suzuki, Dainizi Sankoanno Sakuseito Bukaishingi: Part I, Jurist (No. 479) 128 (1971).
[8] R. Hirano, Keiho Kaiseianno Hihanteki Kento, The Hogagu Seminar (No. 192) 9–13 (1972).
[9] Y. Suzuki and others, supra note 5, 74.
[10] Id. 74–75.

DUKE UNIVERSITY,
RULE OF LAW RESEARCH CENTER,
Durham, N.C., March 6, 1972.

Hon JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: In response to your letter of February 3, 1972, I have the honor to submit my observations to some of the questions included in it.

I remain, Dear Senator,
Sincerely yours,

KAZIMIERZ GRZYBOWSKI,
Professor of Law and Political Science.

OBSERVATIONS ON THE DRAFT FEDERAL CRIMINAL CODE TITLE 18 U.S. CODE

(1) The division of the Code into three parts (General Provisions, Sentencing and Specific Provisions) is the result of the effort to combine in one piece of legislation both the substantive criminal law in its most important aspects, as well as that part of the adjective criminal law (sentencing) which is most closely related to the application of the substantive criminal law. Hence three parts, of which sentencing is a part of the criminal adjective law. In effect, the Draft is organized in a manner which conforms to the overall practice of foreign criminal substantive codes, namely the general part which established general principles of criminal administration of justice and of penal policy and the catalog of federal offenses according to their various classes.

The review of the modern codes beginning with those which were enacted in the interwar period demonstrates that this method is uniformly followed by modern legislators. The most recent group of the European Codes (codes en-

acted by the union republics of the Soviet Union) also follow a bipartite division.

(2) The Draft of the Code compares favorably with other modern criminal codes also as regards the legislative technique. Its provisions are succinct, precise and to the point. It differs, however, from other pieces of modern criminal legislation by great numbers of blank sections, to leave room for the incorporation of future additions to the code, without distorting its organization of cohesion.

The question arises to what extent incorporation of the later statutes into the code is necessary. Perhaps in this country, in view of the fact that for the first federal courts are to receive a code in which basic principles of the administration of justice, of the judicial process and of the penal policy are systematically stated this is a proper thing to do. In European countries such a method is not necessary, because it is always understood that all criminal statutes are to be applied with reference to the general provisions of the criminal code, which makes the incorporation unnecessary. In the Soviet Union where the practice is to incorporate new statutes into the code, new criminal legislation, enacted in order to respond to an emergency situation (usually) distorts the code and its organization. One may avoid the distortion should the judiciary be trained in the conviction that the general part of the criminal code is a codification of due process of law in criminal law, and that it applies to later statutes as well. In that case a simple statement in the general part of the draft to that effect would take care of that problem. Otherwise, I think that the practice of incorporation may be necessary, and reserving a number of sections for future statures may be a reasonable precaution.

(3) Modern criminal law is based on the proposition that the purpose of punishment is primarily to correct and only in exceptional cases to eliminate. As a consequence, liability to punishment, as well as its type and severity, are related to the form and nature of subjective guilt, which modern criminologists consider the surest guide to the personality of the offender. Absolute liability (objective criteria of responsibility) is little known to the European criminal law (except in special laws introduced by the totalitarian regimes). The commission of a punishable act requires intent, in its various forms, or negligence. As a rule, a punishable act requires the presence of intent in order to determine culpability. If the offender was negligent, he is liable to punishment if the law expressly provided for it. So for instance, article 19 of the Danish Criminal Code (1930) stated: "As regards the offenses dealt with in this act, acts which have been committed through negligence on the part of the perpetrator shall not be punished except when expressly provided for." Another example is the Norwegian Criminal Code of 1902 which stated the same principle in a somewhat different manner (article 40): "Whoever acts without a malicious forethought is not subject to punitive provisions of the present statute, unless it is expressly provided for, or undoubtedly follows that the omission is punishable." The Italian pre-fascist code also stated (article 45) that a person is not subject to punishment if he did not intend (non abbia voluto) the result which constitutes a criminal act, unless the law provides otherwise."

The Greek Criminal Code of 1952 (one of the most modern pieces of legislation) which included in its provisions a short theoretcial treatise dealing with various aspects of guilt and forms of criminal acts, introduced a small addition to the generally accepted limitation of criminal responsibility for acts considered punishable but committed without direct intent. Article 15 of this Code States: "When the law requires that a specific consequence should occur as an element of a criminal act, the non-prevention of that consequence shall stand for causation only when the offender was under special duty to prevent that consequence."

In general historical perspective it may be stated that as legislative techniques developed types of guilt were related to the classificatioon of offenses. Crimes and misdemeanors as a rule require intent. In expressly provided circumstances, misdemeanor may be declared punishable without intent but through negligence, while petty offenses (police offenses) are liable to punishment without regard for the type of guilt (absolute responsibility) except when the law provides otherwise.

A full statement of the various forms of guilt seems to have been included for the first time in the Russian (imperial) Code of 1903, and its classification

has become almost a rule in modern codes. (Yugoslav, 1927) and Polish Codes (1932) have repeated it almost without change. According to the formula of the 1903 Russian Code, which contains all four forms of guilt, an offense should be considered intentional not only when the offender desired its commission but when he is aware of the possibliity of the result (knowingly) which constitutes the criminal nature of the act. An offense is committed by negligence not only when the offender failed to foresee it, although he could or should have foreseen it, but also when, having foreseen the possibility of the result, he lightminded supposed that could present its occurrence (negligence and recklessness).

Provisions of the Italian Code of 1930 (article 42) represent another type of formulation of the same set of ideas: "No one may be punished for an act or omission deemed by the law to be an offense, unless he has committed it with criminal intent, except in cases of transferred intent (knowingly) or crimes without criminal intent, which are expressly provided for in the law. The law determines cases for which the offender is accountable as a consequence of his act of commission or omission. In regard to contravention (petty or police offense) each person is answerable for his knowing and willful act or omission, whether it be with or without intent."

Intent as a basis for the determination of innocence appears only in the form of various circumstances which excuse the commission of an otherwise criminal act, self defense, emergency, or which will reduce culpability.

Certainly the type of intent shall always play an important role in sentencing and imposition of penalty, but as European courts are given in most cases, great powers (within statutory limits), to increase or reduce the penalty, generally codes do not go beyond the general statement of various circumstances affecting the imposition of the penalty. However, as a rule they determine rather closely circumstances (in which again intent plays an important role) which authorize courts to exercise judicial pardon.

Provisions defining culpability function properly only if they are systematically related to the special part which contains definitions of separate offenses, in which the degree of guilt (culpability) is matched with a penalty depending upon the seriousness of the offense, crimes and misdemeanors always calling for culpable conduct (guilty conduct) and only infractions penalized without presence of guilt (absolute responsibility). Unless this is systematically done, the possibility arises (as it is quite frequent in the Soviet Criminal Code) the defendants are punished for serious crimes and misdemeanors unintentionally committed (without culpable conduct).

The last question which must be considered in this connection is the question of culpability for omission to act. It is an increasingly important problem in the modern society, where professional responsibility for failure to act endangers important values, e.g. life and security, safety of travel, etc., etc. At the foundation of this approach the belief is that profession calls for greater alertness in the member of the profession, than in the member of the public.

The draft deals of the responsibility for omissions in a section separate from one containing the definition of culpability. One may suggest that culpability for omissions should be treated jointly with culpability in its various forms.

(4) Causation is handled in modern criminal codes in connection with the definitions of culpability. There must be a direct connection between the conduct (culpable) and the result in order that liability be established. Section 305 dealing with causation separately from intent, adds nothing useful. It should be omitted.

(5) There is a basic difference in approaches to legislative solutions in the civil law and common law countries, due to the fact that in civil law countries substantive law includes all questions of crime, guilt, liability or absence of liability or belonging to the same class of problems, while in the common law tradition many of these questions are still treated as procedural and therefore cosidered as defenses rather than components of the system of events which establish guilt or innocence or absence of criminal liability. Naturally, this is a theoretical problem rather than one of practical, nevertheless, on occasion primarily, it may result in a different solution.

A matter of principle in civil law countries, the court which controls evidence calls for a testimony of a psychiatrist to examine the defendant. Prosecution or defense may only raise the issue of culpability because of the mental

disorder or other facts diminishing or affecting culpability. Obviously, the nature of mental disturbance is an important factor. Somebody who is permanently mentally diseased presents a different problem in terms of criminal justice, than somebody who occasionally (even if regularly) gets drunk. In this last case, it will be the duty of the defense to raise during the trial points which may indicate reduced culpability. Hence, also a different approach to mental disease and drunkenness and similar events (abuse of drugs) in individual cases.

On the whole, foreign codes distinguish between two situations. Should the court come to the conclusion that the defendant, in spite of his mental condition is liable to punishment—the sentencing will take place. However, the court may at the same time prescribe that penalty must be combined with a proper treatment. Should the court decide that the defendant cannot be declared liable, it still may decree a proper treatment, or even isolation of the defendant in a mental institution for a definite or an indefinite period. The purpose of this approach is to introduce the element of expertise and combine it with the judicial control of the administration of justice. It is for the psychiatrist to say whether at the time the offense was committed the condition of the accused was such as to affect his liability. It has not been desired, however, that the court should be bound to exempt the offender from punishment where according to the medical report it is a case, say, of insanity. After all, the question of culpability (a legal question) is for the lawyers to decide. (See Danish Criminal Code, the Italian Criminal Code of 1930 and the Creek Code of 1952).

This is also the position of the Soviet Criminal Code of 1960 which makes the application of various measures of medical and educational character dependent upon the gravity of the offense. In other words, most of the modern civil codes treat cases where mental or other disorders prevent applicaton or normal penalties to the offender as a separate way of dealing with offenders. In the respect the draft follows the prevailing approach to this problem.

There is also a different approach which treats all offenders (particularly those incurring criminal liability for serous crimes) as representing social danger. The duty of the court is to consider criminal offenses primarily in terms of the degree of their social danger. First code of this type was the draft code of Ferri (1921) prepared by a founder of the School of Social Defense. The only code which systematically followed his teachings is the Cuban Code still in force. There are traces of the social defense approach also in the Criminal Code of Argentina and in the Italian Criminal Code of 1930. Under that system there is no difference between penalties and various measures aiming at the rehabilitation, resocialization, reeducation or isolation of the defendant. All of them are applied in order to protect the social order and social values.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., March 13, 1972.

Senator JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: In response to your letter of February 3, I am enclosing a description of the Criminal Code of the Russian Soviet Federated Soviet Republic (RSFSR), which is the largest of the 15 republics that constitute the Union of Soviet Socialist Republics (USSR).

Given the relations between the United States and the Soviet Union, it might be argued by some that Soviet experience in the field of criminal legislation can safely be ignored by us. On the other hand, it would surely be a source of embarrassment if the proposed Federal Criminal Code were to be inferior in quality to the Soviet criminal codes.

Apart from such considerations, the fact is that the RSFSR Criminal Code, adopted in 1960 after many years of discussion and drafting, represents a modern codification of a high quality and deserves to be considered in connection with the proposed Federal Criminal Code.

I take the liberty of referring you to the translation of the RSFSR Criminal Code, by James W. Spindler and myself, and to the Introduction to it by myself, in Harold J. Berman and James W. Spindler, Soviet Criminal Law and Procedure: the RSFSR Codes (Harvard University Press, 1966).

If I can be of further help to the Subcommittee, please do not hesitate to call on me.

Yours sincerely,

HAROLD J. BERMAN,
Professor of Law.

MEMORANDUM CONCERNING THE CRIMINAL CODE OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC (RSFSR) AND ITS RELATION TO THE PROPOSED FEDERAL CRIMINAL CODE NOW UNDER CONSIDERATION IN THE UNITED STATES SENATE

(By Harold J. Berman*)

The following memorandum contains answers to questions asked in a letter of February 3, 1972 by Senator John L. McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate.

The memorandum concerns the RSFSR Criminal Code, which was adopted in 1960. The RSFSR is the largest of the 15 union republics of the Union of Soviet Socialist Republics (USSR). Each of the union republics has its own criminal code; however, they are all quite similar to each other, and all are based on Fundamental Principles of Criminal Legislation valid throughout the USSR.

The contents of the memorandum follow, with some variation, the order of the questions posed by Senator McClellan.

Questions (1) and (8):

The Criminal Code of the RSFSR does not follow a tripartite division such as is proposed for the Federal Criminal Code. Instead, there are two parts: a General Part and a Special Part. The General Part would appear to correspond to the material in Parts A and C of the proposed Federal Criminal Code; i.e., it covers General Provisions and Sentencing. The Special Part defines specific crimes and imposes penalties—which would appear to correspond to Part B of the proposed Federal Criminal Code.

There are twelve chapters in the Special Part of the RSFSR Criminal Code, arranged in an order roughly corresponding to the seriousness with which the lawmaker views crimes of various types. Within each chapter, specific crimes of the type contained in the chapter are also listed in an order roughly corresponding to their seriousness.

The following is a table of contents of the Special Part of the RSFSR Criminal Code:

Chapter I. Crimes Against the State
  1. Especially Dangerous Crimes Against the State
  2. Other Crimes Against the State
Chapter II. Crimes Against Socialist Ownership
Chapter III. Crimes Against Life, Health, Freedom, and Dignity of the Person
Chapter IV. Crimes Against Political and Labor Rights of Citizens
Chapter V. Crimes Against Personal Ownership of Citizens
Chapter VI. Economic Crimes
Chapter VII. Official Crimes
Chapter VIII. Crimes Against Justice
Chapter IX. Crimes Against the System of Administration
Chapter X. Crimes Against Public Security, Public Order, and Health of the Population
Chapter XI. Crimes Constituting Survival of Local Customs
Chapter XII. Military Crimes

Question (2):

The articles of the RSFSR Criminal Code are numbered successively 1–269. There are no "blanks."

Additions are made by appending a dash and numeral to an article number: *e.g.*, Article 213–1, on the crime of stopping a train, was later inserted after Article 213, on violation of transport regulations.

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*Professor of Law, Harvard Law School.

Question (3):

The provisions of the RSFSR Criminal Code dealing with kinds of culpability are contained in Chapter 3 of the General Part. Crimes may be committed either intentionally or negligently. Intent is of two kinds, which roughly correspond to our categories "intentionally" and "knowingly." Negligence is also of two kinds, which roughly correspond to our "recklessly" and negligently." However, negligence is defined in subjective terms: the actor is held to a standard based on his own education, intelligence, etc.

Where a given crime may be committed either intentionally or negligently, the fact that it was committed negligently and not intentionally will bear upon the sentence (within the range of penalties listed in the provision of the Special Part defining the crime) only in a general way. In determining punishment, the court is required to take into account all circumstances of the case and of the defendant's personality. Also there is provided in the Code a list of mitigating and aggravating circumstances, relevant to the assignment of punishment.

Question (4):

Causation is not expressly defined in the RSFSR Criminal Code.

Question (5):

Article 11 of the RSFSR Criminal Code provides that a defendant "shall not be subject to criminal responsibility" if, at the time the crime was committed, he was "in a state of non-imputability." This state is defined as one in which the defendant "cannot realize the significance of his actions or control them because of a chronic mental illness, temporary mental derangement, mental deficiency, or other condition of illness." The Article further states that "compulsory measures of a medical character may be applied to such a person by order of the court." It would thus appear that non-imputability does not, automatically, trigger commitment to a mental institution for observation and treatment; the language of Article 11 is "may." However, the corresponding articles in the RSFSR Code of Criminal Procedure use the term "shall" (Article 403).

The procedural aspects of the insanity defense are likwise to be found not in the Criminal Code but in the Code of Criminal Procedure. Article 79 of the Code of Criminal Procedure provides that expert examination shall be obligatory to determine the suspect's mental state when there is doubt as to his imputability. Article 404 of the Code of Criminal Procedure requires a preliminary examination (1) of the circumstances surrounding the alleged criminal act and (2) of the personal history of the accused; participation of a forensic psychiatric expert is required once there is sufficient data that the accused actually did the act with which he is charged. There is no reference in the Code to a "government psychiatrist" or to "defendant's psychiatrist."

Question (6):

Article 12 of the RSFSR Criminal Code provides that intoxication shall not be a defense to a crime; indeed Article 39 provides that drunkenness is an "aggravating circumstance" to be considered in sentencing.

Article 62 deals with the problem of "compulsory measures of a medical character" for "alcoholics and drug addicts." "Compulsory therapy" is to be applied regardless of whether or not the defendant is punished, may extend beyond termination of a sentence, and concludes when the court approves a proposal to that end from the concerned "medical institution." Thus, such compulsory treatment is not to be thought of as an alternative to the normal punishment. The Article requires a petition from any of certain social groups before compulsory treatment will be administered by court order. Where a defendant is not to be deprived of liberty, the court may "establish a curatorship for him," again providing that a social organization or collective so petitions.

Question (7):

Draft Code 603–607 deal with self-defense and the use of force in much greater detail than does the RSFSR Criminal Code, which only sets broad standards. Moreover, the standards are rather different.

Article 13 of the RSFSR Code provides that, even if an act meets all the standards provided for in the General and Special Parts, it shall not be a crime "if it is committed in necessary defense." "Necessary defense" is any act

that protects (a) the Soviet state, (b) social interests, (c) the person or rights of the defender, or (d) the person or rights of another person. The harm thus caused by "the defender" must not be clearly disproportionate to the character and danger of the infringment that would otherwise have been caused to the persons or interests listed above.

Article 14 deals with the defense of "extreme necessity." An action committed in "extreme necessity" is one to eliminate a danger which threatens (a) the interests of the Soviet state, (b) social interests, (c) the person or (d) the rights of the person or (e) the rights of other citizens. Article 14 also requires that the "danger cannot be eliminated by other means" and that "the harm caused is less significant than the harm prevented."

The amount of (and justification for) use of force also plays a role in other important articles used in affixing blame. For example, Article 38 ("Circumstances mitigating responsibility") provides, in 38(6), that even where the defendant may not avail himself of the provisions of Article 13 because he used excessive force, such use of force for the purposes there described is, in itself, a mitigating circumstance.

Examples of the Code's concern with amount of (and justification for) use of force are quite plentiful within the Special Part of the Code. For example, the articles on homicide in Chapter 3 of the Special Part provide for some significant distinctions based on some of the considerations outlined above. Intentional homicide is punishable by penalties ranging from death to three years' deprivation of freedom, depending on the aggravating or mitigating circumstances involved (Articles 102 and 103). But the Code provides for an even *lower* penalty than might be achieved by the operation of Articles 103 and Article 38(6), by specially providing that homicide "committed while exceeding limits of necessary defense" is punishable by deprivation of freedom for no more than two years or by "correctional tasks" for no more than one year. (Article 105). (The concept and mechanics of the punishment of "correctional tasks" is explained in the answer to Question (17)(b).)

In summary, then, it may be noted that the RSFSR Criminal Code sets general standards rather than enunciating specific rules. However, in certain areas, as in homicide, certain specific application of the rules (in relation to punishment) is given.

It is also interesting to note that Articles 13 and 14 and 38(6) in the General Part do not draw distinctions based on the relationship of threatened party to the defendant himself. Article 13 provides that the defendant may use certain force to protect the "person or rights" of "another person," without specifying relationship. Article 14 is similar, though limited to "rights ... of other citizens." The significance of the relationshiip of the threatened one to the defendant is manifested only in particular areas of the substantive criminal law of the Special Part, and then only in an indirect way. For example, if unlawful actions on the part of the victim result or could result in "grave consequences for [the defendant's] near ones" and if these actions provoke "a state of sudden strong mental agitation" that persists during defendant's use of force on the victim, much reduced maximum penalties are provided (Articles 104, 110).

Question (9), (a) (b) (c):

There are several provisions in the RSFSR Code relating to suspension of sentence. Article 44 provides that "if the court, taking into consideration the circumstances of the case and the personality of the guilty person, becomes convinced that it would be inappropriate for the guilty person to serve punishment, it may decree the conditional nonapplication of punishment"; the court is required to state its reasons therefor. The decree is conditional on the defendant's not committing "a new crime of the same kind or of equal gravity." The probation period is set for a period between one and five years. The most interesting feature of the Article is probably that relating to control of the defendant during the probation. Upon petition or "with their consent," the court may make a particular collective or social organization responsible for carrying out educational work with the defendant. After not less than half the term of probation has passed, the remainder may be reduced upon petition of the responsible collective or social organization.

Articles 41 and 45 when taken together indicate that if defendant commits a new crime during the period of probation, sentences for both crimes are to be cumulated.

A tangentially related matter is given in Article 50 of the Code, which empowers a court to relieve a defendant of any criminal responsibility when, "as a result of a change in the situation, the act committed by the guilty person has lost its socially dangerous character or the person has ceased to be socially dangerous." Article 52 is akin to these provisions but much less sweeping in its scope; it provides for suspension of sentence for defendants accused of minor crimes when the defendant has "sincerely repented." In the event of application of this Article, the defendant is released on surety to the charge of a social organization or collective, providing that they so petition the court. Article 52, like Article 50, relieves the defendant of criminal responsibility but it appears to operate only prior to trial, and Article 52 may not go into effect if the accused has previously been convicted of an "intentional crime" or has already been released on surety.

Suspension of the execution of sentence is also provided for in the Code but only in rather unusual situations: for example, (1) when the defendant is serving in the Army or "subject to call-up or mobilization" (Article 46), and (2) when the defendant becomes "nonimputable" (i.e., non-responsible) after a trial (Article 11).

Question (9)(d):

Sentences are not indeterminate. Aside from the death penalty, no sentence ever exceeds twenty years. It is impossible for any sentence to exceed a twenty year total, even where different types of sentences are consecutively applied for a single crime, and even under the provision for cumulation of sentences for two or more separate crimes. Other than the death penalty, sentences exceeding twenty years are thought to be cruel, inhumane, and counter-productive.

(e) There are no "special extended term prison-sentence" provisions for "dangerous special offenders", but the RSFSR does embody the concept of the "especially dangerous recidivist." Under the new 1969 law, Article 24–1, an "especially dangerous recidivist" suffers *added* penalties. But there penalties may be imposed only on defendants already determined to be "especially dangerous recidivists" in a special separate proceeding prior to the *committing* of the crime for which the defendant is being tried.

(f) In responding to the other questions of this questionnaire, maximum and minimum sentences for particular crimes have been listed. This information can be used for comparison with the sentences meted out under the "class A, B, C provisions" of the proposed Federal Criminal Code.

(g) The RSFSR Code provides for both maximum *and* minimum sentences for each crime, and these are enumerated in each article of the "Special Part." However, Article 43 permits the court to assign a sentence below the minimum, or, indeed, to use a "milder kind of punishment."

(h) and (i) Under the RSFSR system of release on parole, all decisions are made *by the court*. If no other provisions of the Code have operated to prevent it, and if the convicted person has actually been deprived of freedom, parole ("conditional early release") is not possible in most cases until not less than half of the assigned term has been served. Commission of acts made crimes by certain specified articles require the convicted person to serve two-thirds of his sentence; commission of acts made crimes by certain other specified articles will render any "conditional early release" impossible, as will certain other events such as commission of a new intentional crime before expiration of the remaining unserved term assigned for a first crime.

The same article, Article 53, which sets out provisions for "conditional early release," also provides for "replacement of punishment by milder punishment." This novel idea is to be applied under the same conditions as the more conventional parole ("conditional early release").

Article 55 operates in a very similar way for convicted persons under eighteen when convicted. Only one-third of the sentence needs to be served for Article 55 to become applicable.

The provisions of the RSFSR Code thus differ from those of the proposed Federal Criminal Code in requiring court decision rather than Parole Board decision and in providing for longer periods of actual punishment before consideration of the possibility of release. The standard for the convict's conduct is also differently and less precisely phrased; the convict is to "prove his correction" by his exemplary conduct and honorable attitude toward labor." (Article 53.)

Unlike the provisions of the proposed Federal Criminal Code, there are provisions in the RSFSR law that would allow some review of a parole decision. The RSFSR Code of Criminal Procedure, Article 357, would allow protests by the procuracy, with suspension of execution of the ruling until the upper court had considered the matter. Presumably, each determination could be appealed; it should be emphasized that such "appeals" are not of right but would involve a decision on the part of the procurator, who is in some very rough ways similar to an ombudsman. It should also be noted that though the court is to make the decision, the Code of Procedure provides that certain administrative groups familiar with the conduct of the defendant should first make a proposal for the convict's parole.

(j) and (k) The special publication of a conviction is not one of the "kinds of punishment" listed in Article 21. However, some of the unusual "kinds of punishment" provided for in this article do appear to contain elements of the idea of a "special publication." "Social censure," which is the punishment mentioned in Article 21(9), is defined in Article 33 as requiring a public reprimand by the court, and "if necessary," the court may elect to bring this to the notice of the public through the press or other means. This appears to differ from the proposed Secton 3007 in that the court, and not the defendant, takes the steps in publication.

Another type of punishment, "imposition of the duty to make amends for harm caused," also requires "publicity" of an unusual kind. (Article 21 (8).). Article 32 explains the term to require, *inter alia*, "a public apology before the victim or before members of the collective in a form prescribed by the court." The "public apology" is deemed appropriate where there has been no material loss, but, instead, an infringement of the dignity or integrity of another person or a "violation of the rules of socialist communal life."

(l) The only concept in the RSFSR Criminal Code that is similar to Section 3003 of the proposed Federal Criminal Code is that of "especially dangerous recidivist." This concept was explained in the response to question (9) (e).

Article 39 of the Code explicitly makes previous commission of *any* kind of crime an "aggravating circumstance." "Aggravating circumstances" are taken into account in increasing sentences.

(m) In the usual case, the Code does not appear to require judges to set forth the reasons for sentencing a particular defendant to a particular punishment. A Court is required to state its reasons, however, in more unusual proceedings and in application of lower than normal penalties. For example, Article 24-1 requires a setting forth of reasons in any determination that a person is an "especially dangerous recidivist," and Article 43, as previously noted, requires a statement of reasons for sentences below the statutory minimum.

(n) Sentences are subject to review on appeal. Article 380 of the RSFSR Code of Criminal Procedure explicitly provides that when a case is considered "by way of judicial supervision" (on motion of the prosecution or on the court's own motion) sentence may only be reduced, *not increased*, either by applying the law for a graver crime or by reviewing the discretion of the lower court. However, it may *remand* the case on grounds of "lightness of sentence." Article 373 of the Code of Criminal Procedure requires all such protests by the prosecution or upper court be made within one year.

(o) The defendant has only one appeal of right. Further appeals following defendant's exercise of this right occur only through the protests of the prosecution or on the court's own motion. Occasionally, the procuracy may intervene to appeal a case *for* a defendant. This form of appeal may be required even in the first instance, as defendant's *first* appeal, if the case were tried in the RSFSR Supreme Court or in the USSR Supreme Court, as decisions of those courts may not be appealed (or reconsidered) on defendant's motion alone.

(p) and (q) Uniformity of sentencing is achieved in part through review on appeal, as explained in (n), and in part by the standards explicated in the Code. The criteria are given in Article 37 and include: (1) The character and degree of the social danger of the committed crime; (2) the personality of the guilty person; (3) circumstances mitigating or aggravating responsibility. Article 38 enumerates nine circumstances mitigating responsibility. Article 39 enumerates twelve circumstances aggravating responsibility. Uniformity is also promoted through explicit statements of maximum and minimum sentences for each crime.

(r) If a defendant is convicted of more than one crime, Article 40 of the RSFSR Criminal Code requires the court to assign a separate punishment for

each crime. It then may "absorb. . . the less severe punishment in the more severe" *or* it may "fully or partially" cumulate the punishments. There is, however, a limit to the cumulation; it must be "within the limits established by the article which provides for the more severe punishment." As explained in the answer to question (9)(d), this means that the total sentence may never exceed 20 years imprisonment in severity, except, of course, for the imposition of the death penalty.

Article 47 provides that "the court shall deduct preliminary confinement from the term of punishment." It further establishes conversion rates, *e.g.*, one day of preliminary confinement substitutes for one day of imprisonment. In cases where the punishment imposed is of the milder variety, Article 47 provides that the court may "relieve the guilty person from serving the punishment because of the days spent in preliminary confinement.

(s)(t)(u)(v) A "fine" is deemed to be a "supplementary punishment" (Article 22), which is assigned in addition to or in replacement of a "basic punishment;" however, Article 30 explicitly provides that a fine may *not* replace or be replaced by deprivation of freedom. If it is not possible to exact a fine, the fine may be replaced by "correctional tasks." "Correctional tasks" are, in practice, a deduction of a percentage of monthly wages for a period of time. When the offender is not a wage-earner, he may be assigned to a job.

A fine may be assigned as punishment only where the relevant article of the Special Part of the Code so provides. The articles that provide for fines list a maximum; *e.g.*, Article 230 ("intentionally destroying, demolishing, or damaging cultural monuments") provides for punishment, *inter alia*, "by a fine not exceeding one hundred rubles." But Article 30 in the General Part provides the principles by which the exact amount shall be established: "in accordance with the gravity of the crime committed, taking into account the financial position of the guilty person."

Thus, the RSFSR Code has no provision similar to section 3301(2) of the proposed Federal Criminal Code. Article 32 explains the sentence of "imposition of the duty to make amends for harm caused" as including "compensation, with one's own means, for mataerial loss." This is not a fine, and may not exceed 100 rubbles in any event. The duty of compensation, like all other sentences, is imposed only when it is an option provided for in the Special Part of the Code in *specific* articles. As stated, the "duty to make amends" would not involve the "doubling" of Section 3301(2).

Question (10):

There are no provisions in the provisions in the RSFSR Criminal Code that compare with Section 303, Section 304, and Section 609 of the proposed Federal Criminal Code.

Question (11):

This problem does not arise in the Soviet Union because, although there is a Supreme Court of the USSR, there are no "lower federal courts," except for military courts.

There is no national criminal code. There are, however, Fundamental Principles of Criminal Legislation that apply throughout the USSR. These correspond generally to the articles of the General Part of the RSFSR Criminal Code.

Question (12):

Article 5 of the RSFSR Criminal Code provides that *anyone* who is situated in the RSFSR shall bear responsibility for acts which he has committed abroad that are deemed crimes under the RSFSR Code. The last paragraph adds that foreigners shall bear responsibility under the Code in instances provide for by international agreements.

Article 5 also provides that the court may mitigate punishment or completely relieve the guilty person if he has already undergone punishment for the crimes abroad.

Thus Article 5 has a broader sweep than the proposed Federal Criminal Code.

Questions (13) and (14):

The RSFSR Criminal Code has no criminal conspiracy rules and no felony-murder rule. No article, nor any combination of articles, has the reach of these doctrines. However, the RSFSR Criminal Code does make punishable the mere preparation of a crime (Article 15).

Questions (15) and (16):

Soviet criminal law does not seem to provide especially helpful insights into the problems raised by these questions.

Question (17):

The following are some notes about the treatment of selected "victimless crimes" by the RSFSR Criminal Code:

(a) *Homosexuality.*—Article 121 ("Pederasty") provides that sexual relations between men are crimes punished by a maximum of five years' deprivation of freedom, except that the maximum is eight years in cases (a) involving physical force or threats, (b) with respect to a minor or (c) involving the taking advantage of the dependent condition of the victim.

Sexual relations between women are not covered by a separate article in the Code.

Articles 119 and 120 would also cover homosexual acts, but their provisions are limited to "Sexual relations with a person who has not attained puberty" and "Depraved actions [with respect to minors]." The penalty is deprivation of freedom for a maximum of three years, except where there are sexual relations "in conjunction with satisfaction of sexual desire in perverted form," in which case the penalty is imprisonment for a maximum of six years.

(b) *Abortion.*—Article 116 is entitled "Illegal performance of abortion" and includes (1) non-approved abortions and/or (2) abortions performed by a person "not having a higher medical education." The maximum penalty in the first case is one year; the maximum penalty in the second case is two years. However, a lesser penalty—"correctional tasks" (usually a deduction from monthly wages for a period of time)—is also applicable and available in both cases. The Article also provides for the sanction of deprivation of the right to engage in medical activity. The pregnant woman is not held criminally responsible for illegal abortions.

(c) *Pornography.*—Making, circulating, trading, retaining in order to sell or disseminate, or advertising all types of pornographic articles is punishable by imprisonment for no more than three years, or by a fine of no more than 100 rubles. Also, the pornography and means of making it are to be confiscated. (Article 228.) There are no qualifications or defenses as in Section 1851.

(d) *Drugs.*—Article 226 provides stiff penalties for keeping dens for the use of narcotics. Article 225 covers the growing of four substances: (a) opium poppies, (b) Indian hemp, (c) Southern Manchurian hemp, (d) Southern Chuisk hemp. The growing of (a) or (b) without the requisite permit is punishable by imprisonment for not more than two years or by correctional tasks (as explained above) for not more than one year. The growing of (c) or (d) under any circumstances is punishable by deprivation of freedom for not more than three years, or by correctional tasks for a term not exceeding one year. In all cases, the crop is confiscated. The third and most important Article is 224, which deals with "making or supplying narcotics or other virulent or poisonous substances." The penalty for making or supplying narcotics is imprisonment for not more than ten years; making or supplying a virulent or poisonous substance that is not a narcotic receives a penalty of imprisonment for not more than two years.

The related issues of (1) the smuggling of drugs and (2) the medical treatment of addicts are separatedly treated in the Code.

The penalty for smuggling narcotics and "virulent or poisonous substances" across the state border of the USSR is imprisonment for a term of three to ten years with confiscation of property, plus a possible additional exile for a term of two to five years. (Article 78.) ("Exile" is the removal of the convicted person from the place of his residence, with obligatory settlement in a certain locality"—Article 25). Concealment of smuggling is itself a crime punishable by penalties almost as severe. (Article 88-2).

Article 62 provides details of a procedure for "application of compulsory measures of medical character to drug addicts." Its terms were explained in the response to Question (6). There does not appear to be a curatorship for "drug addicts" as there is for "alcoholics," but all other provisions of Article 62 apply to both groups.

(e) *Vagrancy or Begging.*—Article 209 of the RSFSR Code, revised in 1970, deals with the problem of "systematically engaging in vagrancy or in begging." It provides for deprivation of freedom for not more than two years or for

correctional tasks for not more than one year nor less than six months. A second conviction carries a penalty of imprisonment for not more than four years.

Article 209–1 is the new version of the notorious "anti-parasite law." Under it a person who maliciously refuses to fulfill the decision of the executive committee of the relevant soviet "to obtain work and to stop a parasitic existence" shall be punished by imprisonment for no more than one year or by correctional tasks for the same term. A second conviction is punished by imprisonment for no more than two years.

(f) *Gambling.*—Gambling itself is not covered by the Code. However, Article 226 provides that keeping gambling dens shall be a crime punishable by imprisonment for a term not exceeding five years "with or without banishment." (Banishment is the removal of a convicted person from his place of residence, together with additional prohibitions against his living in certain areas. Article 26). Article 210 also deals, in part, with gambling, and provides for a maximum of five years' imprisonment for drawing minors into this activity.

(g) *Prostitution.*—Prostitution itself is not covered by the Code. Three separate articles, however, deal with certain aspects of prostitution. Article 210 provides for a maximum of five years' deprivation of freedom for drawing minors into prostitution. Article 226 provides for a maximum of five years' deprivation of freedom, with or without banishment, for keeping a den of debauchery. Article 115 provides for a maximum of three years' deprivation of freedom or a maximum of one year's correctional tasks for knowingly infecting another person with venereal disease.

Question (18):

Firearms provisions.—Section 1811 of the proposed Federal Criminal Code finds its cousin in the RSFSR Code in Article 17 ("Complicity"). In the terminology of the RSFSR Criminal Code, a person who supplies a weapon for committing a crime is an "accessory," and he is punishable in accordance with the degree and character of his participation in the crime rather than in accordance with a specific provision narrowly concerned with "supplying firearms."

Section 1812's prohibition is covered in the RSFSR's Code's Article 218 ("Illegally carrying, keeping, making, or supplying arms or explosives"). Supplying such firearm or explosive without an appropriate permit is punishable by deprivation of freedom not exceeding two years, or by lesser penalties. Slightly reduced penalties are applied as well for supplying daggers, Finnish daggers, or any other cutting weapon without an appropriate permit. (There are special limited exceptions.)

Section 1814's prohibition would be included in, but not completely exhausted by, the coverage of Article 216 ("Violation of rules of safety in enterprises or shops where there is danger of explosion"). Penalty is dependent on resulting effects, but even where there are no injuries, a penalty as severe as one year's deprivation of freedom is provided. Since the means of producion are owned by the state, these industrial buildings are "federal" in some sense. Possessing an explosive device in a "federal government building" as provided in Section 1814 is not explicitly covered in the Code but would be presumably subsumed in the actual coverage of Article 217 ("Violation of rules for keeping, utilizing, registering, or transporting explosives and radioactive materials"). Penalties are rather similar to those provided in Article 216.

Question (19):

Capital punishment is mandatory only for attempted homicide of a policeman or people's guard, and even then only under aggravating circumstances (Article 191–2). A representative sampling of crimes in which the death penalty *may* be applied, in extreme circumstances, includes, but is not limited to: treason (Act 64), espionage (65), a terrorist act against the representative of a foreign state for the purpose of provoking war or international complications (67), organization of armed bands for the purpose of attacking state or social institutions or enterprises or individual persons (77), speculation in currency or securities as a form of business or on a large scale (88), intentional homicide under aggravating circumstances (102), rape (117).

Separate hearings for sentencing are not held in the RSFSR. However, as previously mentioned, separate hearings are held to determine the defendant's status as an "especially dangerous recidivist" and such a determination can be very important in deciding whether to impose the death penalty.

The death penalty is said to be "an exceptional measure. . . until its complete abolition." (Article 23).

Capital punishment is executed by shooting.

Persons under eighteen and women pregnant at the time of the commission of a crime or at the time of sentencing or at the moment set for execution may not be executed. (Article 23).

Question (20):

Neither the RSFSR Criminal Code nor Code of Criminal Procedure contains provisions as detailed as those of the proposed Federal Criminal Code on the subject of multiple prosecutions and trials. Hence, very little can be offered that is useful for comparison and contrast in this field.

Some of these considerations have already been presented in the responses to Questions (9)(r) and (11).

SUMMARY

Some of the more interesting aspects of the RSFSR Criminal Code are:

(a) Arrangement of chapters within the Special Part to correspond to the seriousness with which society views crimes of that type, as explained in the response to Question (1).

(b) Extension of the defenses for use of force to include prevention of harm to other citizens and to the rights of other citizens including persons *not* related to the defendant, as explained in the response to Question (7).

(c) Where appropriate, the release of a convicted person on probation, not to police or probation officers, but to the supervision of a social organization, as explained in the response to Question (9) (a) (b) (c).

(d) The provision of relief from criminal responsibility when, "as a result of a change in the situation, the act committed by the guilty person has lost its socially dangerous character or the person has ceased to be socially dangerous," as mentioned in the response to Question (9) (a) (b) (c).

(e) Restriction of the maximum sentence to twenty years, except for the death penalty, as explained in the response to Question (9)(d).

(f) Provisions relating to publication of convictions, as explained in the response to Question (9) (j) (k).

(g) Listing "mitigating" and "aggravating" circumstances to be used in consideration of sentencing, as explained in the response to Question (9) (p) (q).

(h) Provisions concerning fines and the ways that an indigent may pay such a fine, together with provisions prohibiting the court from making fine and imprisonment in any sense substitutes for each other, as explained in response to Question (9) (s) (t) (u) (v).

(i) The explicit provision making the intentional infection of another person with veneral disease a crime with a severe punishment, as explained in response to Question (17) (g).

(j) The imposition of severe penalties on improper transmission or possession of firearms without appropriate permit, and parallel provisions that extend even to cover "daggers. . . or any other cutting weapon without appropriate permit," as explained in response to Question (18).

Some other provisions of the RSFSR Criminal Code that deserve comment are:

(k) Defamation and insult (Articles 130, 131) are punishable crimes.

(l) Criminal penalties are imposed for "failure to render aid which is necessary and is clearly required immediately to a person in danger of death, if such aid could knowingly be rendered by the guilty person without serious danger to himself or to other persons. . ." (Article 127.)

(m) Article 57 of the RSFSR Criminal Code provides that under certain circumstances convicted persons may have the notation of the conviction expunged from official records. The chief criterion for the application of this article is the passage of a given period of time following completion of the term of punishment, during which the convicted person does not commit a new crime.

(n) Military criminal law is integrated into the Criminal Code. Military tribunals are permanent courts located in the various military districts and staffed by professional military judges. Servicemen who commit crimes of any kind are subject to their jurisdiction. In addition, the RSFSR Criminal Code contains in Chapter XII of the Special Part a list of specific military crimes, with the applicable punishments. A convicted serviceman may have his case reviewed by the Supreme Court of the USSR, which exercises general supervision over all courts, including military tribunals. Equally important, the specific provisions of military criminal law contained in Chapter XII of the

Special Part of the RSFSR Criminal Code (and in corresponding chapters of the criminal codes of the 14 other union republics) must be applied in the light of the provisions of the General Part of the Code. Thus there is a complete integration of Soviet military criminal law into the general body of Soviet criminal law.

UNIVERSITY OF OTTAWA,
Ottawa, Ontario, Canada, February 29, 1972.

Mr. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. MCCLELLAN: Thank you for the copy of the hearings of the Subcommittee on Criminal Laws and Procedures, Part I.

Following your invitation of February 3 and my letter of February 8, 1972 I enclose herewith short remarks on the aims of criminal procedure as seen by the undersigned (search for truth and protection of the suspect).

Insofar as your questionnaire is concerned, I am unable to give you a detailed reply, but you will find enclosed some remarks.

Hoping that you will find the whole of some use, and thanking you for your invitation, I remain,

Yours sincerely,

L. KOS-RABCEWICZ-ZUBKOWSKI.

REMARKS BY L. KOS-RABCEWICZ-ZUBKOWSKI ON THE QUESTIONNAIRE OF THE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

(1) It is suggested that Part D could be added, dealing with enforcement of sentences. Several legislations (Portugal, Italy, France) provide for a judicial control of the enforcement of sentences, and vest these powers in the person of a special judge called an enforcing magistrate (in French: judge de l'application de peines). (See also under No. 9).

(2) Consecutive numbering of sections is suggested.

(6) There is a valid theory that a person who loses control of himself by intoxication, and in such a state commits an offence, should not be excused, as it is a so-called *actio libera in causa*. That means that such a person should foresee the possible consequences of his intoxication. Forced intoxication, however, is always a valid defence.

(8) Generally speaking, a classification for purposes of sentencing is as follows:

(a) Petty Offences (in French "contraventions"). This category tends to be considered as illicit, but not criminal.

(b) Medium Offences (in French "délits"). The commission of such offences does not involve the loss of civil rights. However, it is sanctioned by a punishment, including imprisonment.

(c) Felonies (in French "crimes"). This category comprises serious offences and most often includes offences committed from base motives, and with the aim of achieving illicit gain.

(9) Reasons in writing for sentences imposed are generally required, especially for the purposes of appeal. It is submitted that the very idea of the rehabilitation of a convict presupposes the possibility of such a rehabilitation. Human personality is not rigid but subject to change. It is impossible to foresee exactly in advance when and what changes will occur in the dynamic personality of the convicted offender. Therefore it is essential to assure a flexibility of sanctions and/or measures applied by the court. This is achieved by changes of probation orders, by parole, remission etc. All such modifications of sentences should be applied by the court, and preferably after a hearing of interested parties, including the offender or his attorney.

CRIMINAL PROCEDURE TO SERVE THE SEARCH OF TRUTH AND TO PROTECT THE SUSPECT

1. The aim of criminal trial: search for truth and protection of the suspect

(A) The importance of the search for truth in criminal proceedings is universally recognised.

Recently, an international symposium, under the auspices of the International Association of Penal Law, examined the scientific methods of search of truth (at Abidjan, Côte d'Ivoire).

(B) Present practice as to preliminary inquiry does not assure the best preparation of evidence for a trial aiming at the discovery of truth.

The evidence submitted to the court at the trial may be incomplete:

(a) There is no time for the attorney for prosecution and for the attorney for defence to evaluate the depositions of witnesses and to decide as to additional evidence;

(b) Even if an attorney manages to: (i) question, (ii) make notes, and (iii) think at the same time what should still be done in the light of the testimony heard in court, (1) he may not be in a position to call additional witnesses needed in consequence of information revealed in testimony of the witnesses heard in court, and (2) to find out, in a pre-trial interview, what such additional witnesses can contribute to the evidence already heard. (3) The presiding judge is reduced to reception of evidence as submitted; in the best case obvious omissions are corrected by the presiding judge by way of his questioning of the witnesses.

2. The aim of the preliminary inquiry: the search of truth and (a) committal for trial, or (b) acquittal

(A) It is submitted that a better preparation of trial may be achieved by hearing at the preliminary inquiry of *all available evidence.*

(B) The judge presiding at preliminary inquiry shall receive the evidence submitted by the *prosecution* and *defence.*

(C) The judge presiding at preliminary inquiry shall question the witnesses submitted by the prosecution and defence if he deems it useful for search of truth.

(D) The judge presiding at preliminary inquiry shall have the right to summon witnesses on his own initiative.

(E) The evidence received at the preliminary inquiry shall be transcribed and available to the parties at least one (two) weeks before the trial (or tape recordings should be available).

(F) Only such evidence shall be submitted at the trial: (i) which was submitted at the preliminary inquiry; or (ii) which, notwithstanding the diligence of the parties was discovered at or after the preliminary inquiry, or (iii) which is indicated by the judge who presided at the preliminary inquiry.

(G) In cases scheduled for trial before a judge without a jury, if all parties waive their rights for a trial and the presiding judge considers it in the interest of justice, the judge shall render his judgment after the closing of evidence in the preliminary inquiry.

(H) Before the beginning of the preliminary inquiry the defendant shall be informed that the judge may appoint a counsel or request that a counsel be appointed by the Legal Aid.

(I) If the preliminary inquiry does not lead to the committal for trial the defendant shall be acquitted (elimination of double jeopardy).

Reasons.—The suggested procedural reform tries to incorporate in to the adversary system some of the advantages of the inquisitorial system, while asserting also the rights of the accused who shall have his traditional "day in court" at his trial.

This reform does not require the accused to be a compellable witness.

While starting from an adversary system, these suggestions follow to a certain extent (a) the English practice, and (b) the Swiss Canton of Geneva legislation.

The latter provides, on request of a party, for an adversary type preliminary investigation aiming at: (1) the search of truth, and (2) the protection of the suspect.

The Geneva procedure is characterized by the rights of the parties: (A) to be present at all acts of inquiry; (B) to summon witnesses; (C) to question witnesses; (D) to have access to all witnesses and other evidence; (E) to request additional inquires and opinions of experts.

The duty of the investigating judge to inform the defendant that he may appoint a counsel or request that a counsel be appointed is also provided by the French penal procedure (art. 114, alinea 3 of the French code of penal procedure) and art. 243 (4) of the German code of penal procedure.

3. Type of evidence:

It is suggested that all types of evidence, including hearsay evidence, shall be admitted (at the preliminary inquiry and at the trial). However, the weight of the evidence shall be left to the appreciation of the court.

4. The accused and the evidence: (i) minimum suggestions

(A) It is suggested that the principle that the accused is not a compellable witness should be retained.

(B) The plea of guilty should not be, as such, binding for the court. Notwithstanding the plea of guilty, the judge presiding at appearance may order a preliminary inquiry if he belives that the plea of guilty is not an absolute proof in the given case.

(ii) Possibilities to be considered

(C) The accused shall not be a witness (even if he wants to testify).

(D) The accused shall be informed that he may either offer explanations or abstain from offering explanations. Such explanations shall be offered at the commencement of preliminary inquiry and/or trial. When offering explanations the accused shall not be under oath. As such explanations do not constitute a testimony the accused shall not be cross-questioned.

Reasons.—Even in present major European inquisitorial systems the accused is not a compellable witness. In fact, he is not a witness at all. Even his admission of guilt does not, per se, eliminate the need to submit evidence by the prosecution.

However, the accused may offer explanations or declarations. The judge must inform the accused that he is free to abstain from making any declarations (e.g. Articles 114 alinea 1 and 170 of the French code of penal procedure; also compare section 545(1) Canadian Criminal Code: "you are not bound to say anything . . ."). In practice, in most cases, the accused make declarations.

This practice can be compared to a detailed plea. Such a detailed plea exists in civil jurisdiction in the form of a writen plea of the defendant (e.g. in the Quebec code of civil procedure).

The general assembly of the United Nations adopted on December 16, 1966 by 106 votes to none the covenant on civil and political rights (the United Nations and Human Rights, 1968, U.S. Sales No. E67 129, p. 85). The said covenant provides in article 14(3)(g) that persons accused of criminal offences should not be forced to testify against them or to admit their guilt.

5. Trial

(A) The transcript of the evidence received at the reliminary inquiry shall be available to the parties and to the judge presiding at the trial.

(B) The judge presiding at the trial shall have the right to question witnesses, although the main questioning and cross-questioning shall be conducted by the counsel.

(C) Perhaps the judge presiding at the trial should have also the right to summon additional witnesses.

6. Private Claimant ("partie civile")

(A) Private claimant seeking indemnification of damages caused by the offence, shall be admitted as a party to criminal proceedings (preliminary investigation and trial).

(B) Perhaps the private claimant should be a party but not a witness (as in Europe) but this does not appear to be essential.

Reasons.—Compare: section 628 of the Canadian Criminal Code provides that: "A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted". Section 630 of the Canadian Criminal Code provides for restitution of "any property obtained by the commission of the offence". The economy of trial militates in favour of settling of the issue of indemnification of the victim in one(criminal) trial, instead of repeating the same evidence in the civil court.

Should the assessment of the amount (quantum) of damages be complicated it could be done during an additional part of the criminal trial, following the conviction, in an adversary way.

European legislations provide for the party status for private claimants. Such a party has the advantage of submitting the evidence both as to liability and the quantum of damages, the latter being often dealt with marginally by the prosecuting attorney.

UNIVERSITY OF DETROIT SCHOOL OF LAW,
Detroit, Mich., February 10, 1972.

MR. ROBERT H. JOOST,
Assistant Counsel, U.S. Senate, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedure, Washington, D.C.

DEAR MR. JOOST: Unquestionably, the crime situation in the United States is worse than bad. It is sad that in the wealthiest country in the world which justifiably boasts of its great tradition of liberty and fraternity, citizens are afraid to walk on the streets of their towns and to leave their homes uninhabited when they go on vacation. The situation became so disgusting that some Americans left their country in order to settle elsewhere. Many others avoid living in towns. Just last week, a gifted prospect for a teaching position at our law school decided to decline our offer, stating that she liked the faculty and the University, but was reluctant to work in a community where her security would be impaired. Foreigners visiting the United States, foreign diplomats and members of the U.N. Secretariat are dismayed by the robberies and muggings they are subjected to, and foreign tourists prefer to visit other countries. The sight of downtown Detroit is dismal and discouraging: in the daytime, a policeman must be placed in every room of commercial establishments—a phenomenon unseen in any other country of the world. In the night time, the streets are deserted. In New York, a policeman must patrol every subway. In many places, exact fare is required in public transportation and service stations in late hours.

Among the problems that the United States has to solve, crime is the most important. It should be attacked on many fronts. Its causes are various, and there is no single answer to the questions it presents. Some of the most important factors which contribute to the skyrocketing rate of crimes in recent years are the breakdown of family life, the disrespect of authority and legal rules, the undermining of moral values, the tolerance of violence in the American mind, the incredible trend towards permissiveness, the drug abuse, and extremely poor TV programs and movies. All these factors are a national concern, exceeding the boundaries of legal considerations. However, some other causes are strictly connected with the law: obsolete procedure, unworkable rules of evidence, highly exaggerated emphasis on due process in utter disregard of substantial truth, an antiquated jury system, lax law enforcement, obstacles laid to police action, helplessness against threats to witnesses, leniency of the judges, frequent inexcusable mistakes of the prosecution, a poor prison system and lack of control over possession of dangerous weapons.

On the other hand, some of the other reasons cited sometimes as contributing to the high rate of crimes in the United States cannot be considered as real factors. In particular, the purported difficulty in finding employment and the poverty of some segments of the population should not be considered as vital. The situation on both points is much worse in most of the countries in the world, where, however, the crime situation is much better than in the United States. Many artificial legal rules and the lack of any desire on the part of the judges to protect the interests of society rather than to furnish dozens of technical obstacles to the administration of justice, technicalities and legal excuses to the criminals result in an ever growing dissatisfaction of the citizens with our legal system and its enforcement, the disrespect for the law and lawyers, and the establishment of groups of "vigilantes" as a more efficient means of self-defense than the entrusting of public security to the authorities. Frankly, the situation here is so bad that it calls for drastic measures. There were countries where, in order to stop crimes, cruel methods of punishment were devised, such as cutting the hands of thieves off. The result was that in some countries law breaking was practically eliminated. While such a crude approach could not be advocated today, it indicates that one of the important ways of fighting crime is deterrence by a fear of severe punishment. Unfortunately, in the United States only a small percentage of the offenders are ever caught; still less are indicted, and a very

insignificant number are found guilty and punished. The risk of the criminal is not great: he knows that his chances of escaping from the hands of the law are good, and the possibilities of being sentenced to a serious prison term are small.

Instead of devising means to render the criminals insulated from the society which they destroy, instead of attempting to show to the offenders that the nation's patience has been abused too long and that every crime will be punished, the courts and some scholars continue on the path of an interpretation of the Constitution never dreamed of by the Founding Fathers. They construct beautiful abstract principles which may be very idealistic and which possibly could be applied in a society where crime is a rarity, but which are absolutely unworkable in the United States of today.

The due process clause is an excellent provision devised to protect the citizen against the arbitrariness of the government. However, its construction should be reasonable and appropriate to the conditions of the society in which it is in force. The way the courts (and, in particular, the Supreme Court) extended its scope renders a great disservice to the nation. This clause, along with some other constitutional provisions (such as the "bill of attainder" clause) was intended primarily to apply to political offenders rather than to comomn criminals. It was greatly justified in the light of the XVIII century practice in some European countries where the king could imprison anyone he wanted for an indefinite period of time without giving any reasons and without the necessity of instituting any judical proceedings. He could delegate his authority to others (the French "letters de cachet" may serve as an outstanding example).

In many dozens of opinions, the courts laid down their own rules on "due process", absolutely unwarranted by the Constitution. Connected with the rules of evidence as understood by the American judiciary, they frequently defy common sense. If evidence was unlawfully obtained, it will not be admitted in court. In case it was, conviction may be reversed even if there is other good evidence supporting the verdict. And the over-restrictive understanding of the reasonable suspicion rules out good and relevant evidence! The very fact that a search produced such evidence is an indication that there were valid grounds for suspecting criminal activity. Unfortunately, the courts prefer to "punish" the police for nonabidance by the rules they arbitrarily devised than to render a service to the general public.

It was said that the admission of unlawfully obtained evidence is a rule protecting the citizens. There is a clear fallacy in this argument. First, a law abiding citizen does not object to a search. As far as I am concerned, I would welcome a search of my person or car, even without any judicial warrant. I have nothing to be afraid of and I would be glad to know that the police are trying to detect crime for the good of society. However, assuming that some other persons may object, the way to remedy the situation is by no means to exclude the "unlawfully obtained" evidence. The purpose of the judicial process should be to elicit the truth, not to suppress it as it is constantly being done. The criminal trial should not be a game between two equal parties to be won by the one who knows the artificial rules better. The tendency to make the job as difficult as possible to the prosecutor is deplorable.

In order to prevent unreasonable searches and seizures, the disciplinary control over the police and sanctions against those who proceed with unwarranted action should be applied upon the request of the aggrieved citizens. Probably, it would not be a strong weapon in some cases because the supervisory police organs may be unwilling to take the proper steps. Another, much more efficient device is the assurance of a cause of action against the offending police officer to the prospective plaintiffs. Possibly, the best approach is to grant recovery to those persons whose search did not result in finding any evidence and was unlawful. Thus, the police could act on their own risk. Another possibility is to permit recovery even if the search did produce evidence although it was contrary to technical rules. Such a cause of action is quite sufficient to deter the police from failing to abide by the rules of conduct and to protect the citizens against arbitrary action.

On the other hand, in no case should the courts hush up the truth by excluding relevant evidence. The American system of excluding unlawfully obtained evidence is unique—it is contrary not only to the situation in civil law countries, but also in common law countries such as England or Australia.

And nobody may say that in Switzerland, France, Germany or England the administration of justice is not fair enough to the accused. On the contrary, these countries gained a reputation of having excellent legal systems. Nobody can say that in England, the defendants have no decent trials, even though there is no "due process" clause in that country. Maybe it is better not to have such a clause, because then it cannot be misinterpreted.

What we really need, in the United States, is a revolution in the way of thinking of the judges and lawyers, rather than in changing substantive rules of the law. Of course, they may be improved, but even a perfectly written text will not do if it is misinterpreted and misapplied. The judicial and legal profession in this country must awaken, must become dedicated to the eradication of crime and protection of society before progress will be achieved. Inefficient administration of justice, shocking leniency towards the criminals, encourage law breaking and undermine society. Unfortunately, young generations of lawyers, educated in the spirit of what is sometimes inacurately called the "extreme liberalism" of the Supreme Court, being repeatedly told that this is the essence of freedom and democracy, do not realize that the American system is an oddity which renders the life of the citizens ever more miserable and which has nothing to do with civil rights. They do not know that the situation may be and is different in other Western countries. In some fields, American law gained respect and influenced developments in foreign legal systems. This is the case, in particular, with anti-trust legislation. On the other hand, American criminal law puts the United States in disrepute and is frequently cited as an example which should not be followed. In the "Atlantic Charter", the leaders of the Allies solemnly proclaimed that one of their goals in winning the war was to provide freedom from fear to humanity. Unfortunately, the greatest country in the world is unable to secure freedom from fear to its citizens, and it seems that its courts are unwilling to do so.

One of the most important purposes of the criminal law system is to render the criminals harmless; to punish them and—if at all possible—to reform them. But the courts utterly disregard their duties. They make every possible effort to render the prosecution and conviction as difficult as possible. Instead of serving the community which entrusted them with a most important function, they purport to serve some fictitious abstract ideas frequently termed as "constitutional rights." Inability to convict or excessive leniency in sentencing encourages the criminals to become ever bolder, to become more dangerous to law abiding citizens, to apply their experience to a more skillful perpetration of their deeds and evading the arm of the law. The deplorable tendency to impose light penalties on drug pushers is disastrous to the society which they undermine, frequencly destroying the lives of our youngsters and turning them into criminals willing to commit any breach of the law in order to get money to satisfy their needs arising from drug addiction. Especially severe treatment should be extended to organized crime. Unfortunately, big syndicate bosses either escape punishment or get light sentences. The courts show no deep desire to eliminate them from the American scene. Besides, they may afford to retain skillful lawyers knowing all legal technicalities and possibilities of motions and delays. On the other hand, a substantial possibility of being convicted would be an important deterrent preventing criminals from carrying out their activities.

The change in the judicial atmosphere and constitutional interpretation is a condition without which progress cannot be expected. Personally, I have some ideas about a few rules of substantive and procedural law which, however, have only secondary importance. I will mention a few without much elaboration. By "American", I mean the federal and/or state system.

Sentences should be meted out for definite periods of time. This is the uniform European approach which works better than the American system of indefinite sentences.

I would retain the death penalty, to be applied sparingly, even though many European and American lawyers would disagree with me. It seems to me that there are extreme cases of hardened criminals who are absolutely incorrigible, whose crimes are so odious and revolting that the perpetrator should be completely eliminated, once and for all, from the society which he destroys. Such persons just were not created to live in our world. Life imprisonment presents dangers that sooner or later they will escape and continue their activities and possibilities of exerting bad influence and terror on other prisoners. Besides, it

is questionable whether it is actually "charitable" to let a person "rot in prison" for the rest of his life.

The grand jury should be eliminated and replaced by investigating judges. This is the uniform European system which works much better. A body of laymen is incapable of dealing with the problem of whether the suspect may be successfully prosecuted, as the American experience clearly establishes. The fact finding by the jurors during the trial is a quite sufficient—frequently even exaggerated—participation of men from the community in judicial proceedings. Endeavors to put the United States in line with the rest of the world, even at the expense of constitutional amendment, should be initiated as soon as possible. In England grand juries were abolished in 1933.

Peremptory challenges in jury selection should be strictly limited to a small number of persons. Even in other common law countries, the whole process takes just a few hours (e.g., at most half a day in Australia). The American spectacle where this simple step may take weeks, at the expense of tax payers, waste of time and delay in the administration of justice, is scandalous in the public opinion of foreign nations.

There is no reason for having twelve persons on the jury. In some states, this number has been decreased. By all means, this trend should be followed. There is no reason to think that there is magic in the number of twelve. Six persons can do the job well enough. There would be less time wasted, less possibility for a mistrial, less public money expended and less possibility of bribing a juror.

Jury verdicts should be reached by a qualified majority rather than by unanimity. This is the rule even in England which is the cradle of the jury system. The Louisiana reform should be held constitutional and followed. The stubbornness, stupidity or bribing of one juror prevented the reaching of verdicts in more than one case. In many states of the Union, a qualified majority is sufficient in civil cases.

Appeals should be permitted both to defendants and to the prosecution. In some respects, both parties are treated equally, but on the problem of appeals, the usual American rule is to give preferential treatment of the accused. In Europe, the prosecutor may appeal both from the dismissal of the case and from the imposition of a sentence considered by him to be too lenient.

Judicial delays should be eliminated. Short periods of time should be set for motions and appeals, and they should be taken care of with all possible sped. The lapse of many years from commencing of an action until the determination of the case by the highest court, as it happens in the United States, is undesirable, frustrating, impeding the administration of justice and unparalleled in other civilized countries.

In cases of juveniles, they should be treated in accordance with the rules applicable to their age bracket at the time of the commission of the crime rather than of the trial.

Some other foreign approaches should be accepted in the United States—or just previous American rules reinstated. Third degree police methods should be eliminated by all possible means, but voluntary confessions should be admitted as relevant evidence whether they were made after consultation with a lawyer or not. The duty of the police is to prevent crime, arrest the suspects and collect evidence against them. In no other country of the world are the police under a duty to act as lawyers of the suspects as they are in the United States where they have to teach the law to the suspects by instructing them about their right to keep silent, to decline answering questions and making confessions before retaining a lawyer. The reason sometimes given for this obligation is that it provides the same opportunities to the poor as are available to the rich. There is an obvious fallacy in this reasoning. The artificial rules of evidence are well known to skilled lawyers specializing in defending wealthy organized crime bosses who are in a financial position to retain them. Therefore, primarily they protect the rich criminal rather than the poor. But even assuming that this is not so, crime should be fought against on every level, by whomsoever it may be perpetrated. The law should not provide a possible way out to one criminal only because another one is able to do so. If one law violator has a car and drives away from the scene of the crime, it is not a reason to require the police to furnish a car to another suspect so that he may have the same chance of escaping as the wealthier one.

In Europe, the essential duty of the judge is to find the truth, and the whole judicial process is geared in this direction. Witnesses are not limited to answering questions put by the attorneys of the parties. When called on the witness stand and sworn, they are told by the judge to say everything they know about the case. Their free narration is uninterrupted unless they engage in irrelevant statements. After they finish, the judge himself asks questions before permitting examination and cross-examination by the parties. Persons who testify are witnesses of the court itself rather than of the parties, and therefore there is no problem of impeaching "the own" witness of a party and similar ideas. Again, the experts are selected primarily from among a panel of names of well qualified persons which is kept in every judicial district. The shocking sight of "battle of experts" presented by the two parties is eliminated.

One important impediment in the providing of the prosecutor's case is the fear of the witnesses to testify against a criminal who may take a vengeance, either personally or by his famliy or friends. How many cases were lost because of a refusal to testify, or of a sudden "loss of memory" of the witnesses! The device of anonymous witnesses, with masked faces, is resorted to in extremely rare cases in the United States. It should be applied in hundreds of trials.

The emphasis on cross-examination is much exaggerated. In Europe, if evidence is relevant, it is admitted. If no cross-examination is possible, its weight may be questionable, but it is not excluded. In the American trials, how much excellent evidence is not admitted on the ground of an extensive view on what a hearsay is! A typical example is a treatise by a famous physician. The adversary is always free to introduce evidence to the contrary, but it is against common sense to exclude observations of a well known authority on some disease just because he cannot personally appear in court. Happily, there is a trend against this extreme approach in the United States, but many other aspects of the unfortunate hearsay rule are still permitted to obscure the issues at trial.

While I would not advocate the abolishment of the privilege against self-incrimination, I strongly favor that it be interpreted reasonably. Its natural meaning should cover oral statements. It should never be applied to such evidence as blood tests or written records. Again, the concept of double jeopardy should be given a narrow construction.

The obstacles put on the path of the prosecution lead to devices whose propriety is questionable. Unable to get a conviction in any other way, the prosecutor enters into "plea bargaining" with the suspect or guarantees freedom from prosecution in exchange for a testimony against other suspects.

It is also difficult to see the wisdom of the rule requiring the state to furnish a lawyer to the indigent accused, and providing for lawyers in juvenile cases. Traditionally, the lawyer was a person who helped the court by facilitating the judge to elicit all aspects of the case and pointing out the arguments available to his client. Today, lawyers sometimes endeavor to obscure the truth and twist the law around so as to make conviction impossible. In simple criminal cases, in juvenile delinquency problems, there is no reason for the defendants to have lawyers. Unless difficult problems are presented and the help of an attorney is desirable, the court should handle the case all by itself. The recent impositon of the obligation to provide lawyers to all defendants at public expense is unwarranted, and with many other American rules, imposes an additional financial burden on the community.

The situation got out of hand in the United States. The citizens feel insecure, frustrated, and have no confidence in the ability of the authorities to protect them. While a strict arms control should be effective everywhere, self-defense, and defense of others as well as property should be freely permitted and encouraged. A few decisions imposing liability on good faith defenders are shocking. Permission to carry a concealed weapon should be given to reliable citizens for use in cases of emergency.

A few other points should be made. First, some jurists say that the exclusionary rules of evidence are necessary in the United States because of the poor quality of the police. There is more than one fallacy in such a statement.

Of course, the quality of the police should be upgraded as much as possible. Undeniably, much may be done, in this respect. Certainly, there are some rude,

dishonest, corrupt and incompetent policemen. But it does not follow that the society should be punished for their shortcomings. It is natural that in an imperfect society there are imperfect policemen, physicians, lawyers and politicians. We may be proud that at least one of the American law enforcement agencies—the F.B.I.—merits fame all around the world for its efficiency and integrity. As to the American police, with all their shortcomings, I would be inclined to state that they are no worse than in other countries, trying to maintain law and order and to protect the law abiding citizens. An interesting experience was initiated by Indiana University for its law students: accompanying policemen on their rounds and routine work. The devotion and courage of many of them was an eye-opener to many future lawyers.

Again, prison reform is badly overdue in the United States. It appears certain that one of the most important goals of confinement of criminals, their reform, is hardly ever achieved. But it does not follow that it is preferable not to lock them up and to permit them to continue their life of crime. Will they learn still worse things from fellow prisoners? Possibly yes, in some instances. But even if this may happen, it does not mean that they should be let free. Naturally, all efforts should be made to establish different categories of inmates, to protect some of them against the others, and to stop the possibility of exposing slight law violators to the influence of hardened criminals. As to robbers and muggers, what else may they learn from the fellow inmates? Persons who endanger the life of the citizens, beat and injure them in order to satisfy their desire to get easy money (which sometimes brings them just a few pennies) may hardly learn worse things.

What are the classes which are hit hardest because of the crime rate? Certainly not the millionaires who usually live out of town and are driven with the escort of a driver. The crimes are directed particularly against the poor man, living from his modest wages in an old neighborhood—frequently, a person belonging to a minority group. The average robber would not hesitate to take away the money from an old or crippled person, a blind man walking with the help of a white cane or a newspaper boy, as everyday reports indicate.

It is easy to say that there should be more judges and more police. However, this will not solve the problems. Besides, I am not sure that such steps would necessarily be advisable. I would agree with respect to the judges, along with the recommendation that they spend more hours in the courtroom. More police in some neighborhoods would enhance the security of the population. But how far do we have to go? Did we reach the stage at which it is necessary to place a policeman in every block, at every corner, in every apartment building, in front of every home?

All possible means should be used in order to curb the crimes and destroy the organized law breaking groups. A few well established myths among the American jurists should be eliminated. First, that wire-tapping is inherently unfair and should be used only in exceptional cases. As a matter of fact, it is an efficient device, frequently providing important data to law enforcement authorities, and it should be freely resorted to. Second, the idea of "entrapment" by the police, preventing conviction, should be discarded, on the pattern of foreign countries. A person willing to commit a crime in front of an undercover agent should be considered as guilty as if he were acting in other circumstances. Third, the idea that the defendant may be prejudiced by an unfavorable atmosphere in the community where he committed the crime should be either discarded or at least substantially limited. A recent Indianapolis trial in a "torture murder" case resulted in the conviction of the defendant. However, a new trial was granted on the ground of possible prejudice of the community. The evidence was clear and the facts were not denied. A second trial was held in another community and the result was the same. How much delay, waste of judicial energy in overcrowded courts and waste of the taxpayers' money! In a few other cases, no trial was held at all because of an alleged impossibility to find unbiased jurors! What may be expected from the community in the case of an odious crime? General sympathy for the brutal murderer?

For good reasons, England is considered as the most conservative country in the world. But the English knew how to reform their law in the right direction when the need arose. Why are we so reluctant to see straight? Why should the American legal profession close its eyes to reality; perpetrate the errors, and even expand the "protection" of the law breakers at the expense of the general public? Is it because the Constitution is sacrosanct? First of all,

with due respect to the Constitution, it is a document which should serve the people, not vice-versa. If it should prove to be detrimental to the best interests of the nation, it should be amended forthwith. But the so-called "constitutional rights" of the accused have little to do with the mandates of this remarkable basic law. They are a pure creation of abstract minds which for the purported "fairness" in the court are willing to substitute anarchy for necessary restraints and control over anti-social elements of the people.

I hope that we reached the bottom, and that future developments will go in the right direction.

Very sincerely yours,

W. J. WAGNER,
Professor of Law.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass. May 15, 1972.

Senator JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Law and Procedures, Committee on the Judiciary, U. S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in reply to your letter of April 27, 1972, in which you invited me to testify or submit a statement for the record on Section 208 and Chapters 11 and 12 of the proposed Federal Criminal Code drafted by the National Commission on Reform of Federal Criminal Laws.

In accordance with your invitation, I submit the following statement:

I. *Sec. 208. Extraterritorial Jurisdiction:* Your Committee may wish to consider two suggestions in relation to Section 208.

First, in subsection (h), I suggest that the word "territorial" be inserted before the word "jurisdiction". The insertion would help to clarify what I take to be the intention of your Committee, and would avoid possible ambiguities arising from the scope of the word "jurisdiction". Suppose, for example, that the criminal code of Japan were made applicable by its terms to all offenses committed by Japanese nationals anywhere in the universe. Under such a posture of Japanese criminal law, if a Japanese should assault a national of the United States in Antarctica, the act of the Japanese would constitute a criminal offense under Japanese law and subject him to prosecution by Japanese authorities if he should be apprehended. His offense, while committed outside the territory of Japan, would thus be within "the jurisdiction" of Japan as defined by Japanese law under the assumption of this hypothetical case. It would follow that the offense would not be "outside the jurisdiction of any nation' and therefore would not be punishable under subsection (h), unless the term "jurisdiction" in subsection (h) were interpreted to mean "territorial jurisdiction". The possible confusion can be obviated by making clear that subsection (h) is intended to apply only to offenses committed "outside the *territorial* jurisdiction of any nation".

Second, your Committee may wish to consider strengthening subsection (f) by an additional provision. A federal public servant or a member of his household residing abroad (or a person accompanying the military forces of the United States abroad) who commits an offense might seek to avoid punishment by remaining outside the United States after the expiration of the term of office (or the term of military service). In such a case, the offender would be beyond the reach of the process of American courts; and he might be in fact also free from prosecution by any other government either because of the terms of a status of forces agreement or other treaty or because such other government might be uninterested in prosecuting. To meet such a possible difficulty, your Committee may wish to consider a suggestion which, as I am informed, was made by the Department of Defense in another context. At a *Hearing on the Operation of Article VII, NATO Status of Forces Treaty* before a Subcommittee of the Senate Committee on Armed Services, 91st Cong., 2d Sess., 7–8 (1970), I am informed that the Department of Defense recommended that the American military abroad be authorized to arrest civilians accompanying the military forces of the United States who may commit an offense abroad. Whatever reason Congress may have had for not adopting the recommended measure of the Department of Defense on that occasion, your Committee may wish to consider a comparable step in connection with subsection (f) of Section 208. Such a step would involve supplementing subsection

(f) by a provision authorizing the American military (or other U.S. public officers abroad) to arrest a federal public servant, a member of his household, or a person accompanying the military forces of the United States who commits an offense in the contemplation of subsection (f) and to return such offender promptly to the United States for trial in a federal court. Manifestly, such a power of arrest could be exercised only when it is authorized by a status of forces agreement or some other treaty with the nation in the territory of which the offense took place. Such a provision would appear to be constitutional so long as the actual prosecution in each case is conducted in a federal court in accordance with the established constitutional procedures.

II. *Chapter 12, Sec. 1204:* As Section 1204 now reads, it seems to me to contain obscurities that should be clarified. Take, for example, the effect of Section 1204 on 22 USC §287c(b), referred to in clause (c) of subsection (2) of Section 1204. At present, 22 USC §287c(b) provides a penalty for any violation of its provisions by imprisonment up to ten years and by a fine up to $10,000. Sec. 1204 provides that any person who violates 22 USC §287c(b) "with intent to conceal a transaction from a government agency . . . or with knowledge that his unlawful conduct substantially obstructs, impairs or perverts the administration of the statute . . ." shall be guilty of a Class C felony. Under Section 3201 of the proposed Federal Criminal Code, a Class C felony may be punished by imprisonment for no more than seven years. Thus, it would appear to follow that the term of permissible imprisonment under 22 USC §287c(b) would be reduced by Section 1204 of the proposed Federal Criminal Code from a maximum of ten years to a maximum of seven years if the offense is committed "with intent to conceal a transaction from a government agency . . . or with knowledge that his unlawful conduct substantially obstructs, impairs or perverts the administration of the statute . . ." Suppose, however, that a person should violate 22 USC §287c(b) without such an intent "to conceal a transaction", etc. and without "knowledge that his unlawful conduct substantially obstructs", etc. What then? Section 1204 of the proposed Federal Criminal Code is silent on the point. In consequence, if Section 1204 and 22 USC §287c(b) are read together and applied literally, a court might well conclude that the original ten year maximum imprisonment of 22 USC §287c(b) still applies, absent the "intent to conceal", etc. and absent the "knowledge that his unlawful conduct substantially obstructs", etc. It appears to me, therefore, that Section 1204 of the proposed Federal Criminal Code requires an additional provision to make clear what the effect will be of a violation of any of the statutes listed in subsection (2) when the person committing the violation does so without any "intent to conceal a transaction", etc. and without any "knowledge that his unlawful conduct substantially obstructs", etc.,

I hope that these comments may be helpful.

Sincerely yours,

MILTON KATZ.

TRIBUNAL DE GRANDE INSTANCE DE PARIS,
Paris, France, March 11, 1972.

Senator JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

DEAR SIR: I received on March 8 your kind letter of March 3, 1972. Thank you for showing interest in comparative law and for sending me your questionnaire.

Unfortunately the deadline for the answers being March 17 it is out of my capacity to make available to your committee any valuable material on the French penal law. Although I limited myself to the first three questions, I realize that my answers on these questions are incomplete or inadequate.

Should your committee still be interested in receiving information at a later date, would you please let me know. I could more easily work at leisure on the questionnaire during the summer, when our courts are out of sessions.

My late husband was American and until a recent date, and for five happy years, I lived with him in the United States. I have retained close ties with your country, was back there last summer and will probably return in 1973 to

spend my summer vacation there. Yet my command of English was never too good, so that I feel more at ease to answer the questionnaire in French.

With kindest regards,

Sincerely yours,

GENEVIEVE SUTTON.

ANSWER TO QUESTION 1

Le droit pénal français a été codifié sous le Premier Empire dans deux codes, qui depuis, et récemment encore, ont été à diverses reprises complétés et rénovés sans toutefois qu'on ait procédé à une révision complète de ces codifications. Leur structure est donc ancienne, et nombre de lois postérieures à la codification d'origine n'ont pas été incorporées dans ces codes. (N.B. droit pénal = *penal law*, loi = *statute*).

Le "Code pénal" date de 1810, le "Code de procédure pénale" date de 1808. C'est le Code pénal qui serait l'équivalent de votre *Penal Code*. Il comporte 477 articles (*sections*), répartis en "dispositions préliminaires", et troit Livres. Il contient:

1° la partie générale du droit pénal, c'est à dire les règles générales relatives à l'infraction (*offense*), au délinquant, à la peine. Cette partie générale, est contenue dans les "dispositions préliminaires", le Livre I et le Livre II, est la plus courte (74 articles). Une des bases du droit pénal général est la classification des infractions en trois catégories en fonction des peines qui leur sont applicables: les "crimes", punissables de peines criminelles; les "délits", punissables de peines correctionnelles; les "contraventions", punissables de peines de police.

2° la partie spéciale du droit pénal: definition de chacune des infractions et énoncé des peines applicables à chacune d'elles. Ceci fait l'objet du Livre III et du Livre IV et va de l'article 75 à l'article 477.

Tout ce qui concerne la procédure pénale (y compris les règles concernant les preuves), l'organisation des juridictions (*courts*) et leur compétence (*jurisdiction*), les voies de recours contre les décisions de ces juridictions et l'exécution des sentences est l'objet du Code de procédure pénale (801 articles).

Votre projet de code (*proposed code*) contient des dispositions qui en France ne feraient pas partie du Code pénal mais du Code de procédure pénale: ainsi vos chapitres 2, 7 et presque toutes les dispositions des chapitres 31, 32, 33 et 34 seraient en France contenues dans le Code de procédure pénale.

En ce qui concerne notre Code pénal, les "articles" en sont beaucoup plus brefs que vos *sections*. Le style du code est très condensé, les définitions rentrent rarement dans les détails. Ainsi l'article 2 concernant la tentative (*attempt*) définit celle-ci en moins de cinq lignes, la légitime défense (*self defense*) est traitée en deux articles (art. 328 et 328), totalisant dix lignes. Il en résulte que le Code laisse une grande marge à l'interprétation judiciare. L'unification du droit pénal sur tout le territoire français ne tient pas seulement à l'unité de la loi applicable mais en outre à l'unification qu'assure la Cour de Cassation: cette cour suprême, par le contrôle qu'elle exerce sur les décisions des juridictions de premier degré et des cours d'appel vérifie que l'application, par ces juridictions, de la loi pénale est bien conforme au texte de la loi et aux intentions du législateur. La jurisprudence des tribunaux (premier degré), des cours d'appel et de la Cour de Cassation évolue, naturellement, au cours des âges, mais de façon harmonieuse, grâce surtout au rôle de la Cour de Cassation.

Votre soin de faire un code extrêmement minutineux et détaillé démontre de votre part un très légitime souci d'assurer le strict respect du principe de la "légalité", mais l'on peut se demander si votre code laissera suffisamment de marge d'interprétation aux tribunaux (*courts*) pour permettre l'evolution du droit pénal en fonction de l'évolution des idées et des moeurs, et si le Congrès n'aura pas sans cesse à modifier les textes du Code.

ANSWER TO QUESTION 2

La structure de votre projet de code est moderne et très pratique, analogue au système que nous adoptons pour nos bibliothèques (*libraries*—système décimal, Dewey).

En raison de son ancienneté la structuration de notre Code pénal est beaucoup moins commode. Les matières n'y sont pas toujours présentées dans un ordre

logique, et, surtout, la numération des articles y est faite sans laisser de numéros en blanc à la fin des chapitres et des paragraphes, permettant l'insertion ultérieure, à leur place logique, de dispositions nouvelles. C'est pourquoi, lorsqu'il veut compléter un article du Code par un article nouveau traitant du même sujet, le législateur répète le mêmo numéro en y ajoutant un chiffre distinguant le nouvel article de celui qui le précède. Par exemple, à l'article 334 définissant et réprimant le proxénétisme on a, en 1946, ajouté un article numéroté 334–1 visant une forme aggravée de proxénétisme.

Votre système de numérotation me paraît excellent, et, puisque votre projet de code tend à être exhautif et que, pour faire évoluer le droit en fonction de l'évolution de la société, le Congrés sera, j'imagine, appelé fréquemment à ajouter des dispositions nouvelles, je ne crois pas que vous ayez laissé trop de "blancs".

Answer to Question 3

Il n'y a pas dans le Code pénal français de dispositions générales sur la faute, élément moral de l'infraction, ni de définitions des différents degrés de faute. Cependant, en étudiant la définition de chacune des infractions spécifiquement visées par le Code, on découvre qu'il existe, du point de vue du degré de la faute (élément moral) requise pour que l'infraction soit constituée, diverses sortes d'infractions :

A.—*infractions non intentionnelles*, constituées alors même qu'il n'y a pas eu intention de causer un dommage :

(1) infractions dites "matérielles" : ce sont la plupart des *contraventions*, par exemple les contraventions aux règles concernant la circulation routière (*traffic offenses*). Cependant même en de tels cas l'infraction n'est constituée que s'il y a eu au moins volonté de commettre le fait matériel incriminé ; l'infraction n'existerait pas, il n'y aurait ni incrimination ni poursuites possibles, si la volonté était absente par suite de la démence (*insanity*) ou de la contrainte (duress).

Charge de la preuve : en de telles infractions la volonté (de commettre le fait matériel) est présumée. A celui qui invoque l'absence de volonté d'en faire la preuve.

(2) *infractions par "imprudence"* : Pour que l'infraction soit constituée il faut qu'il y ait eu non seulement la volonté de commettre le fait matériel mais en outre imprudence à avoir agi ainsi. Cependant le dommage lui-même n'a été ni voulu, ni même. Exemples : —le délit de blessures involontaires (*negligent assault*) —le délit d'homicide involontaire (*reckless manslaughter, negligent homicide*).

Les articles du Code pénal prévoyant ces délits visent "la maladresse, l'imprudence, l'inattention, la négligence ou l'inobservation des règlements", aucun de ces mots n'étant défini. Il s'agit, en résumé, de faits d'homicide ou de blessures commis par imprudence, que l'expansion industrielle et le développement de l'automobile ont évidemment multipliés.[1]

Charge de la preuve : c'est à l'autorité de poursuite (*prosecution*) de prouver la faute d'imprudence commise par l'auteur du fait matériel dommageable.

B.—*infractions intentionnelles.*

(1) Tous les "crimes" et la très grande majorité des "délits" nécessitent pour être constitutés qu'il y ait en chez l'auteur une intention coupable, c'est-à-dire une intention d'atteindre un certain résultat dommageable spécifique à l'infraction. Voici des exemples :

Délit de coups et blessures volontaires (*willful assault*) : il faut qu'il y ait eu intention de blesser.

Délit de vol : il faut que la soustraction (élément matériel) de la chose d'autrui ait été commise "frauduleusement". Le Code ne définit pas le mot "frauduleusement". Selon la jurisprudence, "frauduleusement" signifie que l'auteur de la soustraction savait que la chose ne lui appartenait pas et qu'il l'a prise sans que le propriétaire de la chose y consente.

Crime de meurtre (*2d degree murder*) : homicide commis dans l'intention de tuer.

(2) Il peut y avoir un degré plus élevé d'intention coupable : la préméditation. Exemple : le crime d'assassinat (*1st degree murder*).

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[1] P.S.—Le Code pénal ne distingue pas divers degrés dans l'imprudence. En fait, dans la répression des homicides involntaires ou blessures involontaires, les tribunaux tiennent compte, pour mesurer la peine qu'ils infligent, du degré de l'imprudence qui a causé le dommage.

Charge de la preuve: pour toutes les infractions intentionnelles, c'est évidemment à l'autorité de poursuite de prouver l'existence de l'intention coupable spécifique à l'infraction poursuivie.

* * * P.S. Le Code pénal ne distingue pas divers degrés dans l'imprudence. En fait, dans la répression des homicides involontaires ou blessures involontaires, les tribunaux tiennent compte, pour mesurer la peine qu'ils infligent, du degré de l'imprudence qui a causé le dommage.

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Études et Variétés

LE PROJET DE CODE PÉNAL FÉDERAL DES ESTATS-UNIS

(Par Geneviève Sutton, Juge au Tribunal de grande instance de Paris)

Le 8 novembre 1966 le Congrès vota le principe d'une révision fondamentale du droit pénal fédéral et confia à une commission, qui devait être spécialement constituée à cet effet, le soin de lui soumettre un projet législatif dans le délai de trois années.

La commission devait comprendre trois members, dont un président, nommés par le président des Etats-Unis, trois sénateurs désignés par le président du Sénat, trois membres de la Chambre des représentants choisis par le président de cette Chambre, et trois juges fédéraux, dont un de cour d'appel et deux d'une juridiction de première instance, nommés par le ministre de la Justice. L'acte du Congrés disposait qu'aucune des trois premières caatéparti politique . . . . louable souci de ménager un certain pluralisme de tendances qui, effectivement, allait inspirer les travaux de la commission et dont le texte du projet porte en divers endroits la marque.

Par ailleurs, la composition de la commission allait offrir l'avantage d'associer étroitement législateurs et praticiens du droit. Les six parlementaires choisis par le Congrès furent des membres des Commissions judiciaires de leurs Chambres respectives. Les trois juristes que nomma le président Johnson étaient des avocats en exercise ; celui d'entre eux qui fut désigné pour présider la commission, M. Edmund G. Brown, s'était acquis une juste réputation de compétence dans les fonctions successives de procureur du District de San Francisco, de procureur général de la Californie, puis de gouverneur de cet Etat. Le reste de la commis-

sion fut, on l'a dit, composé de juges en fonction. Encore faut-il préciser que l'acte législatif de 1966 mettait à sa disposition des crédits suffisants pour qu'elle puisse s'adjoindre à titre permanent le concours d'un rapporteur général-directeur des travaux, aidé d'un corps d'assistants de recherche et d'un secrétariat administratif, et pouvant faire appel aux conseils de juristes éminents, dont des universitaires. La commission se choisit en la personne de M. Louis B. Schwartz, professeur à l'Université de Pennsylvanie, un rapporteur et directeur particulièrement qualifié. Ajoutons enfin que la commission devait s'assurer la collaboration d'un comité consultatif officiel de quinze membres, lequel fut également composé de praticiens et théoriciens du droit, dont l'honorable Tom C. Clark, président, juge honoraire de la Cour suprême des Etats-Unis, et le doyen Louis H. Pollak, de l'Ecole de droit de Yale.

Cependant, quelles que fussent l'importance et la haute qualité des concours dont elle disposait, la commission se voyait impartir une mission si vaste qu'elle dut, en cours de travaux, en restreindre la portée, éliminant notamment de son propos la réforme de la procédure pénale. Et encore lui fallut-il faire proroger d'une année, jusqu'au 8 novembre 1970, le délai fixé par le Congrès pour mener à bien l'œuvre entreprise.

C'est donc dans le courant de l'été 1970 que parut finalement le projet de code, fruit de quatre années de travail intensif. Sa publication fut accompagnée de celle de deux gros volumes de *working papers*, rendant compte des nombreuses recherches, études et consultations effectuées. La commission toutefois ne considéra pas alors son texte comme définitif : il s'agissait d'un "avant-projet" dont elle addressa des milliers d'exemplaires aux parlementaires, juges féderaux, représentants du ministre public, members des barreaux, professeurs de droit, etc., en vue de susciter leurs avis. Aussi chaque article du texte publié en 1970 comporte-t-il, à sa suite, un précieux commentaire du professeur Schwartz destiné à éclairer le lecteur. En outre, sur plusieurs points controversés, au sujet desquels la commission reste partagée, le texte propose plusieurs solutions de rechange. C'est finalement le 7 janvier 1971 qu'aprés l'avoir modifié sur plusieurs points, la commission saisit officiellement de son projet le président et la Congrès [1].

A plus d'un titre le texte proposé est source d'intéressantes réflexions pour le lecteur français. Il exprime bien le puissant courant de codification qui, depuis peu, tend à bouleverser le visage traditionnel du droit pénal américain. Par ailleurs, au regard de nos habitudes centralisatrices et de notre conception d'un droit unitaire, nous y trouvons l'occasion de mieux cerner, dans une nation encore très décentralisée, le rôle du pouvoir fédéral et de sa législation . . . rôle en principe exceptionnel mais qui tend à le devenir de moins en moins, sous la pression d'une évolution apparemment irréversible, quelque regret qu'en aient les tenants nostalgiques de la primauté des *States' Rights*. A d'autres égards encore, l'histoire récente, on les préoccupations sociales de l'heure— qui ne sont pas toujours propres aux Estats-Unis—sont inscrites on filigrane on les sent présentes, par exemple, au travers des développements consacrés aux épineux problèmes de la réglementation des armes à feu ou de la lutte contre les stupéfiants.

Dans leurs avant-propos et commentaire général, le président Brown et le professeur Schwartz soulignent l'intérêt historique du project présenté: c'est la première tentative du pouvior fédéral de fondre en un ensemble logiquement norganisé et exhaustif un droit pénal jusqu'à présent "cahotique", résultant de statuts multiples et souvent contradictoires. Les dernières codifications, pures compilations de textes, dont certaines formulations remontent au Moyen Age, ne présentent ni classement des infractions— additionées sans ordre, si ce n'est alphabétique—, ni classement des peines. Elles ne contiennent aucune disposition d'ensemble des règles du droit pénal général et comportent même en la matière d'importantes lacunes, touchant par exemple aux questions de la légitime défense, de l'aliénation mentale, du cumul des infractions et des peines, négligées par le législateur et dont la solution est laissée au hazard des constructions divergentes des Cours d'appel.

Le projet, à l'instar du *Model Penal Code* élaboré il y a une dizaine d'années par l'*American Law Institute*, dont il s'inspire sur plus d'un point, et de codes récemment promulgués dans quelques rares Etats, forme au contraire

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[1] Dan un *Mémorandum* du 18 janvier 1971, M. Schwartz exprime le regret de l'abandon par la commission de quelques-unes des solutions primitivement envisagées.

un tout solidement charpenté et logiquement construit.[1] Innovation dans le domaine du droit fédéral, il pourra aussi, comme le souhaitent ses auteurs, fournir un modèle aux législateurs des Etats.

Il s'agit d'un code tripartite. La Partie A, groupant les chapitres 1er à 7, est consacrée au droit pénal général, dans lequel est du reste inclus un chapitre fondamental concernant la compétence fédéral; la Partie B, des chapitres 10 à 18, contient tout le droit pénal spécial; la Partie C, des chapitres 30 à 36, traite des peines.

Chaque chapitre est subdivisé en articles dits *sections*. Le code en contient quelque quatre cent soixante, alors que le premier article, qui relève du chapitre 1er port le numéro 101 et que le dernier est l'article 3605 (relevant du chapitre 36). C'est dire que la présentation est entièrement fondée sur le système du "classement décimal" qui permet de grouper, sous la même décimale, tous les articles traitant de mitières voisines, tout en laissant subsister des l'articulation inteerne de toutes les matières traitées. On a l'impression que, de dispositions législatives nouvelles.

Cette forme rationnelle ne fait qu'exprimer la rigueur qui a présidé à l'articulation interne de toutes les matières traitées. On a l'impression que, résolument hostiles à l'incohérence du droit pénal actuel, les auteurs ont poussé jusqu'à l'extréme le souci de l'organisation. Un exemple parmi d'autres: au chapitre 3 sur de "fondement de la responsabilité pénal", l'article 302, long d'une soixantaine de lignes, énumère et explicite les quatre degrés possibles de fautes pouvant constituer l'elément moral de l'infraction: *intentionally, knowingly, recklessly, negligently*. Chacun de ces degrés étant complètement défini d'advance, on saura ensuite à quoi s'en tenir en retrouvant l'un ou l'autre de ces termes lors de l'examen de chaque infraction spécifique. Ainsi, au chapitre 16 des "attentats contre les personnes", peut-on aisément différencier le *manslaughter* (art. 1602), homicide commis *recklessly*, du *murder* (art. 1601), où la mort aé té causée *intentionally* ou *knowingly*, et du simple *negligent homicide* (art. 1603).

Nul besoin non plus d'énoncer pour chacune des canduites incriminées les peines encourues: le législateur se contente d'indiquer la catégorie d'infractions dont elle relève. *Le murder*, par exemple, est une felony de classe A, le *manslaughter* une *felony* de classe B, le *negligent homicide* une *felony* de classe C. Dès le premier chapitre du code nous présentée une classification générale des infractions, complétée par une classification détaillée contenue au chapitre 30 concernant les peines en général. Cette dernière classification présente une répartition graduée des infractions en six catégories dont chacune comporte sa mesure de peine applicable. Il suffira donc de savoir de quelle catégorie delève telle infraction spécifique pour connaître les peines encourues.[1]

Tout aussi évident que ce soin d'organisation logique est le souci des auteurs d'être exhaustif. On pourra difficilement leur reprocher un silence ou une obscurite de la loi. Les définitions terminologiques aboundent.[2] Les dispositions de droit pénal général et la plupart de celles qui traitent des incriminations specifiques frappent par l'ampleur de leurs développements.

Ainsi la légitime défense, qui fait son entrée dans le droit écrit, est-elle aboundamment réglementée en cinq articles totalisant plus de cent soixante lignes (art. 603 à 607) . . . on songe au laconisme des articles 328 et 329 du code français! De même des conditions de la contrainte exclusive de responsabilité (art. 611, *duress*) et la tentative. Celle-ci, qualifiée d'infraction "générale", est toujours punissable. Venant en tête de la Partie B (droit pénal spécial), elle fait l'object d'un long article 1001, où se trouvent minutieusement définis le commencement d'exécution et le désistement volontaire.

Même attention des auteurs à décrire aussi complètement que possible le comportement constitutif de chaque infraction, ainsi que ses circonstances aggra-

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[1] M. Schwartz fut l'un des principaux auteurs du *Model Penal Code*. V. cette *Revue*, 1966, p. 599 à 606, "La réforme du droit pénal américain: le Model Penal Code", par Louis B. Schwartz.

[1] Le code prévoit trois catégories de *felonies* (A, B, C) qui, s'agissant par exemple de l'emprisonment, comportent respectivement des termes légaux de huit à trente ans (classe A), six à quinze ans (classe B), cinq à sept ans (classe C), deux catégories de *misdemeanors* dont l'une (classe A) peut être sanctionnée par un emprisonnement d'un an au maximum et l'autre (classe B) par un emprisonnement ne pouvant excéder trente jours. Ces cinq catégories sont dénommés *crimes*. Il en existe une sixième, dite des *infractions* (purement réglementaires), exclusive de toute peine d'emprisonnement.

[2] On va jusqu'à préciser par exemple ce qu'il faut entendre par "raisonnablement", "être humain", "dommage corporel", etc.

vantes. Indépendamment du vol avec violences (*robbery*, art. 1721), on a "fondu", dit-on, en quelques articles (art. 1731 et s.), sous la qualification unique de *theft*, une douzaine de textes disparates qui réprimaient divers modes d'appropriation frauduleuse de la chose d'autrui (vol, recel, abus de confiance, grivèlerie, extorsion de fonds, chantage), mais en fait le code consacre à cette infraction rénovée plus de deux cents lignes dont la majeure partie consiste en des définitions terminologiques. Les cinq degrés de gravité de ce *theft*—qui vont du crime grave de *felony* classes B à la simple infraction à peine punie et dicteron les peines s'imposant aux juges [1]—sont strictement définis en fonction, notamment, de la valeur de la chose indûment approprié.

En somme, il se dégage l'impression d'ensemble qu'en matière d'incrimination on a voulu réduire au minimum la part de l'imprévu . . . et de l'imagination. Le principe de la légalité y trouve, semble-t-il, sa consécration absolue. Mais quel sera dès lors le rôle de la jurisprudence dans l'évolution du droit pénal?

Pour les auteurs, une des grandes innovations de leur projet tient en un changement fondamental de perspective quant au mode de définition de la compétence fédérale. On sait que celle-ci est en principe une compétence d'exception, chacun des Etats gardant sur son territoire le pouvoir souverain d'assurer l'ordre tel qu'il l'entend, au moyen d'un droit pénal qui ne relève que de son propre législateur, de ses seuls juges et de sa police particulière.

Dès l'origin· il est vrai, certaines infractions affectant la vie de la nation comme telle relevaient exclusivement du domaine fédéral. Ainsi de la trahison, et des délits fiscaux et douaniers. S'il est vrai que ce domaine réservé demeure à l'heure actuelle relativement restreint, par contre sous la pression de l'histoire économique, politique et sociale, le pouvoir fédéral s'est progressivement intéressé, en s'attribuant une compétence concurrente de celle des Etats, à la répression des délits aussi communs que le vol, les attentats aux mœurs, etc. La base légale de cette immixtion de l'Etat fédéral dans des questions relevant normalement des autorités locales était le pouvoir propre au Congrès de légiférer en matière de relations postales, commerce inter-Etats et sur certains impôts. La raison profonde en était le besoin croissant, à mesure que se développaient les moyens de communication et que la criminalité prenait des dimensions nationales, d'assurer à la répression une plus grande efficacité. Il en résulta, dès la fin du XIX^e^ siècle et plus encore au XX^e^ siècle, une accumulation de textes votés par le Congrès, créant—à partir d'infractions de droit commun échappant jusqu'alors à la compétence fédérale—des incriminations fédérales dont le seul élément qui fût défini était le critère fondant la compétence nouvelle, par exemple l'utilisation de la poste (service fédéral) dans la réalisation d'une escroquerie. C'est dire qu'en fonction d'un critère externe, un même comportement criminel pouvait se trouver sanctionné par des textes législatifs divers, plus ou moins répressifs, votés à des années d'intervalle, ajoutant l'un après l'autre un nouveau cas d'intervention et créant, ce faisant, une nuvelle infraction fédérale.

Ainsi—mais selon un mode incohérent—le pouvoir fédéral est-il devenu l'auxiliaire des Etats dans la lutte contre la délinquance. Ce rôle du pouvoir fédéral a posé aux auteurs du code deux ordres de problèmes.

D'abord un problème de méthode, mais touchant le fond. Il convient de ne plus traiter le critère de l'intervention du pouvoir fédéral comme un élément intrinsèque de l'infraction mais de définir au contraire celle-ci en termes spécifiques du comportement incriminé, comme le ferait le code d'un Etat normalement compétent pour la réprimer, puis d'indiquer, chaque fois que l'infraction n'est de la compétence exclusive du pouvoir fédéral, le ou les cas où celui-ci devient compétent pour en connaître.

Le code continent donc—c'est l'objet de sa Partie B, la plus abondante—des dispositions de droit pénal spécial où se trouve définie chacune des multiples infractions retenues par les auteurs: quelques-unes sont toujours et uniquement de la compétence fédérale (crimes contre la sûreté de l'Etat, infractions fiscales et douanières, etc.), les autres, très nombreuses, ne le sont qu'à titre exceptionnel.

Au préalable dans la Partie A, générale, les auteurs énumèrent à l'article 201—de *a* jusqu'à *l*—les douze cas où le pouvoir fédéral peut se trouver compétent pour connaître d'une infraction normalement hors de son atteinte.

On se trouve donc devant deux sortes d'incriminations: d'une part celles qui emportent la *compétence plénière* de la justice fédérale—à leur égard aucune mention spéciale n'est indiquée à la suite de leur définition spécifique—, d'autre

[1] Cf. n° 1, p. 354.

part celles, beaucoup plus nombreuses, qui ne pourront être poursuivies par le pouvoir fédéral que dans les cas expressément visés pour chacune par référence à l'article 201. Ainsi est-il prévu à propos du *murder* que celui-ci entraîne compétence fédérale dans les cas, *a*, *b*, *c* et *l* de l'article 201, c'est-à-dire lorsqu'il a été commis sur un territoire appartenant à l'Etat fédéral, ou au cours ou à la suite immédiate d'un infraction relevant de la juridiction fédéral, ou lorsque la victime en a été le président des Etats-Unis, le vice-président, un membre du Cabinet ou de la Cour suprême ou un fonctionnaire fédéral agissant dans le cadre de ses fonctions,[1] ou encore lorsqu'il s'agit d'un meurtre commis dans des circonstances de piraterie.

A la réflexion on s'aperçoit que la presque totalité des incriminations possibles et imaginables en droit moderne sont prévues par le code et ne peuvent donc, à un titre ou à un autre, constituer une infraction fédérale. Il en sera toujours ainsi lorsque l'une de ces infractions a été commise sur un des territoires fédéraux, mais ceux-ci l'exception. D'autres critères spécifiés à l'article 201 contribueront, eux, à élargir considérablement le domaine du pouvoir fédéral, en particulier le critère *b*, visé à l'occasion d'un très grand nombre d'infractions et qui autorise l'intervention des autorités fédérales dès lors que les faits incriminés ont été commis au cours de la réalisation d'une infraction elle-même fédérale. Une telle extension présente, dans le contexte socio-politique actuel, un intérêt évident. C'est ainsi qu'à propos, par exemple, du délit fédéral d'entrave au libre exercice des *civil rights* (droits à la protection desquels Washington attache du prix), les autorités fédérales pourront se saisir d'affaires de meurtres ou de violences commis pour entraver l'exercice de ces droits au lieu que la répression en soit laissée comme à présent au gré des pouvoirs locaux.

Cependant les auteurs ont conscience des risques que présenterait une extension inconsidérée de la compétence fédérale : poussée à l'extrême elle compromettrait gravement la souveraineté des Etats, ébranlant le fondement même du régime. Comment donc restreindre aux seules circonstances où elle s'avère indispensable l'intervention du pouvoir fédéral ? . . . tel était le second problème à résoudre. Il ne suffisait pas de dresser une liste limitative des cas d'intervention (art. 201), puis d'indiquer pour chaque infraction dans lequel ou lesquels de ces cas elle pourrait être de la compétence fédérale. Celle-ci ne devrait être mise en œuvre que si, en fait, il y va de l'intérêt national. Il n'en est pas forcément ainsi, alors même que se présente l'un des cas de l'article 201. Que, par exemple, dans une affaire de vol de voiture, le véhicule ait franchi la frontière d'un Etat n'implique pas en soi la nécessité de l'intervention du pouvoir fédéral. Aussi—réserve faite des quelques infractions emportant *compétence plénière* et de toute infraction quelconque commise sur un territoire appartenant à l'Etat fédéral—chacun des cinquante Etats particuliers demeure-t-il en principe compétent à l'égard de l'une ou l'autre des multiples infractions visées par le Code fédéral du moment que les faits ont été commis sur son territoire et que sa propre législation les incrimine.

On est donc le plus souvent en présence d'une compétence concurrente du pouvoir fédéral et des Etats. En cas de conflit, lequel des souverains tranchera ? La suprématie du pouvoir fédéral est, pour la première fois, erigée en principe : l'article 207 reconnait formellement à ses autorités le pouvoir discrétionnaire de poursuivre ou de ne pas poursuivre l'infraction, selon qu'elles estiment qu'un "important intérêt national" est ou non en cause. Le texte spécifie qu'un tel intérêt existe notamment lorsque la délinquance apparemment localisée dans ses effets semble être en relation avec des activités criminelles organisées au delà frontières de l'Etat, ou que l'intervention fédérale est nécessaire à la protection de droits garantis par la Constitution (*civil rights*), ou que les pouvoirs locaux sont corrompus au point que l'application de la loi pénale en est compromise.

La concurrence des juridictions pose encore le problème de l'autorité, sur l'une, de la chose jugée par l'autre. Jusqu'à présent, en cas d'acquittement ou de condamnation par une cour fédérale du chef d'une infraction poursuivie d'abord devant elle, des poursuites ultérieures demeuraient possibles dans la plupart des Etats, à la discrétion du ministère public local : la règle *non bis in idem* s'imposera désormais à tous les Etats dans le cas d'une saisine antérieure de la juridiction fédérale. En corollaire, une condamnation ou un acquittement prononcés par la cour d'un Etat fait-elle obstacle à des poursuites ultérieures par les autorités fédérales ? En principe oui, à moins que le ministre fédédal de la Justice n'atteste

[1] Le code s'inspire ici d'une législation récente, votée par le Congrès à la suite de l'assassinat du président Kennedy, et instituant la compétence fédérale en cas d'agression contre le président ou le vice-président des Etats-Unis.

que l'intérêt de la nation se trouverait gravement lésé par l'application de la régle *non bis in idem*. Cette particularité, issue d'une jurisprudence récente, consacre expressément encore la primauté de la compétence fédérale. En matière de droit pénal, comme en d'autres domaines, le centre de gravité semble bien se déplacer des Etats à l'Etat fédéral.

D'autres signes des temps se font jour à travers les dispositions du projet de code, en particulier dans sa Partie B consacrée au droit pénal spécial.

Dans une civilisation caractérisée par un extrême développement technique, de ses propres découvertes. La vigilance dans l'usage des choses s'imporant plus que jamais, le législateur est conduit à prévenir des compor tements virtuellement dangereux par la création d'incriminations nouvelles, telles le *reckless endangerment* (art. 1613), qui est le fait d'exposer autrui à la mort ou à un dommage corporel grave par un mépris téméraire du risque. Pour que soit réalisée l'infraction, il suffit que le danger existe, alors même qu'aucun dommage n'en est résulté. D'après le commentaire de l'article 1613, le comportement reproché peut recouvrir des actes aussi divers quel a conduite d'une automobile, le fonctionnement d'un barrage ou le maniement d'engins nucléaires. Dans un même ordre de préoccupations sera également punissable, sous le terme générique de *release of destructive forces*, le fait d'avoir causé volontairement un risque de catastrophe par explosion, incendie, inondation, avalanche, effondrement d'édifices, dissémination de produits toxiques, radioactifs ou bactériologiques alors même que la catastrophe ne s'est pas produite (art. 1704, al. 2).

Certains aspects problématiques de l'Amérique contemporaine ont particulièrement préoccupé les auteurs du projet.

En matière de moeurs, l'évolution des idées, l'extrême diffusion des *mass media* et l'influence de la publicité tendant à favoriser la plus grande licence que réprouve pourtant une fraction de l'opinion. La ligne de partage est délicate à tracer entre les conduites dont le jugement ne devrait relever que de la conscience individuelle et celles que les pouvoirs publics se doivent de réprimer. Si les auteurs n'hésitent pas à abandonner l'incrimination de plusieurs infractions anciennes, telles l'adultère et quelques attentats à la pudeur encore punissables dans certains Etats, leur embarras par contre ets évident en matière de ce que nous appelons "l'outrage aux bonnes mœurs": diffusion d'écrits, images ou représentations "obcènes". Ils savent qu'il n'existe pas à ce sujet de consensus général et qu'en outre une répression trop rigoureuse risquerait de porter atteinte à la liberté d'expression garantie par la Constitution. L'article 1851, qui définit l'infraction, s'inspire de disposition législatives existantes dans les limites de la "constitutionnalité" qu'en a tracées la Cour suprême et tend à bien circonscrire le champ de l'incrimination. Il semble cependant que la commission n'ait pas été unanime, certains souhaitant restreindre devantage encore le champ de la répression, du moins par le pouvoir fédéral. Des propositions de rechange sont présentées qui, au lieu de l'article 1851, ne sanctionneraient la diffusion d'écrits ou images obscènes que lorsque le réceptionnaire est un mineur de seize ans ou une personne non consentante.[1]

Autre sujet de préoccupation, l'usage toujours croissant de stupéfiants, qui finit par atteindre des milieux très divers et prend le caractère d'un fléau national. Les lois fédérales actuellement applicables sont complexes, incohérentes et ne réservent aux juridictions fédérales qu'une compétence d'execption. Parce qu'il est indispensable d'assurer sur tout le territoire une protection uniforme et efficace contre un danger dont l'exploitation a des dimensions nationales, le code attribuera à la justice fédérale compétence plénière à l'égard de toutes les infractions en matière de stupéfiants. Une telle extension du pouvoir fédéral trouve un fondement juridique dans le droit du Congrès de légiférer en matiere de commerce. La sévérité de la répression dépendra évidemment de la nociviteé du produit en cause, les substances dangereuses étant réparties, par des réglementaires, en trois catégories: produits toxiques très dangereux, produits dont l'abus peut être dangereux, produits pharmacentiques à usage réglementé. Le code montre en outre le souci de bien distinguer entre différentes sortes de comportements: simple détention, achat pour usage personnel, trafic d'habitude,

[1] D'après le *Mémorandum* de M. Schwartz il apparaît que le projet définitif écarte, à son regret, ces propositions subsidiaires pour s'en tenir à l'incrimination assez large de l'article 1851.

les rigueurs de la loi étant réservées à ceux qui font commerce de la faiblesse d'autrui. Aussi les incriminations des articles 1822 à 1827 sont-elles très nuancées.[2]

Quant au phénomène de la violence, s'il n'est past nouveau, il a pris récemment les devants de la scène nationale et pose, entre autres problèmes, celui d'une réglementation plus rigoureuse et plus efficace des armes à feu. La liberté de les acheter, de les détenir et de les transporter n'est pas le moindre sujet d'étonnement du Français aux Etats-Unis. Jusqu'à une époque récente, seul était soumis à régmentation, par le pouvoir fédéral et une minorité d'Etats, le négoce des armesgle, sous lo forme notamment de licenses accordées aux commercants. Cette réglementation n'assurait, semble-t-il, aucum conerole réel de la détention des armes. En 1968, à la suite d'une série d'assassinats tragiques—on garde en mémoire ceux du pasteur King et du sénateur Robert Kennedy—il parut urgent de limiter radicalement, sud tout le territoire de la nation, le commerce et la détention des armes. Une réforme en ce sens fut proposée par le Gouvernement du président Johnson, mais ne trouva pas de majorité favorable au Congrés. Celui-ci se contenta, par deux textes successivement votés en 1968, d'un contrôle encore très partiel.

Quelle est la position des auteurs du code? Sur ce point aussi le texte révèle leur embarras. A titre principal on présente, sous les articles 1811 à 1814, des dispositions reprenant essentiellement la législation féderale déjà en vigueur, y compris la plus récente, de 1968: principe d'interdiction de la détention par des particuliers des armes les plus dangereuses (mitraillettes, bombes, etc.); obligation de déclaration s'imposant aux fabricants et négociants des armes à feu de toutes catégories, chaque arme devant être en outre numérotée et tout transfert déclaré; interdiction à certaines personnes (inculpés et condamnés, déficients mentaux, toxicomanes, etc.) d'acheter ou de détenir une arme; réglementation du commerce entre les Etats (afin d'éviter que des armes ne soient aisément introduites dans un Etat où leur vente est strictement réglementée, à partir d'un Etat où elle ne l'est pas). A l'égard des infractions à ces dispositions, la justice fédérale n'aura pas compétence plénière, ce n'est que dans certains cas (parmi ceux prévus à l'article 201, déjà mentionné) qu'elle pourra s'en saisir. Par conséquent, en une matière où la sécurité de tous est pourtant en jeu, l'Etat fédéral demeurera le simple auxiliaire de chaque Etat local auquel sera laissé le soin d'assurer sa police. Il est probable que la commission a hésité à aller au delà de ce que le Congrès avait accepté en 1968.

Cependant, outre les dispositions prévues aux articles 1811 à 1814, qui en définitive paraissent timides, le code offre, au choix, trois autres solutions visant à restreindre ou même interdire sur tout le territoire la détention de toutes armes à feu, quelles qu'elles soient. Ces propositions ne sont faites qu'à titre subsidiaire: sans doute n'ont-elles pas obtenu l'adhésion unanime ni même majoritaire des membres de la commission, ou ne s'est-on fait que peu d'illusions sur leur chances d'être adoptées par le Congrés.

Les dispositions réprimant l'émeute (*riot*) portent aussi la marque de l'actualité (art. 1801 à 1804). Elles s'inspirent principalement, en les harmonisant, de textes très récents dont l'un d'eux, de 1968, a pour la première fois autorisé l'intervention du pouvoir fédéral sur les territoires des Etats en vue d'y rétablir l'ordre. Les auteurs du code ont tenu à définir très précisément ce qu'il faut entendre par émeute, ou attroupement séditieux, et à doser autant que possible la répression en fonction des responsabilités individuelles engagées.[1] Ils soustraient expressément aux poursuites la simple présence sur les lieux de l'attroupement, remarquant qu'elle peut être le fait du hassard ou d'un désir de manifestation pacifique, et ne sanctionnent que modérément, sous la qualification de *misdemeanor* classe B, la participation au désordre si le délinquant n'a pas fait usage d'une arme. Le refus d'obtempérer, notamment à un ordre de dispersion, devient une infraction, mais elle est mineure et le texte prévoit à son sujet le principe de l'immunité des journalistes ou autres reporters. Ces deux

[2] Le trafic des substances de la première catégorie sera, par exemple, une *felony* classe B, alors que l'acht pour usage personnel de la marijuana, substance de in deuxiéme catégorie et dont la nocivité est très discutée aux Etats-Unis, ne constituera qu'une contravention mineure (*infraction*, non passible d'emprisonnement).

[1] Les événements récents, notent les commentateurs, démontrent qu'il convient de ne sévir légèrement et selon des procédures rapides à l'encontre des "petits" participants; il faut aussi, dans le maintien de l'ordre par les forces de police, éviter les excès qui risquent de "mettre le feu aux poudres" et de s'aliéner l'opinion locale.

incriminations n'emportent que très exceptionellement la compétence fédérale. Plus sévèrement punies sont la provocation à l'émeute (*misdemeanor* classe A) et surtout la fourniture d'armes aux participants (*felony* classe C), qui autorisent aussi plus largement l'intervention du pouvoir fédéral. Cependant, même à leur sujet, on retrouve le souci des auteurs de laisser aux Etats la responsabilité première de maintenir l'ordre sur leurs territoires. Ainsi, s'agissant de la provocation à l'émeute, lorsque la compétence fédérale est motivée par le fait que l'attroupement a été organisé en utilisant des moyens de communication entre Etats ou a comporté le passage de personnes d'un Etat à l'autre, encore faudra-t-il, pour permettre son intervention que le ministre de la Justice atteste qu'il y va de l'intérêt national parce que l'émeute a rassemblé au moins cent personnes et a trouvé d'importants appuis hors de l'Etat où elle s'est produite. Si le code n'attribue donc au pouvoir fédéral qu'une compétence subsidiaire de celle des autorités locales, du moins offre-t-il—c'est le voeu exprès de ses auteurs—le modèle d'une législation moderne, cohérente et nuancée, dont pourraient s'inspirer les parlements des Etats.

Un dernier trait, capital, de l'histoire politique intérieure des Etats-Unis retient encore l'attention. Il s'agit du mouvement en faveur des *civil rights* dont la consécration juridique est le fruit des efforts résolument déployés, depuis une quinzaine d'années, par la justice fédérale et le Congrès pour mettre un terme à la discrimination raciale.

En réalité il y a déjà un siécle que le Congrès a prévu la répression des atteintes aux libertés democratiques. Deux textes out été votés à cette fin dès les lendemains de la Guerre de Sécession. L'un d'eux incrimine la "*coalition* en vue d'intimider un citoyen ou de lui faire tort dans l'exercice d'un droit garanti par la Constitution et les lois fédérales", l'autre, le fait de "priver quelqu'un *sous le prétexte de la légalité*, d'un droit garanti par la Constitution et les lois fédérales". Mais dans la pratique, et pour des raisons plus ou moins juridiques, ces textes no furent qu'exceptionnellement appliqués. A une époque encore récente les cours fédérales reculaient devant leur formulation tout à la fois restrictive et vague (que fallait-il entendre par *droits garantis par la Constitution et les lois fédérales?*).

Le premier succès législatif du mouvement en faveur de l'égalité raciale fut le vote par le Congrès, en 1957, d'un premier *Civil Rights Act*, suivi de plusieurs autres échelonnés jusqu'en 1965. Ces différents textes, au contraire de ceux du siècle dernier, précisaient les droits fondamentaux dont le Congrès entendait protéger l'exercice: non seulement les droits électoraux, quels qu'ils soient, mais aussi ceux à l'égalité dans l'accès à l'emploi, au logement, à l'école, aux lieux ouverts au public, etc. Mais ils ne prévoyaient guère d'autres sanctions que civiles ou administratives. Cepedant, grâce à leur formulation spécifique des divers *civil rights*, ils ont offert aux juges fédéraux l'occasion de redonner vie aux deux vieux textes centenaires qui, eux, avaient été assortis de sanctions pénales.[1] Par sa jurisprudence novatirce, la Cour suprême a finalement incité le Congrès à compléter son oeuvre législative par des dispositions pénales visant à protéger de façon précise et efficace l'exercice des *civil rights* les plus variés. Ainsi fut voté, après deux ans de débats au Congrès, le *Civil Rights Act* de 1968.

C'est principalement de cette législation de 1968 que s'inspire le projet de code. Aux termes de l'article 1511 est coupable toute personne qui fait tort à une autre ou l'intimide à l'occasion de l'exercise de l'un quelconque des droits électoraux ainsi que de ses droits à être juré dans une cour fédérale ou à bénéficier d'un service fédérale (d'assistance, de prêt, etc.). Seront également passibles de poursuites les intimidations ou torts motivés par des "raisons de race, de couleur, de religion ou d'origine nationale", à l'occasion de l'exercise de droits très divers, énumérés à l'article 1512: droit de fréquenter l'école publique de son choix, de profiter de n'importe lequel des services ou activités dispensés par les administrations locales, d'être juré dans les tribunaux, d'avoir libre accès aux hôtels, restaurants, stations-service, salles de spectacle ou tous autres établissements ouverts au public, de solliciter un emploi ou d'adhérer à un syndicat professionnel, d'acheter, vendre ou occuper le logement de son choix, d'utiliser librement les

[1] L'une des interprétations les plus décisives date de 1966 (affaire *Price*). A la suite de l'assassinat trois ans plus tôt, dans le Mississipi, de trois militants du mouvement pour les *civil rights*, la Cour suprême estima fondée l'intervention de la justice fédérale en cas d'entrave à l'exercice de l'un quelconque des droits individuels protégés par une loi fédérale.

transports en commun. Sont en outre réprimés les torts ou intimidations faits à ceux qui aident autrui à bénéficier des droits ainsi protégés, ou à ceux qui s'opposent, par la parole ou la manifestation pacifique, à la violation de ces droits.

Le projet de code ne prévoit que des sanctions relativement modérées à l'encontre de ces diverses infractions (*misdemeanors* classe A), mais il est à noter qu'elles sont toujours de la compétence fédérale et l'on sait que, par application de l'article 201–*b*, les autorité fédérales pourront désormais se saisir, en outre, de tous crimes de violences commis à leur occasion.[1]

La Partie C relative aux peines retient peut-être moins l'attention du lecteur français. Elle offre pourtant l'intérêt de simplifier le système pénal en vigueur et, en outre, de consacrer nettement, par plusieurs dispositions nouvelles, la tendance moderne à l'individualisation et au traitement.

Observons d'abord que les auteurs écartent en principe la peine de mort et l'emprisonnement à vie. Si leur projet est adopté par le Congrès, le droit fédéral se rangera donc parmi les législations abolitionnistes des Etats-Unis.[2]

Les seules peines désormais applicables sont la probation, l'amende et l'emprisonnement temporaire, lequel ne pourra jamais excéder trente ans. Ces peines sont indifféremment encourues, à titre principal, quelle que soit la catégorie de *felony* ou de *misdemeanor* dont relève l'infraction. Seule varie, en fonction de la catégorie, la *mesure* de la peine. Les crimes même les plus graves (*felonies* classe A) peuvent donc en principe n'être sanctionnés que par une amende.

La *probation*—mesure de traitement par excellence—se généralise : non seulement elle est désormais applicable à toute infraction, si sérieuse soit-elle, mais encore le code recommande-t-il d'en faire un large usage, en posant le principe que la "cour ne doit infliger l'emprisonnement que si elle l'estime nécessaire à la protection de la société", pour des raisons que spécifie le texte. L'actuelle disparité des sentences judiciaires en matière de peines, extrêmement variables d'une cour fédérale à l'autre, est soulignée par les auteurs.[1] Aussi formulent-ils, à titre indicatif, une liste de critères pouvant inspirer aux juges la décision de probation ainsi que les conditions dont ils pourront utilement l'assortir. Signalons à ce sujet une nouveauté : la faculté d'ordonner, dans le cadre de la probation, de courtes incarcérations à subir aux moments (nuits ou week-end, par exemple) que la cour estimera appropriés. Par contre la durée de la probation—qu'à présent le juge peut très librement fixer jurqu'à da réduire à un jour—s'imposera désormais à lui (un an pour les *infractions*, deux pour les *misdemeanors*, trois pour les *felonies*), mais une fois le condamné mis à l'épreuve la cour pourra évidemment mettre fin à la probation avant l'échéance du terme légal.

En ce qui concerne l'*amende*, le code attribue aux cours un assez large pouvoir discrétionnaire : dans la limite d'un maximum légal (qui varie selon la catégorie dont deléve l'infraction ou, éventuellement, le gain réalisé ou le dommage causé à la victime), le juge peut en fixer librement le taux, les modalités de paiement, avec la seule obligation, expressément édictée par le texte, de tenir compte des ressources due condamné. Il ne pourra par contre déterminer d'avance la durée de l'incarcération qu'entrainerait le défaut de paiement. Par la suite, pour tenir compte de circonstances nouvelles, le juge pourra réajuster l'amende primitivement infligée, en la réduisant, en modifiant les délais de paiement impartis, en allant même jusqu'à la supprimer.

Une des perspectives nouvelles, à vrai dire étonnante, élargit encore le champ de l'individualisation judiciaire : la faculté qui sera donnée aux cours de pro-

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[1] Voir, *supra*, p. 356.

[2] Le dernier chapitre du code est cependant consacré à ces mesures extrêmes pour le cas où la commission, encore indécise lors de la publication de son projet, n'adopterait pas finalement une position abolitionniste. L'éventuel maintien de la peine de mort n'est envisagé qu'à titre très exceptionnel, avec un champ d'application considérablement restreint par rapport au droit fédéral en vigueur. Encore pourra-t-on toujours lui substituer l'emprisonnement à vie. Innovation de procédue : le choix entre l'une ou l'autre de ces peines devra faire l'objet d'une audience spéciale réunissant la cour et le jury. C'est ce dernier qui en décidera, après considération de toutes sortes de circonstances atténuantes et aggravantes dont le projet dresse la liste. Si le jury ne parvient pas à un verdict unanime, la cour ne pourra prononcer que l'emprisonnement à vie. En tout état de cause l'emprisonnement à vie n'est prévu qu'à titre de substitut de la peine de mort.

[1] C'est une des raisons pour lesquelles, à l'occasion de cette réforme du Code pénal, ils proposent une importante modification touchant la procédure : les cours d'appel auraient désormais compétence pour réformer—en tout cas dans le sens de l'adoucissement—les sentences pénales de juridictions inférieures, ce qui est encore exceptionnel aux Etats-Unis.

noncer—par décision très motivée et à condition que la condamnation ne soit pas prononcée pour *felony* de classe A ou **B** — l'élargissement pur et simple du pas prononcée pour *felony* de classe A ou B—l'élargissement pur et simple du amende.

En matière d'*emprisonnement* par contre, du moins par rapport au système fédéral actuel, lequel est analogue à celui de plusieurs Etats, le projet semble restreindre nettement les pouvoirs de la cour, jusqu'alors assez larges dans le domaine des longues peines. Dans les limites des minimum et maximum légaux, la cour se contentera de prononcer un maximum et n'aura plus, sauf cas exceptionnellement graves, la liberté de fixer un minimum avant lequel la *parole* (libération conditionnelle) ne saurait être accordée: désormais celle-ci pourra toujours, en principe, intervenir dès l'expiration de la première année d'incarcération.

Le code énonce la règle de l'*indétermination* de la sentence d'emprisonnement pour *felony*, mais il ne s'agit que d'une indétermination postjudiciaire, obtenue par le jeu de la *parole* entièrement laissée à la discrétion des *boards of parole* (commissions administratives). La seule limite imposée au pouvoir de ces commissions est que tout emprisonnement comporte une portion légale, dite *parole component*, qui devra être obligatoirement subie sous le régime de la *parole*. Plus grave la catégorie de *felony* dont relève l'infraction sanctionnée, plus longue la durée de *parole component*, car se sont les individus dont la délinquance s'est révélée la plus dangereuse qui doivent être plus longtemps soumis à des mesures de contrôle et d'assistance avant leur libération définitive.

Les marges délimitées par les minima et maxima légaux sont, il est vrai, assez larges, du moins en ce qui concerne les plus graves des *felonies* (huit à trente ans pour la classe A, six à quinze ans pour la classe B, cinq à sept ans pour la classe C). Cependant la cour ne pourra infliger de peines supérieures à ces minima que par décision très précisément motivée. Bien plus, des peines excédant vingt ans en cas de *felony* classe A et sept ans en cas de *felony* classe B ne pourront être prononcées qu'à l'encontre de délinquants reconnus dangereux pour la société (tels les "grans" récidivistes, les professionels du crime, ou les délinquants atteints d'anomalies mentales graves). La très longue incarcération ne peut en effet servir au reclassement et doit être réservée à ceux qu'il convient de mettre hors d'état de nuire.[1]

Quant à l'emprisonnement pour *misdemeanor*, les dispositions nouvelles le concernant reflètent la défaveur croissante des pénologue à l'égard des peines de courte ou moyenne durée, qui ne sont guère plus exemplaires que de très brèves incarcérations et ne peuvent assurer aucune fonction éducative. Les infractions relevant de la classe B ne pourront entraîner plus de trente jours d'emprisonnement, celles de la classe A—à moins de certaines récidives—ne devront pas être sanctionnées par des peines supérieures à une année, ou mieux, propose M. Schwartz, six ou même trois mois.[1]

Notons encore, pour en terminer avec les peines, une disposition très novatrice qui abuotirait à pallier l'absence, dans la législation fédérale comme à notre connaissance dans l'ensemble du droit pénal américain, de ce vieux moyen d'individualisation judiciaire que constitue chez nous "l'octrol des circonstrances atténuante". La cour pourra désormais, par une décision très précisément motivée, tenir compte des circonstances de l'infraction et de la personnalité du délinquant pour appliquer à une incrimination relevant de telle catégorie d'infractions les sanctions applicables à la catégorie immédiatement inférieure.

Dans l'ensemble, réserve faite de la *parole* dont le contrôle reste hors de la compétence des cours, le code fait donc une assez large place à l'individualisation de la répression par l'autorité judiciaire, à laquelle sont du reste donnés, préalablement à la décision sur la peine, certains moyens d'investigation de la personnalité. Mais en définitive la réforme la plus hardie nous parait être la faculté dont le juge disposera dans la plupart des cas de choisir à son gré entre des mesures aussi diverses que l'amende, la probation ou la peine privative de liberté.

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[1] La durée, très réduite, de trois mois à toutefois été exclue du projet définitif soumis au Congrès.

[1] Ajoutons que le cumul des peines étant désormais strictement réglementé, on ne trouvera plus, du moins dans les pénitenciers fédéraux, de détenus purgeant d'étranges sentences de cent ans et plus d'emprisonnement.

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CONGRESSIONAL RESEARCH SERVICE

Translation [French]

[Letter from Mrs. Geneviève Sutton, Judge, Tribunal de grande instance de Paris, Palais de Justice, Paris, France]

[ANSWERS TO QUESTIONNAIRE]

Answer to Question 1:

The French penal laws were codified under the First Empire in two codes which have since then, and again recently, been complemented and renewed several times, but no complete revision of these codifications has been made. Their structure is therefore old and a number of statutes subsequent to the original codification have not been incorporated into these codes. (P.S.: droit pénal—*penal law;* loi—*statute.*)

The "Code Pénal" [*Penal Code*] dates from 1810; the "Code de procédure pénale" [Code of Criminal Procedure] dates from 1808. The Code Pénal would be equivalent to your *Penal* [Criminal] *Code*. It includes 477 articles (*sections*), divided into "dispositions préliminaires" [preliminary provisions], and three Books. It contains:

(1) The general part of penal law, i.e., the general rules relative to *offense*, offender, and penalty. This general part, which is contained in the "preliminary provisions" and Books I and II is the shortest (74 articles). One of the bases of general penal law is the classification of the offenses into three categories according to the penalties that are applicable to them: "crimes" punishable by criminal penalties; "délits" [misdemeanors] punishable by five days' to five years' imprisonment; "contraventions" [petty offenses] punishable by short-term imprisonment [if "simple", 1–5 days in prison] or a small fine.

(2) The special [specific] part of penal law: definition of each of the offenses plus penalties applicable to each of them. This is the subject of Book III and Book IV [sic] ranging from article 75 to article 477.

Everything that concerns penal procedure (including the rules concerning proof [and/or evidence]), organization of the juridictions (*courts*)* and their compétence (*jurisdiction*), means of redress against the decisions of these courts and the enforcement of the sentences, is the subject of the Code of Penal Procedure (801 articles).

Your *proposed code* [*draft* code—EBP] contains provisions that in France would not form a part of the Penal Code, but of the Code of Penal Procedure: thus, your sections 2, 7, and almost all provisions contained in chapters 31, 32, 33, and 34, would in France be contained in the Code of Penal Procedure.

As concerns our Penal Code, its "articles" are much shorter than your *sections*. The style of the code is very condensed; the definitions rarely go into detail. Thus, "article", 2 concerning "tentative" (*attempt*), defines this in less than five lines, "légitime défense" (*self-defense*) is dealt with in two "articles" (arts. 328 and 329) totalling ten lines. As a result, the Code leaves a wide margin to legal interpretation. The unification of penal law throughout the French territory derives not only from the unity of applicable law, but beyond that from the unification that the "Cour de Cassation" [Supreme Court of Appeal] ensures: this supreme court verifies, because of the control that it exercises over the decisions of the "jurisdictions de premier degré [courts of first instance] and of the "cours d'appel" [courts of appeal], that the application of penal law by these courts is well in compliance with the text of the law and with the legislator's intent. The body of laws set forth by the courts (premier degré) [of first instance], of the Courts of Appeal and of the Supreme Court of Appeal naturally has developed in time, but harmoniously thanks, especially, to the role of the Supreme Court of Appeal.

Your concern for making an extremely minute and detailed code shows a very legitimate solicitude on your part for ensuring strict respect for the principle of "legality", but one may wonder whether your code will leave the *tribu-*

*TRANSLATOR'S NOTE: Translation, etc., in *square brackets* are supplied by EBP. Translations *in parentheses* were supplied by Mrs. Sutton.

*Translator's note: The term "juridiction", or "juridictions" does not always mean "court" or "courts"—sometimes it means "jurisdiction", depending on the context in which the term is used.

naux (*courts*) [the Bench] sufficient margin for interpretation to permit the development of penal law according to the development of ideas and mores, and whether the Congress will not have to modify the texts of the Code incessantly.

Answer to Question 2:

The organization of your draft code is modern and very practical, analogous to the system that we adopt for our libraries (*libraries*—Dewey decimal system).

By virtue of its age, the organization of our Penal Code is much less convenient. The subjects in it are not always presented in logical order and the articles in it are numbered without leaving blank numbers [spaces for extra numbers] at the end of chapters and paragraphs for subsequent insertion, at their logical place, of new provisions. That is why the [French] legislator, when he wants to complement an article of the Code by a new article dealing with the same subject, repeats the same number by adding to it a digit distinguishing the new article from the one preceding it. For example, to article 334 defining and suppressing procuring, an article numbered 334—1, relating to an aggravated form of procuring, was added in 1946.

Your numbering system seems to me excellent and, since your draft code tends to be exhaustive and since, in order to have the law develop according to the development of society, I imagine the Congress will frequently be required to add new provisions, I do not think you have left too many "blanks".

Answer to Question 3:

There are no general provisions in the French Penal Code on fault—the moral component of the offense—nor definitions of the different degrees of fault. However, by studying the definition of each of the specific offenses of the Code, one discovers that, from the point of view of the degree of the fault (moral component) required for the offense to be constituted various kinds of offenses:

A.—*Unintentional Offenses*, which are offenses even when there has been no intention to cause an injury:

(1)—So-called "material" offenses: these are the bulk of the *contraventions* [misdemeanors], for example, violations of the traffic rules (*traffic offenses*). However, even in those cases it is an offense only if there has been at least an intention to commit the material act as charged: the offense would not exist, neither crimination [indictment?] nor prosecution being possible, if the intention were lacking due to "démence" (*insanity*) or "contrainte" (*duress*).

Burden of proof: In such offenses the intention (of committing the material act) is presumed. [It is up] to the one who invokes the lack of intention to prove it.

(2)—*Offenses by "imprudence"* [negligence]: For the offense to be established, there must have been not only the intention to commit the material act, but, in addition, negligence in having so acted. However, the injury itself has been neither intentional nor even anticipated.

Examples:

—le délit de blessures involontaires (*negligent assault*),

—le délit d'homicide involontaire (*reckless manslaughter—negligent homicide*).

The articles of the [French] Penal Code providing for these offenses refer to "la maladresse, l'imprudence, l'inattention, la négligence ou l'inobservation des règlements" [blunder, imprudence or negligence, neglect, or non-observance of the rules], none of these words being defined. They are, in sum, acts of homicide or of injuries committed by imprudence [negligence] multiplied, obviously, by industrial expansion and the development of automobile [traffic].**

Burden of proof: It is up to the *prosecution* to prove negligence committed by the author of the "material" injurious act.

B.—*Intentional Offenses:*

(1) All "crimes' and the great majority of "délits" [offenses or misdemeanors] necessitate, for being constituted, that the author had a culpable inten-

**P.S. The Penal Code does not recognize different degrees of negligence. In fact, in the suppression of "homicides involuntaires" or "blessures [injuries] involontaires", the courts, in order to determine the penalty that they impose, take into account the degree of negligence that has caused the injury.

tion; i.e., an intention to achieve a certain tangible result that is specific to the offense. Here are some examples:

—le délit de coups et blessures volontaires (*willful assault*): there must have been intention to injure another;

—le délit de vol [theft]: the taking away of property of others must have been committed "frauduleusement" [literally: fraudulently—in bad faith?]. The Code does not define the word "frauduleusement". According to [French] jurisprudence, "fraudulently" means that the author of the theft knew that the property did not belong to him and that he took it without the owner's consent.

—le crime de meurtre [*second degree murder*]: homicide committed with the intention to kill.

(2) There may be a higher degree of culpable [sic—criminal?] intent: premeditation.

Example: le crime d'assassinat (*first degree murder*).

Burden of proof: For all intentional offenses, it is obviously up to the prosecution to prove the existence of the culpable [sic—criminal] intent that is specific to the prosecuted offense.

ETUDES ET VARIETES [SECTION OF THE REVUE]

Draft of a Federal Criminal Code of the United States

(By Geneviève Sutton, Judge, Tribunal de grande instance, Paris)

On November 8, 1966, the U.S. Congress initiated a revision in depth of the federal criminal laws by entrusting a commission, which was to be specially constituted to that effect, with the responsibility of submitting a legislative proposal to it within a period of three years.

The commission was to comprise three members: a chairman appointed by the President of the United States, three senators designated by the President of the Senate, three members of the House of Representatives chosen by the Speaker of the House, and three federal judges, one from the Court of Appeal, and two trial judges, nominated by the Attorney-General. The Act of Congress provided that none of the first three categories could include more than two members belonging to the same political party . . . , a commendable concern for injecting a certain variety of opinions which, in effect, was going to inspire the work of the commission and which the text of the proposal reflects in several places.

Moreover, the composition of the commission was going to present the advantage of closely associating legislators and practicing lawyers. The six Members chosen by Congress were members of the Judiciary Committees of their respective Houses. The three jurists appointed by President Johnson were practicing lawyers. Mr. Edmund C. Brown, who was designated as chairman of the commission, had made a reputation of competence for himself in his successive offices of District Attorney for the District of San Francisco, Attorney General for the State of California, and governor of that State. The rest of the commission was, as said before, composed of office-holding judges. It should also be stated that the act of 1966 made available to it sufficient appropriations for engaging the services of a full-time staff director, supported by a body of research assistants and an administrative secretariat, and for calling on the advice of eminent jurists, some of them university professors. The commission selected in the person of Mr. Louis B. Schwartz, professor at the University of Pennsylvania, a particularly well qualified director. Let us add, finally, that the commission was to ensure for itself the collaboration of an official 15-member advisory committee, which was likewise composed of practicing lawyers and legal theorists, such as the Honorable Tom C. Clark, chairman, former Justice of the U.S. Supreme Court, and Dean Louis H. Pollak of the Yale Law School.

However, regardless of the importance and high quality of the assistance at its disposal, the commission found itself invested with such a vast mission that it had to narrow down the scope of its work by eliminating from its proposal the reform of criminal procedure. And it again had to have the deadline set by Congress for completing the job it had undertaken extended another year, i.e., until November 8, 1970.

So it was that the draft code, the fruit of four years of intensive work, finally appeared in the course of the summer of 1970. Its publication was accom-

panied by the simultaneous publication of two big volumes of *Working Papers*, accounting for numerous pieces of research, studies, and consultations that had been effected. The commission, however, did not yet regard its text as final: It was a "study draft" of which it addressed thousands of copies to members of congress, Federal judges, representatives of the Attorney General, members of the Bars, law professors, etc., with a view to obtaining their opinion. Moreover, each section of the text published in 1970 was accompanied by pertinent comments by Professor Schwartz intended to enlighten the reader. Furthermore, the text proposed, on several controversial points on which the commission was divided, several substitute solutions. Finally, on January 7, 1971, after having modified the text on several points, the commission officially submitted its proposal to the President and the Congress.[1]

On more than one title the proposed text is a source of interesting reflections for the French reader. It well expresses the powerful forces underlying the desire for codification which have recently changed the traditional look of American criminal law. Furthermore, with regard to our centralizing habits and our conception of a unitarian law, we find here an opportunity to discern, in a still rather decentralized nation, the role of the Federal government and of its legislation . . . , a role which in principle is exceptional, but which tends to become so less and less under the pressure of an apparently irreversible evolution, whatever regrets the nostalgic supporters of the preeminence of States Rights may have about it. In still other regards, recent developments or the social problems of the hour—which are not peculiar to the United States—are not fully spelled out: but one feels that they are present, for example, through explanatory sections devoted to the thorny problems of the regulation of firearms or the fight against narcotics.

Chairman Brown and Professor Schwartz underlined in their study draft and general comments the historic significance of the project: It is the first attempt of the Federal Government to blend into a logically organized and exhaustive whole a criminal law, that is presently "chaotic" as a result of multiple and often contradictory statutes. The latest codifications, pure compilations of texts, with certain formulations going back to the Middle-Ages, present neither a classification of offenses—lumped together haphazardly, though in alphabetical order—nor a classification of penalties. They contain no overall disposition of the rules of general penal law and imply missing links even touching, for example, on such important questions as legitimate defense, mental disease or defect, cumulation of offenses and penalties—questions that have been neglected by the legislator, their solution being left to the hazard of the divergent constructions of the courts of appeal.

The proposal, after the pattern of the *Model Penal Code* elaborated some dozen years ago by the American Law Institute, from which it is derived on more than one point, and of codes recently promulgated in some few states, forms, on the contrary, a well-knit and logically constructed whole.[2]
An innovation in the field of federal law, it can also, as its authors wish, furnish a model for state legislators.

The code has three parts. Part A, comprising Chapters 1 to 7, is devoted to general criminal law, in which also a fundamental chapter concerning federal criminal jurisdiction is included; Part B, Chapters 10 to 18, contains all of the special penal laws [specific offenses]; Part C, Chapters 30 to 36, deals with penalities [the sentencing system].

Each chapter is subdivided into articles, or so-called *sections*. The code contains some 460 of these, with the first section, which belongs to Chapter I, being numbered as 101 and the last section as 3605 (belonging to Chapter 36). This means to say, the presentation is wholly based on the "decimal classification" system, grouping under the same decimal all sections dealing with related subjects, while leaving gaps in the enumeration, which gaps will facilitate subsequent insertion at their logical place of new legislative provisions.

This rational procedure can best express the exactness that has been applied to the internal organization of all subjects dealt with. One has the impression that the authors, decidedly hostile to the incoherence of the present criminal

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[1] In a memorandum dated January 18, 1971, Mr. Schwartz expressed the regrets of the Commission about not using some of the originally envisaged solutions.

[2] Mr. Schwartz was one of the principal authors of the *Model Penal Code*. See this *Revue*, 1966, pp. 599–606, "La réforme du droit pénal américain: le Model Penal Code" by Louis B. Schwartz.

law, have gone all out in their concern for organization. Just one example, among others: In Chapter 3 on the "basis of criminal liability", section 302 enumerates and explains in some sixty lines the four possible degrees of culpability that can constitute the moral component of the offense: "intentionally, knowingly, recklessly, negligently". Each of these degrees being fully defined in advance, one then knows how to find one or the other of these terms by examining each specific offense. Thus, in Chapter 16, "offenses involving danger to the person", one can easily differentiate among manslaughter (sec. 1602), homicide committed recklessly, murder (sec. 1601), or death caused intentionally or knowingly, and simple negligent homicide (sec. 1603).

There is no need to state the penalties incurred for each of the kinds of conduct of which a person is accused: The legislator is satisfied with indicating the category of offenses to which it [the penalty] belongs. Murder, for example, is a class A felony; manslaughter a class B felony; negligent homicide, a class C felony. As of the first chapter of the Code, a general classification of offenses is presented to us, complemented by a detailed classification concerning penalties in general, which is contained in Chapter 30. This latter breakdown presents a graduated classification of offenses into six categories, each of which shows the applicable size of the penalty. It will, therefore, suffice to know to which category a specific offense belongs in order to know the penalties incurred.[3]

As evident as this concern for logical organization is also the authors' concern for being exhaustive. They can hardly be charged with a silence or an obscurity of the law. Terminological definitions abound.[4] The provisions of general penal law and most of those that deal with specific charges are impressive by the fullness of their expositions.

Self-defense, too, which is making its entrance into written law, is abundantly regulated in five sections totalling more than 160 lines (sections 603 to 607) . . . we think of the brevity of Arts. 328 and 329 of the French Code! The same applies to the conditions of duress excluding criminal liability (sec. 611 [i.e., 610], duress) and or [criminal] attempt. This is qualified as a "general" offense and is always punishable. Discussed first in Part B (special penal law [specific offenses]), it is the subject of a long section, 1001, in which the beginnings of the attempt and the voluntary renunciation [of criminal intent] are thoroughly defined.

The same attention has been given by the authors to describing as fully as possible the behavior constituting each offense, as well as its aggravating circumstances. Except for *robbery* (sec. 1721), one has consolidated into a few sections (sec. 1731 *et seq.*), under the heading of *theft*, a dozen disparate texts that did away with various modes of fraudulent [illegal] appropriation of the property of others (theft [of property], receiving and concealing, abuse of confidence, cheating hotels and restaurants [theft of services], extortion of funds, blackmail); in fact the code devotes to this renewed offense more than two hundred lines the greater part of which consisting of terminological definitions. The five degrees of gravity of this theft—which range from the serious crime of class B felony barely punished simple infraction and which will dictate the penalties being forced on the judges[5]—are strictly defined according to the value of the unduly appropriated property.

In sum, the impression is obtained that in the matter of culpability the intent was to reduce the role of the unexpected . . . and of the imagination to a minimum. The principle of legality finds in it, it seems, its absolute justification. But what will then be the role of jurisprudence in the development of criminal law?

For the authors, one of the great innovations of their proposal rests in a fundamental change of approach to defining federal jurisdiction. We know that

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[3] The code provides for three categories of *felonies* (A, B, C) which, if it is, for example, a matter of imprisonment, involves terms from eight to 30 years (class A), six to 15 years (class B), five to seven years (class C), two categories of *misdemeanors*, one of which (class A) may be punished by imprisonment of a maximum of one year, and the other (class B) by imprisonment not to exceed 30 days. These five categories are called *crimes*. There is a sixth category of so-called *infractions* (purely regulatory), exclusive of any prison penalty.

[4] They go so far as to specify, for example, what must be understood by "reasonably", "human being", "bodily injury", etc.

[5] See footnote 3.

this is in principle a special jurisdiction, each of the states preserving on their territory the sovereign power to maintain order, as it understands it, by means of a penal law that depends only on its own legislator, its own judges, and its own police force.

From the outset, it is true, certain offenses affecting the life of the nation as such fell exclusively within the federal domain, such as treason, tax evasion, and customs violations. Though it is true that this reserved field is at present relatively small, under the pressure of the economic, political, and social change, on the other hand, the federal government is progressively interested by claiming a jurisdiction concurrent with that of the states, in the suppression of offenses as common as theft, criminal assault, etc. The legal basis for this interference of the federal government in questions falling normally into the competence of the local authorities was the power belonging to Congress to legislate in postal matters, interstate commerce, and certain taxes. The underlying reason was the growing need, as the means of communication were developing and crime was attaining nationwide proportions, to make the suppression of offenses more efficacious. The result of it was—as of the end of the 19th Century and even more so in the 20th Century—an accumulation of texts passed by Congress creating—starting with offenses of common law up to then not coming under federal jurisdiction—federal offenses the only element of which that was defined was the criterion establishing federal jurisdiction when, for example, the use of the mails (federal service) was involved in obtaining something under false pretenses; i.e., according to an external criterion, the same criminal behavior could be subjected to punishment under various more, or less, suppressive legislative provisions passed years apart, adding, one after another, a new case of intervention and creating by so doing a new federal offense.

Thus, but in an incoherent manner—the federal government has become the auxiliary of the states in the fight against crime. This role of the federal power has presented the authors of the code with two sets of problems.

First, a problem of method, but a touchy one. It is advisable no longer to treat the criterion of intervention of the federal power as an intrinsic element of the offense, but to define it in specific terms of the behavior [with which the defendant is] charged, as the code of state normally having jurisdiction to suppress it would do, then to indicate each time the offense does not come under the exclusive jurisdiction of the federal power, the case or cases in which the government does have jurisdiction to take cognizance of it or them.

The code contains therefore—this is the object of its Part B, which is the most detailed part—provisions of special penal law in which each of the multiple infractions retained by the authors are defined: some come at all times and solely under federal jurisdiction (crimes against the security of the state, tax and customs violations, etc.), the others, which are very numerous, are so only by way of exception.

In Part A (general) the authors list first of all in section 201—from "a" to "l"—twelve cases in which the federal government may find itself competent to deal with an offense that is normally out of its reach.

We are dealing, therefore, with two categories of offenses: on the one hand, those that involve the *plenary jurisdiction* of the federal courts, no special particulars are indicated in regard to them following their specific definition —on the other hand, those, which are much more numerous, that can be prosecuted by the federal government only in the cases expressly referred to in section 201. Thus, apropos of *murder*, federal jurisdiction exists in cases a, b, c, and l of section 201, i.e., when it has been committed on a territory belonging to the federal government, or in the course, or as an immediate result, of an offense coming under federal jurisdiction, or when the victim of it has been the President of the United States, the Vice President, a member of the Cabinet or of the Supreme Court, or a federal public servant engaged in the performance of his duties, or when it is a murder committed under circumstances amounting to piracy.[6]

On further consideration one realizes that almost all of the possible and imaginable offenses in modern law are provided for by the Code and cannot, there-

[6] The Code is derived here from recent legislation passed by Congress as a result of the assassination of President Kennedy, and instituting federal jurisdiction in case of aggression on the President or the Vice President of the United States.

fore, for one reason or another, constitute a *per se* federal offense. It will be operative when one of these offenses has been committed on one of the Federal territories, but these are the exception. Other criteria specified in section 201 will contribute to enlarging the domain of the federal government considerably, in particular, criterion *b*, aimed at a large number of infractions, which authorizes the intervention of the federal authorities when the acts charged have been committed in the course of carrying out an offense which in itself is a federal offense. Such an extension presents, in the present social and political context, an obvious interest. Thus, for example, apropos of the federal offense of impeding the free exercise of civil rights (on the protection of which Washington sets high value), the federal authorities can take cognizance of cases of murder or violence committed in order to impede the exercise of these rights instead of their suppression being left, as at present, to the discretion of the local authorities.

The authors, however, are aware of the risks that an inconsiderate extension of federal jurisdiction would present: Pushed to the extreme, it would gravely comprise the sovereignty of the states, and shake the structure of government to its very foundations. How then to limit the intervention of the federal government to circumstances in which it proves to be indispensable? . . . that was the second problem to be resolved. It was not sufficient to make up a restrictive list of cases of intervention (section 201) and then to indicate for each offense under which circumstances it might come under federal jurisdiction. This intervention should be brought into play only if, in fact, it is within the national interest. It is not necessarily so even if one of the cases set out in section 201 comes up. If, for example, in a case involving the theft of a car, the vehicle has crossed a state line, this does not in itself imply the necessity of intervention by the federal government. Also—except for some offenses implying *plenary jurisdiction* and for any offense committed on territory belonging to the federal government—each of the individual 50 states continues, in principle, to have jurisdiction with regard to one or another of the multiple offenses aimed at by the federal code as of the moment the acts have been committed on its territory and are punishable under its own legislation.

We are therefore most often faced with a concurrent jurisdiction of the federal government and that of the states. In case of conflict, which of the sovereign powers will settle it? The supremacy of the federal power is, for the first time established in principle: Section 207 formally grants its authorities discretionary power to prosecute or not to prosecute the offense unless [?blanked out] they hold that an "important national interest" is or is not involved. The text specifies that such an interest exists especially when the crime [?blanked out] apparently limited in its impact seems to be associated with organized criminal activities extending beyond state lines, and when federal intervention is necessary for the protection of rights guaranteed by the Constitution (*civil rights*), or when the local powers are corrupted [sic] to the point that the enforcement of criminal law is thereby prejudiced [sic].

The concurrence of jurisdictions also poses the problem of authority [. . . blanked out] of the case judged by the other. Up to the present, in case of acquittal or of [blurred] conviction by a federal court for an offense prosecuted before it, subsequent prosecution would, in most of the states be left [?blurred] to the discretion of the local prosecutor: The rule of protection against double jeopardy will from now on be imposed on all the states in the event of a prior [? blurred] of the federal jurisdiction [courts ?]. In corollary, will a conviction of an acquittal pronounced by the state court stand in the way of later prosecution by the federal authorities? In principle, yes unless the Attorney General certifies that the national interest would be gravely impaired by enforcement of the double jeopardy rule. This peculiarity, which has come out of recent jurisprudence, expressly confirms the preeminence of federal jurisdiction. In criminal law, as in other fields, the center of gravity seems to be shifted from the states to the federal government.

Other signs of the times come to light through the provisions of the draft code, in particular in its Part B which is devoted to specific offenses.

In a civilization characterized by extreme technological development, man who ventures to escape the command of his own discoveries is exposed to new

dangers. As vigilance in the use of things is becoming more imperative than ever, the legislator is led to avert virtually dangerous behavior by the creation of new offenses such as *reckless endangerment* (section 1613), which is the act of exposing others to death or to serious bodily injury by a reckless contempt for the risk that is involved. For the offense to be carried out, it is sufficient that the danger exists, even though no injury has resulted. According to the comment to section 1613, the behavior taken exception to may cover acts as diverse as driving an automobile, the operation of a dam, or the handling of nuclear contrivances [sic]. Also punishable in this connection will be, under the generic term of *release of destructive forces*, the fact of having willfully caused a risk of catastrophe by explosion, fire, flood, avalanche, collapse of buildings, release of poison, radioactive material, bacteria, although no catastrophic results (section 1704, par. 2).

Certain problematic aspects of modern America have worried the authors of the draft particularly.

With regard to morals, the development of ideas, the extreme diffusiveness of the *mass media*, and the influence of publicity tend to favor the greatest license, which is rejected, however, by a segment of public opinion. The dividing line between forms of conduct whose judgment should depend only on individual conscience and those that the public authorities ought to suppress is difficult to trace. Though the authors do not hesitate to abandon the crimination of several former offenses, such as adultery and some forms of indecent assault [exposure], which are still punishable in certain states, their embarrassment is evident, however, on the matter of what we call "outrage aux bonnes moeurs" [public act of indecency]: the dissemination of "obscene" written materials, images, or shows. They know that there is no general consensus on this subject and that, moreover, too rigorous a suppression would risk infringing upon the freedom of expression which is guaranteed by the Constitution. Section 1851, which defines the offense, is derived from existing legislative provisions within the limits of "constitutionality" set by the Supreme Court, and tends to circumscribe properly the area of culpability. It seems, however, that the Commission has not been unanimous, that some wanting to restrict even further the field of their suppression, at least by the federal government. Proposals for redrafting section 1851 were submitted under which the dissemination of obscene written materials or images would be sanctioned only when the recipient is a minor of 16 [or under] or a non-consenting person [a person not chosing to be so exposed].[7]

Another subject of concern is the ever growing use of drugs, which is affecting very diverse groups and is assuming the character of a nationwide scourge. The federal laws that are applicable now are complex, incoherent, and reserve only an incidental jurisdiction for the federal jurisdictions [courts]. Because it is indispensable to assure on the entire territory a uniform and effective protection against a danger whose exploitation has nationwide dimensions, the code will confer plenary jurisdiction on the federal government with regard to all narcotics offenses. Such an extension of the federal powers finds a legal foundation in the right of Congress to legislate in matters of commerce. The severity of the suppression will obviously depend on the noxiousness of the product involved, the dangerous substances being divided, by the regulatory law, into three categories: very dangerous toxic products, products whose abuse may be dangerous, and pharmaceutical products for restricted use. The code shows, moreover, the concern for distinguishing properly among different kinds of behavior: simple possession, purchase for personal use, trafficking for profit, the rigors of the law being reserved for those who prey on the weakness of others. The degrees of culpability set out in sections 1822–1827 also are particularized.[8]

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[7] From Mr. Schwartz's Memorandum it appeared that the final draft discards, to his regret, these proposals for substitution and sticks to the rather broad culpability set out in section 1851.

[8] The traffic in substances of the first category would, for example, be a Class B *felony*, while the purchase of marihuana for personal use, a second category substance whose harmfulness is widely debated in the United States, would constitute only a minor *infraction* (not punishable by imprisonment).

Through the phenomenon of violence is nothing new, it has recently dominated the national scene and poses, among other problems, that of a stricter and more effective regulation of firearms. The ease with which one can buy, possess, and transport them amazes the Frenchman in the United States. Up to quite recently, the firearms business was only subject to regulation by the federal government and a few states, in the form, especially, of licenses granted to dealers. This regulation does not seem to assure any real control of possession of firearms. In 1968, as a result of a series of tragic assassinations —we remember those of the Reverend King and of Senator Robert Kennedy— it seemed urgent to restrict the selling and possession of weapons on a nationwide basis. A reform to that effect was proposed by the Johnson administration, but found no majority in Congress in favor of it. Congress was content, by two acts passed successively in 1968, with providing for rather limited control.

What is the position of the authors of the code? On this point, too, the text reveals their embarrassment. They present provisions, principally those in sections 1811 to 1814, based esentially on Federal legislation already in force, including the most recent acts of 1968: prohibition of possession by private individuals of the most dangerous weapons (machine-guns, bombs, etc.); producers of and dealers in all categories of firearms having to report all transactions and each firearm having to be numbered and each transfer having to be declared; certain persons (charged and convicted, mentally deficient, drug addicts, etc.) being prohibited from buying or possessing a firearm; interstate commerce being regulated (in order to present easy introduction of weapons into a State in which their sale is strictly regulated from a state where it is not). With regard to the offenses under these provisions, the federal government has no plenary jurisdiction, it can only take cognizance of certain cases (as set out in section 201, mentioned above). Therefore, in a matter involving the security of all, the federal government will simply be the auxiliary of each state government, which will retain its own law enforcement. It is likely that the Commisson hesitated to go beyond what Congress had approved in 1968.

However, besides the provisions set out in sections 1811 to 1814, which seem definitely timid, the code offers a choice of three other solutions aimed at restraining or even prohibiting on a nationwide basis the possession of other firearms, whatever they may be. These are only minor proposals: They have no doubt obtained neither unanimous nor even majority consent by the members of the Commission, and one has no illusions on their chances of receiving congressional approval.

The provisions for suppressing *riots* also bear the stamp of reality (sections 1801 to 1804). By harmonizing them, they are derived in the main from very recent laws, one of which, dating from 1968, for the first time authorized the intervention of the federal government on the territories of the states with a view to restoring order there. The authors of the code were bent on defining very precisely what is to be understood by riot, or "attroupement séditieux", and on assessing responsibility as closely as possible according to individual participation.[9] They exclude from prosecution expressly the mere presence on the scene of the riot, noting that this presence may be due to chance or to a desire for peaceful demonstration, punishing only lightly, as Class B *misdemeanor*, participation in the disorder if the offender has not used a weapon. The refusal to obey, especially, an order to disperse, becomes an offense, but it is a minor offense, and the text provides on this subject for immunity to journalists or other reporters. These two offenses came only in very exceptional cases under federal jurisdiction. More severely punished are incitement to riot (Class A *misdemeanor*), and especially the supplying of arms to participants (Class C *felony*), which entail a more ample intervention of the federal government. However, even in this respect, we find the concern of the authors to leave to the states the primary responsibility for maintaining order within

[9] The commenters note that recent events demonstrate that "petty" participants should be dealt with only lightly and according to summary procedures; it is also necessary, in maintaining order by the police force, avoid excesses that are likely to "cause an explosion" [of indignation] and to disaffect local opinion.

their territories. Thus, in inciting to riot, the federal government is brought in if the riot was organized by the use of interstate means of communications, or has involved the crossing of state lines by persons; but it will also be necessary, for federal intervention, for the Attorney General to certify that the national interest is at stake because the riot involves at least 100 persons and has found substantial support [sic] outside the state in which it occurred. If the code grants the federal power only a jurisdiction subsidiary to that of the local authorities, at least it offers—this is the express wish of its authors—the model for a modern, coherent, and well balanced legislation, to serve as a pattern for the state legislatures.

A last, but major feature of the internal political history of the United States is worth noting. It is the *civil rights* movement whose legal justification is the fruit of 15 years of determined efforts by the federal courts and Congress to put an end to racial discrimination.

In reality, Congress has provided for suppression of the impairment of the democratic freedoms. Two laws had been passed to that end since the War of Secession. One of them calls "*coalition* with a view to intimidating a citizen or to wrong him in the exercise of a right guaranteed by the Constitution and the federal laws" a crime; the other, the fact of "depriving anyone, *under the pretext of legality*, of a right guaranteed by the Constitution and the federal laws." But in practice, and on more or less legal grounds, these texts were applied only by way of exception. At an even more recent date the Federal courts recoiled from both their restrictive and vague formulation (what should be understood by *rights guaranteed by the Constitution and the federal laws*?).

The first legislative success of the movement for racial equality was the adoption by Congress in 1957 of the first *Civl Rights Act*, followed by several others spread out over the years up to 1965. These different laws contrary to those of the past century, specified the fundamental rights whose exercise Congress intended to protect not only as the rights to vote, whatever they may be, but also as the right to equality in applying for or enjoying employment, access to housing, to schools, to facilities open to the public, etc. But they provided more or less for civil and administrative penalties alone. However, thanks to the specific formulation of the various *civil rights*, they offered the federal judges an opportunity to revive two hundred-year old texts which had been coupled with penalties.[10]

Through its innovative jurisprudence, the Supreme Court finally spurred Congress to completion of its legislative work by providing criminal standards aimed at protecting precisely and effectively the exercise of the most varied civil rights. Thus, after two years of debate in Congress, the *Civil Rights Act* of 1968 was passed.

This legislation of 1968 serves mainly as the model on which the draft code is patterned. Under the provisions of section 1511, any person is guilty [of a Class A *misdemeanor*] who wrongs or intimidates another in exercising any of the voting rights, as well as of his rights to serve as a juror in any Federal court, or to benefit from a Federal service (of assistance, loan, etc.). Likewise subject to prosecution will be intimidation or wrongs motivated by "reasons of race, color, religion or national origin", in exercising various rights itemized in section 1512: the right to attend the public school of his choice, to benefit by any of the services or activities provided by the local administrations [sic], to serve as a juror in the courts, to have free access to the hotels, restaurants, service stations, motion picture houses, or any other establishments open to the public, to apply for employment, or to belong to a trade association, to buy, sell, or occupy the dwelling of his choice, to use common carriers without restraint. It is also an offense to wrong or intimidate those who help others to enjoy rights so protected, or those who oppose, by verbal expression or by peaceful demonstration, the violation of these rights.

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[10] None [? . . blurred] of the most decisive interpretations dated from 1966 (*Price* case). As a result of the murder three years earlier of three *civil rights* movement militants in Mississippi, the Supreme Court upheld the intervention of the federal government in cases of deprivation of individual rights protected by a federal law.

The draft code provides only relatively light penalties for these various offenses (Class A *misdemeanors*), but it is to be noted that they always come under federal jurisdiction, and we know that, pursuant to section 201–b, the federal authorities can from now on take cognizance of all crimes of violence over which federal jurisdiction exists.[11]

Part C, relative to sentencing may be less interesting to the French reader. It offers, however, the advantage of simplifying the penal system now in force and, moreover, of introducing several new provisions reflecting the modern trend toward individualization and treatment.

Let us observe, first of all, that the authors discard the death penalty and life imprisonment on principle. If their draft is adopted by Congress, federal law will fall in with the abolitionist laws of the United States.[12]

The only penalties applicable from now on are probation, fine, and temporary imprisonment that can never exceed thirty years. These penalties are incurred in the main indifferent of what the *felony* or *misdemeanor* category may be into which the offense falls. Only the *severity* of the penalty varies according to category. Even the most serious crimes (Class A *felonies*) can, on principle, be punished by a fine only.

Probation—a treatment method *par excellence*—is generalized: Not only is it from now on applicable to any offense, however serious it may be, but the Code also recommends making broad use of it by posing the principle that "the court shall impose a sentence of imprisonment only if it deems it necessary for the protection of society" [sic], on grounds that are specified in the text. The present sentencing disparities in regard to penalties that are apt to vary extremely from one federal court to another, is underlined by the authors.[13]

They also formulate, by way of indication, a list of criteria that may prompt the judges to rule in favor of probation, as well as the conditions with which they can be usefully associated. On this subject, let us point out a novelty: the power to order, within the scope of probation, short prison terms to be served at times (nights or weekends, for example) that the court deems appropriate. On the other hand, the duration of probation—which at present the judge can fix very liberally up to reducing it to one day—will from now on be incumbent on him (one year for *infractions*, two years for *misdemeanors*, three years for *felonies*); but once a probationer [something mission . . . so warrants by his conduct?], the court can obviously terminate the probation before his time is up.

With regard to fines, the Code confers on the courts rather broad discretionary powers: The judge may, within the limits of a legal maximum (which varies according to the category into which the offense falls or, possibly, the [pecuniary] gain derived from or the [economic] loss caused to the victim), may set the rates, the methods of payment, with the single obligation, expressly states in the text, that the defendant's resources be taken into account. He cannot, on the other hand, determine the duration of the prison term that nonpayment would entail. As a result, in order to take new circumstances into account, the judge can readjust the originally imposed fine by reducing it, by modifying the [amount of each] installment, or even by suppressing it.

One of the new, truly amazing features further broadens the field of juridi-

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[11] See *supra*, p. 356.

[12] The last Chapter of the Code is, however, devoted to these extreme measures in case the Commission, which was still undecided at the time of publication of its draft, would not finally adopt an abolitionist position. The possible upholding of the death penalty is envisaged only by way of exception, with a rather limited area of application as compared with federal law now in force. One can always substitute life imprisonment for the death penalty. A procedural innovation: the choice between one or the other of these penalties will have to be made the object of a special hearing, bringing the court and the jury together. It is the latter that will decide on it, after considering all sorts of mitigating and aggravating circumstances, which are itemized in the draft. If the jury does not reach a unanimous verdict, the court can only pronounce life imprisonment. In any case, life imprisonment is provided for only by way of substitute for the death penalty.

[13] It is one of the reasons why, on the occasion of this reform of the Criminal Code, they propose an important modification in regard to procedure: the court of appeal would from now on have jurisdiction for reforming—in any case, in the sense of mitigation—the sentences of the lower jurisdictions, which is exceptional in the United States.

ciary individualization: the power that is to be given to the courts to pronounce—decision setting forth in detail the reasons therefore and provided that the sentence is not pronounced for a Class A or B *felony*—a so-called *unconditional discharge*, without imposing even the slightest fine.

With regard to *imprisonment*, on the other hand, at least under the present federal system, which is analogous to that of several states, the draft seems to restrict the powers of the court, which have been quite broad in the area of long sentences. Within the limits of minimum and maximum terms, the court will merely pronounce a maximum term and will no longer have, except in exceptionally serious cases, the power to fix a minimum term beyond which *parole* cannot be granted: from now on a *parole* can be granted after the first year of the prison sentence has been served.

The Code spells out the rule of an *indefinite sentence* for a *felony*, but it is only a post-judiciary indetermination to be reached through the action of the *parole* being left entirely to the discretion of the *Boards of Parole* (commissions administratives). The only limit imposed on the power of these boards is that any imprisonment comprises a legal portion, or so-called *parole component*, which must be served under the *parole* system. The more serious the *felony* category under which the sanctioned offense falls, the longer the length of the *parole component* period; for these are the individuals whose delinquency was found to be of the most dangerous kind and who must be submitted to the longest to control and assistance prior to their final discharge.

The margins set by the minimum and maximum terms, it is true, are quite wide, at least as concerns the gravest *felonies* (eight to 30 years for Class A, six to 15 years for Class B, five to seven years for Class C). However, the court can impose sentences in excess of these minimum terms only by a decision setting forth in detail the reasons for the action. Furthermore, sentences in excess of 20 years in case of a Class A *felony*, and seven years in case of a Class B *felony*, can be pronounced only against criminals recognized as a danger to society (such as dangerous special offenders, professional criminals ["if he committed the felony as part of a pattern of criminal conduct", etc.], or criminals whose mental condition is seriously abnormal). A very long imprisonment cannot, in effect, serve their rehabilitation and must be reserved for those who should be prevented from harming others.[14]

As for imprisonment for *misdemeanor*, the new provisions for it reflect the growing disfavor of penologists with regard to short or medium term sentences, which are hardly any more exemplary than very brief incarcerations and cannot ensure any educational purpose. Class B *misdemeanors* cannot be punished by a longer than 30-day term; those falling into Class A—except for certain second offenses—are not to be sanctioned by penalties in excess of one year, or rather, as Mr. Schwartz proposes, six or even three months.[15]

To wind up our discussion of penalties, let us note also a significant innovation, that of "the granting of mitigating circumstances", an old device of judicial individualization. This provision would fill a gap in existing federal legislation as well as, so far as we know, in American criminal law as a whole. The court can from now on, through a decision setting forth in detail the reasons therefor, take into account the circumstances surrounding the offense and of the personality of the defendant, thus placing the offense into such a category the applicable sanction for which are that of the immediately lower one.

On the whole, exept for *parole* whose control is outside the jurisdiction of the courts, the code provides the Bench with quite a bit of room for individualization of its remedy, authorizing certain methods of investigation of the personality [of the defendant] prior to deciding on the penalty. But definitely the boldest reform seems to us to be the power that the judge will have in most cases of choosing at his discretion among measures as diverse as a fine, probation, or deprivation of freedom.

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[14] Let us add that multiple or concurrently running sentences being strictly regulated from now on, we will not find any more, at least in the federal penitentiaries, inmates serving esoteric prison sentences of 100 years or more.

[15] The very brief term of three months has, however, been excluded from the final draft submitted to Congress.

死刑制度と世論

菊田幸一
明治大学

はじめに

死刑制度の存廃を論ずるに際し、世論が死刑を支持しているから、これを廃止するのは時期尚早であるといったことがしばしばいわれる。現に法務省でも刑法全面改正作業の参考資料とする目的で、昭和四二年六月、総理府広報室に依頼して死刑に関する全国的な世論調査を行なっている。その結果は、死刑を存置すべしとする意見が七一%、廃止すべしとする意見が一六%あり、この数字は昭和三一年五月の同じ調査に比べて賛成が二%減少し、反対が六%ふえていると報告されている。(1)そしてこの結果は新聞紙上(たとえば、朝日新聞昭和四二年一〇月一四日朝刊)にも大きく報道され、刑法の全面改正を審議している法制審議会刑事法特別部会の第二小委員会にも重要な資料として提供され、(2)本年二月二、三両日開かれた刑事法特別部会が死刑存続の方針を決定するについても有力な資料とされた。(3)

世論が法の改変に大きな力となることはむろん重要なことである。しかし、死刑制度ほど、世論がこれを許さないとしてよりどころにされることもめずらしい。率直にいって、わたくしは死刑制度に関する世論について従来から疑問をもっていた。カー(Edward Hallett Carr)は「現代の大衆デモクラシーのもとにおいては、支配層は世論を政治に反映させるよりも、むしろ自分に都合のよい世論の形成と操作にばかり関心を向けるようになっている」(4)といみじくものべている。

そこで、総理府の世論調査が公表されたのを機会に第一に、単に新聞紙上の報告のみでなく、(5)報告書そのものを徹底的に分析してみる必要があること、(6)第二に、一般国民に対する「強制なき同調」により死刑の世論が利用されることに対抗するには、死刑制度に対するいわゆる自覚的集団である大学教授、裁判官、刑務官等に直接、死刑についての見解を求めてみる必要があること、第三に、専門家別に見解の相違を出すことによって、一般世論との対比をすることで、死刑制度に対する意識を明確にできるのではないかという仮説のもとに、総理府の行なった同じ質問様式により、アンケートを求めることにした。(8)

しかし、われわれの調査による有効回収数は総計一二八名である。総理府の有効回収数二五〇〇名にははるかに及ばない。したがって、これだけの資料で総理府の世論調査と対比することが可能かどうかについては統計専門家の判断を求めなければならない。(9)しかし、いわゆる自覚的集団であるこれらの各専門家について少なくとも、刑法学者については全員、裁判官については二五名に一人の割合でアンケートを求めたことで一応、第一次報告とすることは許されると思う。(10)むろん、その意味でこの調査はいわばパイロット・リサーチであり、このあと、さらに本格的な調査をしたいとかんがえている。本調査に際し、アンケートに回答をよせられた刑法学者、裁判官、そして刑務官の方がたに感謝の意を表したい。

(1) 死刑に関する世論調査、昭和四二年九月、内閣総理大臣官房広報室刊。

(2) 奥村誠「死刑に関する世論調査について」法律のひろば二〇巻一二号四〇ページ。

(3) 朝日新聞昭和四五年二月四日朝刊では存続論の理由の一つとして「世論調査でも、多数の国民は死刑の存続を支持しており、こうした感情を無視することは好ましくない」ことをあげている。またわが国の国民性が死刑を存置しているとの説もある。青柳文雄・犯罪とわが国民性(昭和四四年)一一六ページ以下。

(4) 社会学辞典(有斐閣)世論、九二一ページ。

(5) 朝日新聞(昭和四二年一〇月一四日朝刊)によれば、「七割が死刑反対——世界の大勢と違う結果」との見出しで「……ひとくちにいえば『世論』の七割までが死刑廃止に反対していることがこの調査ではっきりした。欧米諸国の最近の傾向とは逆に、わが国にはなお、死刑存続の意見の根強いことが注目される……」とのべている。はたしてかように単純にいえるかどうかが問題であろう。

(6) 奥村誠・前掲論文は単に同報告書の要旨を紹介したものである。

(7) 筆者がかような仮説を実証しようと意図するにいたったのには木村亀二教授の「法務省の調査の結論として、死刑存置論者の数が七二%あり、昭和三一年の調査の時よりも六%増加したことが、大々的に報ぜられた。存置論者は、さぞ、自己の見解の賛成者が増えたと考えて、喜ろこんだかもしれない。しかし、この調査は全国二億余りの人口中、二十歳以上の男女たった三千人を対象としたにとどまり、しかも、その人々が、どの程度死刑について認識していたか不明である。むしろわたくしは、かねてから、全国の矯正職員、裁判官、検察官、警察職員、刑事専門の弁護士、刑法学者を対象として、年齢の区別、死刑執行の経験があるか、執行に立会ったことがあるか、死刑を言渡したり、求刑した経験があろか否か等を明らかにして調査してみると、はるかに重要で有意義な結論が出るのではないかと考えている……」(法学セミナー、昭和四二年一二月号、毎月の言葉)という提言による。

(8) この調査は明治大学法学部の刑事政策のゼミの諸君に手伝ってもらった(以下単に「ゼミ」とのみ表示する)。調査の概要はつぎのとおりである。

(1) 調査時期　昭和四四年六月一日～六月末日(ただしこの間に大学紛争にまきこまれ集計は夏以降まで遅延した。また刑務官については同年一〇月中旬に行なった)。

(2) 調査対象者　①刑法学者(法学部をもつ全国の大学の刑事法講座担当者全員)、②裁判官(裁判官職員録昭和四四年版より間隔抽出法により採用)、③刑務官(矯正研修所東京支所で研修中の刑務官)

(3) 調査方法　郵送により用紙を発送して回収(ただし、刑務官は直接面接聴取)。

(4) 回収結果

	発送数	有効回収数
刑法学者	一三六	四〇(二九・四%)
裁判官	一三一	五四(四一・二%)
刑務官	面接	三四(一〇〇%)

(9) 総理府の調査が面接聴取であるのに対し、われわれの調査は郵送を主とした点も根本的には対比条件に欠けるとの批判をうけることはもとより承知している。

(10) 検察官、弁護士については、前者は検察官一体の原則により個人の見解を求めるのが困難であろうということ、後者については検察官にアンケートを求めないとすれば集計上客観性をそこなうと判断し除外した。なお、裁判官の中にも、現職裁判官として意見を出せないとする回答が一通あった。今後の調査においては、その他の自覚集団、たとえば、評論家、教育学者等についてもその対象を広めることが望ましいと考えている。

一　死刑の可否

1　現行法の死刑規定に対する態度

死刑の適用をへらす方法の審議の参考として、現行法上、死刑が法定されている罪のうち、殺人、内乱、外患誘致、現住建造物放火および爆発物使用の各罪について、死刑の規定をおくべきか否かについてたずねてい(I―1表参照)。

I―1　現行法における死刑規定の可否

	死刑存置 総理府	死刑存置 総	死刑存置 ゼミ	死刑存置 うち 刑法学者	死刑存置 うち 裁判官	死刑存置 うち 刑務官	死刑廃止 総理府	死刑廃止 総	死刑廃止 ゼミ	死刑廃止 うち 刑法学者	死刑廃止 うち 裁判官	死刑廃止 うち 刑務官	一概にいえないわからない 総理府	一概にいえないわからない 総	一概にいえないわからない ゼミ	一概にいえないわからない うち 刑法学者	一概にいえないわからない うち 裁判官	一概にいえないわからない うち 刑務官	計
殺人	70%	69%	43%	78%	85%		17%	27%	50%	17%	15%		13%	5%	8%	6%	—		100%
内乱の首謀者	39	39	33	52	26		25	44	55	37	38		36	12	10	7	24		〃
外患誘致	61	56	38	65	65		12	35	55	24	32		27	5	10	7	3		〃
現住建造物放火	43	37	30	46	32		34	40	58	31	32		23	20	8	20	25		〃
爆発物使用	71	58	40	67	67		16	26	45	19	15		13	13	10	13	18		〃

総理府の調査によると、殺人および爆発物使用は七割以上が死刑の存置を主張し、廃止した方がよいとする者は二割にみたない。われわれの調査でも若干割合は低いが、同じく死刑存置率が高い。とくに、刑務官(八五%)および裁判官(七八%)は殺人については存置論がもっとも多い。また総理府の調査で放火(三四%)と内乱(二五%)は死刑廃止を主張する者が三割前後あり、死刑の存置を主張する者は半数以下であるが、われわれの調査ではこの二つの罪名は廃止論が圧倒的に多い。

これを専門家別にみると、刑法学者の廃止の割合の多いのは内乱および現住建造物放火の罪、裁判官はとくになく、刑務官は内乱罪をあげる。他方、裁判官は殺人、外患および爆発物の罪について強く死刑存置を主張している。現住建造物放火については、準備草案一九二条で死刑の規定をおかなかったのであるが、刑法学者、刑務官において廃止論が多いこと、裁判官は存廃が同程度であり、一概にいえないとする者が二割あるところから、ある程度廃止することに専門家の意見も傾いているとみてよかろう。総理府の調査では、現住建造物放火については、なお四三%の死刑存置論があり、注目されるとしているが(1)、廃止論が三四%、一概にいえないが二三%あるところからみると、必ずしも死刑存置が圧倒的であるというわけにはいかない。

2　殺人の具体例に対する態度

殺人罪に対する死刑廃止論者は、前述のように総理府の調査では一七%であり、われわれの調査では二七%であった

が、さらに殺人のいくつかの場合について死刑を廃止してよい場合があるかどうかを問うた結果がI—2表である。この設問は、死刑の適用をへらす方法の一つとして、殺人罪についても死刑を法定する重い類型とこれを法定しない軽い類型に分けてはどうかとする議論があるので、その審議の参考のため、さらに殺人の具体例をあげて各場合について死刑の要否をたずねたものである(3)（ただしこの表においては殺人罪一般について死刑を廃止せよという者を除いたため総理府の調査では一七%を除いた八三%、われわれの調査では二七%を除いた七三%についてたずねている。ただし各専門家別ではそれぞれ除外率は異なる）。

I—2　殺人の具体例に対する死刑の可否

	死刑存置					死刑廃止					いちがいにいえない わからない				
	総理府	ゼミ	うち			総理府	ゼミ	うち			総理府	ゼミ	うち		
			刑法学者	裁判官	刑務官			刑法学者	裁判官	刑務官			刑法学者	裁判官	刑務官
	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
人を殺した人	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
人を殺した人	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
殺人を犯した者	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
殺人を犯した者	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
殺人を犯した者	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
殺人を犯した者	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
殺人を犯した者	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
殺人を犯した者	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
誘拐による殺人	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
誘拐による殺人	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
誘拐による殺人	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
誘拐による殺人	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
誘拐による殺人	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
誘拐による殺人	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
誘拐による殺人	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
営利誘拐による殺人	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
営利誘拐による殺人	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
営利誘拐による殺人	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
営利誘拐による殺人	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
営利誘拐による殺人	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
営利誘拐による殺人	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
営利誘拐による殺人	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
営利誘拐による殺人	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
列車転覆による殺人	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
列車転覆による殺人	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
列車転覆による殺人	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
列車転覆による殺人	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
列車転覆による殺人	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
列車転覆による殺人	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
列車転覆による殺人	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
列車転覆による殺人	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
強姦殺人および警察官殺しの場合	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
強姦殺人および警察官殺しの場合	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
強姦殺人および警察官殺しの場合	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
強姦殺人および警察官殺しの場合	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
強姦殺人および警察官殺しの場合	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
強姦殺人および警察官殺しの場合	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
強姦殺人および警察官殺しの場合	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
強姦殺人および警察官殺しの場合	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
営利誘拐中の殺人を犯した者	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
営利誘拐中の殺人を犯した者	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
営利誘拐中の殺人を犯した者	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
営利誘拐中の殺人を犯した者	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
営利誘拐中の殺人を犯した者	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
営利誘拐中の殺人を犯した者	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
営利誘拐中の殺人を犯した者	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
営利誘拐中の殺人を犯した者	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
列車転覆を伴う殺人	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
列車転覆を伴う殺人	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
列車転覆を伴う殺人	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
列車転覆を伴う殺人	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
列車転覆を伴う殺人	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
列車転覆を伴う殺人	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
列車転覆を伴う殺人	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
列車転覆を伴う殺人	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
営利誘拐による殺人を犯した者	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
営利誘拐による殺人を犯した者	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
営利誘拐による殺人を犯した者	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
営利誘拐による殺人を犯した者	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
営利誘拐による殺人を犯した者	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
営利誘拐による殺人を犯した者	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
営利誘拐による殺人を犯した者	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
営利誘拐による殺人を犯した者	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35
営利誘拐による殺人を犯した者	78	67	38	80	82	1	1	—	—	3	4	6	13	4	—
営利誘拐による殺人を犯した者	69	61	38	72	71	4	1	—	—	3	10	12	13	11	12
営利誘拐による殺人を犯した者	67	60	38	69	74	5	3	—	6	3	11	10	13	9	9
営利誘拐による殺人を犯した者	66	65	43	78	71	5	3	—	2	3	12	—	—	—	—
営利誘拐による殺人を犯した者	60	52	35	52	74	6	4	—	7	3	17	17	15	24	9
営利誘拐による殺人を犯した者	52	48	35	52	56	7	7	—	11	9	24	19	15	20	21
営利誘拐による殺人を犯した者	40	39	30	46	38	15	10	3	11	18	28	24	18	26	29
営利誘拐による殺人を犯した者	26	25	22	28	24	27	20	5	28	27	30	28	23	28	35

総理府およびわれわれの調査とも営利誘拐による殺人、列車転覆による殺人、強姦殺人および警察官殺しの場合には死刑の存置論が圧倒的に多く、死刑廃止を主張する者は少ない。ただ、われわれの調査では、警察官殺しについては、一概にいえないとする者が全体で一七%あり、とくに、裁判官には二四%ある。

親を殺した者については、総理府およびわれわれの両調査ともはっきり死刑廃止を主張する者は少ないが、一概にいえないとする者が総理府の調査で二四%、われわれの調査で一九%ある。この罪についても死刑存置を主張する者は、両調査とも半数あるが、刑法学者は三五%である。設問自体に問題があったように思われる。「死刑にできるようにしておくにしても、単純殺人罪の規定をもうけておくについては賛成であるが、尊属殺については反対である。」（ある裁判官）という意見もあり、かような考えの者は一概にいえないという回答になったため、割合が多くなったとも思われる。

政治的な目的で政府高官を殺した場合については、内乱の場合と同じく、両調査とも存置論は四〇%前後で、半数以下である。「政治犯の処罰は現実には歴史も示すごとく、裁判（司法的）制度になじまないから」とする学者からの意見もあった。

けんかの末の殺人については、両調査とも存廃論いずれも同程度であるが、刑務官は廃止の者が若干多い。しかし、いずれも、一概にいえないとする者がもっとも多く、全体としては廃止に傾いているともみられるが、被害者によって法定刑を差別するという類型化には反対であるという根強い意見のあることは忘れてはなるまい。

(1)奥村誠・前掲論文四二ページ。
(2)奥村誠・前掲論文四二ページ。

二　死刑廃止論

1　死刑廃止に関する調査

死刑廃止の賛否は、総理府調査の最重要項目であり（これからの検討は主としてこれを軸として死刑存置論および、廃止論者の対比において記述する）過去二回の調査（昭和三一年、同四二年）で同じ質問文を用いている。すなわち「今の日本で、どんな場合でも死刑を廃止しようという意見にあなたは賛成ですか、反対ですか」というものである。これについては（II—1表参照）、前述したごとく総理府の調査では死刑の廃止には、七割の者が反対で、賛成者は二割弱であり、これは、昭和三一年の調査と比較すると死刑廃止論者は若干減少しているといわれる。これをわれわれの調査についてみると、死刑存置論者は六八%であって、総理府（第二回、昭和三一年）の調査と

II—1　死刑廃止に対する意見

	死刑存置	死刑廃止	わからない	計
昭和31年（総理府）	65%	18%	17%	100%
昭和42年（総理府）	71	16	13	〃
昭和44年（ゼミ）	68	27	5	〃
うち 刑法学者	45	48	8	〃
うち 裁判官	80	17	4	〃
うち 刑務官	76	21	3	〃

比べると若干存置論者が多い。しかし、逆に廃止論者は二七%であって、過去二回の総理府の調査よりはるかに多い。これは、わからないとする者がわれわれの調査ではきわめて少ないことによる。こうした傾向はわれわれの他の質問についても同じ傾向であって、いわゆる専門家（自覚集団）であるこれらの人たちと一般人との差を示すものといえよう。

これを専門家別にみると、刑法学者は死刑廃止論者（四八%）が、存置論者（四五%）を若干ではあるが上廻ることは注目すべきことである。しかし、裁判官は圧倒的に存置論が多い（八〇%）。刑務官も同じく存置論者が多い（七六%）。裁判官および刑務官が実務家として現実的な考えに傾くであろうことは推察される。しかし単に存置論、廃止論の割合のみでことを論ずることはできないのではないか。その内容の点については以下で論ずることとしよう。刑法学者にとくに廃止論が多かったのはわれわれを力強くさせた。しかし、このような調査には廃止論者の方がより積極的に調査に応じてくれるのではないかという推測もなりたたないわけではない（この意味では総理府の調査―面接法―とわれわれの調査―郵送法―に本質的な相違があるとの批判をうけるかもしれない）。その理由の一つは、たとえば「凶悪な犯罪が起こる原因は、社会にあると思いますか、それとも犯人自身にあると思いますか」という質問に対し、死刑廃止論者は一九名のうち七名（三六・八%）は社会にあると答えているのに対し、存置論者では一八名中二名のみがこのように答えており、「犯人にある」と答えた者は一人もいない。その他の一六名は一概にいえない（八八・八%）と答えている。他方、「凶悪な犯罪を犯しても普通の人間に更生させることができると思うか」という質問に対しても、存置論者の五〇%は、「必ず可能」と答えている。すなわち、死刑の廃止には反対であるが、犯人だけが悪いわけではなく、また更生も可能であるという考えが根底にはあり、こうした調査に当たり、死刑・廃止論のように直接的に結びつかないものがあるのではないか。しかし、いうまでもなく、これは単なる一つの推論をでない。ただ、ここで明白なのは専門家においても死刑存置および廃止のそれぞれの理由が大きく異なるということである。つまり、一般人を対象とした、いわゆる世論調査ではこうした違いはすべて平均化されてしまうわけである。

死刑制度に対する賛否と「現行法で死刑規定のある罪および具体的な殺人の例」（前述）に対する死刑の可否との関連（Ⅱ―2表参照）では、総理府の調査においては、死刑存置論者（七一%）のうち、廃止してもよい罪があると回答した者は二八%あり、かなりの割合を占める。しかし、われわれの調査では、これよりもはるかに上廻る三四%が廃止してもよい罪をあげている。ただし、専門家の別ではかなりの差がある。

まず、死刑存置論のもっとも多い（八〇%）裁判官のうち、三九%までは廃止してもよい罪をあげている。すなわち、全面廃止には反対であるが、罪名によっては廃止してもよいとするのがその半分近くを占めているわけである。また刑務官では、死刑廃止に七六%が反対しているものの、そのうち四七%、つまり死刑存置論のうち六割までは廃止してもよい罪をあげている。このように死刑存置論の比較的多い実務家において、とくに廃止すべき罪名をあげていることは注目してよいことである。刑法学者で廃止してもよい罪をあげた者が極端に少ないのは、全面廃止の立場を論理的にもつらぬこうとした結果であると思われる。総理府の調査では死刑の全面廃止論者（一六%）のうち、他の質問にも一貫して死刑廃止を主張した者は六%のみであって、必ずしも論理的に一貫しているというわけではない。われわれの調査では刑法学者および裁判官の全面廃止論者はどんな他の質問にも一貫して廃止を主張している。これに対し、刑務官の全面廃止論者二一%のうち、九%は死刑存置の罪名をあげており、必ずしも一貫していない。(2) こうした傾向も世論調査のあり方の一つとして参考にされるべきであろう。なお、総理府の調査では学歴の高い者に死刑廃止論がやや多い旨指摘されている。(3)

Ⅱ―2　死刑存廃の総合

	死刑廃止に賛成	死刑廃止に反対		意見のない者	計
		廃止してもよい罪をあげた者	あげない者		
総理府	16%	28%	43%	13%	100%
ゼミ	27	34	38	—	〃
刑法学者	48	18	35	—	〃
裁判官	17	39	44	—	〃
刑務官	21	47	32	—	〃

2　死刑存置の理由

死刑存置論の理由を総理府の調査（総理府の調査報告にしたがい理由の多い順にならべてある）と対比すると、つぎのとおりである（カッコ内は死刑存置論を一〇〇とする比率）。

(一)死刑を廃止すれば悪質な犯罪がふえる。

総理府　四三%（六二%）
ゼミ　三三〃（四八〃）
うち　刑法学者　五〃（八〃）
　　裁判官　二〇〃（三〇〃）
　　刑務官　七〃（一〇〃）

(二)凶悪な犯罪者は命をもってつぐなうべきだ。

総理府　四三%（六二%）
ゼミ　三〇〃（四三〃）
うち　刑法学者　五〃（八〃）
　　裁判官　一六〃（二四〃）
　　刑務官　八〃（一一〃）

(三)悪質な犯罪を犯す人は生かしておくとまた同じような罪を犯す危険がある。

総理府　二一%（三〇%）
ゼミ　一〇〃（一五〃）
うち　刑法学者　二〃（三〃）
　　裁判官　六〃（九〃）
　　刑務官　二〃（三〃）

(四)死刑を廃止すれば被害をうけた者の気持がおさまらない。

総理府　七%（一〇%）
ゼミ　二〇%（三〇%）
うち　刑法学者　六〃（九〃）
　　裁判官　一二〃（一七〃）
　　刑務官　二〃（三〃）

(五)その他

総理府　三%（四%）
ゼミ　六〃（九〃）
うち　刑法学者　二〃（三〃）
　　裁判官　二〃（三〃）
　　刑務官　二〃（二〃）

死刑存置の理由としては、死刑制度存置による一般予防効果（理由）をあげる者が、総理府の調査によると六割（全体の四三%）を占める。われわれの調査でも五割（全体の三三%）近くを占め、存置理由としてはもっとも多い。とりわけ裁判官はこれを理由とするのがもっとも多い。理由の(三)「悪質な犯罪を犯す人は生かしておくとまた同じような犯罪を犯す危険がある」は、総理府の調査では全体の二一%あるに対し、われわれの調査では一〇%にすぎなかった。むしろ理由の(四)「死刑を廃止すれば被害をうけた者の気持がおさまらない」が、われわれの調査では二〇%あるに対し、総理府の調査では七%にすぎない。これを各専門家についてみると（Ⅱ—3表参照）、刑法学者は反対の理由として第一位に右の(四)「被害者の気持」をあげている。また総理府の調査で三位の理由(三)は刑法学者では最下位である。裁判官も同じ傾向を示している。刑務官は(二)「凶悪な犯罪者は命をもってつぐなうべきだ」が一位であり、この点は刑務所内で第一線に勤務している刑務官の意識として注目すべきことといえよう。理由の(三)は刑務官も同じく三位であり、総理府の調査と同順位である。このようにみると、理由の(三)は比較的単純で平均化された理由と考えられ、刑務官、裁判官、刑法学者の順に一般人に接近しているとみられる。

Ⅱ—3　専門別にみた存置理由の順位

	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
Ⅰ	(一)	(一)	(四)	(一)	(二)
Ⅱ	(二)	(一)	(二)(三)	(二)	(一)
Ⅲ	(三)	(二)	(一)	(四)	(四)
Ⅳ	(四)	(四)	(五)	(三)	(三)
Ⅴ	(五)	(三)	(三)	(五)	(五)

3　死刑廃止の理由

死刑廃止論の理由を同じく対比するとつぎのとおりである（カッコ内は同じく死刑廃止論を一〇〇とする比率）。

(一)人を殺すことは、たとえ刑罰であっても人道に反し野蛮である。人が人を殺す権利はない。凶悪犯人でも殺してしまうにはしのびない。

総理府　八%（五三%）
ゼミ　一六%（六〇%）
うち　刑法学者　一二〃（四三〃）
　　裁判官　五〃（一四〃）
　　刑務官　〇〃（〇〃）

(二)たとえ悪質な犯罪を犯した者でも更生の可能性がある。

総理府　五%（三一%）
ゼミ　一六〃（五七〃）
うち　刑法学者　八〃（二九〃）
　　裁判官　四〃（一四〃）
　　刑務官　四〃（一四〃）

(三)生かしておいて罪のつぐないをさせた方がよい。

総理府　三%（一二%）
ゼミ　四〃（一三〃）
うち　刑法学者　三〃（一一〃）
　　裁判官　一〃（二〃）
　　刑務官　〇〃（〇〃）

(四)死刑を廃止してもそのために悪質な犯罪が増加するとは思わない。死刑があっても犯罪がなくなるわけではない。

総理府　三%（一一%）
ゼミ　一二〃（四六%）
うち　刑法学者　七〃（二六%）
　　裁判官　四〃（一四〃）
　　刑務官　二〃（六〃）

(五)裁判に誤りがあった時死刑にしてしまうと取返しがつかない。

総理府　三%（一八%）

ゼミ　二〇%（七一%）
うち　刑法学者　一五〃（五四〃）
　　裁判官　五〃（一七〃）
　　刑務官　〇〃（〇〃）

総理府の調査によると、死刑廃止理由でもっとも多いのは㈠「人を殺すことは野蛮である」という、いわゆる人道的立場からのものであり、これは昭和三一年の調査でも第一位であったといわれる。[4] しかるに、われわれの調査では、理由㈤の誤判にあるとするのが第一位であり、全体の二〇%（廃止論者の七一%）を占める（Ⅱ—4表参照）。総理府の調査では右の理由は最下位であり、全体の三%（廃止論者の一八%）であるのに比べると格段の相違がある。刑法学者および裁判官が理由として第一位にしている点は法律家の見解として注目すべきである。「刑事裁判にも間違いが絶対ないとはいえない。そのことは論理必然的に、絶対的刑罰である死刑の廃止を根拠づけるものである」とくに加筆された裁判官があった。また刑法学者の廃止論者の五四%はこの理由をあげている。理由㈢「生かしておいて罪のつぐないをさせるべきだ」とするのは前述の死刑存置論者の理由㈢とともに、比較的単純な、平均化された理由と思われるのであるが、刑法学者および裁判官ともに最下位である点は、存置論で刑法学者がその理由㈢を最下位にしたのと同じ傾向がなりたつものと思われる。おおむね、刑法学者および裁判官はともに順位を同一にしている（裁判官は理由㈠および㈣が人数においても同一であった）。

Ⅱ—4　専門別にみた廃止理由の順位

	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
Ⅰ	㈠	㈤	㈣	㈤	㈡
Ⅱ	㈡	㈠	㈠	㈠㈣	㈣
Ⅲ	㈢	㈡	㈡	㈣	㈢
Ⅳ	㈣	㈣	㈢	㈢	㈠
Ⅴ	㈤	㈢	㈤	㈡	㈤

刑務官は、総理府および刑法学者、裁判官と比較しても若干その理由の傾向に特色がある。すなわち、理由㈡の「たとえ悪質な犯罪者も更生の可能性がある」とするのを第一位にしている点は、刑務官◉存置論者が凶悪な犯罪者は命をもってつぐなうべきだとする理由を第一位にしているのと対照的である。存置論、廃止論者の各人がそれぞれ両極端に分かれる。同時に、刑務官の廃止論者は死刑を廃止してもそのために悪質な犯罪が増加するとは思われないとする理由㈣を第二位にあげている点がめだつ。しかし、いずれも廃止論者の母数が少ない（刑務官三四名中廃止論者は七名にすぎない）ため全体としては刑法学者および裁判官の理由順位の中に同化された。

要するに、存置論、廃止論のいずれにおいても、その理由の重みは多様である。しかし、総理府の調査から明らかなことは、一般人の存置論および廃止論はともに、比較的単純な理由がもっとも多いのに対し、いわゆる各専門家のそれは、存置論者は被害者の感情問題をどう処理するかといった問題、廃止論者は誤判の問題を強調する。したがって、前者につういていえば、被害者の感情問題を何らかの方法で解決することによりかなり死刑廃止に傾くのではないかという点、逆に廃止論者のいう誤判の点は、死刑の存置する以上さけられないものである点にその理由の重みをおくことはできないであろうか。少なくとも、これまでの検討から、死刑制度に直接関心のある専門家の見解にとくに重要視すべきものがあることだけはいえよう。

（1）総理府・前掲報告書九ページ参照。
（2）総理府調査による被調査者の最終学歴（在学、中退を含む）は、大学・短大卒（旧高等）一〇・三%、高卒（旧中高女）三五・二%、中卒（旧高小）四三・二%、小卒以下、一一・二%である。これに対し、われわれの調査で、刑法学者、裁判官はおおむね大卒または相当の者と考えられる。刑務官は大学・短大卒（旧高専）三八・二%、高卒（旧中・高女）六一・八%である。
（3）大学卒は死刑廃止が二九%、存置が六六%であるに対し、中学卒は死刑廃止が一三%、存置が七三%である（総理府・前掲報告書八ページ）。
（4）奥村・前掲論文四一ページ。

三　死刑の漸次廃止

1　死刑漸次廃止の調査

死刑を漸次廃止していくことについての回答は、総理府の調査では、即時全面廃止（三%）を含めて、将来は漸次廃止して行くのがよいと答えた者は四〇%である。[1] これは将来も存続させよという意見をもつ者の比率（四五%）に接近している。われわれの調査と比較してみると、Ⅲ—1表に示すごとく、漸次廃止論者は六〇%に近い。この数字は将来も存続とする二八%をはるかに上廻るもので

Ⅲ—1　死刑の漸次廃止

	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
漸次廃止がよい（含即時全面廃止）	40%	59%	85%	57%	32%
将来も存続	45	28	10	26	53
わからない	15	13	5	17	15
計	100	〃	〃	〃	〃

ある。なかんずく、刑法学者のうち八五%までは即時全面廃止（三二・五%）かもしくは、漸次廃止（四五%）である（Ⅲ—2表参照）、裁判官も六割近くまでは漸次廃止論者である。ただ、刑務官は一般世論（総理府調査）より将来も存続とする者が多い。

漸次廃止論の内訳（Ⅲ—2表参照）をみると、総理府の調査では死刑存置論者で、漸次廃止する意見の者は二〇%であって、将来も存続させる者四四%に比べ半分以下である。しかし、われわれの調査では、死刑存置論者のうち、三二%は漸次廃止に賛成しており、将来も存続させようとする者二五%を上回っている。これを各専門家についてみると、刑法学者および裁判官とともに、存置論者でありながら、いずれも漸次廃止論が多い（刑法学者の中で漸次廃止はあてはまらないとして存続に○印をつけた人もある）。このことは、存置論者の中には「現行の刑法規定を一応維持しながら、実際には死刑を科する場合をできるだけ少なくしていって、死刑という刑罰がなくとも別に支障を感じない世の中になったのち、はじめて廃止するという方法をとる」（刑法学者の添書きしていた意見）という、法定刑では存置させるが、運用面で廃止と同様の効果をあげるという見解をもつ者が多いのではなかろうか。ただ、刑務官だけは、死刑存置論者で漸次廃止の者は一〇%のみであって、将来も存続させよとする者が五〇%あり特殊な傾向を示している。前述のごとく、刑務官の死刑存置論者の中には、凶悪犯罪者は命をもってつぐなうべきだという見解をもつ者が多いところから、死刑制度は将来も存続させるということに結びつくのであろう。その点、裁判官の場合は、同じく死刑存置論者でもその理由がいわば相対的であるところから漸次廃止が多くなるものと解される。

こうしたことから明らかなことは、死刑即時廃止と漸次廃止との関係は、それぞれがいかなる理由にもとづいているかに大きく依存していることである。刑務官と一般世論が比較的理由の傾向がにていることころから、したがって、漸次廃止についても同一傾向を示すにいたったものといえよう。

Ⅲ—2　死刑廃止論と死刑漸次廃止の関係

死刑廃止論に		賛成の者	うち 即時全面廃止	うち 漸次廃止	うち わからない	反対の者	うち 漸次廃止	うち 将来も存続	うち わからない	わからない者	うち 漸次廃止	うち 将来も存続	うち わからない	計
総理府		16%	3%	12%	1%	71%	20%	44%	7%	13%	5%	1%	7%	100%
総ゼミ		27	15	7	5	68	32	25	10	5	4	—	1	100
うち	刑法学者	48	33	13	3	45	33	10	3	8	8	—	—	100
	裁判官	17	9	7	—	80	43	22	15	4	2	—	2	100
	刑務官	21	9	6	6	76	10	50	16	3	3	—	—	100

注　即時廃止か、漸次廃止かに必ずしも全員が答えていないので本表とⅡ—1表の数字は必ずしも一致しない。

2　死刑の試験的廃止に関する調査

試験的に死刑を廃止して、その後の犯罪動向をみた上で死刑の存廃を決めることについては、総理府の調査では、賛成者が半数（四九%）を占めるに対し、反対者は二六%にすぎない（Ⅲ—3表参照）。しかるに、われわれの調査では、むしろ反対の者が五〇%を占め、賛成の者は三一%にすぎない。この傾向については「試験的に廃止して、その後の犯罪がふえるかどうかを科学的に厳密に測定することが非常に困難である」（刑法学者の意見）、「日本の国情は、外国のように論理的・科学的に物を考えないからこうした試みは意味がない」（刑法学者の意見）等の添書きがあった。ただ、Ⅲ—4表で示すように、総理府およびわれわれの調査においても、将来に向って漸次廃止して行くことに賛成する者は、試験的廃止にも賛成する者が多い。これは、ただちに廃止できないときの次善の策として賛成するというもののようである。ただし、刑法学者は同率である。次善がつねに最善とすりかえられることの危険性はつねに意識しておく必要はある。

将来も存続させるとする者は総理府の調査では試験的廃止の賛成と反対が半ばして（それぞれ三九%、三八%）いるのに対し、われわれの調査では存置論者は圧倒的に試験的廃止にも反対している（一四%対七八%）。とくに刑法学者の存置論者は全員が反対している。これは存置の根拠にそれなりの理由があり、その理由から結論づけているため当然こうした傾向となるものといえよう。しかるに一般世論では、理由そのものが確固た

Ⅲ—3　試験的死刑廃止

	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
試験的廃止に賛成	49%	31	35	33	24
試験的廃止に反対	26%	50	45	48	59

Ⅲ—4　死刑廃止論と試験的死刑廃止の関係

		試験的廃止に賛成 総理府	試験的廃止に賛成 ゼミ	試験的廃止に賛成 うち 刑法学者	試験的廃止に賛成 うち 裁判官	試験的廃止に賛成 うち 刑務官	試験的廃止に反対 総理府	試験的廃止に反対 ゼミ	試験的廃止に反対 うち 刑法学者	試験的廃止に反対 うち 裁判官	試験的廃止に反対 うち 刑務官
現時点における死刑全廃に	賛成	74%	50%	53%	44%	57%	15%	34%	42%	33%	14%
	反対	44	23	17	33	15	32	54	50	51	68
将来漸次廃止することに	賛成※	66%	42	50	45	45	18	36	50	39	27
	将来も存続	39	14	—	15	17	38	78	100	71	78

※（含即時全面廃止）

るものでないので右のような結果になるものと解される。

（1）総理府・前掲報告書一一ページ。

四　死刑の代替刑

死刑をもし廃止した場合、その代わりにどのような刑罰を科すべきかについては、総理府およびわれわれの調査のいずれにおいても終身刑が圧倒的に多い。専門家別にこれをみても有意差はない。仮定の上にたった質問である以上、結果的にこうした割合となるのは当然であろう。また、代替刑はあくまで代替であって、死刑そのものがつねに前提としてある。かような意味での死刑廃止はむしろ死刑存置を前提としている点で真の意味の死刑廃止とはいえず、死刑存置の変形とでもいった方がよいかもしれない。そこに設問自身にも問題があるように思われる。われわれの調査では、したがって、刑法学者のうち「わからない」（含無記入）がかなり多い。無期刑の場合、総理府の調査では一生自由を束縛せよという者（三三%）が、仮釈放を認めよという者（三〇%）を上廻っている（Ⅳ—1表参照）。これに対し、われわれの調査では、前者が一五%であるに対し、六五%は仮釈放を認めようとしている。とくに、刑法学者（八三%）および裁判官（七八%）に多い。終身刑が死刑と比較してどちらが残酷であるかが問題とされており、このことが専門家にはこのような数字となってあらわれたものといえよう。刑務官も同様に仮釈放を認めようとする者が多い（三八%）のであるが、その差はわずかである。これはさきの死刑存置理由と結びつくものといえよう。

これを死刑廃止論者と存置論者に分けて表示したのがⅣ—2表である。総理府の調査では、死刑廃止論者でも七〇%は無期刑がよいとしている。ただし、仮釈放を認めようとする者は半数の三八%である。これに対し、われわれの調査では、死刑廃止論者の八七%は同じく無期刑がよいとしているが、そのうち八四%までは仮釈放を認めようとする者である。すなわち、仮釈放なしの無期刑を主張する者は三%にすぎない。とくに裁判官の廃止

Ⅳ—1　死刑の代替刑

		計	わからない（含む無記入）	その他	うち 一〇年未満	うち 一〇年以上二〇年以上	うち 二〇年以上三〇年以上	うち 有期の懲役または禁錮	うち わからない・一概にいえない	うち 仮釈放を認める	うち 一生自由を束縛する（終身刑）	うち 無期の懲役または禁錮
総理府		100%	13%	1%	—1%	2%	9%	12%	11%	30%	33%	74%
ゼミ	学者	100	10	2	—	—	9	9	65	8	15	80
うち	官	100	20	3	—	—	13	13	63	8	9	70
	法務官	100	10	—	—	—	4	—	78	9	9	87
	刑務官	100	6	3	—	—	9	—	38	32	12	82

Ⅳ—2　死刑廃止論と代替刑

	無期刑												有期刑			
	仮釈放なし				仮釈放あり				わからない							
	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	23%	3%	—	—	14%	38%	84%	84%	100%	71%	11%	—	—	—	—	16%	11%	16%	—	14%
〃 存置	39	18	11	12	35	30	53	44	72	35	11	4	—	2	12	11%	4	11	5	—

論者は仮釈放を認める無期刑を主張しており、終身刑（仮釈放なし）はもとより、有期刑を主張する者も一人もいない。刑法学者も八四%までが仮釈放を認めよとし、終身刑（仮釈放なし）は一人もいない。

死刑存置論者においては、無期を主張する者が総理府の調査で八〇%を占め、われわれの調査でもほぼ同じく七五%を占める。質問の性質上当然といえようが、総理府の調査で死刑存置論者は仮釈放を認めない者（三九%）が仮釈放を認める者（三〇%）より多い結果となったのに対し、われわれの調査では、前者が一八%であるに対し、後者は五三%と逆に仮釈放を認めよとする者が圧倒的に多い。つまり、死刑存置論者も、もし死刑を廃止するとすれば、いわゆる終身刑（仮釈放なし）で代替させることはさけるべきであると考えているとみられる。なかんずく裁判官の存置論者の七二%までがそのように感じていることは重要である。

五　死刑の手続

死刑の言渡しや執行を手続の上でできるだけ厳格にし、なるべく死刑を最少限にとめる方策には種々のものが考えられるが、そのうち、(1)裁判への国民参加（いわゆる陪審制度ないしは参審制度）、(2)死刑言渡しの裁判官全員一致制、および(3)死刑言渡し後の観察期間の設置（いわゆる死刑の執行猶予制）について意見を求めている。

1　裁判への国民参加

死刑を言渡すような事件の裁判には、裁判官のほかに一般の国民を加えることに対しては、総理府およびわれわれの調査において一致して裁判官のみでよい（現行のまま）という者が多い。しかし、われわれの調査の方が裁判官のみを主張する者の割合が六六%と高い割合を示す（V—1表参照）。また裁判官自身も八一%まで現状維持を主張している。

V—1　裁判への国民参加

	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
裁判官のみ（現在のまま）	50%	66%	53%	81%	59%
国民を加える	32	21	30	15	21

これを死刑存置論者および廃止論者の別にみると、V—2表に示すように、いずれも現状維持が多い。しかし、刑法学者のうち死刑廃止論者は国民を加えよとする者が若干多い（前者の三七%に対し四二%）。しかるに、死刑存置論者は、逆に国民を加えよとする者は一一%であるに対し、裁判官のみとする者は七二%を占める。参審制度そのものに問題があり、わが国の国民性からして反対が多いのは至当である。

V—2　死刑言渡しの裁判

	国民も加える 総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官	裁判官のみ（現行） 総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	37%	36%	42%	22%	43%	48%	47%	37%	67%	37%
〃 存置	33	13	11	14	15	54	72	72	76	58

2　死刑言渡しの裁判官全員一致制

現在の裁判制度においては、普通、裁判官三人のうち二人が賛成すれば死刑を言渡すことができるようになっているわけであるが、死刑についてはとくに裁判官三人の全員一致がなければ言渡せないようにしてはどうかとの質問に対し、総理府の調査では全員一致（四四%）と多数決（四二%）がほぼ同程度である（V—3表参照）。これに対しわれわれの調査では全員一致にすべきであるとする意見が六五%であり、現行のままでよいとする者は二九%である。とくに、刑法学者および刑務官は七〇%台で全員一致制を支持している。裁判官も全員一致を支持する者が五四%あり、現行維持の三九%より多数を占めることは注目すべきことといえよう（V—3表参照）。裁判官の中には「事実審に限り全員一致とする」という意見の人もあった。

V—3　裁判官全員一致制

	総理府	ゼミ	うち 刑法学者	うち 裁判官	うち 刑務官
全員一致	44%	65%	75%	54%	74%
多数決（現行）	42	29	18	39	26

V—4 死刑言渡

	全員一致					多数決（現行）				
	総理府	セミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	セミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	85%	95%	95%	100%	99%	24%	—	—	—	—
〃 存置	40	51	50	46	65	50	40	39	46	35

これを死刑存置論者および廃止論者に分けて考察してみると、総理府およびわれわれの調査においていずれも死刑廃止論者が全員一致制を強く支持していることはいわば当然のことといえる。とくにわれわれの調査では死刑廃止論者が全員、現行の多数決制に反対している。一人の人間の生死が多数決によって決定されること自体が十分問題にされるべきものといえよう。この点については死刑存置論者も全員一致支持者が若干でも多いことに注目すべきである。比較的強い死刑存置論をもつ刑務官もその六五%の者が全員一致制を支持し、現行のままでよいとする者は三五%であることは、現実に死刑囚を扱っている刑務官の意見であるだけに問題である。

3 死刑言渡し後の観察期間の設置

現在は、裁判によって死刑の言渡しを受けた者は、六カ月内に執行されるわけであるが、言渡し後すぐに死刑を執行するのでなく、その後の情況によっては無期懲役などに減刑することができるように、一定の観察期間をおいた方がよいとする意見もある。この質問に対しては、総理府の調査では賛成者が圧倒的に多い（賛成者六五%、必要ないとする者二〇%、V—5表参照）。われわれの調査でも賛成者が多い（四九%に対し二七%）のであるが、刑務官はむしろその必要はないとする者が若干多い。

V—5 死刑執行の猶予

	総理府	セミ	うち 刑法学者	うち 裁判官	うち 刑務官
一定の観察期間をおく	65%	49%	55%	48%	44%
その必要はない	20	27	18	22	47

これを死刑の存置論、廃止論の関係でみると（V—6表参照）、死刑廃止論では総理府およびわれわれの両調査において、いずれも必要だとする者が大部分である。ただし、裁判官で必要とする者は三三%のみであり、一概にいえないとする者が存置論のうちの五六%あった（表示していない）。いずれにしても刑法学者および裁判官の死刑廃止論者に、必要とする意見の多いのは、誤判をさけえないとすることも手伝っていると思われる。

裁判官の死刑存置論者では、五一%が必要を認めているのに対し、不必要とする者は二九%である。このように、とくに裁判官において必要とする者が多い。ただし「手続的な面、法の安定性の面を考えるとむずかしい」とする裁判官の意見もあった。

V—6 観察期間の設置

	必要					不必要（現行）				
	総理府	セミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	セミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	85%	67%	78%	33%	85%	6%	3%	—	—	14%
〃 存置	63	41	39	51	31	26	37	39	29	58

六 死刑に関する一般的態度

死刑の存廃に関する論評の主たる根拠である㈠重罪人の扱いに対する態度、㈡死刑の一般予防的効果、㈢犯罪の動向、㈣犯罪の原因および㈤犯罪人に対する見方等について、いわゆる死刑存廃の背景をなす意識について質問しているので概括的にまとめておきたい。

1 重罪人の扱いに対する態度

重い犯罪を犯した場合でも、実際にはなるべく死刑にしない方がよいと思うかという問に対して、総理府の調査（VI—1(A)表参照）では「なるべく死刑にしない方がよい」（四二%）、「そうは思わない」（四〇%）とほぼ同程度である。これに対し、われわれの調査では前者が六三%、後者二四%と圧倒的に死刑にしない方がよいとする意見が多い。とりわけ刑法学者に多い（八八%）。しかし、刑務官は一般世論と比べても、そうは思わな

いという者が多く（五〇%）、ここでも特異な結果となっている。

死刑存置、廃止論との関係でみると（VI—1(B)参照）、総理府の調査で死刑廃止論者の七五%がなるべく死刑にしないとしていることは当然であるとしても、存置論者も三五%は死刑にしないこととしていることは注目してよい。われわれの調査では、死刑存置論者のうち、裁判官および刑務官の一〇〇%、刑法学者の九五%までが死刑にしないようにとしている（全体では九五%）。また存置論者でも刑法学者は七八%まで、なるべく死刑にしないようにとの意見をもっており、死刑にはなるべくしたくないという意識はとくに強いものがあるといわねばならない。とくに、総理府はもとより、裁判官、刑務官と比べても特異な割合になっているといえよう。また、総理府の調査では集計結果はでていないが、われわれの調査では、一概にいえないとする者が死刑廃止論者では一人もいないのに対し、存置論者には全体の一九%、とくに裁判官の二三%にある。したがって、そうは思わないとする者と一概にいえないとする者が同程度あることになる。つまり、死刑存置論者で、なるべく死刑にしないという答えを率直に出せない場合は、一概にいえないという回答に廻るという（そうは思わないというほど死刑を絶対とは考えていないことになるのではないか）結果がこれらの統計から推察できるように思う。

VI—1 重罪犯人の扱い(A)

	総理府	うち 刑法学者	うち 裁判官	うち 刑務官
	ミ			
なるべく死刑にしない方がよい	42%	63%	88%	63%	35%
そうは思わない	40%	24	8	20	50

VI—1 重罪犯人の扱い(B)

	なるべく死刑にしない				そうは思わない				一概にいえない			
	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	75%	95%	95%	100%	100%	18%	3%	5%	—	—	—	—	—	—
〃 存置	35	45	78	53	15	48%	32	11	23	65	19	11	23	19

2 死刑の一般予防的効果

死刑という刑罰をなくしてしまえば、悪質な犯罪がふえると思うかどうかについては（VI—2(A)および(B)表参照）、総理府の調査では過半数がふえていると思うと答えている（五二%）。これに対し、われわれの調査結果では反対にふえるとは思わないという回答が半数に近い（四八%）。とくに刑法学者の六割まではふえると考えていない。

これを死刑存置論および廃止論の関係でみると、死刑廃止論者は、われわれの調査では、ふえると思う者は一人もなく一貫している。これに対し、ふえるとは思わないとする者がほとんど九〇%を占める。この点は総理府の調査においても、割合こそ六四%であるが、同じくふえると思わない者が多い。これに対し、死刑存置論者は、総理府の調査でふえると思う者が六三%あり、そうは思わない者

VI—2 死刑の一般予防効果(A)

	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官
ふえると思う	52%	27%	10%	37%	30%
ふえるとは思わない	31	48	60	39	48

VI—2 死刑の一般予防効果(B)

	死刑廃止によって凶悪犯罪は ふえると思う				ふえるとは思わない				一概にいえない			
	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	20%	—	—	—	—	64%	87%	89%	89%	85%	11%	11%	1%	14%
〃 存置	63	37	22	46	38	24	28	22	29	35	28	56	23	19

（二四%）より圧倒的に多い。ヒかるに、われわれの調査では死刑存置論者でもふえると思う者は、ふえると思わない者より全般に少ない。ただ、一概にいえないとする者も、ふえると思わない者と同程度ある。このことは、前述の重罪人の場合と同じく、死刑存置論者、とくに刑法学者および裁判官の存置理由が、前者は誤判、後者は被害者の感情を問題にしているところから生じた結果であるとみられる。

総理府の調査では、死刑廃止論者では「ふえている」とする者が六割、存置論者では「ふえる」とする者が六割あるところから、死刑規定の一般予防効果に対する期待の有無は死刑存廃に対する意見と関係が深いとのべている（総理府・前掲報告書一三ページ）。しかし、かような解釈は、少なくとも専門家の自覚集団については妥当しないといえよう。

3 犯罪の動向

総理府の調査によると、凶悪な犯罪は最近ふえているという見方が一般的であるとしている（ふえている七四%、へっている六%）。しかし、われわれの調査では、この点でも必ずしも一致せず、むしろへっているとする者（一六%）と、同じようなものとする者（三八%）で過半数を占めており、ふえているとする者は三割である（執行人員はふえているとする人もある）。なお死刑存置および廃止論との関係では、総理府の調査で存置、廃止のいずれも七割台がふえているとしている。これに対し、われわれの調査では「ふえている」「へっている」がほぼ同程度である。ただ、存置論者のうち、裁判官および刑務官はそれぞれ三三%、四七%がふえていると感じ、へっているとする者は一人もいない、残りの者は一概にいえない、同じようなものと答えている（表示していない）。実務家が少なくとも、へっているとは感じていないのは最近の犯罪状況を感じとっているものと解されるが統計上は凶悪犯罪は戦後漸減傾向にある（犯罪白書、昭和四三年版）。

4 犯罪の原因

総理府の調査では、凶悪な犯罪の原因はおもに「社会にある」という者（三九%）が「犯人自身にある」とする者（三一%）より若干多いのがめだつ（Ⅵ—4(A)表参照）。われわれの調査ではほとんど差がない。これは、刑法学者は社会にあるとする者が多い（一三%）のに対し、裁判官は犯人自身にあるとみる者が多い（二八%）ところから生じた結果である（刑務官は同程度である）。前者で、「凶悪犯人の人格は多くの場合異常である。異常な犯罪者は死刑の対象者になりえない。したがって、犯罪を起こらしめた社会に責任がある」と添書きしている人もいた。しかし、いずれも「一概にいえない」である。

Ⅵ—3 最近の凶悪犯罪(A)

	総理府	ぜ・ミ	うち 裁判官	うち 刑法学者	うち 刑務官
ふえている	74%	30%	18%	22%	59
へっている	6	16	30	13	6
同じようなもの	12	38	40	48	21
一概にいえない	1	11	8	11	15
わからない	8	4	5	6	—
%	100	100	100	100	100

Ⅵ—3 最近の凶悪犯罪(B)

	ふえている 総理府	ぜ・ミ	うち 刑法学者	うち 裁判官	うち 刑務官	へっている 総理府	ぜ・ミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	70%	22%	5%	33%	47%	9%	25%	47%	—	—
〃 存置	77	33	33	21	58	5%	20	11	16	34

Ⅵ—4 凶悪犯罪の主原因(A)

	総理府	ぜ・ミ	うち 刑法学者	うち 裁判官	うち 刑務官
社会にある	39%	19%	23%	13%	19%
犯人自身にある	31	21	3	28	21

Ⅵ—4 凶悪犯罪の主原因(B)

	社会にある 総理府	ぜ・ミ	うち 刑法学者	うち 裁判官	うち 刑務官	犯人自身にある 総理府	ぜ・ミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	44%	31%	37%	22%	28%	29%	5%	—	28	6%
〃 存置	40%	13	11	12	19	33	—	35	35	26

えない」とする者がかなりの割合を占めている（表示していないが、たとえば、われわれの調査では全体の五九％は一概にいえないとしている）。

これを死刑存置および廃止論の関係でみると（Ⅵ—4(B)表参照）、総理府の調査では、四％だけであるが、死刑存置論者に「社会にある」とする者が多い。われわれの調査では、この差は大きくなるが（存置論者は三一％、廃止論者は一三％がいずれも社会にあるとする）。裁判官の死刑廃止論者は、「社会にある」および「犯人自身にある」が同程度である。死刑存置論者が、いずれも犯人自身にあるとするのは当然であろうが、全体ではここでも一概にいえないとする者が多く（存置、廃止のいずれも六割がそう答えている）、この問に対する回答を留保している。その点総理府の一般世論の結果と対比してみると興味あることといえる。

5　犯罪人に対する見方

総理府およびわれわれの調査において、凶悪犯人でも更生が「不可能な人もいる」とみる者がいずれも多いのは当然である（Ⅵ—5(A)および(B)参照）。しかし、これを死刑存置および廃止論別にみると、総理府の調査では、死刑廃止論の五割までが「必ず可能」としているのは当然としても、死刑存置論者の三割も「必ず可能」としており、不可能（二八

Ⅵ—5　凶悪犯人の更生(A)

	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官
必ず可能	33%	17%	20%	13%	21%
不可能な人もある	38	33	45	41	35

Ⅵ—5　凶悪犯人の更生(B)

	必ず可能					不可能な人もいる				
	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官	総理府	うち ミ	うち 刑法学者	うち 裁判官	うち 刑務官
死刑廃止	49	40%	26%	44%	71%	41%	31%	37%	33%	14%
〃 存置	31	10	17	10	8	28	47	50	44	58

%）より多いのは注目すべきことである。われわれの調査では、死刑廃止論者でも「必ず可能」（四〇%）、「不可能な人もいる」（三一%）が同程度である。とくに刑法学者は「不可能な人もいる」とするのが四割を占める（精神的に異常な人をさすものと思われる）のに対し、裁判官および刑務官では逆に「必ず可能」とする者が四四%および七一%を占めるのは興味ある結果である。「刑罰によって立返らせることはできないが、他の方法によって立返らせることはできる者もある」とのべている裁判官もあった。

刑法学者で死刑廃止論者は「一概にいえない」とする者が三二%を占め、他の専門家よりもっともこの回答が多い。実務家の死刑廃止論者は信念に近いものがあると解されはしまいか。「経験……生可能な者が相当いる」と……裁判官もあった。

七 そ

……総理府の調査項……であるが、裁判……の判決を言渡したこ……ついての質問を加え……五四名の対象者のう……ち一一名（二〇%）、すなわち、五人に一人の割合で死刑の判決を言渡している。その一名は全員が死刑存置論者であり、廃止論者は一人もいなかった。これだけの資料で断定的なことはむろんいえないが、死刑を言渡した経験のある裁判官には存置論者が比較的多いといえるのではないか。死刑を言渡したこと……むろん推測はできないが、……に、死刑を言渡す職責になかったと思われる非該当の裁判官は全員のうち四名にすぎ……他の裁判官はおおむね……はあったものと推……

同じく、刑……は「死刑の執行に立……るか」について問……その経験をもっていた……者）にすぎなかった。

むすび

本稿の冒頭でもふれたごとく、一般の大衆の無知や誤信をバンドワゴン的効果（bandwagon effect）とし、調査した結果を原動力にしながら、さらに新しい世論を捏造し、大衆をこれに追随させることが、仮にあるとするならば、きわめて由々しいことであるとせねばならない。死刑制度についていえば特定の被害者を除き、一般大衆はおおむね無自覚的集団であるといえよう。これまでの検討で、われわれは一般大衆の死刑制度に対する認識が無自覚集団であると断定するに足るものがあることを実証したとかんがえる。かような一般大衆を背景とする世論が死刑制度存……大きな……エイトをもつものと……されることはきわめて危……るといわざるをえな……度に対する世論は、少なくとも……害や関心をもつ意見集団（opinion group）によって形成されねばなるまい。意見集団の一つの方向を見定め、吸いあげることによって死刑廃止へ大衆を導いてゆくのが真の世論といえるのではないであろうか。

これまでの検討から得られた結論の若干を列挙するとつぎのごとくである。

㈠放火および内乱の罪は一般世論（総理府の世論調査をさす、以下同様）および各専門家（われわれの調査をさす。以下同様）ともに廃止論が多い。政府高官殺し、およびけんかによる殺人も同じく廃止論が多い傾向にある。

㈡専門家相互間に死刑廃置、廃止の見解は大きな差がある。これに対し一般世論ではすべて平均化されてしまう。

㈢実務家（裁判官および刑務官）は死刑存置論者でも罪名によっては廃止してもよい罪をあげることが多い。

㈣一般世論では死刑廃止論者で他の質問にも一貫して死刑廃止を主張した者は六%にすぎず、わからないとする者が多いのに対し、専門家では全員が一貫しており、わからないとする者はきわめて少ない。

㈤死刑存置論者の存置理由の第一は、一般世論では死刑の一般予防効果をあげるが、専門家は被害者感情をあげる。

㈥死刑廃止論者の廃止理由の第一は、一般世論は人道的立場をあげるが、専門家は誤判の危険性をあげる。

㈦単純な理由からの一般世論の死刑存置論者は、将来も存続させよとするに対し、専門家の理由は漸次廃止に結びつく。

㈧一般世論では終身刑で一生自由を束縛させよとする者がもっとも多いが、専門家は仮釈放を認める者が圧倒的に多い。

㈨専門家では死刑言渡しは裁判官の全員一致でやるべきであるとする者が圧倒的に多い。一般世論では現状維持と同程度である。

末弘研究所編集

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日本評論社

The System of Capital Punishment and Public Opinion

(By Kōichi Kikuta*)

INTRODUCTION

In June 1967, the Japanese Ministry of Justice asked the Public Information Section of the Prime Minister's Office (PMO) to conduct a survey of overall public opinion throughout the country regarding capital punishment, having in mind the objective of using the data thus obtained in the revision of the present penal code.

The results of this survey showed that 71% of the surveyed population favored retention of capital punishment, while 16% were opposed to the retention of capital punishment. The PMO had conducted a similar survey in May 1956. As compared with the results of this 1956 survey, the 1967 survey of the PMO showed a 2% decrease in those favoring abolition of capital punishment and a 6% increase in those favoring maintenance of capital punishment.

The results of the 1967 PMO survey were highlighted in the various media. For example, the morning daily *Ashai Shimbun* reported on October 14, 1967, that

> ...the PMO survey showed a 70% opposition to the abolition of capital punishment, a finding which is contrary to recent trends in the European countries and the United States, where there is increasing sentiment in favor of the abolition of capital punishment. In Japan there still exists deeply rooted opinion supporting retention of capital punishment....

In addition to being well covered by the media, the results of the 1967 PMO survey were submitted to the Second Subcommittee of the Special Committee on Criminal Law of the Legislative Council (part of the Ministry of Justice) for use in its deliberations on overall revision of the present penal code. The results were also used by the Special Committee in formulating its general policy regarding capital punishment.

The various uses of the results of the PMO survey indicate that they are being taken quite seriously. The most pertinent questions are: (1) to what extent should general public opinion be used as a determining factor in any decision with regard to the place of capital punishment in the Japanese legal system; (2) on what bases does the general public establish its position with regard to capital punishment; and (3) how would "expert public opinion" (that is, the opinion of those having knowledge of and experience with capital punishment) compare with "general public opinion?"

In order to provide tentative answers to the second and third of these questions, the Law Department of Meiji University, with the aid of students enrolled in a criminal policy seminar, conducted its own survey of "expert public opinion" from June 1, 1969, to June 30, 1969. A questionnaire almost identical to that used in the PMO survey was mailed to: (1) the entire Japanese population of professors who teach criminal law in a Law Department of a university; and (2) every twenty-fifth judge on the list of judges as of 1969. In addition, interviews were carried out with 34 prison officers who were undertaking a program of study at the Tokyo Branch of the Research and Training Institution for Prison Officials. Of the 136 criminal law professors to whom questionnaires were mailed, 40 (29.4%) responded. Fifty-four replies were received from the 131 judges to whom questionnaires were mailed (41.2%). Thus, a total of 128 experts participated in our survey.

Proper evaluation of the validity of the results of a survey of expert public opinion so conducted would have to be done by statistical experts, one of the major questions being whether or not the population whose views were solicited and the number from whom responses were received are sufficient to constitute a fair sample to be compared with the sample surveyed by the PMO, which consisted of 2,500 persons. Also, the PMO survey was conducted entirely through interviews, while our survey was carried out, in the case of criminal law professors and judges, by mail.

We believe that our survey is so-called pilot research, and we will pursue it further.

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*Kikuta's Article appeared in *Hōritsu jihō*, Vol. 42, No. 5 (May 1970), pp. 43–56.

CHAPTER I. PRO'S AND CON'S OF THE ABOLITION OF CAPITAL PUNISHMENT

1. Attitude toward the provisions concerning capital punishment under the present penal code.

The question was asked whether we should retain or abolish the capital punishment prescribed in the present penal code for such crimes as murder, insurrection, inducement of foreign aggression, arson against a dwelling, and the use of explosives. (See Table I–1.)

According to the PMO survey, about 70% supported the existing death penalty imposed on murder and the use of explosives while about 17% favored abolition of capital punishment in the case of murder and the use of explosives. Our survey indicates that 85% of prison officers and 78% of judges were in favor of the existing death penalty in the case of murder.

Generally speaking, our survey showed a high ratio of support for the death penalty in the case of murder (69%), although this ratio was slightly lower than that revealed by the PMO survey (70%).

When one examines the figures for individual professions, one notices a relatively higher percentage of criminal law professors favoring abolition of the death penalty in the case of arson of dwellings (58%) and being the ring leader of an insurrection (58%); in the case of judges, the lowest rate of support for abolishing the death penalty was noted in respect of the use of explosives (19%), while the lowest rate of support from prison officers appeared with respect to being the ring leader of an insurrection (15%) and murder (15%). There is a high rate of support from judges for retention of the death penalty imposed at present for the crimes of murder, inducement of foreign aggression, and use of explosives.

The figures of the PMO survey indicate that 43% favored the existing death penalty for arson of dwellings, while 34% supported abolition of the death penalty in the case of arson of dwellings, and 23% either did not know or were not sure of their position. One can say that there is not great support for the capital punishment now imposed for the crime of arson of dwelling.

II. Attitude toward various types of murder.

As recorded in Table I–1, the PMO survey showed 17% support for the abolition of capital punishment in the case of murder, while our survey revealed 27% support for the abolition of the death sentence in the case of murder. In Table I–2, figures are recorded with respect to general and expert public opinion in the case of various types of murder. The intent of this aspect of the surveys was to provide indications of the degree of support for the imposition of differential sentences (heavy or light) for murders committed in various ways, for various motives, and against various victims.

Both the PMO and our surveys indicated a great deal of support for the death sentence meted out at present for murder of an abducted victim, murder of a rape victim, murder by overturning a train, and murder of an on-duty policeman; there was also a relatively low degree of support for abolition of the death sentence involving these types of murder. However, in the case of murdering an on-duty policeman, our survey indicated that 17% preferred to be included in the "unknown" category.

Both the PMO and our surveys also indicated that relatively few people (7%) favored abolition of the death penalty in the case of parricide, but that 24% (PMO survey) and 19% (our survey) did not know or were not sure of the position they wished to take with respect to capital punishment for parricide, while 52% (PMO survey) and 48% (our survey) went on record as favoring imposition of the death sentence on a parricide. Only 35% of the criminal law professors participating in our survey, however, thought that the crime of parricide definitely warranted the death sentence.

In the case of murder of government officials for political purposes, both surveys indicate that about 40% supported the capital punishment presently imposed. Similarly, in both surveys about 25% felt that capital punishment was warranted in the case of murder during an altercation.

CHAPTER II. ABOLITION OF CAPITAL PUNISHMENT

1. Survey concerning abolition.

In both the 1956 and 1967 PMO surveys the following question was asked: "Do you support or not support outright abolition of capital punishment?" (See Table II–1.)

According to the 1967 PMO survey, about 70% did not support the outright abolition of capital punishment, while less than 20% indicated support of outright abolition. As compared with the results of the 1956 PMO survey, the 1967 PMO survey shows that those favoring abolition of capital punishment are on the decline. Our survey (1969) shows that 68% support capital punishment a figure which is a little higher (3%) than the comparable figure reported in the 1956 PMO survey.

Our survey also indicates that 27% favored abolition, which is much higher than the figure reported in both the 1967 and the 1956 PMO survey (16% and 18% respectively). The fact that our survey when compared to the 1956 PMO survey showed a higher percentage both opposing and supporting abolition of capital punishment is due to the fact that in our survey a smaller percentage of those reported in our survey fall under the category of "unknown" attitude.

Forty-eight percent of the criminal law scholars in our survey supported abolition of capital punishment, a figure which is slightly higher than the 45% of the criminal law professors who were opposed to outright abolition of the death penalty. On the other hand, 80% of the judges and 76% of the prison officials in our survey supported capital punishment.

See Table II–2 for the following discussion. As stated above, in the 1967 PMO survey 71% indicated opposition to the outright and overall abolition of capital punishment. This 71% was comprised of 28% who thought that capital punishment should be retained only for certain of the crimes to which it presently is applicable and 43% who favored retention of capital punishment for all the crimes to which it now is applicable.

Our survey, however, showed that 34% favored retention of capital punishment only in the case of certain crimes, which is higher than the 28% falling in this category in the 1967 PMO survey. Approaching this category in terms of occupation of the respondent, one finds that 39% of the judges thought that capital punishment should be retained only in the cases of certain crimes. Thus, although about 80% of the judges were opposed to the outright and overall abolition of capital punishment, (see Table II–1) 39% of them supported partial abolition on the basis of the nature of the crime.

Similarly, while 76% of the prison officers were opposed to the outright and overall abolition of capital punishment, 47% of them listed certain crimes for which the presently imposed capital punishment should be abolished. It thus is worthy of note that a high percentage of these two categories of expert practitioners enumerated certain crimes which they thought should be exempt from the death sentence. Only 18% of the criminal law professors listed certain crimes which they felt should be exempt from capital punishment; this low figure must be evaluated, however, in light of the high percentage (around 48%) of criminal law professors who favor the outright and overall abolition of capital punishment.

II. Reasons for Supporting the Present System of Capital Punishment.

The following is a comparison of figures obtained in the PMO survey and our survey in response to statements constituting reasons for supporting the present system of capital punishment. The first figure stated refers to the percentage obtained when one divides the number of persons affirming that the statement is a reason for supporting the present system by the overall number of persons participating in the survey; the second percentage, which is enclosed in parentheses, is obtained by dividing the number of persons affirming that the statement is a reason for supporting the present system by the number of persons participating in the survey who indicated that they in general support the retention of the present system of capital punishment.

1. The number of dangerous offenders may increase if capital punishment is abolished.

PMO—43% (63% of all those indicating support for the present system).
Our survey—33% (48% of all those indicating support for the present system).
Criminal law professors—5% (8% of all those in this profession indicating support for the present system).
Judges—20% (30% of all those in this profession indicating support for the present system).
Prison officers—7% (10% of all those in this profession indicating support for the present system).

2. Felonious criminals should be put to death to atone for their crime.

PMO—43% (62% of all those indicating support for the present system).
Our survey—30% (43% of all those indicating support for the present system).
Criminal law professors—5% (8% of all those in this profession indicating support for the present system).
Judges—16% (24% of all those in this profession indicating support for the present system).
Prison officers—8% (11% of all those in this profession indicating support for the present system).

3. Dangerous offenders, if not put to death, may again commit similar crimes.

PMO—21% (30% of all those indicating support for the present system).
Our survey—10% (15% of all those indicating support for the present system).
Criminal law professors—2% (2% of all those in this profession indicating support for the present system).
Judges—6% (9% of all those in this profession indicating support for the present system).
Prison officers—2% (3% of all those in this profession indicating support for the present system).

4. If the death penalty is abolished, those injured by a felonious crime previously carrying the death penalty will not be satisfied in their desire for vengeance.

PMO—7% (10% of all those indicating support for the present system).
Our survey—20% (30% of all those indicating support for the present system).
Criminal law professors—6% (9% of all those in this profession indicating support for the present system).
Judges—12% (17% of all those in this profession indicating support for the present system).
Prison officers—2% (3% of all those in this profession indicating support for the present system).

5. Other reasons.

PMO—3% (4% of all those indicating support for the present system).
Our survey—6% (9% of all those indicating support for the present system).
Criminal law professors—2% (3% of all those in this profession indicating support for the present system).
Judges—2% (3% of all those in this profession indicating support for the present system).
Prison officers—2% (2% of all those in this profession indicating support for the present system).

In Table II–3, the above statements are ranked in order of their importance as reasons for supporting the present system of capital punishment. It should be noted that criminal law professors ranked statement number four with regard to the feelings of those injured by the felonious crime as the most important reason for support of the retention of capital punishment. Law professors ranked as least important statement number three (the danger of repetition of a felonious crime), which on the PMO survey was ranked as the third most important reason for retention of the present system of capital punishment. Judges also accord less importance to statement number three than was accorded it in the PMO survey. Prison officers gave first rank to statement number two (felonious criminals should atone for their crime), which was ranked second in the PMO survey.

III. Reasons for abolishing capital punishment.

The following statements were offered as expressions of reasons for abolishing capital punishment and were ranked as shown in Table II–4 in order of their importance as reasons for supporting abolition of the death penalty.

1. Killing a human being, even if he is a felonious criminal, is a barbarous act against humanity. No person has the right to kill another person.

PMO—8% (53% of all those indicating support for abolition of capital punishment).
Our survey—16% (60% of all those indicating support for abolition of capital punishment).
Criminal law professors—12% (43% of all those in this profession indicating support for abolition of capital punishment).
Judges—5% (14% of all those in this profession indicating support for abolition of capital punishment).
Prison officers—0 (0 of all those in this profession indicating support for abolition of capital punishment).

2. It is probable that even the most vicious criminal may be rehabilitated.

PMO—5% (31% of all those indicating support for abolition of capital punishment).
Our survey—16% (57% of all those indicating support for abolition of capital punishment).
Criminal law professors—8% (29% of all those in this profession indicating support for abolition of capital punishment).
Judges—4% (14% of all those in this profession indicating support for abolition of capital punishment).
Prison officers—4% (14% of all those in this profession indicating support for abolition of capital punishment).

3. The criminal should be given the opportunity to atone for his crime, an opportunity which capital punishment denies him.

PMO—3% (22% of all those indicating support for abolition of capital punishment).
Our survey—4% (13% of all those indicating support for abolition of capital punishment).
Criminal law professors—3% (11% of all those in this profession indicating support for abolition of capital punishment).
Judges—1% (2% of all those in this profession indicating support for abolition of capital punishment).
Prison officers—0 (0 of all those in this profession indicating support for abolition of capital punishment).

4. Even if capital punishment is abolished, it is unlikely that dangerous crimes will increase; even if capital punishment continues to exist, such crimes will not decrease.

PMO—3% (21% of all those indicating support for abolition of capital punishment).
Our survey—12% (46% of all those indicating support for abolition of capital punishment).
Criminal law professors—7% (26% of all those in this profession indicating support for abolition of capital punishment).
Judges—4% (14% of all those in this profession indicating support for abolition of capital punishment).
Prison officers—2% (6% of all those in this profession indicating support for abolition of capital punishment).

5. In the case of an error in decision (mistrial) discovered after the person sentenced to capital punishment has been executed, there is no way to rectify the wrong done to him.

PMO—3% (18% of all those indicating support for abolition of capital punishment).
Our survey—20% (71% of all those indicating support for abolition of capital punishment).
Criminal law professors—15% (54% of all those in this profession indicating support for abolition of capital punishment).
Judges—5% (17% of all those in this profession indicating support for abolition of capital punishment).
Prison officers—0 (0 of all those in this profession indicating support for abolition of capital punishment).

In the 1967 PMO survey (also in 1956) statement number 1 (against humanity) is ranked as the most important reason for abolition of capital

punishment. It is interesting to note that in our survey first rank is given to statement number 5 (possibility of mistrial) by both criminal law professors and judges.

CHAPTER III. GRADUAL ABOLITION OF CAPITAL PUNISHMENT

I. General Survey.

For the following discussion, consult Table III–1. The PMO survey revealed 40% (including 3% in favor of immediate and outright abolition) favored gradual abolition, and 45% supported perpetuation of capital punishment. According to our survey, almost 60% were in favor of gradual abolition, a much higher percentage than the 28% who favored continued future existence of the present system. Among criminal lawyers, 85% supported either immediate and outright abolition or gradual abolition.

See Table III–2 for the breakdown of the statistics on gradual abolition in terms of those in general favoring abolition of capital punishment and those in general opposing the abolition of capital punishment. In the PMO survey, among those opposing the abolition of capital punishment, 20% were in favor of gradual abolition, and 44% were in favor of continued existence of capital punishment. Our survey indicated that, among those opposing the abolition of capital punishment, 32% favored gradual abolition, while 25% favored uninterrupted future existence of capital punishment.

II. Abolition of Capital Punishment on a Trial Basis.

In conjunction with the following discussion, consult Table III–3. The PMO survey indicates that 49% favor abolition of capital punishment on a trial basis, while 26% oppose such a step. Our survey shows that 50% oppose abolition on a trial basis, while 31% support this approach. A law professor states that even if capital punishment is abolished on a trial basis, it would be very difficult to establish with any certainty the relationship between the tentative abolition and any observable fluctuation in the amount of crime. Both the PMO and our surveys indicate that those favoring gradual abolition also support abolition on a trial basis. (See Table III–4.)

CHAPTER IV. SUBSTITUTE FOR CAPITAL PUNISHMENT

In connection with the following discussion, consult Table IV–1. With regard to the question of whether other punishment could be substituted for capital punishment, in the PMO survey 74% indicated that life imprisonment or life imprisonment at forced labor could be substituted. This 74% was comprised of 33% who favored restraint of the criminal's freedom for life, 30% who would accord him the possibility of eventual parole, and 11% who could not express their position or could not express it without reservations. Our survey showed that 80% favored life imprisonment (15% for lifetime restraint of freedom, and 65% for according the criminal the possibility of eventual parole). Criminal law professors (63%) and judges (78%) came out especially heavily in favor of the possibility of eventual parole.

See Table IV–2 for figures indicating the degree of support for substitute punishment on the part of those favoring and those opposing the abolition of capital punishment. In the PMO survey, among those favoring the abolition of capital punishment, 38% were in favor of according the convict the possibility of eventual parole. Our survey indicated that, among those favoring the abolition of capital punishment, 84% favored according the prisoner the possibility of eventual parole, while only 3% favored lifetime imprisonment with no possibility of parole.

CHAPTER V. PROCEDURE OF CAPITAL PUNISHMENT

I. People's participation in trials involving capital punishment.

Many agree that judges alone should participate in a trial involving the sentence of capital punishment, the practice followed at present in the Japanese system. In the PMO survey 50% favored participation by judges alone in such trials, while our survey showed 66% favored this practice. It is interesting to note that 81% of the judges supported sole participation by judges. (See Table V–1.)

Table V–2 breaks down the data given in Table V–1 in terms of those favoring and those opposing capital punishment. It shows that the majority of

both groups support capital punishment's being meted out only by judges. Among law professors favoring abolition of capital punishment, 42% support popular participation in trials involving capital punishment, while 37% are in favor of participation by judges alone.

II. Unanimous decision by the judges in meting out capital punishment.

Under the present system agreement of two out of the three participating judges is sufficient to sentence a person to capital punishment. When asked if the unanimous decision of all three judges should be required for the meting out of such punishment, 44% of those participating in the PMO survey answered in the affirmative, while 42% favored the present practice of requiring only a majority decision. (See Table V–3.)

Table V–4 breaks down the statistics on the requirement of unanimous decision by all three judges in terms of those supporting and those opposing abolition of capital punishment. Here it is interesting to note that 95% of the criminal law professors supporting abolition of capital punishment, 100% of the judges supporting abolition of capital punishment, and 99% of prison officers supporting abolition favor capital punishment's being prescribed only upon unanimous decision of the three judges.

III. Establishment of an observation period prior to execution of capital punishment.

At present the convict sentenced to death is executed within six months from the day on which the judgment is rendered. Participants were asked whether or not it would be desirable to establish a period of observation during which the capital criminal could by good behavior lead to his death sentence being reduced to life imprisonment at forced labor. Table V–5 shows overall statistics on responses to this question, while Table V–6 breaks down these figures in terms of those supporting and those opposing abolition of capital punishment.

CHAPTER VI. GENERAL ATTITUDE TOWARD CAPITAL PUNISHMENT

I. Attitude toward handling felons.

See Table VI–1(A) and Table VI–1(B) for statistics on responses given to the statement that the "death penalty is not preferred if possible."

II. General preventive effect of the death penalty.

See Table VI–2(A) and Table VI–2(B) for statistics on responses given to the statement that "if the death penalty is abolished, felonious crimes will increase."

III. Felonious crimes in recent years.

See Table VI–3(A) and Table VI–3(B) for statistics on the participants' estimation of the general trend in the number of felonious crimes in recent years.

IV. Major causes of felonious crimes.

See Table VI–4(A) and Table VI–4(B) for statistics on the participants' position with regard to the question of whether society or the individual criminal is responsible for his criminality. The PMO survey indicates that 39% of the participants think that society is responsible for the individual's criminality, while 31% hold the criminal responsible. Our survey revealed an almost equal division of opinion on this question, with 19% holding society responsible, and 21% holding the criminal responsible. A higher percentage of judges (28%) thought the criminal responsible for his behavior, while 23% of the criminal law professors took the opposite position. Table VI–4(b) analyses the statistics on responses to these opposing attributions of responsibility in terms of those favoring and those opposing abolition of capital punishment.

IV. Rehabilitation of felons.

In both surveys [See Table VI–5(A)] many persons stated that it is not necessarily the case that a felon may be rehabilitated. However, as indicated in Table VI–5(B), 49% of those favoring the abolition of capital punishment in the PMO survey answered that rehabilitation of a felon is always possible,

while 31% of those opposing abolition of capital punishment thought that rehabilitation is always possible. Our survey indicated that 40% of those favoring abolition of capital punishment thought rehabilitation always possible, while 31% of those favoring abolition felt that rehabilitation was not necessarily possible.

CHAPTER VII. MISCELLANEOUS

To those listed on the PMO's questionnaire, our survey added one question to be answered by the participating judges; this question was whether or not the participant himself had heard a case involving a decision that the accused should be sentenced to capital punishment. In reply to this question, eleven out of 54 judges (20% or one out of five) answered in the affirmative. All eleven of these judges favored overall retention of capital punishment. Although our data in this respect is too incomplete to support any definitive statement, we suggest tentatively that judges who have imposed capital punishment are mostly in favor of retaining capital punishment.

Another question was directed to prison officers, asking them whether or not they had taken part in an execution. One person favoring retention of capital punishment answered in the affirmative.

CONCLUSIONS

The following are the conclusions reached from this study:

1. There appears to be some support for abolition of capital punishment in the case of the crimes of arson and insurrection according to both the PMO and our surveys. There also is a tendency to support abolition of capital punishment in the case of the crimes of killing government officials for political purposes and murder resulting from altercation.

2. Among the "expert" group surveyed in our poll, there exist divergent views with regard to abolition of capital punishment. Such divergent views do not show up in the PMO survey, where the participant's occupation was not taken into account.

3. Practitioners (judges and prison officials) in the criminal law system, even though they in general terms are opposed to the abolition of capital punishment, suggest that certain crimes should be exempt from capital punishment.

4. In the case of the general public opinion registered in the PMO survey, among those favoring abolition of capital punishment, 6% consistently supported abolition in their responses to all the questions, and large numbers appeared in the "unknown" category. In the case of the expert opinion registered in our survey, there was a great deal of consistency in responses to varied questions, and very few persons opted for the "unknown" category.

5. In the PMO survey prevention of crime was listed as the primary reason for supporting capital punishment, whereas in our survey lack of satisfaction of the injured parties' desire for vengeance should capital punishment be abolished assumed first place among criminal law professors as a reason for supporting capital punishment.

6. In the PMO survey, the inhumanity of killing any person was the primary reason given for support of abolition of capital punishment, while in our survey of expert opinion the possibility of judicial error was viewed as the primary reason for abolishing capital punishment.

7. In the PMO survey those who favored overall retention of capital punishment also tended to support perpetuation in the future of the present system of capital punishment, while experts who favored overall retention of capital punishment tended to support gradual abolition of the death penalty in the future.

8. The PMO survey revealed that many support life imprisonment as an alternative to capital punishment, while expert public opinion in our survey overwhelmingly supported imprisonment with the possibility of eventual parole.

9. The majority of the experts participating in our survey favored the requirement of unanimous decision of the three judges in the meting out of capital punishment, while there was an even division of opinion in this regard in the general public opinion expressed by the PMO survey.

TABLE I-1.—PRO'S AND CON'S OF THE ABOLITION OF CAPITAL PUNISHMENT UNDER THE PRESENT LAW

[In percent]

	Polls by PMO	Our survey	Breakdown		
			Criminal law professors	Judges	Prison officers
For capital punishment:					
Murder	70	69	43	78	85
Ring leader of insurrection	39	39	33	52	26
Inducement of foreign aggression	61	56	38	65	65
Arson of dwellings	43	37	30	46	32
Use of explosives	71	58	40	67	67
For abolition:					
Murder	17	27	50	17	15
Ring leader of insurrection	25	44	58	37	38
Inducement of foreign aggression	12	35	55	24	32
Arson of dwelling	34	40	58	31	32
Use of explosives	16	26	45	19	15
Not sure or unknown:					
Murder	13	5	8	6	
Ring leader of insurrection	36	12	10	7	24
Inducement of foreign aggression	27	5	10	7	3
Arson of dwellings	23	20	8	20	25
Use of explosives	13	13	10	13	18

TABLE I-2.—PRO'S AND CON'S OF CAPITAL PUNISHMENT IN VARIOUS MURDER CASES—Continued

[In percent]

	Polls by PMO	Our survey	Breakdown		
			Criminal law professors	Judges	Prison officers
For death penalty:					
Murder by abduction	78	67	38	80	82
Murder by overturning trains	69	61	38	72	71
Murder by rape	67	60	38	69	74
Murder by robbery	66	65	43	78	71
Murder of policemen on duty	60	52	35	52	74
Parricide	52	48	35	52	56
Murder of government officials	40	39	30	46	38
Murder by altercation	26	25	22	28	24
For abolition:					
Murder by abduction	1	1			3
Murder by overturning trains	4	1			3
Murder by rape	5	3		6	3
Murder by robbery	5	3		2	9
Murder of policemen on duty	6	4		7	3
Parricide	7	7		11	9
Murder of government officials	15	10	3	11	18
Murder by altercation	27	20	5	28	27
Not sure or unknown:					
Murder by abduction	4	6	13	4	
Murder by overturning trains	10	12	13	11	12
Murder by rape	11	10	13	9	9
Murder by robbery	12				
Murder of policemen on duty	17	17	15	24	9
Parricide	24	19	15	20	21
Murder of government officials	28	24	18	26	29
Murder by altercation	30	28	23	28	35

TABLE II-1.—OPINIONS ON THE DEATH PENALTY—PRO'S AND CON'S

[In percent]

	Polls by PMO (1956)	Polls by PMO (1967)	Our survey (1969)	Criminal law professors	Judges	Prison officers
Against abolition	65	71	68	45	80	76
For abolitoin	18	16	27	48	17	21
Unknown	17	13	5	8	4	3
Total	100	100	100	100	100	100

TABLE II-2.—OVERALL TABLE CONCERNING DEATH PENALTY

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
For abolition of death penalty	16	27	48	17	21
Against abolition:					
Those who listed crimes for which death penalty should be abolished	28	34	18	39	47
Those who did not list such crimes	43	38	35	44	32
No opinions	13				
Total	100			100	100

TABLE II-3.—RANKING IN ORDER OF IMPORTANCE OF STATEMENTS CONSTITUTING REASONS FOR SUPPORTING PRESENT SYSTEM OF CAPITAL PUNISHMENT

	Statement number by—				
	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Rank:					
I	1	1	4	1	2
II	2	2	1, 2	2	1
III	3	4		4	3, 4
IV	4	3	5	3	
V	5	5	3	5	5

TABLE II-4.—RANKING IN ORDER OF IMPORTANCE OF STATEMENTS CONSTITUTING REASONS FOR SUPPORTING ABOLITION OF DEATH PENALTY

	Statement number by—				
	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Rank:					
I	1	5	5	5	2
II	2	1	1	1	4
III	3	2	2	2, 4	
IV	4	4	4		
V	5	3	3	3	

TABLE III-1.—GRADUAL ABOLITION OF CAPITAL PUNISHMENT

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Gradual abolition (including immediate and outright abolition)	40	59	85	57	32
Future continuance	45	28	10	26	53
Unknown	15	13	5	17	15
Total	100	100	100	100	100

TABLE III-2.—RELATIONSHIP BETWEEN ABOLITION OF DEATH PENALTY AND ITS GRADUAL ABOLITION

[In percent]

[Since all the people did not answer the question regarding immediate or gradual abolition, the percentages shown here do not necessarily correspond to those of Table II-I]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Favoring the abolition of capital punishment	16	27	48	17	21
Breakdown:					
Immediate abolition	3	15	33	9	9
Gradual abolition	12	7	13	7	6
Unknown	19	5	3	----	6
Opposing the abolition of capital punishment	71	68	45	80	76
Breakdown:					
Gradual abolition	20	32	33	43	10
Future continuance	44	25	10	22	50
Unknown	7	10	3	15	16
Unknown	13	5	8	4	3
Breakdown:					
Gradual abolition	5	4	8	2	3
Future continuance	1				
Unknown	7	1	----	2	----

TABLE III-3.—ABOLITION OF CAPITAL PUNISHMENT BY EXPERIMENTATION

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Favoring	49	31	35	35	24
Opposing	26	50	45	48	59

TABLE III-4.—RELATION OF THE ABOLITION OF CAPITAL PUNISHMENT TO ITS ABOLITION BY EXPERIMENTATION

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Favoring the abolition by experimentation (outright abolition at the present):					
Favoring	74	50	53	44	57
Opposing	44	23	17	33	15
Gradual abolition in the future:					
Favoring (including immediate total abolition)	66	42	50	45	45
Continue in the future	39	14	----	15	17
Opposing the abolition by experimentation (total abolition at the present):					
Favoring	15	34	42	33	14
Opposing	32	54	50	51	68
Gradual abolition in the future:					
Favoring (including immediate total abolition)	18	36	50	39	27
Future continuance	38	78	100	71	78

TABLE IV-1.—SUBSTITUTE FOR CAPITAL PUNISHMENT

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
I. Imprisonment at forced labor or imprisonment for unlimited term (life imprisonment)	74	80	70	87	82
Restraint on freedom for life	33	15	8	9	32
Release on parole	30	65	63	78	38
Unknown or cannot say without reservation	11	----	----	----	12
II. Imprisonment or forced labor or imprisonment for limited term	12	9	13	4	9
Breakdown:					
Not less than 30 years	9	13	----	----	----
Not less than 20 years	2	----	----	----	----
Not less than 10 years	1	----	----	----	----
Not more than 10 years	----	----	----	----	----
Others (including those not answered)	1	2	3	----	3
Unknown	13	10	20	10	6
Totals	100	100	100	100	100

TABLE IV-2.—ABOLITION OF CAPITAL PUNISHMENT AND ITS SUBSTITUTE

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
I. For unlimited term (life imprisonment) no release on parole:					
For abolition of capital punishment	23	3	----	----	14
Against abolition of capital punishment	39	18	11	12	35
Release on parole:					
Abolition of capital punishment	38	84	84	100	71
Retention	30	53	44	72	35
Unknown:					
Abolition of capital punishment	11	----	----	----	----
Retention	11	4	----	2	12
II. For limited term:					
Abolition of capital punishment	16	11	16	----	14
Retention	11	4	11	5	----

TABLE V-1.—PEOPLE'S PARTICIPATION IN TRIALS

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Judges only (as of today)	50	66	53	81	59
People's participation	32	21	30	15	21

TABLE V–2.—PARTICIPATION IN TRIALS SENTENCING CAPITAL PUNISHMENT

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
People's participation:					
Abolition of death penalty	37	36	42	22	43
No abolition	33	13	11	14	15
Judges only:					
Abolition	48	47	37	67	57
No abolition	54	72	72	76	58

TABLE V–3.—UNANIMOUS DECISION BY THE JUDGES

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Unanimous decision	44	65	75	54	74
Majority (today)	42	29	18	39	26

TABLE V–4.—SENTENCE OF CAPITAL PUNISHMENT

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
By unanimous decision:					
Abolition	65	95	95	100	99
No abolition	40	51	50	46	65
By majority decision (the present system):					
Abolition	24				
No abolition	50	40	39	46	35

TABLE V–5.—SUSPENSION OF EXECUTION OF DEATH PENALTY

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Certain probation period is necessary	65	49	55	48	47
Not necessary	20	27	18	22	44

TABLE V-6.—CREATION OF AN OBSERVATION PERIOD

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
Necessary:					
Abolition	85	67	78	33	85
No abolition	63	41	39	51	31
Not necessary:					
Abolition	6	3			14
No abolition	26	37	39	29	58

TABLE VI-1.—ATTITUDE TOWARD HANDLING OF FELONS

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
(A):					
Death penalty is not preferred (if possible	42	63	88	63	35
Not in agreement with the above	40	24	8	20	50
(B):					
Death penalty is not preferred if possible:					
Abolition of death penalty	75	95	95	100	100
No abolition	35	45	78	53	15
Not in agreement with the above:					
Abolition	18	3	5		
No abolition	48	32	11	23	65
Cannot say without reservation:					
Abolition					
No abolition		19	11	23	19

TABLE VI-2.—GENERAL PREVENTATIVE EFFECT OF DEATH PENALTY

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
(A):					
Increasing	52	27	10	37	30
Decreasing	31	48	60	39	48
(B):					
By abolishing the death penalty, feloniuos crimes will increase:					
Abolition	20				
No abolition	63	37	22	46	38
By abolishing the death penalty, felonious crmes will decrease:					
Abolition	64	87	89	89	85
No abolition	24	28	22	29	35
Cannot say without reservation:					
Abolition		11	11	1	14
No abolition		28	56	23	19

TABLE VI-3.—FELONIOUS CRIMES IN RECENT YEARS

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
(A):					
Increasing	74	30	18	22	59
Decreasing	6	16	30	13	6
Almost same	12	38	40	48	21
Cannot say without reservations	1	11	8	11	15
Unknown	8	4	5	6	
(B):					
Increasing:					
Abolition of death penalty	70	22	5	33	47
No abolition	77	33	33	21	58
Decreasing:					
Abolition of death penalty	9	25	47		
No abolition	5	20	11	16	34

TABLE VI-4.—MAJOR CAUSES OF FELONIOUS CRIMES

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
(A):					
Society is responsible	39	19	23	13	19
Criminal is responsible	31	21	3	28	21
(B):					
Society is responsible:					
Abolition	44	31	37	22	28
No abolition	40	13	11	12	19
Criminal is responsible:					
Abolition	29	5		28	6
No abolition	33		35	35	26

TABLE VI-5.—REHABILITATION OF FELONS

[In percent]

	Polls by PMO	Our survey	Criminal law professors	Judges	Prison officers
(A):					
Always possible	33	17	20	13	21
Not necessarily possible	38	33	45	41	35
(B):					
Always possible:					
Abolition of death penalty	49	40	26	44	71
No abolition	31	10	17	10	8
Not necessarily possible:					
Abolition of death penalty	41	31	37	33	14
No abolition	28	47	50	44	58

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THE MAX-PLANCK-INSTITUTE FOR FOREIGN AND INTERNATIONAL CRIMINAL LAW

Foreword

Comparatists have long appreciated the fact that it is not the difference between written law and unwritten law which characterizes the gulf between civil law and common law. Rather, the difference is—and has been since the days of the Roman *jurisconsulti*—that the civil law has experienced the ordering hand of the scholar, so that it has become organized and systematized, while the common law still retains much of its pragmatic judge-made qualities with a remarkable resistance toward any comprehensive ordering.

It may be surmised that one of the consequences of the civil law's orderliness in the preservation of experience data (codes) is its capacity to be used for strategic planning for the future, whether by the citizen, the public law maker or the social planner. The common law probably does not have that capacity on the same scale, though it is more adapted for rapid, dynamic change, relatively oblivious to effects in the distant future. Certain features of continental and American society would seem to bear out these surmises. In particular, however, the developments in comparative law bear witness to the essential differences in the continental and Anglo-American approach to law, law reform and law planning. Englishmen and Americans had made use of foreign legal experiences only sporadically and usually purely on an *ad hoc* basis, often almost accidentally. Continentals, on the other hand, went about it in a systematic way, reaching their exploitations of foreign legal experience in a systematic fashion, canvassing whole "systems," surveying these in a gapless fashion, and searching for the experience rules of comparison. Comparative law abroad, thus, became a science which developed its own specialists and institutes at which they worked.

One of the best-known of them is the Max-Planck-Institute of Foreign and International Criminal Law, at the University of Freiburg, Germany, the foremost of its kind in the world. While a visiting professor at that Institute and at the University of Freiburg almost a decade ago, I had the opportunity of acquainting myself with the workings of that Institute, and resolved to create a similar institution in the United States of America. This was established as the Comparative Criminal Law Project of New York University which is proud to admit its lineage as leading back to Freiburg; and Freiburg still remains our model, for much hard work remains to be done before the New York University Project will have reached the stature of its Freiburg progenitor, and before the impact of its research labors can be truly felt in government circles and in law reform generally. Even after the publication of twenty volumes and numerous independent studies, there remain those in American criminal law circles who are ignorant of, or unsympathetic to comparative criminal law. For Germany, and perhaps Europe as a whole, the Freiburg Institute, in its generation of labor, has been successful in creating a more auspicious and receptive attitude very much to the benefit of criminal law reform.

I welcome the opportunity of introducing the splendid report on the Max-Planck-Institute of Foreign and International Criminal Law, by Professor Robert A. Riegert, and express the hope that publication of his article at this time, when the American Bar Association has formed its first Committee on Comparative Criminal Law, will help in creating a receptive attitude among the American Bar toward comparative studies in criminal justice.

GERHARD O. W. MUELLER *

Introduction. The Institute for criminal law in Freiburg, Germany, is the newest of the Max Planck Association's five legal Institutes,[1] having been converted from a former university institute on July 1, 1966. In size it is one of the smaller of the legal Institutes. It is, nonetheless able to look back to a tradition which in some ways rivals that of the older and larger Institutes. It was originally founded in 1938 as a very small institute (called a "Seminar") of the University of Freiburg, and was converted in 1954 into an Institute belonging to and supported by the University of Freiburg, the State of Baden-Württemberg, and the federal government. The University "Seminar" and the later Institute were able to build on a German tradition in comparative criminal law which dates at least from Napoleonic times and which was particularly strong around the turn of the last century.

The work of the Institute is not limited to substantive criminal law in the narrow sense, but includes criminal procedure, post-conviction procedure and execution of sentences, international criminal law in general, extradition law, history of criminal law, philosophy of criminal law and related subjects. The Institute does not ordinarily engage in research in criminology, as there is a university Institute for Criminology in Freiburg, with which it shares one of its buldings.

The major emphasis of the Institute, as well as of previous German studies of foreign criminal law, has been on the comparative aspect, *i.e.*, on reporting and explaining the foreign law and comparing it with the German law, usually with a view toward German law reform. Another major function of the Institute is the giving of legal opinions to courts,

* Professor of Law and Director of the Comparative Criminal Law Project of New York University; President of the American Society of Criminology and Special Consultant on Comparative Criminal Law to the U.S. Senate Subcommittee on Improvements in Judicial Machinery, the Children's Bureau (HEW) and the American Bar Association Committee on Comparative Criminal Law.

[1] The Max Planck Association, originally known as the Kaiser Wilhelm Association, was founded in Berlin in 1911. It is a private organization for the advancement of science, which now receives between 80% and 90% of funds from government sources. It maintains about 50 research Institutes which are divided into three sections: a Biological-Medical Section, a Chemical-Physical-Technical Section, and an Arts and Social Sciences Section. As part of its Arts and Social Sciences Section the Max Planck Association maintains five Institutes for legal studies: The Institute for Foreign Public Law and International Law, established in Berlin in 1924 and now in Heidelberg; the Institute for Foreign and International Private Law established in Berlin in 1926 and now in Hamburg; the Institute for European Legal History, established in Frankfurt in 1964; the Institute for Foreign and International Patent, Copyright, and Unfair Competition Law established in Munich in 1966; and the Institute for Criminal Law in Freiburg.

administrative authorities and private practitioners, usually in instances in which the information is for immediate practical application. A third major function of the Institute is a pedagogical function, the training of young scholars in the methods of comparative criminal law.

On the occasion of the recent conversion of the Institute into a Max-Planck-Institute,[2] the Director stressed three principal areas in which the Institute is working. The first is engagement in comparative studies to serve as a basis for the major reform of criminal procedure planned by the German Parliament.[3] The second is the study of the criminal law of the European Community, and is divided into three parts: (1) the study of the civil penalties which the European Organizations can impose, (2) the study of the law of the member states penalizing acts against the European Organizations, and (3) the study of agreements reached under the auspices of the Council of Europe, particularly the agreements regarding extradition and mutual assistance in criminal matters. The third principal area is a reconsideration of the basic policy underlying the criminal law. The criminal law reforms which have taken place in many countries during the past fifteen years have led the Institute's Director to emphasize the new developments centering around the rehabilitation of the individual.

History. Franz von Liszt gave new emphasis to the already venerable German tradition for the study of foreign criminal law at the end of the last century. In 1888 he began the publication of a series of foreign penal codes in German translation.[4] In the same year he joined a Belgian scholar, Prins, and a Dutch scholar, van Hamel, to found the International Association for Criminal Law and Criminology.[5] In 1894 and 1899 he published two volumes containing a systematic presentation of the non-German criminal law of virtually all the countries of the world, written by leading German and foreign authors.[6] Several years later most of the German criminal law specialists joined together to produce a sixteen-volume work, *A Comparative Presentation of German and Non-German Penal Codes.*[7]

This background suggests the tradition on which Adolf Schoenke could rely at the time he established his "Seminar" for Foreign and International Criminal Law at the University of Freiburg in 1938. He had previously been employed in the German Ministry of Justice, where part of his duties

[2] Conversion into a Max-Planck-Institute means not only greatly increased financial support for the Institute, but also the opportunity to obtain academic and technical assistance from other Max-Planck-Institutes and from the central administration of the Max Planck Association, *e.g.*, in the planning of a new building for the Freiburg Institute.

[3] So far, the major work of the Institute has been almost exclusively in the field of substantive law.

[4] Ausserdeutsche Strafgesetzbücher in deutscher Übersetzung.

[5] *Internationale Kriminalistische Vereinigung.* This title has also been translated more liberally as "The International Union of Criminalists."

[6] Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung, Vol. 1, 1894; Vol. 2, 1899.

[7] Die Vergleichende Darstellung des deutschen und ausländischen Strafrechts, 1905-1909.

involved comparative legal studies. He was familiar with the Kaiser-Wilhelm-Institutes for foreign and international private and public law in Berlin and wanted to establish a similar institute for criminal law in Freiburg.

But in 1938 the circumstances were no longer favorable for such a project. A new draft of a penal code had just been completed, and the Ministry of Justice therefore had little interest in extensive studies in comparative criminal law. The intellectual climate in Germany was becoming narrow and national. Schoenke was given 5,000 RM to establish a library, 600 RM for furniture and 1,000 RM per year to cover all his expenses. No provision was made for a typist. The "Seminar" was housed in a single room which it had to share with the University's Seminar for Private International Law.

That Schoenke was able to establish and keep the "Seminar" going under these conditions is a tribute to the best German academic tradition. He managed to secure temporary approval for a part-time secretary, which had to be renewed from time to time. He obtained various special grants from the German Research Foundation, the German Foreign Office, and the German Ministry of Justice. Because of the scarcity of foreign exchange he had to trade law books with Institutes in other countries. By November 1944, when the university was partly destroyed in the war, Schoenke had transferred his library of 5,000 books to a nearby cloister.

In the fall of 1945 Schoenke reopened his "Seminar" and was able to give legal advice on questions regarding the prosecution of Germans before foreign courts in Germany and abroad. The work was carried on in a single war-damaged room. As late as 1947 the seminar still had only one lawyer and one legal intern as assistants, and had to rely to a considerable extent on voluntary help to meet the demands made for its advice.

Schoenke was able to re-establish most of his contacts in foreign countries. The United States, France, Sweden, and Switzerland donated books to the "Seminar" and it was a beneficiary of the McCloy gift of the United States government.

After the founding of the Federal Republic in 1949, the financial position of the "Seminar," which in 1947 had been renamed an "Institute," improved. It began to receive funds from the Federal Ministry of Justice and also received a substantial increase in state funds.

Before Schoenke's untimely death in May 1953, plans had been made to convert the Institute into a foundation belonging to and supported by the university, and the state and federal governments. The conversion, which put the Institute on a sound financial basis, was completed in 1954 under his successor, the present Director of the Max-Planck-Institute, Hans-Heinrich Jescheck.

[8] Hans-Heinrich Jescheck was born in Silesia in 1915. He became an assistant professor in Tübingen in 1949, in Bonn in 1952, and an official of the Ministry of Justice in 1953. In 1954 he was appointed professor of the University of Freiburg and Director of the Institute for Foreign and International Criminal Law. He has been a part-time judge of the Supreme Court for Civil and Criminal Matters of Baden-Württemberg since 1957. It is not uncommon for German professors to be given the "appended" position (*Nebenamt*) of judge on the Supreme Court of a state. This promotes contact

Under Jescheck German contacts with foreign countries continued to increase. The staff of the Institute as well as its library continued to grow. In 1955 the extensive comparative legal studies, which were used for the purpose of making the new draft of the penal code, were completed. Similar studies were made from 1957 to 1959 with regard to post-conviction procedure and the register of criminal convictions.

The Institute is presently housed in two adjacent large old buildings, which were built as private residences around the turn of the last century. Plans are now being made for a new building, which is expected to be completed in 1971.

Staff and Organization. Professor Jescheck, the Director of the Institute, is its only senior member and the only member to have formal tenure. The Institute has nine *Referenten,* of whom one is a half-time employee, three assistants, and three part-time members, two judges and a Protestant prison minister.[9] One of the *Referenten* positions is usually reserved for a foreign scholar who generally remains in the Institute for a period of up to one year.

Most of the *Referenten,* although young, have considerable experience in comparative criminal law and in the law of the countries with which they are working; typically they will have spent some time studying in these countries. At least two of them had important positions with the Institute while they were still students. Many of them have graded practice examinations for Professor Jescheck, and have worked in the Institute part time while serving as legal interns.

Up till now few *Referenten* have left the Institute for other positions. Most of the male *Referenten* (the Institute has four women *Referenten*) hope to become professors of criminal law. The Director expects that most of them will remain in the Institute five or six years after passing their final (second) bar examinations. The women are expected to be permanent employees.

The Director stresses the difficulty of attempting to do reliable work in more than one foreign language or in more than one group of related legal systems. In choosing personnel for his Institute he emphasizes the importance of teamwork, and therefore pays particular attention to both ability to cooperate with others and proficiency in a foreign language.

The Institute attempts to keep abreast of criminal law developments of about sixty-five countries, with greater or lesser intensity. These are divided into twelve groups of countries, usually having the same language and similar legal systems; these groups are assigned to various members of the Institute.[10] One member is responsible for the problems of international criminal law rather than for a particular group of countries.

The legal staff of the Institute meets about once every two weeks on Thursday afternoons to discuss administrative and legal problems with

and the exchange of ideas between the bench and the university. Jeschek participates in court sessions about once every two months.

[9] The minister reports on the execution of prison sentences and on the problems of rehabilitation. The three assistants are paid by the university.

[10] Several of these members have administrative duties as well (personnel administration, new building, the library).

the Director. Although most of the problems are discussed rather freely, the Director has the right to make the final decisions. At each of these sessions one of the members gives a talk on some of the problems in his specialized field of work. The staff of the Institute also includes two librarians, four secretaries, a translator for English who works half-time, a bookkeeper, and a caretaker.

The Institute has an advisory council of fourteen members. Its chairman is a former German undersecretary of justice who is now a judge on the Court of the European Communities in Luxemburg. Its members include the President of the *Association Internationale de Droit Pénal,* the President of the German Supreme Court for Civil and Criminal Matters, the Directors of the Heidelberg and Hamburg Institutes, and other prominent jurists and government officials.

Activities of the Institute

The activities of the institute fall into the following nine categories: (1) Following the current developments in the criminal law of foreign countries, from newspapers and legal literature (including acquisition of books for the library); (2) legal opinions on specific questions; (3) contact with foreign criminal law specialists through international meetings, exchange of assistants guest professors for comparative seminars and individual lectures; (4) comparative research for the purpose of statutory revision; (5) publication of the foreign part of the German journal of criminal law, the *Zeitschrift für die gesamte Strafrechtswissensschaft;* (6) publication of the series "The Contemporary Criminal Law of Foreign Countries " (usually written under contract by authors not on the Institute's staff); (7) publication of the series "Foreign Penal Codes in German Translation" (translations are usually made in the Institute); (8) publication of the series "Comparative Research in Criminal Law"; (9) Miscellaneous.[11]

Following the Developments in the Criminal Law of Foreign Countries. The *Referenten* trace the legal developments in foreign countries by reading legal periodicals, newspapers, statutes and court decisions. The method and intensity vary from country to country. For some countries, *e.g.,* the Soviet Union, which do not have a system for recording their decisions, the *Referenten* have worked out their own index-card systems.

No attempt is made to keep all *Referenten* informed of the details of developments in countries outside their special areas. At the bimonthly meetings one *Referent* usually reports on a development of particular interest in one of the countries in his area. This provides coverage of the most important developments. Some members of the Institute feel that there should be

[11] The relative expenditure of staff time for each is as indicated:
(1) .... 15%; (2) .... 20%; (3) .... 10%; (4) .... 15%; (5) .... 5%; (6) .... 3%; (7) .... 7%; (8) .... 20%; (9) .... 5%.
The staff turnover in the Institute is expected to be quite low. As a result, the Director expects that less than 20% of its energy, as compared with 30% for several of the other legal Institutes of the Max-Planck-Association, will be consumed in the training of young scholars. Nonetheless, the training in comparative legal method given by the Institute to young scholars represents one of its most important functions.

greater exchange of information between the various "national departments" in the Institute.

Opinions on Specific Legal Questions. The Institute receives a large number of requests for information and legal opinions from German ministries, courts, prosecutors, defense counsel and other German sources, and from abroad. These concern all aspects of foreign and international criminal law and procedure. Often these opinions involve a group project concerned with research in the laws of a number of countries.

Most of the Institute's opinions are charged at the German statutory rate for opinions given to courts, 15 DM per hour. The Director checks the opinions and charges for his time on the same basis as the time of the other members.

Contact with Foreign Criminal Law Specialists through International Meetings, Exchange of Assistants, Guest Professors for Comparative Seminars and Individual Lectures. The Institute had placed great emphasis on maintaining close contact with criminal-law experts in foreign countries and in working with international organizations. As previously stated, every three or four years it sends each *Referent* to a foreign country usually for six months.[12] The Institute maintains one *Referent* position for a foreign scholar. Moreover, it usually has between six and twelve foreign scholars resident at the Institute, of whom about two-thirds have German scholarships,[13] and one-third have foreign scholarships.

Comparative law seminars, which are conducted by a foreign professor in cooperation with Professor Jescheck usually using the language of the foreign professor, are now held every summer and are particularly valuable. They are attended by most of the Institute's staff as well as other selected scholars and students.[14]

Comparative Research for the Purposes of Statutory Revision. The revision of statutes in Germany is often preceded by particularly long and thorough studies under the supervision of the appropriate ministry.[15] Extensive comparative studies preparatory to a revision of the German Penal Code and other criminal laws have been made by the Institute at the request of the Ministry of Justice. Part of the work on these studies was done by members of the Institute and part by persons outside the Institute at the request of the Institute.

Prior to completion of the draft of the Penal Code twenty-two comparative studies were made on questions relating to the general part of the Code, and thirty on questions relating to the special part (the individual crimes). In

[12] For example, one *Referentin* of the Institute studied in Moscow in 1959-1960 under a German-Russian cultural exchange program.

[13] These usually range appr. from 500 to 1.500 DM per month.

[14] The following professors participated in such seminars in recent summers: Gerhard O. W. Mueller (New York University) 1959; Richard Honig (now living in Princeton, N.J.) 1961 and 1963; Jerome Hall (Indiana University) 1961; Monrad G. Paulsen (Columbia University) 1964; Sanford H. Kadish (Berkeley), 1967. Plans for the next years include A. Rieg (University of Strasbourg) 1968 and Henry Weihofen (University of New Mexico) 1969.

[15] Studies have been under way for a complete revision of the German Penal Code since 1902. Important changes have been made, but the complete revision has as yet not been adopted.

each study reports were made on at least six countries: Austria, England, France, Italy, Switzerland, the United States, and on other national laws if some advantage was to be gained. Comparative summaries of these studies were published in the series *Materials for Criminal Law Reform*.[16] Copies of the entire study are kept in the Ministry of Justice and in the Institute.

Such studies usually have a substantial effect upon the statute. Fifty of the 484 sections of the Draft Penal Code of 1962 were directly influenced by comparative studies. There is considerable opposition to the draft on the ground, among others, that it emphasizes retribution too much and rehabilitation too little. Professor Jescheck has given a series of lectures comparing the German draft with the situation in Belgium, Greece, Italy, Portugal, and Switzerland, showing that these relatively conservative countries had gone further in the direction of reform than the German Draft.[17]

More recently studies have been made on such subjects as post conviction procedure,[18] the register of criminal convictions,[19] and military law.

Publication of the Foreign Part of the German Journal of Criminal Law. The Institute edits the foreign part of the German Journal of Criminal Law, *Zeitschrift für die gesamte Strafrechtswissenschaft,* which was founded in 1881 by Franz Liszt and Adolf Dochow. The foreign part[20] is published four times a year and will soon expand its size and format. It contains articles on foreign and comparative law, reports on foreign legislation and judicial developments, an extensive review of the important literature which has appeared in one country during recent years,[21] a regular literature review, and reports of meetings of international criminal law associations with German translations of important resolutions.

Publication of the series, "The Contemporary Criminal Law of Foreign Countries."[22] The purpose of this series is not only to present foreign law, but also to compare it with German law. For this reason authors are chosen who are experts in both German and foreign laws. Volumes of this series are usually not written in the Institute, but may be translated in the Institute. These works consist mainly of a presentation of the basic principles of one particular foreign system, but include some historical background as well and introductions to the jurisprudence of the countries involved.[23]

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[16] MATERIALIEN ZUR STRAFRECHTSREFORM, Vol. 2 (1954) in 22 ARBEITEN ZU THEMEN DES ALLGEMEINEN TEILS; MATERIALIEN ZUR STRAFRECHTSREFORM, Vol. 2.2 (1955) in 30 ARBEITEN ZU THEMEN DES BESONDEREN TEILS.

[17] At the present time it is doubtful whether the draft of the Ministry of Justice will become law in its present form. Fourteen younger professors have made an "Alternative Draft" to part of the Penal Code, which has gained some support.

[18] MATERIALIEN ZUR STRAFRECHTSREFORM, Vol. 8 and 9 (1959, 1960).

[19] MATERIALIEN ZUR STRAFRECHTSREFORM, Vol. 10 (1959).

[20] Through volume 78 (1966) of the German Journal of Criminal Law the foreign part bore the title *Mitteilungsblatt der Fachgruppe Strafrecht in der Gesellschaft für Rechtsvergleichung.* Beginning with volume 79 (1967) the title of the foreign section was changed to *Auslandsteil der Zeitschrift für die gesamte Strafrechtswissenschaft.*

[21] This review of literature differs from the regular reviews in that it deals with a much larger number of books and contains a shorter review of each book.

[22] DAS AUSLÄNDISCHE STRAFRECHT DER GEGENWART, edited by Mezger, Schoenke and Jescheck.

[23] The following volumes have appeared: Vol. 1 (1955): *Argentina* (Nunez), *Denmark* (Markus), *Japan* (Saito), *Jugoslavia* (Munda); Vol. 2 (1957) *Finland*

Publication of the Series "Foreign Penal Codes in German Translation."[24] This collection includes not only translations of existing law,[25] but also translations of important reform proposals.[26] It includes some codes of criminal procedure.[27] The series was begun in 1888. It is kept up to date by issuing new editions as needed. Most of the translations include introductions. Editions with parallel texts are now being planned for a number of countries.[28]

Publication of the Series "Comparative Studies in Criminal Law."[29] This is a series of monographs, of which thirty-six volumes have appeared to date.[30] About two-third of the monographs were written outside the Institute and one-third by members of the Institute. Most are written as theses for university degrees. Those which are written outside the Institute are checked by the *Referent* who is responsible for the countries involved before they are accepted for publication.

Library. The library is divided into a general division, a division for international law and international criminal law, and a division for various countries. It has grown rapidly. At the close of the war in 1945 it had only

(Honkasalo); *Switzerland* (Pfenninger); *Czechoslovakia* (Schmied); Vol. 3 (1959): *Chile* (Riquelme); *Great Britain* (Grünhut); *Greece* (Mangakis and Gafos); *Austria* (Nowakowski); Vol. 4 (1962): *USA* (Honig); *Norway* (Andenaes); *Turkey* (Oender). Vol. 5 is now in preparation: *The Netherlands* (Pompe); *Spain* (Gimbernat); *Italy* (Heinitz); *Brazil* (Lang-Hinrichsen).

[24] SAMMLUNG AUSSERDEUTSCHER STRAFGESETZBÜCHER IN DEUTSCHER ÜBERSETZUNG, edited by Jescheck and Kielwein.

[25] Translations of the Penal Codes of the following countries have been made in recent years: *Argentina* (1957), *Cuba* (1957), *Bulgaria* (1957), *Belgium* (1958), *Holland* (1959), *Hungary* (1960), *Jugoslavia* (1961), *Iceland* (1961), *Portugal* (1962), *Rumania* (1964), *Russian RSFSR* (1964), *Denmark* (1964), *Czechoslovakia* (1964), *Hungary* (1964).

[26] Japan (1961 Draft of a New Penal Code, 1963); American Law Institute Model Penal Code (1965).

[27] Hungary (Code of Criminal Procedure, 1958), Hungary Code of Criminal procedure, 1966).

[28] A translation of the Italian Penal Code to be published in both the German and the Italian text is planned for 1968.

[29] RECHTSVERGLEICHENDE UNTERSUCHUNGEN ZUR GESAMTEN STRAFRECHTSWISSENSCHAFT, edited by Mezger and Jescheck.

[30] Some of the titles of this series are: J. BORNHOEVE, DIE STRAFBARKEIT DER "CONSPIRACY" IM STRAFRECHT DER VEREINIGTEN STAATEN VON NORDAMERIKA (Conspiracy and its Punishment in North American Criminal Law, 1964); P. KRATTINGER, DIE STRAFVERTEIDIGUNG IM DEUTSCHEN, FRANZÖSISCHEN UND ENGLISCHEN STRAFPROZESS UND IHRE REFORM (The Defense of Criminal Cases in German, French, and English Criminal Procedure and its Reform, 1964); B. LEHMANN, DIE BESTRAFUNG DES VERSUCHS NACH DEUTSCHEM UND AMERIKANISCHEM RECHT (Punishment of Attempts in German and American Law, 1962); J. HERMANN, DIE ANWENDBARKEIT DES POLITISCHEN STRAFRECHTS AUF DEUTSCHE IM VERHÄLTNIS ZWISCHEN DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (The Applicability of Political Criminal Law to Germans in Relations between the Federal Republic of Germany and the German Democratic Republic, 1960); G. KIELWEIN, DIE STRAFTATEN GEGEN VERMÖGEN IM ENGLISCHEN RECHT (Crimes against Property in English Law, 1955); H.-H. JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERRECHT (The Responsibility of state Authorities in International Criminal Law, 1952).
In preparation: R. MOOS, DER VERBRECHENSBEGRIFF IN ÖSTERREICH IM 18. UND 19. JAHRHUNDERT (The Concept of Crime in Austria in the 18th and 19th Centuries).

5,000 volumes and is growing at an annual rate of 5,000 volumes. In addition it subscribes to 532 periodicals.[81] It is the largest criminal law library in Germany and perhaps on the Continent. Additions, however, must still be made, especially to its African, Asian and Latin American collections, and to its holdings of older books containing historical background materials.

A uniform system of classification has been worked out by the Institute for the books of all the countries. In 1962 the Institute discontinued its index card file for articles due to the burdens of its administration. A few of the most important articles are now recorded in the library index as if they were separate books.

The library has in the past been headed by *Referenten* who add this responsibility to their normal work. The Institute hopes to acquire a full time director for its library soon. Each *Referent* is responsible for ordering books and periodicals from the countries which are assigned to him; he needs the approval of the Director only when making particularly expensive purchases.

Financial Aspects. The Institute was converted into a Max-Planck-Institute on July 1, 1966. Before the conversion its budget was about 100,000 DM per year of which slightly more than three fourths were costs for personnel. For the next few years the Institute's budget is expected to be about 700,000 DM per year. About two-third of this sum will be expended for salaries and most of the balance for the library. The Institute has also recently received a substantial grant from the Volkswagen Foundation to enlarge its library to a capacity of 200,000 volumes. Funds for the building, which is to be paid for by the Max Planck Association will not come out of the regular budget of the Institute.

Conclusion. With the ever-decreasing size of the world, there is a constant increase of practical problems in criminal law as well as other legal fields which involve the laws of more than one nation. Because of the frequently much underestimated language and cultural difficulties arising from the comparison of different legal systems, these problems can best be dealt with by a number of scholars, each an expert in his field, who work in cooperation. The most efficient way to provide for this cooperation over a substantial period of time is to establish an institution or an institutional framework. These institutions, once established, are also ideally suited for serving another equally or perhaps even more important purpose, that of law reform.

Social experiments relating to basic changes in criminal or other laws often require years of time and involve considerable expense. It is only common sense to attempt to learn as much as possible from the experiments and experiences of others. That such learning has in the past not always proved particularly valuable may well be the result of difficulties in communication. Any institution designed to meet these problems would also be in position to keep the academic community in its own countries informed of the relevant developments in other countries. Even today there exist misunderstandings of foreign legal institutions in a larger degree than is generally realized. This in my view is one reason why comparative research has not yet been able to fulfill its properly assigned tasks. Improvement is likely

[81] Official gazettes, court reports, law reviews, etc. At present the Library has about 50,000 volumes.

to come only when a much larger and more concerted attack is made on the problem than is made at present.

The question of how far the particular methods of the Institute in Freiburg are worthy of imitation is one on which legal scholars may reasonably differ. The more important point is that a serious institutionalized effort is being made in the Federal Republic to utilize the experiences of other peoples for the purpose of improving national law. Furthermore, the Germans are realistic and do not expect immediate results, or even results within a period of several years. They realize that social improvement is a long, slow process.

The Freiburg Institute appears to be giving all the help to the German legal system in solving day-to-day criminal law problems involving contacts with non-German law that could reasonably be expected. Progress in basic law reform appears to have been somewhat more limited. This may be due to an overemphasis on a traditionalist-positivist approach, which is by no means limited to Germany. The increased funds recently made available to the Institute, and the increased interest in an interdisciplinary, sociological and psychological approach to criminal law problems both inside and outside of Germany, greatly improve the likelihood that the Freiburg Institute will make truly basic contributions to the development of criminal law in the Federal Republic in the relatively near future.

ROBERT A. RIEGERT*

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* LL.B. (Harvard), J.U.D. (Heidelberg), Visiting Associate Professor of Law, Southern Methodist University School of Law. The author wishes to express his thanks to Professor Hans-Heinrich Jescheck, Director of the Institute, and to his assistant, Herr Klaus Letzgus for reading the manuscript of this article and making valuable suggestions for its improvement, and to Professor Gerhard O. W. Mueller for writing a foreword to this article. The author would also like to thank the American Bar Foundation for a grant which made his study of the Max-Planck-Institutes possible.

For further information on the Institute see H.-H. Jescheck, Rechtsvergleichung im *Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg i. Br.*, in Mitteilungen aus der Max-Planck-Gesellschaft Heft 1, 1967 at 26–45, and H.-H. Jescheck, *Das Institut für auslaendisches and internationales Strafrecht in Freiburg i. Br.* (Berlin, 1963), also published in 79 Zeitschrift für die gesamte Strafrechtswissenschaft 6 (1967).

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A Comparative Study of Criminal Insanity: A Plea for the Abolition of the Insanity Defense

(Paul Koota, Brooklyn Law School)

Insanity as a defense to crime is frequently discussed in various contexts, but rarely is it suggested that the defense be totally abolished. The predictable complete opposition to such a suggestion is based upon several universally-known concepts which, although often deemed to be scientific facts forming a permanent part of the law, are merely, at best, theoretical assumptions used by various psychiatrists and psychologists in formulating their theories, or, at worst, value judgments made by individuals in the often-fulfilled hope of depriving others of their freedom.

Most modern theories of abnormal human behavior may be classified as being based either upon the classical medical model of abnormality or upon the behavioral model.[1] The medical model of abnormality postulates the existence of mental illness and mental health, and suggests that the former is an illness in the same sense as any physical illness.[2] It involves a display of symptoms (abnormal behavior) resulting from internal causes (defects of the mind or personality), and hence a cure thereof can only result if treatment is directed to the underlying causes, rather than to the manifestations thereof. An important principle to note is that just as there are qualitative physical differences between physically healthy and ill people, so are there qualitative differences between mentally healthy and ill people. If this is conceeded, it is readily seen that mentally healthy and mentally ill people should be treated differently.

Totally opposed to the classical medical model is the behavioral model which, if not outrightly denying the existence of mental illness or mental health, questions the utility of so postulating.[3] Although the behavioral model recognizes the existence of physical illness, it attacks the existence of mental illness as an analogue thereof. It postulates that *all* social behavior is learned as a result of the past environmental consequences of an individual's behavior upon him, and that to change a person's behavior one need only change the person's environment (more precisely, the environmental consequences of his responding). This theory postulates that since all social behavior is learned, there are no qualitative differences between 'healthy' and 'sick' individuals, and that although these labels are ostensibly placed upon individuals as a medical diagnosis, they merely reflect the labeller's opinion as to the desirability or appropriateness of the behavior. That is, if an individual labelled another as 'mentally ill,' one could only infer from this statement that the labeller either didn't like this behavior, felt it was out of place in this particular social context, or believed that it was annoying other people. Note, however, that all of these statements describe a person's social deviancy in terms of value judgments, rather than his pathological medical condition in terms of scientific findings. It follows that if the analogy of mental illness is faulty, and that there are no physical differences between mentally healthy and ill individuals, they should be treated similarly.[4]

To demonstrate the differences in application of these theories to real-life situations, consider a man who has murdered his wife by stabbing her 25 times with a carving knife, and then proceeded on to his place of work in his normal fashion. A believer in mental illness would certainly label this man as 'mentally ill,' and would proceed to diagnose the specific 'illness' on the basis of internal personality characteristics (e.g., did the man have a weak ego—was he paranoid—had he been seized by an irresistible impulse). The psychiatrist or phychologist, believing this man to be ill, would suggest that he is qualitatively different from a normal man (i.e., no normal man would kill his wife and then go on with his routine), and hence should be treated differently from a normal man. A behaviorally oriented psychologist,

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[1] L. P. Ullmann and L. Krasner, Case Studies in Behavior Modification 2–29 (1965).
[2] *Id.* at 2–15.
[3] *Id.* at 15–29.
[4] There are many other basic differences between these two theories regarding classification and terminology, testing and measurement, methods of treatment, and prediction of future behavior, but for the purposes of this work, those differences earlier described are deemed the most relevant.

however, would merely regard the act as a specific response learned by the person, and would look to the environment to discover what behavioral consequences existed to reward the individual for killing his wife (e.g., did the man have a lover—did he have a friend who did the same thing and escaped without punishment). Reasoning that the psychiatrist's diagnosis of illness represented a mere value judgment as to the social desirability of such an act, the behavioral psychologist would not expect this man to be deemed 'abnormal' in an absolute sense, or to be treated any differently, in a qualitative sense, from any other individual, on the basis of this single determination.

At this point, it can be seen that insanity need not be uncritically accepted as a defense to crime. If, as the medical model states, mental illness exists and a mentally ill person should be treated differently from a mentally healthy person, the law should act in accordance, and insanity should be a defense to crime. If, however, as the behavioral model states, mental illness does not exist, and that there is little or no utility in discriminating between a mentally ill person and a mentally healthy person, the law should again act in accordance, and insanity should not be a defense.

It would be futile at this point to argue that one theory is right and that another is wrong, or that one has merit and that another does not. It suffices to point out that the criminal defense of insanity is not an immutable part of the law, but is merely a consequence of a psychological theory which, like all other theories, is based upon certain assumptions which, in turn, are always open to challenge, and may be replaced by more utilitarian or parsimonious assumptions should the need arise. The fact that the majority of the people prefers one view to the other does not make that view the correct one, and hence in no way detracts from the above reasoning. With these ideas in mind, consider now the rules and procedures used throughout the world in employing the criminal defense of insanity.

First, consider the development of the definitions of and tests for criminal insanity in the United States.[5] [6] [7] Like many sections of common law in America, the insanity defense finds its origins in English law. In the earliest times, a madman charged with murder was not acquitted; rather, the court rendered a special verdict that he was mad, and then the king pardoned him.[8] The next doctrine set forth was the so-called "wild beast" test, expounded in *Arnold's Case* and *Hadfield's Case*.[9] The Court held here that an individual would not be excused unless first, he was totally deprived of reason, understanding, and memory; and second, he did not know what he was doing any more than would a wild beast. The next major advance was made in 1812 in *Parke's Case*, in which the Court suggested as a test the ability to discriminate between right and wrong, as used in a general sense.[10]

Then, in 1843, *Daniel M'Naghten's Case* was decided.[11] The Court held (in an advisory opinion responding to hypothetical questions given to it by the Lords) that in order to acquit an individual on the grounds of insanity, it must be satisfactorily shown that at the time of the deed, the individual was suffering from:

"... such a defect of reason...., as to not know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." [12]

The Court emphasized that "wrong" here used referred to moral rather than legal wrong, and that so long as an individual was aware that the act was morally wrong, he could be convicted. The Court went on to hold that if an in-

[5] There are many aspects to the issue of insanity as a defense to crime, some of which are procedural rather than substantive. This work will focus primarily upon two aspects of the law: first various definitions of and tests for insanity; and second, the treatment of an individual who has been acquitted by reason of insanity at the time of the act.

[6] It should be stressed at the outset that whereas 'psychosis,' and 'mental disease' are purely medical terms, 'insanity' is purely a legal term, a hypothetical construct of the court.

[7] This is not really accurate; it would be better to say, 'the definitions of and tests for the existence of a mental condition sufficient to justify exemption from punishment,' since not every jurisdiction (or country, for that matter) adopts the concept of 'insanity' per se. For convenience of writing, however, the all-inclusive term 'insanity' will be used hereinafter.

[8] *People v. Schmidt*, 216 N.Y. 324, 331, 110 N.E. 945, 946 (1915).

[9] 16 Howell's State Trials 764; 27 St. Tr. 1288 (1800).

[10] Collinson on Lunacy 477.

[11] 8 Eng. Rep. 718, 719 (A.C. 1843).

[12] *Id.* at 719.

dividual committed a criminal act, and was aware at the time that he was breaking the law, he could be punished, even if he had been influenced by an "insane delusion." The Court, paradoxically, was here referring to legal rather than moral wrong, and the conflict in interpretation of "wrong" in this case has generated much discussion.

To this point, the great bulk of law in this field had emanated from the English courts. American courts, however, soon began to make their own law. The first important rule formulated was the so-called "New Hampshire" rule, which stated that an act produced by a mental disease is not a crime.[13] The next step forward was the formulation of the "irresistible impulse" doctrine, stated in the case of *Hankins v. State*.[14] The Court here held that even if an individual was aware of the nature and consequences of an act and knew that it was wrong, yet if he was compelled by an irresistible impulse to commit the act, the insanity defense would be available to him. In the midst of enlarging the scope of the defense, an Arkansas Court in 1928 eliminated as a possible defense "emotional or moral insanity," holding that the temporary suspension of reason or conscience by passion would not succesfully defend or rebut criminal charges.[15]

In 1954, the Circuit Court of Appeals in the District of Columbia handed down its decision in *Durham v. United States*.[16] The Court took notice of the previous adoption in its jurisdiction of a 'combination' test (consisting of the *M'Naghten* rules and the irresistible impulse doctrine) and then declared this test insufficient, holding that the *M'Naghten* rules were not commensurate with the latest psychological information, and that the irresistible impulse test eliminated defenses based upon a less demonstrative form of insanity. The Court went on to suggest an additional test:

"... an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect." [17]

This test was a considerable departure from earlier tests, in that it now made possible a defense of insanity on the basis of any recognized mental illness, rather than the few included by *M'Naghten* and *Hankins*. It is to be noted, however, that the newly formulated *Durham* rule augmented, rather than supplanted, the earlier doctrines, and furthermore that the rule was not totally original; it had been earlier stated, in a somewhat different form, in the "New Hampshire" rule.

In the next year, the American Law Institute, presenting its Fourth Tentative Draft of the Model Penal Code, suggested a new test for criminal insanity; namely, that:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." [18]

Moreover,

"The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." [19]

As of the time of this formulation, the drafters noted, 31 states had adopted some form of the *M'Naghten* rules, 15 states had adopted the previously discussed 'combination' test, while only two jurisdictions (New Hampshire and the District of Columbia) had adopted a 'mental disease' test which, as the *Durham* Court had explained, was more in tune with current medico-legal knowledge.[20]

In recent years, the ALI test has been deemed to be even more in keeping with the scientific community than has the *Durham* test. Various jurisdictions have adopted the former, either in a pure form or in a modified form. For example, in 1961, the Circuit Court of Appeals in *United States v. Currens* adopted the ALI test, omitting the phrase, "to appreciate the criminality of his conduct," on the ground that the phrase placed undue stress upon the

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[13] *State v. Jones*, 50 N.H. 369 (1871).
[14] 133 Ark. 38, 201 S.W. 832 (1917).
[15] *Watson v. State*, 177 Ark. 708, 7 S.W.2d 980 (1928).
[16] 214 F.2d 862 (D.C.Cir. 1954).
[17] *Id.* at 874–75.
[18] *Model Penal Code* §4.01(1) (Tent. Draft No.4, 1955).
[19] *Id.* at 4.01(2).
[20] *Model Penal Code* §4.01, Comment (Tent. Draft No.4, 1955).

mind.[21] [22] The 2nd Circuit Court of Appeals in *United States v. Freeman*, however, adopted the ALI test *in toto*, claiming it to be superior to the *Durham* rule, in that, first, it eliminated the problem of establishing a causal relation between conduct and mental disease; and, second, it provided workable guidelines for a lay jury.[23]

At present, although many jurisdictions undoubtedly adhere to some form of the *M'Naghten* rules or other earlier formulations, a significant number of jurisdictions is incorporating into its law, either by judicial decision or by statute, some of these later tests of insanity, deemed more modern in theory and more practical in application.

Although much debate and discussion have centered around the definitions of and tests for insanity, an even greater amount of controversy has arisen concerning the proper treatment and handling of an individual after he has been acquitted by reason of insanity. The problem arises from the following common law axioms:

First: in order for a person to be criminally punished by "normal" methods (e.g., fine, imprisonment, or execution), he must have committed a crime.

Second: in order for a person to have committed a crime, he must have performed a criminal act, and have had criminal intent.

Third: in order for a person to have had criminal intent, he must have been sane at the time of the act.[24]

Furthermore, although treatment of the offender within the United States varies to a certain extent from jurisdiction to jurisdiction, certain rules seem to be applied universally.[25] First, an individual, upon acquittal, will almost always be sent to a medically oriented institution for the criminally insane, the avowed objectives of which are to cure the offender of his illness, protect the offender from himself, and protect society from the offender. Second, the offender may be so incarcerated constitutionally, without a hearing as to his present mental condition, so long as there are some means available to him for achieving his release upon the proof of his recovery. Third, most jurisdictions have some provisions for a periodic review of the offender's condition, and if at any time the offender can satisfactorily demonstrate that he has recovered (i.e., that he no longer presents a danger to himself or others), he may be released, either conditionally or unconditionally. In some jurisdictions, however, a certain amount of time must elapse between the original committment and the first review, independent of the actual condition of the offender. Furthermore, the offender will only have a right to a writ of habeas corpus if no other remedy exists; hence, if there is *any* statutory provision for review and release, he will not be entitled to the writ, regardless of the actual circumstances.

Although the committment procedure outlined above appears to be logical and orderly, many questions and problems concerning the effectiveness of the procedure and the rights (and possible violations thereof) of the offender, have arisen. In a 1960 law review article, Henry Weihofen considers the treatment of such offenders.[26] He suggests that an important issue to resolve concerns the proper emphasis upon therapy as opposed to security in the institutions. He believes that many factors, such as limited training and rapid turnover of attendants, as well as public opinion, provide pressure for an emphasis upon security rather than therapy, and then forcefully argues for a redirection of emphasis toward helping the individuals. Weihofen's second argument is directed toward release procedures. He believes that many hospitals' over-cautious attitudes with regards to the release of offenders is self-defeating, in that hospitals are gradually accumulating large numbers of non-tractable patients (i.e., those who never quality for release). He concludes by suggesting that release procedures be liberalized, and provisions for post-release supervision be made.

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[21] 290 F.2d 751 (3d Cir. 1961).

[22] In the next year, the A.L.I. adopted its "Proposed Official Draft" which added the word "wrongfulness" after the word "criminality" in the previously mentioned phrase.

[23] 357 F.2d 606 (2d Cir. 1966).

[24] It is readily seen, of course, that the previous discussion of definitions and tests relates to this particular axiom; i.e., the definitions and tests are used to establish lack of sanity, which justifies the conclusion of lack of criminal intent.

[25] 21 Am. Jur. 2d. *Criminal Law* § 55-61 (1965).

[26] Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 Texas L. Rev. 849 (1960).

The courts have been no less concerned with the post-acquittal treatment of an insane offender; they, of course, are more properly concerned with striking a proper balance between the protection of society from the offender, and the protection of the offender's own rights. In the case of *Ragsdale v. Overholser*, the plaintiff brought a habeas corpus proceeding to obtain release from an institution in which he had been incarcerated after acquittal, and claimed that the statute pursuant to which he had been committed was unconstitutional, in that it denied him of his freedom without due process of law.[27] The plaintiff claimed the denial since the statute permitted committment without an affirmative finding of insanity at the time of committment. In holding the statute constitutional, the Court first held that the plaintiff had adequate safeguards at his disposal with which to protect his rights (i.e., the right to sue for a writ of habeas corpus). It next stated that the statute was practical, in that, in view of the fact that *some* time must elapse between acquittal and determination of the individual's present mental condition, it would be better spent with the offender in prison than at large. The Court held that it was not unfair to require that an offender, who has been absolved from punishment due to insanity at the time of the act, be confined until it has been determined whether or not he has recovered.

Later cases, however, have manifested more concern for the acquitted offender. In *Lynch v. Overholser*, the Court held that a District of Columbia statute, requiring a court to order committment of any offender acquitted on the grounds of insanity at the time of the act, applied only to an individual who had relied affirmatively upon the defense of insanity, and *not* to an offender who had all along maintained that he had been sane at the time of the act.[28] Further, the Court in *Cameron v. Fisher* held that the acquittal of an individual on the grounds of insanity was *not* tantamount to an adjudication that he was insane, at the time of the act; it merely indicated that, upon all of the evidence, there was a reasonable doubt as to whether or not the offender had had legal capacity to commit the crime.[29]

The above discussion indicates merely a few of the issues which have been raised concerning the post-acquittal treatment of an offender. As will become evident, these and related problems, as well as the more fundamental questions regarding the definitions of and tests for insanity, are by no means limited to the United States, or even to common law jurisdictions.

In Europe, the majority of countries had codified its definitions of and tests for insanity, although these codes often vary greatly in complexity. Some nations have proposed fairly concise and seemingly straightforward definitions and tests. For example, the Austrian Penal Act states that to determine whether or not an act or omission done by an individual is a felony, it must be determined whether or not, among other things, that person was capable or reasoning; if so, he will be held criminally liable for his acts.[30] Furthermore, the Act provides that partial impairment of reasoning ability, reduced intelligence, or partial loss of understanding may be deemed mitigating circumstances in the allocation of punishment.[31] Again, the Norwegian Penal Code states simply that, "An act is not punishable if committed while the perpetrator was insane or unconscious.." and also provides for a partial reduction of punishment, "when the act is committed . . . during temporary strong reduction of consciousness. . . ." [32] Finally, the French Penal Code reads, "If the person charged with the commission of a felony or misdemeanor was then insane. . . ., no offense has been committed." [33] Incidentally, the earlier-mentioned irresistible impulse doctrine is also recognized by French criminal law.[34]

Other nations, however, have formulated more complex tests. The West German Draft Penal Code of 1962, for example, has an elaborate set of criteria for determining which offenders will be excused from punishment; specifically:

"Anybody who at the time of the act is incapable of appreciating the unlaw-

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[27] 281 F.2d 943 (D.C. Cir. 1960).
[28] 369 U.S. 705 (1962).
[29] 320 F.2d 731 (D.C. Cir. 1963).
[30] *The Austrian Penal Act* 1945 § 1 & 2(a) (1966).
[31] *Id.* at 46(d).
[32] *Norwegian Penal Code* 1902 § 44 & 56(1)(b) (1961).
[33] *The French Penal Code* 1810 art. 64 (1960).
[34] Biggs, *Procedures for Handling the Mentally-Ill Offender in Some European Countries*, 29 Temp. L.Q. 254, 259 (1956).

fulness of his act or of acting in accordance with such an appreciation, by reason of a morbid mental or emotional disturbance, a corresponding disturbance of consciousness, or low mentality, acts without guilt." [35]
Here, too, the Code provides for mitigating circumstances based upon the partial or reduced capacity of an individual, with regards to the above criteria.[36] [37]

John Biggs, in a survey of the approaches of several European nations to the insanity defense, discusses some additional tests for insanity employed by these nations.[38] In Denmark, for example, the relevant criterion by which to determine freedom from punishment is the presence or absence of mental disease capable of causing a lack of responsibility. Belgium's tests are similar to those adopted in France, while in Italy the accused will be deemed exempt from liability if a mental aberration has resulted in the individual's lack of understanding or volition. Switzerland, interestingly, has adopted the *M'Naghten* rules almost literally. The Netherlands, finally, has established a general rule that if the accused is suffering from a grave mental disorder, he will almost always be exempt from punishment.

In turning from definitions of and tests for insanity as a criminal defense to the post-acquittal treatment of offenders, consider first the procedures used by several nations in Western Europe. The 1962 German Draft Penal Code contains lengthy provisions on the subject.[39] Generally, if an individual who has been acquitted due to insanity constitutes a future danger to society, he will be ordered committed either to a medical or nursing institution. The individual will be institutionalized until he no longer presents a danger, at which time he will be released. The court may at any point review the committment, and must do so at specific intervals. The Penal Code of the German Federal Republic contains basically the same provisions, describing some of the rules in greater detail.[40] It is interesting to note that (according to the latter Code) the avowed objectives of post-acquittal treatment are *cure* and *care*, and furthermore, that although there are several measures of "safety and rehabilitation" listed (one of which is confinement in a workhouse), only the first (i.e., confinement in an institution for cure and care) is, in practice, generally assigned to an acquitted offender. Finally, the discharge of an allegedly cured offender is always deemed conditional, subject to a variety of conditions subsequent. Tuteur and Venzlaff, commenting upon German post-acquittal treatment, note the presence of strict rules regarding judicial review of an individual's committment, beginning a mere three days after admission, and involving rights of appeal and future review within sixty days thereafter, if the individual so requests.[41] They indicate that the potentially dangerous lack of the writ of habeas corpus may be offset by the favorable procedures outlined above.

Switzerland's post-acquittal treatment, as described by Anton Harder, is predominantly determined by the psychiatrist (as opposed to the courts or other institutions), varies from canton to canton (due to Switzerland's strong tradition of localism), and is often affected by a scarcity of psychiatrists, not only at the institutionalization stage, but also in the initial evaluation stage, in the sense that the probability that an acquitted individual will be institutionalized (rather than merely be placed on probation) will be directly related to the availability of psychiatric evaluation, which in turn will be directly related to the availability of psychiatrists.[42] The available post-acquittal procedures are custodial care, treatment in an institution, and release on probation. Finally, a further problem arises from a lack of hospital facilities, which results in the indiscriminate mixing of criminally and non-criminally insane individuals.

Biggs' article, in distinguishing the Netherlands' post-acquittal treatment from that of Switzerland (whose laws on the subject are almost identical), points to the fact that the determination of the particular method of treatment to be used for the offender in the former nation is largely a function of classification of the offender at the Utrecht Psychiatric Observation Clinic.[43] At the

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[35] *The German Draft Penal Code* 1962 art. 24 (1966).
[36] *Id.* at art. 25.
[37] The 1953 Penal Code of the German Federal Republic, as amended to 1961, contains substantially the same provisions.
[38] Biggs, *supra* note 34, at 255–62.
[39] *The German Draft Penal Code* 1962 arts. 81–90 (1966).
[40] *Penal Code of the German Federal Republic* 1871 arts. 42(a)–(i) (1961).
[41] Tuteur and Venzlaff, *Forensic Psychiatry in the United States and West Germany*, 14 J.For.Sci. 68, 70–75 (1969).
[42] Harder, *Forensic Psychiaery in Switzerland*, 9 Clev.-Mar. L. Rev. 467 (1960).
[43] Biggs, *supra* note 34, at 260–61.

clinic, a specialized team of psychiatrists, psychologists, and social workers classifies the offender as either responsible, partly responsible, or irresponsible, and, then, if a psychopath, as to type. By means of such classification process, it is believed, the best method of post-acquittal treatment can be determined. The basic format of institutionalization and concurrent enforcement of rights discussed with regards to West Germany applies as well to the Netherlands, although perhaps not with such rigorous review provisions.

In the same article, Biggs takes a quick glance at the nations of Italy and Luxembourg.[44] With regards to Italy, he notes that the general standard of determination adopted elsewhere of whether or not an acquitted offender should be institutionalized (i.e., does offender present danger to society) is used here. The viewing of confinement as a security measure, and the periodic review of incarcerated offenders, have also been incorporated into the Italian system. With regards to Luxembourg, Biggs observes that the nation's purpose for having post-acquittal treatment is to rehabilitate rather than punish, and that, to this end, a national governmental committee has been organized to prevent crime, maintain mental health, and promote social welfare.

Consider now the methods of post-acquittal treatment used by the Scandinavian nations. The Norwegian Penal Code provides several safety measures, all of which are theoretically available to a criminally insane individual, some of which involve the standard procedure of committment to an institution, and some of which involve other procedures, such as placing the individual under police supervision or probation, keeping him in custody (of whom is not specified), or placing him in private care.[45] Here, as in West Germany, fairly rigorous procedural rules for the incarceration in, and eventual release from, an institution exist. All decisions which affect incarceration are made by the Public Ministry, supplemented by a physician's opinion. Although an individual's discharge cannot take place until the Ministry's position is known, an individual need not wait longer than three months after an announcement of his alleged recovery. Biggs' article supplements the above information by adding an interesting footnote.[46] Evidently there has been a number of cases in which, although the physicians have found the individual to be insane, the court has proceeded to find the individual sane, thus totally ignoring the testimony of the psychiatric expert.

O. Kinberg, in an article discussing forensic psychiatry in Sweden, describes post-acquittal treatment as being largely determined by such national organizations as the Forensic Psychiatric Clinic of Stockholm, the Central Archive of Criminology, and the Forensic Psychiatric Commission, all of which supply data and manpower used in determining the optimal post-acquittal treatment of a given offender.[47] Despite the availability of such resources, however, the ultimate decision still rests, as in other nations, with the court. The alleged goals of post-acquittal treatment are two-fold: first, to socially rehabilitate the offender; and second, (if the first is not possible) to render the offender harmless. If the offender has a gross disorder, Kinberg suggests, there will be little or no difficulty in having the individual committed to a mental hospital. On the other hand, if the offender, although insane at the time of the act, no longer requires hospitalization, he may be released, and treated as merely an outpatient. Other measures involve the placing of offenders in "security establishments," and the interning of individuals in special mental hospital wards. Kinberg makes one caveat which merits repetition:

". . . they (offenders) often lack such symptoms as are considered signs of mental disease by the man in the street. Therefore, it can be very difficult to get the courts or juries to understand that such persons are sick and belong to the domain of medicine. Although a purely medical treatment is not to be had, they ought, being diseased people, not to be placed in prisons under the direction of non-medical staff. For even where medical treatment is reduced to a kind of vague psychotherapy, it should be applied under medical guidance." [48]

Biggs comments upon Swedish practice, and although reaffirming Kinberg's outline of procedure in substance, points to the existence of several problems,

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[44] *Id.* at 260–62.
[45] *Norwegian Penal Code* 1902 § 39 (1961).
[46] Biggs, *supra* note 34, at 259.
[47] Kinberg, *Swedish Organization of Forensic Psychiatry*, 44 J. Crim L.C. & P.S. 135 (1953).
[48] *Id.* at 149.

such as the lack of psychiatric manpower, lack of medical sophistication among the general public, and the inability of many psychiatrists to agree on basic diagnoses of mental conditions.[49] Biggs also notes that although the court, in rendering a final decision as to the post-acquittal treatment of the offender, usually has before it the report of the official psychiatrist, it rarely has the psychiatrist himself. In concluding, Biggs reiterates Kinberg's view (as stated in a separate article) that the emphasis of post-acquittal handling of an offender should be upon treatment rather than upon punishment, not only because of 'moral' considerations, but also because the avowed goal of all penal measures (moral and educational rehabilitation) can be so better served.[50]

Biggs, in outlining post-acquittal procedures employed in Denmark, finds many similarities to those employed in Sweden, including the presence of many national institutions providing aid to the courts, such as the Forensic Medicine Council at Copenhagen, and the institution at Herstedvesta for recidivists.[51] Four general post-acquittal procedures are employed (the first three of which are applicable if the offender presents a danger to society, and the last of which is applicable if the offender does not): first, committment to a mental hospital; second, committment to an institution for psychopaths; third, committment to an institution for imbeciles; and fourth, the appointment of a guardian or supervisor. In discussing the Herstedvesta institution, Biggs quotes its director as claiming that 55% of the offenders are returned to society without criminal tendencies. This allegedly high cure rate is deemed partially attributable to the lack of physical restraint in the institution, the lack of enforced therapy, and favorable public support. Marring this picture, however, is the fact that, in many cases, castration of sex offenders is deemed the only cure for deviate sexual behavior.

Finally, consider nations in Eastern Europe. The Turkish Criminal Code, besides providing for authority of the court to determine the type of post-acquittal treatment to be employed, and providing the typical criterion for determining when an offender should be released, requires that when an offender is about to be released, the hospital must submit a report to the court, indicating that the offender has recovered, and further indicating whether or not the individual must be subjected to post-release medical control and examination (not necessarily limited to out-patient treatment) which is the responsibility of the prosecuting attorney.[52] Should this be required, the frequency of such examinations must be stated, and if, after the offender's release, he again becomes sick, he will once again be placed in the institution. Finally, in describing procedures employed in Yugoslavia, Biggs notes that the principle adopted by legal and medical authorities with regards to post-acquittal treatment is that man's behavior is not fixed, but is capable of being changed as a function of environmental changes.[53] Based upon such belief, the goals of post-acquittal treatment are to better the offender and return him to society.

In turning from the nations of Europe to the nations of Asia, consider a few of the definitions of and tests for insanity used by these nations. The Criminal Code Ordinance of Israel requires two conditions precedent in order for a person who has committed a criminal act to be exempted from punishment on the grounds of insanity.[54] First, he must have been, at the time of the act, suffering from a mental disease. Second, he must have been, at the time of the act, incapable of comprehending his own actions as a result of this mental disease. Although this test appears to be an exact copy of the American "New Hampshire" rule, it must be remembered that Israeli law is based upon not only American and English law, but also upon Arabic, French, and Turkish law, and hence that the above test will be interpreted and used under the influence of these non-common law bodies of law.

The Korean Criminal Code states that:

"A person who, due to a mental disorder, is unable to pass rational judgments or to control his will, is not punishable." [55]

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[49] Biggs, *supra* note 34, at 256–57.
[50] *Id.* at 256 n.1.
[51] *Id.* at 258.
[52] *The Turkish Criminal Code* 1926 art. 46 (1965).
[53] Biggs, *supra* note 34, at 261.
[54] *Criminal Code Ordinance* 1936 § 14 (Israel 1968).
[55] *The Korean Criminal Code* 1953 art. 10(1) (1960).

Besides containing a provision for partial reduction of punishment due to mitigating circumstances based upon deficiency of mental capacity, the Korean Code provides the following interesting provision:

"The provisions of the preceding two Sections shall not apply to criminal conduct of a person who, anticipating the risk of committing crime, has intentionally incurred mental disorder." [56]

In a preliminary discussion concerning the origins of the above tests, the translator notes two important sources of influence from which the Korean Code has evolved; namely, German law and Anglo-American law.[57] He maintains first that the fact that 'incapacity' in Korean law may be either cognitive or volitional stems from the combined influences of German and English law, in that whereas Anglo-American law defines 'insanity' in cognitive terms, Germany has done so in volitional terms. He declares secondly that whereas the existence of mitigating circumstances is unknown in Anglo-American law, it exists in Germany, and has been directly incorporated therefrom into Korean law.

The Preparatory Draft for the Revised Penal Code of Japan presents another interesting test for the exemption from punishment of an allegedly insane criminal; i.e.:

"Acts committed by a person who, as a result of mental disorder, lacks capacity to discriminate as to the propriety of his conduct or to act according to such discrimination are not punishable." [58]

The Draft also provides for mitigating circumstances, and for the above described self-induced insanity.[59]

M. J. Gamboa, in *An Introduction to Philippine Law*, maintains that there are three requisite elements of a crime: there must be an act or omission, the act or omission must be voluntary, and the act or omission must be punishable by law.[60] In order for the act or omission to be voluntary, there must exist freedom of will, intelligence, and intent to commit the criminal act. According to Philippine law, there can be no freedom of will if an individual was seized by an irresistible impulse, and no intelligence if the offender was insane at the time of the act.[61] Reduction of punishment due to mitigating circumstances based upon partial presence of the three 'voluntary' requirements is also possible.

Finally, the Criminal Code of the Russian Soviet Federated Socialist Republic provides a test which is fairly representative of some other Republics, and at the same time serves as a model code for others:

"A person shall not be subject to criminal responsibility who at the time of committing a socially dangerous act is in a state of non-imputability, that is, cannot realize the significance of his actions or control them because of chronic mental illness, temporary mental derangement, mental deficiency, or other condition of illness." [62]

Furthermore,

". . . a person shall not be subject to punishment who commits a crime while in a state of imputability but before rendering of judgment by the Court contracts a mental illness which deprives him of the possibility of realizing the significance of his actions or of controlling them . . . but, upon recovery, he may be subject to punishment." [63]

Consider now the post-acquittal treatment of a criminally insane individual in the various Asian nations. The Preparatory Draft for the Revised Penal Code of Japan states that whether or not an individual acquitted by reason of insanity will be subjected to "curative measures" depends upon first, the predicted probability of the reoccurence of the criminal behavior on the part of the offender; and second, the extent to which these measures are demanded by interests of public safety.[64] The curative measures almost always involve com-

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[56] *Id.* at art. 10(2) & (3).
[57] Ryu, *Psychiatry and Criminal Law*, in THE KOREAN CRIMINAL CODE 26–29 (G. Mueller ed. 1960).
[58] *A Preparatory Draft for the Revised Penal Code of Japan* 1961 art. 15(1) (1964).
[59] *Id.* at arts. 15(2) & 16.
[60] M. Gamboa, an Introduction to Philippine Law 403–04 (7th ed. 1969).
[61] *Id.* at 404 nn.18 & 19.
[62] *The Criminal Code of the R.S.F.S.R.* 1960 art. 11 (1966).
[63] *Id.*
[64] *A Preparatory Draft for the Revised Penal Code of Japan* 1961 arts. 109–14 (1964), (1964).

mitment to a security institution, the duration of which is initially five years, with the possibility of an unlimited number of three-year extensions. The statute provides, however, that there be a minimum of one review every year to ascertain whether or not the curative measures should continue. Finally, the Draft provides for a provisional release from the institution, brought about by administrative action. Because the release is provisional, however, the released offender is placed under professional supervision, and always faces the possibility of reincarceration.

The Criminal Code of the Republic of China labels its laws concerning post-acquittal treatment as "Peace Preservation Measures." [65] An individual exempted from punishment due to insanity may be incarcerated in a mental institution for an apparently unspecified period of time. There is the customary provision relating to the possible release of the offender at an early date if it is satisfactorily shown that he has recovered, as well as a provision for lengthening the stay, if deemed necessary. There does not appear to be, however, any provision for periodic review of the offender's condition, or for fixed time limits for periods of incarceration, as exist in Japan.

Finally, consider the post-acquittal treatment of an individual in the U.S.S.R. The Criminal Code of the Russian Soviet Federated Socialist Republic states that, in general, an offender may be committed to either a general psychiatric hospital or to a special psychiatric hospital.[66] Committment to a general psychiatric hospital will take place if the individual, by his behavior, shows a need for compulsory hospitalization and treatment. Committment to a special psychiatric hospital will occur, on the other hand, if the individual, again by his behavior, presents a special threat to public safety. The Code notes that:

"Persons committed to a special psychiatric hospital shall be kept in conditions of a reinforced supervision that excludes the possibility of their commission of a new socially dangerous act." [67]

In choosing the proper type of hospital for the offender, the court considers such factors as the type of mental illness involved, and the weight of the social danger posed by the given act. The court is given broad powers to terminate the incarceration, to alter the type of hospital being used, and even to remand the individual to the care of relatives or guardians.

Hazard, Shapiro, and Maggs supplement the above description of treatment by stating that if the offender who has been incarcerated might be sane, the hospital is obliged to appoint a commission of physicians, and to transmit its findings to the proper court.[68] Furthermore, *every* offender undergoing compulsory psychiatric treatment must have his case reviewed by such a commission no less than every six months. The judicial decision, *Case of Illiodorova*, is illustrative of these last points.[69] An individual who was found to be "non-imputable" was subjected to compulsory psychiatric treatment. The hospital, seeking to have her released, appointed a medical commission and submitted its report to the Court. The Moscow Provincial Court, on the basis of this report, discharged the offender from the hospital. The Judicial Division vacated the judgment of the lower Court, holding that the reports presented thereto had been incomplete, and that such reports were to be based upon a complete examination of the individual.

H. J. Berman provides some thoughtful comments concerning the underlying attitudes which have shaped the statutory methods of treatment.[70] According to Soviet theory, the law, by maintaining social order, maintains the mental health of the community, by giving order to interpersonal relations, by providing constructive vents for destructive impulses, and by giving to individuals a sense of community with each other. Berman's caveat bears repetition:

"Whether law adequately fulfills these (psychological) functions depends upon whether certain assumptions about human personality, implicit in law, are in fact valid." [71] [72]

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[65] *The Criminal Code* 1935 arts. 86–99 (Rep. of China 1961).
[66] *The Criminal Code of the R.S.F.S.R.* 1960 arts. 58–61 (1966).
[67] *Id.* at art. 59.
[68] J. Hazard, I. Shapiro, and P. Maggs, The Soviet Legal System 150 (1969).
[69] 2 Bull. Verkh. Suda R.S.F.S.R. 10 (Sup. Ct. R.S.F.S.R. 1968).
[70] Berman, *Law as an Instrument of Mental Health in the United States and Soviet Russia*, 109 U. Penn. L. Rev. 361 (1961).
[71] *Id.* at 364.
[72] Unfortunately, Berman never heeds his own warning, but contents himself with determining the extent to which psychological assumptions agree with legal assumptions.

Berman goes on to point out that, more importantly, the Soviet Union's criminal law is considered a tool with which to shape the behavior of the people into the image of the "new Soviet man." Although criminal law is obviously concerned with the adjudication of legal rights, it is no less concerned with the shaping of ideas and attitudes of the offender and the general public. This 'educational' goal of criminal law, and especially of post-acquittal treatment, is reinforced by the prevailing belief that the behavior of people may be altered by the alteration of their environment.[73] [74] Since the goal of treatment is to change the offender's behavior, and since it is at least theoretically possible for anyone to properly change the behavior by changing the environment, one might imagine that post-acquittal treatment would not be limited to whatever treatment could be given by a physician, but rather could be performed by anyone capable of properly altering the environment. Indeed, this has been codified, as earlier seen, with regards to the various options possessed by a court.[75]

Writing a few years later, Berman again stressed the utilitarian approach taken by Soviet criminal law.[76] Today's purpose of criminal law in general, and of post-acquittal treatment in specific, is to foster external and self-discipline for and within the individual, rather than to 'do' justice in an abstract sense. Berman goes on to evaluate the post-acquittal treatment of the individual. He contends that various institutions in the Soviet Union, the most important of which is the Serbskii Institute of Forensic Psychiatry, help to convert the above described goals of treatment into sensible, result-oriented methods. He further notes that the court, in determining the appropriate post-acquittal treatment to be employed, is typically more concerned with the social danger presented *by* the offender, than it is with the specific rehabilitation *of* the offender; i.e., it is more concerned with maintaining an individual's group productivity, and with reeducating him for his proper role in society, than with promoting an individual's personal welfare.

Turning now to South America, it becomes apparent that most of the nations therein have codified their definitions of and tests for insanity after the fashion of many of the European nations earlier mentioned. For example, the Argentine Penal Code exempts from punishment:

"Anybody who at the time of commission of the crime could not appreciate the unlawfulness of the deed or control his actions, by reason of insufficiency or diseased disturbances of his mind, . . ." [77]

The only quasi-definition appearing in the Colombian Penal Code, on the other hand, is that any individual who experienced a mental "alienation at the time of the act will be punished according to certain specified provisions." [78] The Code does provide, however, for the reduction of punishment if an individual displays "Conditions of psychical inferiority. . . ." [79]

With regards to South American provisions for post-acquittal treatment, the measures once again seem to be almost identical to those of some of the European nations. The Argentine Penal Code requires that any individual acquitted as insane must be incarcerated in an insane asylum.[80] The offender can only be released by a court decision, which in turn will be based upon advice from the public prosecutor and a panel of medical experts, testifying as to the offender's recovery or lack thereof.

According to the Colombian Penal Code, the predominant post-acquittal treatment is also commitment to a psychiatric institution which, at least statutorily, is in the total charge of psychiatrists, and is completely independent of any analogous institution for the non-criminally insane.[81] Once committed, the offender must remain there for two years or until such time as he will be adjudicated sane, presumably whichever comes first. In any event, the offender

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[73] What is interesting is that these beliefs, emphasizing the ability of and need for the State to change an individual's behavior to fit a desired norm, coexist with the belief that a person is responsible for his own character and behavior.

[74] To the extent that this belief is maintained by Soviet psychologists and psychiatrists, one might conclude that, in fact, a behavioral rather than medical model of abnormality has been adopted. Yet such a conclusion does not seem justified when viewed in the light of the statutory provisions for insanity as a defense to crime.

[75] *The Criminal Code of the R.S.F.S.R.* 1960 art. 60 (1966).

[76] H.J. Berman, Justice in the U.S.S.R. 312–29 (1963).

[77] *The Argentine Penal Code* 1960 art. 34(1) (1963).

[78] *The Colombian Penal Code* 1936 art. 29 (1967).

[79] *Id.* at art. 38(12).

[80] *The Argentine Penal Code* 1960 art. 34(1) (1963).

[81] *The Colombian Penal Code* 1936 arts. 61–74 (1967).

cannot be released without a court order which, in turn, will only be issued after a hearing at the office of the Attorney General. Another method of post-acquittal treatment used in Colombia is labelled "supervised liberty." This method involves the placing of the offender in the care of a family, nursing home, hospital, or ordinary insane asylum for a minimum period of two years. Throughout this period, they are subjected to the constant supervision of a guardianship council.

Finally, in considering the nations of Africa with regard to their laws concerning the defense of criminal insanity, it is useful to make reference to A. Milner's collection of scholarly articles on the subject. With regards to definitions of and tests for insanity, Milner and Asuni point out that a large number of African nations has adopted the *M'Naghten* rules, and that these countries may be usefully classified as to whether they have adopted the *M'Naghten* rules untouched or nearly so, or whether they have made one of three possible modifications thereto.[82] The first modification involves the elimination of the rule that in order for a defense of insanity to be valid, the offender must be able to appreciate the general wrongfulness of the action, and substitutes the rule that in order for the defense to be valid, the offender must be able to appreciate the unlawfulness of the action. The second modification is actually an additional ground for exemption from punishment; i.e., where the mental state of the offender indicates that there would be little or no utility in punishing him. The third and final modification is a further addition; that is, the addition of the irresistible impulse doctrine earlier described. According to the authors, at least eight nations have adopted the *M'Naghten* rules in a more or less untouched fashion, while eleven countries have incorporated them into their statutes. Many eastern and central African courts have adopted the first modification, Ghana has adopted the second, and Nigeria and the Sudan have adopted the third (with South Africa and certain other southern African countries recognizing the doctrine, without formally adopting it).

Consider now the methods used by several African nations with regards to post-acquittal treatment. The Penal Code of the Congo Democratic Republic, requiring that an offender who constitutes a danger to himself or to others be ordered into detention, emphasizes the protective function of penal sanction, rather than the rehabilitative function.[83] The Ethiopian Penal Code, based upon the Swiss Penal Code, provides that if the offender is not dangerous, he may merely be instructed to undergo outpatient treatment.[84] Should confinement be required, however, the period thereof is not limited, although the case must be reviewed once every two years. Upon eventual release of the offender from the mental institution, he is then sent to a charitable institution for a minimum of one year. Tanzania, like other nations, finding itself lacking physical post-acquittal treatment facilities, has established an institution for the criminally mentally ill, but has been forced to indiscriminately house therein offenders who became mentally ill during prison, offenders who were charged with a crime but could not be tried due to their mental illness, as well as offenders tried and acquitted due to their mental illness at the time of the crime.[85] Finally, Portuguese Africa, in emphasizing the importance of rehabilitating the offender, permits its courts to impose penal sanctions based upon a consideration of the so-called "cultural pressure," to which the offender has been subjected.[86] To this end, no hard-and-fast rule exists as to exactly who should be incarcerated in a mental institution, and for how long a period.

Milner and Asuni, in evaluating the success of procedures related to the insanity defense employed throughout Africa, stress that the lack of rapid progress in developing definitions of and tests for insanity, as well as modern, result-oriented post-acquittal treatment procedures, may be related to the general lack of development of psychiatry in Africa, which in turn may result from a combination of factors, among which are the limited number of psychiatrists (some nations have none) and physical facilities, travel and language difficul-

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[82] Milner and Asuni, *Psychiatry and the Criminal Offender in Africa*, in African Penal Systems 330–35 (A. Milner ed. 1969).

[83] Rubbens, *The Congo Democratic Republic*, in African Penal Systems 20 (A. Milner ed. 1969).

[84] Lowenstein, *Ethiopia*, African Penal Systems 46 (A. Milner ed. 1969).

[85] Read, *Kenya, Tanzania, and Uganda*, in African Penal Systems 145 (A. Milner ed. 1969).

[86] Gouveia Da Veiga, *Portuguese Africa*, in African Penal Systems 215 (A. Milner ed. 1969).

ties, and superstition and ignorance.[87] Perhaps an even greater block to the rapid development of meaningful law in this field is that one continent is attempting to utilize a set of laws specifically designed for another continent, having different resources and manpower, social problems, and cultural norms. Although they do not suggest a return to primitive methods of handling these problems, the authors do believe that, "A principal danger comes from mistaking the culturally defined norms of behavior in Western culture to be ideal standards."[88] They imply that the thrust of African progress in this field should be directed towards altering the adopted laws to fit the specific needs and cultural norms of Africa, *not* of Europe. Such progress should involve a remodeling and clarification of many of the definitions of and tests for insanity adopted from other nations, a program to educate judges with regards to forensic medicine (at least, until more psychiatrists become available) and an adjustment of the present correctional facilities to fit the needs of the local African community.

From the above description of the definitions of and tests for insanity, and the post-acquittal treatment of offenders, can any general similarities or differences be discerned among the laws of these nations? Consider first the various definitions of and tests for insanity. One of the most obvious, yet most significant, similarities among the nations considered is that they all provide for insanity at the time of the act, no matter how defined, as a ground for exemption from criminal punishment. This is no small point. Its significance lies in the fact that the law-makers of every nation believe that there is such a thing as mental illness, and that it is possible, through the formulation of definitions and tests, to establish criteria by which to discriminate between normal, punishable people and abnormal, 'immune' people; in short, that the medical model of abnormality is the model to be preferred (at least insofar as criminal law is concerned). Of course, the various nations, in their penal codes, do not talk in terms of adopting one theory to the exclusion of another; they accept the existence of mental illness as a fact. As was discussed earlier, however, mental illness is merely a hypothetical construct whose existence was postulated in accordance with a particular theory of abnormal behavior, not quite the same thing as an empirically and scientifically demonstrable phenomenon.

Another similarity among most of the nations discussed is the existence of provisions for a reduction of punishment, if the characteristics of a person which, if fully present, would justify a complete acquittal, are partially present. This practice is in complete opposition to that in the United States, where insanity at the time of the act, if proven, is a complete defense, and always exempts an offender from punishment, independent of the amount or degree of insanity.[89]

Next, the differences which do exist among the various definitions, although they may be many in terminology, are more apparent than real. Although a penal code may discuss the defense in such varied terms as 'insanity,' 'mental disease,' 'inability to reason,' or 'loss of will,' all of the terms refer to the same phenomenon; namely, the mental condition of the offender which is such so as to render him unable to manifest the required criminal intent.

Finally, although all of the definitions and tests purport to cite *medical* phenomena and conditions as prerequisites to the legal exemption, many nations (Japan, for example) actually include *social* phenomena and conditions as prerequisites thereto ('property of conduct,' for example).

Consider now the various methods of post-acquittal treatment of offenders. Independent of the exact wording of the statutes, the methods of treatment display many similarities. First, the actual goal of nearly all such methods, whether or not openly expressed, is (at least in the opinion of the author) the retraining and reeducation of the offender for society's benefit, with the eventual reinstitution of the offender in the community from which he was taken.[90]

Second, because of the belief in mental illness, and hence in the belief that medical techniques can cure it, nearly all nations provide for the commitment of an offender to a mental institution until a certain amount of time has

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[87] Milner and Asuni, *supra* note 82, at 319.
[88] *Id.* at 321 n.10.
[89] *People v. Wells*, 33 Cal.2d 220, 202 P.2d 53 (1949).
[90] A probable justification for this assumption will be found several pages hence in the discussion of the behavioral model's approach to such post-acquittal measures.

elapsed, or until the offender has recovered from the illness (i.e., is deemed capable of resuming his place in society). At the same time, however, most of these nations provide that judges and juries of the court, *not* medical experts, are the final arbiters as to whether or not an individual should be committed (although they will partially rely upon the judgment of the psychiatric experts).[91] In addition, nearly every nation provides some specific method of review of a case to determine if and when the offender is ready to be released.

Finally, almost all nations have a few procedures, besides committment, with their courts may employ, should they deem the first method unsuitable; these methods include outpatient treatment and protective custody. There usually is an additional group of remedies which, although theoretically available to the courts, is rarely used (perhaps unfortunately so) when dealing with insane offenders. Included in this latter group are such special procedures as commitment to work camps and vocational therapy.

Although most of the nations examined followed the above-stated paradigm of post-acquittal treatment, there are also several important differences among their methods. First, although the actual goal of these methods is the readaptation of an individual to a norm sought by the nation, nations vary in their candor as to admitting this. Some nations, most notably the United States and those in Europe, discuss their alleged goals in terms of preventing the offender from presenting a danger to himself or others, curing the mental disease and restoring the offender's mental health, or caring for the individual. Certain Asian and Eurasian nations, on the other hand, most notably the Soviet Union, first recognize that, in reality, post-acquittal treatment of an individual is designed to render him more compatible with his social peers, more useful to society at large, and less likely to again disrupt the social order.[92] Having recognized this goal as the one actually sought (independent of any other labels given to it by the policy and law-makers) the Russian penologists give their approval to this goal, and actively seek new methods by which to further it (this approach was discussed earlier with regards to Berman's articles).[93] Far from feeling a need to justify the incarceration of an acquitted offender on grounds pertaining to his well-being, the Soviet Union recognizes and advocates justification thereof on grounds which (at least in the opinion of the author) are deemed to be the actual ones; namely, grounds pertaining to society's well-being and best interests.

There are various other differences among the nations with regards to post-acquittal treatment that are worthy of note. For example, few African nations have developed the variety or detail of procedures that the European nations have. This may be accounted for, at least partially, by the unavilability of psychiatric personnel and facilities. Next, although all nations provide methods for determining if and when an offender should be released, they vary greatly as to the procedural safeguards designed to protect the personal rights of the offender. Whereas nations such as Norway, Japan, and the Soviet Union have formulated precise and equitable methods of periodic review of an offender who has been committed to a mental institution, other nations such as the Republic of China and Portuguese Africa (as well as certain other African nations) do not have such strict protection for the incarcerated offender. Nations also differ as to the source of their safeguards. Whereas in the United States and other common law jurisdictions the offender has a constitutionally guaranteed right to review (e.g., writ of habeas corpus), other nations afford their protection in a statutory fashion. Whether or not this makes a great deal of difference in practice, however, is doubtful. A final difference among nations which affects post-acquittal treatment is the presence or absence of national

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[91] In many of these nations, this procedures seems to be required by the fact that there are generally more judges available for such duties than there are psychiatrists.

[92] This is not to say that European nations totally outwardly ignore the goal of rehabilitation in terms of society's demands, or that the latter mentioned nations outwardly ignore the individual's status; the difference is one more of degree and emphasis than of kind. Furthermore, it may be more precise to say that those nations which have a socialized form of government and society, independent of their geographical location, will be more likely to express candor as to the actual goal of post-acquittal procedures, since an axiom of the society will be that the resources of the people and the goals of the government will be directed towards the State rather than the individual. Viewed in this light, Sweden's candor on this subject is more understandable since, although it is a European nation, it is a socialized state.

[93] Berman, *supra* notes 70 & 76.

institutions which, besides performing research in the field of forensic medicine and seeking new methods of treatment, lend an air of uniformity and standardization to what otherwise might be the indiscriminate determination of suitable post-acquittal treatment, varying from court to court. Nations benefitting from the existence of such national institutions include Switzerland, Sweden, Luxembourg, and the Soviet Union.

It has been noted that all of the rules, laws, and procedures concerning insanity as a defense to crime are predicated upon the assumption that there is such a phenomenon as mental illness, or at least that there is utility in talking in such terms. It follows logically that if it is shown that there is no such phenomenon as mental illness, or at least that there is no utility in so postulating, these rules, laws, and procedures would be irrelevant, and demand rejection or substantial revision.

It was earlier pointed out that psychologists and psychiatrists who subscribe to the medical model of abnormality maintain that mental illness is an illness like any othr illness, and hence postulate the former by reasoning by analogy. Consider the validity of such reasoning, by considering the extent to which mental illness is analogous to other physical illnesses.[94] First, a physical illness is directly observable, either by means of a person's physical senses, or by means of sensitive instruments which monitor a person's physical condition. On the other hand, mental illness is *not* directly observable; the only phenomenon which *is* directly observable is a person's behavior. The existence of the illness is inferred from the existence of the so-called 'symptoms.' Second, a person's physical illness is modifiable by manipulation of his internal structure (e.g., surgery), but not by manipulation of his environment (e.g., home life). Mental illness, however, cannot be cured by manipulation of a person's internal structure since, as already seen, the behavior is the only observable, measurable, and hence treatable aspect of the 'illness.' Finally, although the characteristics of a physical illness are generally the same throughout the world, the characteristics of mental illness, and physicians' response thereto, vary from nation to nation.

From this comparison it seems clear that the analogy postulated by psychologists and psychiatrists between physical illness and mental illness, at least with respect to the variables here discussed, is not totally valid. If the analogy is not valid, it would seem reasonable to question the existence of (or the utility of the concept of) mental illness. Furthermore, the comparison seems to suggest that in dealing with abnormality, it might be more useful to deal directly with behavior as the 'abnormality' itself, rather than as the symptom of some underlying and unmeasurable illness, since it is only behavior which is capable of empirical observation and manipulation.[95]

An important question remains, however. If all of the abnormal behavior which has hitherto been deemed symptomatic of mental illness is no longer to be so treated, in what light should abnormal behavior be viewed? After all, the elimination of a postulated cause of an observable phenomenon does not eliminate the phenomenon itself. In discussing the behavioral model of abnormality, it was seen that no qualitative difference is perceived as existing between normal and abnormal behavior, since all behavior is learned. Thus, the most that could be said about abnormal behavior is that it is maladaptive, socially undesirable, unpleasant, out of place, and so forth. It is again extremely important to notice that whereas the medical model discussed such behavior in terms of sickness, which implies the existence of some absolute and objective criteria for so judging, the behavioral model discussed the same behavior in terms of desirability, which implies the presence of only relative and subjective criteria for so judging.[96] A slightly different approach is taken by Dr. Thomas Szasz, one of the most controversial writers in this field. He classifies abnormal be-

[94] T. Szasz, Ideology and Insanity (1970).

[95] This conclusion, of course, is based upon the assumption that the treatment of abnormality should be handled in an empirical rather than theoretical or intuitive fashion. This assumption seems well-founded, however, when it is considered that psychology and medicine are both avowedly empirical sciences.

[96] The philosphical consequences of such an approach are enormous. Such a theory denies the existence of absolutes such as right and wrong or good and evil, and postulates that all such labels are merely expressions of a person's *opinion* as to something, which in turn will carry much less weight in any logical argument; i.e., it is more forceful to say, "You are wrong (in an absolute sense)," than it is to say, "I dislike what you are doing."

havior as constituting "problems in living," rather than mental illness symptoms.[97] Whatever the abnormal behavior is called, what is significant is that it is only abnormal in the sense that someone doesn't like it, not in the sense that it is symptomatic of sickness.

Taking this line of reasoning one step further, if mental illness doesn't exist, for what reasons are offenders, who have been acquitted from criminal liability, committed to mental institutions for many years? According to Dr. Szasz, such people are committed because, due to their maladaptive behavior, they have so annoyed or endangered society that they must be removed therefrom until they have learned the skills deemed appropriate by the law-makers and policy-makers of the society. If and when they can demonstrate that they have acquired the appropriate skills, they are readmitted to society. What Dr. Szasz objects to is that by considering undesirable behavior to be sickness, society enslaves its members, since in order for an individual to remain 'healthy,' he must do what society demands of him. Thus a given social ideology, in the guise of mental health, can gradually eradicate individuality.[98]

In the light of the previous discussion, consider again some of the laws and procedures relating to the insanity defense. First, consider generally the definitions of and tests for insanity. As noted earlier, many nations attempt to define a legal exemption from punishment on allegedly medical grounds in terms of social standards, clearly unsound reasoning. Yet even those nations which define their tests in purportedly terms would be hard put to show that such terms as 'ability to reason' constitute objective and absolute criteria, rather than subjective and relative criteria. Such an observation strongly points out the fallacy of assuming that mental illness is an illness like any other illness.

Second, consider the directly quoted statement made by Kinberg; it suggests a dilemma in which medical model supporters often find themselves.[99] Rather than observe phenomena and collect data, and *then* develop a theory to account for such observations, these supporters first postulate the existence of mental illness, and *then* look to the environment to find support for their empirically unjustified postulate. In the event that they find no such evidence, they are required to force theoretical labels upon phenomena which (as the quotation points out) might otherwise not be so labelled. What is amazing is that these supporters will then adduce these phenomena as hard-core data to support the existence of mental illness! Consider also Sweden's goal of post-acquittal treatment.[100] How can the 'rendering harmless' of an individual be justified by any rationale other than that society considers the offender an undesirable. Surely Sweden does not have the same goal for those of its citizens who have *physical* illnesses but can't be cured!

Another provision to note in the light of the previous discussion is that found in the Korean Code, which recognizes the existence of self-induced mental illness.[101] Such a recognition seems to indicate an attempt to maintain, on one hand, the belief that mental illness is an illness and, on the other hand, to recognize the incompatible fact that people may rapidly change their behavior as a function or rapidly altered circumstances (the two concepts are incompatible since one of the characteristics of a physical illness is that it generally cannot be self-induced ((e.g., one cannot wish oneself into having cancer))). Such a provision displays the extent to which the classical theorists will go to make their preconceived concept of mental illness coincide with observable behavior. Does not such a paradoxical concept as 'self-induced mental illness' suggest that a more parsimonious approach to behavior would be to abandon the concept of mental illness?

Finally, the earlier-made assumption that the actual goal of all post-acquittal treatment is the retraining of the offender for the benefit of society may be deemed justified in the light of the previous discussion.[102]

From these few examples, and from additional inspection of the law in view of the earlier discussion, it can be seen that the criminal defense of insanity,

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[97] T. Szasz, *supra* note 94, at 21.
[98] *Id.* at 111–12.
[99] Kinberg, *supra* note 47, at 149.
[100] *Id.* at 148.
[101] *The Korean Criminal Code* 1953 art. 10(3) (1960).
[102] *supra*, note 90.

based upon the medical model of abnormality, which is based in turn upon the belief in the existence of mental illness, suffers from various contradictions, faulty logic, and unnecessarily complicated and circuitous explanations. What, then, should be done with the present insanity defense? This question may be further subdivided into two additional questions: first, should there be *any* insanity defense, and hence compulsory post-acquittal treatment; second, if the first question is answered affirmatively, what would be the best post-acquittal procedures to use?

It is at this point that Dr. Szasz and certain behavioral psychologists, although previously united in opposition to the medical model approach, part company. Dr. Szasz believes that the insanity plea should be abolished, and along with it, all compulsory post-acquittal treatment.[103] [104] Behavioral psychologists such as Leonard Krasner, on the other hand, do not pass judgment on the first issue, but merely imply that if such post-acquittal treatment of an offender is to be done, it would be better to proceed according to the principles of behavior modification (i.e., that behavior is modifiable by altering the environmental contingencies of a given response) than according to the medical model method (i.e., that mental illness is cured by treating the underlying personality disturbances).[105] [106]

It is the opinion of the author that, at least in the immediate future, the most practical goals are: first, to openly admit the existing goals of post-acquittal treatment; second, to adopt more and more the principles of behavior modification in whatever post-acquittal treatment is deemed necessary; and third, to critically evaluate the concept of mental illness, and its ability to justify compulsory incarceration of criminal offenders whose behavior is merely disliked.[107] The long-range goal, however, should be the abolition of the insanity defense and compulsory post-acquittal treatment. By so doing there will be no artificial discrimination between mentally healthy and sick criminal offenders in terms of punishment, and, although more people will obviously be subjected to normal penal sanctions, society will be required to recognize these penal sanctions (obviously designed to rehabilitate the offender in terms of society's objectives) for what they are, and will no longer be permitted to justify the application of these sanctions on the ground of restoration of an offender's mental health. The alternative is to continue to justify the imposition of punishment upon offenders on medical grounds, to equate conformity with normality and health, and to believe the statement which George Orwell's not-too-fictional character O'Brien makes: "You must humble yourself before you can become sane."[108]

2. Commits murder for the purpose of commiting, preparing, or making easier the commission of a misdemeanor, or to help a criminal or his accessory to escape.

In other circumstances, murder shall be sentenced to life at hard labor.

16. On para-military activities, Article 126 states:

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[103] T. Szasz, *supra* note 98.

[104] It should be realized that what Dr. Szasz dislikes about the insanity defense and post-acquittal treatment is *not* that it involves the imposition of value judgments upon individuals per se (*all* laws do that) but rather that it does so under the guise of a seemingly universally attractive goal (to cure patients of mental disease), and hence may be receiving support from society from people who otherwise might not so give.

[105] L.P. Ullmann and L. Krasner, *supra* note 1.

[106] This parting of ways is more readily understandable when it is realized that the aspect of the medical model which Szasz criticizes is its desire to discriminate between normal and abnormal individuals in terms of society's treatment thereof, whereas the aspect most often criticized by other behavioral psychologists is the method of treatment which the medical model supporters use.

[107] With regards to the first goal, certain socialist nations, as seen, have made great advances. Concerning the second goal, certain steps have been taken by behavioral psychologists in setting up token economies; i.e., scientifically controlled environments in which a person is rewarded with tokens to the extent that he responds as desired-he may then use these tokens to acquire whatever he wishes. Furthermore, most nations, as earlier seen, have methods of post-acquittal treatment, other than confinement to a mental hospital, which are already available; some of these environments may be more conducive to behavior modification than are those presently being used. Interestingly enough, the orientation of Yugoslavia, with respect to its emphasis upon the environmental changing of the offender, may provide another receptive climate for such advances.

[108] G. Orwell, 1984, at 190 (1958).

Any person who, without order or authorization of the legal authorities, mobilizes, recruits, employs, or gives orders for mobilization, recruitment or employment of troops, or supplies such troops with weapons or ammunition, shall be sentenced to death.

17. The Criminal Code deals with abortions as follows:

Article 346.—Anyone who by any means whatsoever commits or attempts to commit an abortion upon a woman actually or supposedly pregnant, even though such woman has agreed, shall be sentenced to from one to five years and fined from 5,000$ to 50,000$.

If the criminal is regularly engaged in the abortion practice, the penalty shall be the maximum of imprisonment and the fine shall be from 10,000$ to 200,000$.

If the victim becomes permanently disabled, the criminal shall be sentenced to confinement.

If the victim dies, the sentence shall be to limited hard labor.

Article 347.—Medical doctors, military medical officers, midwives, dentists, pharmacists, medical students, pharmacy students, druggists, medical equipment dealers, surgical equipment dealers, who advise or give assistance in an abortion shall be sentenced as provided in Paragraph 1 or Article 346. Further, they can be temporarily or permanently banned from practicing their profession in accordance with Article 61.

With regard to gambling, there are a number of provisions prohibiting cockfighting, unauthorized lotteries, or participation in a gambling den (Articles 458, 459, 460, and 461). Penalties range from eleven days to two years imprisonment.

Under the Criminal Code, prostitution is not an offense. However, facilitation and promotion of prostitution are punishable under Articles 357 through 364, which describe the specific acts which will constitute such facilitation and promotion.

18. The distribution of weapons in a conspiracy aimed at causing civil war is an offense (Article 123). Articles 318 and 319 forbid the unauthorized fabrication, sale, distribution, and carrying of any kind of rifle or shotgun, also of gunpowder, ammunition, and explosives. Also, Article 129 states:

Any person who uses explosives to turn or destroy any public building, storage area, shipyard, craft, or any properties of national ownership shall be sentenced to death.

19. The Vietnamese Criminal Code provides the death penalty for a number of offenses. The group of crimes termed treason and described in Articles 108, 109, and 110 are all punishable with death, also conspiracy aimed at causing civil war (Article 123), illegal military actions (Article 127), using explosives to destroy public buildings, etc. (Article 129 above), heading an armed group for the purpose of taking possession of military posts, etc. (Article 130), taking part in or organizing an uprising (Articles 130, 131), embezzlement by a public servant of more than two million piasters (Article 136), accepting bribes, and if a public servant, of more than 2,000,000$ (Article 145), premeditated murder, parricide, infanticide, and poisoning (Article 327), felony-murder (Article 329, and intentionally setting fire to a house, ship, vehicles, etc. (Articles 465).

There is no provision for a separate proceeding to determine sentence in capital cases.

20. Presumed cumulation of offenses, wherein the offender commits several crimes by the commission of one act which violates several provisions of the Criminal Code, is dealt with as below:

Article 107.—In case of a presumed cumulation of offenses, the offender shall only be prosecuted once, for the most serious offense, and shall be punished as provided for that offense.

A presumed cumulation of offenses is where the offender, by the commission of one act, violates several provisions of the Criminal Code and thus commits several crimes simultaneously.

No other provision is made on the subject of multiple prosecutions.

APPENDIX

Extraterritorial Applicability of the Criminal Codes in Various European Countries

Prepared by Members of the Staff of the Law Library, Library of Congress, February 1972

Albania

The limits of Albanian penal law in space are contained in the Criminal Code (Arts. 58-63). According to these provisions, it may be assumed that the general principle controlling Albanian penal law is the territorial principle. However, for Albanian citizens who commit a crime abroad, Albanian law shall apply unless the perpetrators have already been penalized for the commission of such crimes outside of the State. In these cases, the punishment provided for under the Albanian law could be reduced or dispensed with altogether.

There are no commentaries on the general principles of the current Albanian Penal Code. A translation of Articles 58-63 of the Albanian Penal Code follows:*

Art. 58. Criminal responsibility of the citizens of the People's Republic of Albania. Citizens of the People's Republic of Albania shall be held criminally responsible and punished in accordance with the penal law of the People's Republic of Albania, for crimes committed whether within or outside the territory of the People's Republic of Albania.

Citizens of the People's Republic of Albania who have been penalized outside of the State for crimes committed there [abroad], such crimes being also punishable under Albania law, may be exempted in Albania from any criminal responsibility, or the penalty to be inflicted upon them may be mitigated accordingly.

Art. 59. Criminal responsibility of foreigners. Foreigners who commit crimes in Albania shall be subject to the criminal laws of the People's Republic of Albania.

Art. 60. Extraterritoriality. Matters concerning the criminal responsibility of foreign citizens enjoying extraterritoriality rights must be resolved in any case through diplomatic channels.

Art. 61. Criminal responsibility of stateless persons. Stateless persons residing within the territory of the People's Republic of Albania shall be punished in accordance with the penal laws of the People's Republic of Albania, for crimes they commit within the territory of the People's Republic of Albania.

Art. 62. [irrelevant]

Art. 63. Special provisions. The general provisions of this Code shall be also enforced for crimes provided for in special penal legislation.

Austria

The Criminal Code of 1852, as amended, is still in force in Austria.[1] The principle of extraterritorial applicability has been adopted and provided for in Section 36 which covers felonies committed by Austrian citizens abroad, while Section 38, which covers crimes committed by foreign citizens abroad, affects only the crimes enumerated therein. However, insofar as other crimes are concerned, the Austrian Criminal Code is applied only if foreign governments fail to request extradition as defined in Sections 39 and 40.

**Kodi Penal i R.P. të Shqipërisë* (Penal Code of the People's Republic of Albania). Tirana, 1952.

[1] *Österreichisches Strafgesetz.* Wien, Österreichische Strattsdruckerei, 1945:

The above-mentioned sections of the Criminal Code read as follows:[2]

Section 36. An Austrian citizen, if found in this country, is not to be extradited to a foreign country for felonies committed abroad, but he is to be dealt with according to this Penal Act without regard to the law of the country where the felony was committed.

If he has already been punished abroad for this deed, then the punishment already suffered is to be taken into account in determining the penalty due under this Penal Act.

In no case are sentences of foreign criminal authorities to be executed in this country.

Section 38. If a foreigner abroad committed the felony of high treason against the Republic of Austria (Section 58), of espionage or other collusion with the enemy (Section 67), of unauthorized recruiting (Section 92), of falsifying Austrian public instruments of credit or coins (Section 106 to 121), or of inducing or aiding the violation of military duties (Section 222), then he is to be dealt with like a national in accordance with this Act.

There is a very extensive commentary on the subject authored by Dr. Gustav Kania, with the complete citation of high court decisions and international agreements.[3]

Belgium

Translation from the French of pertinent provisions*

The Criminal Code (1964)

Art. 4. An offense committed outside of the Kingdom's territory by Belgian citizens or by foreigners shall not be punishable in Belgium, except in the cases determined by the law.

See: Law of April 17, 1878 (Criminal Procedure) Chapter II, Articles 6 to 14.

The Code of Criminal Procedure (1967)

Chapter II. Public Prosecution for Crimes or Misdemeanors Committed Outside the Kingdom's Territory

Art. 6. Any Belgium citizen who commits, outside the Kingdom's territory, one of the following offenses, may be prosecuted in Belgium:

1. [Law of August 4, 1914, Art. 3] A major or minor crime against the security of the State;

2. [Law of July 12, 1932, Art 2a] A major or minor crime against the public faith as stated in the Criminal Code, Book II, Chapters 1, 2, and 3 of Title 3, or a minor crime specied in Articles 497 and 497*bis*, if the major or minor crime has, for its object, either the currency with legal tender in Belgium or things destined for their fabrication, forgery, debasement or falsification, or the bills of exchange, papers, seals, stamps, marks or hallmarks of the State of the Belgian administration or public establishments;

3. [*Id.*] A major or minor crime against the public faith as stated in the same provision, if the major or minor crime has, for its object either currency without legal tender in Belgium or things destined for their fabrication, forgery, debasement or falsification, or bills of exchange, papers, seals stamps, marks or hallmarks of a foreign state.

Prosecution in the last case may not be instituted, except on official advice given to the Belgian authority by the foreign authority.

Art 7. [Law of March 16, 1964, Art. 1] *Par. 1.* Any Belgian citizen who, outside of the Kingdom's territory, is guilty of an act qualified as a crime under Belgian law, may be prosecuted in Belgium if the act is punishable by the legislation of the country where it has been committed.

Par. 2. If the offense was committed against a foreigner, prosecution may not be instituted except upon motion of the Public Prosecutor to the court and must, among other things, be preceded by a complaint from the injured foreigner or his family or an official notication given to the Belgian authority by the authority of the country where the offense was committed.

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[2] *The Austrian Criminal Code.* The American Series of Foreign Penal Codes. London. 1966. p. 31, Secs. 36, 38, 39, and 40.

[3] Gustav Kaniak. *Das Osterreichische Strafgesetz.* Sechste Auflage. Wien. 1969.

* Jean Servais *and* E. Mechelynck. 2 *Les Codes belges.* Bruxelles. 1969.

If the offense is committed in time of war against a national of a country which is an ally of Belgium in the sense of Article 117, paragraph 12 of the Criminal Code, the official notification may be given under the authority of the country of which this foreigner is or has been a national.

Art. 8. [Abrogated by the Law of March 16, 1964, Art. 2]

Art. 9. Any Belgian citizen who is found guilty of an offense in forestry or field matters, fishing or hunting on the territory of a neighboring state, may, if this state agrees on such reciprocity, be prosecuted in Belgium, based on the complaint of the damaged party or based on official notification given to the Belgian authority by the authority of the country in which the offense was committed.

Art 10. A foreigner may be prosecuted in Belgium when he commits the following outside of the Kingdom's territory:

1. [Law of July 19, 1934, Art. 4] A major or minor crime against the State's security;

2. [Law of July 12, 1932, Art. 2b] A major or minor crime specified in Article 6, number 2;

3. A major or minor crime specified in Article 6, number 3.

Prosecution in the last case may not be instituted except upon official notification as given to the Belgian authority by the foreign authority;

4. [Law of April 2, 1948, Art. 1] In time of war, the offense of homicide or of voluntary bodily injuries, rape, indecent exposure, or denunciation to the enemy, against a national of Belgium, a foreign resident of Belgium at the time of the initiation of hostilities or against a national of a country allied to Belgium in the sense of paragraph 2 of Article 117 of the Criminal Code.

Art. 10bis. [Law of July 14, 1951, Art. 1] Any person subject to [Belgian] military laws who commits any offense on the territory of a foreign state, may be prosecuted in Belgium.

The same laws apply to persons who are attached, in any official capacity, to the armed forces on foreign territory or those authorized to follow an army corps of which they are a part.

Art 11. A foreigner who is a principal or an accessory to a crime committed outside of the Kingdom's territory, by a Belgian citizen, may be prosecuted in Belgium, together with the accused Belgian citizen, or after the conviction of the Belgian citizen.

Art. 12. [Law of July 14, 1951, Art. 2] Prosecution for the offenses mentioned in the present Chapter shall be instituted only when the accused is found in Belgium, except in the cases stated in Article 6, numbers 1 and 2, and in Article 10*bis*.

[Law of April 30, 1947, Art. 2] However, when the offense was committed in time of war, the prosecution may be instituted, if the accused is a Belgian citizen in all cases, even if he is not present in Belgium, and, if the accused is a foreigner, [he may be prosecuted] in addition in the cases stated in paragraph 1, if he is found in an enemy country or if his extradition can be obtained.

Art. 13. [Decree-Law of August 5, 1943, Art. 4] The preceding provisions shall not apply when the accused, who has been tried in a foreign country for the same offense, has been acquitted or when, after the conviction, the penalty was executed, prescribed, or when he was pardoned, except for the major or minor crimes committed in time of war.

Any detention imposed abroad [on the accused] as a consequence of the offense for which he has been convicted in Belgium, shall always be taken into account in the duration of the penalty of imprisonment.

Art. 14. In all cases stated in the present Chapter, the accused shall be prosecuted and tried in accordance with Belgian laws.

Bulgaria

The Communist Government established in Bulgaria after September 9, 1944 introduced a new Criminal Code of February 13, 1951, drafted along the line of Soviet doctrines in this field. This Code was entirely replaced by another on April 2, 1968,[1] which also incorporated various criminal provisions scattered throughout a number of legislative acts.

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[1] *Dŭrzharen Vestnik* (Official Law Gazette of Bulgaria), No. 26, Apr. 2, 1968; correction: *id.*, No. 29, Apr. 12, 1968.

The questions of the applicability of the Code regarding crimes committed within and without the territory of the People's Republic of Bulgaria are dealt with in accordance with the traditional principles and Communist teachings related to this area.

The territoriality principle is reflected in Section 3 (1) of the Code which prescribes that it applies to all criminal offenses committed within the territorial limits of the country by any person regardless of his citizenship.

Based on the personality principle, the Bulgarian Criminal Code also applies to Bulgarian citizens for their crimes committed abroad, as explicitly stated in Section 4 (1) ; however, a Bulgarian citizen may not be extradited to a foreign state for criminal prosecution or serving of a sentence (Sec. 4 (2).

The spokesman of the present government of Bulgaria in the field of criminal law science, Professor Ivan Nenov, explains this provision on the basis of the Communist doctrine that "Bulgarian citizens must, in their behavior, always and everywhere comply with the socialist requirements—with the rules of Communist morals and socialist law." [2] In further clarification he states that the nature of the crime and the type of penalty as well as the question whether the crime affects the interests of the Bulgarian state and its citizens or that of a foreign state and its nationals, are irrelevant. Moreover, it is not important, he states, whether the act constitutes a crime under the law of the place where it occurred.[3]

Based on the protective principle, the Bulgarian Criminal Code is also applicable to foreign nationals for their criminal acts committed outside the jurisdictional territory of Bulgaria, but only if these offenses are of a general nature and affect the interests of the Bulgarian state or its citizens (Sec. 5). The above-mentioned criminal law expert, Ivan Nenov, questions the possibility for the application of this provision in regard to foreign nationals who committed a crime abroad. "This principle," he emphasizes, "has a practical significance when the criminal perpetrator, a foreign national, is found within the territorial jurisdiction of the domestic law of Bulgaria against whom, in case of a sentence in absentia, the execution of the penalty could be directed." [4]

However, in the cases specified in Sections 4 and 5 the preliminary detention and the penalty served abroad are to be deducted from the Bulgarian one. If the penalties in both countries are of a different nature, the penalty served abroad is to be taken into consideration by the Bulgarian court when determining its penalty (Sec. 7).

Based on the universality principle, the Bulgarian Criminal Code is also applicable extraterritorially to foreign nationals for their crimes committed abroad if these acts are directed against the peace and mankind and affect the interests of another state or foreign nationals (Sec. 6 (1)).

Finally, Section 6 (2) of the Code contains a provision which opens the possibility for an application of the Bulgarian Criminal Code to foreign nationals committing other crimes abroad, namely, if such jurisdiction is provided by an international treaty to which Bulgaria is a party.

The problems of the territorial and extraterritorial application of the Bulgarian Criminal Code may be summed up as follows:

(1) This Code is applicable to Bulgarian citizens for their crimes regardless of the place of commission, e.g., in the country or abroad.

(2) It is applicable to foreign citizens (a) for their crimes committed in Bulgaria; (b) for all crimes committed abroad if interests of the Bulgarian state or Bulgarian citizens are affected; (c) for crimes committed abroad if these acts are directed against the peace and mankind; and (d) for other crimes committed abroad if an international treaty, to which Bulgaria is a party, so prescribes.

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[2] Ivan Nenov. *Nakazatelno pravo na Narodna Republika Bulgaria* (Criminal Law of tthe People's Republic of Bulgaria). *Obschta chast* (General Part). Sofia, Nauka i izkustvo, 1963. p. 126.

[3] *Id.*

[4] *Id.*, p. 128.

Appendix

Translation from Bulgarian Criminal Code of the People's Republic of Bulgaria

Durzhaven Vestnik No. 26, April 2, 1968

GENERAL PART—CHAPTER ONE

Purpose and Scope of Application of the Criminal Code

Subchapter One. Purpose of the Criminal Code

* * *

Subchapter Two. Scope of Application of the Criminal Code

Sec. 3. (1). The Criminal Code shall apply with respect to all crimes committed within the territory of the People's Republic of Bulgaria.

(2). The question of responsibility of foreigners who enjoy immunity in regard to the criminal jurisdiction of the People's Republic of Bulgaria, shall be decided in accordance with the rules of the international law accepted by it [Bulgaria].

Sec. 4. (1). The Criminal Code shall apply to Bulgarian citizens also for their crimes committed abroad.

(2). A Bulgarian citizen shall not be extradited to a foreign state for adjudication or serving the penalty.

Sec. 5. The Criminal Code shall apply also to foreigners who committed crimes of general character abroad which affect the interests of the People's Republic of Bulgaria or of a Bulgarian citizen.

Sec. 6. (1). The Criminal Code shall apply also with regard to foreigners for committing abroad a crime against the peace and mankind, which affect the interests of another state or a foreign citizen.

(2). The Criminal Code shall apply also to other crimes committed by foreigners abroad when this is provided by an international treaty, to which the People's Republic of Bulgaria is a party.

Sec. 7. In the cases of Sections 4 and 5 the preliminary detention and the penalty served abroad shall be reduced (*prispadat*). When both penalties are of different kind, the penalty served abroad shall be taken into consideration for the determination of the penalty by the [Bulgarian] court.

Sec. 8. The sentence of a foreign court for a crime, to which the Bulgarian Criminal Code applies, shall be taken into consideration in the cases established by an international treaty, to which the People's Republic of Bulgaria is a party.

France

French criminal jurisdiction is based on the principle of territoriality as defined in Article 3, paragraph 1 of the French Civil Code:

"The laws of police and public security shall be binding upon all those who live on the territory."

According to Article 72 of the French Constitution, the territory of the French Republic consists of the metropolitan territory and the overseas departments and territories. For the application of the penal laws, the territorial sea, French ships and airplanes are considered a part of French territory.

If the offense is committed on French territory, or when one of the constituent elements of its has been accomplished on French territory, the offense in all its aspects is French.

The territorial principle is not absolute. Title X of the French Code of Criminal Procedure covers offenses committed abroad by both French citizens and foreigners.[1]

The French Code makes a distinction between major crimes (*crimes*), minor crimes (*délits*), and contraventions (*contraventions*).

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[1] *See* attached Appendix.

I. *Offenses Committed by French Citizens Abroad*

A French citizen who commits abroad an act qualified as a major crime may be prosecuted and tried by French courts (Art. 689), provided that he is a French citizen at the time of the prosecution (it is of no importance what nationality he had at the time when he committed the major crime), that he was not tried abroad, and in case of conviction and sentencing did not serve the sentence or obtain clemency, or that the penalty has not been extinguished by the statute of limitations (Art. 692).

However, if the act committed abroad by a French citizen is qualified by French law as a minor crime then the prerequisites for the French courts to assume jurisdiction are stricter.

At first, the minor crime must be punishable not only under French law, but also under the law of the country where it was committed (Art. 689, par. 2). French court practice concerning this requirement was summarized in the French legal encyclopedia as follows:[2]

Under penalty of cassation, the trial judge must ascertain in his sentence that all elements of foreign law necessary for the accusation are established again (Crim. Jul. 8, 1927. S. 1929. 1, 360).

However it is of no matter that the foreign qualification of the crime is different from the French qualification; it does not much matter that the penalty is not the same as that prescribed in France (*see*, for instance, Trib. corr. Colmar, May 11, 1950, *Gaz. Pal.* 1950, *ibid.* 1950.2.189, *Rev. science crim.* 1950.592 Caron. L. Hugeney).

The Court of Cassation does not review the interpretation of foreign law given by the trial judge (Carrive, *Rev. science crim.* 1937, 309). This judge is not duty bound to quote the text of the foreign law, and the Supreme Court refers to his statements (Crim. Dec. 17, 1887, D. 88.1.330).

It must be taken into consideration that the act must be punishable by the law of the country where it was committed not only at the time when it occurred but also at the time when the complaint was lodged (Aix, Sep. 30, 1959, *Gaz. Pal.* 1959.2.291); that there is no incrimination according to the foreign law when the act, also incriminating according to this [French] law, is covered by the law of amnesty of the foreign country (Crim. Dec. 31, 1936, *Gaz. Pal.* 1937.1420; Trib. corr. Toulon, May 17, 1963. *Gaz. Pal.* 1963.2.387) . . . that, in general, the statute of limitations of public action against offenses committed abroad is regulated by French law (Trib. corr. Montbeliard, Jul 3, 1964. D. 1965,69. Public Prosecutor Petit's charge).

Thus, in case of a minor crime, it is necessary to refer to the foreign law unless it concerns offenses against the security of the State or counterfeiting its seal or current national monies. These minor crimes, even if committed outside of the territory of the Republic, are punishable as minor crimes committed on French territory.

If the minor crime was committed against a private person, the complaint of such person, or the official denunciation by the authority of the country where the crime was committed, must precede the prosecution undertaken by the public prosecutor.

Certain minor crimes and contraventions committed in neighboring States, as defined in Article 695 of the Criminal Code, are subject to the rule of reciprocity.

II. *Offenses Committed Abroad by Foreigners*

As a general rule, and subject to the provisions of Articles 690 and 693, offenses committed by foreigners in a foreign country are not punishable in France. An exception is made for the major and minor crimes specified in Article 694, which appears in the Appendix.

According to Professors G. Stefani and G. Levasseur,[3] the exceptions specified in Article 121-6 of the Code of Civil Aviation of March 30, 1967, which in part reads as follows: must be added to the exceptions specified in Article 619:[4]

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[2] Dalloz, *Répertoire de droit pénal et de procédure pénale*, vol 1, Paris, Jurisprudence Générale Dalloz, 1967, p. 597–98.

[3] G. Stefani *and* G. Levasseur, *Droit pénal général et procédure pénale*, vol. 2, 5th ed. Paris, Dalloz, 1971. p. 298.

[4] *Journal officiel*. Apr. 9, 1967. p. 3570.

The legal relations between persons who are on board a foreign airplane engaged in traffic shall be regulated by the law of the flag of that airplane in all cases where the territorial law is normally applied.

However, in case a major crime or minor crime is committed on board the foreign airplane, the French courts shall be competent provided that the perpetrator or the victim is a French national or the airplane landed in France after the major or minor crime was committed.

Appendix

Code of Criminal Procedure*

TITLE X

Major and Minor Crimes Committed Abroad

Article 689

Any French citizen who outside the territory of the Republic renders himself guilty of an act qualified as a major crime punished by French law may be prosecuted and tried by French courts.

Any French citizen who outside the territory of the Republic renders himself guilty of an act qualified as a minor crime by French law may be prosecuted and tried by French courts if the act is punished by the legislation of the country where it was committed. With reference to minor crimes against the security of the State or counterfeiting the seal of the State or of curren national monies, a minor crime committed outside the territory of the Republic shall be punishable as a minor crime committed within the territory.

The provisions of paragraphs 1 and 2 are applicable to the perpetrator of an act who has become a French citizen only after the act that is imputed to him.

[2-13-60]

Article 690

Whoever on the territory of the Republic becomes an accomplice to a major crime or a minor crime committed abroad may be prosecuted and tried by the French courts if the act is punished by both the foreign law and by the French law, on condition that the act qualified as a major or minor crime was established by a final decision of the foreign jurisdiction.

Article 691

In case of a major crime committed against an individual the prosecution may be undertaken only at the request of public prosecution: it must be begun by a complaint by the offended party or by an official denunciation to French authorities by the authorities of the country where the act was committed.

Article 692

In the case envisaged in the preceding articles, when a major or minor crime is concerned no prosecution shall take place if the accused proves that he was definitely tried abroad and, in case of conviction, that the punishment has been served or has been extinguished by the statute of limitations or that he has obtained clemency.

Article 693

Every offense of which an act constituting one of the constituent elements has been accomplished in France is deemed to be committed within the territory of the Republic.

Article 694

Every foreigner who outside the territory of the Republic renders himself guilty, either as perpetrator or as accomplice, of a major or minor crime against the security of the State or the counterfeiting of the seal of the State or current national monies may be prosecuted and tried according to the provisions of French law if he is arrested in France or if the Government obtains his extradition.

**Code de procédure pénale.* Code de justice militaire. Paris, Dalloz, 1971–72. This translation is one made by G. L. Kock. *The French Code of Criminal Procedure.* South Hackensak, Fred B. Rothman, 1960, with terminological modifications by the present reporter.

Article 695

Every Frenchman who renders himself guilty of minor crimes and contraventions in forest, rural, fishing, customs, or indirect tax matters on the territory of an adjacent state may be prosecuted and tried in France according to French law if that state authorizes the prosecution of its nationals for the same acts committed in France.

The reciprocity shall be legally established by international conventions or by degree.

Article 696

In the cases provided in the present title the prosecution shall be undertaken at the request of public prosecution of the place where the accused resides or of his last known residence or of the place where he is found.

The Court of Cassation may, on the request of public prosecution or of the parties, transfer the case to a court closer to the place of the major or minor crime.

FEDERAL REPUBLIC OF GERMANY

The provisions on the extraterritorial reach, application or jurisdiction of German criminal law are contained in Sections 3 through 10 of the German Penal Code in the version of the Second Criminal Law Reform Law of July 4, 1969, to become effective October 1, 1973.[1]

By providing in Section 3 of the Code that German criminal law shall be applicable to acts committed within the country ,the Federal Republic of Germany has rejoined the majority of States where the territoriality principle plays the primordial role, while the other "principles" of international criminal law constitute its exceptions in explicity formulated narrow fields. At the same time this approach constitutes a return to the original provision of Section 3 in the Code of the German Empire of 1871 which reads: "The Criminal Code of the German Empire is applicable to all offenses committed within the Empire, even if the offender be a foreigner."[2]

The present version of Section 3 is based on the personality principle under which a State applies its criminal law to all offenses perpetrated by its subjects irrespective of the place of perpetration.[3] It also contains the principle of double criminality (Sec. 3 (2)) and provides criteria for the determination of the place where the act entailing the punishment occurred (Sec. 3 (3)). In the 1973 Code, these two matters are dealt within Sections 7 and 9, respectively.

In the opinion of one of the leading German law scholars "the [German] legislator has departed from the personality principle as the basis of the rule

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[1] *Bundesgesetzblatt* 1969, I: 717 (hereinafter referred to as BGB1,).

[2] English translation taken from *Imperial German Criminal Code Translated into English* by Captain R. H. Gage . . . and A. J. Waters . . . Johannesburg, W. E. Horton & Co., Limited, 1917. p. 1. Section 3 has been changed several times. The most sweeping change occurred when the Nazi legislators, by amending Sections 3-5, extended the application of German criminal law by making a larger group of crimes committed abroad by German nationals and foreigners punishable under German law than was provided for previously. As amended May 6 ,1940 (*Reichsgesetzblatt* 1940, I, 754) Section 3 reads: The German Criminal Law shall apply to any act committed and not punishable under the law of the place of commission if such act does not appear to be a wrong deserving punishment when judged according to the sound sentiment of the German people, in view of the particular circumstances of the place where it is committed.

The act is considered to have been committed at the place where the offender acted and, in case of an omission, where he should have acted, or where the criminal effect of the offense took place or should have taken place. (English translation takn from *The Statutory Criminal Law of Germany with Comments.* Prepared by Vladimir Gsovski, Chief of the Foreign Law Section. Edited by Eldon R. James. Washington, The Library of Congress, 1947. p. 7-8.

[3] Section 3, in the German Penal Code version of Sept. 1, 1969 (BGB1, 1969, I: 1445) reads as follows:

(1) German criminal law shall apply to the act of a German citizen no matter whether he commits it within the country or abroad.

(2) German criminal law shall not be applicable to an act committed but not punishable abroad, if this act does not constitute a misdeed meriting punishment by reason of special circumstances [prevailing] at the place where the act is committed.

(3) An act is [considered to be] committed at every place where the perpetrator has acted, or in the case of omission, where he should have acted, or where the result became, or should have become, effective.

on the applicability of punishment in order that Germans should not be punished for such acts committed abroad which, at the place of the act, do not entail punishment, or are permitted, or, possibly are even called for."[4]

As it has been pointed out by the same authority, there is, however, no reason to exclude the application of German criminal law in cases where the act committed abroad is also a punishable offense under the law of the place of commission, or if the place of commission was not subject to any criminal jurisdiction (i.e., where there was no sovereignty exacting retribution).[5] Therefore, pursuant to Section 7, paragraph 2, No. 1 of the 1973 Penal Code, in these cases the personality principle of international criminal law applies: whoever at the time of commission of the offense was a German or became a German after the perpetration shall be subject to, and may be prosecuted under, German criminal law.[6] Moreover, some criminal offenses are considered by the framers of the new Code to be so serious that they are subject to German criminal law regardless of the law prevailing at the place of their commission. Thus, by virtue of Section 5, Number 6, German criminal law shall also apply to an abortion perpetrated abroad, provided the offender at the time of the act is a German and derives his livelihood from the Federal Republic, including Western Berlin. Furthermore, German criminal law shall apply to all criminal offenses, irrespective of the law of the place of commission, if the perpetrator is a German holding a German public office, or a soldier of the German Armed Forces and commits the criminal offense within the scope or during the exercise of his official capacity (Sec. 5, No. 8).

With respect to several other criminal offenses, German legislative jurisdiction has been extended by preserving the personality principle as a jurisdictional basis, although this has been done so that even acts committed abroad and directed against persons or property protected by domestic (German) law entail punishment under German criminal law (the so-called protective principle, "Schutz" or "Real-Prinzip"). In the words of Professor Maurach;[7]

". . . The idea seems to be decisive here, the one that the act of a German against certain persons or property protected by domestic [German] law, which enjoy the protection of German criminal law, wherever the offense is committed, should not remain unpunished merely because of the fact that it has been perpetrated by taking advantage of the special circumstances prevailing at the place of commission. Cases of this kind are covered by Section 5, Number 2 (endangering the external security of the democratic constitutional State in the cases of Sections 89, 90b, 90a, paragraph 1; acts against national defense in the cases of Sections 109a-109d and 109h) and Section 5, No. 5 (lewd acts in the cases of Section 174, No. 1, Section 175, paragraph 1, No. 1, and of Section 176, paragraph 1, No. 3). Here the application of German criminal law is made dependent on the perpetrator's (and in the case of Section 5, No. 5 also his victim's) being a German and his deriving his livelihood from the area of effectiveness of [the law of] the Federal Republic, including Western Berlin."

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[4] Reinhart Maurach. *Deutsches Strafrecht. Allgemeiner Teil. Ein Lehrbuch.* 4th ed. Karlsruhe, Verlag C. F. Müller, 1971. p. 123.

[5] *Id.*

[6] The concept of "German" (*Deutscher*) is defined in Article 116 of the Basic Law (Constitution) of the Federal Republic of Germany of May 23, 1949, which reads as follows:

Art. 116. (1) Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of Dec. 31, 1937, as a refugee or expellee of German stock (Volkszugehoerigkeit) or as the spouse or descendant of such person.

(2) Former German citizens who, between Jan. 30, 1933, and May 8, 1945, were deprived of their citizenship on political, racial, or religious grounds and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile (Wohnsitz) in German after May 8, 1945, and have not expressed a contrary intention. [English translation taken from *Basic Law for the Federal Republic of Germany*, promulgated by the Parliamentary Council on May 23, 1949, as amended up to and including January 29, 1969. Translation published by the Press and Information Office of the German Federal Government. Edited by the Linguistic Section of the Foreign Office of the Federal Republic of Germany. Wiesbaden or Bonn, Wiesbadener Graphische Betriebe GmbH, 6200 Wiesbaden, 1970? p. 69.

[7] Maurach, *supra* note 4, at 124-125.

The safeguarding of persons or property protected by domestic (German) law against violations may be determined by the nature of the domestic person or property under attack as well as the criminal law protection accorded to foreigners and property protected at the foreign place of commission. Proceedings from this classification, Professor Maurach states: [8]

"(a) Without regard to the law of the place of commission, criminal acts perpetrated by [Germany's] own subjects foreigners and directed against persons and property protected by domestic [German] law are subject to German criminal law only in circumscribed, exhaustively enumerated cases.

"In this category belong, under Section 5, No. 1, treasonable acts endangering the peace (Section 80), acts of high treason and treason (Sections 81–83; Sections 94 ff . . .), furthermore endangering the democratic constitutional State in the cases of Sections 90, 90a, paragraph 2, as well as criminal acts against the national defense in the cases of Sections 109, 109e, 109f, and 109g; under Section 5, No. 3, acts of abduction (Section 234a) and of [casting] political suspicion (Section 241a) to the detriment of a German; under Section 5, No. 4, divulging business secrets of German enterprises; under Section 5, No. 7, the offenses connected with testimony (Sections 153, 154, 156) in a proceeding pending before courts located in the Federal Republic, including West Berlin . . .; under Section 5, No. 9, criminal acts perpetrated by a foreigner who is a holder of a German public office (a rare case in practice, e.g., passive bribing of a German honorary consul of foreign nationality) and, finally, under Section 5, No. 10, criminal acts which are directed against the holder of a German public office or against a soldier, to wit, in direct connection with such persons' capacity (e.g., unlawful compulsion against a German diplomat abroad under Section 240; insulting a German customs officer officiating in Basel as a "German customs bandit").

"(b) All *other* acts perpetrated abroad against a German (independently of his domicile in the Federal Republic) are, according to the protective principle, . . . subject to German law alone, if they are also punishable according to the law of the place of commission or if the place of commission is not subject to any criminal jurisdiction."

The German legislative jurisdiction under the universality principle is spelled out in Section 6 of the 1973 Penal Code bearing the title "Acts committed abroad against persons and property which are internationally protected." Here again German criminal law applies regardless of the law of the place of commission. The offenses belonging to this group include genocide, major crimes committed with explosives, slave traffic in children and women, unlawful narcotics traffic, traffic in obscene publications, and major and minor crimes of counterfeiting, as well as any act which the Federal Republic of Germany has undertaken to prosecute even when it is committed abroad.

The special provision of Section 9 provides the criteria to determine the place of the act constituting a criminal offense and, in particular, covers the problem with respect to accessories.

Appendix

The German Penal Code*

GENERAL PART

First Division. The Penal Statutes (*Das Strafgesetz*)

Title One. Scope of Applicability

Secs. 1–2 [Irrelevant]

Sec. 3. Applicability to Acts Committed within the Country. German criminal law shall apply to acts which are committed within the country.

Sec. 4. Applicability to Acts [Committed] Aboard German Ships and Aircraft. German criminal law shall apply to acts committed abroad aboard a German ship or aircraft, independently of the law of the place of commission.

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[8] *Id.*, p. 125-126.

*This version becomes effective Oct. 1, 1973. *Sec Strafgesetzbuch mit 77 Nebengesetzen. Textausgabe mit Verweisungen und Sachverzeichnis. 41., neubearbeitete Auflage.* Stand: Aug. 1, 1970. München, Beck, 1970. p. 664–668. The translation was made from the text.

Sec. 5. Acts Committed Abroad against Persons or Property Protected by Domestic [German] Law. German criminal law shall apply to the following acts which are committed abroad, regardless of the law of the place of commission:

1. Acts of treasonable endangering of the peace under Section 80, of high treason, of endangering the democratic constitutional State in the cases of Sections 90 and 90a, par. 2, of treason and endangering external security, as well as acts against national defense in the cases of Section 109, 109e, 109f, and 109g;

2. Acts endangering the democratic constitutional State in the cases of Sections 89, 90a, par. 1, and Section 90b, and acts against national defense in the cases of Section 109a-109d and 109h, if the perpetrator is a German who derives his living from the territory on which this law is in effect;

3. Acts of abduction (See. 234a) and of [casting] political suspicion [upon another] (Sec. 241a), if the act is directed against a German who has his domicile or usual place of abode in the country;

4. Divulging industrial or commercial secrets of an enterprise located within the territory on which this Law is in effect; of a business enterprise which has its seat there; or of a business enterprise with its seat abroad, which is dependent upon a business enterprise with a seat within the territory on which this Law is in effect and which forms a concern with the latter;

5. Lewd acts in the cases of Section 174, No. 1, of Section 175, paragraph 1, No. 1, and of Section 176, paragraph 1, No. 3 if the perpetrator, and the person against whom the act is perpetrated, at the time [of commission] of the act, are Germans and derive their livelihood from within the territory on which this Law is in effect;

6. Abortion, if the perpetrator at the time [of commission] of the act is a German and derives his livelihood from within the territory on which this Law is in effect;

7. Perjury, false unsworn testimony and intentional false affirmation in lieu of an oath in any proceeding, within the territory on which this Law is in effect, pending before a court or any other agency of the German Federal Republic which is competent to administer oaths or affirmations in lieu of an oath;

8. Acts which the German holder of a German public office, or a soldier of the German Armed Forces, commits while abroad in an official capacity or with respect to such official capacity;

9. Acts committed by a foreigner while holding German public office;

10. Acts committed by anyone against the holder of a German public office, or a soldier of the German Armed Forces, while in the performance of his official functions or with respect to his official functions.

Sec. 6. Acts Committed Abroad against Persons and Property which are Internationally Protected. German criminal law shall continue to apply, regardless of the law of the place of commission, to the following acts which have been perpetrated abroad:

1. Genocide;
2. Major crimes committed with explosives;
3. [Slave] traffic in children and women;
4. Unlawful narcotics traffic;
5. Traffic in obscene publications;
6. Major and minor crimes of counterfeiting;
7. Acts which the Federal Republic of Germany, in a binding international agreement, has undertaken to prosecute even when they are committed abroad.

Sec. 7. Applicability to Acts Committed Abroad in Other Cases:

(1) The German criminal law shall apply to acts which are committed abroad against a German if the act is punishable at the place of commission abroad, or if the place of commission is not subject to any criminal jurisdiction.

(2) The German criminal law shall be applicable to other acts which are committed abroad if the act is a criminal offense where committed or if the place of commission is not subject to any criminal jurisdiction and where the perpetrator

1. at the time of the commission of the act was a German, or became one after the act, or

2. at the time of the commission of the act was a foreigner, is found within this country and is not extradited, although by the nature of the act the [German] Extradition Act would permit his extradition, because an

extradition request was either not made or rejected, or the extradition cannot be carried out.

Sec. 8. Time of the Act. An act shall be[deemed to have been] committed at the time when the perpetrator or accessory has acted, or, in case of omission, should have acted. When the result occurs shall not be decisive.

Sec. 9. Place of the Act:

(1) An act shall be [deemed to have been] committed at every place where the perpetrator has acted, or in the case of an omission, where he should have acted, where the result implicit in the actual element of the crime occurs or [at the place] where the perpetrator imagined that it should occur.

(2) Complicity is committed at the place of commission of the [principal] act as well as at every place where the accessory has acted, or in the case of omission, should have acted, or where he imagined that it should occur. Where the accessory acted within the country by participating in an act committed abroad, German criminal law shall apply to the complicity even though the act is not punishable under the law of the place commission.

German Democratic Republic

The Criminal Code of the German Democratic Republic of January 12, 1968,[1] provides for the international effects of the criminal laws in Section 80, which reads:

TERRITORIAL AND PERSONAL APPLICABILITY

(1) The criminal laws of the German Democratic Republic shall apply to all criminal acts which are committed within its territory, or the results of which occurred or should occur in this territory.

(2) A citizen of the German Democratic Republic may also be called to account in accordance with its criminal laws if he commits an act outside the territory of the German Democratic Republic which is punishable under its laws. This shall also apply to stateless persons who have their permanent residence in the German Democratic Republic. In such cases, the punishment served outside the German Democratic Republic for the same act shall be calculated [in the punishment].

(3) Citizens of other states and other persons may also be called to account in accordance with the criminal laws of the German Democratic Republic for criminal acts committed outside the territory of the German Democratic Republic if:

1. they committed a crime against the sovereignty of the German Democratic Republic, against the peace, against humanity, or human rights;
2. their punishment is provided for by a special international agreement;
3. they committed a crime against the German Democratic Republic;
4. they are present within the territory of the German Democratic Republic, extradition is not to be expected, and the act is punishable at the place of commitment, or in the home state or reign of the perpetrator. The punishment meted out may not be severer than at this place.

Such criminal acts may only be prosecuted with the concurrence or upon the order of the Chief Procurator of the German Democratic Republic

No commentary on the Criminal Code of the German Democratic Republic could be found in the collections of the Law Library.

Greece

I. *General Remarks*

A State may claim jurisdiction over an offense on the ground that a crime affects the national interests, although it has been committed abroad. In regulating this matter, some principles have been developed which have been followed by most of the European countries. These principles (universality, territoriality, personality and the protective principle) are often referred to as "principles of international law" and the group of criminal laws which governs these

[1] *Gesetzblatt*, I, p. 1.

cases as "international criminal law." These terms are misused because each State, when enacting such laws, does not act to regulate its relations with other States, but acts as a sovereign (*imperium*) in stipulating under which circumstances its criminal law should apply to offenses which have been committed abroad but nevertheless affect its legal order.

According to the *principle of universality*, a country may apply its law to any crime, regardless of the place where the crime was committed, the nationality of the perpetrator or whether its national interests are affected or not. It stems from the necessity for international cooperation in combating crime, but it lacks legal realism and has been criticized as extremely broad and difficult to apply. More particularly, its application by a State may be in the nature of a violation of the sovereignty of the other States, and the difficulty in collecting the evidence necessary for the prosecution, especially when the crime has been committed in a remote country, is apparent. In addition, the difference between the laws of different States may lead to injustices, for an act may not be regarded as an offense according to the law of one country, whereas the same act constitutes a crime in another State.

However, the necessity for cooperation in the field of criminal law is unquestionable. International agreements with the objective of combating some crimes, such as the agreements of 1910 and 1923 on obscene literature, and the agreement of 1925 and 1931 on narcotics, is an expression of that need.

Under the *territoriality principle*, a country may claim jurisdiction over offenses which have occurred only within its own territory. No distinction is made as to the nationality of the perpetrator.

This system although advocated by many prominent authors, has been abandoned as an exclusive concept. It postulates that each State must preserve the existing legal order and secure the rights of its own citizens. Therefore, any deed violating those interests must be punishd by its laws, even if it is committed by an alien within the territory.

This principle ignores the fact that such acts may occur within as well as outside the State. Therefore, it does not provide for those acts which are committed abroad and which affect the national interests, or its nationals.

Under the *personality principle*, the criminal laws of a State are personal and must apply to citizens wherever they commit a wrongful act. The concept is based upon an inner relationship between the State and its citizens. On the one hand, it prevents a State from extraditing its nationals for crimes which they have committed abroad and on the other hand, it enables the State to punish them for such acts. For aliens who violate the laws, the principle creates a "fictio juris" by virtue of which aliens living in a country are regarded as its citizens (*subditus temporarius*). Thus, the laws apply to them not because the wrongful act was committed within the legislating State, but because under a *fictio juris*, they are regarded as nationals.

The personality principle does not offer complete protection because, besides the fact that the creation of a "fictio juris" is out of place here, it does not provide for crimes which are committed by aliens abroad and affect the national interests.

The basis of the *protective principle* is that each State has the right to secure its national interests. These interests can be affected not only by acts committed within its territory but also by acts which take place abroad. The means of safeguarding the State's interests rests in the criminal laws, consequently, those laws must protect:

(a) All rights which are enjoyed within the State by nationals or aliens.

(b) All rights which belong to the State or to its citizens and are exercised abroad. The offense against those rights must be punished wherever it is committed and regardless of by whom because it is an inherent right of any State to safeguard such rights.

(c) Those rights which two or more countries are interested in securing. These are known as "common" or "international" rights, e.g., the security of international trade, currency, etc.

II. *The Greek Criminal System*

The Greek Criminal Code deals with territorial jurisdiction in Articles 5 to 11. Article 5 provides that all offenses committed within the State shall be punished according to its provisions regardless of the nationality of the perpetrator and the gravity of the offense. This provision is an expression of the territorial principle. Offenses committed within territorial waters or in

Greek space are to be considered to have occurred on the country's territory. Furthermore, paragraph two of the same Article provides that Greek ships and planes are to be regarded as Greek territory even when they are abroad unless there is an exception in accordance with international law.

Article 6 is an expression of the principle of personality. It is designed to secure the punishment of those who commit crimes abroad. Without this provision, perpetrators would remain unpunished in the event that they returned to Greece, because extradition of Greek citizens is not provided for under Greek law. A condition for the applicability of this Article is that the act must be a major or a minor crime according to the laws of the country where the offense was perpetrated as well as according to Greek law. If the place of the crime is not subject to any criminal jurisdiction, Greek law is applicable.

Paragraph two of the same Article provides that the perpetrator shall be punishable if at the time of the commission of the act, he was Greek but rejected his nationality afterwards, or if he was an alien at that time but assumed Greek nationality afterwards.

The wording of Article 6 may lead to difficulties in its application because it does not make clear whether or not it applies exclusively to major or minor crimes. It simply implies that it must be illegal. Some authors contend that an offense is punishable if it is a petty offense. The opinion that the act must be a major or minor crime seems to be in accord with the whole spirit of Article 6.

Also, there is the question of what the applicable penalty shall be in the event that the law of the country where the act took place provides for a milder punishment than the law of Greece. It appears that the Greek law applies even when the penalty which it requires is severer.

If the offense committed abroad is a minor crime, prosecution must be requested either by the victim or the country where the act took place (paragraph 3). Petty offenses are punishable only where the law expressly so provides (paragraph 4).

Article 7 has its roots in the protective principle and is designated to protect Greeks against whom an offense may be perpetrated abroad by aliens. It provides that the offense must be a major or minor crime according to the law of the country where it occurred as well as to Greek law. The injured party must be a Greek citizen at the time of the commission of the crime and it is irrelevant if he acquired another citizenship subsequently.

Article 8 specifies that Greek criminal law shall apply to the crimes without restriction, specified in Articles 5 to 7, to wit, without respect to the nationality of the perpetrator, to the place of commission, and to the gravity of the crime. The enumeration of the crimes in Article 8 is exhaustive, hence, any crime not mentioned therein shall be tried under Articles 5 to 7, provided that the conditions set out therein met. Those crimes are:

(a) Acts of high treason or treason against Greece;

(b) Offenses against the national defense;

(c) Offenses committed by a Greek holding a public office;

(d) Acts against Greek public officials during the performance of their official duties, or with relation to such duties;

(e) Perjury in a proceeding pending before a Greek authority;

(f) Piracy;

(g) Offenses against the currency;

(h) Unlawful traffic in narcotics;

(i) Commerce in obscene literature;

(j) Any offense for which the application of Greek law is provided by international agreement.

Articles 9, 10, and 11 specify that if the perpetrator has committed a crime abroad and was convicted or acquitted, or if the prosecution of the act has been barred for lapse of time, or pardoned, or if prosecution has not been requested by the foreign country, it may not be prosecuted in Greece. If the perpetrator has served part of the senteence, that time shall be deducted from a punishment subsequently imposed by the Greek court for the same offense (Article 10). If a Greek national has been convicted abroad for a crime which entails additional punishment according to Greek law, the Greek court may impose such punishment. Likewise, the Greek court may impose security measures, if they are provided for by the Greek law. A translation of the above-mentioned Articles follows in the Appendix.

APPENDIX

TRANSLATION FROM THE GREEK

Articles 5–11, Greek Criminal Code

Art. 5, par. 1. Greek criminal laws shall apply to all offenses committed within the State, even if the offender is an alien.

Par. 2. Greek ships and planes shall be regarded as Greek territory, wherever they are, unless subject to alien jurisdiction, in accordance with international law.

Art. 6, par. 1. Greek criminal laws shall apply to major and minor crimes committed abroad by Greek citizens if such acts are punishable according to the law of the place of the commission, or if that place is not subject to the sovereignty of any State.

Par. 2. Prosecution may be instituted against an alien who was a Greek at the time of the commission of the crime as well as against anyone who acquired Greek citizenship after the commission of the act.

Par. 3. In the case of minor crimes, it is necessary for the application of paragraphs 1 and 2 that either the injured party or the country where the act occurs, requests the prosecution of the perpetrator.

Par. 4. Petty offenses committed abroad are punished only where the law expressly provides therefor.

Art. 7, par. 1. The Greek criminal law shall apply to acts committed by aliens abroad against Greek nationals if such acts are major or minor crimes under Greek law and are also offenses where committed or if the place of commission is not subject to the sovereignty of any State.

Par. 2. The provisions of paragraph 3 and 4 of Article 6 shall be applicable to this Article.

Art. 8. The Greek criminal laws shall apply to the following acts regardless of the nationality of the perpetrator and the place of commission:

(1) High treason or treason against the Greek State;
(2) Offenses against the national defense;
(3) Offenses committed by Greek officials;
(4) Acts against Greek officials during the performance of their duties or in relation to such duties;
(5) Perjury in proceedings pending before Greek authorities;
(6) Piracy;
(7) Offenses against the currency;
(8) Slave traffic;
(9) Unlawful traffic in narcotics;
(10) Commerce in obscene literature;
(11) Any other case where the application of Greek law is provided for by international agreements.

Art. 9, par. 1. Prosecution for an act committed abroad may not be instituted:

(a) If the perpetrator was tried abroad and acquitted or has served the penalty imposed;
(b) If the prosecution of the act or the penalty imposed has been barred for lapse of time;
(c) If no prosecution was requested, although required by the law of the place of commission.

Par. 2. These provisions do ont apply to the acts specified in Article 5.

Art. 10. A punishment executed abroad shall be deducted from a punishment subsequently imposed for the same offense by the Greek courts.

Art. 11, par. 1. If a Greek national was convicted abroad of an act which entails additional punishment according to Greek law, the Greek court may impose such punishment.

Par. 2. Likewise, the Greek court may impose security measures upon a Greek citizen who has been convicted or acquitted by foreign courts, if such measures are provided for by the Greek law.

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Hungary

Law No. V of 1961 on the Criminal Code of the Hungarian People's Republic,[1] provides for the international effects of the criminal laws in Sections Four through Seven, which read as follows:[2]

Effect of criminal law as to territory and persons

Sec. 4. (1) Hungarian law shall apply to crimes committed in Hungary and also in cases where a Hungarian citizen commits abroad an act considered a crime under Hungarian law.

(2) A crime committed outside the borders of the Hungarian People's Republic but on a Hungarian warship, a Hungarian military aircraft or a Hungarian merchant ship on the high seas or on a Hungarian civil aircraft in flight shall be judged in the same manner as crimes committed in Hungary.

Sec. 5. Hungarian law shall also apply to acts committed by foreign citizens abroad if the act:

(a) Is a crime under Hungarian law and also punishable under the law of the place of commission or

(b) If it is a crime defined in chapters IX and X of this Act and in title II of chapter XIII, regardless of whether it is punishable under the law of the place of commission or not, provided in both cases that the Procurator General orders criminal proceedings to be instituted.

Sec. 6. A sentence served as a result or preliminary custody resulting from the decision of a foreign court shall be included in the punishment meted out by the Hungarian court for the same act regardless of whether the crime has been committed in Hungary or abroad.

Sec. 7. International treaties (Conventions) and failing these international practice shall be applied to the criminal responsibility of persons enjoying extraterritoriality or personal immunity. The question of international practice shall be decided upon by decision of the Minister of Justice.

The best commentary of the Hungarian criminal code is: *A büntető törvénykönyv kommentárja*. Budapest. 1968. 2 volumes, which is regarded as the semi-official commentary on the criminal laws of Hungary.

Italy

The Italian penal law has, for a long time, followed the so-called territorial principle whereby the applicability of the criminal law is limited to the territory of the State.

However, due to what Italian scholars call "the universal vocation of the penal law,"[3] it also recognizes extraterritorially binding effects in cases prescribed by law (Arts. 7-10 of the Italian Penal Code).

Such cases may be divided into two major groups. In the first group (Arts. 7 and 8), the application of the Italian criminal law to acts committed abroad by its citizens and aliens alike, is subject to no conditions whatsoever. For those under the second group (Arts. 9 and 10), the application of Italian criminal

[1] *Magyar Közlöny*, No. 97, December 22, 1961, p. 939.
[2] *Criminal Code of the Hungarian People's Republic*. Budapest, Corvina Press, 1962. p. 32.
[3] Giuseppe Bettiol. *Diritto penale*. Padova, 1969, p. 134 ff.

law is dependent upon the fulfillment of certain conditions. The translation of these four Articles is as follows:[1]

Art. 7. Crimes committed abroad. A citizen or foreigner who commits any of the following crimes while on foreign territory shall be punished according to Italian law:

1. Crimes against the State;
2. Crimes of counterfeiting the seal of the State and using such counterfeit seal;
3. Crimes of counterfeiting coins which are of legal tender in the territory of the State, or revenue stamps, or Italian public securities;
4. Crimes committed by public officials in the service of the State, abusing their powers or violating the duties inherent in their functions;
5. Any other offense for which special provisions of the law or international conventions prescribe the applicability of Italian criminal law.

Art. 8. Political crimes committed abroad. A citizen or foreigner who commits on foreign territory a political crime other than those specified in (1) of the preceding Article shall be punished under Italian law, upon the request of the Minister of Justice.

If the crime is one which is punishable on the denunciation of the injured party, such action is also required in addition to the above request.

For the purposes of penal law, any crime which damages the political interests of the State, or the political rights of a citizen, is a political crime. A common [ordinary] crime, inspired wholly or in part by political motives, is likewise considered a political crime.

Art. 9. Ordinary crime committed by a citizen abroad. A citizen who, apart from the cases specified in the two preceding Articles, commits a crime while on foreign territory for which the Italian law provides the death penalty or imprisonment for life, or imprisonment for not less than three years shall be punished under that law provided that he is in the territory of the [Italian] State. If it concerns a crime for which a punishment of deprivation of personal liberty for a lesser period is prescribed, the guilty party shall be punished at the request of the Minister of Justice, or upon the petition or denunciation of the injured party.

For cases provided for in the preceding provisions, when the crime has been committed to the prejudice of a foreign State or of a foreigner, the guilty person shall be punished at the request of the Minister of Justice, provided that his extradition has not been granted, or has not been agreed to by the government of the country in which he committed the crime.

Art. 10. Ordinary crime committed by a foreigner abroad. A foreigner who, apart from the cases specified in Articles 7 and 8, commits on foreign territory to the damage of the State or of a citizen, a crime for which Italian law provides the death penalty, or penal servitude for life, or imprisonment for not less than one year, shall be punished according to such law, provided he is in the territory of the State and there is a request from the Minister of Justice, or a petition or denunciation by the injured party.

If the crime is committed to the prejudice of a foreign State or a foreigner, the guilty party shall be punished according to Italian law and at the request of the Minister of Justice, always provided that:

1. He is on the territory of the State;
2. The crime is one for which the death penalty or imprisonment for life or imprisonment for a period of not less than three years is provided;
3. His extradition has not been granted or it has not been agreed to by the Government of the country in which he committed the crime, or by the country to which he belongs.

None of the numerous commentaries on penal law is in English. The following Italian publications are pertinent.

1. Novissimo digesto italiano (v.5). Torino, 1960.
2. Enciclopedia del diritto (v. 3). Milano, 1962.
3. Giuseppe Bettiol. Diritto Penale. Padova, 1969.
4. Carlo Saltelli. Commento teorico del codice penale. Roma, 1956.
5. Gennaro Gaudagno. Manuale del diritto penale. Roma, 1962.

[1] *Codice penale-Codice di procedura* (Penal Code and Code of Penal Procedure) Firenze, 1970, p. 30ff.

6. P. Quadri. Diritto internazionale penale. Padova, 1943.
In the French language, the following study is worth citing:
Le droit penal internationale. Leyden, 1965.

THE NETHERLANDS

The applicability of the Dutch Criminal Code, Articles 2–8, depends on the place where the punishable acts are committed (Arts. 2 and 3), the people who commit them (Arts. 5 to 7), and the nature of the acts (Arts. 4–7).

Articles 2 to 7 deal only with the question of the extent to which a Dutch judge must apply the Dutch law. A judge does not have to apply foreign law, although he must sometimes take it into account (Art. 5 under 2).

The administration of justice uses two criteria to determine the scope of its task under the Criminal Code:

(1) The extent to which the Dutch courts exercise jurisdiction over Dutch subjects. The application of the Criminal Code may be limited to cases in which the subjects of the State are guilty of punishable acts (personality principle) or to cases in which the people who are on the territory of the State commit punishable acts (territoriality principle).

(2) The interests which the Government protects in her Criminal Code. The Criminal Code may be limited to the protection of national interests (protective principle) or be extended to the protection of both national and foreign interests (universality principle).

The most important principle is the territoriality principle, i.e., the exercise of the authority of the State on its own territory. This rule may create a problem as to what is to be considered the place of the crime. When deciding where an act was committed, consideration must be given to the place where the perpetrator was in action as well as to the place where a given instrument took effect.[1]

Article 3 of the Dutch Criminal Code is an important extension of the applicability of the Code, which is also based on the principle of territoriality, in that it covers punishable deeds committed on board a Dutch vessel or airplane outside Dutch territory. This is not a pure application of the public international law adage that the "vessel is territory," for then foreign vessels inside Dutch territorial waters would be considered to belong to the territory of their land of origin and Dutch law would not be applicable to acts committed on board these vessels. According to Article 2, the Dutch Criminal Code is applicable in these cases. In practice, however, this rule is applied circumspectly if at all, in view of the principle expressed in Article 8 that Article 2 should find application only subject to the principles of public international law.[2]

The personality principle (also called the active nationality principle), implies that people belonging to one and the same state according to nationality, are, in principle, bound by their national criminal law wherever they are. This can be seen in Article 5, first paragraph, under number 1, in its purest form. In practice, however, the "good behavior" of the Dutch people abroad does not have to go beyond that of the subjects of the country in which they are. Therefore, the rule exists that there must be incrimination under both legal systems. Under Dutch law, the crime has to be a major one, but under foreign law, it might be an offense of a lesser degree, provided, however, that it is still regarded under the latter law as a punishable act.

The protective principle implies that the Dutch Criminal Code is applicable to acts, regardless of who commits them or where they are committed, which touch upon the national legal order. Formulated in this extensive way, one may say, as Pompe does,[3] that this protective principle is the underlying idea in Articles 2, 3, 5, and 6.

The universality principle (also called the passive nationality principle), is expressed in Article 8. When applying this Article, it should not be forgotten that the applicability of Articles 2 to 7 may be, as already stated, limited by the

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[1] Hoge Raad 6 april 1915, *Nederlandse Jurisprudentie 1915*, p. 427. (A smuggler, standing on German soil, pulled a horse across a border canal by means of a rope).

[2] O. Q. van Swinderen, *Esquisse du droit pénal actuel dans les Pays-Bas et à l'étranger*, *Groningue, Noordhoff*, 1891, p. 60.

[3] W. P. J. Pompe, *Handboek van het Nederlandse Strafrecht*, 5th ed. Zwolle, W. E. J. Tjeenk Willink, 1959, p. 504.

exceptions in public international law. Apart from the exceptions of unwritten public international law, the exceptions agreed upon in international treaties are applicable. A translation of the afore-mentioned Articles is to be found in the Appendix.

Appendix

Pertinent provisions of the Dutch Criminal Code

Art. 2. The Dutch Criminal Code shall apply to anyone who renders himself guilty of any punishable deed within the Kingdom in Europe.

Art. 3. The Dutch Criminal Code shall apply to anyone who renders himself guilty of any punishable deed outside the Kingdom in Europe on board a Dutch vessel or aircraft.

Art. 4. The Dutch Criminal Code shall apply to anyone who renders himself guilty of any of the following offenses outside the European territory of the Kingdom:

1. One of the major crimes described in Articles 92–96, 97a, 98–98c, 105, and 108–110;

2. One of the major crimes described in Articles 131–134bis and 189 if the punishable deed or major crime, which is mentioned in these Articles is a major crime in the meaning of paragraph 1;

3. Any major crime regarding coins, currency notes or banknotes, seals or stamps;

4. Forgery in debentures or certificates of debt of the Dutch Government or a Dutch province, municipality or public institution; counterfoils; dividend and interest coupons belonging to these papers including the certificates issued instead of those papers; and the intentional use of such a false or forged paper as if it were real and genuine;

5. One of the major crimes described in Articles 381–385, 409, and 410, or the minor crime described in Article 446a;

6. The major crime described in Article 207a.

Art. 5. The Dutch Criminal Code shall apply to a Dutch citizen who outside the European territory of the Kingdom renders himself guilty of:

1. One of the major crimes described in Titles I and II of the Second Book and in Articles 206, 237, 272, 388, and 389;

2. An act which is considered a major crime according to the Dutch Criminal Code and is penalized by the law of the country in which it is committed.

The prosecution may also take place, if the suspect did not become a Dutch citizen until after the act was committed.

Art. 6. The Dutch Criminal Code shall apply to a Dutch official who outside the European territory of the Kingdom renders himself guilty of one of the major crimes described in Title XXVIII of the Second Book.

Art. 7. The Dutch Criminal Code shall apply to the captain and all persons on board a Dutch vessel who outside the European territory of the Kingdom, or also off the vessel, render themselves guilty of one of the punishable acts described in Title XXIX of the Second Book and Title IX of the Third Book.

Art. 8. The applicability of Articles 2–7 is limited by the exceptions recognized in public international law.

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POLAND

I. *Pertinent Provisions*

Provisions relating to criminal jurisdiction over acts committed outside the Polish People's Republic are contained in the Criminal Code of April 19, 1969.[1] They read as follows:

Chapter XVI. Responsibility for Offenses Committed Abroad

Sec. 113. The Polish penal law shall apply to Polish citizens who committed an offense abroad.

Sec. 114, par. 1. The Polish penal law shall apply to aliens who commit an offense abroad provided such an act is likewise recognized as an offense by the law in force in the place of its commission.

Par. 2. If differences exist between these laws, the differences may be considered in favor of the perpetrator in applying the Polish law.

Sec. 115. Regardless of the provisions in force at the place of commission of an offense the Polish penal law shall apply to aliens in case of the commission of:

(1) An offense against the essential political or economic interests of the Polish People's Republic,

(2) An offense subject to prosecution by virtue of international agreements.

Sec. 116. If the act committed abroad does not constitute an offense at the place of its commission, the prosecution shall take place on the order of the Prosecutor General of the Polish People's Republic.

Sec. 117. In case of a conviction in the Polish People's Republic, an offense of which a person had been convicted abroad, the court shall deduct from the sentence the whole or a part of the sentence served abroad, taking into consideration the differences between those sentnces.

Sc. 118. A Polish citizen may not be extradited to another country.

Sec. 119. An alien who enjoys the right of asylum may not be extradited to another country.

II. *Citations and Commentaries*

The principles, contained in the provisions of the 1969 Criminal Code pertaining to offenses committed abroad, are discussed by two prominent authorities on criminal law, namely Professor Igor Andrejew, who took part in drafting the Code, and Professor Witold Swida.

Professor Igor Andrejew states:[2]

II. An act committed outside Poland (and not aboard a Polish vessel) may be considered a crime in the light of Polish law on a basis other than the territorial principle.

Thus, if an act is committed by a Polish citizen, he is responsible on the basis of Polish law regardless of whether the act occurred in or outside Poland (personality principle, Sec. 113). However, if an act was committed outside Poland in a place where the act does not constitute an offense, prosecution takes place only on the order of the Prosecutor General of the Polish People's Republic (Sec. 116).

Therefore the definition of the nationality principle given in the Criminal Code is fairly broad. On the one hand, a Polish citizen, regardless of where he is, must comply with his national law. If he is in a country which permits polygamy, this does not mean that he should not have to comply with the principle of monogamy prevailing in Poland. On the other hand, it would be useless to prosecute a Polish citizen for every act which is not considered an offense at the place of its commission. In order to avoid conflicting decisions, the Code makes the prosecution dependent on the decision of the Prosecutor General of the Polish People's Republic.

Polish law explicitly proclaims the principle that a Polish citizen is not subject to extradition, i.e., that he cannot be surrendered to the authorities of another state (Sec. 118).

III. An alien may be tried by a Polish court for an act committed abroad and recognized as an offense both by Polish law and the law in force at the place of its commission (Sec. 114, par. 1). This is a subsidiary responsibility since as a

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[1] *Dziennik Ustaw* (Journal of Laws), No. 13, 1969, text 94.

[2] Igor Andrejew, *Polskie Prawo Karne w Zarysie* (Outline of Polish Criminal Law). 2nd ed. Warsaw, 1971, p. 63-64.

rule the perpetrator is subject to extradition to the authorities of the state where the offense was committed.

In applying Polish law to an alien, the court may take the differences between Polish law and the law in force at the place of the commission of the offense into consideration in favor of the perpetrator (Sec. 114, par. 2).

IV. In some instances an alien is responsible for an act committed abroad even if the act is not recognized as an offense in the place of its commission. These instances refer to offenses against vital political and economic interests of the Polish People's Republic (protective principle, Sec. 115,(1)). Prosecution in such cases is justified by the particular importance of the object of protection because of which [i.e., importance] the prosecution cannot depend on the legal qualification of the act in the light of foreign legislation which sometimes may not only tolerate such acts but even directly encourage them. Prosecution takes place on the order of the Procurator General of the Polish People's Republic (Sec. 116).

Offenses against vital political and economic interests of the Polish People's Republic are dealt with in Chapter XIX (Secs. 122-135) of the Criminal Code. They include: violent overthrow of the government(Sec. 123), espionage (Sec. 124), terroristic acts (Sec. 126), sabotage (Sec. 127), violent overthrow of the government, espionage, terroristic acts and sabotage committed against an allied power (Sec. 129),[3] acts committed by persons authorized to represent a governmental or social organization or institution in dealings with a foreign government, foreign organizations or enterprises (Sec. 130), economic sabotage (Sec. 134), and, finally currency or customs sabotage (Sec. 135).

According to Professor Swida different principles concerning the applicability of domestic law complement each other and he discusses how the 1969 Criminal Code regulates this question in his treatise.[4]

A translation of Professor Swida's relevant remarks follows:

2. *The Territorial Principle*

218. The fundamental principle of the application of Polish criminal law is the territorial principle (Sec. 3). According to this principle, any person, either a Polish citizen or an alien, who commits an offense in the territory of the Polish People's Republic shall be punishable according to Polish criminal law (p. 99).

3. *The Personality Principle*

224. In addition to the territorial principle, our Code bases the applicability of criminal law on the personality principle, stating in Section 113 that criminal law applies to a Polish citizen who has committed an offense abroad. The Code does not introduce the restriction contained in Section 6 of the 1932 Criminal Code which provided that the prerequisite of responsibility is that an act be considered an offense also by the law in force in the place of its commission. Now a Polish citizen is responsible for an offense committed abroad as well, even if the act is not an offense according to the law in force in the place of its commission (p. 100–101).

4. *The Protective Principle*

225. The Criminal Code also uses the protective principle as a supplement to both territorial and personality principles. This principle is introduced in two variations: (a) simple, also known as general or limited (Sec. 114) and (b) strict, also known as special or unlimited (Sec. 115 (1) and (2)).

226. According to the simple protective principle, Polish criminal law applies to an alien who has committed an act abroad which is also recognized as a criminal offense under the law in force in the place where the act was committed (Sec. 114 par. 1). In case of differences between these laws, the differences may be taken into account in favor of the perpetrator in applying Polish law (Sec. 114, par. 2).

227. The second variation of the protective principle is called the strict protective principle because it does not make the punishability dependent on establishing that an offense is likewise punishable under the law of the place of its commission. This principle applies to especially serious offenses whose unqualified prosecution is necessary from the point of view of the interests of the

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[3] According to Andrejew, any act detrimental to another socialist state also endangers the interests of the Polish People's Republic.

[4] *Prawo Karne, Część Ogólna* (Criminal Law, General Part), Warsaw, 1970, p. 99–101.

Polish People's Republic. These offenses are crimes against the vital political and economic interests of the Polish People's Republic as defined in Chapter XIX of the Code, with the exception of treason (Sec. 122) and entering into an agreement with a hostile organization (Sec. 132) which can be committed only by a Polish citizen. According to the strict protective principle, an alien is responsible for the offenses to which this principle applies, regardless of whether they are punishable in the place of their commission. The clause that in case of differences between the foreign law and Polish law, the court may take these differences [into account] in favor of the perpetrator, also is not applicable (p. 101).

5. *The Universality Principle*

228. Regardless of the provisions prevailing at the place of the commission of an offense, Polish criminal law applies to aliens if they have committed an offense [which is subject to] prosecution according to international law (Sec. 115 (2)). Naturally the prerequisite for prosecution is the punishability of the offense according to Polish law and not only as defined in an international agreement concluded by the Polish State (p. 101–102).

ROMANIA

THE CRIMINAL CODE*

Chapter II. The Applicability of Criminal Law.

The Personality [Principle] in Criminal Law

Art. 4. Criminal law shall apply to offenses committed outside of the country's territory if the perpetrator is a Romanian citizen or if, without citizenship, he is a resident in the country [Romania].

The Reality [Principle] of Criminal Law

Art. 5. Criminal law shall apply to offenses committed outside of the country's territory, against the security of the Romanian State, or against the life of a Romanian citizen, or resulting in grave bodily injury or injury to his health, when committed by a foreign citizen or by a person without citizenship who has no domicile in the country's territory.

Trials for the offenses specified in the preceding paragraph shall be allowed with the prior authorization of the General Prosecutor.

The Universality [Principle] of Criminal Law

Art. 6. Criminal law shall also apply to offenses other than those stated in Article 5, paragraph 1, committed outside of the country's territory by a foreign citizen or by a person without citizenship who has no domicile in the country's territory, if:

(a) the fact is considered an offense also by the criminal law of the country where it has been committed;

(b) the perpetrator is in the country.

For offenses against Romanian State interests or against a Romanian citizen, the perpetrator may also be tried when his extradition has been obtained.

The preceding paragraph shall not apply when, according to the law of the State in which the perpetrator committed the offense, any clause exists which forbids criminal prosecution, the continuation of a criminal trial or the execution of the penalty, or when the penalty has been executed or is considered to have been executed. When the penalty [imposed] has not been executed or has been executed only partially, [the trial] shall proceed according to the legal provisions stated for the recognition of foreign judgments.

Criminal Law and International Agreements

Art. 7. Articles 5 and 6 shall apply if an international agreement does not state otherwise.

Immunity From Jurisdiction

Art. 8. Criminal law shall not apply to offenses committed by diplomatic representatives of foreign countries or by other persons who, in conformity with international conventions, are not subject to the criminal jurisdiction of the Romanian State.

**Codul penal al Republicii Solialistic România,* Bucharest, 1968.

Extradition

Art. 9. Extradition shall be accorded or it may be requested based on an international convention or on reciprocity and, in absence of these, by virtue of the law.

Scandinavian Countries

I. *Introduction*

Extraterritorial criminal jurisdiction is sometimes referred to as international criminal law. However, Scandinavian writers prefer to use this term only for the criminal laws which have originated from international institutions and from agreements between individual states.[1]

This report deals with the applicability of national provisions in respect to space, because it is difficult to discuss the somewhat narrower subject of extraterritorial jurisdiction alone. The basic jurisdictional principle of Scandinavian criminal law, as of Anglo-American criminal law, is the territorial principle. However, the Scandinavian countries have had supplementary provisions on extraterritorial jurisdiction for more than a century. There are also Scandinavian provisions which make it possible to consider that a criminal act has been committed where the actual or intended consequences of the act have taken effect, and it may be doubtful whether such jurisdiction should be considered as territorial or extraterritorial jurisdiction.[2]

Part II, about the historical development, deals briefly with the relative place of Scandinavian criminal law within the Western World, because it is desired to stress that the current Scandinavian codes are closely related both to Anglo-American and to Continental European criminal law. The Scandinavian emphasis on territorial jurisdiction points to the relationship with English law.

Part III, about the current criminal codes, discusses the actual Scandinavian provisions in some detail. The Scandinavian experience with dual territorial and extraterritorial jurisdiction has been good, and the current Scandinavian provisions have, in principle, great similarity to the jurisdictional provisions of the proposed Federal Criminal Code.[3]

Appendices A, B, and C contain the translations of the jurisdictional provisions in the current criminal codes of Denmark,[4] Norway,[5] and Sweden[6] respectively. *Appendix D* is a copy of Chapter 10 on criminal jurisdiction in the English version of Professor Andenaes' standard text on Norwegian criminal law.[7] This appendix was included because it is representative of the way in which Danish Norwegian, and Swedish writers normally present the rationale of the Scandinavian provisions on criminal jurisdiction. It also illustrates how easy it would be to apply this approach to Chapter 2 of the proposed Federal Criminal Code.[8] It is probably this kind of systematic or rational approach which Professor Damaska has in mind when he states that: "Continentals would consider traditional common law jurisdictional notions less rational than their own."[9]

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[1] Stephen Hurwitz . *Den Danske Kriminalret*. 4th ed. by Knud Waaben. Copenhagen, G.E.C. Gad, 1967. p. 109.

[2] *Id.*, p. 103.

[3] Final Report of the National Commission on Reform of Federal Criminal Laws: a Proposed new Federal Criminal Code (Title 18, United States Code), in *U.S. Congress, Senate. Committee on the Judiciary.* Hearings before the Subcommittee on Criminal Laws and Procedures on February 10, 1971. Washington, G.P.O., 1971. Part 1, p. 155-514.

[4] *The Danish Criminal Code;* with an introduction by Knud Waaben. Copenhagen, G.E.C. Gad, 1958. 119 p. Hereafter referred to as *The Danish Criminal Code.* (The Use of the terms "criminal code" and "penal code" does not indicate any substantial difference between the Scandinavian codes. Both translations are correct).

[5] *The Norwegian Penal Code;* by Harald Scholdager and Finn Backer, *trans.* with an introduction by Johannes Andenaes. South Hackensack, N.J., Fred B. Rothman, 1961. 167 p. Hereafter referred to as *The Norwegian Penal Code.*

[6] *The Penal Code of Sweden;* by Thorsten Sellin *trans,* with an introduction by Ivar Strahl. Stockholm, the Ministry of Justice, 1965. 82 p. Hereafter referred to as *The Swedish Penal Code.*

[7] Johannes Andenaes. *The General Part of the Criminal Law of Norway.* South Hackensack, N.J., Fred. B. Rothman, 1965. p. 315-322.

[8] *Supra* note 3.

[9] *The National Commission on Reform of Federal Criminal Laws.* Working Papers. Washington, D.C., G.P.O. 1971. V. 3, p. 1479.

II. *The Development of Scandinavian Criminal Law*

The historical basis for Scandinavian criminal law is the same as that for Anglo-American criminal law, namely, the laws of the North Germanic peoples who settled around the North Sea. There was much interaction between these peoples who had excellent means of seaward transportation while their means of overland transportation were poor. This common development lasted up to the Norman invasion of England in 1066. Two American scholars have discussed the later developments in such a way that they supplement each other. Orfield wrote in 1953: [10]

> A study of the growth of criminal law in the Scandinavian states indicates that there are many close parallels with the growth of the criminal law in England. Concepts of private vengeance existed contemporaneously in both groups. There were outlawry, ordeals, and the use of compurgations and oath helpers in both groups. Movements to eliminate the wide use of the death penalty occurred side by side in both groups. A century ago the Scandinavians became interested in American methods of prison administration. During the past century all the Scandinavian states have developed modern codes of substantive and of procedural criminal law, which deserve study in other states when modernization of the criminal law is being attempted. The Scandinavian states have developed a unique alternative to the juvenile courts, namely, the use of committees and boards instead of courts. Criminal penalties are light, yet the Scandinavian states have a much lower percentage of crime than the United States. Scandinavian criminal procedure has moved away from the inquisitorial principle to the accusatorial.

Gerhard O. W. Mueller wrote a decade later: [11]

> Here was a legal system which had spawned our own common law, which was thoroughly continental, yet, because of its historical ties with the British Isles, and a stubborn resistance against mid-European imperialization, had stayed somewhat aloof of the Roman law influences which had reshaped the law of the continent proper. Norwegian law, perhaps like Scandinavian law generally, has therefore become a virtual link between the Roman based continental legal systems and the common law though, without question, its legal ties, like its geography, are much closed with Central Europe than with England and America.

Professor Mueller seems to reflect the school of thought that it is possible to divide the entire Western World up into either common law systems or civil law systems. A Swedish writer has defended this view in some detail,[12] even though he also agrees with the late Professor Max Rheinstein that "the differeneces between the several families of the civil law group are so considerable that it might be justified to regard Nordic [i.e., Scandinavian] laws as another, though peculiar different, family of the civil law group." [13] However, most Scandinavian writers simply reject the idea that Scandinavian law can be classified as either civil law or as common law,[14] primarily because they feel that the so-called civil law group is too fragmentated to be considered one group.[15] The general Scandinavian (and to a large extent European) trend seems to be to consider all the

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[10] Lester Bernard Orfield. *The Growth of Scandinavian Law*. Philadelphia, Univ. of Pennsylvania Press, 1953. p. xv–xvi.

[11] Gerhard O. W. Mueller, "Editor's preface," in: *The General Part of the Criminal Law of Norway*, *supra*, note 7, p. x.

[12] Jacob W. F. Sundberg, "Civil Law, Common Law and the Scandinavians," *in* 13 *Scandinavian Studies in Law* p. 180-205 (1969).

[13] *Id.* p. 205.

[14] The Danish Committee on Comparative Law, *Danish and Norwegian Law*. Copenhagen, G.E.C. Gad, 1963. p. 68; "Danish-Norwegian Law is neither part of the "common law" nor of the "civil law" system"; Bernhard Gomard, "Civil Law, Common Law and Scandinavian Law, "*in* 5 *Scandinavian Studies in Law* p. 33 (1961); "the question whether Scandinavian law is a civil—or a common law system is not meaningful"; Peter Lødrup, "Norweigian Law: a Comparison with Common Law, "*in:* 6 *St. Louis University Law Journal* 520 (1961); "if Norwegian law is classified as "civil law" and thereby declared to be based on Roman Law, the labeling is simply incorrect"; Hilding Eek, "Evolution et structure du droit scandinave," *in* 14 *Revue Hellenique de Droit International* p. 38 (1961); Scandinavian law forms "un troisséme systéme"; Folke Schmidt, "Preface, "*in* 1 *Scandinavian Studies in Law* p. 5 (1957); "Although the Scandinavian legal systems are historically independent, they undoubtedly have much in common both with the systems based on Roman law and with those based on common law."

[15] Stiig Inul. *Forelaesninger over Hovedlinier i Europaeisk Rets Udvikling fra Romerretten til Nutiden*. [Translated title: Lectures over the major trends within the development of European law from Roman Law [i.e., the fall of the Roman Empire] and until contemporary time]. Copenhagen, G.E.C. Gad, 1970. 199 p.

legal systems of the Western World as belonging to one large group of relatively closely related legal systems. As it has been pointed out by the Swiss Professor Schnitzer,[16] all the legal systems of this Euro-American group are mixtures of Roman and Germanic law. Schnitzer clarifies his theory further by stating that this whole group has "developed out of a mixed Roman and Germanic civilization imbued with Christianity." [17]

The Swedish Professor Malmström has written a good article in English [18] about the different comparative approaches, and his opinion seems to be representative of a rather generally held Scandinavian view when he accepts Schnitzer's proposal about organizing the individual legal systems in a way similar to that of a color scale according to the relative importance of Roman ing arrangement: [19]

		CONTINENTAL EUROPEAN GROUP		
Common law (England, U.S.A., etc.)	Scandinavia	Germany Switzerland Austria	France Belgium Luxemburg Holland	Italy Spain Latin America
			LATIN GROUP	

Malmström himself admits that his grouping of the Euro-American legal systems is not a perfect solution, but it seems to be a more useful tool for comparative purposes than is the mere division of the Western World into "civil law systems" and "common law systems."

III. *The Current Criminal Codes*

The jurisdictional provisions in the current criminal codes of Denmark,[20] or Germanic elements. This would, according to Malmström, lead to the follow- Norway,[21] and Sweden [22] are all arranged in the same way: (A) the territorial principle is first established as the general jurisdictional principle; (B) the personality principle is then applied to fill in certain lacunae which have been left by the territorial provisions; (C) the universality principle is finally applied to fill in the lacunae which were left by the two previous principles. The provisions apply to all criminal offenses, regardless of whether they are described in the special part of the criminal codes or in other statutes.

The wording of the current Norwegian jurisdictional provisions has remained practically unchanged since 1951,[23] and the present provisions have much likeness to the corresponding provisions in the Norwegian Criminal Code of 1902.[24] Differently worded provisions which made the territorial, the personality, and the universality principles applicable to most serious crimes had already been introduced in the Norwegian Criminal Code of 1842.[25] The wording of the current Danish jurisdictional provisions has remained virtually unchanged since 1930,[26] and is quite similar to the original, somewhat weaker, provisions which were enacted in 1866.[27] The wording of the present Swedish jurisdictional provisions dates back to 1965,[28] and they were, in principle, introduced by the

[16] Adolf F. Schnitzer, *Vergleichende Rechtslehre*, 2nd ed. Basel, Varlag für Recht und Gesellschaft, 1961. 2 v.

[17] *Id.* v. 1, p. 139. [The quotation is translated from the German by the writer of this report].

[18] Åke Malmström, "The System of Legal Systems," *in* 13 *Scandinavian Studies in Law* (1969) p. 128-149.

[19] *Id.*, p. 148.

[20] *The Danish Criminal Code*, Chapter 2 (See Appendix A).

[21] *The Norwegian Penal Code*, Chapter 1 (see Appendix B).

[22] *The Swedish Penal Code*, Chapter 2 (See Appendix C).

[23] *Almindelig Borgerlig Straffelov av 22 Maj 1902* med senere endringer og tilleg sist ved Lov av. 18 Juni 1971. Oslo, Grøndahl & Søn, 1971. p. 7–8. (The notes on pages 6–7 indicates that the basic text of Sec. 12 was enacted in 1951, and that some minor changes were made in 1963 and in 1971).

[24] Francis Hagerup, *Almindelig Borgerlig Straffelov av 22 Mai 1902*. Kristiania, Aschehoug, 1903. p. 10-17.

[25] *Lov angaaende Forbrydelser av 20 August 1842 Sec. 1-8, in* 1842 *Love*, Anordninger, Kundgjørelser, aabne Breve, Resolutioner, m.m. 1943, p. 354–355. Oslo, Grøndahls Forlag.

[26] Lovbekendtgørelse Nr. 347 af 15. august 1967 af *Borgerlig Straffelov*. Copenhagen, Jespersen of Pios Forlag, 1970. p. 6-9 (An editorial change was made in Sec. 11 in 1939, *see* Straffeloven af 15. april 1930. Copenhagen, G.E.C. Gad, 1958. p. 12).

[27] *Almindelig borgerlig Straffelov* af 10. Februar 1866. Copenhagen, Jul. Schlichtkrull's Forlag, 1892. p. 1-3.

[28] *Brottsbalk*, Chapter 2, in Sveriges Rikes Lag. 91st ed. Stockholm Norstedt, 1970 p. 712-719.

Swedish Criminal Code of 1864.[29] This Code was divided into a general and a specific part, as is usual in European criminal codes. However, the general arrangement of the Swedish Criminal Code was changed in 1965 in order to make it conform better with the original arrangement of 1754.[30] The Swedish Criminal Code is, technically, a chapter of the general Swedish lawbook or code, *Sveriges Rikes Lag*, which has been uninterruptedly in force since 1734.

A. *Territorial Jurisdiction*

Scandinavian criminal law has from olden times recognized *the territorial principle* in the sense that the national criminal law (legal competence) applies to, and the national courts have jurisdiction (judicial competence) over, any crime committed within the national territory, regardless of the nationality of the perpetrator.[31] It is this territorial principle which the criminal codes of Denmark,[32] Norway,[33] and Sweden [34] have established as their basic jurisdictional principle. The Scandinavian words which have been translated as "territory" or "Realm" clearly include both the sea and air territory, and it seems to be generally agreed that the provisions also cover pursuit in continenti from the air or sea territory.[35] Denmark and Norway are extending the territorial principle to apply to Danish or Norwegian ships and airplanes respectively, while Sweden [36] considers such jurisdiction as extraterritorial.

B. *Extraterritorial Jurisdiction*

The territorial principle developed historically as a pragmatic and practical principle which reflected the traditional concept of sovereignty. It was never, in Scandinavia, accepted as a negative principle in the sense that a crime could be prosecuted only if it had been committed within the territorial jurisdiction.[37] The Scandinavian discussion in the middle of the 19th century indicates that it was not doubted that the state had the right to exercise extraterritorial jurisdiction, but that there was considerable doubt as to the practicability of the suggested version of the personality principle, because different countries had different concepts of what constituted a crime. Controversial subjects of the time such as duelling and bigamy, were discussed.[38]

It is interesting to note that the Royal Swedish Commission in its report of 1840 included a response from the law faculty at the University of Uppsala about the hypothetical prosecution of a returning Swedish citizen who, perfectly lawfully, had owned and sold slaves in the United States.[39]

1. *The Personality Principle*

The personality principle fills in lacunae left by the territorial principle by extending jurisdiction to include crimes which have been committed abroad by citizens or permanent residents of the respective Scandinavian country. The Danish [40] and the Swedish [41] criminal codes describe the personality principle in sweeping terms, while the Norwegian code [42] describes exactly to which criminal acts the principle applies. The Norwegian method of drafting is probably preferable from an American point of view.

It appears, from the legislative history dating back to the middle of the 19th century, that the Scandinavian personality principle can scarcely be said to have been motivated by the allegiance that citizens and permanent residents owe to their country. The main motivation for the enactment was that the Scandinavian countries, as the general rule, do not extradite their citizens or permanent residents to non-Scandinavian countries, and that consequently, it had to be made possible to prosecute citizens or permanent residents for crimes which

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[29] Ivar Strahl, "Introduction," in *The Penal Code of Sweden*, effective January 1, 1965. Stockholm, Ministry of Justice, 1965. p. 6-7.
[30] *Id.*, p. 5.
[31] Hurwitz, *supra* note 1 at 94.
[32] *Danish Criminal Code*, Sec. 6.
[33] *Norwegian Penal Code*, Sec. 12.
[34] *Swedish Penal Code*, Ch. 2, Sec. 1
[35] Hurwitz, *supra* note 1 at 95.
[36] *Swedish Penal Code*, Ch. 2, Sec. 3, No. 1.
[37] Hurwitz, *supra* note 1 at p. 94-95.
[38] Hans Thornstedt, "Svensk medborgares ansvar för brott utomlands," *in 51 Svensk Juristtidning* (1966) p. 506-517.
[39] Sweden. *Lagcommitcen*. Utlatande i anledning af Anmärkningar wid Forslaget till Allmän Chiminallag. 2nd ed., Stodkholm, B. M. Bredberg, 1840. p. 40–43.
[40] *Danish Criminal Code*, Sec. 7.
[41] *Swedish Penal Code*, Ch. 2, Sec. 2.
[42] *Norwegian Penal Code*, Sec. 12, No. 3.

they had committed abroad. The 19th century discussions also indicate that it was felt that the general preventive effect of the criminal code would be undermined if it should become impossible to prosecute a person present in the country for a crime which he undoubtedly had committed. It is a consequence of this philosophy that the relevant time for deciding citizenship or permanent residency, at least in Denmark, is the time when the criminal investigation is initiated, rather than the time when the crime was committed.[43]

The Danish and the Norwegian personality principle is limited to criminal acts which were also punishable in the country where they were committed, while Sweden does not extend this benefit to its citizens or permanent residents. Those provisions reflect the discussions previously referred to about the different concepts of such crimes as duelling, bigamy, and slavery, and criticism has been made that the relatively new Swedish Criminal Code of 1965 does not follow Danish-Norwegian law on this point.[44] However, the present Swedish solution is motivated by the desire to offer international legal assistance by being able to prosecute criminals, rather than to extradite them.[45] The shortcoming of the Danish-Norwegian provisions is that prosecution becomes impossible, if the respective foreign country does not have a criminal offense which corresponds closely to an offense described in the Danish or the Norwegian Criminal Code. For instance, it has proved impossible to prosecute Danish citizens in Denmark for defrauding innkeepers in France, because France does not have any criminal offense which corresponds close enough to Section 298, No. 3, of the Danish Criminal Code.[46]

The Swedish reference to international legal assistance refers to the fact that European international cooperation within the field of law enforcement has greatly increased within the later decades. It has been a long-standing Scandinavian practice to prosecute for crimes committed in another Scandinavian country, and to execute criminal judgments handed down by the courts of the other Scandinavian countries. The latter field is now regulated by uniform Scandinavian laws,[47] while the former is based on informal agreements and mutual understandings. A very similar trend can be seen for all of the European countries, and this is reflected by the recent European convention on the international validity of criminal judgments.[48] Normally it is this body of law which Scandinavian writers refer to when they use the term "international criminal law." [49]

2. *The Universality Principle*

The real [50] or universality [51] principle denotes that non-residents/aliens may be prosecuted for acts committed abroad when the state has a special interest in protecting itself or its citizens against such acts. The universality principle is generally accepted in Scandinavia as an unavoidable supplement to the territorial and the personality principles.[52] The Swedish [53] and the Danish [54] provisions are drafted in sweeping terms, while the Norwegian,[55] as for the personality principle, describes accurately the crimes for which the universality principle applies.

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[43] Hurwitz, *Supra* note 1 at 98-99. *See also* Andenaes, *supra* note 7 at 318-319.

[44] Thornstedt, *supra* note 37 at 514-517.

[45] Nils Arvid Teodor Beckman *and others*. 1 *Brottsbalken*. 3rd ed Stockholm, Norstedt, 1970. p. 66-69.

[46] Stephan Hurwitz. *Den Danske Kriminalret, Almindelig Del*. 2nd ed. Copenhagen, G.E.C. Gad, 1961. p. 151.

[47] *Danish* lov nr. 214 af 31. maj 1963 om semarbejde mellem Finland, Island, Norge og Sverige angaende fuldbyrdelse af straffedomme, m.v., *in* 2 *Karnovs Lovsamling*, 7th ed Copenhagen, Karnov, 1967. p. 1687-1690. *Finnish* lag nr. 326 av 20. juni 1963 om samarbete mellan Finland och de övrige nordiska länderne vid verkställighet av domar i brottmal, *in Finlands Lag*. Helsingfors, Finlands Juristforbund, 1969. p. 1112-1114. *Norwegian* lov av 15. november 1963 om fullbyrding av nordiske dommer pa straf m.v., *in* Norges Lover 1682–1969. Oslo, Grøndahl øg Søn, 1970. p. 2305–2307. *Swedish* lag av 22 maj 1963 om samarbete med Danmark, Finland, Island och Norge ang. verkstallighet av straf m.m., *in Sveriges Rikes Lag*. 91st ed., Stockholm, Norstedt, 1970. p. 815-820.

[48] Lov nr. 522 af 23. december 1970 om fuldbyrdelse af europaeiske straffedomme, *in* 1970 *Lovtidende for Kongeriget Danmark A* p. 1811-1841. (Includes the full text of the European convention on the international validity of criminal judgments in English and Danish).

[49] Hurwitz, *supra* page 1 and note 1 at 109-114.

[50] Damaska, *supra* note 9 at 1478-1479.

[51] Hurwitz, *supra* note 1 at 99-102. *See also* Andenaes, *supra* note 7 at 319-320.

[52] *Id.*

[53] The Swedish Penal Code, Ch. 2, Sec. 3.

[54] The Danish Criminal Code, Sec. 8.

[55] The Norwegian Penal Code, Sec. 12, No. 4.

C. *Where Shall the Crime be Deemed Committed?*

It is generally accepted principle within Scandinavian criminal law that a crime may always be considered to have been committed at the place where the crime was executed, regardless of where the consequences of the act occurred. It is on this background that the criminal codes of Denmark,[56] Norway,[57] and Sweden[58] have provisions that a crime under certain circumstances may be "deemed" or "considered" as committed also where an actual or intended consequence took place. These provisions are not considered as mere extensions of the territorial principles, but as independent jurisdictional provisions, e.g., the unlawful mailing of a bomb is considered a committed crime both where the bomb was mailed and where it was received.[59]

It is generally agreed that the Scandinavian provisions about where a crime shall be deemed to have been committed also apply to attempts, cooperation, and crimes of omission.[60]

D. *The Applicability of Foreign Law*

The recognition of extraterritorial jurisdiction greatly enlarges the possibility of conflicts with foreign criminal codes. The Danish,[61] Norwegian,[62] and Swedish[63] codes state rather categorically that the national courts should apply national law. However, this recognition of *lex fori* does not prevent foreign law from being applied in a number of situations. For instance, it is a matter of course that questions arising in the civil law area, such as the question about marriage in a bigamy case, are always decided in accordance with the appropriate legal system.

The Scandinavian countries do not have any absolute prohibition against double jeopardy. However, Section 10, Subsection 3 of the Danish Criminal Code states expressly that foreign judgments for acquittal prevent prosecutions based on the personality principle. The same rule may normally be deduced from Sections 12 and 13 of the Norwegian Penal Code, and the rule seems also to be followed in the Swedish administrative practice based on Section 5 of the Swedish Penal Code.[64] The criminal codes of Denmark,[65] Norway,[66] and Sweden[67] also have provisions which make it mandatory for the courts to deduct punishment which has already been served abroad.[68]

E. *International Law*

The Scandinavian criminal codes[69] expressly state that their jurisdictional provisions are limited by generally acknowledged exceptions of international law. It is generally agreed that these provisions confer immunity to certain persons, such as foreign diplomats, the crews from foreign warships on visits, and the like. Scandinavian writers claim that, apart from such rules of immunity, it is disputable whether international law limits the right of individual countries to punish acts committed outside their territory by aliens. They often refer, in this connection, to the Cutting case of 1886 where the United States disputed that Mexico had jurisdiction over the Uniter States citizen, A. K. Cutting.[70]

F. *The Protected Interest*

It should finally be mentioned that extraterritorial jurisdiction may be limited by the fact that the criminal offense is described in such a way that it, as a practical matter, has to have been committed inside the territorial borders.[71]

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[56] The Danish Criminal Code, Sec. 9.
[57] The Norwegian Penal Code, Sec. 12, Subsec. 2 (last subsec)
[58] The Swedish Penal Code, Ch. 2, Sec. 4.
[59] Hurwitz, *supra* note 1 at 102-109. *See also* Andenaes, *supra* note 7 at 320-321.
[60] Hurwitz, *supra* note 1 at 105. *See also* Andenaes, *supra* note 7 at 321.
[61] The Danish Criminal Code, Sec. 10, Subsec. 1.
[62] The Norwegian Penal Code, Sec. 12, Subsec. 1.
[63] The Swedish Penal Code, Ch. 2, Sec. 1-3.
[64] Beckman, *supra* note 45 at 64
[65] The Danish Criminal Code, Sec. 10, Subsec. 4.
[66] The Norwegian Penal Code, Sec. 13, Subsec. 3.
[67] The Swedish Penal Code, Ch. 2, Sec. 6.
[68] Hurwitz, *supra* note 1 at 107-109. *See also* Andenaes, *supra* note 7 at 321-322.
[69] Danish Criminal Code, Sec. 12; Norwegian Penal Code, Sec. 14; Swedish Penal Code, Ch. 2, Sec. 7.
[70] Hurwitz, *supra* note 1 at 112-114. *See also* Andenaes, *supra* note 7 at 316. For a resume of the Cutting case, *see* Jon Skeie, 1 *Den Norske Strafferet* Oslo, Olaf Norlis, 1946, p. 85-86.
[71] Hurwitz, *supra* note 1 at 114-117. *See also* Andenaes, *supra* note 7 at 319.

For instance, Section 128 of the Danish Criminal Code provides:

Any person who within the territory of the Danish State undertakes to recruit for war service with a foreign power shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

Appendix A

Denmark Laws, Statutes, Etc.

(Introduction by Dr. Knud Waaben, Professor a.i.)

THE DANISH CRIMINAL CODE

of 15 April 1930, as amended by later Acts.

General Part

CHAPTER II—CONDITIONS UNDER WHICH THE CRIMINAL LAW IS GENERALLY APPLIED

3. (1) Where the penal legislation in force at the time of the criminal proceedings in respect of any act differs from that in force at the time of commission of that act, any questions concerning the punishable nature of the act and the penalty to be inflicted shall be decided under the more recent Act: provided that the sentence may not be more severe than under the earlier Act. If the repeal of the Act is due to external conditions irrelevant to the guilt, the act shall be dealt with under the earlier Act.

(2) If in circumstances other than those provided for in the last sentence of subsection (1) an act ceases to be lawfully punishable, any penalty awarded, but not yet served for such act shall be remitted. The convicted person may demand that the question concerning the remission of the penalty be brought, at the instance of the Public Prosecutor, before the court which passed sentence in the first instance. The decision shall be made by court order.

4. (1) The question whether the punishable act shall have legal effects of the nature referred to in sections 30, 56 to 61, 70 to 77, or 79 of this Act shall be decided under the law in force at the time of the criminal proceedings.

(2) Unless otherwise provided, other legal consequences shall take effect only if provided for by the law in force at the time the act is committed.

(3) The provision of sect. 3, subsect. (2), of this Act shall likewise apply to legal effects other than punishment, provided such effects directly arise from the punishable nature of the act.

5. Where an aggravation of the penalty or other legal effects have been prescribed in the case of recidivism, decisions made under previous law shall be taken into account as if they had been made in conformity with the law under which the immediate act is to be dealt with.

6. (1) Under Danish criminal jurisdiction shall come acts committed—(I) within the territory of the Danish State; or (II) on board a Danish ship or plane being outside the territory recognised by international law as belonging to any State; or (III) on board a Danish ship or plane being within the territory recognised by international law as belonging to a foreign State, if committed by persons employed on the ship or plane or by passengers traveling on the ship or plane.

(2) The Minister of Justice shall decide to what extent acts committed on board a foreign ship or plane within Danish territory by and against any person employed by it or travelling on it as a passenger shall be brought before the courts.

7. Under Danish criminal jurisdiction shall also come acts committed outside the territory of the Danish State by a Danish national or by a person residing in that territory—(I) where the act was committed outside the territory recognised by international law as belonging to any State; provided acts of such nature are subject to a penalty more severe than simple detention; (II) where the act was committed within the territory of a foreign State, provided it is punishable also under the law in force in that territory.

8. (1) Under Danish criminal jurisdiction shall also come acts committed outside the territory of the Danish State, irrespective of the nationality of the perpetrator—(I) where the act violates the independence, safety, Constitution or public authorities of the Danish State, the duties of an official to the State

or such interests the legal protection of which depends on a personal connection with the Danish State; or (II) where the act violates an obligation which the perpetrator is required by law to observe abroad or prejudices the performance of an official duty incumbent on him regarding a Danish ship or plane; or (III) where an act committed outside the territory recognised by international law as belonging to any State violates a Danish national or a person residing within the territory of the Danish State, provided acts of such nature are subject to a penalty more severe than simple detention.

(2) In the circumstances referred to under paragraph (III) of subsect. (1) of this section, the Chief Public Prosecutor shall decide whether or not an action shall be brought.

9. Where the punishable nature of an act depends on or is influenced by an actual or intended consequence, the act shall also be deemed to have been committed where the consequence has taken effect or has been intended to take effect.

10. (1) Where prosecution takes place in this country under the foregoing provisions, the decision concerning the penalty or other legal effects of the act shall be made under Danish law.

(2) Provided that, in the circumstances referred to in sect. 7 of this Act, the penalty to be inflicted in respect of an act committed within the territory recognised by international law as belonging to a foreign State shall not be more severe than that provided for by the law in force in that territory.

(3) In the case referred to in sect. 7 of this Act, no prosecution may be proceeded within this country if the perpetrator has been finally acquitted in the State where the act was committed or if he has served the penalty inflicted or if the penalty has been remitted under the law of that State.

(4) If, otherwise, any person who is to be sentenced for an act in this country has already served his sentence elsewhere, this shall be taken into account by the court in such manner as to reduce the penalty commensurately or to remit it, as the case may be.

11. If a Danish national or a person residing in the Danish State has been punished in a foreign State for an act which under Danish law may entail loss or forfeiture of an office or profession or of any other right, such effect may take place in the course of a public action brought by the order of the Chief Public Prosecutor.

12. The application of the provisions of sections 6 to 8 of this Act shall be subject to the exceptions recognised by international law.

Appendix B

The Norwegian Penal Code

(Translated by Harald Schjoldager, LL.M. and Chief of Division Finn Backer, with an Introduction by Professor Dr. Jur. Johns. Andenaes)

PART I—GENERAL PROVISIONS

CHAPTER I—APPLICABILITY OF THE NORWEGIAN PENAL LAW

Section 12

The Norwegian penal law is applicable, unless otherwise provided or agreed upon by a treaty with a foreign state, to acts committed:

1. in the realm including on a Norwegian vessel on the high seas and on a Norwegian aircraft in areas outside the jurisdiction of any state,

2. on a Norwegian vessel or aircraft wherever it is, by a member of its crew or others travelling on the craft,

3. abroad by a Norwegian national or any other person domiciled in Norway when the act

   (a) is covered in chapters 8, 9, 10, 11, 12, 14, 17, 18, 20, 23, 24, 25, 26 or 33 or sections 135, 141, 142, 144, 169, 191–195, 199, 202, 204 (*cf.* 202), 205–209, 223–225, 228–235, 242–245, 291, 294 no. 2, 318, 326–328, 330 last para., 338, 367–370, 380, 381 or 423 of this law, or

   (b) is a felony or misdemeanor against the Norwegian state or a Norwegian authority, or

   (c) is subject to punishment also according to the laws of the country in which it has been committed,

4. abroad by a foreigner, when the act

(a) is one treated in sections 83, 88, 89, 90, 91a, 93, 94, 98–104, 110–132, 148, 149, 152, paras. 1 and 2, 153, paras. 1 to 4, 154, 159, 160, 161, 169, 174–178, 182-185, 187, 189, 190, 191–195, 202, 217, 220, 221, 223–225, 229, 231–235, 243, 244, 256, 258, 267–269, 276, 292, 324, 325, 328, 415 or 423 of this law or the Defense Secrets Law, sections 1, 2, 3, or 5 or

(b) is a felony punishable also according to the laws of the country in which it has been committed, and the guilty person is domiciled in the realm or is staying here.

In cases where the punishability of the act depends on or is influenced by an actual or intended effect, the act is considered to have been committed also where the effect has occurred or is intended to occur.

[5–11–1951]

Section 13

In the instances mentioned in section 12, No. 4, legal proceedings can be limited only by the decision of the King.

In the instances mentioned in section 12, No. 4 (b), legal proceedings cannot be initiated, unless the perpetrator actually can be punished according to the laws of the country in which the act has been committed. Nor can more severe punishment be inflicted than provided for by the laws of that country.

In every case where somebody has been punished abroad, and in this country is convicted of the same offense, the punishment already served shall, if possible, be deducted from his sentence.

Section 14

The application of the above described rules is circumscribed by generally acknowledged exceptions of international law.

Appendix C

The Penal Code of Sweden

(Translated by Thorsten Sellin, University of Pennsylvania; Introduction by Ivar Strahl, University of Uppsala)

Issued at Stockholm's Castle, December 21, 1962

Part One—General Provisions

CHAPTER 2—OF THE APPLICABILITY OF SWEDISH LAW

Sec. 1. A person, who has committed a crime within this Realm, shall be tried according to Swedish law and in a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm.

Sec. 2. If a crime has been committed outside the Realm by a Swedish citizen or by an alien domiciled in Sweden, he shall be tried according to Swedish law and in a Swedish court.

If some other alien, while being outside the Realm, has committed a criminal act which was punishable under the law in force at the place of the crime, he shall be tried according to Swedish law and in a Swedish court, if, after having committed the crime, he has become a Swedish citizen or has acquired domicile in this Realm or if he is a Danish, Finnish, Icelandic, or Norwegian citizen and is found here, and similarly too if he is found in the Realm and the crime is punishable according to Swedish law by imprisonment for more than six months.

Sec. 3. Even in a case other than those mentioned in Section 2, an alien, who has committed a crime outside the Realm, shall be tried according to Swedish law and in a Swedish court,

1. if he committed the crime on board a Swedish vessel or airplane or if he was a commanding officer or belonged to the crew of such carrier and committed the crime while in that capacity;

2. if he committed the crime in an area where a detachment of military forces was found but, unless he was a serviceman, only if the detachment was there for other than training purposes;

3. if the crime was committed against Sweden, a Swedish citizen or a Swedish group, institution or organization or against an alien domiciled in Sweden; or

4. if the crime violated international law.

Sec. 4. A crime is deemed to have been committed where the criminal act occurred and also where the crime was completed or, in case of attempts, where the intended crime would have been completed.

Sec. 5. Prosecution for a crime committed within the Realm on a foreign vessel or airplane by an alien, who was a commanding officier or belonged to the crew of or otherwise accompanied the carrier, against such alien or a foreign interest shall not be instituted without an order from the King or from someone authorized by the King to give such order.

Prosecution for a crime committed outside the Realm may be instituted only pursuant to an order as stated in the first paragraph. Nevertheless, prosecution may be instituted without such order if the crime was committed on a Swedish vessel or airplane or, while on duty, by the commanding officer or some member of the crew of such carrier or by a serviceman in an area where a detachment of the armed services was found or by a Swedish, Danish, Finnish, Icelandic or Norwegian citizen against a Swedish interest.

Sec. 6. No one may, without an order from the King or from some one authorized by the King to give such order, be prosecuted for an act for which he has been subjected to punishment or other sanction outside the Realm. If prosecution is instituted in this Realm, the fixing of the sanction shall be done with due consideration for what he has suffered outside the Realm, and he may according to circumstances be sentenced to a lesser punishment than the one set by law for the act or be completely absolved of punishment.

Sec. 7. Aside from the provisions of this chapter regarding the applicability of Swedish law and the jurisdiction of Swedish courts, attention shall be paid to the limitations resulting from generally recognized principles of international law or, in accord with special statutory provisions, from agreements with foreign powers.

Sec. 8. Separate statutory provisions govern extradition for crime.

Conditions stipulated in connection with extradition from a foreign state to Sweden shall be complied with in this Realm.

Appendix D

The General Part of the Criminal Law of Norway

(By Johannes Andenæs, Dr. Jur.; Translated by Thomas P. Ogle, LL.B.)

THE APPLICABILITY OF PENAL PROVISIONS WITH RESPECT TO SPACE AND TIME

§ 39. The Penal Code's Territorial Applicability

I. Posing the problem

To what extent does Norwegian penal law apply to acts committed in foreign countries or by foreigners? That is the question of the penal law's territorial applicability. In this connection we occasionally speak about international penal law, in analogy with international private law. In both instances the word international indicates only that we are dealing with foreign countries or foreign citizens, and not that the rules are the same or similar in most countries. But otherwise there is a great difference between the two branches of law. In international private law, the question is which country's law our courts will or must apply to a judicial question connected with foreign countries or aliens, whereas here there is a conflict of national laws and a choice between them. On the other hand, Norwegian courts never sentence anybody on the basis of foreign penal laws.

With respect to civil rights and duties bearing on the offense, there may be a question of applying foreign law in accordance with basic concepts of international private law. In a bigamy case, for example, the question may arise whether Norwegian or foreign law should be used as a basis for judging the validity of a marriage or divorce. As we shall see later, even foreign penal enactments can have a certain significance in a Norwegian criminal case, namely, when Norwegian law refers to them. But the authority for criminal liability must always exist under Norwegian law. This follows from § 96 of the Constitution which requires all judgments to be according to law; here, the word law most probably means Norwegian law (see S.K.M., p. 21). Our international criminal law is not a doctrine of conflict of laws, but the body of propositions telling us how far Norwegian penal law extends. The general rules on this are to be found in Penal Code, § § 12–14.

According to Penal Code, § 14, the application of the rules in Penal Code, §§ 12 and 13, is limited by "generally acknowledged exceptions of international law." International law is thus made a part of Norwegian law, so that there cannot be any actual controversy. The main concern of Penal Code, § 14, is with the rules on immunity for certain persons, such as foreign diplomats and the crew of foreign warships on visits to this country. Apart from such rules of immunity, it is disputable whether international law limits the right of individual countries to punish acts committed outside their territory by aliens.[1] The comments to the draft of the Penal Code give a negative answer (S.K.M., p. 18). If the court which hears a case against an alien comes to the conclusion, contrary to these comments, that international law precludes Norwegian jurisdiction over the case, it follows from Penal Code, § 14, that this international principle prevails over the enactments in Penal Code § § 12–13.

Generally, before judgment can be rendered and executed, the guilty person must be present in this country or subject to extradition. One country cannot exercise criminal jurisdiction within the territory of another country. But to a certain extent criminal cases can be heard even with respect to absentees (Code of Criminal Procedure, § § 309–311 and 374). If the accused is sentenced to a fine and he has funds in this country, the judgment can also be executed.

II. The territorial principle

The natural solution is that each state punishes those offenses which have been committed on its soil whether the offender is a citizen or an alien (*the territorial principle*). The evidence is usually more easily accessible in the place where the offense was committed. And for general preventive purposes it is important that trial and execution of sentence be had where the crime was committed.

According to Penal Code § 12, No. 1, Norwegian penal law is applied to acts which are committed in the realm. The rule also applies to legislation outside the Code (Penal Code, § 1). It makes no difference whether the offense is serious or minor, or whether the perpetrator is a Norwegian or an alien. "In the realm" also includes the territorial waters, and the law makes no distinction with respect to acts committed on board foreign vessels. A fight between crew members of a foreign vessel in Norwegian territory thus falls with Norwegian penal law, but if no Norwegian interests are affected, for example by disturbing the peace of the port, there would obviously be every reason for the Norwegian prosecuting authorities to refrain from action in such a case. The freedom to refrain from prosecution granted by Norwegian law generally makes it less dangerous to give our penal law a wide scope of application than for those countries which have a strict legality principle with respect to prosecution.

Penal Code, § 12, No. 1, considers Norwegian vessels a part of the realm when on the high seas, that is, when on the ocean outside of the territorial waters of any country. The same applies to Norwegian planes outside of the areas which are under some other country's jurisdiction. However, if the vessel is in a foreign port or within the territorial waters of some country, the act will be regarded as having been committed in the foreign country. But Penal Code, § 12, No. 2, treats just like acts committed in Norway, any acts committed "on a Norwegian vessel or aircraft wherever it is," as long as the act is committed "by a member of its crew or others travelling on the craft." Thus, an offense committed aboard a Norwegian vessel in a foreign port or in foreign territorial waters is covered by Norwegian penal law if it is committed by one of the crew or by a passenger, but not if it is committed by a visitor on board. The visitor would be affected only if he falls within Penal Code, § 12, Nos. 3 or 4.

The territorial principle also applies to offenses against the state, such as rendering aid to the enemy (Penal Code, § 86). An enemy soldier, of course, cannot be affected by this provision; he is protected by the international laws of war. But apart from that the provision also applies to aliens who commit offenses within this country (see, for example, Rt. 1948, p. 1141), even if the offender acts for the best interest of his own country (see, for example, Rt. 1946, pp. 1074 and 1185, 1947, p. 69.) Here, of course, it is not correct to speak about treason as it would be if the act were committed by a Norwegian. But this is a characterization which is not included in the description of the act, and the state has an interest in protecting itself also against foreigners who aid

[1] See Castberg, *Studier i folkerett* [Studies in international law], pp. 179–182, 189–192, 194–198, 207, 221–222 (Oslo, 1952); Skeie, *Det norske strafferett*, I, pp. 84–85 (Oslo, 1937).

the enemy. It appears from Penal Code, § 12, No. 4, that the most serious felonies against the state are covered by Norwegian penal law even when they are committed by foreigners abroad.

III. Personality principle

If the nations of the world had universal and absolute extradition treaties with each other, we could go quite far with the territorial principle. But since this is not so, it must be supplemented in various ways.

It is a common principle, upon which Norwegian law also builds, that a state does not extradite its own citizens to a foreign state. Thus, if a Norwegian has committed some offense abroad and has taken refuge in his home country, Norwegian authorities could do nothing if they could rely only upon the territorial principle. Here, Penal Code, § 12, No. 3, comes into play (the principle of personality, an example of which may be found in Rt. 1949, p. 142). It applies to acts committed abroad by Norwegians or, more specifically, persons who are Norwegian citizens or are domiciled in Norway. Those who have a permanent residence here are domiciled in Norway. They can actually be extradited, but the law has nevertheless made them subject to Norwegian penal law to the same extent as Norwegian citizens. The reasoning is this: if they could not be punished here, one would have to try to extradite them or expel them, "measures which, where minor offenses are concerned, would often be unreasonably harsh and at times actually brutal" (S.K.M., p. 16).

From this interconnection of the problem with the rules on extradition one would think that the citizenship or the residence of the offender as of the time of judgment would be determinative. However, the wording of Penal Code § 12, makes it clear that the conditions at the time of the act are the determinative ones.

The provision in Penal Code, § 12, No. 3, does not deal with all punishable acts. There is little reason to pursue acts committed abroad when they do not offend Norwegian interests and are not punishable under the law of the place where they were committed. The law mentions three instances where it can be applied to Norwegians who have violated some law abroad. Under (*a*) it lists all of the more serious violations of the penal law, "acts which at least all civilized nations agree ought to be punished," as it is stated in the comments to the draft code (S.K.M., p. 15). Then it includes under (*b*) felonies and misdemeanors against the Norwegian state or Norwegian public authority. From a Norwegian point of view, the foreign state would usually not have satisfactory penal provisions against such acts. Finally, it mentions under (*c*) those instances where the act is also punishable according to the laws of the country where committed (see Rt. 1954, p. 900). In this instance, therefore, it is immaterial whether the act is serious, and against whom it is directed. The fact that there is no possibility of punishment in the country where the act was committed, *e.g.*, because prosecution is barred by some statute of limitation, or because the necessary information or complaint are lacking, is immaterial if the act in itself is punishable.

An additional restriction, however, may follow when the penal provision in question must be interpreted to cover only acts committed within Norwegian territory or against Norwegian interests. When Penal Code, §406, for example, provides punishment for anybody who, by an unlawful act, "attempts to evade the payment of public taxes or duties," it must be interpreted to protect purely Norwegian fiscal interests. If a Norwegian, conducting business in Sweden evades Swedish taxes, he cannot be prosecuted in Norway under authority of Penal Code, § 12 (see, Penal Code, § 406, para. 3, and S.K.M., p. 6).

IV. Universality principle

Even this combination of the territorial and the personality principles does not always suffice. Existing extradition agreements may be suspended because of war or insurrection, or the offense may be committed in a no-man's land, or in a country with which we have no extradition agreement. In such a case, if we could not prosecute in Norway acts committed abroad by foreigners, dangerous criminals might seek asylum here. In addition to this national self-interest we might mention the ideal of international solidarity in the struggle against criminality. Just as nations help each other with extradition and police cooperation, it can be argued that there ought to be solidarity with respect to punishment in the case of serious offenses.

Penal Code, § 12, No. 4, therefore, states the principle that Norwegian penal law also may be applied to acts committed abroad by foreigners (the universality principle). But the condition is that *either* one of the serious offenses listed in No. 4 (*a*) is involved, *or* the act is one which is punishable according to the law of the place where it was committed and the guilty person is domiciled "in the realm," or at least is staying here during the prosecution. If the act is not one of those listed in No. 4 (*a*), it is, according to Penal Code, § 13, para. 2, an additional condition to penal prosecution that the perpetrator actually can be punished according to the law of the country where the act was committed. Thus, penal prosecution in Norway is precluded if barred by limitation in the country where the act was committed. Moreover, one cannot impose a more severe punishment than authorized there.

Penal Code, § 13, para. 1, also shows that in Norway prosecution of an act committed abroad by a foreigner was not intended to become an ordinary occurrence. The provision states that prosecution in these cases can be initiated only by order in council. The offender will ordinarily be extradited or expelled. Only where this is not possible or desirable, and where there exists an offense so serious that it cannot go unpunished, will the universality principle be used.

V. Where shall the offense be deemed committed?

It follows from the rules in Penal Code, §12, that it is often significant whether an offense has been committed in Norway or abroad; and the particular country in which the act took place may also at times be relevant (see Penal Code, § 12, Nos. 3(*c*) and 4(*b*)). Here Penal Code, § 12, last paragraph, comes in with a provision relating to the place where the act was committed: "In cases where the punishability of the act depends on, or is influenced by an actual or intended effect, the act is considered to have been committed also where the effect has occurred or is intended to occur."

The actual place where the act was committed is where the offender was when he committed the act. The law contains no provision substituting the place of the effect for the place of action; it provides that the act is deemed committed in both places. This means that Norwegian penal law can be used when either the act itself was committed in Norway or the result has occurred, or was intended to occur, here.

The principle is also of significance in relation to liability for cooperation. Suppose that a Dane in Denmark induces a Norwegian to publish a defamatory statement in Norway. The Dane can be punished in Norway for cooperation in defamation (see Rt. 1927, p. 513). And if the Norwegian has not executed the plan and thus cannot be punished, the Dane can be punished here for an attempt. Under Penal Code, § 12, last paragraph, the intended effect is equated with the effect that has actually occurred.

VI. The effect of foreign adjudication and execution

The rules on the territorial applicability of penal laws often lead to a situation where many countries have the right to punish the same offense. Where the case is prosecuted will then depend on where the offender is and what provisions the interested countries have with respect to extradition and expulsion.

Punishment of the offender abroad, however, does not preclude prosecution in this country, except in those cases which are mentioned in Penal Code, § 12, No. 4 (*b*) (See Penal Code, § 13, para. 2). Of course, Norwegian prosecuting authorities will not prosecute if the punishment which the offender has served abroad is roughly similar to that which is sufficient according to the Norwegian sense of justice. But this is not always the case, especially where the act is directed against the interests of the Norwegian state. Suppose that a Norwegian in Sweden has organized a spy ring directing its activities against Norway. He is arrested in Sweden and convicted there under Swedish penal provisions dealing with intelligence activities which endanger foreign powers. This punishment, of course, will not be equal to that which a country deems necessary as a punishment for espionage directed against itself.

But when someone who has been punished abroad is sentenced in this country for the same act, Penal Code, § 13, para. 3, provides that the punishment already served shall, if possible, be deducted from the sentence. The reservation "if possible" indicates that there are punishments which may not be reduced, such as the death penalty or removal from an official position.

The criminal proceeding in Norway, of course, is completely independent of the prior case. If the accused is found guilty by the foreign court, he may still be acquitted in the Norwegian trial.

Generally speaking, foreign judgments in criminal cases cannot be enforced in this country. An exception is made, however, with regard to sentences of courts in the other Northern countries (Denmark, Finland, Iceland and Sweden). This possibility of executing foreign sentences was first introduced by an Act of May 14, 1948, but only with regard to sentences of fines, forfeiture and costs. A new Act of November 2, 1963, extended the rule to sentences of imprisonment as well. The Act is a result of Nordic cooperation. Similar laws are enacted in the other Northern countries. One of the reasons for the broadening of the scope of the Act, as compared with previous legislation of 1948, was the consideration that it often will be an advantage for the convict to serve his sentence in his own country, where he ordinarily will have his family and where no language difficulties will impede the program of rehabilitation. There was much discussion in Parliament about the constitutionality of the new law.[2] A strong minority was of the opinion that the prohibition in § 96 of the Constitution against punishing anybody "except according to judicial sentence" means according to a *Norwegian* sentence. They therefore proposed to insert in the new Act a clause providing that nobody should be compelled to serve a foreign sentence in Norway against his own will, but this view did not prevail.

§ 40. *Extradition, Expulsion and Rejection*

I. The Extradition Act

We now have a separate statute dealing with the extradition of offenders (Act of June 13, 1908). Prior to this statute, the rules were fixed by extradition treaties, but by and large these were built on the same basic concepts as the Extradition Act. In § 25, para. 2, however, it is provided that "the provisions of existing treaties shall remain in force, despite any conflicts with this Act." Extradition treaties concluded after the Act had to be framed in accordance with it. Under the Extradition Act, extradition may also take place when Norway does not have an extradition treaty with the requesting state. Extradition in this case takes place as a matter of comity, under the direct authority of the Act.

The rules on extradition are quite similar among those countries which belong to the Western European cultural circle. Belgium's Extradition Act of 1833 has served as a model for later extradition legislation. One basic purpose of the Extradition Act is to protect the individual against arbitrariness and political prosecution. Within the framework of the European Council, a European Convention on extradition was formed after World War II, and Norway joined it. On the basis of Scandinavian cooperation, an Act of March 3, 1961, was passed concerning the extradition of offenders to Denmark, Finland, Iceland and Sweden. This Act allows a more liberal use of extradition between the closely related Scandinavian countries than that which exists between other countries.

II, The conditions for extradition

The substantive conditions for extradition are set forth in §§ 1–4 of the Extradition Act,

1. The person who is sought to be extradited must not be a Norwegian citizen (§ 1). The Scandinavian Extradition Act of 1961 makes an exception to this principle if the offender has resided in the state which is seeking extradition during the last two years or if the act or a similar act is subject to a higher punishment than imprisonment for four years under Norwegian law.

2. The offense, according to Norwegian law, must not be deemed committed in Norway (§ 4, No. 1). Here Penal Code, §12, applies: the act is also deemed to have been committed in Norway, so that extradition is precluded, when the effect has occurred or was intended to occur here, even though the offender resided abroad.

3. Extradition cannot take place for any political offense, nor for any ordinary offense which is committed in connection with a political offense and for the purpose of furthering it (§ 3). This special treatment of political offenses has become common since the Belgian Extradition Act of 1833. Political offenses

[2] See Imst. O.XXI—1962/1963, pp. 2–5 and 8–13.

are not treated in a similar manner everywhere, as are ordinary offenses. Nor is there a similar common interest on the part of the various states as there is in combating general criminality. It would not be considered proper for a democratic country, such as Norway, to extradite political refugees to a dictatorial state, such as Soviet Russia or Franco Spain.

The typical political offenses are violations of Chapters 8, 9 and 10 of the Penal Code; that is, they include not only attacks on the Constitution, but treason as well. The fact that the act has a political motive is not sufficient to make it a political offense (see Rt. 1909, p. 570; 1921, p. 205 and Ot.prp. No. 26 for 1906–1907, p. 9). If a politician defames an opponent in order to weaken him in a campaign, it is not a political offense in the eyes of the law. The act must be directed against the state or its political institutions. If the defamation of a political opponent is made in an unlawful attempt to assume power, however, extradition is precluded.

An attack upon the head of the state traditionally is a political offense, regardless of its purpose (see Penal Code, § § 100–102). But here the law has made an exception to the rule that political offenses cannot be the basis for extradition. "Offenses which have as their aim the murder of, or assault upon, a head of state or a member of his family, shall be subject to extradition, as long as they are not connected with some other political offense" (§ 3, para. 2). Thus, an isolated attempt against the life of a head of state can lead to extradition, but not an attempt committed in connection with a *coup d'état* or a revolution. A clause to this effect first came into the Belgian law after an attempt in 1854 against Napoleon III; the provision has therefore come to be known as the Belgian assassination clause. But the provisions in the Norwegian extradition law differ on many points from the Belgian clause.

According to § 4 of the reciprocal Scandinavian Extradition Act, there is an opportunity to extradite even for political offenses when the act or a similar act is punishable under Norwegian law and the person whose extradition is requested is not a Norwegian citizen. The reason for this rule is the close connection between the Scandinavian countries and the similar interests they have in protecting themselves against espionage, treason and unlawful attempts to overthrow the state. The proposal of the law, however, became the subject of vehement attack, and Parliament passed it only by a narrow margin.[3]

4. Extradition is granted only for crimes of a certain significance (§ 2). Generally, the crime involved must be a felony with a penalty more severe than imprisonment of one year. The law adds, however, that it is enough that the act, if committed in Norway under fully comparable conditions, could have resulted in such a sentence. This aims at penal provisions dealing with offenses against public authorities. The Norwegian penal provisions do not affect the person who has proceeded against foreign public authority, but if he could have been affected by the Norwegian penal law had the act been committed against Norwegian authorities, extradition is possible. Violations of legislation outside the Penal Code, such as that on taxes, duties and exchange, are not extraditable, even though the provisions impose a punishment greater than imprisonment for one year. Some exceptions exist, however, under § 2, para. 2. With respect to military offenses, see § 2, para. 3.

5. The law also sets up certain other restrictions. See § 4, Nos. 2 and 3.

III. Procedure

The Extradition Act contains detailed rules on extradition procedure. The procedure has many stages:

1. The foreign state must first make a request through diplomatic channels, *i.e.*, through the State department, accompanied with proof of the reason for extradition (§ 9).

2. The case is then presented to the Ministry of Justice, and if it finds that the request does not fulfil the formal legal requirements, or that there is no legal right to extradition, the foreign state will be told, through diplomatic channels, that the request cannot be granted (§ 10).

3. If the department finds that the request can be granted, the case is presented by the prosecution to the District or City Court[4] which holds a hearing to determine whether there is a lawful right to extradition (§§ 13–14).

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[3] See Edvard Hambro, *Asylrett og utleveringsplikt. Tidsskrift for Rettsvitenskap*, 1960, pp. 29–61.

[4] The case is heard by one judge. No lay judges are participating. [Translator's note]

The state requesting extradition is not bound to present proof that the accused has committed the act with which he is charged. Nothing more is required than reasonable grounds for suspicion and even this requirement can be omitted in the extradition agreements (§ 9. para. 3). If this is done. the hearing of the court will determine only whether the formal requirements for extradition are present.

4. If the court determines that the conditions for extradition are not present, the request must be denied (§ 16). But if it determines that the conditions are present, this does not necessarily mean that extradition will take place. It is now for the Ministry of Justice to make the final decision on the request for extradition (§ 17), and it may consider international and political factors (see Ot.prp., No. 26 for 1906–1907, p. 13).

Thus, before extradition can take place, there must be both an administrative and a judicial appraisal of the request for extradition. Prior to the Extradition Act the question was solely in the hands of the administration.

According to the Scandinavian Extradition Acts, the procedure is more simple. See, §§ 11–15 of that law.

IV. Expulsion

Extradition takes place only at the request of a foreign state. Even though it may also benefit the extraditing state to get rid of the offender, the Act considers that extradition takes place primarily in the interest of the requesting state.

Legislation also provides an easier method for getting rid of undesirable persons, namely *expulsion*. The rules on this subject are to be found in Chapter 5 of the Alien Act (Act Concerning Admission of Aliens into the Country, of July 27, 1956). As with extradition, expulsion of Norwegian citizens cannot take place. The reasons for expulsion fall into two groups. According to the Alien Act, § 13. expulsion may be had after a decision of the police authorities. This applies, for example. where the individual has not obeyed the rules relating to the obligation to register, to obtain a residence permit, or regarding the becoming of a public charge, or where he has been convicted of felony. According to § 15, the King (now the Ministry of Justice), for reasons of security or the protection of other public interests, may resolve to expel any alien, unless such an action would violate an agreement with a foreign state. Here there is a completely discretionary decision which in no way is subject to a court hearing. Nor are any definite procedures prescribed for the decision.

The expulsion is not to any particular country. In principle, the expelled person himself must be entitled to determine where he wants to go, if he can obtain a visa (where necessary) and money for the trip. But with the existing visa regulations, his home country may be the only country willing to receive him. For this reason expulsion may have the same practical effect as extradition.

Rejection—Even more unrestricted is the right to reject (Alien Act, § 11). The statute provides, however, that *political refugees* shall be given asylum in the country if they apply for it and there are no special reasons against it (§ 2). Under the Act, political refugees are those aliens who rightfully fear political persecution in their native land. "Political persecution means that because of race, religion, nationality, political views, membership in a special social group or for other political reasons, a person is subjected to political persecution which is directed against his life, freedom or otherwise is of a serious nature and, similarly, that a person can be subjected to severe punishment because of a political offense."

§ 11. The Applicability of the Penal Code With Respect to Time

I. Presenting the question

It may happen that the law is amended after the act has been committed but before it is heard by the court. Which law shall then apply, the old or the new, or sometimes the one and sometimes the other? This is the question of the applicability of the Penal Code with respect to time.

If the law is made more severe by the amendment, it follows from § 97 of the Norwegian Constitution that it cannot be made applicable to prior acts. Only when the proposed statutory amendment tends to be more lenient, or at least cannot be said to be more severe, does the legislature have a choice. Various solutions have been chosen in foreign laws. If the amendment of the law expresses a change of view by the legislature, it is natural that the new law should also be made applicable to previous acts. If the new law repeals the

threat of punishment because of such a change of view, it has thus declared that there is no sufficient reason to punish acts of this nature; if it has reduced the punishment, it has declared that the earlier one was excessive. In both instances, this leniency should also be extended to previous acts. The determination is more difficult when changed social conditions have led to the legal amendment, as when emergency legislation is repealed after the crisis is over. Here, the amendment contains no expression of a changed legislative viewpoint, but only that there is no further use for such provisions. As we shall see, this is not the distinction on which Penal Code § 3, builds, at least not directly.

II. The milder law is applicable

Penal Code, § 3, provides the general rule on the effect of a change in the penal law during the interval between the commission of the act and trial therefor. The ruel does not limit itself to the relationship between the Penal Code of 1902 and the older penal legislation, but applies also to newer legislation, both within the Penal Code's own area and outside the Code (see Penal Code, § 1), "unless otherwise provided." This reservation presupposes that the new enactment itself can make transitional provisions in conflict with Penal Code, § 3. Actually it was unnecessary to say this; that a new enactment can make exceptions to the rule follows from the fact that Penal Code, § 3, is only an ordinary legislative provision, not a constitutional provision.

Penal Code, § 3, para. 1, sets up the principle that it is the penal provisions which exist at the time of the *commission of the act* which are applicable to the act. But the rule is immediately modified by the next paragraph, which provides that the penal provisions in force at the *time of adjudication* are applicable when they lead to a more favorable result for the accused than the older law. Together the two provisions establish the rule that the milder law is applicable. But the fact that the law at the time of the act is named as the principal one is of practical significance when there are doubts as to which law is the milder, *e.g.*, when the two laws have different types of punishment which cannot be directly compared. The law at the time of the act is then applicable.

> In Getz' draft Penal Code of 1887 the rule was the reverse: the rules in force at the time of adjudication were to be used as the starting point, but the sentence was to be no less favorable to the defendant than it would have been had the rules in force at the time of commission been applied. The Penal Law Commission agreed that this was the correct view in principle, but because of the prohibition in the Constitution against giving a law retroactive force it found that it should be set up "as a main principle, that the law in force at the time of the act should be used, unless the later law positively and unconditionally is more favorable to the accused" (S.K.M., p. 9). This was more probably an exaggerated caution. It can hardly be said that § 97 of the Constitution is violated unless the new law is stricter than the old one. The issue arose in treason trials after World War II, since the Treason Act of Dec. 15, 1944, created new and stricter rules on the loss of rights and presumed these to be applicable to acts committed during the entire German occupation to the extent that this was consistent with the Constitution. The Supreme Court held that the Constitution does not prevent the application of new penal provisions on earlier acts when the new rules lead to a result which is *not less favorable* for the accused than if he had been judged according to the rules which were in force when the act was committed. Whether this test was met had to be determined separately for each individual case (see Rt. 1945, pp. 26 and 43).

Only legislation in force when the act is committed or adjudicated can be applied. If a new and milder law is passed after the act has been committed, but is repealed before the case comes up for trial, it is not applicable.

How do we determine which of the two laws is the milder? Do we compare the laws in the abstract and determine on the whole which one is the milder? Or do we determine which law will lead to the most favorable result for the particular accused The law states that the new provisions apply when they are more favourable to the accused than the provisions in force when the act was committed. The judge must therefore make a preliminary determination of the result according to both laws (see, for example, Rt. 1952, p. 1059). Suppose that a new enactment increases the penalty for an offense, but at the same time increases the availability of suspended sentence.[5] Under the old law, the punish-

[5] *Getz, Forelöbigt Udkast til almindelig borgerlig Straffelov for Kongeriget Norge, Første del med Motiver*, pp. 1, 26–28 (Kristiania, 1887).

ment would be unconditional imprisonment for three months; under the new law, it would be imprisonment for six months, but with the possibility of suspending the execution of the sentence. Thus, the new law is milder if the judge finds that suspended sentence should be granted in the case before him, but more strict if he comes to the opposite conclusion. Therefore, where several persons have taken part in the same offense, one of them may have his case judged according to the new law, because he can have the benefit of suspension of the sentence, while the other may have his case judged according to the old law because he cannot under any circumstances obtain a suspended sentence, so that as to him the older law is the milder.

It is the legislation *as a whole* in force when the act was committed or when it was judged which must be applied (see S.K.M., p. 9; Rt. 1905, p. 454). The judge cannot combine the two laws so as to mete out the punishment according to the old law, and suspend sentence pursuant to the rules of the new law.

It may occasionally be difficult to determine which law is the milder, especially when the new law makes a change in the type of punishment. A new law, for example, makes possible a shorter term of imprisonment, but at the same time extends the applicability of loss of rights. The judge must try to ascertain which sanction is the more favorable for this particular person; a loss of rights which is a serious punishment for one person may be a mere formality for another.

III. The area of application of Penal Code, § 3

Penal Code, § 3, uses the terms "penal law" and "penal provisions." The question is now how far these expressions extend.

1. Procedural provisions.—It is clear that procedural provisions do not fall within Penal Code, § 3. The general rule here is that the court applies the procedural rules which are in force when the case *comes up for trial*. An accused has no protection against new and less favorable rules of procedure being applied in his case. New rules, for example, which restrict the accused's access to appeal or rehearing, can also be applied to prior acts. But new procedural rules can, of course, provide that they are non-retroactive.

Whether a provision is inserted in a procedural enactment or in a penal statute cannot determine its character. The Penal Code contains several provisions of a purely procedural nature (see, for example, § 39b) and, on the other hand, it is not impossible that substantive penal provisions can for some reason or other be found in a procedural statute. The decisive factor in relation to Penal Code, § 3, must be the character of the provision itself, not its place in the legal system (see, however, the statement in Rt. 1939, p. 740). The nature of some provisions may be doubtful. The rules on prosecution are in certain ways considered procedural. But it appears from Penal Code, § 3, paras. 3 and 4, that in this respect the rules on prosecution are considered substantive law (see below, pp. 338–339).

2. Provisions governing execution of sentences.—Provisions governing execution of sentences also fall outside Penal Code, § 3. These are questions which usually do not arise until after adjudication, at the stage of execution. New provisions as to prison rules, release on parole or collection of fines, for example, are generally also applied to previously imposed sentences, regardless of whether the change involves an improvement or a worsening of the convict's situation. Any other rule would lead to serious practical difficulties.

But if the rules were to be so radically changed as to create in effect an entirely new punishment—if, for example, the rules on jailing were aggravated to such an extent that only the name would distinguish it from imprisonment in a penitentiaary—it would be a violation of § 97 of the Constitution to apply the new rules to prior acts. How far legislation may go in this area depends on an interpretation of the Constitution. Since the recent trend has been in the direction of making the rules milder, the question has not been of much practical significance (see, however, Rt. 1948, p. 103).

3. Provisions governing legal consequences which are not punishment.—Provisions governing *legal consequences other than punishment* also fall outside Penal Code, § 3. This is clear for purely civil claims, such as claims for damages or redress as a result of the punishable act. The rule here is that the law at the time of the act must be used. If one were to follow the principle in Penal Code, § 3, that a new and milder law shall apply, this would mean for the victim a loss of the claim which had arisen in his favor by the commission of the offense. That which is favorable to one is detrimental to the other.

But the situation is doubtful with respect to public sanctions which are not legally defined as punishment, but which nevertheless stand in close proximity to punishment, such as preventive detection, safety measures, and forfeiture. The correct solution is probably to say that Penal Code, § 3, is not directly applicable, and that the question must be solved by interpretation of the new provisions and any special transitional provisions which may exist, but that Penal Code § 3, allows a certain basis for the use of analogy where the measure is closely related to punishment. Practice has taken no definite position on the issue. In general, the new regulations expressly state whether they are applicable to prior acts.

4. Changes in judge-made law.—The provision in Penal Code, § 3, refers to legislative amendments, not to judge-made law. The Supreme Court may overrule a legal interpretation which earlier decisions have followed. Whether the change derives to the benefit or the detriment of the accused, the new construction will nevertheless apply to prior acts. But if the change is to the detriment of the accused, the prior legal practice may be the basis of an acquittal on the grounds of excusable mistake of law.

IV. More details about the applicability of § 3

As the area proper of the applicability of Penal Code, § 3, we are thus left with legislative amendments which have a direct effect upon whether the offender is to be punished, and if so in what manner. However, Penal Code, § 3, will not apply to all changes of this nature.

Temporary enactments—One group, namely, temporary enactments, can be immediately distinguished. A temporary Act, for example, may be given effect until December 31, 1964. A violation of this Act is committed in December of 1964, and is prosecuted the next year, after the Act has lapsed. There is no change of view on the part of the legislature. And it would clearly weaken the effectiveness of such temporary enactments if a violation were to be nonpunishable if it did come up for decision until after the law had expired. Toward the end of the time period, people could violate the law without any risk, since they could rely on the fact that the case would not be tried until after the time had run. It has been discussed whether it can really be said that there has been any change whatsoever in the penal legislation in such cases. It can be argued that there is no change in the legislation at all, but that the act according to its own terms affects only those offenses which are committed before a certain date. The situation is similar to the one we have when a conservation act, for example, provides that hunting is forbidden during a certain time of the year. In any event, it is assumed in practice that a temporary law must generally be interpreted so that it is applied to all violations which occur within the time limits, and that the offense shall not be exempt from punishment merely because the case first reaches court after the time period has run. This interpretation takes precedence over the general provision in Penal Code, § 3 (Rt. 1926, p. 501; Rt. 1920, p. 486).

There may be a question as to whether the same principle of interpretation should apply to all laws which define themselves as temporary or which are clearly based on temporary conditions, even though they mention no special time limit. Here also, the termination of the applicability of the law is due to a change of conditions, not a change of the legislature's viewpoint. And it can be said that the difference between enactments with a fixed time-limit for their applicability and other temporary enactments is of a rather formal character. It is often a matter of accident whether a time limit is fixed by the law. Time-limited laws, on the other hand, are often legislatively extended before they expire, if the extraordinary conditions which motivated them continue to exist.

However, a significant difference nevertheless remains. It is only when the time-limit is fixed that the offender can calculate when the law will be ineffective. The courts have not been willing to accept as a general rule that Penal Code, § 3, is inapplicable to penal provisions which are due to exceptional temporary conditions. See the decision in Rt. 1920, p. 486, quoted below.

Distinction between penal provision and norm of conduct—Practice, on the other hand, has laid down the basis for another limitation which often leads to the same result. In the leading case, in Rt. 1920, p. 486, the rule is formulated that Penal Code, § 3, does not apply to "such provisions, which can have indirect significance for the applicability of a penal provision, but which cannot themselves be said to be of penal nature." In other words, a

distinction is made between the *penal provisions proper* and the *norms of conduct* which are sanctioned by the penal provisions. Only changes within the first area fall within Penal Code, § 3. As far as the norm of conduct is concerned, the law at the time of action is always applicable.

Blanket penal provisions—The rule has its most important area of application with respect to the blanket penal provisions which confine themselves to providing punishment for violation of regulations promulgated by some public authority to whom the power to make such regulations has been duly delegated within a specific area (see above, § 3, II). By established practice, it is assumed here that only changes in the penal provision itself fall under Penal Code, § 3, and not changes in those regulations which fill out the penal provision. Typical examples are changes in price and rationing provisions. As long as the statute itself with its threat of punishment remains unchanged, it does not benefit the accused that the regulations are changed before trial, so that the act now would be non-punishable.

Rt. 1920, p. 486: An enactment of May 14, 1917, dealing with provisions to secure the country's supply of food and other goods, gave the King, in § 1, the power to introduce rationing ordinances, and in § 8, imposed punishment on one who intentionally or negligently violates regulations made pursuant to the statute. The defendants, in the fall of 1918, had sold ninety-five kilos of coffee without rationing coupons or permit. But before this case came to trial, the rationing of coffee was terminated. The accused were nevertheless found guilty by the City Court and their appeal was unanimously rejected by the Supreme Court. The Attorney-General argued that Penal Code, § 3, did not apply to penal provisions which exist because of exceptional temporary conditions, and which at the outset are meant to last no longer than necessity demands. The Supreme Court Justice who voted first, and with whom the other Justices concurred, did not agree with this: "To consider the courts competent to make a discretionary evaluation, in each individual case, of these conditions and, according to the circumstances, attach relevance to the abolition in certain cases and not in others, in relation to prior violations, would in my opinion lead to a very unfortunate uncertainty and arbitrariness in law enforcement and would also be in direct conflict with the legal provision as it is worded." But he held that Penal Code, § 3, could not be applied since it spoke only about changes in the penal law and the penal provisions in force. "And it seems to me that it would be an extremely unnatural construction that provisions which increase or lower a maximum price or change the quantity which can be sold for a rationing coupon, or which make changes in the tariff duty, could be termed penal provisions."

Rt. 1933, p. 1001: According to the Salmon Fishery Act of Feb. 27, 1930, no salmon fishery equipment may be used or left standing so that fish can be caught or their movement interrupted from Friday at 6:00 p.m. to Monday at 6:00 p.m. More detailed provisions as to permissible methods of closing the nets may be given by the King. § 37 of the law provides punishment for violations of the law or of provisions made under authority of the law. The accused had closed his nets in a manner which was in fact effective, but which was not permitted according to the provisions in force at the time. Before the case came up for decision, however, the closing rules had been changed, making the method which he had used permissible. He was nevertheless found guilty, since the change in the closing rules could not be regarded as a penal provision according to Penal Code, § 3. There were two dissenting opinions.

Rt. 1938, p. 367: According to the Act of July 14, 1894, dealing with measures against contagious diseases among domestic animals, the Ministery of Agriculture can decree measures which are necessary to prevent contagion. Violation of these rules are punishable under § 27 of the Act. During an epidemic of splenic fever, the Ministry had provided that dogs were to be leashed or kept indoors. A dog owner had violated the regulation, but before his case came up for decision, the epidemic was over and the prohibition cancelled. Referring to established practice, the Supreme Court unanimously held that this could not justify an acquittal.

See also Rt. 1938, pp. 866 and 922 (the traffic rules, which are decreed by the King by authority of the Highway Traffic Act, are not penal provisions in relation to Penal Code, § 3); Rt. 1950, pp. 557, 715 and 924; Rt. 1953, p. 1206 (the same is true with respect to price regulations.)

The distinction between penal provision and norm is also used as the basis outside of the area of delegated legislation. It often happens that an Act

first contains a number of prohibitions and orders and then a general provision which provides punishment for one who violates the rules. In practice, it is presumed that a change in the prohibitions and orders is not a change in a penal provision and thus does not fall within Penal Code, § 3.

Rt. 1930, p. 903: The owner of a seine was charged with failure to sign up his crew as members of the compulsory health insurance plan, as required by the rules which were then in force. Before the case came to trial, the law was changed exempting such cases from compulsory insurance. This, however, did not prevent punishment, "since the amendment of 1928 did not actually contain any change with respect to the penal provisions of the law here considered."

As the practice has developed, it can be said that outside the Penal Code itself, it is almost an exception that new provisions are applied to the benefit of the offender. As a rule this happens only when the entire statute is repealed or the punishment is changed, but not in the very common instance where the changes relate to the description of the acts to which the threat of punishment pertains. It cannot be regarded as certain, however, that the courts will disregard changes in the norms of conduct when they have a more permanent and general character. The Price Act of June 26, 1953, § 18 states: "It is forbidden to accept, demand or agree to prices which are unreasonable." The penal threat is found in § 52, which generally directs itself against those who breach provisions which are fixed in the law or promulgated under its authority. Assume that the provision in § 18 against unreasonable prices is repealed. If the penal threat had been inserted in the same provision the repeal of § 18 would have affected earlier violations, and it does not seem reasonable that the result should be different because the authority for punishment is found in a general provision. The relationship between norm and penal provision is the same, *e.g.*, in the Motor Vehicle Act, which has a prohibition against drunken driving in § 17, and a threat of punishment in § 29.

I have been referring to the legislation outside the Penal Code where the question of the effect of new laws is most practical. The consequence of the established practice must undoubtedly be that the distinction between penal provision and norm must also apply with respect to those provisions of regulatory character in the Penal Code itself which refer to rules of conduct contained in other laws or in regulations made by public authorities (see, for example, Penal Code, §§ 334, 339, 352 *et seq.*). Whether the same can be presumed with respect to violations of other types will have to remain an unsolved question. An example is the provision in Penal Code, § 220, which makes it a crime to enter into a marriage which is void due to previous marriage, consanguinity or relationship by marriage. How far the marriage prohibition extends is shown by the act dealing with the consummation and dissolution of marriages, of May 31, 1918, §§ 7 and 8. Suppose that a previously divorced man has married his divorced wife's daughter, in violation of § 8. He is accused under Penal Code, § 220, but before the case comes to trial, the prohibition in § 8 of the Marriage Act is repealed. The penal provision in Penal Code, § 220, remains unchanged. If one applies the principles which practice has established with respect to penal provisions outside the Penal Code, the change should not benefit the accused.[6] But this is hardly reasonable, since the change in the law in this instance signifies a changed evaluation by the legislature. If Penal Code, § 220, instead of referring to the marital law, had itself contained the definition of the prohibited relationship, it is clear that there would have been an amendment of the penal provision. The choice of formulation depends on reasons of convenience which should not have any bearing on the decision.

The solution which the courts have chosen can be criticized both from a theoretical and practical point of view. Skeie[7] has strongly held that it is untenable to limit the concept "penal provision" as it is done in legal practice. A complete penal provision consists of a threat of punishment and a description of the acts which fall under it. The two together make up the penal provision. It can be arranged editorially in many ways. The threat of punishment and the norm can be combined in one and the same provision. Or the threat of punishment can be combined in one section, and the norm in another, or even in another law. The threat of punishment may also be in a status

[6] See Andenaes, *Straffbar unnlatelse*, pp. 493–495, 562–564 (Oslo, 1942).
[7] Skeie, *Den norske strafferett*, I, pp. 69–70 (2nd ed., Oslo, 1946).

whereas the norm is found in regulations promulgated by public authorities. Whatever may be the legal technique, both parts are needed to make up a complete penal provision. Whether the amendment concerns the penal threat itself or the description of the acts to which it applies, there is in fact an amendment of a penal provision.

The interpretation of Penal Code, § 3, making it applicable only to the penal threat, leads to a result whereby similar questions are determined differently, dependent on which legal technique is used. The real considerations, however, are the same whether one or the other form is used.

Skeie comes to the conclusion that both a change in the threat of punishment and in the description of the act should be applied in favor of the offender. Strong practical objections, however, can be raised against this point of view. For example, if one thinks of an area such as the price and rationing legislation, where the various provisions change rapidly, it is naturally important from a legislative point of view to create respect for the rules as they are at any time, and it would be very unfortunate if breaches were to go unpunished merely because the provision in question was amended before the case went to trial. When the law itself is changed, the legislature can say explicitly whether or not older breaches are to be affected by the new law. But when only regulations promulgated by public authorities, under authority of the statute, are involved, this solution is precluded because the new regulations cannot disregard the legislative enactment in Penal Code, § 3. In favor of the distinction presently recognized by practice, it can be said that it leads to reasonable results in the most important practical situations, and it is flexible enough so that policy considerations can influence the determination.

The rational solution should probably be for the law to give the court free discretion to determine whether new and (for the accused) more favorable provisions should be applied, without binding the decision to a fictitious distinction between penal and non-penal provisions.

V. The rules on prosecution

The rules on prosecution, as mentioned before, are considered penal provisions with respect to Penal Code, § 3. It follows that the rule most favorable to the accused must be applied. If a new law has been enacted which requires that the victim request public prosecution, the public prosecutor cannot proceed with the case if such a request is lacking. In the reverse case, where a request for prosecution is needed under the old law, but not under the new one, the result will be the same and the public prosecutor cannot proceed with the case without such a request.

There are two exceptions to the rule, both of which are unfavorable to the accused:

1. If legal proceedings have been lawfully initiated, it follows from Penal Code, § 3, para. 3, that a subsequent law which makes the prosecution dependent upon the request of the victim, or which restricts prosecution to private action, shall not apply to the case. The lawfully commenced prosecution can thus continue.

2. Out of consideration for the victim, Penal Code, § 3, para. 4, provides: "The time limiting the victim's initiation of legal action, or request for prosecution, shall in no case be computed until the law determining it has come into force." Suppose that the period of limitation in Penal Code, § 80, for a request for public prosecution, or the commencement of a private prosecution has been shortened from six to three months. The new provision is more favorable to the offender than the old and should thus be applied, but with the limitation which is provided for in Penal Code, § 3, para. 4. If two months have passed when the new law comes into effect, the victim will nevertheless have three months within which to commence action. If four months have passed, the new law will have no effect whatever. According to the old law he would have two months left, but it is obviously not the purpose of Penal Code, § 3, para. 4, to create a situation whereby the victim will have more time than before.

VI. The rules on limitation

The rules on limitation are also penal provisions and thus the mildest rule must be applied. But if prosecution has been lawfully initiated according to the old law, the prosecution can continue even though there is now a new law which shortens the period of limitation (Penal Code, § 3, para. 3.). The law provides a similar rule with respect to limitation on execution of sentences if execution has been lawfully commenced.

VII. Amendments after sentence

If the amendment is introduced after the sentence has been passed by the trial court, but before the case has been heard on appeal, the provision in Penal Code, § 3, para. 2, comes into effect. The rule will be different according to the type of legal remedy used against the judgment.

The law does not take into consideration an amendment passed after final judgment. The comments to the draft code indicate that in such a case unjustified hardship will have to be avoided through pardoning (S.K.M., p. 9). The same applies when, according to the rules in Penal Code, § 3, para. 3, it is impossible to take into consideration a new and milder law which has come into effect subsequent to the judgment in the lower court, but before the case is finally determined. See, for example, Rt. 1929, p. 571.

VIII. When is the act deemed committed?

There may occasionally be doubts about when an act is to be deemed committed.[8]

If the amendment tends to favor the defendant, the doubts are of no importance. The new and milder law shall then be applied in all cases. If the new law is stricter than the old, however, the question will be significant, since only acts which have been committed after the new law has come into effect are affected by the aggravation.

The starting point is that the *commission of the act* itself is decisive. Here, we cannot analogously use the principle in Penal Code, § 12, last paragraph and § 69, para. 2, attaching relevance to the occurrence of the effect of the criminal act.

A *continous* offense which occurs partly before and partly after the amendment must be treated partly according to the old law and partly according to the new law. The same holds true if several acts, some of which take place before and some after the new and stricter law, are all judged in the same proceeding. Difficult questions may arise here. (See Rt. 1947, p. 25.)

If the offense consists of an omission, it must be considered as continuing as long as the legal duty remains (see above, § 37, III). In other words, if the duty has not ceased by the time the new and strict law comes into effect, the new law can be applied.

SWITZERLAND

The Swiss Criminal Code of December 21, 1937,[1] as amended on October 5, 1950,[2] regulates, in Sections Three to Six, its territorial applicability. It is the territoriality principle which is the basic point of contact between a criminal case and the applicability of the Swiss Criminal Code (Sec. 3). The exception to this principle is the provision of Section Four which is based on the so-called protective principle. It applies to criminal cases against the security of the state committed abroad no matter by whom. And finally the third point of contact is the personality principle which claims Swiss jurisdiction when a crime or an offense against a Swiss national is committed abroad (Sec. 5).[3] A translation of the above-mentioned Sections follows:

Sec. 3. 1. The present Law shall apply to anyone who commits a crime or an offense in Switzerland.

If the offender served a sentence for his act fully or partially abroad, then the Swiss judge shall take the served punishment into account.

2. If a foreigner was prosecuted abroad on the request of a Swiss authority, he shall not be punished further for the same act in Switzerland: if the foreign court finally acquitted him; if the penalty to which he was sentenced abroad was carried out, remitted or barred by the statute of limitations.

If the offender did not serve the sentence abroad at all, or only partially, then the penalty, or the remainder, shall be carried out in Switzerland.

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[8] See Ørsted in the statements which are recapitulated in *Norsk Retstidende* (1920), p. 489. See, however, Hurwitz, *Den danske kriminalret*, p. 191 (Copenhagen, 1952).

[1] *Amtliche Sammung der Bundesgesetze und Verordnungen* (hereinafter abbreviated as AS), 1938, p. 757.

[2] AS, 1951, p. 1.

[3] O. A. Germann, *Schweizerisches Strafgesetzbuch vom 21, Dezember 1937*. Zürich, Schulthess, 1966; *Commentaire du Code penal suisse*. Neuchatel, Paris, Editions Delachaux & Niestlé, 1941–56; Oscar Härdy, *Handkommentar zum Schweizerischen Strafgesetzbuch*. Bern, K. J. Wyss Erben, 1964.

Sec. 4. The present Law shall also apply to anyone who commits abroad a crime or an offense against the state (Secs. 265, 266, 266bis, 267, 268, 270, 271, 275, 275bis, 275ter), carries on an illegal intelligence service (Secs. 272 to 274), or interferes with military security (Secs. 276 and 277).

If the offender served the penalty for his act fully or partially abroad, then the Swiss judge shall take the served penalty into account.

Sec. 5. Whoever commits a crime or an offense abroad against a Swiss national and the act is also punishable in the place of perpetration, Swiss law shall apply, provided, however, that he is found in Switzerland and not extradited aboard, or if he was extradited for this act to the Federation. If the law of the place of perpetration is more lenient, then this shall be applied.

The offender shall not be punished further for a crime or an offense if the punishment for which he was sentenced abroad was carried out, remitted or barred by the statute of limitations.

If the penalty was not served abroad at all, or only partially, then the penalty or the remainder of it shall be carried out in Switzerland.

Sec. 6. The present Law shall apply to a Swiss national who commits a crime or an offense abroad for which Swiss law permits extradition provided that the act is also punishable in the place of perpetration and the person is found in Switzerland or is extradited to the Federation for this act. If the law of the place of perpetration is more lenient, then this shall be applied.

2. The offender shall not be punished further in Switzerland: if he was finally acquitted abroad for his crime or offense; if the punishment for which he was sentenced abroad was carried out, remitted, or barred by the statute of limitations.

If the punishment abroad was only partially carried out, then the served part shall be taken into account.

U.S.S.R.

I. *Pertinent Provisions*

In the Soviet Union, the personality principle and the universality principle (universal repression principle) are the main principles upon which the applicability of Soviet criminal law[1] to crimes committed outside the boundaries of the Soviet Union is based. The former makes criminal law applicable to Soviet citizens and stateless persons, the latter, to aliens. The relevant provisions are contained in Section 5 of the Fundamental Principles of Criminal Legislation of the USSR and Union Republics (*Osnovy ugolovnogo zakonodatel'stva Soiuza SSR i soiuznykh respublik*) which reads as follows:[2]

> *Sec. 5. Applicability of the Criminal Laws of the USSR and the Union Republics to Acts Committed Outside the Boundaries of the USSR*
>
> Citizens of the USSR who commit crimes abroad shall be subject to criminal responsibility according to the laws in force in a union republic on the territory of which criminal proceedings are insitituted against them or they are arraigned before the court.
>
> Persons without citizenship who are situated in the USSR and who have committed a crime outside the boundaries of the USSR shall be responsible on the same basis.
>
> If the persons specied in the preceding paragraphs have been punished abroad for the crimes committed by them, the court may accordingly mitigate the punishment or completely relieve the guilty person from serving the punishment.
>
> Aliens who have committed crimes outside the boundaries of the USSR shall be subject to responsibility according to the Soviet criminal laws in instances provided for by international agreements.

These provisions have been incorporated into the criminal codes of all the union republics. For the purpose of this report, the relevant section of the

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[1] Soviet criminal legislation consists of the Fundamental Principles of Criminal Legislation which defines the principles and general provisions of criminal law, federal (*obshchesoiuznye*) criminal laws defining crimes against the state, milltary crimes, and if necessary, other crimes against the interests of the Soviet Union, and the criminal codes of the union republics.

[2] *Osnovy zakonodatel'stva Soiuza SSR i soiuznykh respublik* (Fundamental Principles of the Legislation of the USSR and the Union Republics), Moscow, 1971, p. 247-8.

Criminal Code of the Russian Soviet Federative Socialist Republic of 1960 is quoted below:[3]

> *Art. 5. Operation of the present Code with respect to acts committed outside boundaries of USSR.* Citizens of the USSR who commit crimes abroad shall be subject to responsibility in accordance with the present Code if criminal proceedings are instituted against them or they are brought to trial on the territory of the RSFSR.
>
> Persons without citizenship who are situated in the RSFSR and who have committed crimes beyond the boundaries of the USSR shall bear responsibility on the same basis.
>
> If the persons specified in paragraphs one and two of the present article have undergone punishment abroad for the crimes committed by them, a court may accordingly mitigate the assigned punishment or may completely relieve the guilty person from serving the punishment.
>
> For crimes committed by them outside the boundaries of the USSR, foreigners shall be subject to responsibility in accordance with Soviet criminal laws in instances provided for by international agreements.

II. *Comments and Interpretation*

A. Soviet citizens and stateless persons.[4]

One of the leading authorities on criminal law, N. D. Durmanov, points out that a Soviet citizen and a stateless person:[5]

> . . . is subject to criminal responsibility before the Soviet court according to Soviet criminal law irrespective of the place where he committed an act considered a punishable crime by Soviet law.
>
> Section 5, paragraph 1 of the Fundamental Principles has in mind, of course, acts considered crimes by Soviet law. It is of no importance whether these acts are considered crimes by the state where they were committed.

B. Aliens.

According to the interpretation of Section 5, paragraph 4, of the Fundamental Principles prevailing in the Soviet Union, Soviet criminal law has no external application except when international treaties provide for the punishment of aliens for crimes committed abroad.[6] Such a view is expressed by M. I. Kovalev who states:[7]

> Aliens who commit crimes outside the boundaries of the USSR are subject to criminal responsibility only in the cases provided for by international agreements.

However, it should be pointed out that the provisions of Section 5, paragraph 4, do not make an alien immune from prosecution in the Soviet Union for other acts committed abroad which are punishable under Soviet criminal laws but not punishable under foreign law.

According to the Soviet doctrine formulated in one of the commentaries:[8]

> . . . a crime is deemed to be committed on the territory of the USSR if the criminal result occurs within the boundaries of the USSR. Therefore, aliens who commit an act whose criminal result occurs within the boundaries of the USSR may bear criminal responsibility under the Criminal Code of the RSFSR if the criminal result occurs in the territory of the RSFSR or under the criminal codes of the other union republics if the criminal result occurs in their territory.

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[3] Harold J. Berman. *Soviet Criminal Law and Procedure, the RSFSR Codes. Introduction and Analysis.* Cambridge, Mass., 1966. p. 5.

[4] According to Sec. 8 of the Law on Citizenship of the USSR of August 19, 1938, a person who permanently or temporarily resides in the USSR and has no proof of citizenship of any other foreign country is deemed to be a stateless person.

[5] V. D. Men'shagin, N. D. Durmanov *and* A. G. Kriger, *editors. Sovetskoe ugolovnoe pravo. Obshchaia chast'* (Soviet Criminal Law. General Part). Moscow, 1969. p. 55.

[6] Soviet sources mention for instance: making or passing counterfeit money or securities (Sec. 87 of the RSFSR Criminal Code), illegally engaging in hunting seals and beavers (Sec. 164), making or supplying narcotics or other virulent or poisonous substances (Sec. 224), growing opium poppies and Indian hemp (Sec. 225), etc.

[7] M. I. Kovalev and others, *editors. Nauchnyi kommentarii k ugolovnomu kodeksu RSFSR.* Sverdlovsk, 1964. p. 9. A similar view is contained in Prof B. S. Nikiforov, *editor. Nauchnyi kommentarii ugolovnogo kodeksa RSFSR* (Scholarly Commentary to the Criminal Code of the RSFSR). Moscow 1964. p. 11.

[8] *Id.*

This doctrine is, in the first place, applicable to crimes against the Soviet Union. An authority on Soviet criminal law states: [9]

> An act which was begun outside the boundaries of the USSR but completed (the result has occurred or should have occurred) on our territory, is considered [an act] directed against the USSR and committed on the territory of the USSR. Thus, for instance, the planting of a delayed action bomb intended to go off on our territory should be considered a crime against the USSR.

Confirmation of this doctrine may be found in the decision of the Military Division of the Supreme Court of the USSR of May 19, 1960, which convicted Francis G. Powers, a pilot of the U–2 plane, of espionage for which preparations had been made outside the boundaries of the USSR.[10] Powers was tried and convicted of espionage on the basis of Section 2 of the Law on Crimes Against the State of December 25, 1958, which reads as follows: [11]

> *Sec. 2. Espionage*
>
> The transfer or stealing or obtainment for the purpose of transfer to a foreign state, a foreign organization or its intelligence service, of information constituting a state or military secret, as well as the transfer or obtainment on assignment from a foreign intelligence service of any other information to be used to the detriment of the USSR, if the espionage is committed by an alien or a stateless person, shall be punished by deprivation of liberty for from 7 to 15 years with confiscation of property and with or without exile for a term of 2 to 5 years, or by death with confiscation of property.

Other crimes against the state are treason, terrorist acts, diversion, sabotage, anti-Soviet agitation and propaganda, smuggling, currency violations, disclosure of state secrets, and others.

The Law of December 25, 1958, makes these federal crimes but since its provisions were incorporated in the criminal codes of the union republics, they are also republican offenses.

Attached is the Appendix: *Law in Eastern Europe, a series of publications issued by the Documentation Office for East European Law*, University of Leyden.

YUGOSLAVIA

The Criminal Code of March 2, 1951, as amended, is in force in Yugoslavia.[1] The Code has adopted the principle of its extraterritorial applicability. Thus it provides for the prosecution of specified crimes committed abroad (Section 92), all crimes against the State, crimes committed by Yugoslav citizens abroad (Section 93), and, finally, crimes against Yugoslavia or her citizens committed by foreigners abroad (Section 94).

An English translation of the Code is found in the *Collection of Yugoslav Laws*, and the above-mentioned provisions read as follows: [2]

> *Applicability of criminal law to anybody who commits specific criminal offences abroad*
>
> *Art. 92.* The present Code is applicable to anybody who commits outside the Yugoslav territory any of the criminal offenses provided by this Code in articles 100 to 112, 114 to 118, 120, 121 and in article 221 insofar as the deed relates to domestic currency.
>
> *Applicability of criminal law to Yugoslav citizens for criminal offences committed abroad*
>
> *Art. 93.* Yugoslav criminal law shall also apply to a citizen of Yugoslavia when he commits abroad a criminal offence other than the criminal offences enumerated in article 92 of the present Code, provided he is found on Yugoslav territory or has been extradited.

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[9] 1 I. I. Solodkin *in Kurs sovetskogo ugolovnogo prava, Chast' obshchaia* (A Course in Soviet Criminal Law, General Part) Moscow, 1968, p. 129.

[10] *Trial of the U-2 Exclusive authorized Account of the Court Proceedings of the Case of Francis Gary Powers.* Chicago, Translation World Publishers, 1960.

[11] 2 *Sbornik zakonov SSSR, 1938-1967* (Collection of Laws of the USSR, 1938-1967). Moscow, 1968, p. 451.

[1] *Criminal Code.* Official Gazette of the SFRY, No. 11/1951.

[2] Institute of Comparative Law. *Collection of Yugoslav Laws*, vol. XI. Criminal Code, p. 62 ff.

Applicability of criminal law to foreigners for criminal offences committed abroad

Art. 94. (1) Yugoslav criminal law shall be applicable to a foreigner who has committed outside the Yugoslav territory a criminal offence against her or her citizen, if this offence is threatened at least by the punishment of imprisonment and does not belong to the group of offences specified in article 92 of the present Code, provided the foreigner is found on Yugoslav territory or has been extradited.

(2) Yugoslav criminal law shall also be applicable to a foreigner who has committed abroad a criminal offence against a foreign state or another foreigner for which a punishment of five year's strict imprisonment or a heavier penalty may be imposed under this law (refers to Yugoslav law), provided the perpetrator is found on Yugoslav territory and is not extradited to a foreign state. In such a case the court may not inflict a heavier punishment than the one provided by the law of the country of the place of commission.

There are several textbooks and commentaries on the Criminal Code.[3]

FOREIGN CRIMINAL LAWS COMPARED WITH THE PROPOSED FEDERAL CRIMINAL CODE

(By Members of the Staff of the Law Library, Library of Congress, March 1972)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
Washington, D.C., January 26, 1972.

Mr. CARLETON W. KENYON,
Law Librarian,
Library of Congress,
Washington, D.C.

DEAR MR. KENYON: The Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee is considering a proposed total revision and reform of Title 18 (Crimes and Criminal Procedure) of the United States Code. The "work basis" for the Subcommittee's effort is the Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws. The Code is contained in Part I of the Subcommittee's hearings, a copy of which is enclosed. Additional copies may be obtained from the Subcommittee on request.

Since the Federal government has never had a penal code, only an aggregation of loosely joined statutes supplemented by court decisions and common-law doctrines, the proposed codification and revision would represent an enormous development in American criminal jurisprudence.

Because continental Europeans have hundreds of years of experience in drafting, construing and applying criminal codes, the Subcommittee wishes to draw upon the law, practice, theory and experience of the nations of Europe, as it evaluates and formulates a penal code for the government of the United States.

This letter details a number of questions, and areas in which information of a comparative nature is desired. Please do not feel restricted by this list; if any of your European lawyers, specialists and staff think of other subjects or alternatives that may be of interest and useful in the Federal code, I hope they will include such material in the work furnished to the Subcommittee.

In response to the various questions, except where obviously inapplicable, please gather the text, in English translation, of (a) relevant European Code sections or portions of sections; (b) relevant chapters, pages or sentences in Code Commentaries; (c) additional bibliography or citations. We are searching for ideas and possibilities for the Federal Criminal Code, rather than for a comprehensive survey of European criminal law. On this basis a Norwegian Code section is as valuable as a French Code section even though it comes from a much smaller nation. The Subcommittee is particularly interested in the 1969 German Criminal Code (eff. 1973) because it is the newest of the continental codes.

We should like information on the following points:

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[3] Nikola Srzentic, *Krivicno Pravo*. Sarajevo, 1968 p. 31–33 (Criminal Law); Milos Radovanovic, *Krivicno Pravo SFRJ*. Beograd, 1969. p. 147–151 (Criminal Law of the SFRY).

1. The National Commission, following the lead of the American Law Institute in its Model Penal Code (1962), has proposed what is primarily a code of substantive criminal law. The proposed Code is divided into three Parts—Part A, General Provisions; Part B, Specific Offenses; Part C, Sentencing.

Is such a tripartite division followed in the European codes? How are European codes structured?

2. The proposed code contains 350 sections (Part A: 73; Part B: 238; Part C: 39) but the numbering system runs from Section 101 to Section 3601.

Is it customary in European Codes to leave so many blank numbers for future statutes? What is the usual numbering system?

3. The proposed Code defines the various "intent" requirements or the mental elements necessary for criminal conduct in §302(1). The Code would establish four different kinds of culpability: intentionally, knowingly, recklessly and negligently.

How do the continental Codes regard and use the element of the defendant's state of mind? Is it used to determine guilt or innocence? Degree of guilt? Sentence? How do the kinds of culpability proposed in the draft code compare with European provisions? (See 3 W.P. 1455).

4. The proposed Federal Criminal Code includes a section (§305) which defines the causation requirement or causal connection which must be proved between the defendant's conduct and the result.

How is causation handled by the continental codes? (See 3 W.P. 1456).

5. The Draft proposes that mental disease or defect at the time of the criminal conduct be a defense and defines that defense in proposed §503.

Is there an insanity defense to criminal charges under European Codes? How do the European provisions compare with that of the Draft Code? Do any continental codes provide that the insane defendant may be found guilty, but that upon conviction he must be accorded medical rather than penological treatment? How do the European Codes handle the procedural aspects of the insanity defense: is there provision whereby the Judge selects a psychiatrist to examine the defendant or do both the government and the defense lawyers bring in their own medical witnesses? Is there provision whereby the defendant found not guilty by reason of insanity is automatically committed to a mental institution for observation and treatment?

6. Although the defendant who "lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" because of mental illness has a defense under §503, the defendant who is similarly situated because of alcohol, or drug intoxication has no defense under §502 (except in limited situations).

How do European Codes handle the problem of the defendant who is intoxicated? Is he given a defense to criminal liability? Is he handled differently upon sentencing? (i.e. sent to a hospital rather than prison?) If European law is similar to American, how do theorists defend different treatment, for example, for the alcoholic and the mentally-ill person?

7. The Draft Code contains a rather elaborate and detailed group of sections on self-defense and use of force, etc. (§603—Self-Defense: §604—Defense of Others: §605—Use of Force by Persons with Parental, Custodial or Similar Responsibilities: §606—Use of Force in Defense of Premises and Property; §607—Limits on the Use of oFrce; Excessive Force; Deadly Force.)

How do these detailed rules compare with the equivalent provisions in European codes? Do the European Codes enunciate specific rules or set general standards? (See 3 W.P. 1460).

8. Near the end of the Code proposal, in §3002, the system of classification of offenses is set forth. There are six categories: Class A, Class B and Class C Felonies, Class A and Class B Misdemeanors and Infractions. This is a system of classification for purposes of sentencing.

How and for what purposes do European codes classify offenses? (See 3 W.P. 1462–1464).

9. How do European Code provisions on sentencing of convicted defendants compare with the sections in Part C of the proposed Federal Code? Do European Code sections on suspension of sentences provide for suspension of imposition of sentence and/or suspension of execution of sentence? Do the continental codes provide for a sentence of probation or is probation a form of suspension of sentence? Is a person so released under supervision by probation officers, police officers or no one? Do the European Codes provide for indeterminate or de-

terminate sentences of imprisonment? Are there special extended term prison-sentence provisions for dangerous special offenders similar to §3207? How do the authorized prison sentences for a representative group of crimes compare with the authorized prison sentences for the same offenses under European codes? Are there mandatory minimum prison sentences under the continental codes? If the European nations employ systems of release on parole, how do they compare with the provisions in Chapter 34 of the Draft? Are prisoners released on parole by an administrative agency such as the United States parole board or by the Court? Does European law have any equivalent to proposed §3007 under which an organization convicted of an offense may be required to give notice or appropriate publicity to the conviction? Is giving publicity to a conviction (a different colored license plate for persons convicted of drunken driving, for example) used as a sanction or sentence under European Codes? Do the European Codes have any equivalent to proposed §3003 (Persistent Misdemeanant)? Do European Codes require Judges to give reasons in writing for sentences imposed? Are sentences subject to review on appeal by a higher court? If so, may the appellate court raise as well as lower the sentence? May the government appeal a sentence or only the defendant? What standards do the Codes require for sentencing review? If appellate review of sentences is not authorized under European penal or criminal procedure codes, how is uniformity of sentencing amongst the judges secured? How does §3204 (Concurrent and Consecutive Terms of Imprisonment) compare with European code provisions on multiple offenses? According to Professor Andenaes some European codes provide for a joint sentence rather than concurrent or consecutive sentences (3 W. P. 1473; also 1484–1485). How are terms computed under joint sentencing provisions? Under a "joint sentence", what happens if *one* but not all of the convictions is reversed on appeal? Regarding the imposition of fines, do any European codes have provisions similar to §3301 (2)? In the United States many imposed fines are never collected and therefore of limited value either as a punishment or deterrent to others; how do the European codes provide for collection of fines? What is the "day fine" system and how are provisions regarding it formulated? Is the day fine a fixed amount depending upon the gravity of the offense of which the defendant is convicted or is the amount fixed based upon the ability of the defendant to pay?

10. Is mistake of law a defense under European codes? Mistake of fact? How do continental provisions compare with §§303, 304, 609? (See 3 W. P. 1460–1461, 1488–1491).

11. One significant change in the proposed Code from present federal criminal law is the separation of the jurisdictional base upon which federal prosecution rests from the definition of the offense as to which the defendant is prosecuted. Are there analogues to this differentiation between crime and jurisdiction in any of the European codes? (See 3 W.P. 1478)

12. How do the Draft Code's provisions on extraterritorial jurisdiction (§208) compare with the European provisions on extraterritoriality and jurisdiction over crimes committed outside national boundaries? (See 3 W.P. 1478–79)

13. How is the problem of criminal conspiracy handled under European codes? (See §1004)

14. How do European codes handle the problem of "felony-murder" (murder committed by one party to a felony)? (See §601[c])

15. In those European nations which have a federal system (e.g. West Germany, Switzerland) does the Federal government have concurrent or exclusive jurisdiction over riots, mass demonstrations and crimes or is jurisdiction limited in a way similar to proposed §1801(4)? How do the Code provisions in this area (§1801—Inciting Riot; §1802—Arming Rioters; §1803—Engaging in a Riot; §1804—Disobedience of Public Safety Orders under Riot Conditions) compare with European code sections dealing with similar problems? (See 3 W.P. 1505)

16. Do any of the European codes have a section similar to §1104 (Para-Military Activities)?

17. A number of sections and subchapters of the proposed code deal with an area which is often referred to as "crimes without victims"; i.e. crimes in which the victim either consents or is a willing customer of the defendant. See, e.g., §§1821–1829 (drugs), §§1831–1832 (gambling), §§1841–1849 (prostitution), §1851 (obscenity), and homosexual activity between consenting adults. How do the European codes approach these problems?

18. How do European code provisions on firearms and explosives compare with §§1811 to 1814 and the Commission's controversial recommendation in the introductory note to the subchapter?

19. Which European jurisdictions provide for capital punishment? For which offenses? Do any European codes provide for a separate proceeding to determine sentence in a capital case? (See §3602). Are separate hearings on sentencing authorized in any cases or does the absence of a jury system on the continent make separate hearings not bound by restrictive rules of evidence superfluous?

20. How do the codes' provisions on multiple prosecutions and trials (§703—Prosecution for Multiple Related Offenses; §704—When Prosecution Barred by Former Prosecution for Different Offense; §706—Prosecutions Under Other Federal Codes; §707—Former Prosecution in Another Jurisdiction: When a Bar; §708—Subsequent Prosecution by a Local Government: When Barred; §709—When Former Prosecution is Invalid or Fraudulently Procured) compare with the relevant sections of European codes? (See 3 W.P. 1494–1496).

In addition, please furnish us with a list of the names and approximate addresses of the major criminal-law scholars in Europe so that we may, if our resources permit, contact them directly to solicit their evaluations of the Code proposed by the National Commission. Two such experts, Professor Johannes Andenaes of the University of Oslo and Mirjan Damaska of the University of Zagreb, prepared comparative studies which are published in Volume III of the Working Papers of the Commission. Copies of the Working Papers can be obtained from the House Judiciary Committee.

It would be helpful if as much material as possible could be made available to the Subcommittee no later than March 17, so that at least some of it may be inserted into the hearings of the Subcommittee, now planned for the end of that month, and made available to the American academic and legal communities interested in criminal law.

If you have any questions in reference to this request, please contact Mr. G. Robert Blakey, the Chief Counsel to the Subcommittee at 225-3281.

With kindest regards, I am

Sincerely yours,

JOHN L. MCCLELLAN,
Chairman.

FEBRUARY 17, 1972.

NEAR EASTERN AND AFRICAN LAW DIVISION,
Law Library, Library of Congress,
Washington, D.C.

GENTLEMEN: On January 26, 1972, the Subcommittee on Criminal Laws and Procedures submitted an extensive question letter to the Law Librarian of the Library of Congress requesting the assistance of the European Law Division in researching useful continental precedents for the pending total revision, codification and reform of Title 18 of the United States Code (Crimes and Criminal Procedure). On February 3, 1972, the Subcommittee sent a slightly modified questionnaire to 250 Professors of comparative law throughout the country. On February 14, Dr. Hsia of the Far Eastern Law Division suggested that the questions should also be sent to the Far Eastern, Near Eastern and Hispanic Law Divisions of the Library of Congress because the European Criminal Codes were adopted and adapted rather than copied by non-European states which adopted the code approach. Accordingly, please find attached a copy of the questions which the Subcommittee has prepared.

Please do not feel restricted by this list. If any of your lawyers, specialists and staff think of other subjects or alternatives that may be of interest and useful in a United States Federal Criminal Code, I hope such material will be included in the work furnished to the Subcommittee.

In response to the various questions, except where obviously inapplicable, please gather the text, in English translation, of (a) relevant Code sections or portions of sections; (b) relevant chapters, pages or sentences in Code Commentaries; (c) additional bibliography or citations. We are searching for ideas and possibilities for the Federal Criminal Code, rather than for a comprehensive survey of the criminal law of other areas of the world.

Since the Federal government never had a penal code, only an aggregation of loosely joined statutes supplemented by court decisions and common-law doc-

trines, the proposed codification and revision would represent an enormous development in American criminal jurisprudence. Your assistance in this development is appreciated.

Sincerely,

G. ROBERT BLAKEY, *Chief Counsel.*

FEBRUARY 17, 1972.

FAR EASTERN LAW DIVISION,
LAW LIBRARY, LIBRARY OF CONGRESS,
Washington, D.C.

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Sincerely,

G. ROBERT BLAKEY, *Chief Counsel.*

FEBRUARY 17, 1972.

HISPANIC LAW DIVISION,
LAW LIBRARY, LIBRARY OF CONGRESS,
Washington, D.C.

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G. ROBERT BLAKEY, *Chief Counsel.*

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ARGENTINA

INTRODUCTION

The old penal code of Argentina, enacted pursuant to the provisions of Law 1920 of November 7, 1886, in force as of March 1, 1887, was repealed by the new code enacted by Law 11179 of 1921, in force as of April 29, 1922.

Almost after the enactment of the Code of 1886, a movement to amend it began. A new draft was prepared in 1891 which included a definition of all the violations of the law, regardless of the court which should try the case, making it, therefore, common to all the Republic. This reform was not adopted. A new draft was prepared in 1916 and eventually was approved in 1921, becoming Law 11179.

The Code of 1921 was soon the object of severe criticism, mainly because in that year, there appeared the draft prepared by the famous Italian penalist Enrico Ferri and soon afterwards, between the years 1923 and 1925, the ideas of the brilliant Spanish penalist Luis Jiménez de Asúa were published. These prompted the Argentinians to prepare new drafts revising their code.

After the preparation of several drafts and amendments to the Code, Law 17567 of 1968 was finally enacted (Boletín Oficial, January 12, 1968) and enforced as of April 1, 1968. It contains substantial amendments to the penal code.

JURISDICTION OF THE PENAL CODE

In the study of Argentine criminal law, it should be taken into consideration that the country is politically organized under a federal system. The basic codes, such as the civil, commercial, criminal or penal and mining codes nevertheless are enforceable throughout the nation. This does not hold true

with regard to procedural laws or codes, which, like the criminal codes, are local. With regard to substantive criminal laws, notwithstanding, certain matters, because of their subject or their jurisdiction, are subject to federal jurisdiction, as it happens when the sovereignty and security of the nation is involved or in cases where territorial waters are concerned. The provinces are empowered to create their own criminal laws in those cases where there is no conflict with federal matters.

MAIN FEATURES OF THE PENAL CODE OF 1921

The Argentine Penal Code of 1921 is divided into two parts: Book I which contains the General Part which covers the general application of criminal law, the penalties, suspended sentence, reparation of damages, criminal liability, attempt, accessoryship, recidivism, concurrence of felonies, extinction of liability and prosecution, exercise of prosecutions, functions and definitions of the terms used. Book II deals with special crimes or felonies and is divided into felonies against the person, honor, civil statutes, liberty, property, security of the nation, felonies against the government and the constitutional order, public administration and public faith.

The Code respects the legal principle, *nullum crimen sine lege*. It defines every offense precisely, assigns to each a corresponding sanction and seeks to grant a judge a certain margin of discretion which will permit him to apply punishments within minimum and maximum limits provided by the law. At times, it gives the judge a choice among different classes of punishments.

The punishments established by the Code are imprisonment and jailing, fine and disqualification (*inhabilitación*). It does not provide for capital punishment nor for forfeiture of property. Life imprisonment is a rare punishment applied in exceptional cases, such as in homicide under aggravating circumstances.

Individualization of punishment is achieved by a system of sufficiently ample minimum and maximum sentences, by parallel punishments and other dispositions, such as that of Article 41 which calls for the consideration of mitigating and aggravating circumstances, or those of Article 26 referring to parole or similarly those of Article 13 on conditional release, which looks to the rehabilitation of the convict.

Short sentences have been largely replaced by the imposition of fines for many offenses and through the use of the suspended sentence based on the moral stature of the convict. However, there is no provision for judicial grace, nor free mitigation of punishment, although Article 44 allows the judge to exempt the perpetrator from punishment in accordance with the degree of danger if the act was incapable of being harmful.

Parole is another important measure adopted by the Code in an effort to stimulate good conduct. It is not based on the executive power; it is a judicial faculty which does not exempt from punishment as a pardon would, but it subjects the person to whom it has been granted to certain obligations and rules of conduct, which in case of noncompliance would lead to revocation of the benefits. On the local level, the governors of the provinces can grant clemency.

A suspended sentence can be given only to convicts without previous criminal records and sentenced to a maximum term of two years in jail. This limitation was adopted by the Code because, for certain persons, short terms of jailing were found to have a more harmful effect than liberty on probation, for in jail the convict is likely to acquire detrimental habits.

Another peculiar advantage of the Code is its provisions for parallel punishments, which permit the judge to choose from among several punishments the one which best fits the personality of the offender. The Code also contains both punishments and security measures. Among the latter there are sanctions ranging from imprisonment for an indefinite period in the Southern territories (Art. 52) to commitment in an insane asylum in case of insanity, and protection of minors.

In order to obtain the best possible individualization of punishment, the judge, prior to sentencing, must try to obtain a conception of the perpetrator's personality, with the assistance or advice of experts, and especially by direct examination of the convict. The individualization and graduation of punishment is made obligatory by Article 41 of the Code.

AMENDMENTS TO THE CODE ADOPTED IN 1968

The amendments adopted in 1968 to Book I of the Code are the following:

(1) Under the old provision, in certain instances a conviction entailed absolute disqualification (*inhabilitación absoluta*). It included, among others, the loss of pension or retirement benefits. The 1968 amendment provides that the convict's relatives shall receive said pension or retirement. It also empowers the courts to assign to the victims of the criminal act and to those persons dependent upon him up to one half the amount of said retirement or pension, or in case the convict has no dependent, they may receive said amount in full, until the amount set as civil indemnity by the court is paid in full.

(2) Courts are empowered to impose limited disqualifications which entail the loss of the position, office or profession for a period of time of no less than six months nor more than ten years in the following cases:

(a) In the case of conviction for incompetence or abuse in the performance of a public office;

(b) In the case of abuse in the exercise of parental authority, adoption, guardianship or curatorship rights, and

(c) In the case of abuse or incompetence in the practice of a profession or activity for which licensing is required.

(3) Restoration of qualifications to convicts punished with the penalty of disqualification in these cases where they have properly behaved during half of the time of the service of sanction or for ten years in case of life imprisonment when the convict has made restitution as far as it was possible for him to do.

In these cases where the penalty also included disqualification to hold public office, restoration of qualifications does not entail reappointment of the convict to said office.

(4) In these cases where a crime was committed for profit, the court may add a fine to the penalty of deprivation of liberty, even though it is not provided in the Code or only provided in alternate form. In case a fine is not provided for by the Code, said fine cannot exceed the amount of 50,000 *pesos*.

(5) Conviction of crime entails the furfeiture of the instruments with which it was committed and the objects which the crime produced, all of which shall be sized. They shall be destroyed, except in cases where they may be used by the governments of the nation or the provinces.

(6) In the case of a first conviction where the penalty of jailing for a term not exceeding two years is applicable, the courts are empowered to suspend the sentence. This decision shall be based on the moral qualifications of the convict, the nature of the crime he committed and the circumstances surrounding the case.

In the cases of concurrence of crimes, a suspended sentence shall be applied if the penalty does not exceed the term of two years of imprisonment. Suspended sentence shall not be applicable for the penalties of fine or disqualification.

(7) It shall be considered that a suspended sentence was not pronounced upon a culprit in a case where he did not commit another crime within the term of four years.

Should he commit another crime, then he shall serve the punishment imposed in the first sentence in addition to the punishment for his second conviction.

A suspended sentence may be granted for a second time in a case where a new crime was committed eight years from the date of the first conviction.

(8) With regard to reincidence or recidivism, the 1968 amendments provide that a previous conviction shall not be taken into account to consider the convict a second offender in the cases that another term equal to the one of the served sentence has elapsed. Said term shall never exceed ten years nor be less than five yars.

(9) Reincidence or recidivism causes an increase in the penalty to one-third of its minimum or maximum periods. After the third reincidence, the minimum penalty shall be doubled but not less than one year or more than one half the term set for the maximum penalty.

In case the penalty for deprivation of liberty was served prior to the convict's reaching twenty-one years of age, his term cannot be computed, in order to calculate the term in case of aggravation of his penalty.

(10) In case several crimes punishable with divisible penalties of imprisonment or jailing concur, the highest penalty shall be applied, also taking into consideration the crimes punished with minor penalties.

In cases where some penalties are indivisible they alone shall be applied, except in the cases where life imprisonment and imprisonment for a certain term concur, in which case life imprisonment shall be applied. Disqualification to exercise certain rights and fines shall always be applied regardless of the provisions of the first paragraph.

(11) With regard to the barring of prosecution by application of the statute of limitation, the following amendments were also adopted in 1968:

(a) Crimes punishable by fine, regardless of the amount involved, were included in one provision and assigned the same prescriptive term.

(b) Said term was raised to three years.

(12) Prior to the 1968 amendment, in cases where a crime was punishable by a fine, the offense was barred from prosecution if the fine established by the Code was voluntarily paid by the offender. Due to abuses by those persons who had sufficient means, this privilege was repealed.

(13) The term for the statute of limitation to operate with regard to payment of fines was raised to three years.

(14) The application of the provisions of the statute of limitation, with regard to crimes committed by public officials while in office, is suspended for as long as said officials remain in office.

(15) The 1968 amendment authorizes private prosecution of certain crimes solely on the complaint of the victim himself: (a) Such crimes are rape, seduction, abduction and indecent assault, provided that death of the victim does not occur or that the latter did not suffer any of the injuries described by Article 91 of the Code; (b) threats; (c) minor injuries; (d) trespassing; and (e) criminal bankruptcy. Excepted, however, are those cases where public interest is involved. Or, where the victim is a minor or incapacitated without legal representation, or that he is an abandoned child. In these instances, they shall be publicly prosecuted. The same holds true in those cases where there is a conflict of interest between a minor and his legal representative.

CONCLUSION

From the above study we may conclude that the Argentine Penal Code, as amended, lies between the classical and the positive schools; therefore, we may call it an eclectic code. For some authors, like Professor Luis Jiménez de Asúa, it is placed in the neoclassical school, and for others, like Juan P. Ramos, it lies within the social defense theory.

BULGARIA

I. *General Remarks*

The Communist Government, established in Bulgaria after September 9, 1944, introduced a new Criminal Code on February 13, 1951, drafted along the line of Soviet doctrines in this field. This Code was entirely replaced by another on April 2, 1968,[1] which also incorporated various criminal provisions scattered throughout a number of legislative acts, in particular, the provisions dealing with military offenses and crimes against the peace and mankind as well as provisions regarding persons who deviate from socially useful labor and conduct a parasitic life. The new Code is based on the traditional principles of criminal law science and reflects the fundamentals of the Communist teachings related to this area.

The Bulgarian Code of Criminal Procedure adopted on February 5, 1952,[2] and amended several times, is still in force.

None of the above-cited major legislative acts have been translated into English and only a few decisions of the Supreme Court involving the new Criminal Code have been published.

The spokesman of the present regime in Bulgaria and indisputable authority in the field of criminal law is Professor Ivan Nenov, at the University of

[1] *Durzhaven Vestnik* (Bulgarian Official Law Gazette, hereinafter abbreviated as DV), No. 26, April 2, 1968; correction: DV No. 29, April 12, 1968.

[2] *Izvestia no Prezidiuma na Narodnoto Sŭbranie*, No. 11, February 5, 1952.

Sofia Law School, while Professor Stefan Pavlov has a similar position and reputation in the field of criminal procedure law.

There is no commentary on the new 1968 Criminal Code; the two major codes of 1951 and 1952 have been extensively analyzed and interpreted by the above-mentioned legal scholars, as follows:

Ivan Neov. *Nakazatelno pravo na Narodna Republika Bŭlgariia. Obshta Chast* (Criminal Law of the People's Republic of Bulgaria. General Part). Sofia, 1963. 525 p.

Ivan Nenov. *Nakazatelno pravo na Narodna Republika Bŭlgariia. Obsobena Chast* (Criminal Law of the People's Republic of Bulgaria. Special Part). Sofia, 1956-59. 2 v.

Stefan Pavlov. *Nakazatelen protses na Narodna Republika Bŭlgariia* (Criminal Procedure of the People's Republic of Bulgaria). Sofia, 1971. 819 p.

Very few books dealing with specific topics of problems of criminal law have been written. The following are worth mention:

P. Boiadzhiev. *Opredeliane na nakazanieto pri sŭvokupnost ot prestŭpleniia* (Determination of the Penalty in Cases of Cumulation of Crimes). *In* Vŭprosi na nakazatelnoto pravo (Problems of Criminal Law.) Sofia, 1962: 61-106.

Venetsi Buzov, *Prochinnata vrŭzka v sotsiatisticheskoto pravo* (The Casual Connection in the Socialist Criminal). Sofia, 1964.

Venetsi Buzov. *Vmeniaemost i nevmeniaemost spored sotsialisticheskoto nakazatelno pravo* (Responsibility and Non-responsibility According to the Socialist Criminal Law). Sofia, 1965.

P. Gindev. *Prichinnata vrŭzka i vinata v nakazatelnoto pravo v svetlinata na dialektichcskiia materialism* (Casual Connection and Guilt in the Criminal Law in the Light of Dialectical Materialism). Sofia, 1961.

Nikola Manchev. *Prestŭpleniiata protiv Narodnata Republika* (Crimes against the People's Republic). Sofia, 1959.

II. *Answers to the Questionaire*

Question 1. The Criminal Code of the People's Republic of Bulgaria of April 2, 1968, is divided into two major parts:

General Part, consisting of 11 Chapters:

1. Scope and Limits of Application of the Criminal Code
2. Crime [Definition]
3. Criminally Responsible Persons
4. Penalty
5. Determination of the Penalty
6. Special Rules Regarding Juveniles
7. Release from Serving an Imposed Sentence
8. Release from Criminal Responsibility
9. Extinction of Criminal Prosecution and Criminal Penalty
10. Rehabilitation of Criminal Prosecution and Criminal Penalty
11. Compulsory Medical Measures

Special Part, comprising 14 Chapters:

1. Crimes against the People's Republic
2. Crimes against the Person
3. Crimes against Citizens' Rights
4. Crimes against Marriage, Family and Youth
5. Crimes against Socialist Property
6. Crimes against the Socialist Economy
7. Crimes against Personal Property
8. Crimes against the Activity of State Organs and Public Organizations
9. Crimes Involving Documents
10. Crimes against Order and Public Peace
11. Generally Dangerous Crimes
12. Crimes against the Defense of the People's Republic
13. Military Crimes
14. Crimes against Peace and Mankind

Question 2. The Code contains 424 Sections running from Section 1 through Section 424. The custom of leaving blank numbers in statutes is not known in Bulgarian legislative techniques and practice. In case a new section must be added to the statutes by an amendment the number of the preceding section

is used with the addition of a letter; for instance, Section 275 (original), Section 275 a (additional).

Question 3. The Bulgarian Criminal Procedure Code of February 5, 1952, states that the accused is innocent until the contrary is proved (Sec. 3, par. 1). The Criminal Code of 1968 defines a crime as a socially dangerous act, committed guiltily and punishable by law (Sec. 9, par. 1.). Thus, under Bulgarian substantive criminal law, one of the basic elements of a crime is guilt (*vina*) in its two forms: intent (*umisŭl*) and negligence (*nepredpazlivost*). The intent could be *dolus directus* or *dolus eventualis*. The Code itself does not provide definitions of these terms. In analyzing the various elements of crimes Professor Ivan Nenov describes guilt as "a concrete mental relationship between the perpetrator and the socially dangerous act condemned by the socialist law and its socially dangerous results [consequences]."[3] Otherwise expressed, according to Nenov, the guilt is the capacity of the perpetrator to understand the nature and importance of his act and to direct his conduct accordingly.[4]

The relevant provisions of the Code regarding guilt read as follows:

Sec. 9. (1) Crime is that socially dangerous act (commission or omission) which is committed guiltily and is declared punishable by law.

(2) [irrelevant]

Sec. 11. (1) A socially dangerous act is committed guiltily when it is [committed] intentionally or negligently.

(2) The act is [committed] intentionally when the perpetrator is aware of its socially dangerous nature, foresaw its socially dangerous results [consequences] and wanted or allowed the occurrence of these results.

(3) The act is [committed] negligently when the perpetrator did not foresee the occurrence of the socially dangerous results, but thought that they could be averted.

(4) Negligent acts shall be punished only in the cases provided by law.

(5) [irrelevant]

Question 4. The Bulgarian Criminal Code does not contain any specific provisions which define the causation requirement or casual connection to be proved between the defendant's conduct and the criminal result. However, this is expressed in the description or set of facts of each individual crime. For instance, Section 115 of the Code states that "whoever guiltily kills another [human being] shall be punished for murder," e.g., the defendant's conduct resulted in the death of another person. Professor Ivan Nenov emphasizes the point that "the casual connection between the act and the criminal result is a necessary objective element of the crime."[5] Thus, the Bulgarian criminal law doctrine in this field does not consider the problem of the casual connection between the act and the criminal result to be a juridical but a factual one. According to this doctrine the act, as an objective fact, is of interest to the law inasmuch as it leads to certain objective changes in reality, negatively affecting social relations.[6]

Question 5. In Chapter Three of the General Part of the Code entitled "Criminally Responsible Persons," Section 33 states in its first paragraph that "a person is not criminally responsible if he acts in a condition if irresponsibility (*nevmenjaemost*) [e.g.], when he, because of being mentally ill or permanently or temporarily mentally disturbed, is unable to comprehend the meaning and importance of the accomplished [act] or to conduct his actions." Professor Ivan Nenov summarizes the legal provisions under which guilt may be excluded in the following three situations, namely, when there is (a) a mental retardation; (b) permanent mental disturbance; and (c) temporary mental disturbance and as a result thereof, the perpetrator was in such a mental [psychic] condition that he could not comprehend the criminality of his conduct himself in conformity with the requirements of the law.[7] The second paragraph of Section 33 provides that "no penalty shall be imposed on a person who committed a crime if prior to the pronouncement of the sentence, he falls into [a state of] mental disturbance, as a result of which he cannot understand the meaning and importance of his actions or control them. Such a person shall serve [his sentence] if he recovers."

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[3] Ivan Nenov, *Nakazatelno pravo na Narodna Republika Bŭlgariia. Obshta Chast* (Criminal Law of the People's Republic of Bulgaria. General Part), Sofia, 1963. p. 313.
[4] *Id.*, p. 161.
[5] *Id.*, p. 258.
[6] *Id.*, p. 261.
[7] *Id.*, p. 163.

Thus, if the defendant is found insane, he is criminally irresponsible; if he is found guilty but prior to the pronouncement of the sentence becomes insane, no penalty is imposed. The trial court, as explained in a decision of the Supreme Court, is under the duty to examine the mental condition of the defendant by appointing an expertise of medical doctor-psychiatrists.[8] As a rule, the appointment of experts may be made upon the request of the interested parties in the trial or upon the initiative of the organs of the preliminary proceedings and the court.[9] However, it is within the authority of the court and the organs of the preliminary proceedings to evaluate the need of an expert in the specific case.[10] A rejection of such a request must be justified by the respective organ.[11]

In the above-described cases the Code prescribes the application of appropriate compulsory medical measures (Sec. 34), discussed in a special Chapter 14 of the General Part of the Code (Secs. 89–92). Thus, in regard to a person who has committed a socially dangerous act in a condition of irresponsibility or who fell into such a condition prior to the pronouncement of the sentence or during the time of serving the penalty, the court may (a) surrender him to his relatives if they will assume the obligation for his cure under the care of a psycho-neurologist despensary; (b) order compulsory treatment in a regular psycho-neurological institution; or (c) decree compulsory treatment in a special mental institution or in a special department of a regular mental neurological institution.

According to Section 90, the court decides what type of treatment is necessary in each individual case. Also, the court must decide after a period of six months whether the compulsory medical measures should be discontinued or changed.

In instances of compulsory medical treatment this Code does not expressly specify whether the judge should select the psychiatrist who is to examine the defendant. The Code of Criminal Procedure, however, provides that a defense counsel be appointed *ex officio* if the defendant himself cannot realize his rights of defense because of physical or mental deficiencies (Sec. 175, par. 2). Furthermore, the Code states that upon the recommendation of the district government attorney and on the basis of investigation and expertise the district court may, in a public hearing, order that the accused be sent to a medical institution for compulsory treatment (Sec. 124, par. 2). Another provision in Section 128 provides for the possibility that the trial be stopped if the accused, after the commission of the criminal act, falls into a disturbed state of mind, which excludes his guilt. After his recovery the trial is to be reopened; if the defendant is incurably ill, the preceedings are to be closed by the government attorney.

Question 6. As explained elsewhere [Answer to Question No. 5], under the provisions of the Bulgarian Criminal Code guilt may be excluded in the following three situations: namely, when there is (a) mental retardation; (b) permanent mental disturbance; and (c) temporary mental disturbance, and as a result thereof, the perpetrator was in such a mental condition that he could not comprehend the criminality of his conduct or conduct himself in conformity with the requirements of law.[12] The last category of temporary mental disturbance may be the result also of alcoholic or other drug intoxication, i.e., a case of a pathological alcoholic intoxication. However, the doctrine excludes "normal drinking (getting drunk) of alcohol" as a defense.[13] Thus, the Code accepts the principle that voluntary intoxication does not in itself relieve the perpetrator of criminal responsibility.

The 1968 Code contains a special provision in Section 92 which deals exclusively with the compulsory medical measures applicable to criminals suffering from alcoholism or drug intoxication.[14] According to this provision, if the crime was

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[8] Decision No. 824 of 1963, II crim. div of the Supreme Court, as cited by Pavlov, *op. cit., infra* note 9.

[9] Stefan Pavlov, *Nakazatelen protses na Narodna Republika Bŭlgariia* (Criminal Procedure of the People's Republic of Bulgaria). Sofia, 1971. p. 423.

[10] Decision No. 822 of 1953, II crim. div. of the Supreme Court, as cited by Pavlov, *op. cit.*, p. 423.

[11] Pavlov, *op cit.*, p. 423.

[12] Nenov, *op. cit.*, p. 163.

[13] *Id.*, p. 167.

[14] *Sŭdebna Praktika na Vŭrkhorniio Sŭd na NR Bŭlgariia. Nakazatelna Kolegiia* (Judicial Practice of the Supreme Court of the PR of Bulgaria. Criminal Division). Sofia, 1970. p. 41; Court decision No. 133 of March 7, 1969. I crim. div.

committed by such a person, the court may order, in addition to the penalty, also compulsory medical measures. If the imposed penalty is not a deprivation of liberty (imprisonment), the compulsory medical treatment is given in a medical institution under a special cure and labor regime. The compulsory cure of a criminal condemned to imprisonment is carried out during the serving of the penalty; but the term of compulsory cure is deducted from the term of deprivation of liberty. The court may order the continuation of this treatment even after the release of the criminal and only the court may interrupt this measure.

No provision is contained in the Code of Criminal Procedure regarding the problem of defense of an alcoholic defendant; nor are there any discussions in legal writings.

Question 7. The Bulgarian Criminal Code and doctrine distinguish two general standards or situations in which an act is considered "not socially dangerous," and consequently not punishable, namely, in the case of "self-defense" (Sec. 12) and in the case of "state of distress" (Sec. 13).

In the first instance, a person is acting in self-defense when he is trying "to protect state or public interest from an immediate illegal attack [as well as], the person or rights of the one who is defending himself or another [person]." This is excusable, however, up to certain "limits." Any act which is in excess of the use of self-defense is punishable. Again, the law excuses and does not punish any excess of self-defense if the latter was a result of "fright" or "confusion".

In interpreting Section 12 of the Code, the Supreme Court defines "fright" or "confusion" as "that mental condition of the perpetrator in which his mental disturbance is so strong that it restricted to a considerable degree his capacity to control his actions and to motivate his conduct within the limits of self-defense".[15]

The second possibility of an excusable act is when a person is acting in a state of distress, e.g., "in order to save state or public interests as well as his own or somebody else's personal or property rights from an immediate danger, which the perpetrator could not avoid in any other manner, [and] if the damage caused by the act is less significant than that of the averted [damage]". However, the law excludes the existence of a state of distress "if the avoidance itself of the danger constitutes a crime".

Question 8. The Bulgarian Criminal Code does not classify criminal acts; the only term known and used is *prestŭplenie* (crime, offense). Professor Ivan Nenov states that the basic "twofold or threefold division of criminal acts as practiced in bourgeois legislations has no essential importance in the Bulgarian legal system."[16]

Depending on the seriousness of the crime, however, the penalty may range from public reprimand to death. There are eleven different types of penalties, which may be imposed in combination (Sec. 37, par. 1). For the most serious crimes "which jeopardize the foundations of the People's Republic" the Code provides the death penalty executed by a firing squad "as a temporary and an exceptional measure" (Sec. 37, par. 2).

Question 9. Sentencing. In accordance with the Criminal Code provisions the trial court determines the penalty within the limits prescribed by law for the committed crime after taking into consideration the provisions of the General Part of the Code as well as (a) the degree of social danger of the act and its perpetrator; (b) the motives for the commission of the crime; and (c) all other circumstances aggravating or mitigating the guilt (Sec. 54). If the mitigating circumstances are so exclusive and numerous, and if the penalty provided by law appears to be still too harsh, the court may change the type of penalty accordingly (Sec. 55).

If the Code prescribes the choice of one or two types of penalties the court may select the most appropriate in kind and term; if the law provides the imposition of two or more penalties the court may determine the term of each penalty so that they may in their combined form fit the purposes of the penalty (Sec. 57).

Special rules are applicable in regard to the determination of the penalty for juvenile delinquents (Secs. 60–65).

Reasons in Writing Sentences. Each sentence must contain, in addition to several other items of information, as listed in the Code of Criminal Procedure,

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[15] *Id.*, decision No 236 of 1969. I crim. div.
[16] Nenov, *op cit.*, p. 369.

written information on the reasons for the sentences imposed, as well as on the kind of appeal allowed, before which court, and within what period of time (Sec. 213).

Appeal. Sentences of the people's court as a first instance are appealed to the district court and sentences of the district courts are reviewed by the Supreme Court (Sec. 220, Crim. Proc.); both sides in the trial, defendant and the government, may appeal (Sec. 221, Crim. Proc.).

Suspension. Under the present Criminal Code probation is a form of suspension of sentence which may be realized in one of the following manners: (a) full suspension of the execution of a sentence; (b) partial suspension of the execution of the sentence; (c) conditional suspension of the imposition of the sentence; and (d) suspension of criminal responsibility by imposition of nonpenal measures.

(a) When the court imposes the penalty of deprivation of liberty of up to 3 years, it may suspend its execution for 2 to 5 years, if the defendant has never been deprived of his liberty for a crime of a generally dangerous nature and the court is inclined to believe that this would be in the interest of the case (Sec. 66).

Whenever a sentence is suspended, the court may authorize a public organization or a labor collective to exercise "educational care" during the determined period. General supervision of the educational care and conduct of the convicted on probation is placed in the hands of the people's court within that jurisdiction. There is a special regulation regarding the implementation of these provisions (Sec. 67).

(b) The court may release a convicted person on probation before the full serving of his penalty e.g. (Sec. 70–73).

(c) The Criminal Code also provides for the possibility of suspending the imposition of a sentence when, upon the recommendation of a public organization or the labor collective, the court decrees his reeducation by this organization or collective if the crime is punishable by deprivation of liberty for up to one year, there is no great social danger, the defendant admits his guilt and regrets the act and if the purpose of the penalty is better realized in this manner.

(d) Suspension of criminal responsibility may be achieved by the imposition of measures involving public influence by the comrade's court in cases of a certain type of criminal act as listed in the Criminal Code (Sec. 77). In its decision No. 37 of January 20, 1969, the Supreme Court stated that the comrade's court is an organ of society which makes use of measures of public influence not only in cases that are transferred to it by the trial court, but also in cases within its jurisdiction.[17]

Minimum Prison Sentence. The mandatory minimum prison sentence is one month and every sentence of imprisonment is always a determinate one; furthermore, it is always a joint sentence rather than a concurrent or consecutive one (Sec. 57). The court determines the term of each penalty in cases of several crimes and combines them.

Fine. A fine is imposed in accordance with the financial situation as well as the income and family obligations of the convicted defendant. It may be less than 10 leva (official rate of one leva equals $1.17).[18] The fine is collected from his property. However, properties which are not subject to confiscation, as specified and listed in a special law, may not be sold for the compulsory collection of the fine.

"*Day Fine*". The Code is silent on the problem of the "day fine" system.

Question 10. As a rule, under Bulgarian criminal law, a generally dangerous act is punishable only if it was committed guiltily, e.g., intentionally (*dolus directus* and *dolus eventualis*), or negligently. If the element of guilt in either of its two forms is absent the generally dangerous act does not constitute a crime [*see also* answers to questions Nos. 5, 6 and 7]. There are a few situations in which the Code excludes the presence of the element of guilt: in cases of a mistake as well as in cases of an "accidental act," and in the execution of an illegal official order.

Professor Ivan Nenov, when analyzing mistake as a circumstance which excludes guilt, emphasizes the point that a mistake of law is not known in Bulgarian criminal legislation. "If we refer to a very old division of mistakes," he states, "into a 'mistake of fact' and a 'mistake of law,' we have to stress [the

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[17] *Sŭdebna Praktika, op. cit.*, p. 40.

[18] *See Pick's Currency Yearbook, 1971.* New York, 1971. p. 84.

fact] that under our legal system only the first category—'the factual one' is of importance." [19] However, in its decision of May 30, 1969, the Supreme Court stated that "the mistaken notion of the perpetrator regarding the person whom he intended to kill is irrelevant since the desired result and the one factually attained concerns one and the same object of protection and contains the element of one and the same crime." [20]

The pertinent Criminal Code provisions dealing with the circumstances which exclude guilt read as follows:

Sec. 14 (1) Ignorance of the factual circumstances which belong to the elements of the crime, exclude the intent connected with this crime.

(2) This provision also refers to negligently committed acts if the ignorance of the factual circumstances is not due to negligence.

Furthermore, the Code declares the act is committed without guilt in two other instances: (a) if the perpetrator was not under the obligation to or could not foresee the occurrence of the generally dangerous results. (Sec. 15), of the so-called "accidental act" or (b) if he was acting in execution of "an illegal official order" (Sec. 16).

In all these instances, the lack of criminal "guilt" may be used as a defense.

Question 11. There are no analogues to the differentiation between crime and jurisdiction in the Bulgarian Criminal Code.

Question 12. The extraterritorial applicability of the Bulgarian Criminal Code is the subject of separate report, a copy of which is attached.

QUESTION 12

The Communist Government established in Bulgaria after September 9, 1944 introduced a new Criminal Code of February 13, 1951, drafted along the line of Soviet doctrines in this field. This Code was entirely replaced by another on April 2, 1968,[a] which also incorporated various criminal provisions scattered throughout a number of legislative acts.

The questions of the applicability of the Code regarding crimes committed within and without the territory of the People's Republic of Bulgaria are dealt with in accordance with the traditional principles and Communist teachings related to this area.

The territoriality principle is reflected in Section 3(1) of the Code which prescribes that it applies to all criminal offenses committed within the territorial limits of the country by any person regardless of his citizenship.

Based on the personality principle, the Bulgarian Criminal Code also applies to Bulgarian citizens for their crimes committed abroad, as explicitly stated in Section 4(1); however, a Bulgarian citizen may not be extradited to a foreign state for criminal prosecution or serving of a sentence (Sec. 4(2).

The spokesman of the present government of Bulgaria in the field of criminal law science, Professor Ivan Nenov, explains this provision on the basis of the Communist doctrine that "Bulgarian citizens must, in their behavior, always and everywhere comply with the socialist requirements—with the rules of Communist morals and socialist law." [b] In further clarification he states that the nature of the crime and the type of penalty as well as the question whether the crime affects the interests of the Bulgarian state and its citizens or that of a foreign state and its nationals, are irrelevant. Moreover, it is not important, he states, whether the act constitutes a crime under the law of the place where it occurred.[c]

Based on the protective principle, the Bulgarian Criminal Code is also applicable to foreign nationals for their criminal acts committed outside the jurisdictional territory of Bulgaria, but only if these offenses are of a general nature and affect the interests of the Bulgarian state or its citizens (Sec. 5). The above-mentioned criminal law expert, Ivan Nenov, questions the possibility for the application of this provision in regard to foreign nationals who committed a crime abroad. "This principle," he emphasizes, "has a practical significance when the criminal perpetrator, a foreign national, is found within the

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[19] Nenov, *op cit.*, p. 344.

[20] Decision No. 336 of May 30, 1969, I crim. div., *Sŭdebna Praktika, op. cit.*, p. 13.

[a] *Dŭrzhaven Vestnik* (Official Law Gazette of Bulgaria), No. 26, April 2, 1968; Correction: *id.*, No. 29, April 12, 1968.

[b] Ivan Nenov, *Nakszatelno pravo na Narodna Republika Bulgaria* (Criminal Law of the People's Republic of Bulgaria). *Obschta chast* (General Part). Sofia, Nauka i iskustvo, 1963, p. 126.

[c] *Id.*

territorial jurisdiction of the domestic law of Bulgaria against whom, in case of a sentence in absentia, the execution of the penalty could be directed." [d]

However, in the cases specified in Sections 4 and 5 the preliminary detention and the penalty served abroad are to be deducted from the Bulgarian one. If the penalties in both countries are of a different nature, the penalty served abroad is to be taken into consideration by the Bulgarian court when determining its penalty (Sec. 7).

Based on the universality principle, the Bulgarian Criminal Code is also applicable extraterritorially to foreign nationals for their crimes committed abroad if these acts are directed against the peace and mankind and affect the interests of another state or foreign nationals (Sec. 6 (1)).

Finally, Section 6 (2) of the Code contains a provision which opens the possibility for an application of the Bulgarian Criminal Code to foreign nationals committing other crimes abroad, namely, if such jurisdiction is provided by an international treaty to which Bulgaria is a party.

The problems of the territorial and extraterritorial application of the Bulgarian Criminal Code may be summed up as follows:

(1) This Code is applicable to Bulgarian citizens for their crimes regardless of the place of commission, e.g., in the country or abroad.

(2) It is applicable to foreign citizens (a) for their crimes committed in Bulgaria; (b) for all crimes committed abroad if interests of the Bulgarian state or Bulgarian citizens are affected; (c) for crimes committed abroad if these acts are directed against the peace and mankind; and (d) for other crimes committed abroad if an international treaty, to which Bulgaria is a party, so prescribes.

APPENDIX: TRANSLATION FROM BULGARIAN

Criminal Code of the People's Republic of Bulgaria, Durzhaven Vestnik No. 26, April 2, 1968

General Part

Chapter One. Purpose and Score of Application of the Criminal Code.

Subchapter One. Purpose of the Criminal Code. * * *

Subchapter Two. Scope of Application of the Criminal Code.

Sec. 3. (1) The Criminal Code shall apply with respect to all crimes committed within the territory of the People's Republic of Bulgaria.

(2) The question of responsibility of foreigners who enjoy immunity in regard to the criminal jurisdiction of the People's Republic of Bulgaria, shall be decided in accordance with the rules of the international law accepted by it [Bulgaria].

Sec. 4. (1) The Criminal Code shall apply to Bulgarian citizens also for their crimes committed abroad.

(2) A Bulgarian citizen shall not be extradited to a foreign state for adjudication or serving the penalty.

Sec. 5. The Criminal Code shall apply also to foreigners who committed crimes of general character abroad which affect the interests of the People's Republic of Bulgaria or of a Bulgarian citizen.

Sec. 6. (1) The Criminal Code shall apply also with regard to foreigners for committing abroad a crime against the peace and mankind, which affect the interests of another state or a foreign citizen.

(2) The Criminal Code shall apply also to other crimes committed by foreigners abroad when this is provided by an international treaty, to which the People's Republic of Bulgaria is a party.

Sec. 7. In the cases of Sections 4 and 5 the preliminary detention and the penalty served abroad shall be reduced (*prispadat*). When both penalties are of different kind, the penalty served abroad shall be taken into consideration for the determination of the penalty by the [Bulgarian] court.

Sec. 8. The sentence of a foreign court for a crime, to which the Bulgarian Criminal Code applies, shall be taken into consideration in the cases established by an international treaty, to which the People's Republic of Bulgaria is a party.

Question 13. Conspiracy as an individual crime is treated in Section 109, Chapter One of the Special Part of the Criminal Code which deals with the most serious crimes against the People's Republic of Bulgaria (treason, high treason, etc.). It reads as follows:

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[d] *Id.*, p. 128.

Section 109 (1) Whoever organizes or leads an organization or group whose objective is to commit crimes against the People's Republic [is punished by between 3 and 12 years of imprisonment].

(2) Whoever is a member of such an organization or group [is punished by up to 10 years of imprisonment].

(3) If the organization or group is established by the instructions or assistance of a foreign state [is punished by between 10 and 15 years of imprisonment].

(4) A participant in [such] an organization or group who voluntarily surrenders to the authorities before the commission of another crime by this [organization or group] or himself, shall not be punished.

In a decision of 1969, the Supreme Court analyzed the crime described in Section 109, par. 3, by stating that "there are two hypotheses in the elements of this crime; the first exists when the organization or group is established upon the instructions of a foreign state or foreign organization; the second, when the organization or group is created with the assistance of the foreign state or foreign organization. In the first the idea and initiative for the creation derives from the foreign state while in the second case the idea and initiative are given by the individual persons acting within the territory of the People's Republic of Bulgaria." [21]

Question 14. The problem of "felony-murder" rule does not exist in Bulgarian criminal legislation.

Question 15. The Bulgarian Government represents a sovereign nation composed of a single political unit, and has exclusive jurisdiction over riots, mass demonstrations and similar offenses without jurisdictional limitation in any form. In other words, there is only one criminal jurisdiction over the entire territory for all crimes committed there by any person, regardless of nationality.

Provisions dealing with the problems of riots, inciting to riots, arming rioters, engaging in a riot, disobedience of public safety orders, etc., are contained in two chapters of the Special Part of the Criminal Code, Chapter One. "Crimes against the People's Republic;" and Chapter Ten. "Crimes against the Order and Public Peace."

Question 16. The Bulgarian Criminal Code does not include any provision designed to outlaw private armies; however, there are a number of provisions which prosecute paramilitary activities. Thus, in the first place, since the possession and use of firearms and explosives, on the basis of special legislation, are exclusively a licensed matter, the special Subchapter I. "Crimes Committed in a Generally Dangerous Manner or with Generally Dangerous Weapons" (Secs. 337–339) in Chapter Eleven. "Generally Dangerous Crimes," makes it a crime and punishes every manufacture, repair, sale, transport, export and import of firearms, explosives and ammunition "without having the right to do that by law or license issued by the proper agency of the Government" or not "within the authorization given by the license." Also, whoever comes into possession "in whatever manner" of such firearms, etc., or transfers them to another, "without having a license to do so," is subject to severe penalties.

Secondly, every conspiracy to use weapons for political purposes falls under the provisions of Chapter One, "Crimes against the People's Republic."

Question 17. With reference to "crimes without victims," e.g., crimes in which the victim either consents or is a willing customer of the defendant, the Bulgarian Criminal Code contains provisions dealing with prostitution (Sec. 155), homosexual activity (Sec. 157), and obscenity (Sec. 159) in Subchapter VII. "Lewdness," of Chapter Two. "Crimes against the Person;" gambling (Sec. 227) in Chapter Ten. "Crimes against the Order and Public Peace;" drugs, poisons, etc. (Sec. 354) in Subchapter III. "Crimes against the Public Health" of Chapter Eleven. "Generally Dangerous Crimes."

Prostitution. While there is no specific provision concerning engaging in prostitution, the Code punishes any person who induces a female person to prostitution or to lewd acts or to sexual relations, as well as whoever systematically provides dwellings to various persons for sexual relations or lewd acts, by imprisonment of up to 5 years; also the condemned person may be forced to resettle in another place.

Homosexual Activity. The Code punishes homosexual activity only when there is use of force, threat or influence based on a position of dependence or supervision; when an adult commits such activity with a minor or infant; or with

[21] Decision No. 288 of April 30, 1969, I. crim. div., *Sŭdebna Praktika, op. cit.*, p. 43–44.

the purpose of material advantages or induces other people because of such advantages, or promises them. Thus, the Code seems to exclude from punishment homosexual relations between consenting adults.

Obscenity. Whoever produces, disseminates, displays, projects or sells works, printed matter, pictures, films, or other objects of a pornographic nature is punished by a fine of 500 leva and the objects in question are subject to confiscation.

Gambling. Whoever engages in gambling or participates in such a game is punishable by correctional labor or a fine of up to 1,000 leva; the money and other objects connected with gambling are confiscated.

Drugs. Whoever, without a license, acquires, possesses, sells, or delivers poison or drugs placed under the licensing regime, is punished by imprisonment of up to 2 years or a fine of up to 300 leva.

Question 18. Three provisions (Secs. 337-339) in Chapter Eleven, "Generally Dangerous Crimes," Subchapter I. "Crimes Committed in a Generally Dangerous Manner or with Generally Dangerous Weapons" deal exclusively with the offenses connected with firearms and explosives. It must be emphasized [as also mentioned elsewhere in this report, answer to question number 16] that firearms and explosives are subject to a very strict regime provided by special legislation.

Section 337 punishes every person who manufactures, processes, repairs, trades, transports, imports or exports explosives, firearms or ammunition, without having the right to do that by law or license issued by the proper agency of the administration, or does so not in accordance with the authorization issued to him.

Section 338 makes it a crime and punishes those who do not take the necessary measures for protection, especially those prescribed by regulations, ordinances or instructions when keeping, carrying, transporting, or repairing explosives, firearms and ammunition. If damage, injuries, or death occur on account of this negligence, the penalty is severer.

Finally, Section 339 punishes every person who obtains possession of firearms or explosives or delivers them to another without the proper license.

Question 19. The Bulgarian Criminal Code lists 11 different kinds of penalties (Sec. 37 (1); however, Section 37 (2) also provides for the "death penalty executed by a firing squad" as a "temporary and exceptional measure" for "the most serious crimes which jeopardize the foundations of the People's Republic, as well as for other especially dangerous intentional crimes."

A survey of the crimes for which a death penalty is prescribed reveals 27 cases:

(a) Chapter One. "Crimes against the People's Republic:" Sections 96, 97, 99, 100, 102 (2), 104, 106;

(b) Chapter Two. "Crimes against the Person:" Section 116;

(c) Chapter Eleven. "Generally Dangerous Crimes:" Sections 340 (2) "b", 342 (2) "c", 349 (2);

(d) Chapter Thirteen. "Military Crimes:" Sections 372, par. I and par. III, 376, 377, par. II, 382, 383, par. III, 386, par. I, 397, 399, 400;

(e) Chapter Fourteen. "Crimes against Peace and Mankind:" Sections 409, 410, 411, 412, 415, 416.

The death penalty is imposed by the same court before which the trial was conducted; no separate proceedings to determine the sentence in a capital or any other case is possible under the present Bulgarian Criminal Procedure Code.

Question 20. The Bulgarian Code of Criminal Procedure solves the problems of multiple proceedings and trials in the following manner. According to Section 145, as early as in the preliminary investigation, the proceedings involving several connected crimes may be conducted in a joint investigation. The examining magistrate may, however, with the permission of the public prosecutor, divide the investigation when there is reason to assume that it will be conducted more expediently in this way. When a person is accused of committing several crimes, the trial court adjudicates each one separately (Sec. 211).

The Criminal Code further provides that if a person committed several crimes by one act or if he committed several separate crimes, before a sentence has entered into force for any one of them, the court, after determining a penalty for each crime, shall impose the severest penalty among them. The penalties for compulsory resettlement, public reprimand, and deprivation of rights are always added to the fixed severest penalty (Sec. 23). When the penalties imposed are of one and the same kind, the court may increase the severest penalty by one-

half maximum; but the established penalty should not exceed the term of the individual penalties, nor the maximum term provided for the respective type of penalty (Sec. 24).

People's Republic of China

Although it follows the civil law system, which is characterized by codified law, the People's Republic of China to date has not promulgated substantive or procedural codes to supplant those of the Nationalist Chinese Government which the Communist Chinese abrogated upon assumption of effective control of the Chinese mainland in 1949. Nor have the Communist Chinese enacted a great number of individual criminal statutes. There are, for example, no statutes governing such common crimes as murder, rape, or arson, unless it can be demonstrated or construed that these crimes were committed for counter-revolutionary purposes, in which case they would fall under the Regulations of the People's Republic of China Governing the Punishment of Counterrevolutionaries either expressly or by analogy to a specified crime. In many instances, the existing criminal laws of the People's Republic of China (PRC) are loosely constructed and vaguely worded. A formula which one encounters frequently in these criminal laws is "punishment according to the degree of guilt."

Despite the dearth of enacted criminal law and the sketchiness of that which does exist, certain features of the Communist Chinese criminal law and legal system merit examination, although we freely concede at the outset that adapting these features to the American scene would present formidable difficulties. We here will consider two notable features: the educative role of the criminal law and the rehabilitation and reform of nonproductive elements and criminals. Before considering each of these features separately, it is helpful to touch upon the link between them. This link is what in Communist China amounts to a profound faith in the capacity of the official ideology, when properly expounded and received and appropriately combined with basic economic changes, to transform the individual into a being approaching the ideal "Maoist man," that is, an individual who spontaneously, consistently, and without internal conflict places the interests of the socialist collective above his own selfish interests. One perhaps might say more precisely that the "Maoist man" is one who sincerely is convinced that, in the long run, the interests of the collective and the interests of the individual are so inextricably bound together as to be indistinguishable. To the end of bringing every Communist Chinese citizen as close to the ideal "Maoist man" as possible, the Communist Chinese have placed relentless stress upon universal knowledge and acceptance of the official ideology. They have expected not only outward conformity to their policies, but also genuine, internal acceptance; the Communist Chinese citizen typically has been denied the "right of silence."

To understand fully how the vision of the Maoist man links the educative role of the criminal law and the rehabilitation and reform of nonproductive elements and criminals, one must know something of the fundamental principles of the Marxist philosophy espoused by the Communist Chinese and the manner in which they relate these fundamental principles to law and crime.

In the Marxist view, any given society can be divided into an economic base and a superstructure erected upon that economic base. The nature of the economic base is determined by its predominant mode of production. In the United States, for example, the capitalist mode of production is said to prevail, while in the People's Republic of China the mode of production is socialist. Included in the superstructure erected upon the economic base are such phenomena as religion, philosophy, politics, ideology, and law. The content of the various components of the superstructure is a reflection of and is determined by the economic base. In a society where the capitalist mode of production obtains, the religion, philosophy, etc. will necessarily also be capitalist. The content of these various components of the superstructure is in effect decreed by the class of society which economically is in the dominant position in that society, and the content is calculated to maintain and strengthen the power of the dominant class. One's class membership is determined by one's relation to the mode of production, that is, in general terms, in all pre-socialist societies, by whether one is an exploiter or one of the exploited. One's world view further is derived from one's class membership. As one of the exploiters, the capitalist cannot help but have the various attitudes belonging to the capitalist class as a social

entity. The Marxist position is in effect that the individual is the product of his environment, environment being understood in terms of class membership.

According to classical Marxist analysis, changes in the superstructure are the product of changes in the economic base. The Communist Chinese have accepted this classical Marxist position, but have placed great emphasis upon there being a time lag between changes in the economic base and changes in the superstructure as the superstructure is reflected in the thinking of the various individuals comprising the society in question. The socialist mode of production now prevails in the PRC. The prevalence of the socialist mode of production there, however, does not insure that every individual in Communist Chinese society will have absorbed the world view proper to a socialist economic base. There inevitably will be residues of the world view belonging to the previous economic base. Residues of feudal and bourgeois thinking remain in the PRC. The Communist Chinese attempt to eradicate these residues by systematically inculcating socialist ideology. Their extreme emphasis upon the efficacy of ideological education in effecting the individual's transition to the world view proper to the socialist mode of production and upon the impact of this transition upon production has laid them open to the charge from some quarters of harboring the heretical view that ideological influences prevail over economic factors. To some, the Communist Chinese appear to be attempting to influence the economic base through the superstructure rather than letting the economic base determine the superstructure. We need not here decide upon the putative apostasy of the Communist Chinese, but only to emphasize their pronounced reliance upon ideological education in advancing socialism.

The Communist Chinese approach both law and crime in terms of the Marxist framework sketched above. Not only in the capitalist state, but equally in the socialist state, law, as a component of the superstructure, is an instrument which the ruling class uses in maintaining and enhancing its power. As such, law is far from being a supra-class phenomenon impartially formulated to attain or approach the abstract standard of "justice." All law is the law of a particular social class. It is difficult to distinguish between law and policy, both of which are formulated by the ruling class to serve its own ends. The Communist Chinese themselves speak of policy as being the "soul" of law. Knowledge of the law of the PRC thus becomes as much a part of the ideological education of the Communist Chinese citizen as knowledge of the regime's concrete policies and its abstract Marxist theory. Study of state law plays its part in the growth in the individual of the proper world view. More specifically, study of the criminal law of the PRC provides the citizen with an understanding of the types of behavior characteristic of the socialist man and the types of behavior found in the man whose thinking is still contaminated to varying degrees with residues of bourgeois or feudal ideology or with residues of the thinking appropriate to him when he was one of the exploited. The criminal is, indeed, a person whose thinking for various reasons is so contaminated with such residues as to prevent his realizing the identity of his interests with the interests of the socialist collective; not seeing this identity, he places himself at odds with the state and the Communist Party, both of which are seen as carrying out the will of the people in a socialist state. By the time that communism is realized in the PRC, there will be no crime and no backward thinking. Until that time, the regime is obligated to punish, and often punish severely, actions which are contrary to the interests of the regime, that is, contrary to the interests of the people. In addition to punitive functions, the Chinese Communists have taken upon themselves the tasks of eradicating the backward thoughts which lie behind criminal behavior. In their view, they are eradicating the backward thinking which leads to crime primarily by eliminating its environmental sources through the creation of socialism in the PRC. As an auxiliary measure, however, they concentrate intense efforts upon rehabilitating non-productive elements and reforming criminals by a program which combines labor with intensive ideological education.

The Educative Role of the Criminal Law

An important treatise on the criminal law of the People's Republic of China authored by a group of Communist Chinese professors of law stresses that one of the main tasks of the criminal law of their country is "to educate the citizens to observe law self-consciously."[1] By "self-consciously" in this formulation is

[1] *Lectures on the General Principles of Criminal Law in the People's Republic of China*, Joint Publications Research Service Translation No. 13331, CSO: 2050-S, p. 18.

intended an attitude in which the citizen voluntarily adheres to the law and does so with full, conscious understanding of the fact that his adherence is to the mutual advantage of himself and the society in which he lives. The Communist Chinese attempt to cultivate this attitude in the populace by various methods, most of which can be included under the rubric of propaganda.

The Communist Chinese take as a fundamental approach to legal documents the perhaps not so evident principle that the citizen must understand the content of a legal document before he can self-consciously apply it to his own life. In part to assure their being understood by the common man, legal documents in the PRC are written in plain language and a simple style. In a discussion of how to write decisions, a handbook issued by the secretariat of the Peking Municipal People's Court states some principles which apply equally to the texts of Communist Chinese criminal laws. The statement reads:

> A decision is a document meant for the public. It should be so written as to be understood not only by the litigants but also by people not involved in the case. Therefore, not only must the facts be clearly presented in decisions, but the language used must be in a popular style. Ordinary stereotyped expressions for legal documents should be avoided. A successfully written decision must be easily understood by those who are able to read general material. It should also be easily understood by those who listen to the reading of the document.[2]

Accustomed as he is to complex documents written in technical legal language, the Westerner perhaps cannot help looking askance upon Communist Chinese legal documents, in which it appears to him that plainness and simplicity have been carried many times to the point of sloppiness. Nonetheless, one cannot totally reject the notion that legal documents should be intelligible to the average citizen who is held responsible for adherence to their contents.

The Communist Chinese authorities take full advantage of their control of all the media in the country to bring about awareness of the provisions of state laws. Discussion of a particular law may precede its promulgation or even its final drafting by several months. Typically, discussion in the media begins with pointing out a problem or a situation constituting an obstacle to the progress of socialism. Gradually is created the impression of the necessity of action, often legal, to remedy the problem or situation. At an appropriate time the text of a draft legal measure often is introduced for widespread, organized popular discussion. The regime at times goes through the motions of accepting criticism, limited in scope, of this draft. Sometime later, the final version of a draft so discussed and criticized will be promulgated, following which there is further discussion of the manner in which the statute in question is in the interests of the people, that is, the way in which it will advance or protect socialism.

In the case of a criminal statute, the regime often makes public examples of some of those punished under its provisions. If formal trials precede the meting out of punishment, the trials will be featured in media reports. Particularly in the early days of the Communist government, mass attendance at these trials often was solicited.

The Communist Chinese press also devotes considerable attention to reports of those criminals who have reformed in the process of their punishment. Typically, the person so reformed testifies to his past evils, describes his new life and his new way of thinking, and expresses his gratitude to the regime for having helped him to effect a transformation. Members of his family sometimes also outpour their amazement at the "new man" and their gratitude to the regime.

The educational role of the criminal law is carried out in two ways other than those discussed above under the general heading of propaganda. One of these ways is that of encouraging the citizens to assume some responsibility for enforcement of the criminal law. Citizens are urged to observe others conscientiously and to report any violations known to them. During the excesses of the Cultural Revolution, some citizens apparently went beyond observation and reporting to actual detention and meting out of punishment.

Another approach is that of bringing the average citizen into the judicial process as a "people's assessor." Modeled after similar participants in the Soviet judicial process, the "people's assessor" is a layman elected to share the

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[2] Pei-ching shih jen min fa yüan pi shu ch'u [Secretariat of the Peking Municipal People's Court], comp., *Jen min ssu fa kung tso chü yü* [Some Aspects of the People's Judicial Work], Peking, 1950, p. 25–26.

bench with the judge in the trying of certain types of cases and to have equal voice with the judge in deciding questions of both law and fact. In principle the ratio between assessors and judges for each case is two to one and decisions are reached by majority vote. Active participation by the people's assessors in the judicial process is said by the Communist Chinese to yield many benefits, among them increased popular respect for the law and the courts. The media, as one would expect, have given considerable publicity to the experience of various lay assessors in sitting on the bench.

One can say that the aim of all the matters discussed under the educational role of the law is prevention of crime. As it also can be argued that one of the primary purposes of having a published criminal code is prevention of crime, one well may ask why the Communist Chinese have promulgated no criminal code and enacted so few criminal statutes. The reasons for the absence of a criminal code and a poverty of criminal statutes in the PRC are numerous and complex. Here it is instructive to touch upon only two among these reasons. First, it appears to us justifiable to assume that the Communist Chinese leadership is sincere in its belief that fundamental social and economic reforms will do incomparably more to reduce crime than it could be hoped that any piece or corpus of criminal law would do. They appear to us to pay more than lip-service to the Marxist tenet that crime is an environmental product. Secondly, their approach to crime and the criminal law is perhaps colored by traditional Chinese philosophy. In traditional China a distinction was maintained between the concept of *li* (variously translated as morality, ethics, propriety) and the concept of *lü* (law). *Li* were the principles which guided and found expression in the conduct of the gentleman in all his dealings with others. Through his education he had absorbed *li* into the very core of his being. This absorption of *li* made lü (law) unnecessary and perhaps even irrelevant to the conduct of the gentleman. To adopt a term from the modern Chinese Communists, one could say that the gentleman "self-consciously" did what was moral, correct, and proper in every situation. With him there was no question of legality or illegality. But the uneducated, those who were not gentlemen, did not have *li* within them. If the state was to be properly governed, *lü* were essential because the mass of the people otherwise would have no guidelines for their behavior.

One can regard the Communist Chinese, through their intensive efforts in ideological education, as attempting to instill their own form of *li* in all the citizens of the PRC. The "little red book" of Mao's thought which has figured so prominently in the life of the Communist Chinese citizen in recent years is perhaps the Communist Chinese equivalent of the *Confucian Analects*, the principal source of traditional *li*. If every citizen can come self-consciously to follow the *li* of socialist life, if every citizen can become a "gentleman," there will be no need of law. Perhaps this traditional attitude underlies the faith the Communist Chinese appear to have in the Marxist vision of communism's being the stage of society in which there will be no state and no law, but in which there will not be anarchy.

REHABILITATION THROUGH LABOR

We have here to consider the Decision of the State Council of the People's Republic of China Relating to Problems of Rehabilitation Through Labor, promulgated by the State Council, August 3, 1957, during the anti-rightist campaign which followed on the heels of the Hundred Flowers period of relative liberality in Communist China.

When the Communist Chinese assumed effective control of mainland China in 1949, they were confronted with sizeable social, political, and crime problems, particularly in the cities, problems which had been aggravated by the dislocation attendant to long years of war. To cope with these problems, they put into practice various procedures resembling those finally given a statutory basis in the above Decision. In his *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction*, Jerome Cohen alludes to these antecedents of the Decision:

> Rehabilitation through labor grew out of a variety of experiments that took place in the years immediately preceding its formal enactment. Beginning with the early 1950's, many government and Party cadres who were suspected of serious political deviations and of perhaps even harboring counter-revolutionary sentiments were sent to "new life schools" in which they were involuntarily confined while undergoing examination and in-

doctrination. In some places by 1956 the name of such schools had been changed to "rehabilitation through labor," reflecting the greater relative emphasis that had come to be placed upon physical labor in their "curriculum."

During its earliest years, the PRC also resorted to similar measures to meet the serious threat to public order that was posed by the prevalence of prostitutes, petty thieves, black marketeers, opium addicts, vagrants, and other social parasites.[3]

The effectiveness of these antecedent measures, which one Western lawyer has characterized as "a ruthless solution of a social problem,"[4] were apparent to the Chinese themselves and to many of the foreign visitors, who frequently commented upon the marked diminution or absence of visible signs of petty criminal activity and the environment conducive to such activity.

The Decision of the State Council of the People's Republic of China Relating to Problems of Rehabilitation Through Labor makes various categories of persons subject to certain sanctions, which, although involving confinement and subjection to a stringent regimen of "rehabilitation," are not characterized as criminal sanctions. The constitutional basis of these non-criminal sanctions is Article 100 of the Constitution of the People's Republic of China of September 20, 1954, which reads:

> *Article 100.* Citizens of the People's Republic of China must abide by the Constitution and the law, uphold discipline at work, keep public order and respect social ethics.[5]

The various categories of persons subject to the Decision's sanctions are, in general, characterized by non-productivity. These categories are:

1. The following kinds of persons shall be provided shelter and their rehabilitation through labor shall be carried out:

(1) Those who do not engage in proper employment, those who behave like hooligans, and those who, although they steal, swindle, or engage in other such acts, are not pursued for criminal responsibility, who violate security administration and whom repeated education fails to change;

(2) Those counterrevolutionaries and antisocialist reactionaries who, because their crimes are minor, are not pursued for criminal responsibility, who receive the sanction of expulsion from an organ, organization, enterprise, school or other such unit and who are without a way of earning a livelihood;

(3) Those persons who have the capacity to labor but who for a long period refuse to labor or who destroy discipline and interfere with public order, and who [thus] receive the sanction of expulsion from an organ, organization, enterprise, school, or other such unit and who have no way of earning a livelihood;

(4) Those who do not obey work assignments or arrangements for getting them employment or for transferring them to other employment, or those who do not accept the admonition to engage in labor and production, who ceaselessly and unreasonably make trouble and interfere with public affairs and whom repeated education fails to change.[6]

A person subjected to rehabilitation through labor was not charged with any crime and was not tried by any judicial body. The procedures for making a person liable to rehabilitation through labor are described in section 3 of the Decision:

> 3. If a person must be rehabilitated through labor, the application for rehabilitation through labor must be made by a civil affairs or a public security department; by the organ, organization, enterprise, school, or other such unit in which he is located; or by the head of his family or his guardian. The application shall be submitted to the people's council of the province, autonomous region, or city directly under the central authority, or to an organ that has been authorized by them, for approval.[7]

A person's confinement under the provisions of the Decision is an administra-

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[3] Jerome Alan Cohen, *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction*, Cambridge, Mass.: Harvard University Press, 1968, p. 239.

[4] L. C. B. Gower, "Looking at Chinese Justice: A Diary of Three Weeks Behind the Iron Curtain," *in ibid*, p. 243.

[5] *Fundamental Legal Documents of Communist China*, edited by Albert P. Blaustein, South Hackensack, New Jersey: Fred B. Rothman & Co., 1962, p. 31.

[6] Cohen, *op. cit.*, p. 249.

[7] Cohen, *op. cit.*, p. 250.

tive action which can be initiated by various individuals or groups having contact with him. Those confined apparently had little or no recourse to appeal of the administrative action.

The Decision sketches in general terms in section 2 the nature of the regimen to which those being rehabilitated were to be subjected:

> 2. Rehabilitation through labor is a measure of a coercive nature for carrying out the education and reform of persons receiving it. It is also a method of arranging their getting employment.
>
> Persons who receive rehabilitation through labor shall be paid an appropriate salary in accordance with the results of their labor. Moreover, in the exercise of discretion a part of their salary may be deducted in order to provide for the maintenance expenses of their family members or to serve as a reserve fund that will enable them to have a family and an occupation.
>
> During the period of rehabilitation through labor, persons who receive it must observe the discipline prescribed by organs of rehabilitation through labor. Those who violate this discipline shall receive administrative sanctions. Those who violate the law and commit crimes shall be dealt with in accordance with law.
>
> As for the aspect of administering education, the guideline of combining labor and production with political education shall be adopted. Moreover, discipline and a system shall be prescribed for them to observe in order to help them establish [in their minds] the concepts of patriotic observance of law and of the glory of labor, learn labor and production skills, and cultivate the habit of loving labor, so that they become self-supporting laborers who participate in socialist construction.[8]

The period of confinement is left unstated in the Decision, which provides only that:

> 4. If during the period of rehabilitation through labor a person who receives it behaves well and has the conditions for getting employment, he may, with the approval of the organ of rehabilitation through labor, separately [independently] get employment. If the unit, head of the family, or guardian that originally made the application for the person's rehabilitation through labor asks to take him back so that it can assume responsibility for disciplining him, the organs of rehabilitation through labor may also, giving consideration to the circumstances, approve the request.[9]

The implication seems to be that a person will be confined until he has been rehabilitated, though what constitutes the criteria of the rehabilitated state is vague. Cohen reports that "several former public security officers who have left China since the spring of 1962 have said that shortly before that time the government issued instructions that limited the term of rehabilitation through labor to three years."[10]

The Decision at many points thus seems to invite abuse, and various sources confirm that such abuse has occurred, notably in the form of forced confinement and "rehabilitation" of persons guilty only of an objectionable affinity to "bourgeois thinking," i.e., rightists. The Communist Chinese authorities and press, however, have consistently held to the view that rehabilitation through labor is a laudable and highly effective program. It is possible, however, that some of the abuses in the work of reforming vagrants described during the Hundred Flowers period in some official Instructions of the Ministry of Interior of the PRC also apply to the program of rehabilitation through labor, of which the work of reforming vagabonds was a precursor. The abuses noted in these official Instructions include the following:

(1) During the initial period some places were not clear as to the scope of the classification "vagrant," and investigation work was not thorough enough—this led to some errors in providing shelter;

(3) In arranging for vagrants to participate in labor and production some places did not sufficiently comprehend and implement the guideline of combining reform with placement and they only concerned themselves with present production problems and did not care about the needs of long-term placement;

(4) Also, some places executed the work too mechanically in the direction that considered agriculture to be paramount in placement and reform, and they placed on farms vagrants who were not suited to participate in agricultural production;

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[8] *Ibid.*, p. 249-250.
[9] *Ibid.*, p. 250.
[10] *Ibid.*, p. 269.

(5) Also, some places were not reasonable enough in the work of disciplining vagrants and in compensating them for their labor.[11]

REFORM THROUGH LABOR

The second statute to be considered is the Act of the People's Republic of China for Reform through Labor (September 7, 1954), which is made applicable in its Article 1 to "all counterrevolutionary and other criminal offenders."[12] The sanctions described in this document are criminal ones, as opposed to the non-criminal ones described in discussion of the previous Decision on rehabilitation through labor, and they are made applicable to offenders whose cases have already been adjudged. Such offenders are to be held in detention houses, prisons, or reform through labor discipline groups in accordance with the provisions of the following articles:

Article 8. Detention houses shall be [used] primarily for confining in custody offenders whose cases have not been adjudged. . . .

Article 13. Prisons shall be [used] primarily for holding counterrevolutionary offenders and other important criminal offenders whose cases have already been adjudged, who have been given suspended death sentences or life imprisonment, and for whom the execution of sentence by labor outside of prison would be inappropriate.

Article 17. Reform through labor discipline groups shall hold counterrevolutionary offenders and other criminal offenders whose cases have already been adjudged and for whom labor outside of prison is appropriate.[13]

With the possible exception of those confined in detention houses whose cases have not been adjudged, these three classes of offenders are subjected to reform through labor regimens comprised of (a) labor, often physical in nature; (b) political and ideological education; and (c) a "carrot-and-stick" system of rewards and punishments. We shall discuss these three aspects of the reform regimen individually after recording the following observation of Jerome Cohen:

"Both inside and outside the People's Republic reform through labor is the most publicized aspect of the criminal process in China. Chinese publications have claimed that a blend of thought reform techniques and compulsory labor has achieved remarkable success in the correction and rehabilitation of criminal offenders. Some foreign observers have enthusiastically endorsed these claims. Others have indicted the system of penal administration for having cruelly subjected millions of prisoners to the worst of the abuses that are associated with the term "forced labor."[14]

A. *Labor*

The labor in which counterrevolutionary and other offenders engage during their punitive period apparently has been varied, though the emphasis perhaps has been upon gross physical tasks. The Act itself specifies that those in prisons shall engage in "compulsory labor" and that those in reform through labor discipline groups shall engage in "planned participation in agriculture, industry, construction work, and other such production" and finally that "provinces and cities shall establish reform through labor discipline groups on the basis of actual needs."[15] The Act also stipulates that: attention shall be paid to the cultivation of production skills and labor habits of offenders. During reform through labor attention shall be paid to the full utilization of technical skills of offenders who have them.[16]

Article 52 of the Act states in part that: the time of actual labor for offenders generally shall be fixed at nine to ten hours each day. With seasonable production it may not exceed twelve hours. The time for sleep generally shall be fixed at eight hours.[17]

In a Peking prison which he visited, Edgar Snow found that there were three prison factories (a hosiery mill, a mill for plastic articles, and a machine and electrical shop). Meng Chao-liang wrote in 1958 in the Communist Chinese journal *Cheng-fa yen-chiu* [Political-Legal Research] that:

Reform through labor agriculture is largely established along rivers, in lake

[11] *Ibid.*, p. 244.
[12] *Ibid.*, p. 589.
[13] *Ibid.*, p. 590.
[14] *Ibid.*, p. 588.
[15] *Ibid.*, p. 590-591.
[16] *Ibid.*, p. 591.
[17] *Ibid.*, p. 592.

regions, in saline or alkaline regions, and in dry regions with extremely inconvenient transportation. It has encountered great difficulties in technology and material supplies. The cadres who engaged in reform through labor work lead the offenders to scarcely populated, barren land. They eat simple food and sleep in the open. By means of hoes and ploughs they surround the lakes with fields, dig ditches for removing the alkali, open rivers and canals and ultimately conquer the rivers, lakes, salt, alkali, and dryness, reform nature, open up a large amount of barren land, and produce much food, cotton, and livestock.

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In the last few years various work teams have participated in the construction of many well-known railroads and water utilization projects. House construction work teams were mainly [formed] for the purpose of serving basic construction of reform through labor production.[18]

In this statement and others of a similar tone the Communist Chinese obviously do not shut their eyes to the fact that offenders constitute a ready source of cheap labor to be used to the economic advantage of the regime.

The official argument of the regime sees the labor of offenders as being mutually beneficial, for, while it has economic significance to the regime, it has a profound psychological significance to the laboring offender. In the words of Meng Chao-liang, "reforming nature not only makes the vast [number of] cadres happy about their victory, it also makes a great majority of the criminals recognize the truth that labor creates the world."[19] From recognition of this truth, the laboring offender ideally progresses to recognition of the Marxist principle that it is through his labor that man also creates himself. Work, that which was once forced effort, is supposed to become voluntary once he realizes its profound significance to nature, society, and himself. The Communist Chinese tend to glorify labor, particularly physical labor, as something with intrinsic value in and of itself, as opposed to the view that regards a skill as a technique acquired by the individual which is very helpful to his adjustment and success in life.

B. *Political and ideological education*

Much has been written about the Communist Chinese techniques of political and ideological education and about the apparent success of these techniques in many cases. The first paragraph of Article 26 of the reform through labor Act gives a very sketchy outline of these techniques with reference to offenders:

Article 26. In order to expose the essence of crime, to eliminate criminal thoughts, and to establish new concepts of morality, collective classes, individual conversations, assigned study of documents, organized discussions, and other such methods shall be regularly and systematically used to educate offenders about admitting their guilt and observing the law, about current political events, about labor and production, and about culture.[20]

Communist Chinese descriptions of the techniques of political and ideological education in the case of offenders stress that the process begins with somehow bringing the offender to the point of admitting his own guilt, of seeing his punishment and reform as a good thing, and of adhering to the rules applicable to his life in confinement. Once he has admitted his guilt, he is encouraged to probe fully the question of why he became a criminal; such probing is done in terms of both the individual, specific factors and events in his life which were operative in his criminal behavior, and the general, societal influences so operative. He is encouraged to confess to all his "evil crimes" and to expose others he knows to be guilty. The progress of the regime in eliminating as fully as possible the societal factors which provided nourishment for his criminal tendencies is paraded before him in the form of personal testimony in the prison by outsiders, including members of his own family in some cases and former criminals who have reformed and now are leading an exemplary, new life; and in the form of organized visits to personally observe evidence of progress. Meng Chao-liang writes that "as a result of their observations many criminals, after comparing the new China with the old one, have been so moved as to cry bitterly and to express their determination to correct their past wrongs and to become new persons."[21] The possibility of any offender's becoming a new man

[18] *Ibid.*, p. 600–601.
[19] *Ibid.*, p. 601.
[20] *Ibid.*, p. 591.
[21] *Ibid.*, p. 599.

is constantly held before the prisoner. He is systematically schooled in the official ideology and the official interpretation of current affairs and policy.

Westerners commenting upon the techniques of ideological and political education in Communist China have divergent views. Many emphasize that the effectiveness of these techniques stems in large part from the mobilization of intense group pressure upon the individual who has been stripped of his various psychic defenses and whose conscious and unconscious guilt has been systematically exploited. The ideological and political education of offenders in confinement is sometimes viewed as merely an intensified extension of the techniques applied to almost the whole of the Communist Chinese population. Much emphasis is placed upon the painfulness of the process of political and ideological education when this process involves careful scrutiny and minute dissection of one's whole life history under intense pressure from the group to which one belongs to bring one's thought and one's understanding of one's whole life into conformity with the prevailing philosophy.

In contrast to these views, one Western psychiatrist, while recognizing both the painfulness and the group pressure, sees the "humanitarian, socialist morality" of Communist Chinese penal personnel as a major factor in the reform of criminals and gives expression to the various attitudes toward the prison and the penal function that are included in this morality. He concludes that "the fact that the prison keepers lived by the same ethical principles which they were attempting to teach the prisoners was undoubtedly the largest single factor in the re-education of so many delinquent individuals."[25]

C. *Rewards and punishments in the penal setting*

In its Articles 67 through 72 the Act of the People's Republic of China for Reform Through Labor states various punishments which may be inflicted on the offender if, while serving his sentence, he fails to adapt to the reform regimen. These Articles read:

Article 67. In order to enable offenders to establish their merit and atone for their crimes, a reward and punishment system with clearly defined rewards and punishments shall be put into effect.

Article 69. In any one of the following situations offenders may, on the basis of the different circumstances of each case, be given warning, demerit, confinement to quarters or other such punishment: (1) They hinder the reform of other offenders; (2) they do not take care of or they damage instruments of production; (3) they are lazy or deliberately work slowly; (4) they engage in other acts that violate the rules of administration.

Article 71. On the basis of the seriousness of the circumstances of each case, organs of reform through labor shall [decide whether to] recommend that the local people's court sentence, in accordance with law, offenders who commit any one of the following crimes while they are being held by those organs: (1) Rioting or committing deadly acts or inciting others to commit deadly acts; (2) escaping or organizing escapes; (3) destroying construction work of important public property; (4) openly resisting labor despite repeated education; (5) engaging in other acts that seriously violate the law.

Article 72. When major counterrevolutionary offenders, habitual robbers, habitual thieves, and other offenders who, during the period of their reform through labor, do not labor actively but repeatedly violate prison rules, and the facts prove that they still have not reformed and that there is a real possibility that they will continue to endanger the security of society after release, before their term of imprisonment expires organs of reform through labor may submit to the people's security organ in charge the sugestion that their reform through labor be continued; after the suggestion is reviewed by the public security organ and after the offenders are sentenced by the local people's court in accordance with law, their reform through labor shall be continued.[26]

This last article thus holds forth the possibility of an offender's confinement continuing even after the expiration of his original sentence if he has given good reason to the view that he has failed to reform.

The incentives to reform, i.e., rewards for good behavior, are described in Articles 68 and 70, as follows:

Article 68. Offenders in any one of the following situations may, on the basis

[25] *Ibid.*, p. 617.
[26] *Ibid.*, p. 619.

of different behavior, be given a commendation, material reward, merit mark, reduction of sentence, conditional release, or other such reward:

(1) They habitually observe discipline, diligently study, and really demonstrate that they have repented and reformed;

(2) They dissuade other offenders from unlawful conduct, or information given by them denouncing counterrevolutionary organizations and activity inside or outside prisons is confirmed through investigation;

(3) They actively labor and fulfill or overfulfill production tasks;

(4) They have special accomplishments in conserving raw materials and taking care of public property;

(5) They diligently study technical skills and specially demonstrate inventiveness, creativity, or [ability in] teaching their own technical skills to others;

(6) They eliminate disasters or major incidents and avoid loss [to the people];

(7) They engage in other acts that are beneficial to the people and the state.[27]

Article 70. The rewards and punishments prescribed in Articles 68 and 69 shall be announced and given after review and approval by a responsible officer of the organ of reform through labor. But, for reduction of sentence or conditional release, a recommendation of the organ of reform through labor must be submitted to the people's public security organ in charge for review and then sent to the local provincial or city people's court for approval, announcement and execution.[28]

A special type of incentive to reform in the case of those guilty of capital crimes is the suspended death sentence, to our knowledge, a unique feature of the Communist Chinese system. It is discussed in the *Lectures on the General Principals of Criminal Law in the People's Republic of China* as follows:

Furthermore, in our practice of struggle against counterrevolutionaries, we have also created a doctrine, i.e., "two years of suspension for a death sentence, execution pending the result of forced labor performed by the convict."

This provides a flagrant counter-revolutionary the opportunity to repent and to reform himself if immediate execution of his sentence is not necessary. After two years of suspension, whether his sentence should be finally executed or not will be decided by his achievements in labor reform. If during the period of suspension he has made concrete achievements in labor reform, sufficiently showing his hearty repentance, his death sentence may be reduced to life imprisonment or long-term imprisonment through definite procedures.

On the other hand, if he has refused to accept reform, his death sentence should be executed right after the expiration of that period. The practice in the past years has shown that most of the counter-revolutionaries who had been sentenced to death but were granted two years of suspension demonstrated their determination to reform themselves during the period of suspension. Consequently, they were commuted to life imprisonment or long-term imprisonment. This doctrine has not only insured healthy development of the movement of suppressing counter-revolutionaries, but has highly demonstrated the spirit of revolutionary humanitarianism in our criminal law and the state's policy of "uniting suppression with clemency." [29]

Cuba

The Spanish Penal Code of 1870, extended to the Island of Cuba in 1879,[1] remained in force during the independence of that country in 1901 until the year 1938. At this time, it was repealed by the Code of Social Defense, enacted pursuant to the provisions of Decree Law 802 of April 4, 1936,[2] in force since October 8, 1938.

The Code is divided into four parts or Books. Book I contains general provisions of substantive penal law; Book II refers to specific felonies (*delitos*); Book III contains specific misdemeanors (*contravenciones*); Book IV governs the application of security measures. Matters concerning criminal procedures as well as execution of sanctions are not part of the Code; they are regulated by special statutes.

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[27] *Ibid.*, p. 620–621.
[28] *Ibid.*
[29] *Lectures, op. cit.*, p. 173–174.
[1] Royal Decree of May 23, 1879.
[2] *Gaceta Oficial*, April 11, 1936, Extraordinary Issue.

I. PRINCIPAL FEATURES OF THE CUBAN CODE OF SOCIAL DEFENSE OF 1936

Book I:

A. *Concept of the penalty.*

The penalty-punishment theory under the Spanish Code of 1870 has been replaced, under the new Code, by the penalty-treatment theory which is based principally on the idea that it is necessary to defend society. Under the latter theory, the imposition of a sanction is justified only when the fundamental laws of the social order are violated, such as in the commission of a misdemeanor or any other act which produces an alteration in the social order, although not of a "grave" nature.

In order to leave no doubts that this was the intention of the lawmaker, the original name Penal Code, no longer fitting to the new Code, was changed to Code of Social Defense.

Book IV contains regulations on security measures destined precisely to defend society and to avoid the repetition and consequences of crime. These security measures are not considered penalties per se.

An interesting point is that at the time the Cuban Code of Social Defense entered into force; i.e., in 1938, no country in the world had adopted a penal code bearing such a name. Only the Mexican state of Yucatan had its Code of Social Defense enacted and in force at this time (April 25, 1938), although as aforementioned, the Cuban Code was enacted earlier in 1936, although enforced two years later.

B. *Danger to society as fundamental criteria for sanctioning.*

In order to determine the sanction for the commission of a felony (*delito*) or misdemeanor (*contravención*), the danger the criminal represents in society must be considered; that is, the extent of his anti-social behavior, the fear he inspired, his capabilities of causing damage or of placing the social order in danger or disruption. Professor Ferri used to say that "a grave crime committed by a less dangerous criminal and a simple crime, on the contrary, may reveal the symptoms of an abnormal or very dangerous personality." Therefore, when sentencing, judges shall apply the sanctions, taking into account these fundamental circumstances. In order to accomplish this, the law must grant judges sufficient flexibility with regard to the length and manner of imposing a sanction. The Cuban Code adopts this criterion and grants judges a wider flexibility than the previous Code regarding the imposition of a sentence. This, on the one hand, allows a more severe sanctioning procedure against habitual delinquents or those more dangerous to society either by congenital or acquired tendencies; on the other hand, it allows a less severe procedure against a great majority of occasional or less dangerous offenders.

C. *Criminal liability.*

Under the theory of social defense as opposed to retributive justice by the State, legal liability (*imputabilidad*) derives from moral liability. The Code adopts this criterion, not only because it is absolutely inseparable from the idea of social defense or danger of the criminal, but also because the lawmakers agreed with Professor Ferri that this should bring positive benefits to the administration of criminal justice.

This principle is found in Article 18, which states that "No one may be sanctioned for the commission of an act provided by the Code, unless the action or omission which determined said act was desired by the agent who at the same time wanted to cause or foresaw the results of his act or omission."

D. *Criminal liability of juristic persons.*

The Code establishes, in addition to the criminal liability of juristic persons, the criminal liability of those natural persons involved in the commission of a punishable act by juristic persons.

E. *Political crimes.*

They are defined in Article 21 of the Code as "any crime which violates a right or a political interest of the state or a political right of the citizens."

When, in addition, the criminal act violates any other right, or that the commission of a political crime concurs with the commission of any other crime, the rules on concurrence of crimes shall be applicable.

F. *Consummated and frustrated crimes.*

The concepts of frustrated crime and tentative [to commit a crime] disappear. They are replaced by a distinction between consummated crime (*delito consumado*) and frustrated crime (*delito imperfecto*). The criminal forms of frustrated and tentative crime fall into the latter form.

G. *Concealment of the commission of a crime.*

Concealment of the commission of a crime (*encubrimiento*) became a crime against the administration of justice.

H. *Exempting and justifying circumstances.*

Among the first ones we found:

(1) *Insanity and mental alienation.* The old concept of insanity is suppressed. Instead, the definition of Professor Sanchiz Banus adopted by Article 8, Section I of the Penal Code of the Spanish Republic which includes transitory insanitary, is adopted. Determination of insanity is vested in doctors.

(2) *Drunkenness and temporary insanity.* Drunkenness that is complete, accidental, nonhabitual and not preconceived may be considered grounds for exemption from criminal liability. The same may be said of temporary insanity that is complete, accidental, nonhabitual, not preconceived and not caused by the absorption or injection of narcotic substances.

(3) *Minority.* For the purposes of criminal liability, the Code sets minority age as up to twelve years.

(4) *Deaf-mutes.* They are exempt from criminal liability, thus following the Spanish Penal Code of the Republic (Article 3, Section VIII).

(5) *Physical force and intimidation.* Together with physical force, the Code includes intimidation as grounds for exemption from criminal liability.

(6) *Error of law.* This becomes an exempting circumstance, only with regard to the commission of misdemeanors (*contravenciones*) by aliens who have been in the country for a short period of time.

Among the second ones, there are:

(1) *State of need;* that is, in case an individual acts in self defense, provided a) that he is unjustly attacked and b) that for his protection, he rationally employs an adequate way of defending himself.

(2) *Stealing as caused by hunger or starvation* (*hurto famélico*). To be applicable, however, the amount of goods stolen should not exceed that amount which is strictly indispensable for the immediate subsistence of the culprit, that property does not suffer any unnecessary damages, that there is no duress or intimidation of the victim, that the act does not reveal that the agent is dangerous, that he is not a vagabond, an alcoholic, a beggar or a drug addict.

Among the circumstances that may modify criminal liability, we find the following:

(A) *Attenuating circumstances.* Here we find some new attenuating circumstances such as repentance, influence of the environment, fatigue caused by work, mental unbalance in women due to menopause, pregnancy, menstruation or a pathological condition caused by childbirth, and old age which is fixed at 60 years.

(B) *Aggravating circumstances.* Among those the Code mentions the use of automobiles, vessels, aircrafts or any similar medium capable of achieving the impunity of the agent by insuring his rapid escape from the site of the crime.

Book II: *Felonies* (*delitos*).

This book of the Code deals with specific crimes (*delitos*). It is based on the principle that crime as an act committed against the law (*acto antijuridico*) constitutes a violation of criminal law. The classification of punishable acts is made, therefore, in accordance with the rights violated by the commission of an illegal act.

Death penalty. It is established for certain crimes such as piracy when it is accomplished by homicide or abandonment of the victim without facilities to survive. Also, for those persons who for the purpose of stealing cause a vessel to list or sink and consequently, someone dies. It is also applicable to the commission of the crime of murder and parricide, including in the latter the murder of one's mother, father or child or any legitimate or illegitimate ascendant, descendant or spouse. Death penalty is also applicable to cases of homocide caused by the use of explosives.

Commission of a crime while practicing a sport. This crime is included in the provisions of Article 471-A of the Code. Where the injury is caused with

intention to violate the rules of the game, it is punishable. Should the referee or umpire consent to the breaking of the rules of the game in question, he shall be brought to trail as an accomplice.

Book III: *Misdemeanors (contravenciones)*.

These are minor violations of the law committed without malice or the more or less marked characteristics of those violations which constitute a felony (*delito*). Penalty for the commission of misdemeanors (*contravenciones*) cannot exceed the term of six months in jail.

Book IV: *Security measures.*

Security measures are applicable to individuals who commit an act which the law qualifies as a crime, regardless of the fact that the individual may not be criminally liable (*inimputable*) or that he may not be punishable. They are also applicable to those individuals who have symptoms of a permanent dangerous condition which particularly inclines or may incline them to commit a crime, even though the commission of said crime has not occurred.

Security measures may be applicable for an undetermined period of time until the purposes of cure, instruction, education or rehabilitation (*rehabilitación*) of the individual is achieved.

In order to apply security measures, the following criteria should be followed:

(1) They shall be applicable only to socially dangerous persons who have committed a crime, regardless of the fact that they are not criminally liable. They also shall be applicable to persons who have not committed a crime but evidently reveal permanent symptoms of being dangerous to society.

(2) The law regulates the cases where a socially dangerous person may be subject to security measures.

(3) Security measures shall be decreed following previous determination of the dangerous status of the person who committed a crime.

(4) Generally speaking, any person who is believed to be a potential criminal shall be reputed as socially dangerous.

II. CRIMINAL PROCEDURE

As aforementioned, criminal procedure is not regulated by the Code of Social Defense but by the Law on Criminal Procedure enacted in Spain, pursuant to the provisions of Royal Decree of September 14, 1882, and later extended to Cuba and Puerto Rico by Royal Decree of October 19, 1888. It became enforceable in these islands on January 1, 1899. It is still in force in the Republic of Cuba.

Basically, we may say that the preliminary handling of a criminal case involving the commission of a felony (*delito*) is conducted in an Instruction Court (*Juzagdo de Instrucción*). It takes place after the police turn the matter over to the judicial authorities (within 24 hours after detention of the individual). This preliminary proceeding is conducted in secret and has the elements of crime investigation assigned to the judicial branch, terminating in the indictment or release of the accused. Trial is held in provincial courts (*Audiencias*) before no fewer than 3 judges (*magistrados*). No jury is involved. Parties to the trial are: the accused or person under indictment (*procesado*), the attorney for the defense, the public prosecutor (*Fiscal*) and in certain cases a private prosecutor (*acusador particular*) who represents the rights of the injured party. Trial may end in a verdict declaring the accused guilty or not guilty. Sentencing in the first case then follows.

An appeal of the sentence may be filed before the Supreme Court, only on arguments that the lower court decision violated the provisions of the Law on Criminal Procedure (*quebrantamiento de forma*) or substantive provisions of penal law (*infracción de ley*). An appeal on questions of fact is not admissible.

The Supreme Court, in the first case, may order the lower court to start a new trial; in the second case, the upper court may amend the sentence issued by the lower court and increase or decrease the sanction, as the case may be, or even absolve the accused.

Cases involving misdemeanors (*contravenciones*) are heard before a judge (*Juez correccional*). Likewise, no jury is involved. After hearing the charges, the defense and evaluating the evidence submitted to him, the judge renders his decision. It is non-appealable. The sentence cannot exceed the term of six months in jail.

III. EXECUTION OF SANCTIONS

Matters concerning execution of sanctions are governed by a special statute known as Law on Execution of Sanctions of April 4, 1936,[3] enforceable as of October 8, 1938, which is the same date set forth for the enforcement of the provisions of the Code of Social Defense.

This law creates a technical body known as the Superior Council of Social Defense (*Consejo Superior de Defensa Social*), charged with the execution of sanctions and security measures involving deprivation of liberty. It exercises broad technical and administrative powers.

Consequently, the classification of inmates with regard to the kind of treatment that shall be applicable to them becomes essential. This is the keystone of the Cuban penitentiary system. It is based on the premise that the Administrative Organ of a Penitentiary has the right to determine the moment the sanction of deprivation of liberty shall cease, within the limits set forth by the Court in the corresponding sentence. Therefore, the base for the individualization of the execution of the sanction is really the undeterminable sentence, which has as a corollary the conditional liberty of the inmate.

Corrective treatment. The law adopts a system of correction based on compulsory studies and work.

Classification of penal establishments. They are divided into two groups: Institutes of Repression and Institutes of Prevention. The former function as prisons where persons penalized to deprivation of liberty are committed; the latter are the centers where the execution of the security measures established by the Code of Social Defense are enforced.

Probation officers. The law also makes provisions for probation officers, with powers and functions similar to those of Probation and Parole officers in the United States. They are civil officials subject to the administration of the penitentiary and are charged with the observation, care and supervision of those individuals placed on probation.

Since the Code of Social Defense was conceived on the theory of penal-treatment, it thus follows that a penitentiary must be, in effect, a reformatory; i.e., a social institution. The culprit is considered to be arrested from society, not as a penalty, but for the purposes of his instruction, reeducation, rehabilitation, discipline and regeneration.

CZECHOSLOVAKIA

Question 1:

The Czechoslovak Criminal Code of November 29, 1961,[1] as amended, has 301 sections and is divided into three parts: Part One, General Part (Secs. 1-90), Part Two, Special Part (Secs. 91-295), and Part Three, Transitional and Final Provisions (Secs. 296-301).

Part One consists of the following chapters: The Purpose of the Penal Code; The Foundations of Criminal Liability; The Applicability of Penal Laws; Penalties; The Extinction of Criminal Liability and Punishment; Protective Measures; Special Provisions Concerning the Prosecution of Juveniles; and General Provisions.

Part Two has the following chapters: Crimes Against the Republic; Economic Crimes; Crimes Against the Public Order; Crimes Causing Common Danger; Crimes Grossly Violating Good Civil Relations; Crimes Against the Family and Youth; Crimes Against Life and Health; Crimes Against Liberty and Human Dignity; Crimes Against Property; Crimes Against Humanity; Crimes Against Military Service; and Military Crimes.

Part Three has one chapter, entitled "Transitional and Final Provisions."

Question 2:

The numbering of the sections of the Code is consecutive. If an amendment to the text is made, the wording of the affected section is changed and the number remains the same; if an additional section is needed, then the number of sections is extended by adding the letters a, b, c, etc., after the section where the new material most appropriately belongs.

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[3] *Gaceta Oficial*, April 11, 1936, Extraordinary issue.

[1] *Sbírka zakonů československé socialistické republiky* (hereinafter referred to as Sb., No. 140/1961.

Question 3:

In order to be a crime, an act must have been committed intentionally, unless the present Code expressly provides that an act committed through negligence is punishable as a crime (Sec. 3, Subsec. 3).

The present Code makes use of two kinds of culpability: "intent" (Sec. 4), and "negligence" (Sec. 5). The following is the text of Sections 4 and 5 of the Code:[2]

Sec. 4.—A crime shall be [considered to have been] committed intentionally, if the offender

(a) wished to violate or endanger in a manner specified in the present Code an interest protected by the Present Code, or

(b) knew that his action could cause such violation or danger and, in the event of causing it, accepted the result.

Sec. 5.—A crime shall be [considered to have been] committed through negligence, if the offender

(a) knew that he could, in the manner specified in the present Code, violate or endanger an interest protected by the present Code, but without adequate reasons depended on not causing such violation or danger, or

(b) did not know that his action could cause such violation or danger although, considering the circumstances and his personal situation, he should have known it.

The intent may be direct (knowledge is required—Sec. 4, letter (a)) or indirect (volition is required—Sec. 4, letter (b). In both forms of intent, the offender must have known that by his act he might violate or endanger an interest protected by the present Code in a manner specified in the present Code; however, in the case of direct intent, the offender directly wished to violate or endanger such an interest, whereas in the case of indirect intent; the offender did not wish to cause the violation or endangerment of such interest directly, but realized that such a violation or endangerment would take place. The intent must be established by the court on the basis of the facts and evidence.[3]

Section 5 recognizes two kinds of negligence, which the theory terms 'conscious' and 'unconscious' negligence.[4]

Conscious negligence is present when the offender knew that he might violate or endanger said interest; however, he did not understand that he would cause such a violation or endangerment, but trusted without adequate reasons that his act would not cause it. There is a lack of volition in the person of the offender which makes the difference as regards indirect intent.

Unconscious negligence is present when the offender did not know that his action could cause such a violation or danger. The difference between an unintentional violation or danger (i.e., not a criminal case) and unconscious negligence is that the offender should have known it considering the circumstances and his personal situation.

Guilt must be established, not innocence. Section 2, Subsection 2, of the Code of Criminal Procedure reads:[5] "No person prosecuted in penal proceedings shall be viewed as being guilty until his guilt has been pronounced in a judgment which has become legally valid."

Question 4:

The "proximate cause" between conduct and result is not expressly mentioned in the Code; however, in the chain of causation, such proximity must be established in order to find the offender guilty. The proximate cause is present if the result could not have taken place without the offender's action. If his action is one of the proximate causes of the result, then it is necessary to establish a so-called degree of causation in bringing about the result. Of course, the offender is criminally liable only if he caused the result intentionally or by negligence.[6]

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[2] The text is taken from an official translation of the Union of Czechoslovak Lawyers, *Bulletin of Czechoslovak Law*, 1962.

[3] *Trestní zákon; Komentár*, Praha, Orbis, 1964 (hereinafter Komentár), p. 43–47.

[4] *Id.* at 47–49.

[5] The Czechoslovak Code of Criminal Procedure of November 29, 1961, No. 141/1961 Sb., as amended (hereinafter referred to as CCP).

[6] Komentár, *supra* note 3 at 31–32.

Question 5.

Insanity is dealt with in Section 12, Subsection 1 of the Code, entitled "Insanity" which reads as follows:

(1) A person who, due to mental disorder, was unable at the time of the crime to recognize its danger to society or to control his action shall not be criminally liable for the crime.

Insanity is not defined in the Code. However, the mental disorder must be such that the offender was unable to recognize the danger of his act to society or to control it. The quesion of insanity is a legal question which must be decided by the court on the basis of the facts found.[7]

If the offender was insane at the time when the crime was perpetrated, he is not criminally liable. An insane person may not be prosecuted, found guilty or be convicted. The prosecution must be stayed and if insanity was established during the main trial, the sentence must call for an acquittal.

The procedural aspects of insanity are handled in the Code of Criminal Procedure in the following manner:

In the preparatory proceedings, which are carried out by the Office of the Public Prosecutor or by an investigating agency, the public prosecutor stays the criminal prosecution, if the accused was not criminally liable at the time of the crime because of insanity (Sec. 1.2, Subsec. 1, letter (e) of the CCP).

In the judicial proceedings, the presiding judge may order a preliminary review of the indictment, if he is of the opinion that the accused was insane (Sec. 186, Subsec. 1, letter (c) of the CCP), and after having reviewed the indictment, the court must stay the prosecution, if the accused was found insane (Sec. 188, Subsec. 1, letter (d) of the CCP).

The court must acquit the defendant if he is not criminally liable due to insanity (Sec. 226, letter (d) of the CCP).

The psychiatric examination of the accused is regulated by Sections 116 and 117 of the Code of Criminal Procedure. They read as follows:

Sec. 116.—(1) If the mental health of the accused must be examined, two expert witnesses from the field of psychiatry shall always be called to do so.

(2) If the psychiatric examination cannot be carried out otherwise, the court and, in preparatory proceedings, the prosecutor, or, with the prosecutor's approval, the investigating organ, may order that a person accused of a crime be observed in a medical institution or, if the accused is in custody, in a special department of the penal institution. This decision may be contested by complaint which shall have dilatory effect.

(3) If the expert witnesses find that the accused shows signs of insanity or lessened sanity, they shall at the same time express their opinion whether his freedom would be dangerous.

Sec. 117.—Psychiatric observation shall not last longer than two months; the opinion shall be submitted within this term; at the warranted request of the expert witnesses, the court and, in preparatory proceedings, the prosecutor or, with the prosecutor's consent, the investigating organ, may extend the term, but not longer than by one month. The extension of the term may be contested by complaint.

The Criminal Code provides for protective therapy as a protective measure for a person who commits an otherwise criminal act and is not criminally liable because of insanity and his continued stay at large would be dangerous.

This protective therapy may be ordered in addition to a penalty or if the punishment is waived. It shall be provided as a rule in a medical institution and shall continue as long as its purpose so requires. Release from protective therapy may be ordered only by the court. The execution will be stopped by the court if the circumstances for which it had been ordered change before its commencement (Sec. 72 of the Code).

Protective therapy may also be ordered for an offender who commits a crime in a state of impaired sanity (or a state approaching insanity) and his stay at large is dangerous. Impaired sanity is a state in which, due to mental disorder at the time of the crime, the ability of the offender to recognize that his act is dangerous to society or the ability to control his action was substantially decreased.[8] Such persons are criminally liable; however, the court may waive punishment if it is of the opinion that the protective therapy which

[7] *Id.* at 68.
[8] *Id.* at 104–105.

it is simultaneously ordering will ensure the offender's rehabilitation and the protection of society better than a penalty (Sec. 25 of the Code). The court will also take the state of reduced sanity into consideration when determining the type and extent of penalty. Section 32 of the Code reads as follows:

Sec. 32.—(1) If the offender committed the crime in a state approaching insanity and did not induce himself into such state, even through negligence, by having taken an alcoholic beverage or a drug, the court shall take this circumstance into consideration when determining the type and extent of penalty.

(2) If the court holds that in view of such an offender's state of health the purpose of the penalty can be achieved by a lesser penalty paralleled by protective therapy (Sec. 72), it shall reduce the term of imprisonment below the minimum term, not being bound by the restriction listed in Section 40.

At the trial, if the court finds that there are grounds for ordering protective therapy with respect to the defendant, it may be ordered even in the absence of a motion by the prosecutor. If the court requires further evidence for its decision which cannot be immediately produced, the court will reserve the decision concerning protective therapy for a public session (Sec. 230 of the CCP).

Question 6:

A person who induced in himself a state of insanity, even through negligence, by taking an alcoholic beverage or a narcotic drug, is not criminally liable (Sec. 12, Subsec. 2 of the Code). The reason given by the official Statement Accompanying the Bill on the Criminal Code for such liability when a crime was committed in a state of self-induced drunkenness is "a consistent fight against alcoholism." [9]

In some instances the circumstance that the crime was committed under the influence of alcohol will bring a higher sentence (for instance, when an offender committed a crime while performing his duty in his employment, occupation, position or office, Sec. 180, Subsec. 2, letter b; or Sec. 224, Subsec. 2 of the Code) or will be considered as a common aggravating circumstance.

There are other restrictions in the Code concerning intoxication. The provision of Section 25 on a waiver of punishment in case of a state approaching insanity in connection with protective therapy (see above) does not apply, "if the offender had induced in himself the state approaching insanity, even through negligence, by taking an alcoholic beverage or a drug" (Sec. 25, second sentence).

The state approaching insanity caused by intoxication will not be taken into consideration in determining the type and extent of the penalty (see above).

If an offender addicted to the excessive consumption of an alcoholic beverage or narcotic drug commits a crime while drunk or in a similar state of intoxication (chronic alcoholism, morphinism, and similar cases), the court may order protective therapy (Sec. 72, Subsec. 2, letter b).[10]

Question 7:

Self-defense, duress (extreme necessity) and the justified use of weapons are spelled out in Sections 13, 14, and 15 of the Code: the principles are stated in general terms. As to necessary defense, the Code specifies that an otherwise punishable act by which a person averts a directly threatening or continuing attack on any interest protected under the Code shall not be considered a crime. However, it is not a necessary defense, if the defense was clearly out of proportion to the nature and danger of the attack. Extreme necessity is defined as an otherwise punishable act by which a person averts a danger directly threatening an interest protected by the Code. However, it is not an extreme necessity, if under the given circumstances, the danger could have been otherwise averted or if the resulting consequence is clearly as serious or even more serious than the one which had threatened. And finally, the justified use of a weapon is not a crime, if the person used the weapon "within the scope of the authority provided by the respective legal regulations."

Question 8:

The Czechoslovak Criminal Code deals only with "criminal acts." Misdemeanors, that is acts which do not reach the same degree of danger for society

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[9] *Id.* at 67 and 69–73.
[10] *Id.* at 223.

as do criminal acts, are now handled in a special Law on Misdemeanors of December 18, 1969, No. 150 Sb.

Question 9:

The provisions on sentencing are in Chapter Four (Secs. 23–64). Sections 58–60 deal with a suspended sentence which is a suspension on probation of the execution of a penalty, and Sections 61–64 handle the release of a convicted person on parole, and suspension of the execution of an unexpired penalty prohibiting a convicted person from engaging in a specific activity. Probation is a form of suspension of a sentence.

A person so released is under the supervision of a public organization (Trade Union organizations; Youth organizations) which takes reponsibility for his good behavior.

The Code provides for determinate sentences of imprisonment stating, as a rule, the maximum, or the minimum and the maximum terms of imprisonment, for instance, "up to one year," or "six months to three years."

The Code provides for "imprisonment of especially dangerous repeaters," in Sections 41 and 42. After the definition of especially dangerous repeaters, the maximum term of imprisonment set by the Code is raised by one third for them. The court must impose a penalty in the upper half of this term. However, the maximum term of imprisonment may not exceed fifteen years even after the increase.

The minimum term of imprisonment is not set in the Code; however, the maximum term is fifteen years (Sec. 39, Subsec. 1).

The system of release on parole is established in Sections 61–64. The court may release a convicted person on parole after he has served one half of the prison term (two-thirds for the crimes enumerated in Sec. 62) to which he had been sentenced, if he has demonstrated by his model behavior and his honest attitude toward work that he has reformed and he may be expected to lead an orderly life of a working man in the future, or if the court accepts the guarantee offered by the public organization for completing his reform. When releasing a convict on parole, the court sets a probation period of from one to 7 years. The court may impose suitable restrictions on the parolee designed to make him lead an orderly life of a working man; it may also order him to compensate according to his ability for the damage he caused by his crime.

Publicity to a conviction (Sec. 3007 of the Draft) is not mentioned in the Code.

Every judgment must include reasons in writing (Secs. 120 and 129 of the CCP). The judgments are subject to review on appeal by a higher court (Sec. 252 of the CCP).

The appellate court may increase as well as decrease a sentence. Both the government and the defendant may appeal a sentence (Sec. 246 of the CCP). However, a judgment to the detriment of the defendant may only be appealed by the prosecutor (Secs. 247, Subsec. 1 and Sec. 259, Subsec. 4 of the CCP).

Complaints against violations of the law and the respective proceedings are spelled out in Chapter 17 (Secs. 266–276 of the Code of Criminal Procedure).

The Code provides for a joint and supplementary sentence in Sections 35–38. If the court sentences the offender for two or more crimes, it imposes a joint penalty upon him according to the legal provision relating to the crime which is subject to the strictest punishment. The court imposes a supplementary penalty under the same principle, when it sentences the offender for a crime he had committed before the court of the first instance pronounced the sentence for another crime he had committed.

When imposing a supplementary penalty, the court at the same time voids the penalty imposed on the offender by the previous verdict. Consequently, if one but not all of the convictions in a joint sentence is reversed on appeal, the new sentence must repeal the previous sentence to the joint penalties and issue a new penalty.[11]

The supplementary penalty may not be less than the previously imposed penalty. If the court sentences an offender for a crime he had committed before the penalty imposed upon him by a previous verdict was executed, and imposes a penalty of the same type, such penalty, together with the unexecuted part of

[11] *Id.* at 135.

the previously imposed penalty, may not exceed the maximum rate permissible under the Code for this type of penalty.

In regard to the imposition of fines, the court may impose a pecuniary penalty in an amount ranging from 500 to 50,000 crowns as a separate penalty only in cases where the Code, in its Special Part, permits the imposition of this penalty and if, in view of the nature of the crime and the possibility of reforming the offender, no other penalty is necessary for achieving the purpose of punishment. The court may impose a pecuniary penalty in addition to another penalty, if, by his premeditated criminal activity, the offender acquired or tried to acquire pecuniary gain (Sec. 53 of the Code). When fixing a pecuniary penalty, the court takes into consideration the offender's personal and property situation; it does not impose a pecuniary penalty if it is clear that the penalty would be irrecoverable.

The execution of a pecuniary penalty is handled in Sections 341–344 of the Code of Criminal Procedure. As soon as a judgment requiring the payment of a pecuniary penalty becomes final, the presiding judge orders the convicted person to pay the penalty within fifteen days, warning him that otherwise the payment will be enforced. For serious reasons, the presiding judge may postpone the payment or allow the payment to be made in installments. The court waives the execution of a pecuniary penalty if it is apparent that its attempt at enforcement would be of no avail.

Question 10:

The Criminal Code does not regulate expressly the effect of a mistake in committing a crime. The principles underlying it can be interpreted from the provisions concerning guilt (Secs. 4, 5, and 6). Mistake of law is not a defense under the Code.[12] Mistake of facts, generally speaking, obviates the knowledge which is required for intent, and, therefore, there is no criminal liability.

Question 11:

The separation of the jurisdictional basis from the definition of the offense is not dealt with in the Codes.

Question 12:

Extraterritorial jurisdiction is regulated in Sections 17–20 of the Code. The provisions of this Code are applicable to all crimes committed within the territorial limits of the country (territoriality principle). They also apply to crimes committed abroad by a Czechoslovak citizen or stateless resident of Czechoslovakia (personality principle). The protective principle and the universality principle are spelled out in Section 19 by which the Code also applies to certain crimes committed abroad to the detriment of Czechoslovakia or society at large by an alien or a stateless person who is not a resident of Czechoslovakia; the crimes are enumerated therein. This law also applies in determining the punishability of a crime committed abroad by an alien or a stateless person who is not a resident of Czechoslovakia, if the crime is punishable also under the law in force on the territory where it was committed, and if the offender is apprehended on the territory of Czechoslovakia and is not extradited for criminal prosecution to a foreign state (the subsidiary universality principle).

Question 13:

The Code does not explicitly provide for criminal conspiracy. According to Sections 9 and 10, a crime may be committed either by one person, the offender, or by the joint action of two or more persons. In such a case, each one of them will be criminally liable as if he alone had committed the crime (accomplices). The Code defines a participant in a completed crime or in an attempt to commit a crime as a person who with intent organizes or directs the commission of the crime (the organizer), instigates another person to commit the crime (the instigator), or who assists another person to commit the crime, in particular by providing the means for doing so, removing obstacles, giving advice, strengthening the intent, or promising help after the crime has been committed (accessory).

Question 14:

The "felony-murder" rule is not dealt with in the Code. In order to commit a crime, intent is necessary.

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[12] *Id.* at 46.

Question 15:

In federated Czechoslovakia, there are Czech courts for the Czech Socialist Republic and Slovak courts for the Slovak Socialist Republic. The only courts common to both states are the Supreme Court of the Czechoslovak Republic and certain military courts.[13]

As to the provisions on rioting and mass demonstrations, the Code has similar provisions on sedition (Sec. 92), which is a crime committed by a person who, acting with the intent to undermine the socialist social and governmental system, territorial integrity or defensive capacity of the Republic or to destroy its independence, participates in forcible acts or mass disturbances against the Republic, its organs or public organizations of the working people, or engages in other especially dangerous activities against the foundations of the Republic or its important international interests.

Question 16:

The present Criminal Code has no provisions concerning para-military activities, because the unauthorized carrying of weapons is a crime under Section 185 (See Question 18 following). The right to carry or possess a weapon is subject to a license.

Question 17:

As to "crimes without victims," the Code for instance in connection with homosexuality (Sec. 244) states that a person who accepts or makes payment for sexual relations with a person of the same sex, or causes a public nuisance by sexual relations with a person of the same sex shall be held criminally liable. According to Section 203, a person shall be guilty of parasitism when he consistently avoids honest work and makes his living through prostitution, gambling, or in some other improper manner, and shall be punished by imprisonment for a term of up to two years. This text was changed in 1963 so that, instead of prostitution and gambling, a more general term was accepted, and the sentence was increased to three years.

Question 18:

The Code has a provision concerning firearms and explosives in Section 185 entitled "Unauthorized Arming:"

(1) Whoever, without being authorized,

(a) obtains for himself or another person or has in his possession a weapon of mass effect or parts essential for the use of such weapon, or

(b) accumulates, manufactures or procures for himself or another person weapons, ammunition or explosives, shall be punished by imprisonment for a term of up to three years.

(2) The offender shall be punished by imprisonment for a term of one to five years,

(a) if he commits the act described in paragraph 1 on a larger scale, or

(b) if he commits such act under a state of defense emergency.

Question 19:

The Czechoslovak law provides for capital punishment as an extraordinary penalty which a court may impose under the conditions spelled out in the Criminal Code, Sections 29 and 30. Under certain circumstances, the death sentence may be imposed, for instance, for high treason, sedition, terrorism, sabotage, espionage, common menace, and murder. The Code does not provide for separate hearings to determine the sentence in a capital case. However, the Code of Criminal Procedure (Secs. 316–319) provides that, if the judgment imposing a death penalty has become final, the presiding judge shall submit the files to the Supreme Court for a review. And only if the judgment has been unaffected by the review and the court has been advised that there has been no petition for pardon or that such petition has been rejected, may the death penalty be executed.

Question 20:

The Czechoslovak criminal procedural system provides for a joinder of prosecution. In Section 20, Subsection 1, the Code of Criminal Procedure spells out

[13] Law on Court Organization and Elections of Judges of February 26, 1964, No. 36 Sb., as amended. Republished in No. 13/1970 Sb., issue No. 5 of March 20, 1970.

that joint proceedings shall be carried out with respect to all the crimes committed by an accused person and with respect to all others whose crimes are related. A similar provision applies to the investigation: if it is necessary to initiate an investigation of at least one criminal act, the investigation shall be made of all the criminal acts of the same accused and against all the accused whose crimes are related (Sec. 161, Subsec. 3).

Egypt

The history of modern Egypt starts with the accession of Mohammad Aly. Very little appears to be known as to the methods of administration of criminal justice under this monarch.

The occupation of Egypt by Napoleon is considered as the first in a series of events which gradually brought it into closer contact with Europe, and especially with France. French influence began to be apparent in substantive and adjective criminal law. The dominance of French culture in Egypt had led to the introduction of French law as the basis of the Mixed Codes—Civil, Commercial and Criminal. Turkey had also borrowed largely from French sources in her Penal Code, issued in 1858. There were, therefore, adequate precedents for recourse to the French Codes when the time arrived for the compilation of a Native Penal Code.[1] The Egyptian Penal Code, promulgated on November 13, 1883, was consequently little more than an abbreviated reproduction of the French Code of 1810.

There is sufficient similarity between the principles of criminal law in all countries to make such wholesale importation less objectionable than it might be thought. Time and experience would bring with them adaptation and improvement.

A penal code is never an exhaustive statement of the penal law. It professes to do little more than provide for the punishment of the graver offenses. To obtain a complete acquaintance with the penal law it would be necessary to study a number of supplementary laws and decrees making punishable various acts of an anti-social character, generally, though not always, less serious than those mentioned in the code. Such supplementary laws sometimes profess to be additions to or alterations of the code, but more frequently they are only supplementary thereto.

Between 1883 and 1904 a large number of laws and decrees of this kind were promulgated in Egypt. Many of these were superseded either by later laws or by the revised Code of 1904. The revised Penal Code and the Code of Criminal Procedure were promulgated February 14, 1904, and came into force April 15, 1904. The revision was by no means complete. The General Part (Articles 1–69) of the Penal Code was rewritten and important alterations made in other respects. Continental codes were drawn upon, in particular the Italian Penal Code of 1889, and certain articles from the Indian Penal Code were also introduced.

In 1937 the Egyptian legislature promulgated a new penal code as Law No. 58 of 1937. This code was applied by the Native and the Mixed Courts until the latter were abolished and their jurisdiction transferred to the Native Courts.

The Penal Code of 1937 is still in force today, but it has gone through numerous amendments and many supplementary laws have been added to it. Egypt, through its Court of Cassation, has developed its own jurisdiction concerning many criminal law principles. This mass of jurisprudence is strictly based on the needs of the Egyptian society. Although certain articles of the Egyptian Code may resemble those of the French, Italian or Indian, their interpretation and implementation is strictly Egyptian.

Question 1. Structure:

The Egyptian Penal Code is divided into four books, each book is divided into chapters and sections, and each section contains the pertinent articles, as follows.

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[1] The extraterritoriality in Egypt created a dual system of law and administration of justice—one the Mixed Courts which applied Mixed Codes on foreigners and Egyptians, and the other a Native Courts system which applied Native Codes promulgated for the purpose of applying such codes on Egyptian nationals only.

BOOK I. PRELIMINARY PROVISIONS

Chapter 1. General Principles. Articles 1–8 are concerned with the application of criminal law.

Chapter 2. Classification of offenses. Articles 9–12 classify offenses into three kinds: crimes, misdemeanors and contraventions.

Chapter 3. Punishment. Articles 13–38 classify punishment into criminal, correctional and contraventional, as well as substantive and subsidiary punishments. The substantive penalties are mentioned in Articles 13–23. The subsidiary penalties are enumerated in Articles 24–31. They are subsidiary because they cannot be imposed except together with a substantive punishment. Articles 32–38 discuss co-existent penalties or cumulative penalties.

Section 1. Under substantive penalties the following are listed: death, penal servitude (either for life or for a specific term), imprisonment, detention, fine, committal to a reformatory school, and surrender of the juvenile to his guardian.

Section 2. Under subsidiary penalties the following are listed: deprivation of rights and privileges, dismissal from public office, police supervision, and confiscation.

Section 3. This section discusses co-existent penalties under Articles 32–38.

Chapter 4. Principals and accessories; Articles 39–44.

Chapter 5. Attempt; Articles 45–47.

Chapter 6. Criminal conspiracy; Article 48.

Chapter 7. Recidivism; Articles 49–54.

Chapter 8. Conditional sentences; Articles 55–59.

Chapter 9. Acts done in exercise of a general right; Articles 60–63.

Chapter 10. Juvenile offenders; Articles 64–73.

Chapter 11. Pardon and amnesty; Articles 74–76.

BOOK II. CRIMES AND MISDEMEANORS AGAINST THE PUBLIC INTEREST AND THEIR PUNISHMENT

Chapter 1. Crimes committed against the external safety of the State; Articles 77–85.

Chapter 2. Crimes and misdemeanors committed against the internal safety of the State; Articles 86–102.

Chapter 2 bis. Explosives; Articles 102A–102F (this whole section was added by Law No. 50 of 1949).

Chapter 3. Bribery and corruption; Articles 103–111.

Chapter 4. Malversation of public funds; Articles 112–119 bis.

Chapter 5. Misuse of official position; Articles 120–125.

Chapter 6. Employment of violence, etc., by public servants; Articles 126–132.

Chapter 7. Resistance and disobedience towards public authorities; Articles 133–137 bis A.

Chapter 8. Escape from custody and harboring fugitives; Articles 138–146.

Chapter 9. Breaking of seals and abstraction of papers from official custody; Articles 147–154.

Chapter 10. Unlawful assumption of titles, ranks, or office; Articles 155–159.

Chapter 11. Offenses relating to creeds; Articles 160–161.

Chapter 12. Damage to buildings, monuments, and other public things; Article 162.

Chapter 13. Offenses relating to means of communication; Articles 163–170.

Chapter 14. Offenses by means of the press; Articles 171–201 bis.

Chapter 15. Coinage and counterfeiting offenses; Articles 202–205.

Chapter 16. Forgery; Articles 206–227.

Chapter 17. Trade in contraband and forgery of postal and telegraph insignia; Articles 228–229.

BOOK III. CRIMES AND MISDEMEANORS AGAINST INDIVIDUALS

Chapter 1. Homicide, wounds and blows; Articles 230–251 bis.

Chapter 2. Willful arson; Articles 252–259.

Chapter 3. Abortion, and the manufacturing, selling, and adulteration of drugs; Articles 260–266.

Chapter 4. Offenses against decency and morality (rape and indecent acts); Articles 267–279.

Chapter 5. Unlawful arrest, kidnapping, abduction, and abandonment of family; Articles 280–293.
Chapter 6. False evidence; Articles 294–301.
Chapter 7. Defamation, insults, and disclosure of secrets; Articles 302–310.
Chapter 8. Theft and extortion; Articles 311–327.
Chapter 9. Criminal bankruptcy; Articles 328–335.
Chapter 10. False pretense and abuse of confidence in respect to property entrusted; Articles 336–343.
Chapter 11. Interference with freedom of auctions and deception in trade; Articles 344–351.
Chapter 12. Games of chance and lotteries; Articles 352–353.
Chapter 13. Willful damage; Articles 354–368.
Chapter 14. Criminal trespass; Articles 369–373.
Chapter 15. Abstention from work in public utilities and interference with freedom of labor; Articles 374–375.

BOOK IV. CONTRAVENTIONS

Contraventions concerning:
Public roads; Article 376
Public safety; Articles 377–380
Public health; Articles 381–384
Public morals; Article 385
Public authorities; Article 386
Property; Articles 387–389
Weights and measures; Article 390
Persons; Articles 391–394
All contraventions listed in local and municipal decrees; Article 395.

Question 2. The numbering system:

The numbering is complete, no space is left blank, and additions are made by means of having the numbers of the provisions added to them as "bis" or "bis A" as it is shown in this Code.

Question 3. Mental elements:

The Egyptian Penal Code, like most European codes, depends on the jurisprudence and the decisions of higher courts on the question of the mental attitude of the offender towards the acts constituting the offense. However, the mental attitude is usually specified in the article which covers the offense. There are cerain general exceptions to criminal responsibility on grounds of justifiable actions, such as self defense; mental conditions, such as insanity and influence of drugs; and the acts of public officials under certain circumstances.

Commentators on the Egyptian Penal Code discuss, in this regard, what they call the elements which contribute towards the fixation of responsibility. They list these elements as:

(1) Knowledge of law; (2) knowledge of fact, and (3) intention and wrongful intention, which is referred to as malice. The offender has foreseen the act which constitutes the offense and he directs his mind towards its realization. This state of mind is expressed in the Code by the use of words such as "willfully," "wrongfully," and "intentionally."

Negligence is said to be a very vague term and consequently is difficult to define. However, the commentators use it to describe the state of mind of the man who is not aware of the possible consequences of his act, or is imprudent in determining what those consequences will be.

A distinction between "willful" omissions and "negligent" omissions is usually drawn in discussing this topic.

Question 4. Causal relationship:

The Egyptian Penal Code does not mention the "causal relationship between conduct and result" at all. However, commentators on the Code discuss this subject and cite decisions of the Egyptian Court of Cassation. It seems that the Egyptian legislature has left it to the discretion of the courts to interpret the "causal relationship" according to the circumstances of each case individually. The trend in many new penal codes of the world is toward including the principle of "causal relationship" in the code.

Question 5. Mental defect as a defense:

Article 62 of the Egyptian Penal Code provides:

No person shall be liable to punishment for any act committed at a time when he has lost power of appreciating the nature of his acts or of controlling them by reason of:

(1) Insanity or mental infirmity; or

(2) Intoxication caused by intoxicants of any kind administered to him against his will or without his knowledge.

The nature of insanity and its effect upon legal responsibility is a much-discussed and difficult question, particularly so because it is in part legal and in part medical.

The commentators on the Egyptian Penal Code include under insanity and mental infirmity lunatics, hypnotized persons, and persons who walk in their sleep. The Penal Code limits the irresponsibility of the insane to cases in which the disease or infirmity prevents the person from appreciating the nature of his acts or from controlling them. It does not say that wherever insanity exists there shall be irresponsibility. This article resembles those of several other countries, notably England, Italy and Germany, in that it provides the judge with tests by which he may determine whether the accused is legally insane, instead of making it necessary for him to decide the medical question as to whether the individual is technically insane.

The question has been much discussd as to whether it is advisable for the criminal law to define the conditions under which insanity frees one from responsibility. It is at least clear that the mere fact that the accused might be pronounced insane by medical experts ought not necessarily to free him. No authoritative definition of insanity has ever been given, and many forms of mental aberration are recognized by some as insane, though the ordinary citizen would be averse to treating them as affecting responsibility.

Criminal law is not concerned primarily with mental responsibility. It lays down rules excusing or exempting from penal liability those cases where the community recognizes that punishment would be unjust or useless, but where these rules do not apply it declines to permit the courts to deny liability because in their opinion circumstances or the mental peculiarities of the accused produced the crime. From this point of view it does not seem unreasonable for the law to demand that the medical evidence shall show, and that the judges shall find, that the insanity of the accused prevented him from knowing what he was doing or from controlling his acts. Only in such cases shall insanity be a defense.

The Egyptian Penal Code speaks of mental infirmity as well as of insanity, but does not indicate what it means by this distinction. Some commentators are of the opinion that mental infirmity was intended to include all temporary deprivations of intellectual power, such as somnambulism, delirium, epileptic seizures, etc., which do not constitute insanity, but produce for the time being the same effects. Whether this is the meaning of the term "mental infirmity" or not, it is considered quite certain that nobody is responsible for acts done under these conditions. The absence of any mental accompaniment frees the doer from responsibility. The Code further speaks of tests of irresponsibility, with reference to the intellect and the will. A defect of intellect arising from insanity, such as to prevent a person from appreciating the nature of his acts, frees him from responsibility. So also does a defect of will, which prevents him from controlling his acts.

The plea of insanity is no defense unless insanity at the time of the commission of the offense is proved, but a person may be insane when the offense is prosecuted, or he may be proved insane after conviction. Generally speaking, all persons found to be insane who have been accused of a criminal offense, convicted of a criminal offense, or acquitted of an accusation on the ground of insanity, are treated in the same way; that is, ordered to be detained as criminal lunatics in some establishment from which they may be released when they are deemed no longer to be dangerous. The Criminal Code of Egypt provides several complete provisions dealing with insane persons of all classes. Some of the cases dealt with are as follows:

(1) A person accused of an offense appears to be insane. He cannot, therefore, be tried. It may be desirable to intern him as a criminal lunatic by order of the investigating judge at the preliminary enquiry or by the order of the

judge during trial, if his insanity does not become apparent until the trial has started.

(2) A person accused of an offense pleads that he was insane when he committed the offense or, without a plea, the probability arises that he was insane. If in this case the accused is sane at the time of the trial he can be tried, and the Court, admitting his plea, may acquit him and order his detention as a criminal lunatic.

(3) A person convicted of an offense may afterwards become insane or be proved insane:

a. It sometimes happens that a person sentenced to death is found afterwards to be insane. The executive authorities in such a case usually remit the death penalty and order detention as a criminal lunatic. Under the Egyptian Constitution the President of Egypt has the power to remit the death penalty and order detention.

b. A person undergoing imprisonment may exhibit signs of insanity. Power is given under Law No. 141 of 1944, concerning the detention of mentally sick persons not accused of any offense, that the prisoner is transferred to a hospital for the mentally diseased and detained for treatment until considered no longer dangerous, regardless of length of time.

Question 6. Drunkenness:

Section 2 of Article 62 of the Egyptian Penal Code speaks of intoxication as follows:

Intoxication caused by intoxicants of any kind administered to him against his will or without his knowledge.

The commentators on this section have interpreted this to cover all intoxicants such as alcoholic beverages and drugs, including opium, morphia, and cocaine.

Drunkenness or intoxication brought about by the use of drugs or alcohol is a kind of temporary insanity. Yet when brought about voluntarily, the intoxicated person is held responsible for his acts, even though he did not contemplate the crime before taking the drug. A man who willfully subjects himself to temptation can hardly request indulgence. The position is different when the drug was administered without his knowledge or against his will, and this is recognized by the above-cited Section 2 of Article 62. It is concluded that voluntary drunkenness is not regarded as entitling a person to exemption from responsibility for his acts, but involuntary drunkenness and diseases caused by voluntary drunkenness do constitute a title to such exemption. Certain writers on this matter prefer to hold the intoxicated person liable only so far as negligence. These writers hold that intention is not an element in the offense, since the state of temporary insanity excludes intention.

The state of temporary insanity produced by intoxication must be distinguished from the permanent state of mental disorder which long indulgence will bring about and which is just as much a ground for exemption from responsibility as are other forms of insanity. Before the stage of insanity is reached, however, the habitual drunkard has long lost all real control over his indulgence and should not be treated as a responsible person. He should be treated the same as the insane person.

Question 7. Acts done in exercise of general right:

Articles 60–63 of the Egyptian Penal Code speak of acts done in exercise of a general right as follows:

Article 60.—An act done in good faith and in the exercise of a right recognized by law does not come within the scope of the Penal Code.

This article is interpreted by the Court of Cassation to be a general statement of a well-recognized principle. A right to use force is clearly recognized by law according to this article. A right of correction of children and young people, for example, by persons having the authority of parents is justifiable under the law. Such right must be exercised in good faith and the punishment inflicted must be moderate, according to commentators on this article. A father who chastises his child beyond measure, and causes his death, would be liable to punishment for homicide by negligence at least.

Article 61.—No person shall be liable to punishment for an offense to the commission of which he was constrained by the necessity of preserving himself or another from a great and imminent bodily danger, to which he has not voluntarily given rise and which he could not avoid by any other means.

Constraint as a defense may be used in four different circumstances:

(1) Irresistible compulsion—in this case the person has been compelled to do the act by force used against him which he is powerless to resist.

(2) Threats—in this case the person has done the act when over-awed by threats made to him of some evil which will be done to him unless he complies.

(3) Attacks made by another—though it is possible to make use of the defense of constraint in the case of acts done in repelling attacks made upon oneself or another, it is more usual to make use of the plea of lawful defense.

(4) Necessity—the case of necessity arises when circumstances alone place a person in a situation in which a choice of acts is presented to him. He can, for example, only escape from some danger by committing an offense.

According to Article 62, the conditions of non-responsibility are as follows:

(1) There must be a danger threatening the doer or another.

(2) That danger must be great and imminent. The term "great danger" means in this article "danger of a great evil." Whether the threatening evil was of sufficient gravity to justify the act will be decided by the court according to its appreciation of the circumstances. In every case the danger must be great, and not merely great in proportion to the gravity of the offense committed.

The danger must also be imminent. Fear of future injury will not excuse the commission of an offense. Thus, threats, which serve as a defense under this article, must give rise to an apprehension of instant execution. They must produce instant alarm.

(3) The danger must be one of bodily evil. To destroy a neighbor's house in order to preserve one's own from fire may be a criminal offense unless it was done to save a life. But the Court would no doubt treat the circumstances as extenuating.

(4) The victim of the constraint must not have voluntarily brought about the danger which he seeks to avoid in committing the offense.

(5) The danger must be unavoidable except by commission of the offense.

Cases of constraint which fall under this Article must be distinguished from cases of lawful defense, dealt with by Articles 245–251, which will follow. Lawful defense is a form of constraint, and is allowed as a justification for the above-mentioned reasons. Lawful defense is, however, distinguishable from other modes of constraint in that the act which justifies a lawful act of defense is committed against the aggressor himself, the author of the constraint.

Article 61 speaks also of necessity. The evil which threatens a man does not, perhaps, arise from the threats of others used for the purpose of urging him to commit an offense. It may arise independently of such threats by the mere combination of untoward circumstances. In such a case a man will be impelled to injure another either in person or property in order to save himself or to succor some third party.

As it has been discussed by many writers on this matter, the real ground for exemption from criminal responsibility in all the cases involving constraint is that no social advantage can follow from the infliction of penalty. Law exists for the society, not the society for the law. The infliction of punishment is itself a social evil, and cannot be justified unless some greater social advantage may be expected to follow.

The history of criminal law shows that the State, as it increased in power, interfered first to regulate and afterwards to forbid the use of self-help, and that gradually the crime ceased to be regarded as private injury and partook more and more of the character of a public offense. Finally, the State now claims the exclusive right to punish crime and indeed is prepared also to punish any who derogate from its right by taking upon themselves that function of punishment which belongs to it alone.

The subject of lawful defense is dealt with in Articles 245–251. These articles are placed among those dealing with offenses against the person, and not in the General Part of the Code.

The effect of these articles may be briefly stated to mean that homicide, wounds or blows committed or inflicted in defense of person or property are not punished, although willful homicide can only be committed with impunity when the act to be repelled is of a specially grave character. In all cases the right is exercisable only when the protection of the law is not available and only exceptionally so when it is a representative of public

authority carrying out the duties of his office who is opposed. The exercise of the right is definitely authorized in the case of all offenses against the person and certain specific offenses against property. These articles also state the measure of the violence to be employed. The court is given power to mitigate the ordinary penalty in cases in which the person defending himself used excessive violence in exercise of his right but has acted in good faith. In every case in which lawful defense is claimed as a justification it must be shown that the danger which threatened was imminent. Violence used to prevent the realization of threats is not justified. If, therefore, there is time to have recourse to the protection of the legal authorities, acts of self defense against the threatened evil are not permitted. Since violence can be used in self defense only and not by way of retaliation, or to remedy an injury already done, the right to use it ceases when the peril is past and the evil consummated.

The right of lawful defense extends, it would seem, not only to defense of our own person and property but also to the person and property of others. Of course, it may well happen that a person, whether defending himself or assisting in the defense of another, would be entitled to plead in words of Article 61, that he was constrained to commit an offense by the necessity of preserving himself or another from a great and imminent bodily danger. But the plea of constraint is often available in cases which clearly do not come within the conditions of lawful defense.

The subject of self defense is covered under Articles 245–251, as follows:

Article 245.—Whoever commits homicide, inflicts any wound or deals any blow in the exercise of the right of lawful defence of his person or property or of the person or property of another, shall be exempt from any penalty. The circumstances under which such right arises and the restrictions to which it is subject are defined in the following articles.

Article 246.—Subject to the exceptions hereinafter enumerated, the right of lawful defence of the person authorizes the employment of the force necessary to repel any act constituting an offence under any of Chapters II, VIII, XIII, and XIV of Book III or under Article 287, §(1) or Article 389, §(1) or §(3).

Article 247.—The right does not exist in cases in which there is time to have recourse to the protection of the public authorities.

Article 248.—The right of lawful defence does not excuse resistance to any representative of public authority who is acting in good faith and in his official capacity, even in a case where such representative is acting in excess of his powers, unless his acts cause a reasonable apprehension that death or serious wounds will result therefrom.

Article 249.—The right of lawful defence of the person can only justify willful homicide when the act to be repelled is:

(1) An attack which causes a reasonable apprehension that death or serious wounds will result therefrom; or
(2) Rape or indecent assault with violence; or
(3) Abduction.

Article 250.—The right of lawful defence of property can only justify willful homicide when the act to be repelled is:

(1) Some offence falling under Chapter II of Book III; or
(2) A criminal theft; or
(3) Entry into an inhabited house or its curtilage during the night; or
(4) An attack which causes a reasonable apprehension that death or serious wounds will result therefrom.

Article 251.—When a person in the exercise in good faith of the right of lawful defence, and with intent to inflict only such injury as such defence requires, nevertheless exceeds the limits of such right, he shall not be entirely exempt from any penalty.

Provided that in the case of crime the court may, if occasion requires, declare such person entitled to mitigation of sentence and sentence him to imprisonment instead of to penalty prescribed by law.

Question 8. Classification of offenses:

The Egyptian Penal Code follows the French Code, and many other penal codes which resemble the French Code, in classifying offenses. Articles 9–12 classify offenses as follows.

Article 9.—Offences are of three kinds:

(1) Crimes; (2) Misdemeanors; (3) Contraventions.

Article 10.—A crime is an offence punishable by any of the following penalties:

Death; Penal servitude for life; Penal servitude for a term; Detention.

Article 11.—A misdemeanor is an offence punishable by either of the following penalties:

Imprisonment which may exceed a week; Fine which may exceed [one Egyptian pound] £.E.1.

Article 12.—A contravention is an offence punishable by either of the following penalties:

Imprisonment not exceeding a week; Fine not exceeding [one Egyptian pound] £.E.1.

The basis of the classification is the gravity of the offense, resulting in severity of punishment. This mode of classification has been criticized as unscientific, since it suggests no essential difference in nature between the three classes. It is branded as a classification for convenience's sake. It is also argued in favor of adopting tripartite division, délits on the one hand, and contraventions on the other, the difference between the two classes being that the class of délits would include offenses punished with reference to the intention of the offender, and the class of contraventions, merely breaches of police regulations, would be offenses punished without reference to the intention.

Other writers claim that harm is done by rigid classification of offenses according to a scale of punishment.

Those in favor of classification say that it is also of importance in other connections. Among these are the following:

(1) Prescription of offenses; (2) Attempts; (3) Recidivism; (4) Conditional sentences; (5) Juvenile offenders.

The classification into crimes, misdemeanors, and contraventions is, therefore, fundamental to the Egyptian Code. Equally fundamental from the point of view of the arrangement of the Code is the distinction between "offences against the State" and "offences against the individuals." Another distinction of importance is that between military and common law offenses. And further distinctions which require noting are those drawn between political and non-political, flagrant and non-flagrant, simple and collective, and instantaneous and continuing offenses.

Question 9. Sentencing:

On sentencing of convicted defendants see the discussion under Questions 1 and 8 in addition to the following.

Articles 1–4 of the Egyptian Penal Code contain the provisions as to the persons to whom the Code applies. Article 5 determines the law to be applied.

Article 1.—This Code shall apply to every person who is guilty of the commission in Egypt of any offence falling under its provisions.

Article 2.—It shall further apply to every person: (1) who, by any act done outside Egypt, is a party, whether as principal or as accessory, to any offence committed either wholly or in part in Egypt; or (2) who is guilty outside of Egypt:

(a) of any crime against the safety of the State falling under Chapters I & II of Book II of this Code; or

(b) of any crime or falsification falling under Article 206 of this Code; or

(c) of any crime relating to coin falling under Article 202; or who participates in such counterfeit or debased coin or its introduction into Egypt and taking it outside of Egypt; or who makes an occupation of possessing and putting such coin into circulation in accordance with the provisions of Article 203 when such crime relates to coin legally current in Egypt.

Article 3.—Every Egyptian who is guilty of the commission outside Egypt of an act classified as a crime or misdemeanor by this Code shall be punishable in accordance with its provisions in the event of his return to Egypt, provided that such act is a punishable offence under the law of the country in which it has been committed.

Article 4.—No proceedings shall be instituted in respect of any offence committed or act done outside Egypt, except by the State representative.

No proceedings shall be taken if the person accused proves that he has been acquitted outside Egypt or that he has been finally convicted and has undergone his sentence.

Article 5.—Offences shall be punished in accordance with the law in force at the time at which they are committed.

Provided that if a law more favorable to the accused comes into force, after the commission of the offence, but before final judgment, such law shall alone be applied.

If a law comes into force after final judgment making the offence for which the offender has been sentenced a lawful act, an order for stay of execution shall be issued by the court.

However, if, during the proceeding of the trial or after sentencing for an offence in violation of a law that is a violation during a certain period of time, such a period ends, it shall not stop the proceeding nor shall it stop the execution of sentencing.

Artiele 6.—Sentences to the penalties prescribed by law are in all cases pronounced without prejudice to any right which the parties may have to restitution or damages.

Question 9. Suspension of sentences:

Suspension of sentences is referred to under Egyptian Code as conditional sentences, covered by Articles 55–59.

Artiele 55.—Whenever in a case of crime or misdemeanor sentence of fine or imprisonment for less than a year is passed on an offender against whom no previous sentence to a criminal penalty existed, the court may stay execution of the sentence, provided it satisfies itself as to the offender's morals, past behavior, age, or the circumstances under which the offence was committed, and that he will not violate the law again.

Such stay may be made complete to cover subsidiary penalties and to wipe out all criminal effects resulting from the sentencing.

Artiele 56.—The order for stay of execution shall be issued for a period of three years from the day on which such sentence becomes final.

The order for stay of execution may be revoked if, during the period mentioned in the Code the following occur:

(1) if the offender was sentenced to imprisonment for more than one month for an offence committed before or after the issuance of the order of stay of execution.

(2) if the defendant was sentenced, before the order of stay of execution, to a similar sentence mentioned in the previous sentence and the court was unaware of it.

Artiele 57.—The revocation of the order of stay of execution is issued by the court which ordered the stay of execution upon the application of the public prosecutor and after summoning the offender.

If the revocation of the order of stay of execution was based on a sentence passed after the issuance of the order, such revocation may be issued by the latter court which made the correction causing the revocation either by itself or upon application from the public prosecutor.

Artiele 58.—The revocation of the order of stay of execution involves the execution of the penalty imposed together with the execution of the subsidiary penalties and all other criminal effects suspended thereby.

Artiele 59.—At the expiration of the period of the stay of execution, if no order of revocation was issued, the offence is extinguished and the sentencing shall be deemed not to have been passed.

The Egyptian Penal Code is criticized for lack of supervision by the court over the future conduct of the discharged offender. The probation system in the United States is considered better because it secures some such supervision, despite being expensive. The Egyptian courts, perhaps realizing the dangers of their system in the absence of effective supervision, have not made much use of their powers under these articles.

Question 9. Determinate and indeterminate sentences:

The primary classification of punishments under the Egyptian Code is that into criminal, correctional, and contraventional, while a secondary classification is that of substantive punishments and subsidiary punishments. The substantive penalties are those mentioned in Articles 13–23, and the subsidiary penalties are enumerated in Articles 24–31. These are referred to as subsidiary because sometimes they follow as a necessary consequence from the infliction of the substantive penalty without needing to be expressly inflicted.

Substantive penalties are:

Article 13.—Every person sentenced to death shall be hanged.

Article 14.—The penalty of penal servitude consists of being employed for life in case of a life sentence, or during the term fixed by the sentence in case of a sentence for a term at such forms of labor of the most severe kind as shall be prescribed by the Government.

The period for which the penalty of penal servitude for a term is imposed shall not be less than three nor more than fifteen years, except in cases where the law specially provides otherwise.

Article 15.—Males and females who have completed their sixtieth year shall, when sentenced to penal servitude, serve their sentence in a central prison.

Article 16.—The penalty of detention consists of confinement, during the term fixed by the sentence, in a central prison and in being employed either in the prison or outside, at such forms of labor as shall be prescribed by the Government. Such terms shall not be less than three nor more than fifteen years, except in cases where the law specially provides otherwise.

Article 17.—When in criminal cases the circumstances of the case appear to be of such a nature as to merit leniency on the part of the court, the penalty may be mitigated as follows:

For the penalty of death may be substituted that of penal servitude for life or for a term;

For the penalty of penal servitude for life may be substituted that of penal servitude for a term or that of detention;

For the penalty of penal servitude for a term may be substituted that of detention or that of imprisonment for not less than six months;

For the penalty of detention may be substituted that of imprisonment for not less than three months.

Article 18.—The penalty of imprisonment consists of confinement either in a local or in a central prison during the term fixed by the sentence. Such term shall not be less than 24 hours nor more than three years, except in cases where the law specially provides otherwise.

Every person sentenced to simple imprisonment for a period not exceeding three months may, instead of being incarcerated during the term of his penalty, declare his option, under the condition laid down in the Code of Criminal Procedure, to undertake work outside the prison, unless he is expressly excluded from such option by the judgment of conviction.

Article 19.—Imprisonment is of two kinds:

Simple imprisonment;

Imprisonment with labor.

Persons sentenced to imprisonment with labor shall be employed, either in the prison or outside, at such forms of labor as shall be prescribed by the Government.

Article 20.—The court shall pass sentence of imprisonment with labor whenever the duration of the penalty imposed is one year or upwards, and in all other cases in which the law so directs.

It shall always pass sentence of simple imprisonment in cases of contravention.

In all other cases the court may pass sentence of imprisonment of either kind.

Article 21.—The duration of a penalty restrictive of liberty shall be computed from the day on which, after the sentence has become enforceable, the offender is detained in custody by virtue thereof. The period spent under preventive arrest shall be deducted.

Article 22.—The penalty of fine consists of the liability on the part of the person sentenced to pay the Treasury the sum fixed by the sentence. Such sum shall in no case be less than five Egyptian piasters.

Article 23.—When a person who has already been under preventive arrest is sentenced to a simple fine, such fine shall, so far as concerns its enforcement, be treated as reduced ten Egyptian piasters for each day spent under preventive arrest.

If sentence is one of imprisonment, as well as fine, and the period spent under preventive arrest exceeds the term of the imprisonment imposed, a like deduction, calculated on the amount of such excess, shall be made in respect of the fine.

Article 24.—Subsidiary penalties are: (1) deprivation of rights and privi-

leges mentioned in Article 25; (2) dismissal from a public office; (3) police supervision; (4) confiscation.

Article 25.—Every person sentenced to a criminal penalty shall be deprived by operation of law of the following rights and privileges:

(1) He shall be incapable thereafter of employment by the State whether directly or as a farmer of taxes or concessionnaire, whatever the importance of the employment.

(2) He shall be incapable thereafter of holding a grade or of wearing a decoration.

(3) During the currency of his sentence he shall be incapable of giving evidence in a court of justice except by way of unsworn information given to the court.

(4) So long as he is in confinement he shall be deprived of the control and management of his property. He shall appoint, subject to the approval of the court, an administrator to control and manage his property. In default of appointment by him, an administrator shall be appointed by the civil tribunal of the district in which he resides, sitting in chambers, on the application of the State representative or of any interested party. The tribunal may require an administrator whom it appoints to give security. The administrator, whether appointed by the person sentenced or by the tribunal, shall be under the control of the tribunal for all purposes of his administration. The person sentenced shall be incapable of disposing of his property other than by Waqf [religious trust], except with the authorization of the civil tribunal. Every contract affecting his property made by him except as hereinbefore mentioned shall be void. The property of a person sentenced shall be restored to him as soon as he has served his sentence or has been set at liberty, and the administrator shall render him an account of his administration.

(5) If at the time at which he is sentenced either finally or in contumacy he is a member of a Majlis Hasby, of a provincial, municipal, or local commission or of any other public commission, his seat shall be vacated.

(6) If he has been finally sentenced to penal servitude, he shall be forever thereafter incapable of membership of any of the public bodies specified in paragraph 5 or of employment as an expert or as a witness to a document.

Article 26.—Dismissal from a public office consists in being deprived of such office and of the emoluments attaching thereto.

A person sentenced to dismissal, whether at the time of sentence he holds or has ceased to hold office, shall be incapable of being appointed to any public office or of drawing any salary from the Government during a period to be fixed by the sentence. Such period shall not exceed six years nor be less than one year.

Article 27.—Every public servant found guilty of a crime falling under any of Chapters III, IV, VI, and XVI of Book II of this Code who, by reason of extenuating circumstances, is sentenced to imprisonment shall, in addition, be sentenced to dismissal; the period to which such dismissal extends shall not be less than double the term of his imprisonment.

Article 28.—Every person sentenced to penal servitude or detention for a crime against the safety of the State, for a crime relating to coin, for criminal theft, for homicide falling under paragraph 2 of Article 234 of this Code, or for one of the crimes falling under Article 356 or Article 368 shall, upon the expiration of his sentence, be placed under police supervision for a period equal to the term for which he was sentenced, but so that such period of supervision shall not exceed five years.

Provided always that the court, in the judgment by which sentence is passed, may reduce the period of supervision or may declare that the person sentenced shall not be subjected thereto.

Article 29.—The effect of being placed under police supervision shall be to subject the person sentenced to all the provisions contained in the decrees dealing with such supervision. Any breach of the provision shall be punished by imprisonment not exceeding one year.

Article 30—Upon a conviction for crime or misdemeanor the court may order the confiscation of any property which is the product of the offence, as well as of all weapons and implements which have actually been used in the commission of the offence or are apt for such use, without prejudice in all cases to the rights of innocent third parties.

In the case of property the manufacture, use, possession, sale or exposure for sale whereof constitutes an offence, the confiscation of such property shall always be ordered even when it is not the property of the accused.

Article 31.—In cases not falling under the above provisions the penalties of dismissal from a public office, of police supervision, and of confiscation may be imposed whenever the law so prescribes.

Article 32—When the same act falls within the definition of more than one offence the penalty prescribed for the offence involving the heaviest penalty shall alone be imposed.

Two or more offences committed with the same object and connected one with another in such a manner as to form a single transaction, are deemed to constitute a single offence involving the penalty prescribed for the most serious of the offences committed.

Article 33—Subject to the exceptions contained in Article 35 and Article 36, penalties restrictive of liberty shall be cumulative.

Article 34—When cumulative penalties are of different kinds they shall be undergone in the following order: (1) penal servitude; (2) detention; (3) imprisonment with labor; (4) simple imprisonment.

Article 35—The penalty of penal servitude shall, to the extent of its duration, be deemed to be a satisfaction of any other penalty restrictive of liberty imposed for an offence committed before sentence to such penal servitude was passed.

Article 36—When two or more offences have been committed before any of them has been tried, the aggregate duration of penal servitude shall not by reason of this cumulation of penalties exceed twenty years, that of detention or of detention and imprisonment shall not exceed twenty years, and that of imprisonment shall not exceed six years.

Article 37—Fines shall always be cumulative.

Article 38—Sentences of police supervision shall be cumulative, but so that the aggregate period thereof shall not exceed five years.

The Egyptian Penal Code does not have any provision or section similar to §3007 of the proposed Federal Criminal Code, nor does it provide for publicity to a conviction.

The principle of "persistent misdemeanants" under §3007 resembles the provision on recidivism in the Egyptian Code inasmuch as the punishment is increased when the repeater continues to commit crimes. The judges under these articles are given additional powers in this respect.

Article 49.—A person is said to be a recidivist: (1) who, having been sentenced to a criminal penalty, is found guilty of a crime or misdemeanor committed subsequent to the passing of such sentence, or (2) who, having been sentenced to imprisonment for a year or more, is found guilty of a misdemeanor committed subsequently within a period of five years from the expiration of his sentence or from the date at which such sentence is barred by prescription; or (3) who, having been sentenced for a crime or misdemeanor to imprisonment for less than a year or to fine, is found guilty of misdemeanor similar in nature to his former offence and committed within a period of five years from the passing of such sentence.

For the purposes of recidivism, theft, obtaining by false pretences, and abuse of confidence are deemed to be offences of a similar nature.

Article 50.—In the case of recidivism as defined by the preceding article, the court shall have power to impose a penalty in excess of the maximum prescribed by law for the offence, so nevertheless that such penalty shall not exceed twice such maximum.

Provided always that the duration of a sentence of penal servitude for a term of detention shall in no case exceed twenty years.

Article 51.—If a recidivist, who has previously been sentenced to two penalties restrictive of liberty, each of which was one year or more in duration, or to three such penalties, one of which at least was one year or more in duration, for theft, receiving stolen goods, obtaining by false pretences, abuse of confidence or falsification or attempt to commit any of such offences, is found guilty of any misdemeanor of theft, receiving stolen goods, obtaining by false pretences, abuse of confidence or falsification, committed subsequent to the last of the former convictions, the court may sentence him to penal servitude for a period of not less than two nor more than five years instead of applying the provisions of the preceding article.

The judgment in every trial in a criminal court must be pronounced, or the substance of it explained, either immediately after the termination of the trial or at some subsequent time. Notice of this is given to the parties or their advocates, and if the accused is in custody, he will be brought up to hear the judgment delivered. Every judgment is written and must contain the point or points determined, specify the offense and the provision or provisions of the Penal Code or any other law under which the accused is convicted, and the punishment to which he is sentenced.

Criminal sentences are subject to appeal to a higher court. If the higher court considers there are sufficient grounds for interfering it will exercise the following powers:

(1) In an appeal from an order of acquittal, the court may reverse such order and may direct that further inquiry be made or that the accused be retried or committed for trial, as the case may be, or may find him guilty and pass sentence on him according to law.

(2) In an appeal from a conviction, the court may:

(a) Reverse the finding and sentence or acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction;

(b) Alter the finding, maintaining the sentence, or with or without altering the finding, increase or reduce the sentence;

(c) Alter the nature of the sentence with or without such reduction or increase and with or without altering the finding.

Every individual organization, public or private, including the Government or one of its agencies, may appeal a sentence.

The standards required by the Code for sentencing review are provided for in the Code. For concurrent and consecutive terms of imprisonment, see Articles 32–38.

The Egyptian Penal Code does not have any provisions similar to §3001(2) (see Article 22).

Criminal procedure codes, or sometimes criminal codes, provide for executions issued on the goods of the person sentenced to a fine, both for the fine and the costs. The more usual method of execution is by means of detention of the person. In Egypt the enforcement of pecuniary penalties payable to the State may be so carried out, and consequently a sentence to a fine may, alternatively, be a sentence to imprisonment. The imprisonment wipes out the fine at a fixed rate but does not discharge the offender from costs, restitution or damages.

It is, however, most undesirable that the prisons should be filled with persons serving short terms of imprisonment in lieu of payment of fines. In order to avoid this it is provided in many codes that the person liable to detention for non-payment of fine may declare his option for work outside the prison and by such work may wipe out not only the fine but any sum due to the State by way of fine, restitution, damages or costs—not, however, amounts due to the civil claimant.

Question 10. Mistake of law

It is an accepted principle among commentators on criminal law that every person is deemed to know the criminal law. Ignorance of the rules of criminal law is not admitted as a good defense to a criminal prosecution. It may, if the blunder is reasonable, be regarded by the court as a good ground for inflicting a milder punishment.

A person is presumed, unless the contrary is proven, to have knowledge of any material fact, if such fact is a matter of common knowledge. The justice and convenience of this rebuttable presumption cannot be doubted. Some commentators have gone further and declared that people are presumed to know facts which are matters of common knowledge or which they had the means to ascertain had they not wilfully neglected to enquire. In any case, it is not likely that a criminal court would treat seriously a defense heard upon ignorance of a fact of common knowledge if the means for ascertaining the truth were easy to obtain. It would certainly be up to the defense alleging ignorance to explain why the offender did not make use of them. Otherwise he will be presumed to have done so.

It is said that ignorance of fact, unlike ignorance of law, may be and at times is an effective defense to a criminal charge. Frequently the court cannot arrive at any conclusion as to whether the prisoner intended to commit the wrong or was guilty of criminal negligence, unless it is satisfied as to the knowledge of fact which he possessed.

The Egyptian legislator has left this matter to the consideration of the courts to determine in each case whether the offense consists merely in the doing of the act or whether the accused must be proved both to have done the act and to have been aware that the conditions were present which made the act criminal.

Question 11. Separation between jurisdiction of courts and definition of offense

The judicial organization of Egypt, as well as most of the continental countries and those influenced by the European legal systems, provides in its criminal procedure code or code for the judicial organization of the country provisions discussing the court system and the jurisdiction of each court, including its Constitution. On the other hand, the definition and classification of an offense is provided for in the penal code.

The general rule is that criminal courts have jurisdiction over all offenses committed on national soil. The Egyptian Code of Criminal Procedure does not distinguish between civil and criminal courts. A court in Egypt has dual jurisdiction, civil and criminal. Judges sitting in civil and commercial cases sit also in criminal cases. The Constitution and jurisdiction of the Egypt criminal courts is provided for by Law No. 56 of 1959, concerning judicial power.

Question 12. Extraterritorial jurisdiction

Articles 1–3 of the Egyptian Penal Code, as discussed under Question #9, provide for the territorial application of the Penal Code. The general rule recognized in modern states is that the criminal law of a state applies to all persons committing crimes within its territory.

Despite the fact that criminal law is in principle territorial, there are certain exceptions to the application of the principle to be noted. In certain cases the state applies the opposite principle, viz., that the criminal law of the state applies to nationals of the state irrespective of the territory in which the offense may have been committed. Many states apply their criminal law to aliens who commit certain classes of crimes outside their territory.

The Egyptian Penal Code devotes Chapter I of Book II, Articles 77–85 to crimes committed against the safety of the State outside the Egyptian territorial boundaries. These articles and their numerous divisions and subdivisions spell out in detail all such offenses.

Section 209 of the proposed Federal Criminal Code compares very favorably with other codes.

Question 13. Criminal conspiracy

Criminal conspiracy under the Egyptian Penal Code is provided for by Article 48 as follows.

Article 48—There is criminal conspiracy [criminal accord] when two or more persons conspire to commit crimes or misdemeanors or to prepare or facilitate their commission. The conspiracy is criminal whether the object with which the crimes or misdemeanors are to be committed is lawful or not.

When a criminal conspiracy is directed toward or contemplates the commission of crimes, the conspirators are punishable with detention; when it is directed toward or contemplates the commission of misdemeanors, they are punishable with imprisonment.

Those who instigate a criminal conspiracy or take a directing part therein are punishable with penal servitude for a term in the first case mentioned in the preceding paragraph and with detention in the second case.

However, if the purpose of the conspiracy was only to commit crimes or misdemeanors punishable with a penalty lighter than the penalties mentioned in the preceding paragraphs then the penalty shall be the one provided for by the law for such misdemeanors or crimes.

Provided that every person guilty of conspiracy who, before the commission of the crimes or misdemeanors and before the commencement of any legal proceedings, gives information to the authorities of the existence of the conspiracy and of the members thereof shall be exempt from the penalties provided by this Article.

The idea of conspiracy under the Egyptian Code, as it is clear from this Article, is not limited to conspiracies to commit political offenses. It extends to all conspiracies to commit crimes or misdemeanors. The legislator employed

the word "accord" which is said to be understood, in its widest sense, as comprising not only agreements drawn up in writing, but also mere verbal agreements, provided that they contain all the elements required by the law to render them criminal. To make the "accord" criminal it must have been entered into with a view to the commission of or preparation for offenses. It is not, however, necessary that any determinate crimes should be proved to have been resolved upon. A general criminal intention suffices.

The Egyptian article, although based on the French Penal Code articles, is wider in its coverage, since it makes punishable an arrangement with a view to the commission of a misdemeanor as well as one with a view to the commission of a crime. Thus an arrangement to commit an offense may be punishable although the attempt to commit the same offense by one individual would not be so.

The use of the same word "accord" in both Article 40(2) and Article 48 might lead to the conclusion that every arrangement which would, had an offense followed, been punishable as accessory conduct under Article 40(2) might, if no offense actually resulted, be punishable as a conspiracy under Article 48. But according to a decision of the Court of Cassation "the nature of the agreement is different in the two cases. Some degree of organization, however slight, and a certain permanence of agreement are necessary to constitute a criminal conspiracy, whereas complicity requires neither of these elements."

Article 40.—A person is concerned as an accessory in the commission of an offence: (1) who instigates to the commission of the act constituting the offence, provided that the act is the consequence of such instigation; or (2) who is a party to an arrangement having its object the commission of the offence, provided that the offence is the consequence of such arrangement; or (3) who knowingly supplies weapons or other implements or means employed in the commission of the offence, or in any other manner aids the principal or principals concerned in the offence in the preparation, facilitation, or commission thereof.

Question 14. Felony-murder

In Egypt the pronouncement of the death penalty is never obligatory. If extenuating circumstances are found to be present, the court can always substitute penal servitude for life. And unless murder was accompanied by one of the aggravating circumstances mentioned in Articles 230, 233 and 234(2) of the Penal Code, a sentence of penal servitude for life or for a term must be pronounced. The aggravating circumstances which justify the death penalty under the Egyptian Penal Code are (1) premeditation, (2) lying in wait, (3) poison, (4) simultaneous commission of another crime, and (5) correlation of the murder with misdemeanor.

Simultaneity and correlation of willful homicide with another offense is a cause for aggravation of the punishment of willful homicide. This is provided by the second paragraph of Article 234. If there is simultaneity of the homicide with another crime, the punishment is death; if there is correlation of the homicide with a misdemeanor, the punishment is death or penal servitude for life.

Article 234 states that the homicide must have been preceded, accompanied, or followed by another crime. The word "crime" is here used in its technical sense as in Article 10 of the Code. In Egypt attempt to commit a crime is a crime. Therefore, if the homicide is committed simultaneously with an attempt to commit a crime, the aggravation applies. Under Article 234 the homicide must be willful in every case, while other countries rule it may aggravate an unintentional homicide and punishes it as if it had been willful because it was committed during the commission of another crime.

The following is the translation of the pertinent articles.

Article 230.—Willful homicide committed with premeditation or after lying in wait shall be punished by death.

Article 233.—Poisoning is willful homicide committed by means of any substance capable of causing death more or less swiftly. However the same may be employed or administered, poisoning shall be punished by death.

Article 234.—Willful homicide committed without premeditation or lying in wait shall be punished by penal servitude for life or for a term.

Nevertheless, the penalty shall be that of death if the willful homicide has been preceded, accompanied, or followed by another crime. The penalty shall be that of death or penal servitude for life when the object of the homicide is to prepare, facilitate, or actually commit a misdemeanor, or to assist the escape or immunity from punishment, of any person concerned in the commission of a misdemeanor, whether as principal or accessory.

Article 235.—When a homicide entails the punishment of death for the person committing it any accessory shall be punished by death or by penal servitude for life.

Question 15. Not applicable to Egypt.

Question 16. Para-Military Activities

The foreign codes consulted, in particular the Egyptian and Libyan, do not have a provision or provisions similar to §1104, Para-Military Activities. They all have provisions under offenses against the internal safety of the State which cover such activities and more. Some countries, in addition to the provisions found in their penal codes, have enacted certain laws covering similar grounds under names such as subversive activities, spies, espionage, etc.

The Egyptian Penal Code provides in Article 87, as amended, the following:

Whoever attempts by force to overthrow or change the Constitution of the State, the form of the government of the Republic, shall be punished with penal servitude for life or for a term. If the offence has been committed by an armed band, the person who organized the band or placed himself at its head or held command in it shall be punished with death.

The Libyan Penal Code provides in Article 196 the following:

Whoever, by force or in any other unconstitutional manner, attempts to alter the Constitution of the State or the form of the government, shall be punished by imprisonment for life or by imprisonment for a period of not less than five years.

If the offence is committed by an armed band, whoever raised the armed band or assumed leadership thereof in whatsoever manner shall be punished by death.

These and many other similar provisions are provided in either the penal codes or special legislation for the protection of the state.

Question 17–A. Drugs

The Egyptian legislators have provided several elaborate acts concerning drugs, which are separate from the Penal Code.

Question 17–B. Abortion

Abortion is treated under Chapter 3 of Book 3, Articles 260-264, as follows.

Article 260.—Whoever willfully procures the miscarriage of a woman with child by means of blows or other violence shall be punished by penal servitude for a term.

Article 261.—Whoever procures the miscarriage of a woman with child whether with or without her consent by administering to her any drugs or by the use or indication of any means capable of causing miscarriage shall be punished by imprisonment.

Article 262.—Every woman who knowingly consents to take such drugs or to employ or allow the employment of any of the means above-mentioned, and actually miscarries, shall be punished by the like penalty.

Article 263.—If the offender is a physician, surgeon, or pharmaceutical chemist, he shall be senteneed to penal servitude for a term.

Article 264.—Attempt to procure abortion shall in no case be a ground for prosecution.

The subject of abortion under Egyptian law has been related to both homicide and blows and wounds. It is related to homicide as involving suppression of a possible human life, although it is remarked that abortion consists not in destroying the life of the foetus but "in the intentionally causing the premature expulsion of the product of conception."

From another point of view the offense of procuring miscarriage is related to wounds and blows. An act done for the purpose of abortion is dangerous in itself to the health of the woman and may produce death or bodily injury, or, without having the intended effect, it may cause some ailment or death. It is clear that for prosecution under these articles, intent to procure miscarriage is essential.

It should be remembered that attempts to procure miscarriage are not punishable under the head of "blows and wounds."

Question 17–C. Gambling

Gambling is provided for in the Egyptian Penal Code under Chapter 12 of Book 3, Articles 352-353, as follows.

Article 352.—Whoever keeps a house or place for games of chance to which the public has access shall be punished, with the person who keeps the bank in the said house, by detention and by fine not to exceed one thousand Egyptian pounds; all money and equipment found in the gambling places shall be confiscated by the authorities.

In 1957 the Minister of the Interior published Decree No. 37 of 1957 providing a long list of games, forbidding them and categorizing them as games of chance.

Article 353.—Whoever offers for sale a lottery without government permission shall be punished with the same penalties; all money and equipment used shall be confiscated by the authorities.

Question 17–D. Offenses against decency and morality

Under the Egyptian Penal Code, offenses against decency and morality include indecent assault, habitual instigation to debauchery, and adultery.

Article 267.—The crime of rape shall be punished by penal servitude for life or for a term.

If the offender is an ascendant of the person upon whom the crime has been committed, if he is one of the persons who is entrusted with her education or supervision, or who is in a position of authority over her, or if he is her paid servant or the paid servant of one of the persons above referred to, the penalty shall be that of penal servitude for life.

Rape is said to consist of an illegal natural connection between persons of different sexes contrary to the will of one of the parties. Unnatural connection by violence is punishable not as rape but as indecent assault under Article 268.

Article 268.—An indecent assault accompanied by violence or threats shall, whether completed or not, be punished by penal servitude for a period of not less than three nor more than seven years.

If such assault is committed on a child who has not completed his or her sixteenth year, or if it is committed by one of the persons specified in the second paragraph of Article 267, the penalty may extend to the maximum fixed for penal servitude for a term.

When both these factors are present the penalty shall be that of penal servitude for life.

Article 269.—Whoever commits an indecent assault unaccompanied by violence or threats on a child who has not completed his or her eighteenth year, shall be punished by imprisonment.

If the assault is committed on a child who has not completed his or her seventh year, or if it is committed by one of the persons specified in the second paragraph of Article 267 the penalty shall be that of penal servitude for a term.

The offense of indecent assault dealt with under these two articles covers a wide variety of indecent acts. As rape is limited to natural intercourse, acts of sodomy, whether committed on male or female, are indecent assaults. This term, while it covers such grave improprieties as these, also includes assault of a much less serious character, such as touching a woman's clothes in an improper manner, if the touching is indecent in character. There must always be an assault, because indecent acts done in the presence of another do not constitute an assault. While exposure is not in itself an assault, in the case of children the offense is constituted if the accused induced them to touch him improperly though no act was done of the person of the child.

The indecent act is punishable under these articles whatever the offender's objective may have been. It is not required that he have a carnal or even an obscene purpose. Consent to indecent acts, except in the case of underage children, is a good defense.

The term assault under these articles implies a measure of force. Yet the Code distinguishes between "assault with violence" and "assault without violence." The latter is committed when the indecent act is committed upon the person of a child who is underage with his or her consent. In this case the child is regarded as incapable of consenting.

Under the Egyptian Code one may say that rape, sodomy, and indecent assaults are lumped together and are not separately punishable. There is no distinction drawn in each case between the commission of the act under circumstances in which the victim could not resist [force, threats of death, state of unconsciousness]; and those in which consent has been exacted by threats of a less overwhelming kind; or by deception as to the nature of the act; or where the person was insane or mentally infirm.

Article 269.—Whoever is found in a public street inducing bypassers to commit prostitution, shall be punished by detention for a period not exceeding seven days.

Whenever the offence is repeated within one year from the date of sentencing, the offender shall be sentenced to detention for a period not exceeding six months and with fine not exceeding fifty Egyptian pounds followed by putting the offender under police surveillance for a period equal to his detention.

Articles 270-272 were abolished by Law No. 68 of 1951, concerning prostitution.

Question 18. Firearms and explosives

Provisions pertaining to firearms and explosives in Egyptian criminal law are found both in the Penal Code and in separate acts.

Chapter 2 bis of Book II of the Penal Code, entitled "Explosives" was added to the Code by Law No. 50 of 1949. The following is the translation of these articles.

Article 102A.—Whoever, without a license, keeps, manufactures, possesses or imports explosives shall be punished by penal servitude for life or for a term.

Shall be considered as explosives any materials used in making explosives which are described as such by a decision from the Minister of Interior, as shall be considered explosives any kind of device, machines or tools used for their manufacture or explosion.

Article 102B.—Whoever uses explosives for the purpose of committing the crime mentioned in Article 87, political assassination, destruction of establishments devoted for public utilities, public benefits, public meetings or any other structure used by the public, shall be punished by death.

Article 102C.—Whoever uses or attempts to use explosives in such a way that he will expose the life of the people to danger, shall be punished by penal servitude for life.

If such explosion caused the death of any person the penalty shall be death.

Article 102D.—Whoever uses or attempts to use explosives in such a way that he will expose the property of others to danger shall be punished by penal servitude for a term.

If such explosion caused damage to such property the penalty shall be penal servitude for life.

Article 102E.—As an exception to the provisions of Article 17, in applying the above-mentioned articles no mitigation of penalties is permitted below the one immediately following the first penalty provided for the offence.

Article 102F.—Whoever violates the requirements of Article 102A shall be punished with detention.

The laws pertaining to firearms and ammunition are more detailed and have been amended several times with their schedules. However, articles pertaining to the same subject in Libya are part of the Libyan Penal Code, which seems to carry very lenient penalties. These articles are as follows:

Article 477.—Whoever, without license, manufactures arms or brings them in any manner for sale, or collects them for trade or manufacture, shall be punished by penalty of detention for a period not exceeding one year and of a fine not exceeding fifty pounds.

Article 478.—Whoever has in his possession arms or ammunition and does not inform the authorities of the same shall be punished by a penalty of detention for a period not exceeding six months or a fine not exceeding ten pounds.

Article 479.—Whoever disobeys a lawful order issued from the competent authority to deliver up arms or ammunition in his possession during a specified period therefor shall be punished by a penalty of detention for a period not exceeding one year or of a fine of between ten and twenty pounds.

Article 480.—Whoever carries arms outside his dwelling place or its appurtenances without license to do so from the authorities shall be punished by a penalty of detention for a period not exceeding one year.

The penalty shall be increased by not more than one third if the act is committed in a place of meeting or assembly or by night in an inhabited quarter.

Article 481.—In the circumstances provided for by the preceding articles the person convicted may be subjected to measures of security.

Article 482.—Whoever, although licensed to carry arms, does any of the following acts shall be punished by a penalty of fine not exceeding twenty pounds: (1) delivers an arm to a juvenile of less than fourteen years of age, or to a person incapable or inexperienced in the use of arms or permits such persons to carry the same; (2) fails to take the necessary precautions to prevent any of the persons mentioned in the preceding number from easily reaching or gaining possession of any arms under his control; (3) carries a loaded gun in a place of meeting or assembly.

Article 483.—This article concerns fireworks, and is not related to this discussion.

Article 484.—For the purposes of the preceding provisions the expression "arms" shall mean: (1) firearms and any others prepared for the purpose of injuring others; (2) bombs and any kind of device or container for holding explosive materials, or explosive materials themselves, and asphyxiating gases or gases used in war or any injurious gases.

Question 19. Capital punishment

The Egyptian Penal Code provides for capital punishment in Chapter 3 of Book I, Article 13, under classification of punishment as one of the substantive penalties.

In the absence of extenuating circumstances death is inflicted as a punishment for many offenses under the Egyptian Penal Code. Under other articles of the Code the court has an option between death and penal servitude for life in certain events. Capital punishment is inflicted by hanging according to Article 13. Execution is private and its formalities are provided for by the Code of Criminal Procedure, promulgated by Law No. 150 of 1950.

Capital punishment in Egypt is inflicted for grave offenses against the State and for murder. The punishment is considered preventive in form but reparatory in spirit.

Question 20. Prosecution for multiple related offenses, etc.

This question has been already partially answered under Question No. 9, by Articles 32-38. However, a further discussion is provided here on multiple offenses.

Book I, Chapter 3, Section 3, Articles 32-38 are concerned with co-existent penalties. A person who has committed an offense for which he has not yet been tried should not be able to escape from the penalty for its commission merely by committing some other and more serious offense. If "A" commits several thefts successively for which he might, if detected, have been separately punished, he should, on detection, be liable to punishment for all of them cumulatively. If only one of these thefts was at first discovered, and for this one "A" was tried and punished, it would be ridiculous to treat his conviction as wiping out all liability for any other less or equally serious offense committed prior thereto. If, therefore, he is prosecuted for all of the offenses simultaneously, his liability for punishment for each is not affected. This principle is enunciated in Article 33, to which I shall return shortly. Before dealing with it, however, reference must be made to the more complicated situation for which provision is made by Article 32.

Article 32.—When the same act falls within the definition of more than one offence the penalty prescribed for the offence involving the heaviest penalty shall alone be imposed.

Two or more offences committed with the same object and connected one with another in such a manner as to form a single transaction, are deemed to constitute a single offence involving the penalty prescribed for the most serious of the offences committed.

The commission of an offence frequently involves acts of preparation or acts of execution which, taken by themselves, also constitute a substantive offense. Thus every theft with violence involves violence which might constitute an offense punishable separately from the theft. Also, most thefts involve a criminal trespass. Obtaining property by false pretenses, if accompanied by means of a forged document, also involves an uttering of the forgery, and if the offender is himself the author of the forged document, he is also liable

for forgery. Or, to cite another example, a forged writing may be, by reason of the forgery, defamatory, and its publication constitutes the offense of defamation in addition to the offense of forgery.

French writers distinguish between the cases in which one and the same act gives rise to liability to more than one punishment because it constitutes at once more than one offense (concours idéal), and the more common case in which the offender has committed several different acts, each of which is a separate offense (concours matériel). Thus, if a man strikes another with intention to kill, and incapacitates but does not kill, his victim, his act is punishable (a) under Article 240 by imprisonment and (b) under Articles 234 and 46, as an attempt to commit willful homicide, by penal servitude for a term or detention.

Article 32, paragraph 1, provides that in such cases of concours idéal the penalty prescribed for the offense involving the heaviest penalty should alone be imposed. This is in effect saying that the offense must be treated as a whole and is not to be subjected to a subtle analysis so as to bring different aspects of it under different qualifications. It must be regarded by the court in that aspect alone in which it constitutes the greatest danger to society. The same principle inspires the second paragraph of the article. The case suggested is a form of concours matériel. The best example is perhaps that of forgery and uttering, but it is punishable separately. If the forger has also uttered, he has committed two offenses, but as they are so connected with one another as to form a single transaction, he is to be punished only for the more serious. It is frequently by no means easy to say whether the series of offenses committed are so connected as to form a single transaction. The Egyptian legislator has left its solution to the determination of the court in each case as it arises.

This second paragraph, therefore, establishes an exception to the ordinary rule of cumulation of penalties. Separate offenses have indeed been committed, and the only reason that the penalties set for them should not be cumulated is that they are the manifestation of one single criminal intention. This, more than even practical simultaneity in time, should be taken into consideration in determining whether the different acts do constitute a single transaction. If it is clear that in the mind of the offender the acts had a common purpose, the provisions of Article 32, paragraph 2, are satisfied. It is not enough, and it need not even be relevant, that they were committed at the same time.

It may sometimes be difficult to decide which is the heaviest penalty. Between criminal and correctional penalties no question can arise. Between different correctional penalties the court must presumably inflict that which justifies the longest period of imprisonment. French writers accept the view that subsidiary penalties such as confiscation, closing of an establishment, and the like, are attached to the offense itself and may, therefore, be inflicted independently of the penalty. The French law follows the rule that penalties can never be cumulated. Imprisonment, according to French writers, absorbs fine, unless the fine is of the nature of damages.

The provisions of Article 32 could not be satisfactorily applied unless the court trying the accused had wide powers of altering the "qualification" of the offense of which he was accused. These powers in Egypt are given to the court by the provisions of Article 308 of the Criminal Procedure Code. Under this article the court is also empowered to modify or increase the gravity of the charge contained in the committal order, and, even in the judgment of conviction, to alter the description of the offense constituted by the facts alleged in the committal order, without any preliminary amendment of the charge. This is, however, subject to certain provisions in favor of the defense. Thus, if the facts are at first wrongly qualified and the court is of the opinion that they establish a graver offense than that of which the prisoner is accused, the "qualification" will be altered and the accused may then be convicted of the offense involving the heaviest penalty. But if a conviction has already been obtained on these facts for some less serious offense, the person so convicted cannot be again brought to trial on the same facts differently qualified. Nor if he has been once acquitted at the first trial, can he be tried again, for this would be to put him in jeopardy twice for the same act. The conviction or acquittal settles the matter once and for all. It is res judicata.

The rule laid down in Article 32 does not exist in all countries. However, it is an admitted principle of criminal procedure that a man once convicted or acquitted on an indictment cannot be tried a second time for an offense of

which he might have been convicted on the first indictment. He is then entitled to plead autrefois convict or autrefois acquit, as the case may be. Thus, if a man has been acquitted on a charge of obtaining property by false pretenses, he cannot be afterwards prosecuted for theft on the same facts, since he might have been convicted on the indictment for false pretenses, even though it was shown that the offense committed was really theft. On the other hand, if a person has been acquitted of theft, he can be afterwards prosecuted on the same facts for obtaining property by false pretenses on an indictment for theft.

Article 33.—Subject to the exceptions contained in Article 35 and Article 36, penalties restrictive of liberty shall be cumulative.

Article 34.—When cumulative penalties are of different kinds they shall be undergone in the following order: (1) penal servitude; (2) detention; (3) imprisonment with labor; (4) simple imprisonment.

Article 35.—The penalty of penal servitude shall, to the extent of its duration, be deemed to be a satisfaction of any other penalty restrictive of liberty imposed for an offence committed before sentence to such penal servitude was passed.

The principle here is that punishments are cumulative. However, it would be useless to prosecute for a misdemeanor discovered after, but committed before, a conviction for a crime for which a sentence of penal servitude has been passed. It is true that in cases in which a fine might be imposed for the misdemeanor the fine would not be absorbed by the previous sentence of penal servitude. The Egyptian rule of cumulation of penalties appears to be sounder in principle than other countries' rule of non-cumulation. The mitigation of its application provided by Article 35, coupled with the wide discretion possessed by Egyptian judges in fixing the period of imprisonment, makes it possible for them to treat the commission of another offense as no more than an aggravating circumstance justifying, perhaps, the infliction of a maximum penalty, but not necessitating the actual infliction of a more than normal punishment for the lesser offenses. The practical effect of Article 35 is also to make lesser penalties restrictive of liberty run concurrently with a single penalty of penal servitude.

Article 35 has, however, a restrictive scope. The sentence of penal servitude absorbs other penalties only. Thus a sentence of penal servitude is not a satisfaction of another sentence to the same penalty. The two sentences are cumulative. And the sentence of penal servitude only absorbs "to the extent of its duration." Five years' penal servitude only absorbs five of a ten year's sentence to detention. It is also interesting to observe that only penal servitude can absorb; detention does not absorb imprisonment. Moreover, it is only penalties for offenses committed before the sentence of penal servitude was pronounced which suffer absorption.

Article 36.—When two or more offences have been committed before any of them has been tried, the aggregate duration of penal servitude shall not by reason of this cumulation of penalties exceed twenty years, that of detention or of detention and imprisonment shall not exceed twenty years, and that of imprisonment shall not exceed six years.

Article 37.—Fines shall always be cumulative.

Article 38.—Sentences of police supervision shall be cumulative, but so that the aggregate period thereof shall not exceed five years.

Ethiopia

QUESTION 1

The *Penal Code of the Empire of Ethiopia of 1957* was drafted by Professor Jean Graven, Former Dean of the Faculty of Law of the University of Geneva and now President of the Court of Cassation of Switzerland. The Code contains 792 articles and is divided into three parts: Part I, General Part; Part II, Special Part; and Part III, Code of Petty Offenses. The Code is divided into "Books," of which there are eight, numbered consecutively. Each book is subdivided into "Titles," which in turn are subdivided into "Chapters" which contain sections in which the individual articles are found. The articles are numbered consecutively throughout the Code.

The traditional European "tripartite division" of offenses, according to the assumption of their different natures, into felonies, misdemeanors and petty offenses, has been abandoned. All offenses are, first of all, simply called "offenses" so that the general principles applicable to all offenses may be

stated in Part I, the General Part, of the Code. Book I "Offenses and the Offender," includes the first 84 articles and covers general principles of criminal law and its scope, including subjects such as time limitations, jurisdiction, extradition, conflicts of laws, attempt, participation, criminal responsibility and irresponsibility, criminal intent, negligence and accident, justification, necessity, self defense, mistake, and other topics of general application. Because Ethiopia lacked a highly developed legal profession, and because of the ideal of accessibility of the law to every citizen, as much doctrine as possible was included in the Code. In drafting the Code, these motives of education and accessibility were kept in mind, together with the guiding principles of most codifications, namely clarity, completeness and compactness. Adding to the completeness of the Ethiopian Code is the inclusion of military offenses together with other crimes.

Book II, entitled "The Criminal Punishment and Its Application," covers all phases of sentencing and extends from Article 85 to Article 247. Books I and II comprise the General Part of the Code (Part I).

Part II, the Special Part of the Code, extends from Article 248 through Article 689. These articles define each crime and give the punishment for each. The Special Part contains Books III through VI as follows: Book III, "Offences Against the State or Against National or International Interests"; Book IV, "Offences Against the Public Interest of the Community"; Book V, "Offences Against Individuals and the Family"; and Book VI, "Offences Against Property."

Part III of the Code, the Code of Petty Offenses, is a code within a code and contains two Books. These are Book VII, the General Part, and Book VIII, the Special Part. The Books, as usual, are broken down into Titles and Chapters containing the individual articles, numbers 690 through 792.

Petty offenses differ from ordinary offenses in that their punishments are less than those prescribed for ordinary offenses. Petty offenses are punishable by fines of from one dollar to three hundred dollars or a jail sentence of one day to three months. Included within the category of petty offenses are violations of rules and regulations promulgated by a competent authority, as well as those offenses which are specifically included in the Special Part of the Code of Petty Offenses. The trials of petty offenders are held before a lesser court or magistrate than the trials of the ordinary offenders. It should be pointed out that having a code within a code is a unique approach to codification. A more traditional approach would be to have the general part of the Code of Petty Offenses integrated into the general part of the entire code.

One experienced student of comparative law has traced the influence of the Italian Penal Code upon the Ethiopian Penal Code and reached the following conclusion:

The new Ethiopian Penal Code is based upon well-tried principles and practices of leading Continental countries both as to crimes in general and in particular, and penology. It enacts new provisions as to international offenses. Upon the framework of the excellent Italian Penal Code it imposes Anglo-American ideas of constitutional privileges and rights which formed the basis of the United Nations Declaration of Human Rights.[1]

QUESTION 2

A code whose inspiration is found in the European tradition of codification is drafted with consecutive numbering of the articles throughout the entire code. This numbering scheme gives a unity to the general and the particular codal provisions. Leaving blank numbers is felt to create confusion and fragmentation, which are the opposites of the goals of clarity and conciseness which should guide the draftsmen of such a code. If gaps are left in the numbering system, some will never be used because they will not be in the needed locations. Others will be quickly used up, leaving future enactments to be numbered differently anyway.

Traditional European-style codes retain the original numbering system until the code is revised or superseded. New statutory provisions are added through the device of additions under existing articles so that an article may come to have several paragraphs. Numbering of new provisions can be

[1] Franklin F. Russell, "The New Ethiopian Penal Code," *The American Journal of Comparative Law*, Vol. 10 (Spring 1961), pp. 276–277.

achieved through the use of decimal points or letters of the alphabet. For example, "Article 120A—Flogging," was added as a secondary punishment between "Article 120—General principles applicable to secondary punishments" and "Article 121—Caution, reprimand, admonishment and apology." This method helps to retain the unity of the code.

QUESTION 3

Chapter II of Title I, Book I of the Ethiopian Penal Code is entitled "Criminal Guilt." "Criminal Guilt" corresponds with the proposed Code's term "Culpability." The Ethiopian Code lays down in three articles the mental elements necessary for criminal conduct.

Article 57. Principle: Criminal Fault And Accident

(1) No one can be punished for an offence unless he has been found guilty thereof under the law.

A person is guilty if, being responsible for his acts, he commits an offence either intentionally or by negligence.

(2) No one can be convicted under criminal law for an act penalised by the law if it was performed or occurred without there being any guilt on his part, and was caused by force majeure, or occurred by accident.

Nothing in this Article shall be a bar to civil proceedings.

Article 58. Criminal Intention

(1) A person intentionally commits an offence when he performs an unlawful and punishable act with full knowledge and intent.

Criminal intention exists also when the offender, being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow.

(2) An intentional offence is punishable save in cases of justification or excuse expressly provided by law (Arts. 64-78).

(3) No person shall be convicted for what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence.

Article 59. Criminal Negligence

(1) A person is guilty of a criminal negligence act where, by a criminal lack of foresight or imprudence, he acts without consideration or in disregard of the possible consequences of his act.

A person is guilty of criminal negligence when he fails to take such precautions as might reasonably be expected in the circumstances of the case and having regard to his age, experience, education, occupation and rank.

(2) Offences committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society.

The Court shall assess sentence according to the degree of guilt and the dangerous character of the offender, and according to his realisation of the possible consequences of his act or his failure to appreciate such consequences as he ought to have done.

Article 57 states the general principle that a person is guilty of criminal conduct if, having legal capacity, he commits an offense either intentionally or negligently. The next two articles state the mental elements necessary to constitute criminal intent or criminal negligence. The two articles are respectively entitled "Criminal Intention" and "Criminal Negligence." In Article 58(1), two types of criminal intent are recognized. First, a person intentionally commits an offense when he performs an unlawful and punishable act (various crimes are listed and defined in the Special Part of the Code) with full knowledge and volition. ("Volition" seems more appropriate here than "intent," since we are defining "intentionally." The Code was drafted originally in French, and the word was "la volonté.") In the United States, this type of criminal intent is often termed "specific intent." It corresponds to "intentionally" in §302(1)(a) of the proposed Code.

The second sentence of Article 58(1) establishes the second type of criminal intention. This second and less than specific intent has been called "indirect intention" or *dolus eventualis*. It corresponds to the term "knowingly" in §302(1)(b) of the proposed Code. In cases of indirect intention, the offender's intent to do an unlawful act is fully developed, but not his knowledge that the

result would follow. The usual illustration is that A, desiring to destroy B's property, sets fire to B's house while B is inside. Knowing that B is at home, A foresees the possibility of harm to B. Injury to B would be treated by Article 58, as the result of criminal intent rather than negligence. A more lenient view might place it in the negligence category.

Criminal negligence is defined by the first sentence of Article 59(1). ("A criminal negligence act" could be better rendered into English as "a criminally negligent act" or simply "criminal negligence.") The basic idea is presented that through lack of foresight or due to poor judgment, the offender has carried out the prescribed act.

The Ethiopian Penal Code uses the defendant's state of mind to determine guilt or innocence. Article 59(2) makes the punishment of negligence exceptional and restricts it to cases where it is justified. The degree of guilt is a guide to the assessment of the sentence in negligence cases under Article 59(2).

The kinds of "Culpability" proposed in the draft code compare unfavorably with the provisions of the Ethiopian Code. Sections 302(c) and 302(d) of the proposed Code can be combined into a single provision under the concept of criminal negligence. This is possible because its concepts of both engaging in conduct "recklessly" and engaging therein "negligently" involve the same element of "a gross deviation from acceptable standards of conduct." This approach has been accomplished successfully for thirty years in at least one American jurisdiction (see "The Louisiana Criminal Code—a comparison of prior Louisiana Criminal Law." Dale E. Bennette, 5 La. L. Rev. 6 at page 11. [Dec. 1942]).

QUESTION 4

Causation is handled by the Ethiopian Code in a single article, as follows:

Article 24. Relationship of Cause and Effect

(1) In cases where the commission of an offence requires the achievement of a given result the offence shall be deemed to have been committed only if the result achieved is the consequence of the act or omission with which the accused person is charged.

This relationship of cause and effect shall be presumed to exist when the act or omission within the provisions of the law would, in the normal course of things, produce the result charged.

(2) Where there are concurrent causes or in the case of an intervening cause whether due to the act of a third party or to a natural or fortuitous event, this relationship of cause and effect shall not apply when the extraneous cause was in itself sufficient to produce the result.

If, in such a case, the act or omission with which the accused person is charged in itself constitutes an offence he shall be liable to the punishment specified for such an offence.

The modified "but for" or *sine qua non* test of §305 of the proposed Federal Criminal Code imposes a broader criminal responsibility than the Ethiopian Penal Code. Under the latter, when a concurrent extraneous cause is in itself sufficient to produce the result, the accused is exonerated, whether or not his conduct might have been sufficient in itself. He is given the benefit of the doubt in such cases, whereas the proposed Federal Code is expressed in the conjunctive to require both a concurrent cause sufficient to produce the result and that the accused's conduct was clearly insufficient.

QUESTION 5

The Ethiopian Penal Code, Book I, Title III, "Conditions of Liability to Punishment in Respect of Offences," contains a Chapter on criminal responsibility. Articles 48, 49, and 51 provide for defenses of irresponsibility and limited responsibility and for expert medical opinion.

Article 48. Criminal Responsibility and Irresponsibility

(1) The offender who is responsible for his acts is alone liable to punishment under the provisions of criminal law.

A person is not responsible for his acts under the law when, owing to age, illness, abnormal delay in his development or deterioration of his mental faculties, he was incapable at the time of his act, of understanding the nature

or consequences of his act, or of regulating his conduct according to such understanding.

(2) The Court may order in respect of an irresponsible person such suitable measures of treatment or protection as are provided by law. (Art. 133–135).

Article 49. Limited Responsibility

(1) He who owing to a derangement of his mind or understanding, an arrested mental development or an abnormal or deficient condition was not, at the time of his act, fully capable of understanding the nature and consequences thereof or regulating his conduct according to such understanding shall not be liable in full to the punishment specified for the offence committed.

The Court shall without restriction reduce the punishment. (Art. 185).

(2) In addition to a penalty the Court may order such appropriate measures of treatment, correction or protection as are provided by law. (Art. 133–135).

Article 51. Doubtful Cases, Expert Examination

(1) When there is a doubt as to the responsibility of the accused person, whether full or partial, the Court shall obtain expert evidence and may order an enquiry to be made as to the character, antecedents and circumstances of the accused person.

Such evidence shall be obtained when the accused person shows signs of a deranged mind or epilepsy, is deaf and dumb or is suffering from chronic intoxication due to alcohol or drugs.

(2) The expert or experts shall be appointed by the court under the ordinary rules of procedure. The Court shall define their terms of reference and the matters to be elucidated.

The expert evidence shall describe the present condition of the accused person and its effect upon his faculties of judgment and free determination. It shall, in addition, afford guidance to the Court as to the expediency and the nature of medical treatment or safety measures.

(3) On the basis of the expert evidence the Court shall make such decision as it thinks fit. In reaching its decision it shall be bound solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn therefrom.

Articles 133–135 are found in Book II, Section II, "Measures Applicable to Irresponsible Persons and Offenders with a limited Responsibility."

Article 133. Principle

After having decided (Art. 51) whether the offender is irresponsible (Art. 48) or whether he is of a limited responsibility (Art. 49), the Court shall apply the following provisions having regard to the circumstances and requirements of the case.

Article 134. Confinement

(1) If the offender, by reason of his condition, is a threat to public safety or order, or if he proves to be dangerous to the persons living with him, the Court shall order his confinement in a suitable institution.

(2) If he is in need of treatment, he shall either be treated in the institution in which he is confined or be transferred to an appropriate institution in accordance with Article 135. Proper provision may be made for his safe custody.

Article 135. Treatment

(1) Where an offender is suffering from a mental disease or deficiency, deaf-and-dumbness, epilepsy, chronic alcoholism, intoxication due to the abuse of narcotics or any other pathological deficiency and requires to be treated or placed in a hospital or asylum the Court shall order his treatment in a suitable institution or department of an institution.

(2) Where the Court is satisfied that the offender is not dangerous and can be treated as an out-patient, it shall order accordingly.

The Court shall then order the offender be kept under proper supervision and control either by the medical expert in charge of the case or by some other competent authority. An order made under this Article may be revoked and the Court may require such reports as it considers necessary.

Other pertinent codal provisions for cases involving insanity defense are found in Articles 136 and 137.

Article 136. Duration of Confinement or Treatment

(1) The competent administrative authority shall carry out the Court's decision concerning treatment and confinement.

Treatment and confinement shall be of indefinite duration but the Court shall review its decision every two years. When the offender is cured, the administrative authority with the consent of the Court may release the offender.

As soon as, according to expert opinion, the reason for the measure has disappeared the administrative authority shall, after having referred the matter to the Court and upon its decision, put an end to the measure ordered.

(2) When the Court is satisfied that the treatment or confinement may be suspended, it may on the request of the administrative authority order accordingly.

The Court shall release the offender to the supervision of a selected charitable organization for not less than one year and shall in addition impose such conditions as may be necessary (Art. 210).

(3) Any order made under this Article may at any time be revoked where public safety or the condition of the released person so requires.

If the probation period is successfully undergone, the release shall be final.

Article 137. Effect of Limited Responsibility Upon Penalty

(1) Where an offender is of limited responsibility, a mitigated penalty as provided by law (Art. 49) may be imposed by the Court.

The Court may when it is necessary make an order under Art. 134 or 135 and the enforcement of the penalty shall be suspended.

(2) Upon termination of the measure ordered the Court shall, upon a report made by the Management of the institution or the responsible authority of the charitable organization, decide whether the enforcement of the penalty is still necessary and determine the extent to which the period of confinement or treatment shall be deducted from the sentence unserved.

The court shall take into account the gravity of the offence committed, the antecedents and character of the offender, the effect the internment or treatment had upon his condition and the likelihood of his permanent recovery.

(3) No penalty shall be enforced where the Court considers it inexpedient so to do.

The Ethiopian Penal Code's provisions on criminal responsibility, it will be noted, immediately precede its provisions on criminal guilt. Both responsibility and guilt are necessary elements of any criminal conduct. The offender must be responsible for his acts and he must act either intentionally or negligently. Responsibility is a condition precedent to the fulfillment of the requirement as to guilt. In Ethiopia sanity is a prerequisite to guilt.

For a finding of total irresponsibility the mental condition must render the defendant incapable of understanding or self control at the time of the act. This is substantially the same provision contained in §503 of the proposed code. If the court determines that the accused is irresponsible, then "measures" (medical treatment or confinement) are applied in lieu of punishment.

Although the provisions for limited responsibility may be found in many codes, it may be easily criticized on the ground that it is not possible to evaluate diminished responsibility accurately. On the other hand, the court must order medical treatment whenever it is clearly needed, and the court is thus given the flexibility necessary to deal with diminished responsibility in an enlightened way.

QUESTION 6

Alcohol and drug intoxication do not diminish responsibility under the Ethiopian Penal Code.

Article 50. Intentional or Culpable Irresponsibility

(1) The provisions excluding or reducing liability to punishment shall not apply to the person who in order to commit an offence intentionally put himself into a condition of irresponsibility or of limited responsibility by means of alcohol or drugs or by any other means. The general provisions of this Code are applicable in such a case.

(2) If an offender by his own fault has put himself into a condition of irresponsibility or of limited responsibility while he was aware, or could and

should have been aware, that he was exposing himself, in such a condition, to the risk of committing an offence, he shall be tried and punished under the ordinary provisions governing negligence if the offence committed is punishable on such a charge. (Art. 59).

(3) In the case of an offence which was neither contemplated nor intended and was committed in a state of complete irresponsibility into which the offender put himself by his own fault, Article 485 of the Special Part of this Code relating to offences against Public Safety shall apply.

For cases involving criminal negligence (see answer to Question #1) as an element of the offense, intoxication is handled in the same manner as the American method. For cases described in §(3) of Article 50—unpremeditated irresponsible acts—there is a special sentencing provision limiting the term of imprisonment to a maximum of one year.

Article 485. Disturbances Resulting From Acts Committed in a State of Culpable Irresponsibility.

Whosoever, being deliberately or through criminal negligence in a state of complete irresponsibility due to drunkenness, intoxication or any other cause, commits while in such a state an act normally punishable with imprisonment for at least one year, is punishable with fine or with simple imprisonment not exceeding one year, according to the degree of danger or gravity of the act committed.

The provision of Article 51 (see answer to Question #5) concerning the use of expert witnesses applies to cases involving alcohol or drugs as well as to those involving a question of sanity or other afflictions of the nervous system.

In cases of confirmed alcoholism, the provisions of Article 48 or Article 49 can supersede the provisions of Article 50. In such a case, confinement and medical treatment would be the disposition rather than a jail sentence, once the disease and the causal relationship to the act were established to the satisfaction of the court.

QUESTION 7

The self defense provision of the Ethiopian Penal Code is a generalized statement covering self defense, defense of others, and defense of property.

Article 74. Self-Defence

An act done under the necessity of self-defence or the defence of another person against an imminent and unlawful assault or a threat of an assault directed against a legally protected belonging shall not be punishable if the assault or threat could not have been otherwise averted and if the defence was proportionate to the needs of the case, in particular to the danger and gravity of the assault and the importance of the belonging to be defended.

The limitations placed on self defense are found in the next article of the Code.

Article 75. Excess in Self-Defence

(1) When a person in repelling an unlawful assault exceeded the limits of self-defence by using disproportionate means or going beyond the acts necessary for averting the danger, the Court shall, without restriction, reduce the penalty (Art. 185).

(2) The Court may impose no punishment when the excess committed was due to excusable fear, surprise or excitement caused by the assault.

(3) In the case of acts exceeding strict self-defence he who repelled the assault shall remain civilly liable for the injury caused by his excess.

Use of force by persons in charge of minors is regulated by a special article.

Article 548. Maltreatment of Minors

(1) Whosoever, having the custody or charge of an infant or a young person under fifteen years of age, deliberately neglects, ill-treats, over-tasks or beats him in such a way as to affect or endanger gravely his physical or mental development or his health, is punishable with simple imprisonment for not less than one month. The Court may in addition deprive the offender of his family rights.

(2) The right to administer lawful and reasonable chastisement is not subject to this provision (Art. 64).

QUESTION 8

As indicated in the answer to Question #1, there is a group of offenses which are called "petty offenses." They are treated as minor offenses for which lesser penalties are prescribed. Otherwise all crimes are classified only to the extent that related types of offenses are placed together under a "title" and "chapter" in the Code. For sentencing, each article which defines an offense sets the punishments which may be imposed.

QUESTION 9

There are many provisions relating to sentencing which elaborate upon the mandate of Article 86.

Article 86. Calculation of Sentence

The Court shall determine the penalties and other measures in conformity with the provisions of the General Part of this Code and the special provisions defining offences and their punishments.

The penalty shall be determined according to the degree of individual guilt, taking into account the dangerous disposition of the offender, his antecedents, motive and purpose, his personal circumstances and his standard of education, as well as the gravity of his offence and the circumstances of its commission.

In the Special Part of the Code, which defines each offense, each article contains the appropriate sentence for each crime. However, some sentences refer to general articles concerning "fines" or "simple imprisonment," or a combination of the two. A fine may range from one dollar to five thousand dollars (Article 88) and simple imprisonment, from ten days to three years (Article 105).

"Rigorous imprisonment" (Article 107) is normally for a period of one to twenty-five years, but where it is expressly so laid down by law it may be for life. A sentence of rigorous imprisonment is always stated in terms of a specific maximum such as "punishable with rigorous imprisonment not exceeding five years." By the same token, simple imprisonment is for some crimes extended beyond three years by specific provisions or limited to a maximum, for example, six months, which falls within the simple imprisonment range of ten days to three years.

An interesting feature of the Ethiopian Penal Code is that the court may place the offender on probation without a conviction being entered on the police record. If he does not break the conditions of his probation, the conviction is never entered (Article 195). However, the court may elect to enter a conviction and pass sentence before ordering the sentence suspended and the offender placed on probation (Article 196). Where probation has been undergone and secondary penalties or measures which had been pronounced without suspension have been carried out, the court must order the deletion of the police record entry. Secondary punishments include flogging, caution, reprimand, admonishment and apology, and deprivation of rights (Articles 120-122).

There is also provision for a "conditional release" upon recommendation of the management of the correctional institution (Article 207). The court must then fix a period of probation which must be between two and five years.

Probationers are placed under the supervision of a charitable organization. These organizations, which may be public or private, receive the assistance and are under the control of the State. There is also provision for appointment of a probation officer (Article 215).

In Ethiopia, the judge is given a wide range of sentencing powers in an effort to individualize the sentence. Article 86, entitled "Calculation of Sentence," (see above) sets out the criteria to be applied by the court in its assessment of the sentence.

Once the sentence is passed and the offender imprisoned, the possibility of parole is based upon the system of "conditional release" previously mentioned. Conditional release is the suspension of a penalty of incarceration for good conduct where there are possibilities of rehabilitation. This concept presupposes that part of the sentence has been served in accordance with the seriousness of the offense. The court, upon recommendation of the director of the correctional institution, may grant the prisoner his freedom under the condition that he will not abuse it and that he will use it for purposes of

rehabilitation (Articles 206–212). The conditions upon which anticipatory release may be granted are set forth in Article 207.

Article 207. Conditions for Release

The Court may, on the recommendation of the Management of the institution order conditional release:

(a) if, during the requisite period of performance of the penalty or the measure entailing loss of liberty, the offender, by his work and conduct, gave tangible proof of his improvement; and

(b) if he has repaired, as far as he could reasonably be expected to do, the damage found by the Court or agreed with the aggrieved party; and

(c) if the character and behaviour of the offender, as well as the living conditions he may expect to find upon his discharge, warrant the assumption that he will be of good conduct when released and that the measure will be effective.

If the released person is of good behavior until the expiration of the period of probation, his release is final and his penalty extinguished. The minimum period of probation is five years in the case of the release of a prisoner sentenced to rigorous imprisonment for life. It is usually for a period of from two to five years (Article 209).

There are special provisions for dealing with "dangerous felons." In certain enumerated instances (Article 81), called "general aggravating circumstances," or "ordinary aggravation" (Article 188), the court must increase the sentence which it would normally impose. The court is still bound by the maximum sentences specified for each crime.

Article 81. General Aggravating Circumstances

(1) The Court shall increase the penalty as provided by law (Art. 188) in the following cases:

(a) when the offender acted with treachery, with perfidy, with a base motive such as envy, hatred, greed, with a deliberate intent to injure or do wrong, or with special perversity or cruelty;

(b) when he abused his powers, or functions or the confidence, or authority vested in him;

(c) when he is particularly dangerous on account of his antecedents, the habitual or professional nature of his offence or the means, time, place and circumstances of its perpetration, in particular if he acted by night or under cover of disturbances or catastrophes or by using weapons, dangerous instruments or violence;

(d) when he acted in pursuance of a criminal agreement, together with others or as a member of a gang organized to commit offences and, more particularly, as chief, organizer or ringleader;

(e) when he intentionally assaulted a victim deserving special protection by reason of his age, state of health, position or function, in particular a defenceless, feeble-minded or invalid person, a prisoner, a relative, a superior or inferior, a minister of religion, a representative or a duly constituted authority, or a public servant in the discharge of his duties.

(2) When the law, in a special provision of the Special Part, has taken one of the same circumstances into consideration as a constituent element or as a factor of aggravation of an offence, the Court may not take this aggravation into account again.

Article 188. Ordinary Aggravation

In general cases of aggravation provided by law (Art. 81) the court shall determine the penalty within the limits specified in the relevant provision of the Special Part, taking into account the nature and the multiplicity of grounds of aggravation, as well as the degree of guilt of the offender, if necessary by going to the extent of imposing the maximum sentence enacted. Such maximum is binding upon it.

In addition, the court must give written reasons for finding extenuating or aggravating circumstances which are not expressly provided for by the Code (Article 83). Some aggravating circumstances are included in the definition of the crime. In such cases, the aggravated crime will carry the greater penalty. For example, "aggravated homicide—homicide in the first degree" (Article 522) carries greater penalties than "homicide in the second degree" (Article 533), and the difference stems from the manner in which the offense is carried out.

Aggravated homicide is punishable with rigorous imprisonment for life, or death. There is a compulsory death sentence where the offender has committed murder in the first degree while serving a sentence of rigorous imprisonment for life. The motive of this law is obviously to find a means of controlling the behavior of convicts serving life sentences.

A comparison of the penalties for homicide by negligence (Article 526) with those of §1603, negligent homicide, shows that the Ethiopian Penal Code imposes a less severe penalty.

Article 526. Homicide by Negligence

(1) Whosoever, by criminal negligence, causes the death of another, is punishable with simple imprisonment or fine.

(2) Simple imprisonment shall not exceed five years where the homicide is caused by a person who has a special professional duty to safeguard life.

Likewise, although "extenuated homicide" (Article 524) is roughly equivalent to manslaughter under §1602 of the proposed Federal Code, it carries a much milder sentence of simple imprisonment not exceeding five years. In the area of unintentional homicide, the committee should ask what reasonable purpose is served by the imposition of lengthy prison sentences.

The Ethiopian Penal Code contains mandatory minimum prison sentences for some offenses. For example, there is an article making it a crime to fail to give aid to others in certain circumstances. If the offender was under an obligation to provide such aid, then there is a mandatory minimum imprisonment.

Article 547. Failure To Lend Aid to Another

(1) Whosoever intentionally leaves without help a person in imminent and grave peril of his life, person or health, when he could have lent him assistance, direct or indirect, without risk to himself or to third parties, is punishable with simple imprisonment not exceeding six months, or fine.

(2) Simple imprisonment shall be in addition to the fine, and shall be from one month to one year, where:

(a) the victim has been wounded by the offender himself no matter in what circumstances or by what means; or

(b) the offender was under an obligation, professional or contractual, medical, maritime or other, to go to the victim's aid or to lend him assistance.

The Ethiopian Penal Code contains an article on publicity for judgments. It is not, however, limited in its applicability to convicted organizations.

Article 159. Publication of the Judgment

(1) Whenever the general interest or that of the accused or of the injured person so requires the Court shall order the publication of the judgment or parts thereof.

Such publication shall be ordered as a matter of course when it serves the public interest; it shall be effected only on request when it serves private interests.

Where an accused person is convicted he shall be liable for the costs of such publication. In case of acquittal they shall be borne by the complainant or informer or, failing such, by the State.

(2) The Court shall determine the conditions under which the publications shall take place and their number, according to usage, the circumstances of the case and expediency.

Publication may be effected by means of posters in a public place, notices issued in an official or a privately owned gazette, or by the town-crier.

Another article gives the court authority to order the offender to make a public apology to the victim of the offense.

Article 121. Caution, Reprimand, Admonishment, and Apology

(1) Where the court considers that an appeal to the honour of the offender will have beneficial effects on the offender and on society at large, it may in open court, either during the trial or in its judgment, caution, admonish or reprimand the offender.

The Court may also order the offender to make a public apology to the person injured by the offence, or to the persons having rights from such injured person.

(2) The Court may apply any of the punishments mentioned in this Article instead of the principal punishment where it is specifically laid down by law

that such punishments apply to minor offences; or where extenuating circumstances are present (Art. 79 and 80); or where the law provides for a free mitigation of the punishment (Art. 185); or where enforcement of the sentence is postponed (Art. 196).

There is a section in the Ethiopian Code called "Measures against Recidivists and Habitual Offenders." Such persons are sent to special institutions where they are "interred" and are subject to stricter supervision than ordinary facilities can offer. Applicable articles on this subject are as follows.

Article 128. Internment

(1) Where an offender who has served several sentences involving loss of liberty and who shows an ingrained propensity to evil doing, misbehavior or incurable laziness, or habitually derives his livelihood from crime, is convicted for a further offence punishable with imprisonment not exceeding five years the Court shall order internment in place of any other penalty of loss of liberty.

(2) Internment may be ordered where the new offence is intentional and denotes the dangerous disposition of the offender, notwithstanding that it is not serious or not of the same kind as the previous offences.

Article 129. Conditions of Enforcement

(1) Internment shall be undergone in an institution, labour colony, or place of relegation used for such purpose.

Persons interned shall perform the work assigned to them.

(2) Conditions in such institutions shall be analogous to those applied in penitentiary institutions in general (Art. 109–111) subject to such restrictions or stricter measures of supervision as may be justified.

Particulars of such measures shall be laid down in regulations.

Article 130. Duration

(1) Internment shall be ordered without fixing its duration. But no offender shall be kept to internment for less than two years or more than ten years. Internment shall always be subject to conditional release.

The period of remand shall not be taken into consideration (Art. 114).

(2) At any time after two years of internment have been completed the Court, having regard to the gravity of the case may, on the recommendation of the Director of the institution where the offender is interned, order his conditional release on the usual conditions (Art. 206–212).

In addition, there is an article which provides for increased penalties in cases where a sentence has been previously served by the offender for the same offenses.

Article 193. Aggravation in Case of Recidivism

(1) Where an offense is committed after a sentence has been served in whole or in part in respect of a former offence (Art. 83 (b)), the Court shall aggravate the penalty and is not bound by the provisions of the Special Part of this Code. It may exceed the penalty provided for the offence, having regard to the circumstances of the new offence, the degree of guilt and the danger represented by the offender and is bound solely by the general maximum specified for the kind of penalty imposed.

(2) Nothing in this Article shall affect the provisions relating to internment in cases specified under Article 128 of this Code.

As previously discussed, a court in Ethiopia may find extenuating or aggravating circumstances which are not mentioned in the Code. In such cases, the court's reasons must be stated in writing.

Article 83. Other Circumstances

The Court shall give reasons for applying extenuating or aggravating circumstances not expressly provided for in this Code and shall state clearly its reasons for taking this exceptional course.

Article 84. Cumulation of Extenuating and Aggravating Circumstances

(1) If there exists both extenuating and aggravating circumstances the Court shall take both into consideration in determining the sentence.

(2) In the event of concurrent aggravating and extenuating circumstances the Court shall first fix the penalty having regard to the aggravating circumstances and then shall reduce the penalty in light of the extenuating circumstances.

Sentences may be reviewed on appeal by a higher Ethiopian court. The powers of appellate courts are stated in the *Criminal Procedure Code of The Empire of Ethiopia of 1961.*

Article 195. Powers of Court of Appeal

(1) At the hearing of an appeal the court of appeal shall dismiss the appeal where there is no sufficient ground for interference.

(2) Where it considers that there is sufficient ground for interference, the court of appeal may:

(a) on an appeal from an order of acquittal or discharge reverse such order and direct that the accused be retried by a court of competent jurisdiction or find him guilty and sentence him according to law; or

(b) on an appeal from conviction and sentence:

(i) reverse the finding and sentence and acquit the accused; or

(ii) with or without altering the finding, maintain, increase or reduce the sentence;

(c) on an appeal from conviction only reverse the finding and sentence and acquit the accused;

(d) on an appeal from sentence only maintain, increase or reduce the sentence.

(3) Where the court of appeal confirms the conviction but alters the sentence or vice versa a second appeal shall lie only in respect of the conviction or sentence which has been altered.

Sentencing for concurrent offenses is governed by the provisions of Article 82(1)(a), which defines "material concurrence" (when the offender successively committed several offenses, whatever their nature) and "notional concurrence" (when the act simultaneously contravenes several criminal provisions). Generally, only one penalty, the most severe, is allowed. In these cases, "the penalty shall be aggravated under the relevant special provisions [Articles 189–193]." The major provisions are as follows.

Article 189. Circumstantial Aggravation in Case of Concurrent Offences

(1) In case of material concurrence of offences (Art. 82(a)) the court shall determine the penalty on the basis of the general rule set out hereafter, taking into account, for the assessment of the sentence, the degree of guilt of the offender:

(a) where capital punishment is provided for one of the concurrent offences this penalty shall override any other penalties entailing loss of liberty;

(b) in case of several penalties entailing loss of liberty being concurrently applicable the court shall pass an aggregate sentence as follows: it shall impose the penalty deserved for the most serious offence and shall increase its length taking into account the provisions of the law or the concurrent offences; it may, if it thinks fit, impose a penalty exceeding by half the basic penalty without, however, being able to go beyond the general maximum fixed by law for the kind of penalty applied;

(c) in case of concurrence between a penalty entailing loss of liberty and a fine the court may impose both penalties taking into account the various provisions applicable or the concurrent offences; it may not exceed the general maximum prescribed by law for each kind of penalty;

(d) in cases where several fines have to be applied the Court shall impose a single fine the amount of which shall not exceed the aggregate amount of the separate fines, nor the general maximum amount provided by law, save in cases where the offender acted for gain (Art. 90).

(e) where the court orders the forfeiture of the property owned by the offender it may not, in case of concurrence, impose a fine either as principal or as secondary penalty.

(2) Any secondary penalty or preventive, corrective or safety measure may be applied even though its application is justified under only one of the relevant provisions or in respect of only one of the concurrent offences.

Article 192. Simultaneous Breach of Several Provisions

Where by one and the same act the offender committed a breach of several criminal provisions (notional concurrence Art. 82(a)), the Court may aggravate the penalty according to the provisions of Art. 189 where the offender's deliberate and calculated disregard for the law justifies aggravation; it shall be bound to do so in cases of aggravation expressly provided by law (Art. 63(2)).

In other cases, the Court may only impose the maximum penalty prescribed by the most severe of the relevant provisions.

Under Article 195 of the Criminal Procedure Code, supra, the appellate court may impose an appropriate sentence in the case of a partial reversal.

The Ethiopian Penal Code has a special provision for economic crimes which has a broader application when the court finds that the offender had an economic motive for commission of any crime.

Article 90. Motive of Gain as an Aggravating Circumstance

(1) Without prejudice to any special provision of the law prescribing a higher maximum, where the offender has acted with a motive of gain or where he makes a business of crime in a way that he acquires or tries to acquire a gain whenever a favourable opportunity presents itself, and where it appears to the Court that, having regard to the financial condition of, and the profit made by, the offender, it is expedient so to do, it may impose a fine which shall not exceed ten thousand dollars.

The amount of the fine shall always be in addition to the confiscation of the profit made.

(2) Notwithstanding that no provision is specifically made in the Special Part of this Code, where although gain is not an essential element of an offence, the offender was motivated by gain in the commission of such offence, the Court may impose a fine in addition to imprisonment or other punishment provided by law.

The Ethiopian Penal Code contains provisions for the collection of fines and includes conversion of the fine into simple imprisonment upon default of payment. An alternative means of collection is the conversion of the fine into labor for the State at a certain rate, the minimum of which is provided by law. The amount to be earned per day by the offender's labor is set by the court in each case. The ability of the offender to pay is the criterion to be applied.

Article 91. Recovery of Fine

(1) Where the offender cannot pay the fine forthwith the court may allow a period of time for payment; such period may extend, according to circumstances, from one to three months.

(2) Where, having regard to the circumstances of the offender, it appears to the court that it is expedient so to do, it may direct the payment of the fine to be made by installments within a period not longer than two years.

In fixing the amount and the date for payment of each installment, the court shall take into consideration the actual means of the offender.

Article 92. Conversion of Fine Into Labour

In default of payment of the fine in the manner aforementioned, the Court may allow the offender to settle the fine by doing work for the State or for any public authority and in such case the period within which the fine is to be settled shall be determined.

The Court shall fix an amount, which in no case shall be less than one dollar for each day's work and in fixing such amount it shall have regard to the circumstances of the offender and particularly to his average daily earnings.

Article 93. Security or Surety for the Payment of Fine

Whenever a fine is not paid forthwith, the court may require the offender to produce such security or sureties as is sufficient to ensure the payment of the fine within the stated period.

The security or sureties shall be determined having regard to the circumstances of the case, the condition of the offender and the interests of justice.

Article 94. Conversion of Fine Into Simple Imprisonment in Default of Payment.

(1) The fine, or any part thereof, which remains unpaid within the stated period may be levied by the seizure of the offender's goods.

(2) If there are no goods liable to seizure or if such seizure will cause hardship to the offender or to his family, the fine or any part thereof which remains unpaid shall be converted into simple imprisonment.

The period of simple imprisonment shall be at the rate of one day for such amount as may be specified in the judgment having regard to the personal and financial condition of the offender.

In no case shall simple imprisonment exceed two years.

(3) Simple imprisonment shall terminate when the offender pays the fine or part thereof which is still due. Simple imprisonment shall also terminate when the offender provides a security or surety which, in the opinion of the Court, is sufficient.

It should be mentioned that the Ethiopian Penal Code contains legislation geared to expedite compensation for damages caused by an offense, including a provision that a part of the fine or of the "yield" derived from the conversion of the fine into work is to be appropriated to the benefit of the victim of the crime. The State pays the compensation and the claim is assigned to the State, which enforces it. The compensation scheme is set forth in two articles.

Article 100. Compensation for Damages Caused by an Offence

(1) Where an offence has caused considerable damage to the injured person or to those having rights from him, particularly in cases of death, injuries to the body or health, defamation, damage to property or destruction of goods, the injured person or the persons having rights from him shall be entitled to claim that the offender be ordered to make good the damage or to make restitution or to pay damages by way of compensation

Such claim shall include any expenses in hospital or expenses for medical treatment to such amount as may be assessed by expert evidence.

(2) The right to sue, the conditions under which an award is to be made, and the right to and extent of the restitution, damages and indemnification shall be governed by the provisions of the civil law on such matter.

The court shall hear evidence and the submission of both parties and shall make an order according to its findings and where the parties have reached an agreement which in the opinion of the court is just, it shall make an order accordingly.

The payment of any sum due on such order may be secured by the seizure of goods of the offender, not being goods which are necessary for his livelihood or for the exercise of his trade or profession.

(3) For the purpose of establishing his or their claim, the injured person or the persons having rights from him may be joined as parties in the criminal proceedings.

The conditions, form and manner of such joinder shall be governed by the provisions laid down in the Criminal Procedure Code.

In cases of a complicated nature or where the circumstances of the case make it expedient so to do, particularly where an inquiry has to be held in connection with the offense or where it is necessary to have the report of experts, the court sitting in Criminal Court may remit the case for decision by the civil court.

Article 101. Compensation to Injured Party

(1) Where it appears that compensation will not be paid by the offender or those liable on his behalf on account of the circumstances of the case or their situation, the court may order that the proceeds or part of the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or a part of the fine or of the yield of the conversion into work, or confiscated family property be paid to the injured party.

(2) The granting of such compensation shall not be awarded except upon express application. It shall be proportionate to the extent of the damage suffered and to the needs of the injured party and the members of his family and shall be limited as a maximum to the amount of the damage as assessed by the Court or agreed by the parties.

(3) The claim of the injured party who has been compensated shall be assigned to the State which may enforce it against the person who caused the damage.

QUESTION 10

Mistake of law and ignorance of law are not defenses in Ethiopia. The court is directed to impose no punishment in justifiable cases.

Article 78. Mistake of Law and Ignorance of Law

(1) Ignorance of the law is no defence.

The Court shall, without restriction, reduce the punishment (Art. 185) applicable to a person who in good faith believed he had a right to act and had definite and adequate reasons for holding this erroneous belief.

The Court shall determine the penalty taking into account the circumstances of the case and, in particular, the circumstances that led to the error.

(2) In exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent, the Court may impose no punishment.

(3) The person who committed the breach of the law shall remain civilly liable for the injury caused.

The mistake of fact provisions of the Ethiopian Penal Code follow closely the provisions relating to criminal intent and criminal negligence. When there is no criminal intent, there is no offense, but criminal negligence is punishable in all cases where it results in an offense, regardless of a mistake of fact.

Article 76. Mistake of Fact

(1) Whosoever commits an offence under an erroneous appreciation of the true facts of the situation shall be tried according to such appreciation.

Where there is no criminal intention the doer shall not be punishable. Where he could have avoided the mistake by taking such precautions as were commanded by his personal position and the circumstances of the case (Art. 59), he shall be punishable for negligence in cases where such negligence is penalized by law.

(2) Mistake as to a fact which constitutes a specified offence shall not exclude the punishment of the doer for another offence constituted by the act he performed.

(3) The offence is committed where there is a mistake as to the identity of the victim or the object of the offence.

QUESTION 11

It should be pointed out that the Proposed Federal Code is unduly repetitious in the matter of separation of the jurisdictional base upon which federal prosecution rests from the definition of the offense. Rather, it fails to accomplish its stated objective. In a true code there is no reason to repeat what has already been stated elsewhere. For example, §1001(4) refers to §203 and is absolutely unnecessary. The most that is called for is perhaps a passing reference to §1001 in the "comments." This repetition permeates the Proposed Code. An example of unnecessary repetition is found in §1002(4). Why not include the word "federal" in front of the word "felony" in §1002(1)? Another example is found in §210(e) of the proposed Code, which speaks of any "key containing deposits of guano." If this phrase could not be omitted entirely by the legislator, would not the term "guano island" be more concise?

In Ethiopia the jurisdictions of various courts over the trial of offenses defined in the Penal Code are specified by means of a "schedule" which is an appendix to the Criminal Procedure Code. Each article of the Penal Code which defines a crime is listed in the schedule by number, then the name of the offense and the court having jurisdiction is indicated.

QUESTION 12

The substance of the Ethiopian provisions on extraterritorial jurisdiction is similar to that of the Proposed Federal Code. The methodology differs. Instead of repeating or listing many instances of extraterritoriality, one article makes reference to certain crimes which are given extraterritorial treatment.

Article 13. Offences Committed in a Foreign Country Against Ethiopia

This Code shall apply to any person who in a foreign country has committed one of the offences against the Emperor and the Empire, their safety or integrity, its institutions or essential interests as defined in Book III, Title I, Chapter I, and under Title V of the Special Part of this Code (Art. 248–272 and Art. 366–382).

Other instances of extraterritorial jurisdiction are covered by separate articles: offenses committed in a foreign country by an Ethiopian enjoying immunity (Article 14); offenses committed in a foreign country by members of the Armed Forces (Article 15); offenses committed in a foreign country against international law or universal order (Article 17); and other offenses committed in a foreign country by or against Ethiopians when the offense is also a crime in Ethiopia and has not been prosecuted in the foreign country (Article 18).

QUESTION 13

Only in certain instances is conspiracy to commit a crime considered to be an offense without some other offense actually being carried out. Only in cases of conspiracy against national security (Articles 248–269), or conspiracy to commit genocide or war crimes (Articles 281–286) or to raise a mutiny of the armed forces (Article 313) is conspiracy *per se* defined to be criminal conduct. Otherwise, the conspiracy must "materialize" before there is a crime (Article 472). In such cases, anyone who helped plan or prepare for the commission of the offense is guilty of the separate offense of conspiracy. In addition, for those who commit the planned offense, criminal conspiracy is treated as an aggravating circumstance for which the court must increase the penalty of the primary offense (Article 37).

QUESTION 14

Ethiopia does not have a "felony murder" doctrine. The individual must have an intent to commit the homicide before he may be found liable for it. He may be held liable, however, if he concurs in the homicide while in the company of others who actually perform the act.

Article 32. Principal Act: Offender and Co-Offenders

(1) A person shall be regarded as having committed an offence and punished as such if:

(a) he actually commits the offence either directly or indirectly, for example by means of an animal or a natural force; or

(b) he without performing the criminal act itself fully associates himself with the commission of the offence and the intended result; or

(c) he employs a mentally deficient person for the commission of an offence or knowingly compels another person to commit an offence.

(2) Where the offence committed goes beyond the intention of the offender he shall be tried in accordance with Article 78(3).

(3) Where several co-offenders are involved they shall be liable to the same punishment as provided by law.

The Court shall take into account the provisions governing the effect of personal circumstances (Art. 40) and those governing the award of punishment according to the degree of individual guilt (Art. 86).

Article 36. Accomplice

(1) An accomplice is a person who knowingly assists a principal offender either before or during the carrying out of the criminal design, whether by information, advice, supply of means or material aid or assistance of any kind whatsoever in the commission of an offence.

(2) An accomplice in an intentional offence shall always be liable to punishment.

(3) The punishment to be imposed shall be the punishment for the offence whether attempted or completed insofar as such offence does not go beyond the accomplice's intention (Art. 58(3)). The Court may, taking into account the circumstances of the case, reduce the punishment in respect to an accomplice within the limits specified by law (Art. 184).

Organized armed robbery is specified in the homicide article as an aggravating circumstance which can justify the death penalty for a homicide committed during its course.

Article 522. Aggravated Homicide—Homicide in the First Degree

(1) Whosoever intentionally commits homicide:

(a) with such premeditation, motives or means, in such conditions of commission, or in any other aggravating circumstances, whether general (Art. 81), or particular duly established (Art. 83), as to betoken that he is exceptionally cruel or dangerous; or

(b) as a member of a band or gang organized for carrying out homicide or armed robbery; or

(c) to further or to conceal another crime; is punishable with rigorous imprisonment for life, or death.

(2) Death sentence shall be passed where the offender has committed murder in the first degree while serving a sentence of rigorous imprisonment for life.

But even in Article 522 the individual intent requirement is retained.

Ethiopia does not have a federal system. Some comparable provisions of the Ethiopian Penal Code are as follows.

Article 474. Public Provocation to or Defence of a Crime

Whosoever publicly, by word of mouth, writing, image, gesture or otherwise:

(a) provokes others to commit acts of violence or grave offences against the community, individuals or property; or

(b) defends or praises such offence or its perpetrator; or

(c) launches an appeal or starts a collection for the payment of pecuniary punishments pronounced by due process of law, with the intention of making common cause with the convicted person or of upholding his deed or of showing disapproval of the authorities, or who knowingly takes part in such activities, is punishable with simple imprisonment or fine.

Article 475. Prohibited Traffic in Arms

(1) Whosoever:

(a) apart from offences against the security of the State (Art. 254), makes, imports, exports or transports, acquires, receives, stores or hides, offers for sale, puts into circulation or distributes, without special authorisation or contrary to law, weapons or munitions of any kind; or

(b) without indulging in trafficking, knowingly sells, delivers or hands over arms to suspect or dangerous persons, is punishable with simple imprisonment, without prejudice to the imposition of a fine, where he has acted for gain or has made a profession of such activities, and to confiscation of material seized.

(2) Occasional violations of police regulations, and the carrying or use of prohibited weapons, are subject to the penalties for petty offences (Art. 763 and 764).

Article 478. Forbidden Assemblies

(1) Whosoever forms, organizes or commands, on the public highway or in a public place, assemblies forbidden by law, or of his own free will takes part in them, is punishable with a fine not exceeding one thousand dollars. Ringleaders, organizers or commanders are punishable with simple imprisonment not exceeding one year.

(2) Where the unlawful assembly is armed, simple imprisonment shall be for at least three months, and may be increased up to the general maximum in the case of ringleaders, organizers and commanders and those who have carried weapons or knew that weapons were being carried.

Article 479. Alarming the Public

(1) Whosoever spreads alarm among the public:

(a) by threat of danger to the community; or to the life, health or property of individuals, especially that of invasion, assassination, fire, devastation or pillage; or

(b) by deliberately spreading false rumours concerning such happenings or general disturbances, or imminent catastrophe or calamity, is punishable with simple imprisonment or fine.

(2) In more serious cases likely to cause, or having caused, serious disturbances or disorder, the punishment shall be rigorous imprisonment not exceeding three years, subject to the application, as appropriate, of more severe specific provisions where there are criminal consequences.

Article 480. False Rumours and Incitement to Breaches of the Peace

Whosoever, apart from offences against the security of the State (Art. 252, 269(e) and 273(a)):

(a) starts or spreads false rumours, suspicions or false charges against the Government or the public authorities or their activities, thereby disturbing or inflaming public opinion, or creating a danger of public disturbances; or

(b) by whatever accusation or any other means foments dissension, arouses hatred, or stirs up acts of violence or political, racial or religious disturbances, is punishable with simple imprisonment or fine.

Article 482. Rioting

(1) Whosoever, of his own free will, takes part in an unlawful assembly in the course of which violence is done collectively to person, estate or property, is punishable with simple imprisonment for at least one month, or fine.

(2) The organizers, instigators or ringleaders are punishable with fine and with simple imprisonment for not less than six months or, in grave cases, with rigorous imprisonment not exceeding five years. All persons who have individually committed acts of violence against person or property are punishable with rigorous imprisonment not exceeding three years, where their act does not constitute an offence subject to more severe punishment under any other provision of this Code.

QUESTION 16

The Ethiopian Penal Code does have articles the object of which are similar to §1104 (Para-Military Activities) of the Proposed Federal Code, except that "political purposes" are not required as the object of the activity. These articles are designed to be supplemented by administrative regulations.

Article 476. Forbidden Societies and Meetings

Whosoever:

(a) founds, organizes or commands a society, band, meetings or assemblies forbidden, either generally or from time to time by law, by the Government or by the competent authority; or

(b) knowingly takes part in such activities: or

(c) knowingly places premises or land at the disposal of forbidden societies, meetings or demonstrations, whether for consideration or free of charge, is punishable with a fine not exceeding five hundred dollars. Ringleaders, organizers or commanders are punishable with simple imprisonment not exceeding six months.

Article 477. Secret Societies and Armed Bands

Where unlawful societies whose activities and meetings are secret, or unlawful armed societies or bands, especially for military training or shooting, or ostensibly sporting in character, are involved, the punishment shall be simple imprisonment and a fine, which may be up to the general maximum in the case of organizers, commanders or active members.

QUESTION 17–A. DRUGS

Book IV of the Special Part of the Ethiopian Penal Code is entitled "Offences Against the Public Interest or the Community." Title VIII of Book IV, "Offences Against Public Health," contains an article concerning drugs.

Article 510. Production, Making or Distribution of Poisonous or Narcotic Substances

(1) Whosoever, without lawful authority, produces or makes, transforms, imports, exports or transports, acquires or receives, stores, offers for sale or distributes, or procures for another, poisons, drugs or narcotic substances, is punishable with simple imprisonment for not less than three months, and with fine not exceeding twenty thousand dollars.

(2) The same punishment may be inflicted upon anyone who knowingly places at the disposal of another, even privately, premises where the taking of drugs or narcotic substances is practised.

(3) The court may pass sentence of rigorous imprisonment not exceeding five years and impose a fine not exceeding thirty thousand dollars:

(a) where the offence is committed by a band or association organized for this traffic, or by a person who makes a profession of such felonious activities; or

(b) where such forbidden toxic substance or access to the premises is furnished knowingly, for gain or for an improper motive, to an infant or young person, a mental defective or a drug addict.

Section (2) appears designed to encourage landlords to inform police authorities of drug abuse discovered on their premises.

QUESTION 17–B. ABORTION

The Ethiopian Penal Code contains extensive provisions relating to abortion (Articles 528–536). Generally, the deliberate termination of a pregnancy is an offense (Article 528). The nature and extent of the punishment (Article 529) depends upon whether the abortion is procured by the pregnant woman herself or by another person, in which case the penalty is greater, and in the latter case

according to whether or not she gave her consent (Article 530). If the woman's consent was not voluntary, the penalty is increased.

The advertising for contraceptives or abortive means is punishable under the code of petty offenses (Articles 528(2) and 802). An attempt to procure an abortion on a woman wrongly supposed to be pregnant is an offense, but the court may, without restriction, reduce the punishment (Articles 532 and 529). Where the abortion has been performed as the result of "an exceptionally grave state of physical or mental distress, especially following rape or incest, or because of extreme poverty," the court may mitigate the punishment without restriction (Article 533).

In addition, there is provision for the termination of pregnancy on medical grounds (Article 534). Two physicians must concur, in writing, of the necessity "to save the pregnant woman from grave and permanent danger to life or health which it is impossible to avert in any other way." The second doctor must be qualified as a specialist in the alleged defect of health from which the pregnant woman is suffering. In addition, the woman's consent, or, where she is incapacitated, her legal representative's consent must be obtained and "duly substantiated" (Article 534). The confirming physician is obligated to report his findings to health authorities within a time provided by law and the terminating physician must report the abortion "forthwith." Penalties, including a temporary suspension of the right to practice medicine, are provided for failure to comply with the reporting requirements (Article 535). Special provisions cover emergency situations (Article 535).

QUESTION 17–C. PROSTITUTION

Prostitution is not a crime in Ethiopia. However, there are provisions against the exploitation of prostitution by another.

Article 604. Habitual Exploitation for Pecuniary Gain

Whosoever, for gain, makes a profession of or lives by procuring or on the prostitution or immorality of another, or maintains, as a landlord or keeper, a disorderly house is punishable with simple imprisonment and fine.

There are also provisions against trafficking in women, infants and young persons (Article 605), and organization of traffic in persons (Article 607). The former includes keeping a disorderly house and the latter includes the making of "arrangements or provisions of any kind" for such traffic.

QUESTION 17–D. OBSCENITY

With respect to obscenity, there are several detailed provisions in the Ethiopian Penal Code in a section entitled "Offences Tending to Corrupt Morals." The deliberate performance in a public place or within sight of the public of "the sexual act or any other obscene act or gesture grossly offensive to decency or morals" is prohibited (Article 608). Trafficking or trading in obscene or indecent publications is also forbidden (Article 609).

QUESTIONS 17–E. HOMOSEXUALITY

Section II of Title IV, Book V, of the Sepcial Part of the Ethiopian Penal Code is entitled "Sexual Deviations." Homosexual activity between consenting adults is criminal conduct.

Article 600. Unnatural Carnal Offences

(1) Whosoever performs with another person of the same sex an act corresponding to the sexual act, or any other indecent act, is punishable with simple imprisonment.

(2) The provisions of Art. 597 are applicable where an infant or young person is involved.

There are provisions for aggravation of the offense (coercion, use of violence, etc.) and prohibition of other unnatural acts. This section of the Code concludes with the following article:

Article 603. Demonstrable Pathological Deviations Reserved

Nothing in this section shall prevent the application of curative or protective measures (Art. 134 and 135) in pathological cases where, according to expert opinion, the offender is partially irresponsible.

QUESTION 18

The Ethiopian Penal Code has one article which prohibits unauthorized gun traffic and one provision which prohibits criminal use of explosives and incendiary or poisonous substances. They are drafted in a broad fashion. The arms trafficking article is drafted to be used in conjunction with a regulatory scheme of gun control. Gun traffic is prohibited "without special authorization or contrary to law."

Article 475. Prohibited Traffic in Arms

(1) Whosoever:

(a) apart from offences against the security of the State (Art. 254), makes, imports, exports or transports, acquires, receives, stores or hides, offers for sale, puts into circulation or distributes, without special authorisation or contrary to law, weapons or munitions of any kind; or

(b) without indulging in trafficking, knowingly sells, delivers or hands over arms to suspect or dangerous persons, is punishable with simple imprisonment, without prejudice to the imposition of a fine, where he has acted for gain or has made a profession of such activities, and to confiscation of material seized.

(2) Occasional violations of police regulations, and the carrying or use of prohibited weapons, are subject to the penalties for petty offences (Art. 763 and 764).

Article 494. Illicit Making, Acquisition, Concealment or Transport

(1) Whosoever makes explosives, incendiary or poisonous substances, knowing that they are intended for unlawful use, is punishable, according to the circumstances, with rigorous imprisonment not exceeding ten years, or with simple imprisonment for not less than six months.

(2) Whosoever, knowing that another wishes to make unlawful use of such substances, furnishes him with means or instructions for making them, is punishable with rigorous imprisonment not exceeding five years, or with simple imprisonment for not less than three months.

(3) Whosoever, knowing that they are intended for unlawful use, imports, acquires or procures explosive, incendiary or poisonous substances or the materials used in their manufacture, hands them over to or receives them from another, or stores, conceals or transports them, whether for consideration or free of charge, is punishable with rigorous imprisonment not exceeding five years, or with simple imprisonment for not less than three months.

QUESTION 19

Ethiopia employs the death penalty extensively in matters of state, including attempts against the emperor's life or against the imperial dynasty, war crimes, espionage, treason, and so forth. Usually the death penalty is an alternative to a prison sentence and is to be applied only "in cases of exceptional gravity." These offenses are found in Book III of the Code, "Offences Against the State or Against National or International Interests."

The death penalty may be imposed for aggravated homicide (homicide in the first degree) (Article 522). The death sentence is compulsory "where the offender has committed murder in the first degree while serving a sentence of rigorous imprisonment for life" [Article 522(2)].

The aggravated robbery article also contains captial punishment for gangsters, as follows:

Article 637. Aggravated Robbery

(2) The court may order rigorous imprisonment for life, or in the most serious cases, the death penalty, where the offender has acted together with a gang, used dangerous weapons, means imperilling collective security or means of particular cruelty, or where the acts of violence committed have resulted in permanent disability or death.

Armed robbery committed habitually by a gang is punishable with death.

There is no special provision for sentencing in capital cases. In all cases where the accused is found guilty, the court must ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation (Article 149, Criminal Procedure Code). The prosecutor may call witnesses as to the character of the accused. Where the prosecutor has made submissions on

sentence, the accused is entitled to reply and may call witnesses as to his character. It is provided that "where the accused does not admit any fact regarding his antecedents, the prosecutor shall be required to prove the same." In addition, the court itself may at any time before giving judgment call any witness whose testimony it thinks is necessary in the interests of justice (Article 143, Criminal Procedure Code).

The sentencing provisions of the Ethiopian Penal Code contain alternative or flexible penalties for almost every crime. Article 86 of that Code provides that "the penalty shall be determined according to the degree of individual guilt, taking into account the dangerous disposition of the offender, his antecedents, motive and purpose, his personal circumstances and his standard of education, as well as the gravity of his offense and the circumstances of its commission." The absence of a jury system does not make separate sentencing hearings superfluous. The sentencing process assumes that guilt has been established. At that time the court may hear testimony from all sources in order to properly exercise its duty under Article 86.

QUESTION 20

The Ethiopian Penal Code takes an approach similar to that taken by §703 to the problem of prosecution for multiple related offenses in that it limits the sentences which can be imposed under such circumstances.

Article 192. Simultaneous Breach of Several Provisions

Where by one and the same act the offender committed a breach of several criminal provisions (notional concurrence Art. 82(a)), the Court may aggravate the penalty according to the provisions of Art. 189 where the offender's deliberate and calculated disregard for the law justifies aggravation; it shall be bound to do so in cases of aggravation expressly provided by law (Art. 63(2)).

In other cases, the Court may only impose the maximum penalty prescribed by the most severe of the relevant provisions.

Article 189. Circumstantiated Aggravation in Case of Concurrent Offences

(1) In case of material concurrence of offences (Art. 82(a)) the court shall determine the penalty on the basis of the general rules set out hereafter, taking into account, for the assessment of the sentence, the degree of guilt of the offender:

(a) where capital punishment is provided for one of the concurrent offences this penalty shall override any other penalties entailing loss of liberty;

(b) in case of several penalties entailing loss of liberty being concurrently applicable the court shall pass an aggregate sentence as follows: It shall impose the penalty deserved for the most serious offence and shall increase its length taking into account the provisions of the law or the concurrent offences; it may, if it thinks fit, impose a penalty exceeding by half the basic penalty without, however, being able to go beyond the general maximum fixed by law for the kind of penalty applied;

(c) in case of concurrence between a penalty entailing loss of liberty and a fine the court may impose both penalties taking into account the various provisions applicable or the concurrent offences; it may not exceed the general maximum prescribed by law for each kind of penalty;

(d) in cases where several fines have to be applied the Court shall impose a single fine the amount of which shall not exceed the aggregate amount of the separate fines, nor the general maximum amount provided by law, save in cases where the offender acted for gain (Art. 90).

(e) Where the court orders the forfeiture of the property owned by the offender it may not, in case of concurrence, impose a fine either as principal or as secondary penalty.

(2) Any secondary penalty or preventive, corrective or safety measure may be applied even though its application is justified under only one of the relevant provisions or in respect of only one of the concurrent offences.

The effect of Article 189 is to mitigate the penalty for concurrent offenses. These provisions focus, in the disposition stage of the proceedings, upon the problem of the defendant's criminality and the need for rehabilitation rather than upon piling up the maximum punishment possible.

The problem of double jeopardy and the related doctrines of *res judicata* and *collateral estoppel* are partially provided for by Article 2(3) of the Ethiopian

Penal Code, which simply states that "nobody shall be punished twice for the same act."

Article 60 affords a measure of protection from double jeopardy in that it "merges" certain acts into a single offense so that multiple crimes do not result where, in many instances, several offenses could be charged under American practice. Conviction of "lesser included offenses" is allowed if proof of the most serious offense fails (Article 113(2), Criminal Procedure Code).

Article 60. Unity of Guilt and Penalty

(1) The same criminal act or a combination of criminal acts against the same protected right flowing from a single criminal intention or act of negligence, cannot be charged under two or more concurrent provisions of the same nature.

(2) Successive or repeated acts against the same protected right flowing from the same initial criminal intention or act of negligence and aiming at achieving the same purpose constitute one offence; the offender shall be charged with the said offence and not with each of the successive acts which constitute it.

(3) In cases of offences resulting from injury to property, the putting into circulation of counterfeit coins, or the use of forged documents, the subsequent acts performed by the offender himself after the commission of the main offence for the purpose of carrying out his initial criminal scheme shall not constitute a fresh offence liable to punishment and are merged by the unity of intention and purpose.

Once it is decided that multiple offenses have been committed, because those offenses are not "merged" into a single liability under Article 60, then we speak of the offenses as being "concurrent." There are two types of concurrence defined in Article 82, previously discussed in the answer to Question #9. "Concurrence" should be thought of as the relationship between offenses committed by an offender if they are not merged under Article 60.

In Ethiopia the English doctrine of "autrefois acquit" has been adopted and is analogous to our "double jeopardy." Acquittal of any concurrent offense will not be the basis of autrefois acquit. Likewise, conviction of any "offenses" is not implied, and autrefois acquit does not apply, in the case of concurrence.

The problems resolved by §706 and §709 of the Proposed Federal Code do not exist in Ethiopia because there is a unitary legal system. Military offenses are also included in the Ethiopian Penal Code.

Ethiopia does not recognize a conviction or acquittal in a foreign country as a bar to a fresh prosecution in Ethiopia for cases in which Ethiopia considers itself to have "principal jurisdiction." Principal jurisdiction includes those crimes committed within Ethiopian territory (Article 10), and certain crimes over which extraterritorial jurisdiction is specifically recognized (see answer to Question #12).

Article 16. Effect of Foreign Sentences

(1) In all cases where an offender who is subject to Ethiopia's principal jurisdiction, (Art. 11, 13, 14 para (1) and 15 para (2)) has been sentenced in a foreign country, he may be tried and sentenced again on the same charge in Ethiopia, if he is found in Ethiopia or was extradited to her.

(2) His discharge or acquittal in a foreign country shall be no bar to a fresh sentence being passed in Ethiopia in accordance with the Ethiopian Code.

(3) Where by reason of the offence committed, the offender has already been convicted in a foreign country and has undergone the whole or part of the punishment, the court shall deduct the punishment already undergone from the new sentence to be passed.

In cases where Ethiopian courts have a "subsidiary jurisdiction" only, the offender cannot be tried and sentenced in Ethiopia if he was "regularly discharged or acquitted for the same act in a foreign country" (Article 20). "Subsidiary jurisdiction" exists:

1. Where a member of the Ethiopian Armed Forces in such capacity commits an offense against the ordinary law in a foreign country, excepting offenses against international law and specifically military offenses contained in the Ethiopian Penal Code (Article 15);

2. Over offenses against international law or treaty and offenses against public health or morals as contained in the Ethiopian Penal Code (Article 17); and

3. Over other offenses committed in a foreign country as specified in Article 18.

Article 18. Other Offences Committed in a Foreign Country

(1) This Code shall also apply to any person who has committed an offense in a foreign country against an Ethiopian national or to any Ethiopian national who has committed in a foreign country an offence of another kind than those specified in the foregoing Articles, if the offender was not tried in the foreign country for the offence, provided that:

(a) the act to be tried is prohibited by the law of the State where it was committed and by Ethiopian law; and

(b) it is of sufficient gravity under the latter law to justify extradition.

(2) In the case of all other offences committed in a foreign country by a foreign national, the offender shall, save as otherwise expressly provided, failing extradition, be prosecuted and tried only if the offence is punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years.

If the offender was tried and sentenced in a foreign country but did not undergo his punishment, or served only part of it in the foreign country, the punishment, or the remaining part of it, may be enforced in Ethiopia if it is not barred by limitation [Article 20(2)]. Should the punishments differ as to their nature or form, such punishment as is the closest to that imposed in the foreign country is enforced in Ethiopia [Article 12(3)]. When extraterritorial jurisdiction is involved, the punishment to be imposed cannot be more severe than the heaviest penalty prescribed by the law of the country of commission, where such country is recognized by Ethiopia [Article 19(3)].

Ethiopia does not require provisions similar to those of §709 because, at least in cases involving its "principal jurisdiction," it does not recognize the former prosecution as a bar. It will only deduct punishment already served in the case of a prior foreign conviction (Article 16). In addition, as previously stated, there is currently no federal system in Ethiopia.

France

QUESTION 1

The French Penal Code of 1810 does not enjoy the same fame as the Napoleonic Civil Code of 1804. It consists of short preliminary provisions (Arts. 1–5) and four books.

Punishable offenses are divided into three groups according to penalties: major crimes (*crimes*), minor crimes (*délits*), and contraventions (Art. 1). Articles 2 and 3 deal with attempts. Article 4 reaffirms the principle of *nulla poenae sine lege penale*, and Article 5 is devoted to the computation of penalties for several major and minor crimes and to certain aspects of clemency.

Book I covers punishments in general for major and minor crimes and their effects; Book II, persons criminally responsible, excusable for major and minor crimes; Book III, major and minor crimes and their punishments; and Book IV, contraventions and their punishments.

The Penal Code was greatly modified by several ordinances of December 1958 (Nos. 58–1296 to 58–1300) and by the Ordinance of June 4, 1960. These amendments deal with the range of penalties, major and minor crimes against the State, and riots.

Since 1810 considerable additions have been made so that today the Penal Code actually consists of three parts: the first part is legislative (including Books I–IV mentioned above) the second, regulatory (public administration regulations and decrees issued by the Council of State, as instituted by Decree No. 58–1303 of December 23, 1958), and the third part, covering decrees, instituted by Decree No. 60–896 of August 24, 1960.

The second part consists of 43 articles preceded by the letter R. Articles R1 to R23 deal with penalties pertaining to sojourn, Article R24, with members of the European Community and the security of the allies in France, Articles R24–1 to R24–13 concern the measures directed against violators of morality, Articles R24–14 to R24–31 regulate scientific research on live animals, and Articles R25 to R41 determine certain contraventions and penalties applicable to them.

The third part contains decrees issued by the executive power and consists of only 15 articles preceded by the letter D.

According to P. Bouzat and J. Pinatel, the basic features of the French Penal Code are as follows:[1]

The Penal Code is a code that is:

(A) *Severe.* The compilers of the Code, in fact, learned from experience and were influenced by the Napoleonic tendency toward harshness (*see infra* No. 94), endeavored to strengthen the repression which the constitutent assemblies, nourished by philosophical illusions, had weakened by imprudence. Thus, the Code reestablished certain penalties abolished in 1791 (general confiscation, branding iron, mutilation of the hand before execution for parricide), perpetual penalties, and increased cases of the application of capital punishment. However, as a concomitant to the reestablishment of perpetual penalties, it reassured the right to clemency.

(B) *Penetrated by the utilitarian spirit.* The compilers of the Penal Code, inspired by the ideas of Beccaria (which they misinterpreted), made social utility the dominating idea, voluntarily relegating the idea of justice to second place. This point of view also contributed to the harshness of the penalties prescribed by the Code. It also explains the slight immorality of certain skillfull measures of criminal policy such as the absolving excuse given to those who, having participated in an attempt against State security or the counterfeiting of money, denounced their accomplices (Art. 105 ff., Art. 138).

(C) *Having a transitional character concerning the determination of the power of judges.* The compilers of the Code adopted a solution midway between the arbitrariness of the old regime and the system of fixed penalties. Refusing to give entire freedom to judges to establish the amount of the penalty, they abolished fixed penalties, leaving the judges a certain power of discretion between minimum and maximum; they increased this power in correctional matters, introducing mitigating circumstances when the prejudice did not exceed 25 Fr. (Art. 363).

(D) *Based on abstractions.* The Criminal Code, and this is without doubt the most serious objection which can be made, is a purely legal construction dominated by abstract rules and fictions. It considers the criminal an abstract being conceived by reason, but not a real being subject to variable motivations. It considers an offense, not an act of a delinquent manifesting his criminal temperament, but a pure legal abstraction having a proper and unchangeable nature. Consequently, penal responsibility is purely objective, calculated according to the nature of the offense and not to the personality of the delinquent. The Criminal Code considers all delinquents identical and in the face of the same offense punishable by the same penalty.

From the point of view of legislative technique, the Code suffers from the many shortcomings observed by R. Merle and A. Vitu:[2]

The Criminal Code, on the other hand, is an *imperfect work.* Technically it is inferior to the Civil Code, its senior by 6 years. Its technique is mediocre, because certain provisions of penal law, properly so-called, were unskillfully inserted in the Code of Criminal Investigation (for instance, rules on the application of penal law in space, or the principle of nonaccumulation of penalties, or rules on the period of limitations of penalties). It is divided into four Books according to an illogical plan. . . .

General theories are absent from the Code, such as fault or state of necessity, or barely formulated. Others were written concerning only major or minor crimes and the courts extended them to contraventions (such as concepts of insanity, absolute necessity, Art. 64).

Others are hidden in the special part of the Code, concerning certain groups of contraventions, while they should be included in the general part; for instance, justifying facts (Arts. 327 to 329) and excusable provocation (Arts. 321 to 326) appears only on homicides, assault and battery, while their importance is much greater.

Under the influence of dominant ideas in the 19th century, the Criminal Code underwent several profound reforms. Among these should be mentioned the great Law of April 28, 1832, which modified 162 articles of the Code generally directing the moderation of penalties. The said Law abolished certain

[1] P. Bouzat, *and* J. Pinatel, *Traité de droit pénal et de criminologie*, v. 1. Paris, Dalloz, 1970, p. 97.

[2] R. Merle *and* A. Vitu, *Traité de droit criminel*. Paris, Editions Cujas, 1967, p. 149.

penalties, confiscation of property, branding iron, iron collar, the mutilation of hands, and restricted the application of capital punishment, and defined attempt more precisely. The Law of May 31, 1854, abolished civil death and a great number of violations considered minor crimes were qualified as contraventions (the so-called correctionalization) by the Law of May 13, 1863.

The other measures taken from 1875 to 1914 were directed toward the individualization of penalties for the different categories of delinquents, such as the Law of May 27, 1885, which instituted exile (*relégation*) for professional and habitual delinquents, the Law of March 26, 1891, called the Law of Berenger, which permitted the application of suspended sentences for first offenders, and more severe penalties for recidivists, and the Law of July 22, 1912, which instituted probation for juvenile delinquents.

The third period is characterized by a return to harsh penalties for offenses against: a) economic interests (more energetic repression of commercial and fiscal fraud), b) family and social interests (abandonment of the family, Law of February 7, 1924; abortion, Law of March 27, 1923; bigamy, Law of February 17, 1933; infanticide, Law of September 2, 1941), c) State security (Decree-Law of July 29, 1939).

Despite the humanitarian tendencies to soften the penalties which dominated the French government after the liberation, in the opinion of Bouzat and Pinatel, the following factor contributed to the return to severe punishment:[3]

Unfortunately, the long persistence of the black market, a general increase in delinquency, and especially armed aggression, contributed, on the contrary, to severity. (a) It is characteristic that the regime of economic violations instituted by the ordinances of June 30, 1945, enacted during the period of the black market, took a definitive place in our penal law. (b) It is characteristic, while one part of public opinion asked for the abolition of capital punishment, legislation, under pressure from the other side of public opinion, established new cases for the application of capital punishment. For instance, the Law of November 23, 1950, punished armed robbery with capital punishment; the Law of April 13, 1945, prescribed capital punishment for habitual mistreatment of a child, even without the intention to kill. (c) The anxiety for national defense and the defense of the regime entailed the rigorous repression of offenses against State security. (d) The development of a greater sense of solidarity led the legislator to make the omission to give assistance a crime.

QUESTION 2

The articles of the Criminal Code are numbered in sequence. The original numbering remains unchanged although some articles have been abolished.

QUESTION 3

Marc Ancel in his introduction to the translation of the French Penal Code[1] observed that the Penal Code:

> . . . is based exactly upon the essential premises of classical law, legality, *mens rea* and retributive punishment. . . . It states abstract rules defining crimes objectively viewed, but is only concerned with crime as defined by penal law; the criminal as viewed by both the Napoleonic and the revolutionary legislator, is an abstract being, always equal to himself and identical in every criminal event. The idea of individualization is profoundly alien to the Penal Code as presented in its text of 1810. This idea was introduced into French penal law only through an evolution precipitated by the revision of 1832, and followed by enactment of several special laws which were not incorporated in the Penal Code.

The classical doctrine ignored criminal intent, attaching basic importance to violations and their external elements. Exegetic methods of interpretation were also unfavorable to the theory of intent.[2]

That attitude changed when the legislator, under the influence of the new approach to the delinquent, leaned more and more toward the individualization

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[3] Bouzat, *op. cit.*, v. 1, p. 121–122.

[1] G. O. W. Mueller, *editor*, *The French Penal Code*, South Hackensack, N.J., Fred B. Rothman & Co., 1960, p. 8.

[2] J. Lebret, "Essai sur la notion de l'intention criminelle," *Revue de science criminelle et de droit pénal comparé* 1938, p. 44 ff.

of penalties. Thus, the elements of criminal intent and motivation, in French theory and practice, acquired greater importance.[3]

The honorary first President of the Court of Appeals of Angers, Pierre Mimin, observed the following:[4]

> French law does not furnish any general idea of intention. It is the same, more or less, for all the concepts reported in this study. There are no texts providing information on motivation in criminal law, error of law, error of fact, or on the relationship between result and qualification. The necessity for a separate will from intent does not appear.

He concluded that efforts to provide an adequate definition of criminal intent had been unsuccessful.

According to P. Bouzat the best definition of criminal intent was provided by Garçon:[5] "Criminal intent, *i.e.*, the knowledge of the delinquent that he has performed an illegal act."

It is generally admitted that there are intentional and unintentional offenses. Almost all major crimes are intentional offenses. Article 75 of the Penal Code is an exception.

Minor correctional crimes consist in part of intentional offenses (mainly those established in the Penal Code) and of unintentional offenses, mainly established by special laws. Before the reform of 1958, almost all police contraventions were unintentional offenses. However, by the Decree of December 23, 1958, the fifth class of contraventions which before had been considered minor crimes was established.

In French practice a distinction is made between criminal intent and fault. According to G. Stevani and G. Levasseur:[6]

When the perpetrator wanted the act and its consequences and performed an act to produce them, it is said that he had criminal intent or penal *dolus* (murder, assassination, robbery). When the perpetrator wanted an act but not its consequences, which he should have foreseen or could have avoided, then it was a criminal fault (homicide by injury, imprudence, or contravention).

The terms "intention" or *dolus* and "fault" are seldom used in the Penal Code or in later legislation. For the designation of criminal intent the terms: deliberately, fraudulently, knowingly, with purpose, or even willfully are used. And, for the description of a criminal fault, several expressions are used: lack of skill, imprudence, inattention, negligence or nonobservance of the rules (concerning homicide and involuntary injuries, Art. 319, 320, R.40-4, Penal Code), lack of precaution, or lack of repair or maintenance (Art. R.34-3, 4, Penal Code).

Criminal intent is not always of the same degree. Classical penal law makes a distinction between general and special, simple and aggravated, determined and undetermined, direct and indirect. General intent consists in the will to accomplish an act prohibited by law. Sometimes the law subordinates the offense to a specific will (Art. 379, "whoever fraudulently takes away" or Art. 417, "whoever prejudices French industry"), when it is special intent. Simple as opposed to aggravated intent is connected with premeditation. According to Article 297: "Premeditation consists of a decision arrived at beforehand to make a homicidal attack on a certain person or anyone encountered, regardless of any of the circumstances or conditions on which the act may depend."

In spite of the different terminology used to designate fault, according to A. Vitu and R. Merle:[7]

Penal fault consists either in not foreseeing the injurious consequences of the accomplished act, or in not believing that they will occur, or in not taking the necessary measures to prevent them. The result is not imputable to the will of the perpetrator, but rather to the fault of the intelligence or inertia of the will.

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[3] 2 Dalloz, *Répertoire de droit pénal et de procédure pénal*. Paris, Jurisprudence Générale Dalloz, 1968.

[4] P. Mimin, "L'intention et le mobil" *in La Chambre Criminelle et sa jurisprudence*. Recueil d'études en hommage à la mémoire de Maurice Patin. Paris, Editions Cujas, 1965. p. 115.

[5] *Id.*

[6] G. Stefani *and* G. Levasseur. *Droit pénal général et procédure pénale*. Paris, Dalloz, 1971. p. 186.

[7] R. Merle *and* A. Vitu. *Traité de droit criminel*. Paris Editions Cujas, 1967. p. 450.

Criminal fault is different from contraventional fault which is not a result of imprudence or negligence, but simply consists of the violation of regulations. Therefore, a very important difference follows from the point of view of evidence. Criminal fault must be proven by the prosecution, whereas no such evidence is necessary on the part of the prosecution in contraventional fault. It is also of great importance for the reparation of damage.

As pointed out by G. Stefani and G. Levasseur, "The French Penal Code is loyal to the classical concept, considering only intent, and not taking motivation into account at all." [8]

If motivation has no effect on the punishment in theory, in practice it is different. In order to avoid the harshness of the law, the courts take mitigating circumstances into account (Art. 463, Penal Code).

QUESTION 4

In cases of intentional offenses, the penalty is not subject to the results of the offense. In certain cases, even the attempt is punishable. The situation is quite different in unintentional offenses. Even the most serious fault is not sufficient to entail a sanction; it is necessary that causation exists between the fault and the results. As an illustration, the provisions of Article 309 of the Penal Code could be mentioned.

For a long time the courts considered that the causality had to be direct and immediate; actually such a correlation is no longer required.[1]

According to R. Merle and A. Vitu [2] actually the ritual formula in all decisions is as follows:

> . . . considering that the provisions of Articles 319 and 320 punish any person who involuntarily was the cause of a homicide or wounds, it is not required that this cause be direct and immediate.

The authors concluded that it is possible to connect most of the decisions either to the theory of adequate causality, or to the approximative equivalence of the conditions and that the Supreme Court is leaning more toward the thesis of the equivalence of conditions.[3]

QUESTION 5

Article 64 of the Penal Code reads as follows "If the person charged with the commission of a major crime was insane at the time of commission or acted out of absolute necessity, there shall be no major or minor crime."

According to Stafani and G. Levasseur: [4]

In penal law the term *démence* (insanity) designates all forms of mental alienation. It applies to congenital (cretin, idiot, imbecile) afflictions of the intelligence as well as those acquired as a result of illness (general paralysis, early insanity).

The determination of insanity is a question of fact. When there is any doubt about mental capacity, a medical examination by psychiatrists may be requested by the prosecution or by the parties concerned. The experts are chosen from a national list established by the office of the Court of Cassation or from a list prepared by the courts of appeal after consultation with the General Procurator (Art. 157 of the Code of Criminal Procedure).

In order to apply the clause of insanity, it must be established that the condition existed at the time of the commission of the offense and that it was total. If insanity is established during the preliminary investigation, the investigating judge must issue an ordinance that there is no ground for prosecution. In the court of assizes, the question of insanity is included in the general questionnaire of guilt. If the defendent is acquitted, the court must release him. Only the prefect or members of the family may ask to have the person concerned put in a mental institution.

Insanity is the subjective cause of nonresponsibility which affects only the insane person, but not others who collaborated in the commission of the offense, i.e., joint perpetrators, accomplices. If the accused is acquitted by

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[8] Stefani, *supra* note 6 at p. 189.
[1] Répertoire, *op. cit.*, p. 7.
[2] R. Merle, *op. cit.*, p. 419.
[3] *Id.* at 419.
[4] G. Stefani, *op. cit.*, p. 263. For different forms of mental alienation *see* P. Bouzat, *op. cit.*, v. 1, p. 325 ff.

reason of insanity, the court may charge all or part of the costs to him (Art. 474 C.C.P.).

QUESTION 6

Intoxication may result from the drinking of alcoholic beverages or from the use of narcotics (morphine, cocaine, etc.).

In case of alcoholic intoxication, several situations may occur. If the intoxicated person is in a state of delirium tremens then there is veritable insanity in the meaning of Article 64 of the Penal Code. Except for this extreme case, this type of intoxication does not constitute a cause of irresponsibility. On the contrary, according to the provisions of Article L.1 of the Traffic Code (*Code de la route*), the fact of intoxication constitutes an aggravating circumstance in a case of homicide or involuntary injury and the penalties are doubled.[1]

Also, according to the provisions of Article 65 of the Beverage Code (*Code des mesures concernant les débits des boissons et la lutte contre alcoholisme*, Journal officiel, Febr. 10, 1955, p. 1575) anyone who is found in the streets, roads, plazas, cafés, cabarets, or other public places in an evident state of intoxication shall be punished with a fine of from 200 Fr. to 1200 Fr. In case of relapse, the penalty may be doubled and connected with the deprivation of certain rights: the right to vote, to be elected, to be appointed to public duties, to carry arms (Art. 66).

Dangerous alcoholics may be placed under the surveillance of a public health authority (Art. L335-1) under the conditions established in Article L.35-2 of the Code of Public Health.[2]

Similar problems arise concerning drug addicts. Addicts accused of any of the minor crimes specified in Articles L.627 and L.628 of the Code of Public Health may be compelled by an order of the examining magistrate, upon the advice of a special commission, to undergo treatment to correct the addiction. Failure to comply with this order may be punished by imprisonment for from 6 days to 2 months and a fine of from 360 Fr. to 10,000 Fr.

Decisions taken for the cure of addicts are not entered in the judicial register.[3]

QUESTION 7

The French Penal Code considers self-defense a right and therefore the use of force is justified. The pertinent articles read as follows:

Art. 328.—When homicide, wounding, or striking was compelled by the immediate and actual necessity to defend oneself or another no major or minor crime has been committed.

Art. 329.—Circumstances of immediate and actual necessity include the following:

1. Homicide, wounding or striking, committed at night, in repelling a person who is scaling or breaking down fences, walls or entrances of inhabited dwelling houses or apartments, or of their enclosed yards.

2. Acts committed in defending oneself or another against violent burglars or pillagers.

The Penal Code did not establish the conditions for their application. The opinions of authors vary on the subject.

Articles 328 and 329 of the Penal Code make a distinction between so-called self-defense, properly speaking, and "privileged" cases, when the ordinary conditions for their application are not required.

The Code put self-defense and the defense of others on the same level.

If Article 328 is interpreted literally, self-defense is justified only in cases of homicide, wounding or striking. However, it is generally admitted that it is also justified in less serious cases.

Self-defense may be used only under certain conditions. At first an actual attack and the immediate necessity to defend oneself was necessary. The attack could be directed against personal integrity or, under certain conditions, also against property. The attack had to be unjust. On the other hand, the defense must be proportional to the attack.

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[1] *Code de la route*, Paris, Journal officiel, 1967, p. 1.

[2] *Code Penal*, Paris, Dalloz, 1971–72, p. 288.

[3] G. Stefani *and* G. Levasseur, *Droit pénal général et criminologie*, Paris, Dalloz, 1957, p. 533. *See* English translation in attached Appendix.

Thus the basic elements of self-defense are established in Article 328 of the Penal Code. The question arises as to the meaning of the provision of Article 329. P. Bouzat provides the following explanation : [1]

It was suddenly admitted that Article 329 has established the presumptions of self-defense for the following reason:

As a general rule, anyone who practices self-defense must prove before the investigating jurisdiction or, if he does not convince them, before the trial jurisdictions, that the conditions of self-defense have been met. Thus, he must establish that the defense was a reply to unjust aggression, that it was absolutely necessary, and that it was in proportion to the aggression. When there is a presumption of self-defense, the person who benefits from it no longer has to establish the conditions of self-defense; it is sufficient for him to prove that he acted under one of the conditions specified in Article 329, which is obviously much easier.

This point being accepted, the question arises whether the presumptions of self-defense must be considered simple presumptions, subject to contrary evidence, or as absolute presumptions, irrefutable.

Bouzat concluded that the Criminal Chamber of the Court of Cassation, in its decision of February 19, 1959, declared that these presumptions are simple presumptions.

Among other justifications for the use of force, or other illegal interference, French scholars and courts admit necessity. The Criminal Code does not have any general provisions on the state of necessity but does contain some particular provisions regarding it. For instance, Article R. 40-9 states that persons who kill domestic animals without need shall be punished, and Article R. 38-11 enumerates punishment for persons who obstruct public roads without need, or Article 87 of the Decree-Law of July 29, 1939, authorizes a therapeutic abortion if necessary to save the life of a pregnant woman.

Bouzat gives the following definition of the state of necessity : [2]

It is the state of a person who, to preserve his freedom of decision, has no other means of escaping the danger which threatens him or another, than to commit an offense which may affect an innocent third party.

A distinction must be made between necessity and constraint. While constraint annihilates the will, an act of necessity allows it to subsist, only obliging [the person] to make a choice.

It must also be distinguished from self-defense. In the case of self-defense, harm is inflicted on a guilty aggressor, while in the case of necessity, it touches a completely innocent person.

In certain cases, necessity is justified by the courts by moral coercion, in others, by the lack of criminal intent.

As well as self-defense, necessity is subject to certain conditions. First it is necessary that the person who commits the offense be in actual and immediate danger. Then the gravity of the offense and the danger to be avoided must be proportional: the sacrificed interest must be inferior to the preserved interest.

There are no provisions as to the extent that force may be used by parents or those who take care of children.

Article 357-I of the Penal Code provides punishment only for the abuse of parental authority :

> [the following] shall be punished for from 3 months to one year and a fine of from 300 Fr. to 6,000 Fr.: . . .
>
> 3. a father and mother, regardless of whether the loss of their parental rights has been decreed, endanger the health, safety or morals of one or several of their children by illtreatment, pernicious examples of habitual drunkenness or overt misconduct, a lack of care of necessary control.

QUESTION 8

The French Penal Code relies on a threefold division of offenses, as established in Article 1 :

Art. 1.—An offense which the law punishes by regulatory punishments shall be a contravention.

An offense which the law punishes by correctional punishments shall be a minor crime.

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[1] P. Bouzat *and* J. Pinatel. *Traité de droit pénal et de criminologie.* v. 1. Paris, Dalloz, 1970. p. 97.

An offense which the law punishes by deprivations or infamous punishments shall be a major crime.

QUESTION 9

Provisions on parole suspension and probation and imprisonment for payment are included in Articles 729-749 of the French Code of Criminal Procedure. See the Xerox copy attached as Appendix A.

Several of the procedural questions referred to in Question 9 are explained by G. L. Kock in the introduction to his translation of *The French Code of Criminal Procedure* which went into force on March 2, 1959, and by R. Vouin in his article "French Criminal Procedure" in *The Accused. A Comparative Study*, edited by J. A. Coutts. London, Stevens and Sons, 1966, a Xerox copy of which is attached as Appendix B.

QUESTION 10

The rule *Nemo jus ignorare censetur* applies with particular vigor to penal law. A mistake in penal law has no influence on criminal responsibility. The only exception to this rule was established by the Decree-Law of November 5, 1870, Concerning the Promulgation of Laws: "the administrative military authorities and the courts may, according to the circumstances, accept the exception of a mistake alleged by the delinquents, provided that the contravention was committed within 3 days after the promulgation." [1]

In general the courts apply this rule strictly. It is true that in some recent decisions the courts admitted that excuse.[2]

A mistake of fact may exclude, under certain conditions, criminal responsibility. In this respect a distinction is made between intentional and unintentional offenses.

In case of unintentional offenses the error of fact has no influence. However, as G. Stefani and G. Levasseur have observed: [3]

> . . . our jurisprudence [*i.e.*, case law] imitating Belgian jurisprudence, which admits the exclusion of criminal responsibility even in unintentional offenses in cases of an unsurmountable mistake, shows a tendency to acquit because of the mistake of fact when it was unforeseeable and inevitable, the same constituting a real *force majeur* or when a reasonable person would commit [a similar act] under the same circumstances.

The situation is different in cases of intentional offenses. A mistake of fact excludes intentional offenses because an intentional offense presupposes bad faith and a mistake of fact implies good faith. Several situations may arise. Sometimes the mistake of fact makes the offense disappear: a man was killed instead of a wild animal. In such a case, the perpetrator cannot be convicted of murder, because he had no criminal intention. Sometimes, the mistake of fact transforms an intentional offense into an offense of imprudence. A person who killed another person instead of an animal may be prosecuted for homicide by imprudence. Sometimes it may serve as a mitigating circumstance (for instance when a seller of alcoholic beverages made a mistake as to age of the purchaser). However, there are certain cases when the mistake of fact does not change the character of the offense: when the perpetrator does not care who the victims are or when an individual who wanted to kill X, killed Y who was erroneously taken to be X (a mistake as to the person), or an individual wanted to kill X, but because of bad aim, killed Y (*aberratio ictus*). In both cases the perpetrator is prosecuted for willful homicide.[4]

QUESTION 11

The problem specified in Question 11 does not arise in France.

QUESTION 12

In regard to extraterritorial jurisdiction see the attached Appendix.

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[1] P. Bouzat *and* J. Pinatel, *Traité de droit pénal et de criminologie*, v. 1, Paris, Dalloz, 1970, p. 270.

[2] G. Stefani and G. Levasseur, *Droit pénal général et criminologie*, Paris, Dalloz, 1957, p. 276.

[3] *Ibid.*, p. 278.

[4] Bouzat, *op. cit.*, p. 268–269.

QUESTION 13

The French Penal Code uses different terms, "*complot*," "*association*," or "*entente*," to designate conspiracy.

According to the provisions of Article 87, paragraph, "A conspiracy *(complot)* shall exist as soon as the resolution to act is contrived and decided in concert between two or several persons."

Four elements are necessary for the presence of conspiracy: (a) the resolution to act, (b) the resolution must be contrived in concert between several persons, (c) the resolution must be decided, and (d) the purpose of the resolution must be to commit the crimes specified in Article 86.[1]

The resolution to act must be precise. Conspiracy exists only if the resolution was made by several persons united to attain the same purpose. It is not enough that the resolution was contemplated, it is necessary that all participants agreed on the purpose of the conspiracy and the means to be applied. And finally, the purpose of the attack should be one of those defined in Articles 86 and 93.

Conspiracy, as specified in the above-mentioned Articles, is different from that defined in Article 265, which reads as follows:

Every combination *(association)* formed, regardless of its duration or the number of its members, and every agreement *(entente)* for the purpose of planning or committing major crimes against persons or property, shall be a major crime against the public peace.

The terms used in Article 265, "combination formed" or "agreement reached," are very broad and leave the courts great discretion in evaluating the circumstances. The purpose of the combination or agreement must be to commit major crimes against persons or property. And finally the criminal intent must be established.

Article 267 of the Penal Code also punishes persons who knowingly and willfully favor a combination or agreement by furnishing their members with tools for the commission of major crimes, as well as means of communication or lodging and meeting places.

Closely connected with the problems discussed here are the provisions of Article 123 concerning combined unlawful activities of public employees acting in concert, and Articles 109 and 110 dealing with major and minor crimes against the Constitution, committed by prearrangement (*plan concerté*).

QUESTION 14

The transfer of felonious intent is rejected by the French Penal Code.

QUESTION 15

France is a unitarian State and therefore the problems raised in Question 15 do not arise in France.

QUESTION 16

In 1960, the Penal Code was amended and several detailed provisions concerning major and minor crimes against State security were introduced. Provisions similar to Section 1104 are included in Article 86 which reads as follows:

A criminal attempt with the aim of either destroying or changing the constitutional regime, or incitement of the citizens or inhabitants to arm themselves against State authority or to arm one part of them against the other or against national territorial integrity, shall be punished by hard labor for life.

QUESTION 17

Criminal provisions on drugs are included in the Code of Public Health. See the attached Appendix for the translation of the pertinent provisions.

Provisions concerning gambling are included in Article 410 of the Penal Code. In addition, the provisions of the special laws pertaining to gambling should be mentioned. See the *Code pénal*, Dalloz, 1971–2, p. 225–230.

Offenses against morals by press and print are defined by Articles 283-290.

Provisions dealing with prostitution are included in Articles 334 to 335-6.

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[1] *Répertoire, op. cit.*, "Complot," p. 612.

QUESTION 18

There are several laws dealing with firearms and explosives. Among them, the Decree-Law of April 18, 1939, regulatory provisions of August 14, 1939, pertaining to the Decree-Law of 1939, Ordinance No. 62-1021 of August 29, 1962, Law No. 63-760 of July 30, 1963, and Law No. 70-575 of July 3, 1970, should be mentioned.

For the texts, see the *Code pénal*, 171–2. p. 294–310.

There is no special provision in the Code pertaining to the offense of the supplying of arms. However, there are provisions on the supplying of arms attached to particular crimes, for instance, Article 95 pertaining to crimes against the security of the State.

QUESTION 19

The Penal Code provides capital punishment in several situations especially for crimes committed against State security and for crimes committed against persons: murder, assassination, parricide, and poisoning.

According to the provisions of Article 698 of the Code of Criminal Procedure, major and minor crimes against the security of the State in a time of peace are to be referred to the Court for State Security. Rules of procedure of the Court for State Security are established by Law No. 63-23 of January 15, 1963, which differs basically from the rules on common law offenses.

QUESTION 20

The main problem which arises concerning multiple related offences is the application of penalties. To this effect the following rules are established by Article 5 of the Penal Code:

In case of conviction for several major and minor crimes, only the severest of all applicable punishments shall be imposed.

Thus, in cases when the offense constitutes a contravention, the cumulation of penalties is admitted.

The cumulation of offenses may be real or ideal. There is real cumulation when different offenses were committed, and ideal when the same material fact is susceptible to different qualifications. When the prosecution of different offenses is covered by the same indictment, then the problem of punishment does not raise many difficulties. The severest punishment shall be imposed for all offenses according to the rules established in Articles 7-9. In the case of the penalties of the same degree there must be taken into account the duration. When there are several actions of prosecution, then several situations may arise: the second offense may be punished more severely than the first one, or less severely than the first one. Detailed rules were elaborated by the court decisions.*

Other problems raised in question 20 pertain to federal states.

French criminal jurisdiction is based on the principle of territoriality as defined in Article 3, paragraph 1 of the French Civil Code:

The laws of police and public security shall be binding upon all those who live on the territory.

According to Article 72 of the French Constitution, the territory of the French Republic consists of the metropolitan territory and the overseas departments and territories. For the application of the penal laws, the territorial sea, French ships and airplanes are considered a part of French territory.

If the offense is committed on French territory, or when one of the constituent elements of it has been accomplished on French territory, the offense in all its aspects is French.

The territorial principle is not absolute. Title X of the French Code of Criminal Procedure covers offenses committed abroad by both French citizens and foreigners.[1]

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[1] Dalloz, *Répertoire droit et de procédure pénale*, vol. 1. Paris, Jurisprudence Générale Dalloz, 1967, p. 597–98.

The French Code makes a distinction between major crimes *(crimes)*, minor crimes *(délits)*, and contraventions *(contraventions)*.

I. *Offenses Committed by French Citizens Abroad*

A French citizen who commits abroad an act qualified as a major crime may be prosecuted and tried by French courts (Art. 689), provided that he is a French citizen at the time of the prosecution (it is of no importance what nationality he had at the time when he committed the major crime), that he was not tried abroad, and in case of conviction and sentencing did not serve the sentence or obtain clemency, or that the penalty has not been extinguished by the statute of limitations (Art. 692).

However, if the act committed abroad by a French citizen is qualified by French law as a minor crime then the prerequisites for the French courts to assume jurisdiction are stricter.

At first, the minor crime must be punishable not only under French law, but also under the law of the country where it was committed (Art. 689, par. 2). French court practice concerning this requirement was summarized in the French legal encyclopedia as follows:[2]

Under penalty of cassation, the trial judge must ascertain in his sentence that all elements of foreign law necessary for the accusation are established again (Crim. Jul. 2, 1927. S. 1929. 1. 360).

However it is of no matter that the foreign qualification of the crime is different from the French qualification; it does not much matter that the penalty is not the same as that prescribed in France (*see*, for instance, Trib. corr. Colmar, May 11, 1950. *Gaz. Pal.* 1950, *ibid.* 1950.2.189, *Rev. science crim.* 1950.592 Caron. L. Hugeney).

The Court of Cassation does not review the interpretation of foreign law given by the trial judge (Carrive, *Rev. science crim.* 1937, 309). This judge is not duty bound to quote the text of the foreign law, and the Supreme Court refers to his statements (Crim. Dec. 17, 1887, D. 88.1.330).

It must be taken into consideration that the act must be punishable by the law of the country where it was committed not only at the time when it occurred but also at the time when the complaint was lodged (Aix, Sep. 30, 1959, *Gaz. Pal.* 1959.2.291); that there is no incrimination according to the foreign law when the act, also incriminating according to this [French] law, is covered by the law of amnesty of the foreign country (Crim. Dec. 31, 1936, *Gaz. Pal.* 1937.1.420; Trib. corr. Toulon, May 17, 1963, *Gaz. Pal.* 1963.2.387) . . . that, in general, the statute of limitations of public action against offenses committed abroad is regulated by French law (Trib. corr. Montbéliard, July 3, 1964. D. 1965.69. Public Prosecutor Petit's charge).

Thus, in case of a minor crime, it is necessary to refer to the foreign law unless it concerns offenses against the security of the State or counterfeiting its seal or current national monies. These minor crimes, even if committed outside of the territory of the Republic, are punishable as minor crimes committed on French territory.

If the minor crime was committed against a private person, the complaint of such person, or the official denunciation by the authority of the country where the crime was committed, must precede the prosecution undertaken by the public prosecutor.

Certain minor crimes and contraventions committed in neighboring States, as defined in Article 695 of the Criminal Code, are subject to the rule of reciprocity.

II. *Offenses Committed Abroad by Foreigners*

As a general rule, and subject to the provisions of Articles 690 and 693, offenses committed by foreigners in a foreign country are not punishable in France. An exception is made for the major and minor crimes specified in Article 694, which appears in the Appendix.

According to Professors G. Stefani and C. Levasseur,[3] the exceptions specified in Article 121-6 of the Code of Civil Aviation of March 30, 1967, which in part read as follows, must be added to the exceptions specified in Article 619:[4]

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[2] Dalloz, *Répertoire de droit pénal et de procédure pénale*, vol. 1, Paris, Jurisprudence Générale Dalloz, 1967, p. 597–98.

[3] G. Stefani *and* G. Levasseur, *Droit pénal général et procédure*, vol. 2, 5th ed. Paris, Dalloz, 1971, p. 298.

[4] *Journal officiel*, April 9, 1967, p. 3570.

The legal relations between persons who are on board a foreign airplane engaged in traffic shall be regulated by the law of the flag of that airplane in all cases where the territorial law is normally applied.

However, in case a major crime or minor crime is committed on board the foreign airplane, the French courts shall be competent provided that the perpetrator or the victim is a French national or the airplane landed in France after the major or minor crime was committed.

APPENDIX: CODE OF CRIMINAL PROCEDURE*

Title X

Major and Minor Crimes Committed Abroad

Article 689.—Any French citizen who outside the territory of the Republic renders himself guilty of an act qualified as a major crime punished by French law may be prosecuted and tried by French courts.

Any French citizen who outside the territory of the Republic renders himself guilty of an act qualified as a minor crime by French law may be prosecuted and tried by French courts if the act is punished by the legislation of the country where it was committed. With reference to minor crimes against the security of the State or counterfeiting the seal of the State or of current national monies, a minor crime committed outside the territory of the Republic shall be punishable as a minor crime committed within the territory.

The provisions of paragraphs 1 and 2 are applicable to the perpetrator of an act who has become a French citizen only after the act that is imputed to him. [2-13-60]

Article 690.—Whoever on the territory of the Republic becomes an accomplice to a major crime or a minor crime committed abroad may be prosecuted and tried by the French courts if the act is punished by both the foreign law and by the French law, on condition that the act qualified as a major or minor crime was established by a final decision of the foreign jurisdiction.

Article 691.—In case of a major crime committed against an individual the prosecution may be undertaken only at the request of public prosecution; it must be begun by a complaint by the offended party or by an official denunciation to French authorities by the authorities of the country where the act was committed.

Article 692.—In the case envisaged in the preceding articles, when a major or minor crime is concerned no prosecution shall take place if the accused proves that he was definitely tried abroad and, in case of conviction, that the punishment has been served or has been extinguished by the statute of limitations or that he has obtained clemency.

Article 693.—Every offense of which an act constituting one of the constituent elements has been accomplished in France is deemed to be committed within the territory of the Republic.

Article 694.—Every foreigner who outside the territory of the Republic renders himself guilty, either as perpetrator or as accomplice, of a major or minor crime against the security of the State or the counterfeiting of the seal of the State or current national monies may be prosecuted and tried according to the provisions of French law if he is arrested in France or if the Government obtains his extradition.

Article 695.—Every Frenchman who renders himself guilty of minor crimes and contraventions in forest, rural, fishing, customs, or indirect tax matters on the territory of an adjacent state may be prosecuted and tried in France according to French law if that state authorizes the prosecution of its nationals for the same acts committed in France.

The reciprocity shall be legally established by international conventions or by decree.

Article 696.—In the cases provided in the present title the prosecution shall be undertaken at the request of public prosecution of the place where the accused resides or of his last known residence or of the place where he is found.

**Code de procédure pénale.* Code de justice militaire. Paris, Dalloz, 1971–72. This translation is one made by G. L. Kock. *The Frenee Code of Criminal Proeedure.* South Hackensak, Fred B. Rothman, 1960, with terminological modifications by the present reporter.

The Court of Cassation may, on the request of public prosecution or of the parties, transfer the case to a court closer to the place of the major or minor crime.

THE ACCUSED: A COMPARATIVE STUDY

(Edited and with an introduction by John Archibald Coutts)

FRENCH CRIMINAL PROCEDURE

(R. Vouin)

It has become a commonplace of discussions relating to criminal procedure to contrast, on the one hand, the public interest, which requires prompt and efficient suppression of criminal activities, with, on the other, the interest of the individual, whose liberty must be protected against the abuses of power. However, the matter must be looked at more closely.

It is certain, in fact, that individual liberty is always threatened by disorders and by anarchy itself, which an excessive slackening of repressive action encourages. It is equally certain, on the other hand, that a legal system which does not assure the protection of individual liberty is always in jeopardy, is precarious and does not serve the public interest.

A system of criminal procedure, in order to be satisfactory, must be seen to be at once adequate, efficient and liberal.

It is equally true that this ideal balance appears difficult to achieve, and that the criminal institutions of a country like France have fluctuated, in the course of its history, under the influence of a liberal tendency and of an authoritarian tendency, each dominating in turn.

Between the two world wars, the consummation, the "Swan Song," of a liberal era in France was, in so far as criminal procedure is concerned, a law of February 7, 1933, dealing with the protection of individual liberty. But the next year, 1934, was marked by the troubles of February 6, at home, and in international relations, by the events which confirmed the seizure of power in Germany by Hitler and revealed the imminence of a new war. Further, the first law of reactionary tendency, the law of March 25, 1935, inaugurated a period of authoritarian criminal legislation by abandoning a large part of the reforms resulting from the law of February 7, 1933.

Nearer our time, the last year of the Fourth Republic has seen the French Parliament discuss and vote in conditions which do great honour to it, a law of December 31, 1957, laying down the first 230 articles (preliminary title and first book) of a *Code of Criminal Procedure*, aimed at replacing the old *Code of Criminal "Instruction"* of 1808. But this new Code was only completed, with a total of 801 articles, and put into force, on March 2, 1959 by an order of December 23, 1958, which was made following, and with the favour of, a change of régime.

The authors of this Code of 1958 sought to reconcile the requirements of suppression and the protection of individual liberty. In particular, they drew up proposals clearly protective of the rights of the accused at the same time as they reinforced the authority of the public prosecutor entrusted with enforcing, by judicial process, the criminal law, and assured the independence of the two investigating jurisdictions (the investigating magistrate and, on appeal, the *chambre d'accusation* of the Court of Appeal).

But this Code has had the misfortune of coming into force at a particularly critical period in our national life.[1] The military and political events which accompanied Algeria's accession to independence soon brought about a reinforcement of penal suppression in the form of the orders of February 13 and June 4, 1960, altering the Code of Criminal Procedure or derogating therefrom: then the setting up, on May 3, 1961, of a special *Military Tribunal* and on April 27, 1961, of a *High Military Tribunal*, suppressed on May 26, 1962, and replaced, on June 1, 1962, by a *Military Court of Justice*, the legality of which the Conseil d'Etat challenged, by its order of October 19, 1962; and finally the promulgation of an order of September 1, 1962, with particularly formidable provisions.[2]

[1] See R. Vouin, "L'Application du Code de procédure pénale et le malheur des temps" [The Enforcement of the Code of Criminal Procedure and the Misfortunes of our Times], *Revue de Science Criminelle*, 1962, p. 65.

[2] *Cf.* A. Vitu, "un text inquiétant . . ." [a disquieting text], *Revue de Science Criminelle* 1963, p. 9.

French life has meanwhile becomer calmer. Two laws of January 15, 1963, have put an end to the enforcement of the order of September 1, 1962, and suppressed the exceptional juridictions of 1961-62, by setting up, on a permanent footing, a Court of State Security whose organisation and procedure have been specially studied in order to give satisfaction to the different interests to be taken into account.[3]

Since then, a revision of our 1958 Code has been prepared in the same spirit of conciliation and wisdom, by a Committee for Criminal Legislation set up alongside the Keeper of the Seals, Minister of Justice, the intention of which is shortly to place an important Bill before the French Parliament (the rules concerning criminal procedure only being capable of being fixed by law, according to Article 34 of the Constitution of October 4, 1958).

If one considers the matter, the question of safeguarding the public interest and the interests of the accused, in a given system of criminal procedure can only be studied in a complete account of the system of procedure. French criminal procedure is especially difficult to explain when one is mainly addressing lawyers of countries whose system of criminal justice does not possess either a public prosecutor or a preliminary investigation.

It is therefore necessary to make a choice and to stick to clearly defined points which are particularly likely to interest the foreign observer who wants to study French institutions.

The account which follows will therefore be limited to pointing out—distinguishing between the three successive phases of criminal procedure—some questions where the public interest appears to be in conflict with private interests, considered essentially from the point of view of the rights of the accused in accordance with the Code of Criminal Procedure of 1958 and the two laws of January 15, 1963, dealing with the Court of State Security.

Before Trial, French criminal procedure has, according to the case, on the one hand a preliminary investigation or committal proceedings, and on the other, police inquiries of various sorts.

The preliminary investigation implies the setting in motion of the legal process, that is, the opening of the process of suppression by the Public Prosecutor or the victim of the infraction of the law. It is otherwise in the case of the hearing of witnesses (before trial).

The preliminary investigation, as a rule, is compulsory in the more important criminal matters, optional in the case of misdemeanours and may equally take place in the case of petty offences, but only at the instance of the Public Prosecutor.[4]

However, there are two cases in which the preliminary investigation is always compulsory before trial, because in France it is considered a guarantee of justice and a protection of the rights of the accused.

It is compulsory, in the first place, in the case of minors of less than eighteen years of age, who are triable in juvenile courts. It has, then, the dual purpose of allowing an attentive study of the person of the minor, who only undergoes a punishment, properly speaking, if his personality and circumstances require it (medical—psychological and social examinations) and to inform the judge who, on occasions, may make an order himself, without sending the matter before the juvenile court, of which he is president.[5]

But the preliminary investigation is also compulsory in the case of persons who are to be judged by the Court of State Security. No one can be summoned to appear before this political jurisdiction (composed of three civil judges, of whom one is the president, and of two military judges) without an order of committal for trial left to the responsibility of the Government, but this order can only be made if the investigating magistrate has previously, by a legal decision, recognised as regards the person charged that the charges of crime or misdemeanour amount to that class of offences which are among those that are within the jurisdiction of the *Court of State Security*.[6]

On this question it has been considered that committal for trial before a political jurisdiction should remain an act of government but that the individual citizen should have the guarantee that he will never be prosecuted before

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[3] *Cf.* Les études de G. Levasseur, *Gazette du Palais*, January 26, 1963; R. Vouin, *La Semaine Juridique*, 1963, 1. 1764; A. Vitu, *Revue de Science Criminelle*, 1964, p. 1.

[4] Art. 79, C.C.P.

[5] Ord. February 2, 1945, art. 8.

[6] Law No. 63-23, of January 15, 1963, Art. 27.

this jurisdiction in the absence of a judicial decision previously recognising the existence of sufficient charges. One can think what one likes of the investigation, but the fact of its existence deserves to be remarked on.

In so far as the legal system of preliminary investigation is concerned, there can be no question of analysing here the provisions of Articles 79 to 230 of the Code of Criminal Procedure. But there is one point on which one must dwell.

It has been said [7] that the protection of the suspected person is well assured in France from the moment when the person appears before the investigating magistrate as a person who has been charged.[8] Therefore, the whole question is to know at what moment this "charging" occurs which guarantees that the charged person shall be interrogated by a judge without taking the oath and with the assistance of his lawyer.

In this respect Article 105 of the Code of 1958 prohibits the investigating magistrate (and the judges or judicial police officers delegated by him) from hampering the rights of the accused by hearing as a witness (on oath and without a lawyer) any person against whom there exists "weighty and uncontradicted evidence of guilt." Since it was first drawn up, under the law of December 31, 1957, the text of Article 105 was modified in 1960, at the request of the police, who greatly complained of this provision. But the decisions of which this is the fruit still have great force, and, without expecting Article 105 to be redrafted in its original form (as is requested by the Committee for Criminal Legislation), it is certain that proceedings at a preliminary investigation must be quashed in France, if as a result of the charge being made late the rights of the accused have been infringed.[9]

The question of the invalidity of a preliminary investigation in general is of great legal and practical importance in France from three points of view, namely, grounds, procedure and effects of quashing. The person charged obviously has an interest in being able to adduce at any moment in the case, numerous and extensive grounds for quashing. But the interest of the good administration of justice may perhaps require, on the contrary, that the opportunities for quashing the investigation be limited, both in number and effects, and should not be invoked after a certain point in the trial.

In the face of these divergent requirements, the 1958 Code first of all makes a distinction. On the one hand, every infringement of the legal provisions relating to the first appearance, examination and identification of the person charged (that is to say of the rules formerly enacted in the law December 8, 1897) is penalised by the invalidity of the irregular act and of all subsequent proceedings.[10] On the other hand, there is equally ground for quashing in the case of an infringement of rules recognised as "substantial" by decisions and, "in particular in the case of infringement of the rights of the accused;" but then, it is for the Bench to decide if the quashing is limited to the irregular act or must be extended to all or part of the subsequent proceedings.[11] Further, the Code has reserved to the examining magistrate and to the Public Prosecutor the right to ask the trial court during the preliminary investigation for the formal quashing of the void acts, which will then be struck from the record.[12] But once the preliminary investigation has ended and trial procedure has begun, it authorised the courts of summary jurisdiction of police courts [13] to declare the invalidity of irregular acts in the investigation and of all or part of the subsequent proceedings.[14]

As the 1958 Code stood originally, the person charged could not ask for irregular acts in the preliminary investigation to be quashed during the course of that investigation. But he could ask for this at the trial before courts of summary jurisdiction or police courts, on condition that this was done before

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[7] By Professor C. J. Hamson.

[8] Since the law of December 8, 1897; *cf.* Art. 114s, C.C.P.

[9] *Cf.* R. Vouin, Notes sous l'arrêt *Dominici*, Crim. July 22, 1954, and l'arrêt *Fesch*, Crim. June 16, 1955, in *La Semaine Juridique*, 1954, II. 8351 and 1955, II. 8851; R. Vouin, "L'affaire Drummond," *Criminal Law Review*, 1955, p. 5; *Revue de Science Criminelle*, 1960, p. 495, No. 25.

[10] Art. 170.

[11] Art. 172.

[12] Arts. 171 and 173.

[13] Not the assize courts before which there is "an order for committal for trial," such order having the effect of purging any invalidity in previous procedure but being itself open to attack upon appeal to a higher court (Arts. 218 and 594).

[14] Art. 174.

making a defence on the merits.[15] Now this last possibility has itself been taken away in principle from the person charged by the order of June 4, 1960, already mentioned, when the courts of summary jurisdiction or police courts have before them an order transferring the case to the trial court.[16] This solution is now being studied by the Committee for Criminal Legislation, and is much criticised by professional lawyers, who take exception to it as sacrificing the interests of the accused to the fear of dilatory procedure. But many judges, on the contrary, consider it necessary for the protection of the public interest, as they conceive it. . . .

In any case, it is well established that a violation of the rights of the accused must bring with it the quashing of the proceedings at the preliminary investigation, even if no formal provision of the law has been violated. A decision of the Supreme Court decided this, in a case where a telephone conversation had been astutely organized and recorded by a police superintendent.[17] The Code of 1958 confirms this in Article 172 and at the request of the Committee for Criminal Legislation the drafting of this text is most probably going to be improved, so that the solution which it propounds may be absolutely certain.

The inquiries which precede the preliminary investigation and which can sometimes dispense with it are of an altogether different nature, and each presents particular problems. However, there is one question common to all three: that is the *garde à vue*.

The prefects of the departments (and, in Paris, the prefect of the police) had received from the 1808 Code[18] the right of doing, personally, or of having performed by the officers of the judicial police, all acts necessary for the purpose of ascertaining crimes, misdemeanours and minor infractions of the law, and of arresting those who committed them. Considered dangerous for the republican régime, and too perilous for the liberty of the individual members of the public, this possibility of acting in the way that an investigating magistrate would was taken away from the prefects in 1933, but restored to them in 1935, limited, however, to the investigation of crimes and misdemeanours against internal or external security of the state.[19]

The 1958 Code[20] preserved the powers of the judicial police for the prefect in the field of crimes and misdemeanours against the security of the state (no longer distinguishing, since 1960, between the internal and external security of the state), but on condition that this be not brought before the judicial authority, by obliging the prefect to inform the Public Prosecutor immediately and limiting the exercise of his powers to a period of twenty-four hours, "all this upon penalty of quashing the proceedings."

However, the events already referred to[21] led the Government to extend to five days,[22] then to as much as fifteen days[23] the length of the period fixed in 1958 at twenty-four hours, and at the same time the sanction of quashing the proceedings, in the case of failure to observe the legal rules, was suppressed in the text of the Code.

But the setting up of a Court of State Security[24] fortunately provided an opportunity for redrafting the text. Since the laws of January 15, 1963, Article 30 limits to forty-eight hours the period for the exercise of the powers of the judicial police by prefects, and again defines the conditions for the exercise of these powers, in peace time or war time, "all this upon penalty of quashing the proceedings."

An inquiry into a *flagrant délit* is an inquiry which must be preceded with, without opening a preliminary investigation, in the case of a crime or a misdemeanour (punishable by imprisonment) which is "flagrant"—it being understood that a crime or a misdemeanour is said to be "flagrant" when it is

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[15] Art. 385.
[16] Art. 174, para. 2.
[17] Crim. June 12, 1952, *La Semaine Juridique*, 1952, II, 7241, note J. Brouchot; *cf.* R. Vouin, "Illegally Obtained Evidence," *International Criminal Police Review*, 1955, p. 241.
[18] Art. 10.
[19] Laws of February 7, 1933, and March 25, 1936, *supra*, p. 209.
[20] Art 30.
[21] *Supra*, p. 209.
[22] Ord. February 13, 1960.
[23] Presidential decision of April 24, 1961.
[24] *Supra*, p. 210.

actually being committed, when it has just been committed or even when, at a time that is very close to that of the infraction of the law, the suspected person is followed by public rumour, or leaves traces which show that he participated in an infraction of the law.[25]

In such cases the 1808 Code entrusted the Public Prosecutor with the task of making an inquiry, but it authorised every judicial police officer assisting the Public Prosecutor to proceed on his own initiative and allowed the investigating magistrate to place the matter before himself personally, by opening the preliminary investigation himself. On the other hand, since the 1958 Code, the investigating magistrate can only proceed with the inquiry into a *flagrant délit*, without opening a preliminary investigation in its proper sense, on condition that he then hands the file to the Public Prosecutor "for all necessary purposes," [26] and this inquiry is normally carried out by the first judicial police officer who is informed of the infraction of the law.[27]

The inquiry into a *flagrant délit*—the rules of which would take too long to set out here—gives every judicial police officer very extensive powers, such as that of making a search of the house of persons "who appear to have participated in the crime or seizing articles and objects relating to incriminating matters," [28] or of "calling for and hearing all persons likely to furnish information concerning the matters or the articles and documents which have been seized." [29] One may think that in giving such powers to every judicial police officer,[30] the 1958 Code to some extent sacrificed the liberty of individual members of the public and the rights of the accused to the satisfaction of the public interest, which requires that the circumstances surrounding a flagrant breach of the law be elucidated in the shortest possible time.

On the other hand, the provision must be noted by which the suspected person, whom the Public Prosecutor has ordered to be brought before him, can only be heard in the presence of his counsel if the suspected person appears voluntarily, with his counsel, before the judge.[31]

The preliminary inquiry was previously known under the name of an "unofficial" inquiry and the officers of judicial police proceeded without authority from a judge, but also without particular powers and without other authority than the prestige which attached to their occupation; persons interrogated by them were not obliged to reply, and the officers could only enter the house of a member of the public with his permission, freely given and with the knowledge of the right to refuse it (according to the decisions).

The criminal law relating to minors had already recognised the advantage of sometimes proceeding by way of the unofficial inquiry, instead of opening the judicial investigation.[32] The 1958 Code devoted several articles to the preliminary inquiry, in order to avoid abuses of it. In doing this, it maintained the principle according to which this inquiry is based on the good will of the interested parties: in particular, it specifies that searches and seizures cannot take place without express written agreement.[33] But coercion is, however, introduced, by authorising the judicial police officer "to detain" persons "for the requirements of the preliminary investigation" [34]: this is the "*garde à vue*," which must now be considered.

The *garde à vue* consists of detaining a person—apart from any arrest properly so called, or detention under remand—for the requirements of an inquiry into a *flagrant délit*,[35] or of preliminary inquiry,[36] or for the undertaking of a "rogatory commission" entrusted by an investigating magistrate to a judicial police officer.[37]

The provisions which the 1958 Code devoted to the *garde à vue*—for the first time in the history of our legislation—have been much criticised. M. Maurice

[25] Arts. 53 and 67 C.C.P.
[26] Art. 72.
[27] Art. 54.
[28] Art. 56.
[29] Art. 62.
[30] Art. 16.
[31] Art. 70.
[32] Ord. February 2, 1945, Art. 8 para. 2.
[33] Art. 76.
[34] Art. 77.
[35] Art. 63.
[36] Art. 77
[37] Art. 154.

Garçon, the well-known lawyer, in particular, has often blamed them for having opened the way to all sorts of abuses, by reintroducing into our French criminal justice the system of secret investigation without full argument on both sides, during which the person held is left without the assistance of his counsel, at the discretion of the police officer.

However, it is certain that the *garde à vue* has always occurred in fact, and that it is a practical necessity which it is better to recognise than to try to ignore. Its procedure must be correctly carried out, and a person should be brought before a magistrate because of the evidence of guilt which appears against him must not be left under the control of a policeman; further, its duration must be strictly limited.

Concerning the first condition, it would take too long to analyse here the texts of the Code. Concerning the second, the rule established by Article 105 [38] has already been seen. As for the duration of the *garde à vue*, it is limited in principle to twenty-four hours, but may possibly be extended for a new period of twenty-four hours by the written decision of the Public Prosecutor or of the investigating magistrate. Is this too much? Is it too little?

In the matter of crimes and misdemeanours against state security, this double period of twenty-four hours has been held to be too short. During the difficult years, there was an increase in this field, and the period was extended in the last instance to fifteen days.[39] But when the Court of State Security was set up, a lively debate took place in Parliament on this point and, finally, the period for a *garde à vue* was fixed at forty-eight hours, with the possibility, however, of a double extension carrying it, under judicial control, to a total duration of ten days (or of fifteen days in "a state of emergency" [40]).

But apart from offences against state security, police officers persist in asking for an extension of the double 24-hour period, which they consider too short in all cases where a question arises of identifying and seizing all the members of a criminal gang. In order to reconcile the protection of individual liberty with the public interest, it seems that a longer period of *garde à vue* could be provided for in cases of counterfeiting and drug traffic, for example.

At the trial proceedings, the occasions when there may be a conflict between the public interest and the interest of the accused are also very numerous. Here again, we cannot say everything. A choice must be made, and we shall only examine some questions relating to our common law assize courts and to the Court of State Security.

(a) The assize court, in France, has been the object of numerous reforms since the Code of Criminal Investigation in 1808.[41]

To confine ourselves to the principal dates in a history of 150 years, the laws of June 25, 1824, and of April 28, 1832, allowed the introduction of mitigating circumstances in all crimes and placed the question of the admission of these circumstances, which always exclude the death penalty, to a jury of twelve, who decide by a majority.

Then, the law of June 19, 1881, abolishing the summing-up by the president, at one stroke removed the possiblity of an association between the court (professional judges) and the jury.

But a law of March 5, 1932, provided that the three judges should decide the amount of the punishment, by a majority, the twelve jurors having previously deliberated alone on the question of guilt. Finally, there was the law of November 25, 1941, which fully achieved the association of the court with the jury, the latter being reduced to six jurors for the purpose of deliberating together both on guilt and then on punishment.

After the end of the war, an order of April 20, 1945, raised the number of jurors from six to seven, but still preserved the system of 1941. However, the question of the relationship of the judges and the jury presented itself to the draftsmen of the Code of Criminal Procedure. How should this question be resolved? On the one hand there is an authoritarian view of the assize court, on the other a liberal one, that is to say there are two views taken of public interest and of guarantees of individual liberty.

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[38] *Supra*, p. 212.

[39] Ord. September 1, 1962, Art. 2.

[40] Law No. 63-23 of January 15, 1963, Arts. 16 and 48-1.

[41] Cf. R. Vouin, "La Cour d'Assises française de 1808 à 1958" [The French Assize Courts from 1808 to 1958], in *Contemporary Problems of Penal Procedure*, Collection of Studies in homage to M. Louis Hugueney, Paris, 1964, p. 225.

The return to the 1932 system (a jury deliberating alone on the question of guilt, then joining the court in order to fix the punishment) was insistently demanded by the majority of French barristers, one of whom did not hesitate in denouncing the 1941 law as a law "of rare hypocrisy," by which "the Vichy Government, at the servile instance of a dictatorship, dealt a fatal blow to the jury because it was guilty of being independent," and since when "there is no longer a jury in France." [42]

However, this interpretation is historically inaccurate, for the 1941 reform, the outcome of a draft presented in 1938 by the Committee over which Paul Matter presided, has been approved by two great liberal lawyers, Professors H. Donnedieu de Vabres and Louis Hugueney, and then confirmed clause by clause, immediately after the Liberation, by the order of April 20, 1945.[43]

From a legal point of view, also, French juries do not have the task of handing over criminal justice to the whim of popular emotion by introducing an element of romanticism or judicial democracy which the men of the Revolution never thought of. Our juries assure the accused at the assize courts the safeguard of being judged by men like themselves, by their equals. But they decide according to their judgment, according to the evidence produced before them [44] and, like all professional judges, have the duty of applying the law to the facts of the case. It is therefore perfectly reasonable that they should be associated with the judges of the court.[45]

In fact, the 1958 Code maintained the association of court and jury so that they should deliberate together concerning guilt and then punishment, but increased the number of jurors from seven to nine and provided that the accused could be declared guilty by a majority of eight votes against four.[46] This numerical requirement guarantees that there may only be a finding of guilty against the accused with the approval of the majority of the jury. As for the deliberation together of court and jury, it corresponds to the desires of the average juror and Frenchman, at the same time as it assures, as experience proves, a more equal and regular justice.

If it is true that the principle or essence of an assize court is to be found in a certain association of court and jury,[47] one may think that French law, which persists in not allowing the presiding judge to sum up,[48] has achieved this association in a manner suitably adapted to the French temperament.

Less important at first sight, but in practice very serious, is the question of *the examination* of the accused by the president of the assize court.

The 1808 Code did not provide for this examination. It invited the representative of the public prosecutor's department to open the proceedings by presenting the case for the prosecution [49] and only called upon the president to put possible questions to the accused after each witness had given evidence.[50] But the custom was quickly established whereby the Public Prosecutor no longer presented his case, and it was the presiding judge who opened the proceedings by making the accused undergo an examination with the object of revealing his past to the jury, and also his personality and "the nature of his defence."

The law of November 25, 1941, changed nothing here, neither the text nor well established custom and the question therefore arose of finding out if the new Code of Criminal Procedure had retained or abolished the examination.

It was easy to appreciate that this had too readily the appearance of being a presentation of the case for the prosecution by the presiding judge of the assize court.[51]

Finally, the 1958 Code decided that "the president shall examine the accused and take note of his declarations (but) is under a duty not to disclose his opinion as to guilt." [52]

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[42] M. Garçon, "Should the composition and powers of the jury be altered? *"Revue de Droit penal et de Criminologie*, 1954–55, p. 455.

[43] *Cf.* M. Patin, "The problem of the organisation of the assize courts" in *The Principal Aspects of Criminal Policy*. Collection of studies in homage to the memory of Prof. H. Donnedieu be Vabres, Paris, 1960, p. 225.

[44] Art. 353 C.C.P.

[45] *Cf.* R. Vouin, "The question of the jury," *Revue de Science Criminelle*, 1955, p. 503.

[46] Arts. 296 and 359.

[47] *Cf.* Sir Patrick Devlin, *Trial by Jury*, 1956, p. 120.

[48] Art. 347.

[49] Art. 315.

[50] Art. 319.

[51] *Cf.* R. Vouin, "The examination of the accused by the presiding judge of the assize court," *Revue de Science Criminelle*, 1955, p. 33.

[52] Art. 328.

This solution is certainly not satisfactory. But it must be recognised that it is hallowed by long tradition, corresponds to the wishes of French judges and jurors, and appears perfectly admissible as in fact applied by our presiding judges in the assize courts.

The examination to which the accused is subjected also leaves the accused the freedom not to reply. This examination may thus reach the point where it becomes, in fact, a monologue delivered by the presiding judge of the assize court, based on documents from the preliminary investigation. . . . Therefore, from the beginning of a French criminal trial, the *record* of the preliminary investigation has a great practical importance, and has a notable effect on the proceedings.

However, in order to limit the influence of the record and ensure respect for the oral examination in the proceedings, the 1958 Code decided that the record, at the closure of the proceedings, must be placed in the hands of the clerk of the court, the court and the jury taking with them to the room where they deliberate only the order for committal for trial, concerning which there is certainty that it has been read and debated at a public hearing.[53]

This reform, which has had a mixed reception in France, may appear a modest one. Nonetheless, it does amount to a first step tending to reduce the weight of the written proceedings in the interest of the accused.

Among all the questions which assize procedures still presented to the draftsmen of the 1958 Code, that of expert opinion was certainly one of the most delicate. It must be recognised, unfortunately, that it has been only imperfectly solved by this Code.

Efforts have been made to distinguish from witnesses the experts appointed under the jurisdiction of the courts making the preliminary investigation or that of the trial court.[54] But the fact remains that scholars or technicians called by the accused appear at the hearing of the assize courts as witnesses, not as experts, and that in the case of a conflict of opinion between the official experts and these "witnesses," the French assize court has no other recourse than to decide "either that it be overridden in the proceedings, or that the matter be adjourned to a later date."[55]

The points of law which arose in the trial of Marie Besnard can be observed, and it must certainly be recognised that the rights of the accused in matters of criminal expert opinion are not satisfactorily protected in France.

The Court of State Security, for its part, tries a case according to the rules which apply in general to courts of summary jurisdiction,[56] but nevertheless follows at the close argument a procedure which is very similar to that of assize courts and of military tribunals.[57]

In so far as the jurisdiction of this exceptional court is concerned, the only question which is worth raising here is that of the errors or inadequacies which the *barrister* may be guilty of in the course of the proceedings—a question whose legal and practical importance was shown when Maitre Isorni was penalised by the military court.

It would appear reasonable that a barrister should be disbarred if he failed in the duties which his professional oath imposes upon him. By this oath he promises "to say or publish nothing, as counsel or legal advisor, contrary to the laws, regulations, public morals, state security and the peace of the republic and to public authorities."[58] But it is obviously a very serious matter ruthlessly to place a barrister in a position where it is impossible for him to practice his profession, as though he were an accused person obliged to appeal to another barrister so as at once to ensure his own defence. It is even very serious to fetter the freedom of speech of a barrister by the threats of possible sanctions.

In the face of these contradictory requirements, the regulations concerning the discipline of the Bar provide that "every error, every failure in the obligations imposed on the barrister by his oath, committed at a hearing by him, may at once be checked by the court having jurisdiction in the matter, upon the findings of the Public Prosecutor's department, if such error or failure exists, "the punishments ranging, according to the case, from a simple

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[53] Art. 347.
[54] Arts. 168 and 281.
[55] Art. 169.
[56] Law No. 63–23 of January 15, 1963, Art. 33.
[57] Art. 26 *et seq.*
[58] Decree of April 10, 1954, Art. 23.

warning to temporary suspension (to a maximum of three years) and to permanent disbarment.[59]

The texts relating to the Court of State Security repeat these provisions, but add two important details to them.

On the one hand, a barrister who is at fault must not be able to evade punishment by his absence, and it is correct to give him a period of time for reflection in order to prompt him to have himself represented and to allow him to prepare his defence. It is therefore decided that "if, at the time of the address of the Public Prosecutor to the court, the barrister is absent from the disciplinary action, the proceedings relating to this action are automatically adjourned to the first hearing of the court without further formality."[60]

On the other hand, and in particular, it was a question of finding out if the sanction of temporary suspension or of disbarment would be, or could be, immediately put into force, despite the possibility or the exercise of a right of appeal. Here, the law allows the Court of State Security to declare the sanction to be immediately enforceable, but two conditions are placed upon this: in essence, the lapse committed by the barrister must be inexcusable, and must allow his presence at the proceedings; in so far as procedure is concerned, the court cannot deliver judgment until after hearing the president of the Bar, or his representative.[61]

It is in this fashion that a problem, which the violence of passion may quite often raise in political trials, has been solved. As has been said, "if the barrister has the right to maintain an opinion which differs from that of the state, it seems unreasonable that he should be able to profit by the immunity enjoyed as a barrister in order to make a platform from which he might try to stir up social disorders and encourage or justify subversion."[62]

After judgment, the basic question which arises concerns the right of appeal which may be exercised against the judicial decision. The interest of the accused is to be able to rectify all the errors of law or of fact which may have vitiated the decision. But the public interest is to avoid procedural abuses or delays, for a judgment of a court in practice derives its social value for the most part from the authority of a *res judicata*.

From this point of view, it is not necessary to dwell here on the system of appeals in French criminal procedure at common law: this is set out in all the standard works. A lot could be said about the successive solutions which French law applied to the question of appeal, and of appeal to the highest court from judgments and decisions (called "d'avant-dire-droit"), ruling on a variety of points, in the course of the proceedings. But this question is too complicated to be tackled here.[63] On the other hand, it is interesting to take note of the procedure applicable to decisions of the Court of State Security.

The judgments of the Court of State Security are unappealable, and this is explained—as for decisions of the assize court—by the high standing of the jurisdiction, and the fact that a matter only goes before the court after a preliminary investigation.[64] But the procedures for a stay of execution, against a decision obtained by default, by way of appeal to the highest court, on the ground of violation of the law and for an appeal in the case of an adverse verdict founded on an error of fact, have been declared available, under the conditions in the Code of Criminal Procedure, against the judgments of the Court of State Security.[65]

In conclusion, may I be allowed to suggest that criminal procedure is not satisfactory if it does not ensure respect for the rights of the accused, but that is just as bad if it sacrifices the defence of society to an excessive desire to protect the individual's freedom.[66]

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[59] Decree of April 19, 1954, Arts. 41 and 42.
[60] Law No. 63–23 of January 15, 1963, Art. 34, para. 2.
[61] Art. 34, para. 3.
[62] M. Garçon, *The Barrister and Ethics*, 1963, p. 111 *et seq.*
[63] It has recently been the subject of a very good study by Jean Brouchot, *La Semaine Juridique*, 1964, I, 1828.
[64] *Supra*, p. 210, n. 3.
[65] Law No. 63–23, of January 15, 1963, Arts. 45 and 46.
[66] *Cf.* A. C. L. Morrison, "The protection of the accused," *The Journal of Criminal Science*, 1948, p. 127.

France, 1971

CONTROL OF DRUG DEPENDENCE AND OF POISONS

Law No. 70-1320 of 31 December 1970 relating to the health measures for the control of drug dependence and the suppression to traffic in, and illicit use of, poisons. (*Journal officiel de la République française*, 3 January 1971, No. 2, pp. 74-76)

1. Book III of the Public Health Code is hereby extended as follows:

PART VI

CONTROL OF DRUG DEPENDENCE

Article L.335-14

Any person making illicit use of substances or plants classified as narcotics shall be placed under the surveillance of the health authority.

CHAPTER I—SPECIAL PROVISIONS APPLICABLE TO PERSONS REPORTED BY THE PUBLIC PROSECUTOR

Article L.355-15

Whenever the public prosecutor [procureur de la République], in pursuance of Article L.628-1 of the Public Health Code, orders a person who has made illicit use of narcotics to undergo disintoxication treatment [cure de desintoxication] or to submit to medical surveillance, he shall inform the competent health authority. The latter shall make arrangements for a medical examination of the person and an investigation into his family, professional and social life.

Article L.355-16

(1) If it appears from the medical examination that the person is an addict, he shall be ordered by the health authority to attend an approved establishment of his choice or, if he fails to exercise this right, an officially designated establishment, in order to undergo disintoxication treatment.

(2) Once the person has begun the required course of treatment, he shall remit to the health authority a medical certificate indicating the date of commencement of care, the probable duration of treatment, and the establishment in which he is to be hospitalized or under whose surveillance he is to undergo out-patient treatment.

(3) The health authority shall follow the progress of the treatment and shall at regular intervals inform the public prosecutor's office of the medical and social situation of the person.

(4) In the event of treatment being interrupted, the director of the establishment or the physician responsible for treatment shall immediately inform the health authority which in turn shall notify the public prosecutor's office.

Article L.355-17

(1) If the health authority considers, on the basis of the medical examination, that the person's condition is not such as to necessitate disintoxication treatment, the authority shall order him to submit for as long as is necessary to medical surveillance, either by a physician of its choice or by a social hygiene clinic [dispensaire d'hygiene sociale] or approved health establishment, either public or private.

(2) Once the person has submitted to the required medical surveillance, he shall remit to the health authority a medical certificate indicating the date of commencement of surveillance and its probable duration.

(3) The health authority shall follow the progress of the treatment and shall at regular intervals inform the public prosecutor's office of the medical and social situation of the person.

(4) In the event of medical surveillance being interrupted, the physician responsible for treatment shall immediately inform the health authority which in turn shall notify the public prosecutor's office.

CHAPTER II—SPECIAL PROVISIONS APPLICABLE TO PERSONS REPORTED BY THE MEDICAL AND SOCIAL SERVICES

Article L.355-18

The case of a person making illicit use of narcotics may be referred to the health authority either by the certificate of a physician or by the report of a social worker. In this event, the health authority shall make arrangements for a medical examination of the person and an investigation into his family, professional and social life.

Article L.355-19

If it appears from the medical examination that the person is an addict, he shall be ordered by the health authority to attend an approved establishment of his choice or, if he fails to exercise this right, an officially designated establishment, in order to undergo disintoxication treatment, and to provide proof of compliance.

Article L.355-20

If it appears from the medical examination that the person's condition is not such as to necessitate disintoxication treatment, the health authority shall order him to submit for as long as is necessary to medical surveillance, either by a physician of its choice or by a social hygiene clinic or approved health establishment, either public or private.

CHAPTER III—SPECIAL PROVISIONS APPLICABLE TO PERSONS ATTENDING PREVENTIVE OR CURATIVE ESTABLISHMENTS OF THEIR OWN ACCORD

Article L.355-21

Drug-dependent persons who of their own accord attend a clinic or hospital establishment for purposes of treatment shall not be subject to the above provisions. If they specifically request, their identity may be kept secret at the time of admission. Their identity may be revealed only on grounds other than the suppression of the illicit use of narcotics.

Persons who have received treatment under the conditions provided for in the preceding paragraph may request the physician who treated them for a personal certificate specifying the period(s), duration and purpose of treatment.

2. Chapter I of Part III of Book V of the Public Health Code shall read as follows:

CHAPTER I—POISONS

Article L.626

All persons who contravene the provisions of the public administrative regulations concerning the production, transportation, import, export, possession, offer, cession, acquisition and use of substances or plants, or the cultivation of plants, classified as poisonous by statutory provisions, shall be sentenced to two months to two years' imprisonment and/or a fine of 2,000 F to 10,000 F, the same penalties being applicable to any act associated with the aforementioned operations.

The regulations referred to above may likewise prohibit all operations connected with the said plants and substances.

The courts shall also be empowered, in all the cases provided for in this Section, to order the confiscation of seized substances or plants.

Article L.627

All persons who contravene the provisions of the public administrative regulations provided for in the preceding Article and concerning poisonous substances or plants classified as narcotics by statutory provisions, shall be sentenced to two to ten years' imprisonment and/or a fine of 5,000 F to 50,000,000 F. The period of imprisonment shall be ten to twenty years where the offence consists of the illicit import, production, manufacture or export of the said substances or plants.

A person attempting to commit any of the contraventions covered by the preceding paragraph shall be liable to the same punishment as an actual offender. The same shall apply to conspiracy to commit the aforesaid contraventions.

The penalties prescribed in the two preceding paragraphs may be imposed even if the various acts making up the contravention were committed in different countries.

The following shall likewise be sentenced to two to ten years' imprisonment and/or a fine of 5,000 to 50,000,000 F—(1) persons who with or without payment have aided others to use the said substances or plants, either by making available premises for these purposes or in any other way; (2) persons who have acquired or attempted to acquire the said substances or plants by means of forged prescriptions or prescriptions issued as a favour; (3) persons who have supplied the said substances or plants on presentation of such prescriptions, although aware that the latter are forged or were issued as a favour.

The period of imprisonment shall be five to ten years where aid in the use of the said substances or plants has been rendered to a person or persons less than 21 years of age or where the latter have been supplied such substances or plants under the conditions referred to in item 3 above.

In all the cases mentioned in the preceding paragraphs, the penalty of deprival of civil rights for a period of five to ten years may also be imposed by the courts.

The courts may sentence any person convicted under this Section to restrictions on residence [interdiction de sejour] for a period of not less than two years and not more than five years. They may likewise order the withdrawal of the passport of any such person and the suspension, for a period not exceeding three years, of his driving licence.

The provisions of Section 59 (second paragraph) of the Criminal Procedure Code [1] shall be applicable to premises in which group use is made of narcotics and to premises in which the said substances or plants are illicitly manufactured, processed or stored.

Visits, searches and seizures may be made only for purposes of investigation and verification of the offences covered by this Article. The prior written authorization of the public prosecutor shall be required for such visits, etc., where they involve dwelling houses or apartments, unless they have been ordered by the examining magistrate. Any charges preferred on other grounds shall be rendered null.

Article L.627-1

[*Period of detention in custody; medical examinations of detainees at 24-hour intervals, the medical certificates being appended to the file*]

Article L.628

All persons who make illicit use of any of the substances or plants classified as narcotics shall be sentenced to two months' to two years' imprisonment and/or a fine of 500 to 5,000 F.

Article L.628-1

Persons who have made illicit use of narcotics may be ordered by the public prosecutor to undergo disintoxication treatment or to submit to medical surveillance, under the conditions prescribed by Articles L.355-15 to L.355-17.

Persons who have complied with the medical treatment prescribed for them and have continued the treatment until its termination shall not be liable to prosecution.

Similarly, proceedings shall not be initiated against persons who have made illicit use of narcotics where it is established that, since their reprehensible conduct, the persons have undergone disintoxication treatment or have submitted to medical surveillance, under the conditions prescribed by Articles L.355-18 to L.355-21.

In all the cases provided for in this Article, the confiscation of seized plants and substances shall be imposed, where appropriate, by order of the president of the high court [tribunal de grande instance] on the request of the public prosecutor.

The provisions of the second and third paragraphs above shall apply solely to the first recorded contravention. In the event of a second contravention, the public prosecutor shall determine whether or not proceedings should be initiated, where appropriate under the conditions of the first paragraph.

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[1] Cases in which searches, domiciliary visits and seizures are permitted at any time during the day or night are listed in the paragraph cited. — Ed.

Article L.628-2

Persons charged with the offence referred to in Article L.628 and for whom medical treatment is found to be necessary may be obliged, by writ of the examining magistrate or the juvenile court magistrate [juge des enfants], to undergo disintoxication treatment accompanied by all medical surveillance and rehabilitation measures appropriate to their condition.

The enforcement of the order prescribing this treatment shall be proceeded with, where appropriate, after the termination of the inquiry, the rules laid down by Article 148-1 (second to fourth paragraphs) of the Criminal Procedure Code being applicable in appropriate cases.

Articles L.628-3 — 628-4

[*Various legal provisions relating to the disintoxication treatment*]

Article L.628-5

The disintoxication treatment prescribed by Articles L.628-2 and L.628-3 shall be undergone either in a specialized establishment or under medical surveillance. The legal authority shall be informed of the progress and results of the treatment by the physician in charge. The conditions under which the treatment is to be carried out are to be laid down by public administrative regulations.

The expenses incurred in the fitting out of treatment establishments and the costs of hospitalization, treatment and medical surveillance incurred in the implementation of Articles L.628-1 to L.628-3 shall be borne by the State. The regulations referred to above shall lay down the procedures for implementing this provision.

Article L.628-6

Once the examining magistrate or the authority dealing with the case has ordered a defendant to be placed under medical surveillance or has obliged him to under go disintoxication treatment, the enforcement of the measures in question shall be subject to the provisions of Articles L.628-2 to L.628-5 above, which, insofar as they relate to disintoxication, shall constitute an exception to Article 138 (item 10 of the second paragraph) *et seq.* of the Criminal Procedure Code.

Article L.629

In all the cases covered by Articles L.627 and L.628, confiscation of seized substances or plants must be ordered by the courts. Confiscation may however not be imposed where the offence has been detected in a pharmaceutical dispensary if the offender is merely the manager, unless the proprietor of the dispensary has been an accomplice or the possession of the substances or plants in question is illicit.

In the cases covered by the first paragraph and item 3 of the fourth paragraph of Article L.627, the courts may prohibit the convicted person from practising, for a period not exceeding five years, the profession under the cover of which the offence was committed.

In the cases referred to in the first paragraph of Article L.627, the confiscation of equipment and installations which have been used in the processing and transport of substances or plants must be ordered.

In the cases referred to in item 1 of the fourth paragraph of Article L.627, the courts may order the confiscation of utensils, equipment and furniture with which the premises are stocked and/or decorated, and may prohibit the offender from practising, for a period not exceeding five years, the profession under the cover of which the offence was perpetrated.

Whosoever contravenes the prohibition of professional practice imposed under the second and fourth paragraphs of this Article shall be sentenced to not less than six months', and not more than two years', imprisonment and/or a fine of not less than 3,600 F and not more than 36,000 F.

Article L.629-1

[*Provisions governing the closure of hotels, restaurants, clubs, places of entertainment, etc., in which offences under Articles L.627 and L.628 have been committed*]

Article L.630

[*Penalties for incitement to commit offences under Articles L.627 and L.628*]

Article L.630-1

Without prejudice to the implementation of Sections 23 *et seq.* of Ordinance No. 45-2658 of 2 November 1945,[2] any alien who has been convicted of an offence covered by Articles L.626, L.628-4 and L.630 may be prohibited by the courts from entering French territory for a period of two to five years. Any alien who has been convicted of an offence covered by Article L.627 may be permanently prohibited from entering French territory.

The convicted person shall in all cases be subject to the provisions of Sections 27 and 28 of the above-mentioned Ordinance.

Article L.630-2

The penalties prescribed in this Chapter shall be doubled in cases of recidivism, under the conditions of Articles 58 of the Penal Code.

3. [*Expenses of preventive measures, hospitalization and care*]

4. [*Applicability to Overseas Territories*]

The French Code of Criminal Procedure

(Translated and with an Introduction by Professor Gerald L. Kock, A.B., J.D., LL.M., *Emory University*)

INTRODUCTION

The reform of French criminal procedure begun in 1957[1] was filled out in 1959[2] and has been modified several times since it came into force.[3] It is our purpose here to describe the procedure that now exists for the trial of a criminal case in France.[4]

French penal law recognizes three classes of offenses (*infractions*): felonies (*crimes*), misdemeanors (*delits*) and petty offenses (*contraventions de simple police*). The gravity of an offense is measured by the severity of the punishment prescribed for it. Thus, a petty offense (*contravention*) is one punishable by imprisonment for not more than two months and a fine of not more than 2,000 new francs (*une peine de simple police*)[5]; a misdemeanor (*delit*) is an offense punishable by jailing or imprisonment for not more than five years and a fine of more than 2,000 new francs (*une peine correctionnelle*)[6]; and a felony (*crime*) is an offense punishable by more severe penalties, such as death or imprisonment at hard labor[7] (*une peine criminelle* or *une peine afflictive et infamante*).[8]

The first step in the prosecution of an offender for most offenses is an investigation (*information*) conducted by an examining magistrate[9] (*juge d'instruction*).[10] A different procedure is provided for the prosecution of each class of offense. The different procedures are designed to provide a measure of protection for the accused commensurate with the severity of the penalty that may be incurred should a conviction result.

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[2] Ordinance relating to the entry of aliens into, and their residence in, France; Sections 23–28 deal with expulsion. — Ed.

[1] The law of Dec. 31, 1957, promulgating the Preliminary Title and Book I of the Code of Criminal Procedure.

[2] Ordinances of Dec. 23, 1958, and decrees of April 2, 1958, and Oct. 8, 1958.

[3] Ordinance of June 4, 1960, Decrees of Oct. 6, 1960, Nov. 25, 1960, Feb. 2, 1961, Law of Jan. 15, 1963.

[4] For more complete description of the French court system, see the author's Comment, "The Machinery of Law Administration in France," 108 U. of Pa. L. Rev. 366. No attempt is made here to deal with the special procedures for dealing with offenses detected in the process of their commission (*crimes et delits flagrants*, Arts. 53–74) or offenses against the security of the state (Art. 698).

[5] Penal Code, Arts. 465, 466. In order to maintain at least some consistency of usage within the *American Series of Foreign Penal Codes*, petty offenses are called *violations* in this translation as in volume 1, *The French Penal Code*.

[6] *Ibid.*, Art. 9.

[7] *Ibid.*, Arts. 6, 7, 8.

[8] *Ibid.*, Art. 1.

[9] Code of Criminal Procedure, Art. 79.

[10] Because the police investigation (*enquete preliminaire*) is not an immediate part of the prosecution procedure, it is not here discussed, though it is subject to supervision by the prosecutor (*procureur de la Republique*), Arts. 75–78. The police investigation, which is conducted much as in common law countries, is useful to the prosecutor in deciding whether prosecution is appropriate or not. For a more detailed discussion of these investigations before trial, see Anton, "L'instruction Criminelle," (1960) 9 Am.J.Comp.L. 441–457.

Before Trial. The preliminary investigation conducted by the examining magistrate is a regular part of the judicial process. Its function is the very important one of channeling cases to the trial court that has jurisdiction over the type of offense of which the accused can most reasonably be expected to be convicted. This function is not known in the common law as a separate step for at least two reasons. First, and probably most significant, is the earlier intervention of judicial personnel into the inquiry under the French criminal procedure. Second is the fact that in most common law jurisdictions there is but one court for the trial of any but the smallest offenses.

There are two ways in which a case may be initiated.[11] If a complaint is filed accompanied by a claim for civil damages the magistrate has jurisdiction to proceed with his investigation.[12] If a claim for damages is not filed with the complaint it must be forwarded to the local prosecutor. If he decides to pursue the matter he so notifies the examining magistrate. It is upon this initial application (*réquisitoire introductif*) that the jurisdiction to investigate is based.[13] Once the investigation is begun, the magistrate is free to inquire into any offense related to that stated in the complaint or application and may proceed to investigate any person who may appear to be involved.[14] Persons who are ordered to appear and give evidence must do so, subject to a penalty for nonappearance, as for contempt.[15] The subject of the investigation is not put on his oath as are other witnesses,[16] and he may have the assistance of counsel if he chooses.[17] Witnesses other than the civil claimant are not entitled to the assistance of counsel at these hearings unless they are advised that they are being investigated. The magistrate is required to warn them should that be the case.[18] The proceedings are not open to the public,[19] are in writing or promptly reduced to writing,[20] and are not adversary in form (*sans contradictoire*), except in a very limited sense.[21]

The investigation need not end in a formal charge against anyone. During his investigation, the magistrate may find that the statute of limitations has run (*prescription pénale*) and that he has, therefore, no jurisdiction (*ordonnance de refus d'informer*).[22] The magistrate may, in his order closing the investigation, find that there are not charges enough to justify prosecution, that the facts as shown do not constitute an offense, or that it is not appropriate to prosecute (*ordonnance de non-lieu*).[23]

Appeals may be taken from orders of the examining magistrate to the indicting chamber of the local court of appeal. The prosecutor may appeal from any order of the magistrate. The accused may appeal orders assuming jurisdiction, permitting civil claims to be filed, allowing extended jurisdiction, permitting civil claims to be filed, allowing extended preventive detention, or refusing provisional release (bail). A civil party may appeal from an *ordonnance de non-lieu*, orders refusing to investigate, and other orders that he can show will prejudice his civil interests.[24]

If the magistrate finds that it is an appropriate case for prosecution, he issues an order for transfer (*ordonnance de renvoi*). If the offense charged is a petty offense the case is transferred to a police court (*tribunal d'instance*, sitting for penal matters) for trial.[25] If the offense is a misdemeanor, it is transferred for trial to the appropriate court of primary jurisdiction (*tribunal de grande instance*).[26] If a felony is involved, the case is not transferred to a trial court but goes first to the indicting chamber of the local court of appeal.[27]

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[11] Code of Criminal Procedure, Art. 51.
[12] *Ibid.*, Art. 86. For a discussion of these claims to civil damages, see Howard, "Compensation in French Criminal Procedure" (1958) 21 M.L.R. 387–400.
[13] *Ibid.*, Art. 80.
[14] *Ibid.*, Art. 81.
[15] *Ibid.*, Art 109.
[16] *Ibid.*, Arts. 103, 104.
[17] *Ibid.*, Art. 117.
[18] *Ibid.*, Arts. 104, 105. A statement made by one who is not warned may not be used against him should he later be under charges. Lazreg, C. A. Rouen, Jan. 8, 1960 [1960] Dalloz Sommaire 55.
[19] *Ibid.*, Art. 11.
[20] *Ibid.*, Art. 107.
[21] *Ibid.*, Art. 120.
[22] *Ibid.*, Arts. 7, 8, 9.
[23] *Ibid.*, Art. 177.
[24] *Ibid.*, Art. 186.
[25] *Ibid.*, Art. 178.
[26] *Ibid.*, Art. 179.
[27] *Ibid.*, Art. 181.

The indicating chamber (*chambre d'accusation*) of the court of appeal has exclusive jurisdiction to order the trial of felonies. The action of the indicting chamber is designed to be expeditious. The attorney general of the court of appeal is required to submit the case to the court within ten days, and the court is supposed to dispose of the case as promptly as possible.[28] The court considers only the report of the magistrate's investigation, petitions of the prosecutor, and briefs submitted by the civil parties and the accused. Under the new Code of Criminal Procedure, counsel for the civil party and the accused may appear to argue their clients' positions, and the court may summon the accused. No other witnesses are heard, however.[29]

There are four courses open to the indicting chamber once the case has been submitted to them. First, the court may decide that further investigation is necessary before action can be taken.[30] If this course is chosen, an order is rendered (*arrêt de plus ample informé*) committing the case to one of the judges (*conseillers*) of the court or to an examining magistrate for action.[31] Secondly, the court may decide that it is an inappropriate case for prosecution because of the nature of the offense or the evidence available. If this course is chosen the court issues an *arrêt de non-lieu*, which is substantially the same as the *ordonnance de non-lieu* that can be rendered by an examining magistrate.[32]

The third course open to the indicting chamber is to decide that the offense of which the accused is subject to conviction is not a felony. In this event the court renders a decree (*arrêt de renvoi*) transferring the case to a court of primary jurisdiction (for a misdemeanor) or a police court (for a minor offense).[33]

The fourth, and most usual, course that may be taken by the court is to render a decree of indictment (*arrêt de mise en accusation*), transferring the case to the assize court for trial.[34] This decree has extraordinary qualities. The decree vests jurisdiction of the case in the assize court even if it is not a proper case for that court. Issuance of the decree serves as well to cure all the flaws in the investigating procedure that has gone before.[35]

The Trial Court. The court having jurisdiction over the smallest offenses (*tribunal d'instance*, called the *tribunal de police* when hearing criminal cases) consists of a single judge.[36] There are several ways in which a case can be brought before the court.[37] The culprit and the accuser may voluntarily appear before the court where justice will be rendered rather summarily. Another, and the most usual, way for offenses to come in is by petition of the victim or the local prosecutor (member of the *ministère public* attached to the local court of primary jurisdiction, the *tribunal de grande instance*). On receipt of a petition, an order to appear (*citation directe*) is issued by the court and is served on the accused or at his domicile by the bailiff of the court.[38] The accused must be given not less than five days in which to appear, failing which he can be tried *in absentia*, subject to his right in some cases to demand a rehearing at a later date.[39] Of course, if the prosecution was begun before the examining magistrate the accused is already well aware of the pendency of the action and the necessity for appearing for trial. When the examining magistrate issued his order remanding the case for trial before a police court, he so notified the accused and, if he had been held in custody, released him.[40]

The trial will be conducted in much the same way as for a misdemeanor[41] except that there is but one judge, and the local police commissioner is charged with pressing the interests of the public if the penalty that can be assessed is less than ten days in jail and a fine of 400 new francs, since there

[28] *Ibid.*, Art. 194.
[29] *Ibid.*, Art. 199.
[30] *Ibid.*, Art. 201.
[31] *Ibid.*, Art. 205.
[32] *Ibid.*, Art. 212.
[33] *Ibid.*, Art. 213.
[34] *Ibid.*, Art. 214.
[35] *Ibid.*, Art. 594.
[36] *Ibid.*, Arts. 521, 523.
[37] *Ibid.*, Art. 531.
[38] *Ibid.*, Art. 532.
[39] *Ibid.*, Arts. 487, 489-493, 544.
[40] *Ibid.*, Arts. 178, 180.
[41] *Ibid.*, Arts. 535, 536.

is no prosecutor (*procureur*) assigned to this court.[42] The trial is open to the public unless the court finds that this would endanger the public order or welfare, but minors may always be excluded by the judge if he sees fit to do so.

If there is one, the transcript of the examining magistrate's investigation is read aloud by the recorder. The judge then questions the accused and asks if he has a statement to make. The witnesses are put on oath and testify under questioning by the judge. The civil claimant, if there is one, and prosecutor then argue their cases. The defense is then heard in argument. The prosecutor argues his position followed by the civil claimant, who may offer further observations. The defense may always have the last word if it wishes. The judge then announces his decision on both the criminal prosecution and the civil claim or announces that he will do so at a later hearing, and the trial is closed or recessed, as the case may be.

An appeal may be taken to the local court of appeal by any party whose interests have been infringed.[43]

Misdemeanors may be brought into court by *citation directe*, just as are petty offenses, but in the usual case they are transferred after an investigation by the *juge d'instruction*.[44] The court that has jurisdiction over most misdemeanors (the criminal chamber of the *tribunal de grande instance*) always consists of three judges.[45]

After the *procureur* has filed the case file (*dossier*) compiled by the examining magistrate with the recorder (*greffier*) of the trial court in compliance with an order of that magistrate, or after a proper return has been made to the *citation directe*, the court has jurisdiction to decide the case. The hearings must be public except that the court may vote to close them if the public order or welfare is endangered, and the president of the court may prohibit the admission of minors.[46]

The procedure is much like that in the police court. The recorder reads the police reports or magistrate's transcript, if there are any; the accused testifies (not under oath), unless he chooses to stand silent; witnesses are heard and demonstrative evidence is examined; the prosecutor, civil party and accused sum up; and counsel for the civil party and the prosecutor may reply to the defense arguments.[47] Again, the defense has the right to have the last word.[48]

After the last of the arguments, the court considers first the question of its jurisdiction. If the court finds that the offense should have been prosecuted before the police court, it may enter a final decision.[49] If the court finds that the offense was a felony, it must enter an order transferring the case to the prosecutor for further action. The court may also order that the accused be taken or held in custody for further proceedings.[50]

Appeals from convictions for misdemeanors may be taken to the local court of appeal by the accused, the civil party (but only to the extent necessary to protect his civil interests), the prosecutor (*procureur*) attached to the trial court, and the attorney-general (*procureur général*) attached to the court of appeal.[51] (He is the immediate superior of the prosecutor and is free to exercise many of the same powers.) Notice of appeal, setting forth grounds on which the appeal is based, must be filed with the recorder of the trial court, or the equivalent court in the place where the defendant is detained, within ten days of judgment (except that the *procureur général* of the court of appeal has two months).[52] If one party appeals, the others have five additional days in which to file cross appeals.[53] Execution of the sentence (*jugement*) is suspended during these periods and remains suspended until after an appeal is heard if notice is filed in time.[54]

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[42] *Ibid.*, Art. 45.
[43] *Ibid.*, Art. 546.
[44] *Ibid.*, Art. 388.
[45] *Ibid.*, Arts. 398.
[46] *Ibid.*, Arts. 400, 402.
[47] *Ibid.*, Arts. 427–461.
[48] *Ibid.*, Art. 460. The privilege can be waived, however, and if the defense does not claim its right no error is committed. Tranchant, Cassation, Dec. 28, 1959 [1960] Dalloz Jurisprudence 171.
[49] *Ibid.*, Art. 466.
[50] *Ibid.*, Art. 469.
[51] *Ibid.*, Arts. 496, 497.
[52] *Ibid.*, Arts. 498, 505.
[53] *Ibid.*, Art. 500.
[54] *Ibid.*, Art. 506.

A much more elaborate machinery exists for the trial of felonies than for lesser offenses. The assize court (*cour d'assises*) has full jurisdiction to try any case transferred to it by the indicting chamber of the local court of appeal, and it may try only such cases.[55] The assize court is an anomaly in the French system. Its jurisdiction is limited as has been indicated; it consists, in part, of a jury;[56] it holds quarterly sessions;[57] and its decisions are not subject to appeal to the court of appeal.

Once the decree for trial has become final, the accused is transferred to the jail in the place where the assizes are to be held.[58] If he has not been detained, he is notified that he is to appear before the president of the assize court on a certain date.[59] As soon as possible thereafter, the president (or a judge delegated by him) interrogates the accused about his identity and assures himself that proper notice of the decree for trial was given.[60] The accused is then asked to designate counsel to assist in his defense.[61] If he does not have, or does not choose, counsel, one is appointed for him from among the attorneys (*avocats* or *avoués*) admitted to practice before the court.[62]

Unless the accused waives the delay, the trial may not begin within five days of the first interrogation by the president of the court.[63] If, as a result of his interrogation of the accused or his study of the examining magistrate's report, the president feels that further investigation is required he may conduct such an investigation or order another judge of the court or an examining magistrate to do so.[64] In addition, the president may order the joinder or severance of trials if associated offenses or defendants have been brought for trial at the same term.[65]

The trial begins with the selection of trial jurors from the panel called for the term of court.[66] The jurors are chosen by lot, but the prosecution is allowed four and the defense (no matter how many defendants there are)[67] is allowed five peremptory challenges. No reason may ever be given for a challenge.[68] If the trial promises to be a long one the court may order that one or more alternate jurors be selected.[69]

As is true in the other courts, the trial must be public, unless the judges on the court decide that it would endanger the public order or welfare, and the president may prohibit the attendance of minors.[70]

The trial once begun must continue without interruption to judgment unless it is ordered held over to the next term of court, except that it may be recessed to allow the court to eat and sleep.[71] The president of the court is responsible for maintaining the orderly progress of the trial and has power to do whatever he may deem necessary to discover the truth.[72] The trial proper begins with a reading by the recorder of the decree of indictment.[73] The president then interrogates the accused and tells him he may make any statement he wishes, but the president is not supposed to indicate any opinion on his guilt or innocence.[74] The witnesses called by the prosecution, civil claimant, and accused are then heard.[75] The witnesses may be kept separated until after

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[55] *Ibid.*, Art. 231.
[56] *Ibid.*, Art. 240.
[57] *Ibid.*, Art. 236.
[58] *Ibid.*, Art. 269.
[59] *Ibid.*, Arts. 272, 150.
[60] *Ibid.*, Art. 273.
[61] *Ibid.*, Art. 274.
[62] *Ibid.*, Art. 275.
[63] *Ibid.*, Art. 277.
[64] *Ibid.*, Arts. 283, 284.
[65] *Ibid.*, Arts. 285, 286.
[66] *Ibid.*, Art. 296.
[67] *Ibid.*, Art. 299. If there are more than five defendants they are to draw lots to see who shall exercise the challenges. Mazurier, Cassation, Dec. 15, 1959, [1960] Dalloz Sommaire 27.
[68] *Ibid.*, Arts. 297, 298.
[69] *Ibid.*, Art. 296.
[70] *Ibid.*, Art. 306.
[71] *Ibid.*, Art. 307.
[72] *Ibid.*, Arts. 309, 310. It should be noted in all French courts the use of recording or photographic equipment is prohibited, subject to substantial fines. Arts. 308, 403, 535.
[73] *Ibid.*, Art. 327.
[74] *Ibid.*, Art. 328. The Court of Cassation has recently held that the statement by the president of the trial court that "whatever the motive, the accused has committed two odious and abominable crimes" was adequate ground for reversal. Quiddir, June 14, 1956. [1956] Dalloz Jurisprudence 733.
[75] Code of Criminal Procedure, Art. 329.

they have testified.[76] Before giving his statement, the witness is asked by the president of the court to state his name, age, occupation, domicile, if he knew the accused before the alleged offense, and whether he is related to or employed by the accused or civil claimant.[77]

Unless a witness is related to the accused or a civil claimant or is under sixteen years old, he is required to swear that he will speak without hatred or fear and tell nothing but the truth.[78] The witness then makes his statement. He may not be interrupted, except that the president may prevent him from compromising the dignity of the trial or from prolonging it without contributing to the certainty of its outcome.[79] After the witness has finished he may be questioned by the president and prosecutor. The other judges and the jurors may, with the president's approval, ask questions, and counsel for the accused and civil claimant may submit questions to be asked by the president.[80] The witness must remain in the courtroom until the court retires to deliberate unless he is excused by the president.[81]

After the last witness is heard counsel for the civil claimant argues his position. The prosecutor then presents his arguments. The accused and his counsel follow with the arguments for the defense. If the prosecutor or civil claimant replies to the defense, the accused has another opportunity to speak. The defense has a right always to have the last word.[82]

The arguments finished, the court, judges and jurors, retire to deliberate. Before the court retires, however, the president must instruct them that they should ask themselves in silent reflection whether the impression of the evidence on their minds leaves them thoroughly convinced (*Avez-vous une intime conviction?*) of the guilt of the accused.[83] Nothing may be considered by them that has not been presented orally at the trial.[84] The court, after a period of deliberation, votes by secret ballot.[85] The accused cannot be convicted unless eight of the twelve members vote for conviction.[86] This means that at least five of the nine jurors must vote for any conviction. If the vote is for conviction the court proceeds to vote on a penalty. Each member proposes a penalty by secret ballot, and the penalty must receive a majority of the votes to prevail. The members continue to ballot until they arrive at a penalty. On the third and subsequent ballots the most severe penalty proposed on the preceding ballot is stricken from the list of penalties available.[87]

A penalty arrived at, the court returns to the courtroom, and after the accused is brought in, the president announces the decision and the penalty, if the accused was not acquitted.[88] If a civil claim has been tried along with the criminal charges the three judges then decide that part of the case and hand down their decision.[89] Civil damages may be awarded even if the accused has been acquitted.[90]

No appeal may be taken from the decision of an assize court, but review by the Court of Cassation may be petitioned for by the prosecutor or any aggrieved party.[91]

Appeal and Review. In France, appeal and review differ rather more than in most common law jurisdictions. Appeals are heard by courts of appeal established in districts throughout the country; review is granted only by the Court of Cassation, sitting in Paris. Appeal amounts to a trial *de novo* based on the record of the trial court. If the trial court decision is reversed on appeal the appellate court enters a final judgment, which supplants the judgment appealed from. Review is limited to consideration of specific points

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[76] *Ibid.*, Art. 325.
[77] *Ibid.*, Art. 331.
[78] *Ibid.*, Arts. 331, 335.
[79] *Ibid.*, Arts. 331, 309.
[80] *Ibid.*, Arts. 311, 312, 332.
[81] *Ibid.*, Art. 334.
[82] *Ibid.*, Art. 346.
[83] *Ibid.*, Art. 353.
[84] Vouin and Leaute, Droit penal et criminologie (1956) 435, 439. Also see Martin, Cassation, Feb. 9, 1955 [1955] Dalloz Jurisprudence 274.
[85] Code of Criminal Procedure, Arts. 356–358.
[86] *Ibid.*, Art. 359.
[87] *Ibid.*, Art. 362.
[88] *Ibid.*, Art. 366.
[89] *Ibid.*, Art. 371.
[90] *Ibid.*, Art. 372.
[91] *Ibid.*, Art. 567.

of law enumerated in the petition for review. If the lower court decision is found to have been based on an erroneous understanding of the law, it is set aside, and the case is returned to another court of the same rank for re-trial.

Appeals may be taken from all convictions that involve more than five days' imprisonment or 60 new francs fine,[92] except that no appeal may be had from the decision of an assize court. In general, the procedural rules applied in the *tribunal de grande instance* apply in the court of appeal as well,[93] except that on appeal one judge is assigned to give the case special study and to report his findings but not his opinions to the court orally at the hearing. The defendant is interrogated by the court, but other witnesses are not heard, as a rule.[94]

If the appeal has been taken by the prosecutor, the court may affirm the judgment below or set aside all or any part of it. If the accused appeals, the court may not increase his punishment. If a civil claimant appeals, the court may not reduce his recovery, but they may increase it.[95] If the court finds that the act charged was not a penal offense or cannot be imputed to the defendant, it will set aside the judgment and may grant the defendant damages.[96] If the court finds that the offense was a felony, it will set aside the judgment and dismiss the appeal, because it has no felony jurisdiction.[97] Since all proceedings after the examining magistrate's investigation were void, the accused may properly be prosecuted before an assize court. If the court determines that the trial was void because of a violation of law or some fatal procedural omission, it will vacate the first trial and decide the case *de novo* itself.[98]

Final decisions of the indicting chamber, police court, court of primary jurisdiction, court of appeal, and assize may be taken before the criminal chamber of the Court of Cassation (*chambre criminelle de la Cour de cassation*) for review.[99] Judgments of acquittal rendered by an assize court may be reviewed only for the purpose of clarifying the law; the acquittal may not be in any way affected.[1] Decisions not on the merits of the case may be reviewed only if they terminated the proceedings.[2]

The public sessions of the Court of Cassation are much like those of the courts of appeal. One judge reports on the case, and counsel for the parties present their arguments. If he desires to do so, the attorney general attached to the court may address his views to the court.[3] In the court's deliberations the judge who reported the case states his opinion first, and the president states his last. The other members indicate their opinions in the order of their seniority on the court.[4] The court may reverse a decision only because of a misinterpretation or misapplication of law. It may not consider whether the evidence is sufficient to support the decision.

If, before considering the merits, the court decides that the procedures prescribed for perfecting a review before the court have not been complied with, the court dismisses the petition (by *arrêt d'irrecevabilité* or *arrêt de déchéance*).[5] If the court finds that the case has become moot it renders an *arrêt de non-lieu* and does not reach the merits.[6] After its deliberation on the merits the court either rejects the petition for review (by *arrêt de rejet*) or reverses the decision below.[7] Unless there remains nothing to be decided (as is the case where an acquittal is being reviewed on the prosecutor's petition) the court must remand the case to a lower court for a new decision on the merits. This remand is not to the court whose decision has been reversed but to another court of the same rank, *e.g.*, court of appeal, police court.[8] If a conviction for a misdemeanor or petty offense is reversed because the court

[92] *Ibid.*, Arts. 496, 546.
[93] *Ibid.*, Art. 512.
[94] *Ibid.*, Art. 513.
[95] *Ibid.*, Art. 515.
[96] *Ibid.*, Art. 516.
[97] *Ibid.*, Art. 519.
[98] *Ibid.*, Art. 520.
[99] *Ibid.*, Art. 567.
[1] *Ibid.*, Art. 572.
[2] *Ibid.*, Art. 574.
[3] *Ibid.*, Art. 602.
[4] *Ibid.*, Art. 603.
[5] *Ibid.*, Art. 605.
[6] *Ibid.*, Art. 606.
[7] *Ibid.*, Art. 607.
[8] *Ibid.*, Arts. 609, 610.

had no jurisdiction the remand is to the court that does have jurisdiction to decide the case. If the error found by the court is not one that vitiates the entire proceeding, the Court of Cassation may grant the petition in part only and remand only that part of the case for re-trial.[9] The Court of Cassation has no jurisdiction ever to render a final decision on the merits of the case.

Title III—Parole

Article 729

Convicts having been subject to one or more penalties privative of liberty may benefit from a parole if they have given sufficient proof of good conduct and present serious indications of social readaptation.

Parole shall be reserved to convicts who have served three months of their penalty, if that penalty is less than six months, and half of the penalty in other cases. For convicts who are legal recidivists within the terms of Articles 56, 57 or 58 of the Penal Code the time before release shall be increased to six months if the penalty is less than nine months and to two-thirds of the penalty in other cases.

For those sentenced to solitary confinement with hard labor for life, the time before release shall be fifteen years.

For persons sentenced to a mixed temporary penalty of solitary confinement, it shall be four years longer than that corresponding to the principal penalty if that penalty is correctional, and six years longer if that penalty is a felony penalty.

Article 730

The right to grant parole belongs to the Minister of Justice.

The recommendation file shall contain the advice of the chief of the establishment in which the interested person is detained, the judge for the application of punishments, official counsel attached to the court that pronounced the conviction, the prefect of the department in which the convict intends to fix his residence or, in cases provided by decree, the prefect of the place of detention, and of a consultative committee instituted within the Ministry of Justice the composition of which shall be fixed by decree.

Article 731

The benefit of parole may be mixed with particular conditions such as measures of assistance and control destined to facilitate and verify the readjustment of the freed man.

Those measures shall be placed in operation under the direction or under the surveillance of committees presided over by the judge for the application of punishments, with the concurrence of the charitable associations authorized for that purpose.

A decree shall determine the measures envisaged in the present article, the composition and powers of the said committees and the conditions for authorization of the charitable association. It shall also fix the condition of financing indispensable to the application of these measures and to the functioning of the committees.

Article 732

The decree for parole shall fix the manner of execution, the conditions to which the grant or the maintenance of parole is subordinated and the nature and duration of the measures of assistance and control.

That duration may not be less than the duration of the part of the penalty not served at the time of release, if a term punishment is concerned; it may exceed it for a maximum of one year.

However, when the punishment in course of execution is a life penalty or a mixed punishment of solitary confinement, the duration of the measures of assistance and control shall be fixed for a period that may not be less than five years nor greater than ten years.

During all the duration of parole the provisions of the decree of release may be modified on the recommendation of the judge for the application of punishments on advice of the consultative committee.

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[9] *Ibid.*, Art. 612.

Article 733

In case of a new conviction, notorious bad conduct, violation of the conditions or failure to observe the measures set out in the decision for parole, the Minister of Justice may pronounce the revocation of that decision on advice of the judge for the application of penalties and of the consultative committee.

In case of urgency, arrest may be provisionally ordered by the judge for the application of penalties of the place where the freed man is found, after hearing official counsel and subject to immediately placing the matter before the Minister of Justice.

After revocation the convict must serve, according to the provisions of the decree of revocation, all or part of the duration of the penalty that remained for him to serve at the time of his release on parole, cumulatively, if appropriate, with any new penalty that he has incurred; the time during which he was placed in provisional arrest shall count for the execution of his penalty, however.

If the revocation does not intervene before the expiration of the time provided in the preceding article the release shall be final. In that case the penalty is deemed to be terminated from the day of release on parole.

Title IV—Suspension

Chapter 1—Simple Suspension

Article 734

In case of sentence to imprisonment or to a fine, if the convict has not been the object of an earlier sentence to imprisonment for a common law felony or misdemeanor the courts may order, by the same judgment and by decision stating reasons, that the execution of the principal punishment shall be suspended.

Article 735

If during five years, dating from the judgment or decree, the convict has not incurred any prosecution followed by sentence to imprisonment or to a more serious punishment for a common law felony or misdemeanor the conviction shall be deemed to be void.

In other cases, the first punishment shall be executed first without confounding it with the second, subject to the eventual application of the provisions of Article 738.

Article 736

The suspension of the punishment shall not extend to payment of costs of the trial and damages.

Nor shall it extend to accessory punishments or to incapacities resulting from the conviction.

However, the accessory punishments and the incapacities shall cease to have effect on the day on which, by application of the provisions of Article 735, the conviction has been deemed void.

Article 737

After having pronounced the decision of conviction provided in Article 734, the president of the court must advise the convicted person that in case of a new conviction the first punishment will be executed without confusion with the second being possible and that the punishments for recidivism will be incurred in the terms of Articles 57 and 58 of the Penal Code.

Chapter 2—Suspension With Probation

Article 738

In case of a sentence to imprisonment for a common law offense, if the convicted person has not been the object of an earlier conviction for a common law felony or misdemeanor and a sentence of imprisonment or if he has been sentenced only to a punishment of jailing less than or equal to six months, the courts may, in ordering that the execution of the principal punishment be suspended for a time which may not be less than three years or greater than five years, place the convicted person under the regime of probation.

However, if the earlier conviction was pronounced with the benefit of suspension with probation added the provisions of the first paragraph of the present article shall be inapplicable.

If the earlier conviction was pronounced with the benefit of simple suspension the first punishment shall be executed, by derogation of the provisions of Article 735, only if the second falls under the conditions and times provided in Article 740 or Article 742. That first punishment shall be void if the second punishment itself comes to be declared or deemed void under the conditions and in the periods provided in Article 743 or in Article 745.

Article 739

The regime of probation shall require for the convicted person the observation of the measures of surveillance and assistance provided by an administrative regulation with a view to social readjustment of delinquents as well as the observation of those obligations provided by the same administrative regulation that have been specially imposed by the decree or judgment of conviction.

Article 740

If in the course of the time fixed in application of Article 738 the convicted person has incurred a prosecution followed by a sentence to imprisonment or a more serious punishment for a common law felony or misdemeanor, the first punishment shall be executed first without being confounded with the second.

Article 741

If in the course of the same period it appears necessary to modify, increase or reduce the obligations to which the convicted person is subject, the judge for the application of punishments of the place of his residence may, either on his own motion or on application of official counsel or at the request of the interested person, order their modification, their increase or their suppression.

Article 742

If in the course of the same period the convicted person does not satisfy the measures of surveillance and assistance or the obligations imposed with reference to him, the judge for the application of penalties may place the matter before the court of primary jurisdiction of the place where the convicted person resides, that it may order the execution of the penalty. The same right belongs to official counsel.

The judge for the application of penalties may, after hearing official counsel, decide by order stating reasons that the convicted person be taken to and retained in a jail. In that case, the court must decide within three days of the imprisonment.

The decisions of the court may be appealed from by official counsel and the convicted person.

Article 743

If in the course of the same period the convicted person satisfies the measures of assistance and surveillance and the obligations imposed with regard to him, and if his readjustment appears accomplished, the judge for the application of penalties may place the matter before the court of primary jurisdiction of the place where the convicted person resides, that the conviction may be declared void. The same right belongs to official counsel and the convicted person.

The court may not be called upon for that purpose before the expiration of a period of two years counting from the day on which the conviction became final.

The decision of the court may be appealed from by official counsel and by the convicted person.

Article 744

When the convicted person placed on probation is otherwise the object of measures prescribed by an earlier decision rendered in application of Articles 15, 16 and 28 of the Ordinance No. 45–174 of February 2, 1945, the juvenile judge who first decided or who presided over the juvenile court that rendered the decision or, on delegation of competence, that of the place of the residence of the convicted person, shall exercise the power devolved on the judge for the application of punishments by Articles 741 to 743 of the present code.

When the convicted person reaches twenty-one years of age, those powers shall be exercised by the competent judge for the application of punishments.

Article 745

If at the expiration of the period fixed in application of Article 738 the execution of the punishment has not been ordered under the conditions provided in Article 742 and if the convicted person has not incurred a prosecution followed by a sentence to imprisonment [or jailing] or to a more serious punishment for a common law felony or misdemeanor, the conviction shall be considered as void.

Article 746

The suspension of the punishment shall not extend to the payment of the costs of the trial and damages.

Nor shall it extend to the accessory punishments and to incapabilities resulting from the conviction.

However, the accessory punishments and the incapacities shall cease to have effect on the day on which, by application of the provisions of Articles 743 and 745, the conviction has been declared or deemed void.

Article 747

The president of the court must, after having pronounced the decision of conviction provided in Article 738, give the advice prescribed in Article 737, informing the convicted person of the sanctions to which he is subject if he fails to conform to the measures ordered and of the possibility that he may, on the other hand, see his conviction declared void by observing perfect conduct.

Title V—Recognizing the Identity of Convicted Individuals

Article 748

When after an escape followed by a retaking or in any other circumstance the identity of a convicted person is contested, that contest shall be settled following the rules established for matters of incidents of execution. However, the hearing shall be public.

If the contest is raised in the course of and on the occasion of a new prosecution, it shall be settled by the court dealing with that prosecution.

Title VI—Imprisonment For Payment

Article 749

When a sentence to a fine or to costs or to any other payment for the profit of the public Treasury is pronounced by a criminal jurisdiction for an offense not having a political character and not including a life punishment, it shall fix, for the case in which the sentence remains unexecuted, the term of imprisonment for payment within the limits provided below.

When the imprisonment for payment guarantees the recovery of several debts its duration shall be fixed according to the total of the liabilities.

Article 750

The duration of the imprisonment for payment shall be regulated as follows:

from two to ten days when the fine and the pecuniary liabilities do not exceed 100 new francs;

from ten to twenty days when, greater than 100 new francs, they do not exceed 250 new francs;

from twenty to forty days when, greater than 250 new francs, they do not exceed 500 new francs;

from forty days to sixty days when, greater than 500 new francs, they do not exceed 1,000 new francs;

from two to four months when, greater than 1,000 new francs, they do not exceed 2,000 new francs;

from four to eight months when, greater than 2,000 new francs, they do not exceed 4,000 new francs;

from eight months to one year when, greater than 4,000 new francs, they do not exceed 8,000 new francs;

from one year to two years when they exceed 8,000 new francs.

In police matters the duration of imprisonment for payment may not exceed two months.

Article 751

Imprisonment for payment may not be pronounced either against individuals less than eighteen years old at the time of the acts that led to the prosecution or against those who began their seventieth year at the time of the conviction.

It shall be reduced by half for the benefit of those who at the latter time are in their sixty-second year, without prejudice to the application of the provisions of the following article.

Article 752

It shall also be reduced by half, without its duration ever being less than twenty-four hours, for those convicted who prove insolvency by producing—(1) a certificate of the tax collector of their domicile suggesting that it not be imposed; (2) a certificate of the mayor or the police commissioner of the commune of their domicile.

Article 753

It may not be utilized simultaneously against husband and wife, even for the recovery of sums arising out of different convictions.

Article 754

It may be utilized only five days after a demand made of the convicted person at the request of the prosecuting party.

If the judgment of conviction has not been earlier served on the debtor the demand shall be at the head of an extract of that judgment, which shall contain the name of the parties and the disposing parts. After examination of the return of service of the demand and on the demand of the prosecuting party, the prosecuting attorney shall address the necessary applications to the agents of the police and other functionaries charged with the execution of judicial warrants. The petition for incarceration shall be valid only until the expiration of the period of limitation for the punishment. That limitation occurring, no imprisonment for payment may be utilized unless it is under way or has been the object of an earlier order for confinement.

If the debtor is detained the order may be made immediately after the notification of the demand.

When, before the signature of the petition for incarceration, an entire year passes after the demand, it must be renewed.

[6-4-60]

Article 755

The rules on the execution of judicial warrants fixed by Articles 124 and 132, with the exception of the reference to Articles 133 and 134, paragraphs 1 and 2, are applicable to imprisonment for payment.

[6-4-60]

Article 756

If an already incarcerated debtor requires that he be referred to him, he shall be taken immediately before the president of the court of primary jurisdiction of the place where the arrest was made. That magistrate shall decide as a referee except to order, if appropriate, remand for decision under the forms and conditions of Articles 710 and 711.

The same right belongs to a debtor arrested or ordered to be confined who shall be taken immediately before the president of the court of primary jurisdiction of the place of detention.

Article 757

If the arrested debtor does not require that he be referred to someone, or if, in case of referral, the president shall order that the objection be passed over, the incarceration shall be undertaken in the forms above provided for the execution of punishments privative of liberty.

Article 758

Imprisonment for payment shall be served in a jail in the section destined for that use.

However, in case or order for confinement, if the debtor is subject to a punishment privative of liberty on the date fixed for final or conditional release he shall be held in the penitentiary establishment for the duration of his imprisonment for payment.

Article 759

Individuals against whom imprisonment for payment has been pronounced may prevent it or any of its effects either by paying or by setting aside a sum sufficient to extinguish their debt or by furnishing a security recognized as good and valid.

The security shall be approved by the receiver of finances. In case of dispute, it shall, if appropriate, be declared good and valid by the president of the court of primary jurisdiction acting as referee.

The surety ought to liberate himself within the month, failing which he may be prosecuted.

Subject to the reservation of the provisions of Article 760, when complete payment has not been made, imprisonment for payment may be required anew for the sums remaining due.

Article 760

When the imprisonment for payment has come to an end for any reason whatever it may not be further utilized either for the same debt or for convictions prior to its execution unless those convictions involved on their part an imprisonment longer than that already submitted to, in which case the first incarceration must always be deducted from the new constraint.

Article 761

The detained debtor shall be subject to the same regime as convicted persons, without being required to work, however.

Article 762

A convicted person who has submitted to imprisonment for payment is not freed of the amount of the liability for which it was utilized.

Federal Republic of Germany

QUESTION 1

To avoid any misunderstanding it must be stated at the outset that there exists no 1969 German Criminal Code effective 1973, so that it is not possible to answer the questions on the basis of the provisions of such a Code. On the other hand, among the many recent amendments of the German Criminal Code, which have been made within the framework of the reform of German Criminal law in general and the Criminal Code in particular, there stands out the Second Criminal Law Reform Law of July 4, 1969 (*Zweites Gesetz zur Reform des Strafrechts (2.StrRG) vom 4.7.1969*),[1] which provides an entirely new version of the Criminal Code's General Part (Secs. 1–79b of the Criminal Code), to become effective October 1, 1973. [It will be hereinafter quoted as the 1973 Code]. According to the opinion of a leading German criminal law scholar, who authored one of the most recent treatises on the General Part of German criminal law,[2] "the *2.StrRG* simultaneously assumed the obligation—which, of course, could at any time be revoked—to adjust at least, if not extensively to reform, the new Special Part [of the Criminal Code] by October 1, 1973."[3]

The systematic structure of the German Penal Code, in the version which will become effective October 1, 1973, follows the European pattern of separating the code into a General Part and a Special Part: while the General Part (Secs. 1–79b) deals with crime and punishment in general, outlining general principles of the administration of criminal justice which are applicable

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[1] *Bundesgesetzblatt* 1969, Part I, p. 717.

[2] Eberhard Schmidhäuser, *Strafrecht, Allgemeiner Teil, Lehrbuch*, [Criminal Law, General Part, Textbook], Tübingen, J.C.B. Mohr (Paul Siebeck), 1970. 717 p.

[3] *Id.* at 65.

regardless of the type of the offense involved: the Special Part (Secs. 80-370) defines the essential elements of the individual offenses.[4]

Thus, the tripartite division (general provisions; specific offenses; sentencing—a short survey of sentencing provisions appears at the end of the answer to Question 1) is not followed in the 1973 German Penal Code.

In the following portion, the detailed contents of the General Part of the 1973 Code are given, in order to show its structure, as well as to provide insight into a number of special topics—in particular, measures of rehabilitation and safety, as well as other measures—which cannot be covered in detail due to the shortness of time.

Structure of the 1973 German Criminal Code

General Part First Division

The Penal Statutes (Das Strafgesetz)

Title 1 Scope of applicability

Section 1. No Punishment in the Absence of a Statute.
Section 2. Temporal Applicability.
Section 3. Applicability to Acts Committed Within the Country.
Section 4. Applicability to Acts [Committed] aboard German Ships and Aircraft.
Section 5. Acts Committed abroad against Persons or Property Protected by [German] Law.
Section 6. Acts Committed abroad against Persons and Property which are Internationally Protected.
Section 7. Applicability to Acts Committed abroad in other Cases.
Section 8. Time of the Act.
Section 9. Place of the Act.
Section 10. Special Provisions for Juveniles and Adolescents.

Title 2 Semantic usage

Section 11. Definitions of Concepts with Respect to Persons and Things.
Section 12. Major and Minor Crimes.

Second Division

The Act

Title 1 Basic principles of punishability

Section 13. Commission by Omission.
Section 14. Acting on Behalf of Another.
Section 15. Intentional and Negligent Conduct.
Section 16. Error concerning Definitional Elements [of Offenses].
Section 17. Error concerning Unlawfulness [of the Act].
Section 18. Severer Punishment in Case of Special Consequences of the Act.
Section 19. Incapability of Children to Incur Criminal Responsibility.
Section 20. Lack of Capacity to Incur Criminal Responsibility by Reason of Mental Disturbances.
Section 21. Diminished Capacity to Incur Criminal Responsibility.

Title 2 Attempt

Section 22. Definition of Concept.
Section 23. Punishability of Attempt.
Section 24. Withdrawal.

Title 3 Principals and accessories

Section 25. Principals.
Section 26. Instigation.
Section 27. Complicity.

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[4] The German Penal Code of May 15, 1871, in the version of Announcement of September 1, 1969 (*Bundesgesetzblatt* (BGBl.) I:1445), as amended consists of: Introductory Provisions (Secs. 1–12); First [i.e., General] Part (Secs. 13–77) entitled "Punishment of Major and Minor Crimes and petty offences in General;" and Second [i.e., Special] Part (Secs. 80–370) entitled "Particular Major Crimes, Minor Crimes and petty offenses and Their Punishment."

Section 28. Special Personal Characteristics.
Section 29. Independent Punishability of Participants.
Section 30. Attempted Participation.
Section 31. Withdrawal from Attempted Participation.

Title 4 Self-defense and necessity

Section 32. Self-defense.
Section 33. Exceeding Self-Defense.
Section 34. Justifying Necessity.
Section 35. Excusing Necessity.

Title 5 Impunity of parliamentary utterances and reports

Section 36. Parliamentary Utterances.
Section 37. Parliamentary Reports.

Third Division

Legal Consequences of the Act

Title 1 Punishments

Punishment by deprivation of liberty

Section 38. Duration of Punishment by Deprivation of Liberty.
Section 39. Computation of Punishment by Deprivation of Liberty.

Punishment by fine

Section 40. Imposition in the Form of Day Fines.
Section 41. Punishment by Fine in Addition to Punishment by Deprivation of Liberty.
Section 42. Facilitation of Payment.
Section 43. Fine in Lieu of Punishment by Deprivation of Liberty.

Additional punishment

Section 44. Prohibition of Driving.

Collateral measures

Section 45. Loss of Capacity to Hold Office, of Passive and Active Suffrage.
Section 45a. Beginning and Computation of the Duration of the Loss.
Section 45b. Restoration of Capacities and Rights.

Title 2 Fixing of Punishment

Section 46. Basic Principles for Fixing Punishments.
Section 47. Short Term Punishment by Deprivation of Liberty—only in Exceptional Cases.
Section 48. Recidivism.
Section 49. Particular Statutory Grounds for Mitigation of Punishment.
Section 50. Concurrence of Grounds for Mitigation of Punishment.
Section 51. Counting Toward Punishment of Other Confinement.

Title 3 Fixing punishment in case of violation of several statutory provisions

Section 52. Compound Offenses.
Section 53. Several Criminal Acts.
Section 54. Fixing the Compound Punishment.
Section 55. Subsequent Fixing of the Compound Punishment.

Title 4 Suspension of punishment for probation

Section 56. Suspension of Punishment.
Section 56a. Period of Probation.
Section 56b. Attaching Conditions.
Section 56c. [Probation] Directives.
Section 56d. Assistance of Probation [Counselors].
Section 56e. Subsequent Decisions.
Section 56f. Revocation of Punishment Suspension.
Section 56g. Remission of Punishment.
Section 57. Suspension of the Remaining Punishment.
Section 58. Compounded Punishment and Suspension of Punishment.

Title 5 Reprimand coupled with keeping the [execution of] punishment in abeyance desisting from punishment

Section 59. Precondition on Reprimand Coupled with Keeping [Execution of] Punishment in Abeyance.

Section 59a. Probation Time and Attaching Conditions.
Section 59b. Sentencing to Punishment Kept in Abeyance.
Section 59c. Compounded Punishment and Reprimand Coupled with Punishment Kept in Abeyance.
Section 60. Desisting from Punishment.

Title 6 Measures of Rehabilitation and Safety

Section 61. Synopsis.
Section 62. Principle of Commensurateness.
Section 63. Commitment to a Psychiatric Medical Institution.
Section 64. Commitment to an Institution for Withdrawal Treatment.
Section 65. Commitment to a Socio-Therapeutical Institution.
Section 66. Commitment to Preventive Detention.
Section 67. Sequence of Execution.
Section 67a. Commitment for the Execution of Another Measure.
Section 67b. Suspension by the Sentencing Court.
Section 67c. Delayed Beginning of the Execution of the Commitment.
Section 67d. Duration of the Commitment.
Section 67e. Review.
Section 67f. Multiple Ordering of the Same [Commitment] Measure.
Section 67g. Revocation of the Suspension and Termination of the Measure.
Protective surveillance
Section 68. Grounds for Protective Surveillance.
Section 68a. Surveillance Agency, Probation Counselor.
Section 68b. Directives.
Section 68c. Duration of Protective Surveillance.
Section 68d. Jurisdiction, Subsequent Decisions.
Section 68e. Termination of Protective Surveillance.
Section 68f. Protective Surveillance Where Suspension of the Rest of Punishment Not Granted.
Section 68g. Protective Surveillance and Suspension for Probation.
Revocation of driver's license
Section 69. Revocation of Driver's License.
Section 69a. Bar to the Reissuance of a Driver's License.
Section 69b. International Motor Vehicle Traffic.
Prohibition against exercising a profession
Section 70. Ordering the Prohibition Against Exercising a Profession.
Section 70a. Suspension of the Prohibition Against Exercising a Profession.
Section 70b. Revocation of the Suspension and Termination of the Prohibition Against Exercising a Profession.
Common Provisions
Section 71. Ordering [Commitment and Other Measures] Independently [of Criminal Proceedings].
Section 72. Combination of Measures.

Title 7 Forfeiture and confiscation

Section 73. Grounds for Forfeiture.
Section 73a. Forfeiture of Equivalent Value.
Section 73b. Appraisal of Value.
Section 73c. Provision for Hardship.
Section 73d. Effect of Forfeiture.
Section 74. Grounds for Confiscation.
Section 74a. Extended Grounds for Confiscation.
Section 74b. Principle of Commensurateness.
Section 74c. Confiscation of Equivalent Value.
Section 74d. Confiscation of Writings and [Their] Destruction.
Section 74e. Effect of Confiscation.
Section 74f. Compensation.
Section 75. Special Provision for Organs and Representatives.
Common provisions
Section 76. Subsequent Ordering of Forfeiture or Confiscation of Equivalent Value.
Section 76a. Ordering [Forfeiture or Confiscation] Independently [From Criminal Prosecution].

Fourth Division

Pressing of Criminal Charges, Authorization, Penal Complaint

Section 77. Persons Authorized to Press Charges.
Section 77a. Complaint by [Immediate] Official Superior.
Section 77b. Time Limit for Complaint.
Section 77c. Mutually committed Acts.
Section 77d. Withdrawal of Complaint.
Section 77e. Authorization and Penal Complaint.

Fifth Division

Statute of Limitations

Title 1 Bar to prosecution

Section 78. Period of Limitation.
Section 78a. Beginning [of the Running].
Section 78b. Suspension.
Section 78c. Interruption.

Title 2 Bar to execution

Section 79. Period of Limitation.
Section 79a. Suspension.
Section 79b. Extension.

While the 1962 Draft of the German Penal Code had structured its Special Part into six Divisions corresponding to six legally protected interests,[5] at the present time the reform of the Special Part has not reached a state where such an innovation would have become law. Thus, the Special Part still consists of twenty-nine divisions, some of which have already been amended, while the rest—as has been pointed out above—are expected to be amended prior to October 1, 1973, i.e., the date on which the new General Part will enter into force. Several divisions: the Fifteenth Division (Secs. 201–210) Dueling, as well as the Twenty-fourth Division (Sec. 283) Bankruptcy, have become obsolete, having been replaced by other provisions or special legislation. The crimes against the State continue to rank first in the present version. Details are omitted inasmuch as reforms are to be expected to be forthcoming in the nearest future.

Sentencing—In addition to maximum, and sometimes minimum, penalty provisions contained in most provisions of the special crimes of the 1973 German Penal Code, Title Two of the Third Division of the General Part (Secs. 46–51) contains extensive regulations on judicial sentencing which, along with basic principles for fixing punishments, in particular an outline under which exceptional circumstances a short-term deprivation of liberty may be imposed, provide for rigid sentencing rules in case of recidivism, for particular statutory grounds for mitigation of punishment, for cases of concurrence of such punishment mitigation grounds, and finally for consideration of other confinement or fines. The list of factors for a judge to consider in pronouncing a regular, milder, or severer sentence include: the motivations and aims of the perpetrator; the state of mind which the act bespeaks and the exercise of the volition involved; the extent of the breach of duty; the manner of perpetration, and the culpable effects of the act; the prior life of the perpetrator, his personal and economic circumstances, as well as his conduct following the act, in particular his efforts to repair the damage caused (Sec 60, par. 2). These provisions

[5] Professor Gerhard O. W. Mueller has summed them up as follows: "The Special Part has six principal divisions, corresponding to six legally protected interests: First, the person; second, the moral order; third, property; fourth, public order; fifth, the state and its institutions; sixth, the society of peoples. It is of particular satisfaction for us to note that the human being has been given the uppermost rank in the order of protected values. The moral order and property rank a close second and third. Public order and the state, which hitherto had been ranked above all other values in Germany and elsewhere are properly designated to be of merely subsidiary significance. This is right and proper, for we should never forget that the state merely serves the subsidiary function of protecting the human being in the enjoyment and full development of his primary rights: physical integrity and the enjoyment of his moral and material qualities . . . The entire Special Part follows a rigorous order in a successful effort to cover even the unforeseen case. This Code is as free of loopholes as humanly possible. . . ." "The German Draft Criminal Code 1960—An Evaluation in Terms of American Criminal Law," University of Illinois Law Forum, v. 1961, p. 36–37.

however do not preclude the court from having a choice within a relatively wide frame of minimum and maximum punishments.

There are also special provisions for fixing punishment in case of the violation of several statutory provisions by the perpetrator. These provisions whose translation follows[5a] are, in the opinion of Professor Mueller,[6] "clear, proper, and humanitarian" and "will prevent a lot of unnecessary argument at trial or on appeal. In addition, they are a guard against any possible legislative ambition to cumulate punishments by carving several crimes out of the same typical fact pattern."

QUESTION 2

None of the versions of the German Penal Code[7] left any blank numbers for future statutes. More extensive amendments are incorporated in the Code by creating new Chapters and or Sections identified by adding a capital letter to the number of the particular Chapter and a small letter to the number of the Section.

The usual numbering system is that of consecutive numbers for the entire Penal Code.

The final wording of the 1973 Penal Code is not yet known, since the criminal law reform has not come to a close in the Federal Republic of Germany. Although the Second Criminal Law Reform Statute of July 4, 1969 (*Bundesgesetzblatt* I:717) included the full text of the "General Part" mentioned above, amended some Sections of the "Special Part," as well as added several new Sections (numbered by adding respective small letters to the number of the preceding Section), several later statutes introduced new provisions—both in the General Part [Sec. 4, par. 3 was amended by the Eleventh Criminal Law Amending Statute of December 16, 1971 (BGBl. I:1977)] and the "Special Part" [e.g., a new Section 316c was inserted penalizing highjacking of airplanes (*Id.*); Section 239a received a new version and a new Section 239b concerning abduction was introduced by the Twelfth Criminal Law Amending Statute of December 16, 1971 (BGBl. I:1979)].

In the opinion of Professor Eberhard Schmidhäuser, who authored a recent voluminous treatise on the General Part of German substantive criminal law [based on the Penal Code as amended until April 1, 1970, on the one hand and on the new version of the General Part to become effective October 1, 1973], the German legislator "by [passing] the Second Criminal Law Reform Statute has simultaneously committed himself—of course in an anytime revocable manner—to at least bring in, if not sweepingly to reform, the Special Part with this new General Part, until October 1, 1973." However, he also points out that the General Part will become law on that date only in the case if, in the meantime, no new statutes will amend it, or its entering into force will not be postponed.[8]

[5a] See Question 20.

[6] Miller, *Id.* at 33.

[7] There exist several English translations of different versions of the German Penal Code reflecting its text at different stages of the continuing amending process:

(1) The Criminal Code of the German Empire. Translated with prolegomena and a commentary by Geoffrey Drage. London, Chapman & Hall Limited, 1885; p. 180–204.

(2) *Imperial German Criminal Code.* Translated into English by R. H. Gage and A. J. Waters. Johannesburg, W. E. Horton & Co., Ltd., 1917. p. 1–102.

(3) *The Statutory Criminal Law of Germany with Comments.* Prepared by Vladimir Gsovski., Eldon R. James, editor. A Translation of the German Criminal Code of 1871 with Amendments, together with the most important supplementary penal statutes and with the Laws Nos. 1 and 11 and Proclamation No. 3 of the Control Council for Germany. Washington, The Library of Congress, 1947. p. 1–186 [pages 187–215 contain other legislation affecting German criminal law].

(4) *The German Penal Code of 1871* (with Introductory Act of 1870), amended to May, 1950, as effective in the British Occupied Zone of Western Germany and the British Sector of Berlin (with a list of Supplementary Penal Enactments appended). For use in Control Commission Courts. Newly translated into English and edited, with Preface and Notes by Christoph von Oidtman and Arthur E. E. Reade. [n.p.] Published by the Control Commission for Germany (British Element) for the Office of the Legal Advisor, B.A.O.R., 1950. p. 5–99.

(5) *The German Penal Code of 1871.* Translated by Gerhard O.W. Mueller and Thomas Buergenthal. With an Introduction by Dr. Horst Schroder. South Hackensack, N. J., Fred B. Rothman & Co., 1961. Text of translation on p. 15–177.

In addition there is also an English translaation of the 1962 Draft Penal Code—*The German Draft Penal Code E 1962*, with an Introduction by Dr. Eduard Dreher, Ministerialdirigent, Ministry of Justice, German Federal Republic. Translated by Neville Ross. South Hackensack, N. J., Fred B. Rothman & Co., 1966. [This translation has been very useful for the translation of the 1973 Code provisions in this report, although its terminology was not always followed].

[8] Eberhard Schmidhäuser. *Strafrecht. Allgemeiner Teil. Lehbuch.* Tubingen, J. C. B. Mohr (Paul Siebeck), 1970. p. 62–65, at 65.

As pointed out above, changes affecting the General Part provisions are already taking place.

QUESTION 3

The two main forms of guilt are intent and negligence. They denote two kinds of the perpetrator's psychological relation to his conduct or act which, because of its blameworthiness, may subject him to punishment. As has been mentioned above, the doctrine of guilt in German criminal law has evolved by case law and the work of legal scholars. On the other hand earlier criminal law theory and practice preceding the promulation of the Code of 1871, has had a notable impact.[9] However the Criminal Code of 1871 contains only one Section (Sec. 59) exclusively devoted to the two forms of guilt: intent and negligence. The text of this Section has been preserved as originally conceived and remains in force until October 1, 1973. It reads:[10]

"*Sec. 59.* If a person in committing an offense did not know of the existence of circumstances constituting the factual elements of the offense as determined by statute or increasing the punishment, then these circumstances may not be charged against him.

"In punishing an offense committed through negligence, this provision applies only insofar as the lack of knowledge does not in itself constitute negligence for which the offender is responsible."

One of the best critical analyses of this provision was made in one of the standard German criminal law treatises, authored by two German authorities in this field.[11] Because of its relative conciseness in summing up the salient features of the German doctrine on the forms of guilt (culpability), it is incorporated in this report. To quote:[12]

"The written foundations of the doctrine of the forms of guilt (kinds of culpability) in the Penal Code itself, are, at first glance, quite scarce. They are dealt with exclusively in both paragraphs of Section 59. But for a person who knows how to obtain a deeper insight into the interrelationship of things, the wording of the statute tells more than this would seem to appear at first sight. And he who, furthermore, visualizes more precisely the historical evolution of this provision . . . to such a person, the true meaning of the entire doctrine will easily reveal itself in its details, it making no difference whether one tends to perceive in the finally remaining [text of] Section 59, paragraph 1 (as v. Hippel does it) more of a "result of legislative inefficiency" in Prussia and in the Imperial Penal Code following pace with [the Prussian Criminal Code] as its model, *or* [adopting what is a sounder view (Mezger)] a wise legislative restraint against overhasty doctrinal definitions in a statute. Considered from such a point of view, Section 59 tells us three things:

(a) the Statute starts from the statutory factual element of illegality and Its individual factual circumstances;

(b) the Statute deals in Section 59 especially with the personal "imputability" (*Zurechnen*) of this factual element of illegality, that is with questions of criminal law guilt;

(c) in the juxtaposition of paragraphs 1 and 2, the Statute concerns itself with two forms of guilt imputation, hence two forms of guilt, which simultaneously signify a graded scaling down of guilt. In addition, the more serious form of guilt (par. 1) bears no special name, but according to the preceding evolution . . . is called "Intent (*Dolus*)." The less serious form of guilt (par. 2) is, by the Statute itself, expressly termed "negligent" perpetration.

As a result, the law, which is in force now, deals with *two basic forms* of guilt: they are joined in scattered cases by a combination of both basic forms.

Thus, according to the learned authors quoted above, there actually exist three degrees of guilt: 1) the statutory regular form of guilt, called intent (*dolus malus*); 2) the lighter form of guilt, called negligence (*culpa*), denoting such a psychological attitude of the perpetrator toward his conduct which, although it is *not* intent, still constitutes a form of guilt; 3) the combination of both forms of guilt in circumscribed cases, where with respect to expressly

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[9] For details *see The Criminal Code of the German Empire*. Translated with prolegomena and a commentary by Geoffrey Drage, *supra* note 7(1), at 53–58.

[10] English translation from Gsovski, *supra* note 7(3) at 59.

[11] *Strafrecht*. I. *Allgemeiner Teil. Ein Studienbuch* von Edmund Mezger, fortgeführt von Herman Blei, 14th ed., München. Beck, 1970, p. 184. Quoted Mezger-Blei (1970).

[12] Mezger-Blei, *supra* note 11 at 184–185.

mentioned characteristics of the criminal act, intent is required, while in other respects, mere negligence is sufficient to constitute such a particular criminal offense.

Hence, German legal theory and court practice has evolved the doctrine of guilt (*Schuld*). This term according to Professor Gerhard O. W. Mueller, corresponds almost exactly to our term *mens rea* and as such, was even made part of one of the first recent criminal code drafts (1958). Professor Mueller provides the following comparison between the German terms and the common law approach:[13]

"A previous draft (1958) had contained a remarkable and sweeping Section 2 which reads as follows: 'No punishment without guilt. Anybody acting without guilt cannot be punished. The punishment may not exceed the degree of guilt.' But 'guilt' was left undefined. . . . Actually, the German term 'guilt' (*Schuld*) corresponds almost exactly to our term '*mens rea*' and the first sentence of the section stood for nothing more radical than the psychologically well-founded proposition that punishment for any act constellation or part thereof for which the defendant cannot be blamed is impermissible. As theoreticians we, in America, would regard any additional punishment as useless and absurd. The common law adhered to the same standard, and we began deviating only when American criminal-law scholarship did not perform its watchdog function of speaking up against legislative and judicial abuses during the second half of the nineteenth century. Similar concern, unquestionably, had caused the German draftsmen to include this command as a guard against judicial creation of absolute liability, vicarious liability, praeter-intentional liability (e.g., felony-murder) or the old *versari in re illicita* rule (intention to do any wrong as sufficient *mens res* for any criminal harm actually caused). However, in a series of sweeping decisions and through a number of statutes in the 1950's, German criminal law has been thoroughly cleansed of absolute liability in all its forms. The principle has become so fundamental as a natural proposition, resting on psychology as much as 2 equals 2 rests on mathematics, that it needed no longer any legislative affirmance. Hence, it was stricken. In all the specific instances of the General and Special Part, however, the principle is implicitly contained and explicitly explained without noteworthy exception."

Both the 1960 Draft of the German Penal Code[14] and the 1962 Draft of the German Penal Code,[15] contained definitions of intentional and negligent conduct, in particular, defining the following five terms denoting five different kinds of culpability: intentionally, purposefully, knowingly, negligently and wantonly. The pertinent Sections read as follows:

"*Sec. 16.* Intention.

"Anybody who seeks to effectuate the definitional elements of the act, or who knows or takes it for granted that he will effectuate them, or who considers such effectuation possible and does not mind it, acts intentionally.

"*Sec. 17.* Purpose and Scienter.

"(1) Anybody who seeks to effectuate a circumstance for which the law required purposefulness, acts purposefully.

"(2) Anybody who knows or takes for granted that a circumstance for which the law requires *scienter* is present or will come to pass, acts knowingly.

"*Sec. 18.* Negligence and Wantonness.

"(1) Anybody who fails to exercise that care which the circumstances and his personal condition require of him and of which he is capable and for that reason does not recognize that he is effectuating all the definitional elements of a crime, acts negligently.

"(2) Anybody who deems it possible that he will effectuate the definitional elements of a crime, but in violation of duty and in blameworthy fashion trusts that he will not effectuate them, also acts negligently.

"(3) Anybody who acts with gross negligence acts wantonly."

Neither of these provisions have been retained in the 1973 Penal Code. It is not devoid of interest to note that Horst Schroder, in an article published in 1965, voiced doubts concerning the retention of these provisions in the new Code. To quote:[16]

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[13] Mueller, *supra* note 5 at 49.
[14] For an English translation, *see* Mueller, *supra* note 5 at 63–74.
[15] The German Draft Penal Code E 1962, *supra* note 7.
[16] Horst Schröder, "German Criminal Law and Its Reform, *Duquesne University Law Review*, v. 4, No. 1 (Fall, 1965) : 97–113, at 105.

". . . nevertheless, the draft code contains several novel definitions. For example, intention and negligence are now defined. However, I am not sure that this will survive into positive law. The endless difficulty of attempting to differentiate between intention—in the form of *dolus eventualis*, an approving of chance—taking with respect to the result, and mere recklessness, the latter in Germany regarded predominantly as a form of negligence—makes it almost mandatory that the statute itself be silent on this point. A definition would impede development of a better definition by scholarly endeavor or case law."

The 1973 Code contains the general principle that, as a rule, only intentional conduct entails punishment, unless a statutory provision for the contrary. This general rule is expressed in Section which reads as follows:

"*Sec. 15.* Intentional and Negligent Conduct.

"Only intentional conduct shall be punishable, unless a Statute expressly threatens punishment for negligent conduct."

Further provisions on the question of *mens rea* are discussed under Question 10 (Mistake of Law and Mistake of Fact).

QUESTION 4

Although causation is not defined in the German Penal Code according to constant court practice, the causation theory is accepted, in particular with respect to such conduct which is punishable because it produces an unlawful result (e.g., the death of a person). Under this theory any factor is considered a "cause" the absence of which would have prevented the unlawful result. Thus, in the case of offenses by omission, a "cause" is the omission of any act which, if performed, would have prevented the fulfillment of the unlawful aim. "It is thus sufficient for an act to be one of the causes of an unlawful result even if the latter could not have been brought about without other factors. . . . The act of omission must always have a causal connection with the unlawful result."[17] In particular, the Code contains a provision concerning *commissio* per *omissionem* which is pertinent to this question. It reads as follows:

"*Sec. 13.* Commission by Omission.

"(1) anybody who fails to avert the consequence belonging to the definitional requirements of a penal statute, shall be punishable under this statute only in case if it is his legal obligation to see that such consequence does not occur, and if the omission is tantamount to effecting the definitional elements of such statute by commission.

"(2) The punishment may be mitigated in accordance with Section 49, paragraph 1."

QUESTION 5

The 1973 Code subscribes to the basic principle that any wrongful act must coincide with the wrongful state of mind in order to become punishable. Section 20 contains provisions defining in a general manner the mental elements of an offense, by providing general criteria under which a person may or may not be held responsible for his actions. As has been the case with earlier Penal Code provisions on capacity for penal responsibility, Section 20 does this in a negative way by indicating the mental defects which as a rule exclude the penal responsibility of a person for an act committed, which otherwise would subject him to punishment. Mental derangement or disturbed mentality is a valid defense under the present Code, as provided by the single provision (Sec. 51) which covers both mental disease and diminished capacity due to such disease,[18] and does not substantially differ from the 1973 solution of this problem. The 1973 Code deals separately with mental derangement as an absolute

[17] K. Neumann. "Criminal Law," *in Manual of German Law.* v. II, London, Her Majesty's Stationery Office, 1952. p. 77–78.

[18] This provision, in the Version of the Notice of the New Version of the Penal Code of September 1, 1969 (*Bundesgesetzblatt* I:1445) reads as follows:

"*Sec. 51.* Imputability; Diminished Imputability.

"(1) An act does not constitute an offense if the perpetrator at the time of the commission of the act, because of derangement of the senses, because of morbid disturbance of mental activity, or because of mental infirmity, was incapable to realize the forbidden nature of his act or to act in accordance with such understanding.

"(2) If the capacity to realize the forbidden nature of the act, or to act in accordance with such understanding, was considerably diminished at the time of the commission of the act, due to one of these reasons, the punishment may be reduced in accordance with the provisions for the punishment of attempt."

defense excluding any guilt (Sec. 20) and as a ground for mitigating punishment due to so-called diminished criminal responsibility as a result of mental defects (Sec. 21).

These provisions read as follows:

"*Sec. 20.* Lack of Capacity to Incur Criminal Responsibility by Reason of Mental Disturbances.

"Anyone who, at the perpetration of the act, is incapable of realizing the unlawfulness of the act or to act in accordance with such understanding because of a deep-seated disturbance of consciousness, or because of low mentality, or because of another mental abnormality, acts without guilt.

"*Sec. 21.* Diminished Capacity to Incur Criminal Responsibility.

"If the capacity of the perpetrator to realize the unlawfulness of his act or to act in accordance with such understanding, is substantially diminished at the commission of the act, by reason of one of the grounds specified in Section 20, the punishment may be mitigated in accordance with Section 49, paragraph 1."

Both provisions were already included in a slightly different version in the 1960 and 1962 Drafts of the German Penal Code. Therefore Professor Gerhard W. O. Mueller's comments with respect to the German insanity formula are of great interest. He points out that "Section 24 is properly phrased in terms of *action without guilt*, which leaves the (otherwise criminal) act of a demented person still "unlawful," so that *measures* in lieu of punishment, may be imposed." [19] He also notes that the reference to "unlawfulness" of the act rather than wrongfulness (used heretofore) is a notable improvement "since . . . today a statutory prohibition may well not fall in the category of moral wrong, although it may constitute a legal wrong and unlawfulness, and there is no reason why a defendant whose mind is clouded by disease to such an extent that he cannot appreciate such legal wrongfulness should not be excused." [20] With respect to diminished criminal responsibility, he properly states: [21]

"In case of severely impaired capacity there is no full 'guilt' and hence, the punishment must be mitigated (Sec. 25). The difficulty is not one of formulating the problem but of deciding whom one wishes to regard as having a severely impaired capacity and whom not. In this shady zone of law and human behavior, we meet the so-called psychopath, the neurotic, and the person suffering from a wide variety of behavioral disorders. At issue is really the question of focusing the appropriate correctional attention on such person. But to the extent that their ability to resist anti-legal temptations is merely impaired, they are obviously deserving some, though much less, blame, and thus it is a question of the substantive law of crimes. The German draft appears in order on that score."

One of the measures of rehabilitation and safety provided by the German Penal Code is the commitment to a psychiatric medical institution which the court must order with respect to persons who have committed an offense while lacking criminal responsibility because of mental disturbances (Sec. 20), or while in a state of diminished criminal responsibility (Sec. 21). The pertinent provision contained in Section 63 paragraph 1 has the following wording:

"*Sec. 63.* Commitment to a Psychiatric Medical Institution of Criminals.

"(1) If someone has committed an unlawful act in a state in which criminal responsibility is lacking (Sec. 20) or in a state of diminished criminal responsibility (Sec. 21), the court shall order him committed to a psychiatric medical institution if the total evaluation of the perpetrator and of his act indicates that serious unlawful acts are to be expected of him as a result of his condition, and that he, because of this reason, constitutes a danger to the general public."

Paragraph 2 of Section 63 further provides that under certain circumstances (outlined in Sec. 65, par. 3) the court must order commitment to a social-therapeutic institution.[22]

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[19] The German Draft Criminal Code 1960, *supra* note 5 at 52–53.

[20] *Id.* at 53.

[21] *Id.* at 56.

[22] For a comparativist analysis of this novel measure of care and cure under Section 65 of the 1973 German Penal Code see Ulrich Eisenberg, "Die Sozialtherapeutische Anstalt im zukünftigen deutschen Strafrecht. Vorbilder in Europa—Empfehlungen" *in Kriminologische Gegenwartsfragen*, Heft 9 (Vortrage bei der XV. Tagung der Gesellschaft für die gesamte Kriminologie vom 2. bis 5. Oktober 1969 in Saarbrücken. Herausg. von Hans Goppinger und Hermann Witter. Stuttgart, Enke, 1970. p. 92–107. *See also* Wilfried Rasch, "Zum Problem der Sozialtherapeutischen Anstalt," *id.* at 108–109.

QUESTION 6

There are no specific provisions on alcohol or drug intoxication as a valid defense in a criminal trial, so that such intoxication would be treated like any other disturbance of consciousness under Sections 20 and 21 of the 1973 Criminal Code.

However, in case of conviction for an offense perpetrated in the state of such intoxication, coupled with the propensity of the perpetrator towards alcohol or drug addiction, the court is held to order a measure of cure and care-commitment to an institution for alcoholics or drug addicts.[23] The pertinent provision reads as follows:

"*Sec. 64.* Commitment to an Institution for Withdrawal Treatment.

"If someone has the propensity toward excessive consumption of alcoholic beverages or other intoxicants and is convicted for an unlawful act which he committed while intoxicated or which is traced to his propensity [toward intoxicants] or is not convicted solely because his criminal incapacity is shown or cannot be ruled out, the court shall order commitment to an institution for withdrawal treatment, if the danger exists that he will commit serious unlawful acts as a result of his propensity [toward intoxicants]."

QUESTION 7

Self-defense and necessity provisions have been codified in a special Title of the 1973 Code. The Fourth Title of the Second Division of the Code's General Part entitled "Self-defense and Necessity" (Secs. 32–35), outlines the limits within which the use of force for justifiable or excusable purposes is exempt from punishment.[24] Following long standing practice and legislative tradition, self-defense and its excess are delimited, while two kinds of necessity—justifying necessity and excusing necessity are distinguished. Self-defense with reasonable use of force remains lawful, while excessive use of force in self-defense does not relieve of criminal responsibility, unless occasioned by confusion, fear or fright leading to impunity. Out of the two kinds of necessity, the second—excusing necessity—includes the doctrine of duress and coercion which, however, is not specifically mentioned. In other words, necessity arising from intimidation is also dealt with.

The above-mentioned provisions have the following wording:

"*Sec. 32.* Self-Defense.

"(1) Anybody who commits an act which is compelled by self-defense does not act unlawfully.

"(2) Self-defense is such defense as is required to avert any present unlawful attack from oneself or another.

"*Sec. 33.* Exceeding Self-Defense.

"If the perpetrator exceeds the limits of self-defense by reason of confusion, fear or fright, he shall not be punished.

"*Sec. 34.* Justifying Necessity.

"(1) Anybody who commits an act in the event of a present and otherwise unavoidable danger to life, limb, freedom, honor, property, or another legally protected interest, in order to avert danger from himself or some other person, does not act unlawfully if, in weighing the conflicting interests, namely the affected legally protected interests and the degree of danger they are threatened with, the protected interest substantially outweighs the interest he infringes upon. This applies, however, only insofar as the act is an adequate means to avert the danger.

"*Sec. 35.* Excusing Necessity.

"(1) Anyone who commits an unlawful act in the event of a present and otherwise unavoidable danger to life, limb, or freedom, in order to avert the danger from himself, a relative or some other person close to him, acts without guilt. This [provision] shall not apply insofar as under the circumstances—namely because he himself has caused the [state of] danger or because he was in a special legal relationship—the perpetrator could have been expected to

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[23] For details *see* Reinhart Maurach. *Deutsches Strafrecht. Allgemeiner Teil.* Karlsruhe, Verlag C. F. Müller, 1971. p. 889–891; Hans-Heinrich Jescheck. *Lehrbuch des Strafrechts. Allgemeiner Teil.* Berlin, Duncker and Humblot, 1969. p. 535–536; Jürgen Baumann. *Strafrecht. Algemeiner Teil.* Bielefeld, Gieseking, 1968. p. 719–721; Gerd Pfeiffer, Heinrich Maul [and] Benno Schulte. *Strafgesetzbuch. Kommentar an Hand der Rechtsprechung des Bundesgerichtshofes.* Essen, W. Ellinghaus and Co. GmbH., 1969. p. 97–98.

[24] For the historical background and analysis of these provisions, *see* Maurach, *supra* note 23 at 306–337; Schmidhäuser, *supra* note 8 at 250–281.

suffer the danger; however, the punishment may be mitigated under Section 49, paragraph 1, if the perpetrator has to suffer the danger not in connection with a special legal relationship.

"(2) If the perpetrator at the commission of the act erroneously assumes [the existence] of circumstances which under paragraph 1 would excuse his [conduct], he shall be punished only if he could have avoided the error. The punishment shall be mitigated under Section 49, paragraph 1."

QUESTION 8

While the original, as well as the present version of the German Penal Code follows the model of the French Penal Code in providing a tripartite classification of offenses (major crimes, minor crimes, petty offenses),[25] the 1973 Code has broken with this long-time tradition by adopting a bipartite classification (major and minor crimes) and leaving less serious offenses outside its provisions, to be dealt with, according to established practice, as infractions of regulations (*Ordnungswidrigkeiten*) entailing imposition of fines, but divested of their criminal nature.[26]

QUESTION 9

1. *Sentencing. See* Answer to Question 1, *in fine*.

2. *Suspension of Punishment for Probation.* Sections 56–58 of the 1973 Code cover this subject. They provide for suspension of execution of sentence rather than suspension of imposition of sentence. Thus, probation actually is a form of suspension of sentence. This appears from the pertinent provision of the German Code of Criminal Procedure:

"*Sec. 268a.* Announcement of the Decision Concerning Suspension of Punishment for Probation.

"(1) If the judgment provides for suspension of punishment during probation, the court, by decision, shall issue directives pertaining to the suspension of the punishment for probation (Secs. 24–24c of the Criminal Code [present version]); this decision shall be announced together with the judgment.

"(2) The presiding judge shall instruct the defendant as to the meaning of the suspension of the punishment for probation, the time, conditions and directives of probation, as well as to the possibility of revocation of the suspension paragraph 1."

Thus, the German criminal procedure does not follow the example of the common law countries where criminal procedure at this stage is split into two separate acts: that of acquittal or conviction; and the distinct second stage of determining the sentence, or sentencing—a method which also was considered for adoption in Germany at the outset of the criminal law and procedure reform (Sec. 25 of the Criminal Code). At the same time he shall be instructed to report any change of residence during the time of probation. The instructions shall, as a rule, be given at the close of the announcement of the decision under movement.[27]

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[25] Section 1 of the Code (in the Version of the First Criminal Law Reform Law of June 25, 1969, which became effective April 1, 1970) reads as follows:

"*Sec. 1.* Tripartite Division of Criminal Acts.

"(1) Acts entailing as minimum punishment deprivation of liberty for a term of one year or more, are minor crimes [*Verbrechen*].

"(2) Acts entailing as punishment deprivation of liberty for a term not to exceed six weeks or a fine of up to five hundred DMarks are minor crimes [*Vergehen*].

"(3) All the other (*alle übrigen*) acts entailing as punishment deprivation of liberty or a fine petty offenses [*Übertretungen*].

"(4) Mitigation or aggravation [of punishment] provided for under the provisions of the First Part [of this Code] or, under mitigating circumstances, less serious, especially serious or similar generally circumscribed cases, shall not be taken into account for [the purpose of] this division."

[26] Section 1 of the *Gesetz über Ordnungswidrigkeiten* of May 24, 1968 (BGBl. I:481) in the Version of the Law of June 27, 1970 (BGBl. I:911) defines a [public] order violating act (*Ordnungswidrigkeit*) as follows:

"*Sec. 1. Definition of Concept.*

"(1) Any unlawful and reproachable art which realizes the definition elements of a statute which permits retribution by means of a fine shall be [considered] an infraction of regulations.

"(2) Any unlawful act, which realizes the definitional elements of a statute in the meaning of paragraph 1, even though it has not been reproachably perpetrated shall be [considered] an act for which a fine is threatened."

For details *see* Göhler, Erich. *Gesets über Ordnungswidrigkeiten.* 2nd ed. München, Beck, 1970. 991 p.; Peter Cramer. *Grundbergriffe des Rechts der Ordnungswidrigkeiten.* Stuttgart, Kohlhammer, 1971. 184 p.

[27] Fritz Bauer. *Das Verbrechen und die Gesellschaft.* München, Ernst Reinhardt Verlag, 1957. p. 246–256.

The 1973 Code contains detailed provisions within the limits of which the court may exercise its judicial discretion with respect to suspension for probation of a sentence it has handed down after the trial of a criminal case (Secs. 56–58). In particular, it circumscribes the kinds of cases for which such suspension is available, the length of the probation periods, attaching conditions and directives which the court may impose upon the probationer; mandatory assistance by probation counselors which may be imposed by the court in its discretion; the revocation of suspension; and the remission of punishment. The first general precondition for suspension is that the length of the deprivation of liberty punishment imposed does not exceed one year, which condition, however, has to be coupled with the second condition "if it is to be expected that the convicted person will heed the conviction as a warning and that, even without the impact of the execution of the sentence, he will not in the future commit further criminal offenses" (Sec. 56(1) 1st sentence). The law also points out the circumstances which the court has to take into account in reaching its decision to suspend or not to suspend the sentence. To quote: "In so doing, the personal characteristics of the convicted person, his life, the circumstances of his act, his conduct after the act, his station in life, and the effects which are expected for him from the suspension, shall be considered" (Sec. 56(1) 2nd sentence).

In exceptional cases the court may suspend for probation even the execution of a deprivation of liberty punishment for up to two years (Sec. 56(2)).

The court is, however, barred from suspending any sentence for deprivation of liberty for a term of at least six months "if the protection of the legal order commands it" (Sec. 56(3) of the 1973 Code). The court also may not restrict the suspension to a part of the term to be served. On the other hand, suspension of execution is not excluded because of the fact that detention pending investigation or other deprivation of liberty has been counted toward punishment (Sec. 56(4)).

Supervision and guidance by probation officers, which are called probation counselors, may be directed by the court for the entire length of the probation period "if this is appropriate in order to have him abstain from committing criminal offenses" (Sec. 56d, par. 1). Such supervision is, as a rule, decreed by the court if the suspended deprivation of liberty punishment exceeds nine months and the convicted person has not yet reached the age of twenty-seven years (Sec. 56, par. 2). The tasks of the probation counselors are thus specified by the law (Sec. 56d, par. 3):

"The probation counselor shall look after him in a helpful and provident manner. He shall supervise in cooperation with the court the fulfillment of conditions and directives attaching [to the parole], as well as the offers and acceptances. He shall report on the mode of life of the convicted person after the lapse of periods of time to be determined by the court. He shall inform the court of serious or persistent violations of the attaching conditions or directives."

3. *Determinate Sentences.* The German Code of Criminal Procedure provides for determinate sentences of deprivation of liberty (Sec. 260). A sample of judgment, consisting of heading, pronouncement and grounds,[28] is reproduced below in a Xerox copy.

4. *Recidivism.* Stiffer deprivation of liberty sentences are provided in case of recidivism (Sec. 61 of the 1973 Code).

5. *Mandatory Minimum Prison Sentences.* They are provided for cases of recidivism (Sec. 61), as well as by the individual provisions of special crimes.

6. *Release on Parole (Suspension of the Remaining Punishment).* Section 57 of the 1973 Code contains detailed provisions on suspension of the execution of the balance of a term of deprivation of liberty. Three conditions must be met: 1) two-thirds of the imposed deprivation of liberty punishment, but not less than two months, must have been served; 2) the court executing the punishment must be satisfied that there is some justification to run the risk that the convicted person, apart from the execution of the punishment, will commit no criminal offenses, and 3) the convicted person has given his consent.

In making the decision to release a person on parole, the personal characteristics of the convicted person, his earlier life, the circumstances of the offense, his conduct during the execution of the sentence, his station in life, as well as

[28] This sample judgment is taken from *The German Code of Criminal Procedure*, translated by Dr. Horst Niebler, South Hackensack, N.J., Fred B. Rothman & Co., 1965, p. 233–235. [Hereinafter referred to as Niebler].

the effects the parole is expected to have upon him if it is granted (Sec. 57, par. 1 of the 1973 Code) must be considered.

Under Section 57, paragraph 2, the court executing the punishment may suspend the remaining punishment already after one-half of the sentence is served, if:

(1) at least one year of the deprivation of liberty punishment has been served;

(2) there exist special circumstances with respect to the offense committed and the personal characteristics of the convicted person; and

(3) the remaining preconditions of [Sec. 57,] paragraph 1 have been fulfilled.

However, Section 57, paragraph 5 provides for a limitation of the above-mentioned rules: the sentencing court may at its discretion provide for terms not to exceed six months, prior to whose expiration the petition of the convicted person to suspend the remaining punishment shall not be granted.

It appears from the above-mentioned that in the Federal Republic of Germany prisoners are released on parole not by an administrative agency such as the United States parole board, but by the Court which has jurisdiction over the execution of the imposed sentence.

7. *Notice or Appropriate Publicity to be Given to Conviction of any Organization.* The Court may, as an additional sanction, provide for the publication of such a sentence. Thus, Sections 15 and 23 of the Law Against Unfair Competition of June 7, 1909 (*Reichsgesetzblatt*, p. 499), as amended by Law of June 23, 1970 (*Bundesgesetzblatt* 1970, I:805) provides for publication of a criminal sentence convicting for criminal libel and slander.

8. *Persistent Misdemeanant.* The German Penal Code provides for stiffer penalties in case recidivism (*see above*).

9. *Reasons in Writing for Sentences Imposed.* Section 267 of the German Code of Criminal Procedure provides in some detail that both in cases of conviction and acquittal the court must indicate the grounds for the judgment, such grounds having to include in case of conviction the facts considered proved in which the legal characteristics of the punishable act are found; but in case of acquittal—whether the commission of the act by defendant was not proved or whether and on what grounds the act considered proved was not considered punishable.

For a sample of grounds of judgment, *see* Appendix mentioned above.

10. *Appeal.* German criminal procedure provides for several means of review of a judgment: 1) Complaint (*Beschwerde*—Secs. 304–311); 2) Appeal (*Berufung*—Secs. 312–332 of the Code of Criminal Procedure); 3) Appeal on Points of Law only (*Revision*—Secs. 333–358). The permissible means of review are available both to the prosecution (government) and the accused: the prosecution may make use of them even in favor of the accused (Sec. 296 of the Code of Criminal Procedure). The appeals court may increase the sentence only if the prosecution has appealed; but the effect of any proceeding to review, initiated by the prosecution, is that the judgment may also be amended or reversed in favor of the accused (Sec. 301 of the Code of Criminal Procedure).

11. *Multiple Offenses.* This question is covered in Answer to Question 20. So is also the question on Compound Judgment.

12. *Fines.* Fines are collected by bailiffs executing court orders. No unsurmountable difficulties have been reported with respect to the collection of fines in the Federal Republic of Germany.

13. *"Day Fines."* The "day fine" system inaugurated by the 1973 Code does not provide for fines in a fixed amount in a sense that they are made to depend upon the gravity of the offense, or other factors, but means that the amount of the fines to be imposed upon a convicted defendant is determined according to his ability to pay. It has been said that the "day fine" is "a fictitious currency," inasmuch as "[i]ts real money value is computed only 'by taking into consideration the personal and economic circumstances of the perpetrator.'"[29] The basic provisions on day fines are contained in Sections 40–43 of the 1973 Code. They read as follows:

"*Sec. 40.* Imposition on a Per Diem Basis.

"(1) The fines shall be imposed on a per diem basis. It shall amount to at least five [per diem charges] and, if the statute does not provide otherwise, to not more than three hundred and sixty full per diem charges.

"(2) The amount of the per diem charge shall be determined by the court by taking into consideration the personal and economic circumstances of the perpe-

[29] Bauer, *supra* note 27 at 255.

trator. The per diem charge shall be fixed, at least, at two and, at most, at not more than one thousand DMarks.

"(3) The income of the perpetrator, his property and other bases for the per diem charge may be appraised.

"(4) In the judgment the number [of the days for which the fine is imposed] and the amount of the per diem charge shall be indicated.

"*Sec. 41.* Fine in Addition to Punishment by Deprivation of Liberty.

"If the perpetrator has acted with the specific intent to enrich himself, then, even though punishment by deprivation of liberty alone or deprivation of liberty and a fine in the alternative is threatened [for the offense], a fine may be imposed in addition to deprivation of liberty, if this appears to be appropriate, by taking into consideration the personal and economic circumstances of the perpetator, to impress him or to protect the legal order.

"*Sec. 42.* Facilitation of Payment.

"If the convicted person, according to his personal or economic circumstances, cannot be expected to pay the fine immediately, the court shall grant him a time for payment or shall permit him to pay the fine in fixed installments. In doing so, the court may order that the privilege to pay the fine in fixed installments shall lapse if the convicted person does not pay one installment in due time.

"*Sec. 43.* Substituting Deprivation of Liberty Punishment for a Fine.

"Deprivation of liberty punishment shall be substituted for a fine which cannot be levied. One day of deprivation of liberty shall correspond to one per diem charge. The minimum measure of the substitute deprivation of liberty punishment shall be one day."

QUESTION 10

Provisions on error of fact and error of law[30] are contained in Sections 16 and 17 of the 1973 Code. They read as follows:

"*Sec. 16.* Error Concerning Definitional Elements [of Offenses].

"(1) Anybody who in committing the act does not know a circumstance which belongs to the definitional elements [of an offense], acts unintentionally. Punishability because of negligent perpetration shall remain unaffected.

"(2) Anybody who, in committing an act mistakenly assumes circumstances which would make the definitional elements of a less severe statutory provision materialize, may be punished for intentional commission only under the less severe statutory provision.

"*Sec. 17.* Error Concerning Unlawfulness [of the Act].

"If the perpetrator, in committing the act, lacks the understanding to be acting unlawfully, he acts without guilt if he was unable to avoid this error. If the perpetrator could have avoided the error, punishment may be mitigated in accordance with Section 49, paragraph 1."

QUESTION 11

There are no analogues to this differentiation between crime and jurisdiction in the German Penal Code.

QUESTION 12

Extraterritorial Jurisdiction is already covered by an earlier report.

The provisions on the extraterritorial reach, application or jurisdiction of German criminal law are contained in Sections 3 through 10 of the German Penal Code in the version of the Second Criminal Law Reform of July 4, 1969, to become effective October 1, 1973.[31]

By providing in Section 3 of the Code that German criminal law shall be applicable to acts committed within the country, the Federal Republic of Germany has rejoined the majority of States where the territoriality principle plays the primordial role, while the other "principles" of international criminal law constitute its exceptions in explicitly formulated narrow fields. At the same time this approach constitutes a return to the original provision of Section 3 in the Code of the German Empire of 1871 which reads: "The Criminal Code of

[30] For details *see* Maurach, *supra* note 23 at 454–485; Hans-Joachim Rudolphi, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums.* Göttingen, Otto Schwartz & Co., 1969. 320 p.; Dieter Strauss, *Die Richtlinien der Rechtsprechung für die Vermeidbarkeitsprüfung beim Verbotsirrtum.* Dissertation. München, 1968. 128 p.

[31] *Bundesgesetzblatt* 1969, I: 717 (hereinafter referred to as BGB1.).

the German Empire is applicable to all offenses committed within the Empire, even if the offender be a foreigner." [32]

The present version of Section 3 is based on the personality principle under which a State applies its criminal law to all offenses perpetrated by its subjects irrespective of the place of perpetration.[33] It also contains the principle of double criminality (Sec. 3(2)) and provides criteria for the determination of the place where the act entailing the punishment occurred (Sec. 3(3)). In the 1973 Code, these two matters are dealt with in Sections 7 and 9, respectively.

In the opinion of one of the leading German law scholars "the [German] legislator has departed from the personality principle as the basis of the rule on the applicability of punishment in order that Germans should not be punished for such acts committed abroad which, at the place of the act, do not entail punishment, or are permitted, or, possibly are even called for." [34]

As it has been pointed out by the same authority, there is, however, no reason to exclude the application of German criminal law in cases where the act committed abroad is also a punishable offense under the law of the place of commission, or if the place of commission was not subject to any criminal jurisdiction (i.e., where there was no sovereignty exacting retribution).[35] Therefore, pursuant to Section 7, paragraph 2, No. 1 of the 1973 Penal Code, in these cases the personality principle of international criminal law applies: whoever at the time of commission of the offense was a German or became a German after the perpetration shall be subject to, and may be prosecuted under, German criminal law.[36] Moreover, some criminal offenses are considered by the framers of the new Code to be so serious that they are subject to German criminal law regardless of the law prevailing at the place of their commission. Thus, by virtue of Section 5, Number 6, German criminal law shall also apply to an abortion perpetrated abroad, provided the offender at the time of the act is a

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[32] English translation taken from *Imperial German Criminal Code Translated into English* by Captain R. H. Gage . . . and A. J. Waters . . . Johannesburg, W. E. Horton & Co., Limited, 1917, p. 1. Section 3 has been changed several times. The most sweeping change occurred when the Nazi legislators, by amending Sections 3–5, extended the application of German criminal law by making a larger group of crimes committed abroad by German nationals and foreigners punishable under German law than was provided for previously. As amended May 6, 1940 (*Reichsgesetzblatt* 1940, I, 754) Section 3 reads: The German Criminal Law shall apply to any act committed and not punishable under the law of the place of commission if such act does not appear to be a wrong deserving punishment when judged according to the sound sentiment of the German people, in view of the particular circumstances of the place where it is committed.

The act is considered to have been committed at the place where the offender acted and, in case of an omission, where he should have acted, or where the criminal effect of the offense took place or should have taken place." (English translation taken from *The Statutory Criminal Law of Germany with Comments*. Prepared by Vladimir Gsovski, Chief of the Foreign Law Section. Edited by Eldon R. James. Washington, The Library of Congress, 1947, p. 7–8.

[33] Section 3, in the German Penal Code version of September 1, 1969 (BGB1, 1969, I: 1445) reads as follows:

(1) German criminal law shall apply to the act of a German citizen no matter whether he commits it within the country or abroad.

(2) German criminal law shall not be applicable to an act committed but not punishable abroad, if this act does not constitute a misdeed meriting punishment by reason of special circumstances [prevailing] at the place where the act is committed.

(3) An act is [considered to be] committed at every place where the perpetrator has acted, or in the case of omission, where he should have acted, or where the result became, or should have become, effective.

[34] Reinhart Maurach, *Deutsches Strafrecht. Allgemeiner Teil. Ein Lehrbuch*. 4th ed. Karlsruhe, Verlag C. F. Müller, 1971, p. 123.

[35] *Id.*

[36] The concept of "German" (*Deutscher*) is defined in Article 116 of the Basic Law (Constitution) of the Federal Republic of Germany of May 23, 1949, which reads as follows:

Art. 116. (1) Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (Volkszugehoerigkeit) or as the spouse or descendant of such person.

(2) Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial, or religious grounds and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile (Wohnsitz) in Germany after 8 May 1945 and have not expressed a contrary intention. [English translation taken from *Basic Law for the Federal Republic of Germany*, promulgated by the Parliamentary Council on 23 May 1949 as amended up to and including 29 January 1969. Translation published by the Press and Information Office of the German Federal Government. Edited by the Linguistic Section of the Foreign Office of the Federal Republic of Germany. Wiesbaden or Bonn, Wiesbadener Graphische Betriebe GmbH, 6200 Wiesbaden, 1970] p. 69.

German and derives his livelihood from the Federal Republic, including Western Berlin. Furthermore, German criminal law shall apply to all criminal offenses, irrespective of the law of the place of commission, if the perpetrator is a German holding a German public office, or a soldier of the German Armed Forces and commits the criminal offense within the scope or during the exercise of his official capacity (Sec. 5, No. 8).

With respect to several other criminal offenses, German legislative jurisdiction has been extended by preserving the personality principle as a jurisdictional basis, although this has been done so that even acts committed abroad and directed against persons or property protected by domestic (German) law entail punishment under German criminal law (the so-called protective principle, "Schutz" or "Real-Prinzip"). In the words of Professor Maurach:[37]

". . . The idea seems to be decisive here, the one that the act of a German against certain persons or property protected by domestic [German] law, which enjoy the protection of German criminal law, wherever the offense is committed, should not remain unpunished merely because of the fact that it has been perpetrated by taking advantage of the special circumstances prevailing at the place of commission. Cases of this kind are covered by Section 5, Number 2 (endangering the external security of the democratic constitutional State in the cases of Sections 89, 90b, 90a, paragraph 1; acts against national defense in the cases of Sections 109a–109d and 109h) and Section 5, No. 5 (lewd acts in the cases of Section 174, No. 1, Section 175, paragraph 1, No. 1, and of Section 176, paragraph 1, No. 3). Here the application of German criminal law is made dependent on the perpetrator's (and in the case of Section 5, No. 5 also his victim's) being a German and his deriving his livelihood from the area of effectiveness of [the law of] the Federal Republic, including Western Berlin."

The safeguarding of persons or property protected by domestic (German) law against violations may be determined by the nature of the domestic person or property under attack as well as the criminal law protection accorded to foreigners and property protected at the foreign place of commission. Proceedings from this classification, Professor Maurach states:[38]

"(a) Without regard to the law of the place of commission, criminal acts perpetrated by [Germany's] own subjects and foreigners and directed against persons and property protected by domestic [German] law are subject to German criminal law only in circumscribed, exhaustively enumerated cases.

"In this category belong, under Section 5, No. 1, treasonable acts endangering the peace (Section 80), acts of high treason and treason (Sections 81–83; Sections 94 ff . . .), furthermore endangering the democratic constitutional State in the cases of Sections 90, 90a, paragraph 2, as well as criminal acts against the national defense in the cases of Sections 109, 109e, 109f, and 109g; under Section 5, No. 3, acts of abduction (Section 234a) and of [casting] political suspicion (Section 241a) to the detriment of a German; under Section 5, No. 4, divulging business secrets of German enterprises; under Section 5, No. 7, the offenses connected with testimony (Sections 153, 154, 156) in a proceeding pending before courts located in the Federal Republic, including West Berlin . . .; under Section 5, No. 9, criminal acts perpetrated by a foreigner who is a holder of a German public office (a rare case in practice, e.g., passive bribing of a German honorary consul of foreign nationality) and, finally, under Section 5, No. 10, criminal acts which are directed against the holder of a German public office or against a soldier, to wit, in direct connection with such persons' capacity (e.g., unlawful compulsion against a German diplomat abroad under Section 240; insulting a German customs officer officiating in Basal as a "German customs bandit").

"(b) All *other* acts perpetrated abroad against a German (independently of his domicile in the Federal Republic) are, according to the protective principle, . . . subject to German law alone, if they are also punishable according to the law of the place of commission or if the place of commission is not subject to any criminal jurisdiction."

The German legislative jurisdiction under the universality principle is spelled out in Section 6 of the 1973 Penal Code bearing the title "Acts committed abroad against persons and property which are internationally protected." Here again German criminal law applies regardless of the law of the

[37] Maurach, *supra* note 4, at 124–125.
[38] *Id.*, p. 125–126.

place of commission. The offenses belonging to this group include genocide, major crimes committed with explosives, slave traffic in children and women, unlawful narcotics traffic, traffic in obscene publications, and major and minor crimes of counterfeiting, as well as any act which the Federal Republic of Germany has undertaken to prosecute even when it is committed abroad.

The special provision of Section 9 provides the criteria to determine the place of the act constituting a criminal offense and, in particular, covers the problem with respect to accessories.

Appendix

The German Penal Code[39]

General Part

First Division. The Penal Statutes (Das Strafgesetz)

Title 1 Scope of applicability

Secs. 1–2 [Irrevelant]

Sec. 3. Applicability to Acts Committed within the Country. German criminal law shall apply to acts which are committed within the country.

Sec. 4. Applicability to Acts [Committed] Aboard German Ships and Aircraft. German criminal law shall apply to acts committed abroad aboard a German ship or aircraft, independently of the law of the place of commission.

Sec. 5. Acts Committed Abroad against Persons or Property Protected by Domestic [German] Law. German criminal law shall apply to the following acts which are committed abroad, regardless of the law of the place of commission:

1. acts of treasonable endangering of the peace under Section 80, of high treason, of endangering the democratic constitutional State in the cases of Sections 90 and 90a, par. 2, of treason and endangering external security, as well as acts against national defense in the cases of Sections 109, 109e, 109f, and 109g;

2. acts endangering the democratic constitutional State in the cases of Sections 89, 90a, par. 1, and Section 90b, and acts against national defense in the cases of Section 109a-109d and 109h, if the perpetrator is a German who derives his living from the territory on which this law is in effect;

3. acts of abduction (Sec. 234a) and of [casting] political suspicion [upon another] (Sec. 241a), if the act is directed against a German who has his domicile or usual place of abode in the country;

4. divulging industrial or commercial secrets of an enterprise located within the territory on which this Law is in effect; of a business enterprise which has its seat there; or of a business enterprise with its seat abroad, which is dependent upon a business enterprise with a seat within the territory on which this Law is in effect and which forms a concern with the latter;

5. lewd acts in the cases of Section 174, No. 1, of Section 175, paragraph 1, No. 1, and of Section 176, paragraph 1, No. 3 if the perpetrator, and the person against whom the act is perpetrated, at the time [of commission] of the act, are Germans and derive their livelihood from within the territory on which this Law is in effect;

6. abortion, if the perpetrator at the time [of commission] of the act is a German and derives his livelihood from within the territory on which this Law is in effect;

7. perjury, false unsworn testimony and intentional false affirmation in lieu of an oath in any proceeding, within the territory on which this Law is in effect, pending before a court or any other agency of the German Federal Republic which is competent to administer oaths or affirmations in lieu of an oath;

8. acts which the German holder of a German public office, or a soldier of the German Armed Forces, commits while abroad in an official capacity or with respect to such official capacity;

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[39] This version becomes effective October 1, 1973. *See Strafgesetzbuch mit 77 Nebengesetzen. Textausgabe mit Verweisungen und Sachverzeichnis. 41., neubearbeitete Auflage.* Stand: 1. August 1970. München, Beck, 1970. p. 664–668. The transition was made from the text.

9. acts committed by a foreigner while holding German public office;
10. acts committed by anyone against the holder of a German public office, or a soldier of the German Armed Forces, while in the performance of his official functions or with respect to his official functions.

Sec. 6. Acts Committed Abroad against Persons and Property which are Internationally Protected. German criminal law shall continue to apply, regardless of the law of the place of commission, to the following acts which have been perpetrated abroad:

1. genocide;
2. major crimes committed with explosives;
3. [slave] traffic in children and women;
4. unlawful narcotics traffic;
5. traffic in obscene publications;
6. major and minor crimes of counterfeiting;
7. acts which the Federal Republic of Germany, in a binding international agreement, has undertaken to prosecute even when they are committed abroad.

Sec. 7. Applicability to Acts Committed Abroad in Other Cases

(1) The German criminal law shall apply to acts which are committed abroad against a German if the act is punishable at the place of commission abroad, or if the place of commission is not subject to any criminal jurisdiction.

(2) The German criminal law shall be applicable to other acts which are committed abroad if the act is a criminal offense where committed or if the place of commission is not subject to any criminal jurisdiction and where the perpetrator

1. at the time of the commission of the act was a German, or became one after the act, or

2. at the time of the commission of the act was a foreigner, is found within this country and is not extradited, although by the nature of the act the [German] Extradition Act would permit his extradition, because an extradition request was either not made or rejected, or the extradition cannot be carried out.

Sec. 8. Time of the Act. An act shall be [deemed to have been] committed at the time when the perpetrator or accessory has acted, or, in case of omission, should have acted. When the result occurs shall not be decisive.

Sec. 9. Place of the Act

(1) An act shall be [deemed to have been] committed at every place where the perpetrator has acted, or in the case of an omission, where he should have acted, where the result implicit in the actual element of the crime occurs or [at the place] where the perpetrator imagined that it should occur.

(2) Complicity is committed at the place of commission of the [principal] act as well as at every place where the accessory has acted, or in the case of omission, should have acted, or where he imagined that it should occur. Where the accessory acted within the country by participating in an act committed abroad, German criminal law shall apply to the complicity even though the act is not punishable under the law of the place of commission.

QUESTION 13

The German Penal Code in its present version does not contain a general provision on conspiracy. Instead, there is, among the Sections dealing with complicity, a special provision (Sec. 49b) concerning conspiracy to commit murder. It reads as follows:

"*Sec. 49b.* Conspiracy to Commit Murder.

"(1) Anybody who participates in a combination which has for its purpose the commission of major crimes against [human] life, or which has [such crimes] in view as a means to other purposes, or who supports such combination, shall be punished by deprivation of liberty for from three months up to five years.

"(2) In especially serious cases the punishment shall be deprivation of liberty for from one year up to five years.

"(3) One who notifies the authorities or the person threatened so timely that the major crime against [human] life, intended to be committed in the pursuit of the endeavors of the combination, can be prevented, shall not be punished under these provisions."

This provision was introduced in the Penal Code in 1932 by the legislative decree of the President of the Reich of December 19, 1932,[40] penalizing participation in a combination "or an agreement." Subsequently these last three words "or an agreement" were deleted.[41] It has been argued by German legal writers that this Section, since it contains a special provision concerning crimes against life, belongs in the Special Part, namely in the Division (*Abschnitt*) dealing with homicide and murder.[42]

Some German commentaries to this provision have expressed the opinion that in order to be penalized under this Section 49b, there must have been a combination contemplated to exist for a longer time and that agreement to commit one single offense would not be sufficient;[43] and that at least two persons must have combined to form such conspiracy to commit murder, so that Section 49b would not be applicable, if one of them was an agent provocateur who only pretended to have the intention to form such a combination.[44]

In the General Part of the 1973 Code, no counterpart to Section 49b was included and so far this provision has also not been incorporated in the Special Part of the German Penal Code.

QUESTION 14

The felony-murder rule creating praeter-intentional criminal liability for murder with respect to manslaughter committed by one party to a felony is rejected by the 1973 German Penal Code in its absolute form. However, the provision of the Code providing for severer punishment in case of special consequences of the act contained in Section 22 "in effect, would limit our Anglo-American felony murder liability to cases in which during the commission of a felony, death results from negligence (in the German sense) on the part of the defendant."[45] This provision reads as follows:

Sec. 18. More Severe Punishment in Case of Special Consequences of the Act. Where the statutory provision links to a special consequence of an act a severer punishment, only the principal or accessory who can be charged at least with negligence with respect to this consequence can be subjected to such [severer punishment].

QUESTION 15

Despite its federal system of government, the Federal Republic of Germany does not have a dual system of laender (i.e., state) and federal courts comparable to that of the United States. Both land and federal courts are integrated into a single hierarchy, with state courts on the lower levels (both of original and appellate jurisdictions) and federal courts at the top. These federal courts are appellate courts of last resort to which an appeal lies (on questions of law only; or on the question of constitutionality in the case of the Federal Constitutional Court) from the state courts. Since the bulk of both the substantive and adjective criminal law rules are incorporated in federal criminal (*Strafgesetzbuch*), viz., criminal procedure (*Strafprozessordnung*) codes, no problem of concurrent or exclusive jurisdiction of the Federal government ever arises. The same is, as a consequence, true with respect to jurisdiction over riots, mass demonstrations and crimes—the jurisdiction is unlimited.

Until recently the German Penal Code included special provisions on engaging in a riot constituting a breach of peace (Sec. 115), as well as on the offense for disobeying orders to disperse given with a view of preventing a riot (Sec. 116). They read as follows:

"*Sec. 115.* Riot (*Aufruhr*).

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[40] Eduard Dreher, *compiler. Strafgesetzbuch mit Nebengesetzen und Verordnungen*, 31st ed. München, Beck, 1970. p. 273; Jürgen Baumann. *Strafrecht. Allgemeiner Teil, supra* note 23 at 608–609 (stresses that here a preparatory act has been made a special crime).

[41] Gsovski, *The Statutory Criminal Law of Germany, supra* note 7(3) at 38–39 (explaining the concepts of "combination" and "agreement" in the light of German court practice); Dreher, *supra* note 31 at 273–275 (analysis of Sec. 49b including references to court practice)

[42] Jescheck, *Lehrbuch des Strafrechts. Allgemeiner Teil, supra* note 23 at 468, under VII.

[43] Holger Preiseđanz. *Strafgesetzbuch. Lehrkommentar.* 26th ed. Berlin, Schweitzer. 1970. p. 161.

[44] Dreher, *supra* note 31 at 273.

[45] Mueller, *The German Draft Criminal Code 1960, supra* note 5 at 50.

"(1) Anybody who takes part in a public riotous gathering at which one of the acts specified in Sections 113 and 114[46] is committed with combined efforts, shall be punished for riot with deprivation of liberty for a term from six months up to five years.

"(2) The ringleaders, as well as those rioters who commit one of the acts specified in Sections 113 and 114, shall be punished by deprivation of liberty for a term from one year up to ten years; police surveillance may also be ordered. If there are extenuating circumstances, deprivation of liberty for from six months up to five years may be imposed.

"*Sec. 116.* Unlawful Assembly.

"(1) If an assembled crowd on public roads, streets or places is requested to disperse by the competent official or by the commander of an armed force, any member of such crowd, who, after the third request, fails to leave, shall be punished for unlawful assembly by deprivation of liberty for up to three months or with a fine.

"(2) If, in the unlawful assembly, with combined efforts, an act of resistance has been offered to, or violence committed upon, the officials or the armed force, the punishments imposed for riot shall apply as against those who participated in the commission of such acts."[47]

Sections 115 and 116 have been repealed by the Third Criminal Law Reform Law of May 20, 1970 (*Bundesgesetzblatt* I:505) which amended also Sections 113 and 114 of the Code.[48] Article 2 of this Law provided for a replacement of the repealed text concerning the offense of unlawfully assembling and failure to disperse following orders to do so. However, this was no longer considered a criminal offense, but an "infraction of regulations" (*Ordnungswidrigkeit*) [For a discussion of this term, *see* Answer to Question 8]. Article 2 has the following wording:

"*Art. 2.* Unlawful Gathering.

"(1) Anyone who joins a public gathering or who fails to leave it, although a bearer of sovereign authority has three times lawfully requested the crowd to disperse, shall be [considered] committing an infraction of regulations (*ordnungswidrig handelt*).

"(2) The perpetrator who negligently does not realize that the request [to disperse] is lawful shall also be [considered] committing an infraction of regulations.

"(3) The infraction of regulations may, in the case of paragraph 1, entail retribution by a fine of up to [one] thousand DMarks, in the case of paragraph 2—by a fine of up to five hundred DMarks."

On the other hand, along with a more lenient attitude towards less serious offenses disrupting public peace,[49] the Third Criminal Law Reform Law of May 20, has increased the penalties for rioting coupled with violence or threats of violence against persons or property, as well as for especially serious cases fraught with especially grave consequences (new Section 125a). These provisions read as follows:

"*Sec. 125.* Riot.

"(1) Any person who takes part as perpetrator or participant in 1. acts of violence against persons or property, or 2. threatening of persons with an act of violence, which are committed out of a crowd with combined efforts in a manner endangering public security or who influences the crowd in order to

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[46] Section 113 penalizes resistance against law enforcement officers or persons called to their assistance; against detachments of armed authorities, or local militia or defense squads, while in the exercise of their proper functions (deprivation of liberty from fourteen days up to two years, but in case of extenuating circumstances deprivation of liberty not to exceed one year or a fine. Section 114 contains provisions on the offense of use or threat of force against governmental functionaries—the punishment is: deprivation of liberty for from three months up to five years: in case of extenuating circumstances—deprivation of liberty not to exceed two years or a fine; in case of especially serious cases—deprivation of liberty for from one year up to ten years.

[47] Translated from *Strafgesetzbuch mit 77 Nebengesetzen.* Textausgabe mit Verweisungen und Sachverzeichnis. 40th ed. (Stand: 1 April 1970). München, Beck, 1969: 72–73.

[48] For the legislative history of the Third Criminal Law Reform Law of May 20, 1970, including its different drafts, *see* Klaus Tiedemann. *Strafrechtspolitik und Dogmatik in den Entwurfen zu einem dritten Strafrcehtsreformgesctz.* Bonn, Friedrich-Ebert-Stiftung, 1970. 23 p.

[49] For details *see* Meinhard Hilf. "Demonstrationsfreiheit und Strassenverkehr in der Bundesrepublik Deutschland," *in* Max-Planck-Institut für Ausländisches Offentliches Recht und Volkerrecht, *Demonstration ünd Strassenverkehr, Landasberichte und Reechtsvergleichung.* Köln, Berlin, Carl Heymanns Verlag KG, 1970: 16–47 at 19, 40–47.

further its willingness to [commit] such acts, shall be punished by deprivation of liberty for up to three years, unless such act does not entail severer punishment under other provisions.

"(2) Insofar as the acts specified in paragraph 1, Nos. 1 [and] 2, entail punishment under Section 113, Section 113, paragraphs 3 [and] 4 shall apply, as the case may be.

"*Sec. 125a.*

"In especially serious cases of Section 125, the punishment shall be deprivation of liberty for from six months up to ten years. An especially serious case shall, as a rule, exist, if the perpetrator

"1. carries a firearm,

"2. carries another weapon, in order to make use of it while committing the offense,

"3. by an act of violence, puts another in danger of death or of a severe injury to body or health, or

"4. loots or causes significant damage to property not his own."

At the time the two following Sections (Secs. 126 and 127) also dealing with endangering of the public, have remained unchanged. They read as follows:

"*Sec. 126.* Disturbance of Public Peace by Threats.

"Any person who disturbs the public peace by threatening to commit a major crime involving a common danger, shall be punished by deprivation of liberty not to exceed one year.

"*Sec. 127.* [Unauthorized] Armed Groups.

"(1) Anybody, who without authority, raises or commands an armed group or who provides weapons or war materiel to members of a force which he knows to have been formed without authority shall be punished by deprivation of liberty for a term not to exceed two years.

"(2) Anybody who joins such armed group, shall be punished by deprivation of liberty for a term not to exceed one year."

QUESTION 16

The German Penal Code does not contain a Section similar to Section 1105 concerning Para-Military Activities. There are no quasi-military organizations in the Federal Republic of Germany at the present time.

QUESTION 17

1. Drugs

Possession for personal use of drugs is not penalized in the Federal Republic and the same is true with respect to purchase for personal use. Only illegal trafficking in drugs is a criminal offense.

Section 367 (1) No. 3 provides that "anyone who without permission of the police manufactures, offers for sale, sells or in any other way gives to other persons poison or drugs, insofar as they may not be freely sold," shall be punished by a fine of up to 500 DMarks or with deprivation of liberty not to exceed six weeks.

Commitment to an Institution for Withdrawal Treatment of a drug addict is ordered by the Court if the conditions specified in Section 64 of the 1973 Code are present (see Answer to Question 6).

2. *Gambling*

The German Penal Code contains several provisions penalizing illegal gambling, which appears in the Code under the name of "game of chance." They read as follows:

"*Sec. 284.* [Arranging Games of Chance].

"(1) Anybody who without permission of the authorities publicly arranges or carries on a game of chance or supplies accommodations for it, shall be punished by deprivation of liberty for a term not to exceed two years, or by a fine.

"(2) Games of chance in associations or societies with restricted membership in which it is customary to arrange games of chance shall also be considered publicly arranged.

"*Sec. 284a.* [Participating in Games of Chance].

"Anybody who participates in a public game of chance (Sec. 284) shall be punished by deprivation of liberty for a term not to exceed six months and a fine, or by a fine only.

"*Sec. 285.* [*Professional Gambling*]

"Anybody who pursues gambling professionally shall be punished by deprivation of liberty for a term not to exceed five years and a fine; under extenuating circumstances by deprivation of liberty for a term not to exceed one year or a fine, or both.

"*Sec. 285a.* [Police Surveillance].

"In the cases provided for by Sections 284, 284a, and 285, police surveillance may be permitted, in addition to deprivation of liberty.

"*Sec. 285b.* [Confiscation].

"In the cases specified in Section 284 to 285, the appliances used for gambling and the money found on the gambling table or in the [gambling] bank shall be confiscated, if they belong to a perpetrator or an accomplice at the time of the judgment. Otherwise they may be confiscated; Section 40a shall be applicable."

Furthermore, illegal public lotteries also subject their organizers to punishment. This is provided by Section 286 of the German Penal Code which reads as follows:

"*Sec. 286.* [Public Lotteries].

"(1) Anybody who without the permission of the authorities organizes public lotteries, shall be punished by deprivation of liberty for a term not to exceed two years or a fine.

"(2) Publicly organized raffles of movable and immovable property shall be deemed equivalent to lotteries.

"3. *Prostitution*

"Promoting or facilitating prostitution are punishable under Sections 180 (Pandering), 181 (Serious Pandering), and 181a (Pimping). The punishment is deprivation of liberty not to exceed five years.

"4. *Obscenity*

"Causing public annoyance by lewd acts is punished by deprivation of liberty not to exceed two years (Sec. 183), while dissemination of obscene writings is punished by deprivation of liberty for up to one year and a fine, or by either of these punishments.

"5. *Homosexual Activity Between Consenting Adults*

"Sodomy between men is punished by deprivation of liberty for a term not to exceed five years, but the court may, in its discretion, impose no punishment upon a participant who at the time of the offense has not yet reached the age of twenty-one years (Sec. 175). Serious sodomy between men, in particular sodomy for pecuniary gain entails the punishment of deprivation of liberty for a term of from one to ten years; but in case of extenuating circumstances the punishment is deprivation of liberty from six months up to five years (Sec. 176 of the German Penal Code)."

QUESTION 18

"*Sec. 311.* [Endangering by Means of Explosion].

"(1) Anybody who causes an explosion, particularly by use of explosives and thereby endangers life or limb of another or another's property of significant value, shall be punished by deprivation of liberty for not less than one year.

"(2) In especially serious cases the punishment shall be deprivation of liberty for not less than five years, in less serious cases—deprivation of liberty for a term of from six months up to five years.

"(3) A case as a rule may be considered especially serious, if the perpetrator by his [criminal] act has thoughtlessly caused the death of another.

"(4) Anybody who in the cases of paragraph 1 negligently causes the danger, shall be punished by deprivation of liberty for up to five years.

"(5) Anyone who in the cases of paragraph 1 acts negligently and negligently causes the danger, shall be punished by deprivation of liberty for up to two years or a fine.

"(6) The penal provisions of the Atomic [Energy] Law shall remain unaffected.

"*Sec. 311a.* [Preparation of a Crime Involving Explosives].

"(1) [In the Version of the First Criminal Law Reform Law of June 25, 1969]. Anyone who, for the purpose of preparing for an act punishable under Section 311, paragraph 1, which is to be perpetrated by means of explosives,

produces, procures for himself or another, keeps, transfers to another, or imports into the territory on which this law is in effect, explosives or produces the special contrivances necessary to carry out the act, shall be punished by deprivation of liberty from six months to five years.

"(2) In less serious cases the punishment shall be deprivation of liberty for from three months up to three years.

"*Sec. 311b.* [Active Repentance].

"(1) [In the Version of the First Criminal Law Reform Law of June 25, 1969]. In the cases of Section 311, paragraphs 1–4, the court may mitigate, in its discretion, the punishment (Sec. 15) or abstain from [imposing] punishment under these provisions, if the perpetrator voluntarily averts the danger before serious damage occurs. Under the same preconditions the perpetrator shall not be punished under Section 311, paragraph 5. In the cases of Section 311a [the provision of] sentence 2 shall apply *mutatis mutandis*, if the perpetrator voluntarily abandons the further carrying out of the act, or otherwise averts the danger.

"(2) If the danger is averted without any contributing act of the perpetrator, his voluntary and earnest effort to attain such goal shall suffice."

QUESTION 19

While the Weimar Republic National Constitutional Assembly (by 153 against 128 votes) had in 1919 decided to preserve capital punishment,[50] originally provided by Section 13 of the Imperial German Criminal Code, it has now been abolished by Article 102 of the Basic Law (Constitution) for the Federal Republic of Germany promulgated by the Parliamentary Council on May 23, 1949.[51]

Of a certain interest is the following comment on the death penalty question in Germany, made by an authoritative German criminal law scholar a few years ago, inasmuch as it seems to be true also at the present time. To quote:[52]

"The Penal Reform Commission witnessed long and vigorous debates on the question of capital punishment, a problem on which opinions will remain divided. Of course, in my opinion, for Germany these debates have very little practical significance. Article 102 of the Constitution provides that capital punishment is abolished, and it would require a constitutional amendment to reinstate it. It is impossible to find a two-thirds majority in Parliament for such a purpose. Strangely enough, a national plebiscite would probably result in the reintroduction of capital punishment. But the German Constitution does not permit a plebiscite. Therefore, there is absolutely no possibility for the reintroduction of capital punishment."

QUESTION 20

Despite its federal political structure, the Federal Republic of Germany does not have a dual system of states (laender) and federal courts comparable to that of the United States. Both land and federal courts are inte-

[50] Schmidhäuser, *supra* note 8 at 61.

[51] For a detailed commentary to Art. 102 (historical background, legislative history and analysis of the provision within the framework of the Constitution) *see Kommentar zum Bonner Grundgesetz*, bearbeitet von H. J. Abraham [et al.] Hamburg, Hansischer Gildenverlag Joachim Heitmann and Co., 1950– (looseleaf) : comments to Art. 102 (Zweitbearbeitung: July, 1967), p. 1–37. *See also* Bruno Schmidt-Bleibtreu [and] Franz Klein, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, 2nd ed. Neuwied & Berlin, Luchterhand, 1970. p. 762 [stressing the point that Art. 102 is "directly effective law" which has implicitly repealed each and all penal norms-regulations to the contrary] : Otto Model-Klaus Müller, *Grundgesetz für die Bundesrepublik Deutchland*, 6th ed., Köln, Heymann, 1971. p. 384; Andreas Hamann, *Das Grundesetz für die Bundesrepublik Deutschland vom 23 Mai 1949*. 3rd ed., Neuwied & Berlin, Luchterhand, 1970. p. 629 [stresses that by virtue of Art. 102 Germany cannot extradite to a country where death penalty against the extradited is to be expected or has already been pronounced] ; G. Leibholz [and] H. J. Rinck, *Grundgesetz fur die Bundesrepublik Deutschland. Kommentar an Hand der Rechtsperehung des Bundesverfassungsgerichts*. 4th ed. Köln-Karienburg, Verlag Dr. Otto Schmidt KG. 1971 [on the basis of the practice of the German Constitutional Court entertaining the opposite opinion—that Art. 102 does not prohibit extradition by the German Government to a country which may impose and execute the death penalty p. 737].

[52] Horst Schroder, "German Criminal Law and Its Reform," *Duquesne University Law Review*, v. 4, No. 1 (Fall, 1965). p. 97–113. Hereinafter quoted as Schroder, German Criminal Law.

grated into a single hierarchy, with state courts on the lower levels and federal courts at the top. These federal courts are appellate courts of last resort to which an appeal lies from the state courts. Therefore the problem of multiple prosecutions and trials as a rule does not arise since the bulk of both the substantive and the adjective criminal law rules are incorporated in federal criminal, viz., criminal procedure codes. While the Penal Code includes uniform provisions on the multiplicity of offenses (Secs. 52–55 of the 1973 Code, or Secs. 73–77 of the present Code), the German Criminal Procedure Code in its Sections 2-6 provides rules for prosecution and trial of "interconnected criminal matters." They read as follows: [53]

"*Sec. 2.* [Joinder and Severance].

"(1) Interconnected criminal cases which individually would be under the jurisdiction of courts of different rank, may be brought jointly to the court of superior jurisdiction.

"(2) For reasons of expediency, this court may, by order provide for the severance of criminal cases so joined.

"*Sec. 3.* [Interconnection].

"Interconnection exists when one person is accused of several punishable acts, or if several persons are accused as principals, participants, [or] accessories after the fact or receivers [of stolen property], with respect to one punishable act.

"*Sec. 4.* [Subsequent Joinder or Severance].

"(1) A joinder of interconnected, or a severance of joined criminal cases may also be directed, by judicial order, after the opening of the preliminary judicial investigation or after the opening of the main proceedings, upon motion of the prosecution, or of the person against whom charges are brought or on the court's own motion.

"(2) The court to whose district the other courts belong shall be competent to make such order; if such court does not exist, the superior court common to all involved shall decide.

"*Sec. 5.* [Jurisdiction of the Court of Higher Rank].

"For the duration of the joinder, the criminal case, which belongs to the jurisdiction of the court of higher rank shall be determinative for the procedure.

"*Sec. 6.* [Examination on the Court's Own Motion].

"The court shall on its own motion examine its jurisdiction as to subject matter at every stage of the proceedings."

Furthermore, the German Criminal Procedure Code provides also for the possibility of a different kind of joinder: consisting in the simultaneous trial of several criminal cases pending before the same court. The pertinent provision is contained in its Section 237 which reads as follows: [54]

"*Sec. 237.* [Joinder of Interconnected Criminal Cases].

"If there is an interconnection between several criminal cases pending before it, the court may order their joinder for the purpose of simultaneous trial, even though this interconnection is not the one specified in Section 3."

In the 1973 version of the General Part of the German Criminal Code, the question of prosecution for multiple related offenses is dealt with in Title Three (Fixing Punishment in Case of Several Violations of Law) of the Third Division (Legal Consequences of the [Criminal] Act) consisting of Sections 52–55. They read as follows:

"*Sec. 52.* Compound Offense.

"(1) If the same criminal act violates several penal statutes or the same penal statute several times, only one punishment shall be imposed.

"(2) If several penal statutes are violated, punishment shall be determined in accordance with the statute which provides for the severest punishment. It may not be less severe than the other applicable statutory provisions permit.

"(3) The court may separately impose a fine in addition to the deprivation of liberty punishment if the conditions specified in Section 41 are met.

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[53] The translation was made from *Strafprozessordnung (StPO) mit Nebengesetzen. . . .* bearbeitet von Elmar Brandstetter und Oswald Bussenius, 2nd ed. Köln, Carl Heymanns Verlag KG., 1971. p. 2–3.

[54] *Id.* at 81.

"(4) Additional penalties *(Nebenfolgen)* and measures (Sec. 11, par. 1, No. 4) must or may be imposed where one of the applicable statutes prescribes or permits them.

"*Sec. 53.* Several Criminal Acts.

"(1) If anyone has perpetrated several criminal acts which are adjudicated simultaneously, and thereby incurred several terms of deprivation of liberty or several fines, one compound punishment shall be imposed.

"(2) If a term of deprivation of liberty coincides with a fine, a compound punishment shall be imposed. However, the court may also impose a fine separately; if in such cases a fine is to be imposed for several criminal acts, a compound fine shall be imposed to that extent.

"(3) Section 52, paragraphs 3 and 4 shall apply *mutatis mutandis.*

"*Sec. 54.* Fixing the Compound Punishment.

"(1) The compound punishment shall be fixed by increasing the highest punishment incurred, or where there are different kinds of punishment, by increasing the punishment severest in kind. In so doing the personal characteristics of the perpetrator and the individual criminal acts shall be comprehensively evaluated.

"(2) The compound punishment may not reach the sum of the individual punishments. It shall not exceed fifteen years in the case of a deprivation of liberty punishment and may not exceed seven hundred twenty per diem charges in case of fines.

"(3) If the compound punishment is to be computed from deprivation of liberty—and fine—punishments, in ascertaining the sum of the individual punishments one per diem charge shall correspond to one day of deprivation of liberty.

"*Sec. 55.* Subsequent Fixing of the Compound Punishment.

"(1) Sections 53 and 54 shall also apply if a person under final [judgment of] conviction before the punishment imposed upon him has been executed, barred by the statute of limitations or remitted, is convicted for another criminal act which he perpetrated prior to the earlier conviction. An earlier conviction shall be considered to be the judgment in such earlier proceedings in which the underlying established facts would be examined for the last time.

"(2) Collateral penalties, collateral consequences and measures (Sec. 11, par. 1., No. 4) imposed in the earlier sentence, shall be upheld to the extent they have not become irrelevant as a result of the new sentence."

Appendix

THE GERMAN CODE OF CRIMINAL PROCEDURE

With an Introduction by
Dr. Eberhard Schmidt, *Professor of Law, University of Heidelberg*

Translated by DR. HORST NIEBLER

Introduction translated by DR. MANFRED A. PFEIFFER

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IN THE NAME OF THE PEOPLE

In the criminal matter against Becker et al. charge: aggravated larceny, etc., the Magistrate's Court of Munich—Lay-Judge Court—delivers the following

JUDGMENT

in the public session on April 27, 1961 in which the following persons participated:

(a) magistrate Dr. Reichert as presiding judge,
(b) lay-judges Schnell and Hauser as co-judges,
(c) prosecutor Mertens as official of the prosecution,
(d) referendar Mayer as deputy recording clerk.

(§ 260, subs. IV) [1] I. Becker, Fritz, auto-mechanic in Munich; married; born on July 4, 1930 in Augsburg is guilty of aggravated larceny

(pronouncement) and is therefore sentenced to be confined in a prison for a period of ten months. Preliminary detention is credited against the sentence.

II. Hilger, Hans, clerk in Munich; unmarried; born on January 2, 1935 in Feldkirchen is guilty of receiving property unlawfully acquired, and is therefore sentenced to pay a fine of 300 Deutsche Marks in lieu of a prison term of one month.

III. The defendants bear the costs of the proceeding.

STATEMENT OF GROUNDS

(§ 267, subs.I 1) The injured party in this case, Joseph Schneider, occupies an apartment located on the fourth floor of 175 Schwabingerstrasse, Munich. Between 3.30 and 11.0 p.m. on March 31, 1961, the defendant Becker by force broke open the locked door leading into Schneider's apartment, intending at that time to commit larceny in the apartment. Having entered the apartment, he found a wrist-watch, make *Omega*, which belonged to Schneider. The watch had an approximate value of 150 Deutsche Marks. He took the watch with him, intending at that time to sell it.

At about 11.0 p.m. Becker proceeded to the *Siegesgarten*, a night club located on Siegesstrasse, in Munich, where he started a conversation with the defendant Hilger. The defendants had never met before. During the course of the conversation Becker offered to sell Hilger the watch for ten Deutsche Marks. When Hilger inquired as to whether Becker was the owner of the watch, Becker replied: "People who want to buy Swiss watches for ten Marks shouldn't worry about that." Thereupon, Hilger, without inquiring further, bought the watch for ten Deutsche Marks.

[1] All citations in the margin of this Appendix refer to the Code of Criminal Procedure.

The defendant Becker denied the commission of the act charged against him. He alleged that it was Hilger who had offered the watch to him and that he had rejected the offer. The findings with respect to Becker are, however, sufficiently supported by these facts: according to Schneider's testimony, the watch in question was stolen from his apartment in the afternoon or evening of March 31, 1961. Pinter, the detective, testified that the larceny was committed by breaking into Schneider's apartment by force. A fingerprint found on the inside of Schneider's apartment door was identical with Becker's fingerprint in five points. According to the opinion of the expert, Weise, identity in five points, while not conclusive, indicates a high degree of probability that the print was made by Becker. Hilger states that Becker sold him the watch at about 11.30 p.m. on March 31, 1961. Hilger's statement appeared credible on its face and there was no indication that Hilger had any reason to bear false witness against Becker. Furthermore, Becker's wife, when called by him as a witness to establish an alibi for the time here in question, refused to testify. Under the "free evaluation of evidence" rule (§ 261 of the Code of Criminal Procedure) the court is entitled to draw adverse inferences from her failure to testify in support of Becker's statement that he was in his home all evening on the day question until 11.0 p.m. Becker's intent to appropriate the watch to himself is apparent from his subsequent behavior.

The findings concerning the defendant Hilger are based on the defendant's statement in open court and on the credible testimony of Schneider.

(§ 267, subs. III 1) The act committed by the defendant Becker constitutes aggravated larceny pursuant to §§ 242, 243, subs. I, II, of the Criminal Code. The defendant took a movable thing, namely a wristwatch, by terminating the exclusive custody then exercised by Schneider, and by obtaining custody himself. The wrist-watch was the exclusive property of a person other than the defendant, namely Schneider. When taking the watch, the defendant intended to convert the watch for his own benefit by selling it. He took the watch from a building after breaking into it.

The act committed by the defendant Hilger constitutes receiving property unlawfully acquired pursuant to § 259 of the Criminal Code. He purchased a watch which had been obtained by means of an offense, that is, the larceny committed by Becker. He also acted for his own benefit, since he paid considerably less than the fair market value for the watch. Without deciding whether the defendant knew that the watch had been obtained by means of an offense, the court finds that he should have assumed under the circumstances that it had been so obtained. § 259 creates a rebuttable presumption according to which a person, who should have known of the unlawful origin of a certain thing in view of the attending circumstances, may be considered as having had actual knowledge thereof unless the contrary is shown.

The circumstances in light of which Hilger should have known that the watch was unlawfully obtained are these: he bought the watch from a perfect stranger who gave him an evasive answer when questioned about ownership of the watch. The watch cost only a fraction of the regular price. There was nothing in the evidence which would tend to rebut this presumption.

(§ 267, subs. III 1) As to the defendant Becker the court considered ten months confinement in a prison as an appropriate punishment. Although the code provides for a penitentiary sentence in case of aggravated larceny, unless there are mitigating circumstances, the court deemed a prison term sufficient.It (§ 267, subs. III 2) considered in mitigation that Becker has a wife and two children and that he is still rather young. On the other hand, the court had to bear in mind that the defendant had recently been given a suspended sentence which obviously had no effect on him.

The period between April 1, 1961 and today, which the defendant has spent in preliminary detention, will be credited against the sentence here imposed (§ 60 of the criminal Code).

GREECE

It has been pointed out that the purpose of a modern criminal code is to loosen the restrictions imposed upon the judges by the codes of the past, and at the same time, provide an effective instrumentality for the combating of crime.

In compliance with that concept, the Greek Criminal Code* identifies crimes as certain acts being directed against the rights of the individual and the society which the law regards as necessary to be protected. These cases are specified, but a case by case description of the punishable act is avoided to preserve the fundamental principle of "nullum crimen, nulla poena sine lege" with the proper flexibility. In this way, the interest of the general public is protected just as the interest of the individual is safeguarded.

The Greek system follows the concept of the twofold purpose of punishment, that is, that of retribution and security. The penalties are understood as being expressions of disapproval on the part of society of what the perpetrator has done, and proceeding against him accordingly.

The security measures are a physical protection of society from the criminals. The penalties are imposed in pursuance of the general and specific preventative theories whereas the security measures are imposed in pursuance of the special preventive theory alone. Henceforth, the former must correspond to the gravity of the crime perpetrated, and the latter, to the personality of the perpetrator.

QUESTION 1

The Greek Criminal Code is divided into two parts. The first part contains general provisions and the second, specific offenses. The first part is further subdivided into eight chapters, and the second into twenty-seven.

First Part: General Provisions

The first chapter contains provisions with respect to the place and the time of the application of the Criminal Code.

The second deals with the punishable acts and includes provisions with respect to the factual elements of the crime.

The third provides for attempts to commit a crime and for the accessories to the crime.

The fourth includes provisions for penalties and security measures.

The fifth contains provisions about the imposition of the sentences.

The sixth provides for suspended sentences and the release of the convicted person once certain conditions are met.

The seventh provides for the waiving and extinguishing of the right to institute a criminal action.

The last one contains provisions about juveniles.

Second Part: Specific Offenses

This part consists of 27 chapters. The first and second chapters provide for crimes with respect to acts which are directed against the state. The third provides for those crimes which are committed against a country with whom Greece is at peace. The fourth for crimes against the free exercise of political rights. The fifth for crimes against the King, the heir, and the illegal release of prisoners.

The sixth and seventh pertain to crimes with respect to the public order. The eighth for crimes against the armed forces. The ninth and tenth for crimes against transactions, the currency, etc. The 11th for crimes with resepct to the administration of justice. The 12th for crimes with respect to the public services.

The 13th and 14th, for crimes known as "commonly dangerous" and for crimes against transportation. The 15th to 24th, for crimes against the individual (crimes against personal freedom, family life, morality, etc.). The 25th for crimes of begging and vagrancy. The 26th—for petty offenses, and the 27th contains provisions on infractions of administrative laws and ordinances.

QUESTION 2

The Code contains 474 articles, which run consecutively from 1 to 474. Blank numbers are unknown.

*One of the drafters of the penal code is Nicolaos Chorafas, a former professor in criminal law at the Athens University Law School. He is regarded as an outstanding top authority in the field of criminal law and it is due to his contribution that the Greek Criminal Code is a modern, complete, and effective piece of scientific legislative work.

QUESTION 3

There are two kinds of culpability: (a) intent and (b) negligence. Two kinds of intent are distinguished: (a) where the perpetrator intentionally and deliberately brings the factual elements into being which, according to the law, meet the definition of a punishable act (*dolus directus*) and (b) where the perpetrator, although he perceives the materialization of the factual elements of a crime to be possible by his act, commits the act nevertheless (*dolus eventualis*).

Negligence exists where a person does not pay such attention which, under certain circumstances, he is required and capable of mustering, and consequently, does not foresee the results of his act or he has foreseen the results as possible but believes that they can be averted. In both cases, the element of intent, that is, the will to bring forth the factual basis of a crime, is lacking. Article 26 of the Criminal Code specifies that the major and minor crimes must be punished only where committed intentionally. Minor crimes committed negligently must be punished only where the law expressly so provides.

According to the above, "mutatis mutandis" intentionally and knowingly compare with "intent" (*dolus directus*, and *dolus eventualis*), and recklessly and with negligence.

The defendant's state of mind is used to determine guilt. The accused is regarded as innocent until the pronouncement of the sentence.

QUESTION 4

Article 29 of the Criminal Code establishes the principle of "condicio sine qua non." According to this, the perpetrator must be held responsible if his act produced a certain result, and this result can be attributed to the acts of the perpetrator. Accordingly, there must be a close connection between the act and the result, so that it can be inferred that the result was the inevitable consequence of the act.

QUESTION 5

Insanity is a defense under Article 34 of the Criminal Code. The insane criminals are not legally responsible for their acts, but they are subject to security measures. These measures are part of the system of the criminal punishment and are understood as providing protection to society from the insane.

The court may appoint a psychiatrist if it appears necessary for investigation of the case. A psychiatrist may also be appointed at the request of the prosecution or the defense attorney. Each party has the right to call upon an expert advisor at his own expense.

The court may order commitment of the insane person to a mental institution only where it feels that the person is dangerous to the public security.

QUESTION 6

There are the following provisions with regard to the intoxicated defendant:

(a) If the person has been intoxicated involuntarily, that is, without his fault or privity, he may not be held responsible. In that case, Articles 34 and 36, paragraph 1, must apply.

(b) If a person has become intoxicated intentionally or negligently, he will be held responsible according to the provisions of Article 193 of the Criminal Code. Consequently, if the committed act is a major crime, he must be punished by imprisonment up to 2 years, or if it is a minor crime, up to 6 months. Furthermore, Article 35 provides that if a person contemplates committing a crime while in a normal mental situation but becomes intoxicated in order to accomplish it, such a crime must be regarded as committed intentionally.

QUESTION 7

Self-defense is discussed in Articles 22, 23, and 24 of the Criminal Code and is justified as a means of preserving justice. An act of self-defense requires three conditions to be met: (a) there must be an assault, (b) such an assault must be unlawful, and, (c) immediate.

The right to self-defense belongs not only to the person undergoing an attack, but to anyone who attempts to avert an unlawful act. This is in accord-

ance with the concept that defense is an independent means of protecting legal rights. Consequently, a person who acts to protect another from an unlawful assault, acts in defense even though the other person does not defend himself or ask for help.

Excessive Defense

Self-defense is justified to the extent that it is necessary to avert an immediate assault. When it is excessive, it will be judged "in concreto" depending upon the type, the degree, and the nature of each case.

Article 25 provides that a person who exceeds the limits of self-defense or defense of another must be punished. If the excessive self-defense is intentional, the perpetrator must be punished according to the provisions of Article 83 of the Criminal Code (mitigated punishment). If it is negligent, it is judged according to the provision on negligence (Article 28 of the Criminal Code). But the perpetrator must not be punished if he exceeds the limits of self-defense through fear or confusion.

Where a person provokes an assault by another, in order to act under the pretense of self-defense, in such a case, the provisions about self-defense are not applicable.

QUESTION 8

The offenses are classified as major crimes, minor crimes, and petty offenses. The purpose of this classification is significant both in the substantive criminal law and in criminal procedure. In substantive criminal law, these are the major points:

(A) Major crimes are never punished if negligently committed. Minor crimes which are negligently committed must be punished only where the law expressly provides. The petty offenses are punishable regardless of whether they are committed intentionally or negligently unless the law expressly requires intent.

(B) An attempt to commit a crime is punishable only in the case of major or minor offenses, never in the case of petty offenses.

(C) The accessories before the fact are punished only with regard to major and minor crimes; in the case of petty offenses only where the law expressly so provides.

In criminal procedure: (a) the jurisdiction of a court over a crime will be determined according to the above-mentioned classification; (b) the arrest and detention of a defendant is always called for in major crimes whereas in the other cases, it will depend upon the specific offense.

QUESTION 9

A court may order the execution of a sentence to be suspended if the defendant has not been convicted for a major or minor offense before, and the sentence imposed is not more than of one year's duration. The judge must consider the circumstances under which the offense took place as well as the personality and the conduct of the perpetrator after the act (Art. 100 of the Greek Criminal Code, hereafter assumed unless specified otherwise). The length of the suspension may not be less than three or more than five years (Art. 99).

Suspension of the imposition of the sentence is unknown.

The person so released is under no supervision, but if he commits a major or minor offense during the period specified in the decision of the court, and is convicted therefor, the suspension will be revoked. In such a case, the offender must serve both sentences consecutively (Art. 102).

The Code, as a rule, provides for determinate sentences of imprisonment. The limits set therein are mandatory for the judge. Indeterminate sentences are provided for in the case of recidivist offenders (Art. 90). The judge is required to specify only the minimum of the sentence which may not be less than 3 years.

Term provisions are extended for special offenders. If such an offender is regarded as dangerous to the public, the court may impose an indeterminate imprisonment term (Arts. 89 and 92).

A convicted person may be released on parole under the conditions and procedure set out in Articles 104 to 110 of the Criminal Code. It is required that

two-thirds of the sentence have been served and that the convicted person have demonstrated good behavior during the time of his confinement. The court must scrutinize the history and character of the defendant and if special circumstances indicate that the parolee will lead a law abiding life, a parole will be granted. It is provided that certain obligations may be imposed on the parolee with regard to the place of residence, way of life, etc. The parole will be revoked if the parolee commits a crime during the time specified in the decision of the court.

Legal entities are not subject to criminal prosecution, nor is there an article equivalent to Section 3003. Article 117 of the Constitution and Article 510 (d) of the Code of Criminal Procedure require that all the decisions of the courts must be duly supported by reasons and pronounced in public sessions.

The standards set for the review of the sentences by higher courts vary. They depend upon the timing and standing of the appellant in each particular case. An appellate court may not raise the sentence (Art. 470 of the Code of Criminal Procedure).

In the case of multiple offenses, the perpetrator must, at the determination of the punishment, be sentenced to a compound punishment, consisting of an augmentation of the severest concurrent punishments (Art. 94). If any of the convictions is reversed, then the compound punishment must consist of an augmentation of the severest of the remaining punishments (Art. 94, par. 3).

Where a court imposes imprisonment not to exceed 6 months, it may, at its discretion, convert such punishment to a pecuniary one. The personality and criminal record as well as the financial condition of the defendant must be considered before any conversion is realized. A condition for the release of the convicted person is the payment of the fine imposed. If such a condition is not met, the convicted person serves the sentence. The amount of the fine is a combined consideration of both the gravity of the offense and the financial condition of the defendant.

QUESTION 10

Mistake of fact is a defense under the circumstances specified in Article 30 of the Criminal Code. The first part provides that a person will not be responsible for an offense if he ignores or misunderstands the fact that his act constitutes the factual elements of a crime. The same provision applies in the case where a person mistakenly believes that the facts which constitute an affirmative defense exist, e.g., an impression that an assault is immediate. It is further specified that if such ignorance or misunderstanding is due to the person's negligence, he will be responsible according to the provisions thereof.

It is provided in the same article that the perpetrator will not be responsible with regard to an incident which increases the gravity of the crime if he ignores that incident or misunderstands it.

Mistake of law appears in two forms: (a) mistake as to whether an act is punishable, that is, whether a law exists and what the content of such law is, and (b) mistake as to the illegal character of an act.

As far as the first case is concerned, mistake of law is not a defense. In the second case, a distinction must be made as to whether the mistake is excusable or not. The mistake is excusable when the perpetrator not only does not know but cannot possibly know the illegal nature of his act. In that case, there is no responsibility. But if the person could have realized the illegal nature of his act, then that act is imputed as if intentionally committed.

QUESTIONS 11 AND 15

The Greek Criminal Code does not contain provisions analogous to the questions 11 and 15 due to the reason that there is only one jurisdiction over crimes committed within the country.

QUESTION 13

It is provided in Article 115 that if two or more persons commit a crime each one of them shall be deemed as a principal. Two elements are required for the make-up of the above crime: (a) common intent, and (b) common act. Common intent exists where all the participants want the factual elements of a crime to be perpetrated and also know that the other perpetrator, or perpetrators, have the intention of committing the same crime.

Common act exists where either the act of each participant constitutes the factual elements of a crime, or a crime is perpetrated by the convergence of the act of the participants.

Under the circumstances set out above, each participant will be subject to the same punishment. If a person assists another in the commission of an act but before the crime is committed, such person will not be deemed to be a principal but an accomplice and will be punished under the provisions of Article 47. The distinction between the two cases is that the act of the perpetrator is an act of commission whereas the act of an accomplice is an act of assistance before the commission of the crime. If a person has offered assistance at the time of the commission, such person shall be deemed to be an accomplice during the act and shall be punished as a perpetrator.

QUESTION 14

A rule similar to "felony-murder" does not exist in Greek criminal law.

QUESTION 16

Article 195 specifies that whoever, without authority, forms, supplies, or undertakes the leadership of an armed group, as well as anyone who participates therein, shall be punished by imprisonment for not less than 6 months.

QUESTION 17

Where the victim consents to certain acts, then either there is no crime, or there is a crime but it is not punishable.

The first occurs whenever an element of a crime is that it is perpetrated against the will of the victim, and such an element is lacking (consent is given). Here no crime exists (e.g., illegal detention) (Art. 325).

In the second case, the factual elements of a crime are perpetrated but the act is not punishable due to the victim's consent. This happens only where minor bodily injuries are involved which were caused with the consent of the victim in a way not contrary to good morals (Art. 308, par. 2).

Drugs are governed by the Law 5539/1932 and Law 3084/1954 in combination with Laws 6169/1934, 911/1937, 803/1948, and 1765/1951. It is spelled out therein what narcotic substances are, and that their possession or sale shall be punished by confinement in a penitentiary for up to 10 years and a fine of up to 10 million metallic drachmas. When the quantity of narcotics in the possession of the accused is trivial, the penalty shall be up to 2 years of imprisonment.[1]

Violation of the aforementioned laws is a major crime and therefore, shall be tried by a criminal court.[2] The factual element of the above crimes is the mere possession or sale of narcotics. It is irrelevant whether or not the victims consent or that they are customers of the defendant.

By virtue of Law 256/1939 as amended by Laws 621/1937, 2155/1943, and 1620/1951, gambling is permitted only where permission is given by a competent authority (Ministry of Public Security). The facual element of the crime of gambling is perpetrated if it is done without authorization. Consent is an element of the crime.

According to Law 3310/1955 which has replaced Law 3032/1922, a committee has been established with the objective of implementing the provision concerning prostitution. Generally, women engaging in prostitution are not prosecuted provided that the various regulations established by the committee are observed, mainly that women under 18 years of age are not involved or that two or more women do not practice the prostitution in joint enterprise.

Obscenity is regulated by Law 5060/1931 which was enacted in compliance with the international Geneva Agreement of December 19, 1923, as amended by Law 2306/1953, enacted to implement a protocol agreement signed by the members of the United Nations at Lake Success on December 11, 1947.

According to the provisions of the above laws, the judge must decide whether material is obscene or not, taking into consideration the personality of the author, the purpose of the document and the effect which it may have on

[1] Athens Court of Appeals 188/1958.
[2] Supreme Court (Areios pagos) 330/1957.

the public. If the court decides that the material is obscene, it is confiscated and destroyed.

The above-mentioned laws are not contained in the Criminal Code.

According to Article 34, sexual activities between males is punished by imprisonment for not less than 3 months, if one of the parties is an adult and the other a minor, or such activities are the result of an abuse of a position of authority in any public or private office, or if it is perpetrated for any kind of gain. It seems that "a contrario" homosexuality between consenting adults is not punishable.[3]

QUESTION 18

The Penal Code does not contain provisions about firearms and explosives. This matter is governed by special laws such as Law 286/1914 and Law 2218/1952.

QUESTION 19

Capital punishment is provided for the following cases: (1) an assassination attempt against the King or against a person substituting for him in his offical duties (Art. 134); (2) where a Greek citizen serves in the army of another country with whom Greece is at war (Art. 143); (3) where a person acts in a way that may assist the enemy in connection with a war which is imminent or has already broken out against Greece (Art. 144); (4) espionage against Greece in time of war (Art. 148); (5) where a person intentionally kills another (Art. 299); (6) where a person kills another by willfully violating the rules agreed upon for dueling; (7) in the case of heavily bodily injuries or death caused in connection with a robbery (Art. 380); (8) in the case where a person, in order to derive illegal property benefit, extorts another by threatening his limb or life.

With regard to the above cases, the judge shall impose the death penalty, if the type or means of commission is extraordinarily odious or if the perpetrator is dangerous to the public.

By virtue of Law 1608/1952, Article 1, the death penalty may be imposed in the case of Articles 216, 218, 242, 256, 258, 372, and 376 of the Criminal Code, where the person continued perpetrating the crimes described therein for a long time or where the profit derived therefrom is particularly high. All of the above articles are referred to as abuses against public property.

The death penalty is imposed by a jury and in some instances by the court of appeals. No separate proceedings are provided.

QUESTION 20

A distinction is made in Article 94 between the case where the perpetrator commits several offenses by independent acts and the case where several offenses are committed by the same act. The perpetrator shall be subject to one trial if these offenses are committed at one time or successively (Supreme Court 384/1953), and the imposed sentence shall be, in the first case, a compound one consisting of an augmentation of the severest concurrent punishments. In the second case, the court shall increase, at its discretion, the severest of the concurrent punishments, but not to exceed the maximum provided.

Article 57 of the Code of Criminal Procedure defines that the prosecution is barred by former prosecution of the same offense.

Only one jurisdiction exists in Greece. Therefore, there are no provisions equivalent to Sections 707, 708, and 709.

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QUESTION 12

I. *General Remarks*

A State may claim jurisdiction over an offense on the ground that a crime affects the national interests, although it has been committed abroad. In regulating this matter, some principles have been developed which have been followed by most of the European countries. These principles (universality, territoriality, personality and the protective principle) are often referred to as "principles of international law" and the group of criminal laws which governs these cases as "international criminal law." These terms are misused because each State, when enacting such laws, does not act to regulate its relations with other States, but acts as a sovereign (*imperium*) in stipulating under which circumstances its criminal law should apply to offenses which have been committed abroad but nevertheless effect its legal order.

According to the *principle of universality*, a country may apply its law to any crime, regardless of the place where the crime was committed, the nationality of the perpetrator or whether its national interests are affected or not. It stems from the necessity for international cooperation in combating crime, but it lacks legal realism and has been criticized as extremely broad and difficult to apply. More particularly, its application by a State may be in the nature of a violation of the sovereignty of the other States, and the difficulty in collecting the evidence necessary for the prosecution, especially when the crime has been committed in a remote country, is apparent. In addition, the difference between the laws of different States may lead to injustices, for an act may not be regarded as an offense according to the law of one country, whereas the same act constitutes a crime in another State.

However, the necessity for cooperation in the field of criminal law is unquestionable. International agreements with the objective of combating some crimes, such as the agreements of 1910 and 1923 on obscene literature, and the agreement of 1925 and 1931 on narcotics, is an expression of that need.

Under the *territoriality principle*, a country may claim jurisdiction over offenses which have occurred only within its own territory. No distinction is made as to the nationality of the perpetrator.

This system although advocated by many prominent authors, has been abandoned as an exclusive concept. It postulates that each State must preserve the existing legal order and secure the rights of its own citizens. Therefore, any deed violating those interests must be punished by its laws, even if it is committed by an alien within the territory.

This principle ignores the fact that such acts may occur within as well as outside the State. Therefore, it does not provide for those acts which are committed abroad and which affect the national interests, or its nationals.

Under the *personality principle*, the criminal laws of a State are personal and must apply to citizens wherever they commit a wrongful act. The concept is based upon an inner relationship between the State and its citizens. On the one hand, it prevents a State from extraditing its nationals for crimes which they have committed abroad and on the other hand, it enables the State to punish them for each acts. For aliens who violate the laws, the principle creates a "fictio juris" by virtue of which aliens living in a country are regarded as its citizens (*subditus temporarius*). Thus, the laws apply to them not because the wrongful act was committed within the legislating State, but because under a *fictio juris*, they are regarded as nationals.

The personality principle does not offer complete protection because, besides the fact that the creation of a "fictio juris" is out of place here, it does not provide for crimes which are committed by aliens abroad and affect the national interests.

The basis of the *protective principle* is that each State has the right to secure its national interests. These interests can be affected not only by acts

committed within its territory but also by acts which take place abroad. The means of safguarding the State's interests rests in the criminal laws, consequently, those laws must protect :

(a) all rights which are enjoyed within the State by nationals or aliens ;

(b) all rights which belong to the State or to its citizens and are exercised abroad. The offense against those rights must be punished wherever it is committed and regardless of by whom because it is an inherent right of any State to safeguard such rights.

(c) those rights which two or more countries are interested in securing. These are known as "common" or "international" rights, e.g., the security of international trade, currency, etc.

II. *The Greek Criminal System*

The Greek Criminal Code deals with territorial jurisdiction in Articles 5 to 11. Article 5 provides that all offenses committed within the State shall be punished according to its provisions regardless of the nationality of the perpetrator and the gravity of the offense. This provision is an expression of the territorial principle. Offenses committed within territorial waters or in Greek space are to be considered to have occurred on the country's territory. Furthermore, paragraph two of the same Article provides that Greek ships and planes are to be regarded as Greek territory even when they are abroad unless there is an exception in accordance with international law.

Article 6 is an expression of the principle of personality. It is designed to secure the punishment of those who commit crimes abroad. Without this provision, perpetrators would remain unpunished in the event that they returned to Greece, because extradition of Greek citizens is not provided for under Greek law. A condition for the applicability of this Article is that the act must be a major or a minor crime according to the laws of the country where the offense was perpetrated as well as according to Greek law. If the place of the crime is not subject to any criminal jurisdiction, Greek law is applicable.

Paragraph two of the same Article provides that the perpetrator shall be punishable if at the time of the commission of the act, he was Greek but rejected his nationality afterwards, or if he was an alien at that time but assumed Greek nationality afterwards.

The wording of Article 6 may lead to difficulties in its application because it does not make clear whether or not it applies exclusively to major or minor crimes. It simply implies that it must be illegal. Some authors contend that an offense is punishable if it is a petty offense. The opinion that the act must be a major or minor crime seems to be in accord with the whole spirit of Article 6.

Also, there is the question of what the applicable penalty shall be in the event that the law of the country where the act took place provides for a milder punishment than the law of Greece. It appears that the Greek law applies even when the penalty which it requires is severer.

If the offense committed abroad is a minor crime, prosecution must be requested either by the victim or the country where the act took place (paragraph 3). Petty offenses are punishable only where the law expressly so provides (paragraph 4).

Article 7 has its roots in the protective principle and is designated to protect Greeks against whom an offense may be perpetrated abroad by aliens. It provides that the offense must be a major or minor crime according to the law of the country where it occurred as well as to Greek law. The injured party must be a Greek citizen at the time of the commission of the crime and it is irrelevant if he acquired another citizenship subsequently.

Article 8 specifies that Greek criminal law shall apply to the crimes without restriction, specified in Articles 5 to 7, to wit, without respect to the nationality of the perpetrator, to the place of commission, and to the gravity of the crime. The enumeration of the crimes in Article 8 is exhaustive, hence, any crime not mentioned therein shall be tried under Articles 5 to 7, provided that the conditions set out therein are met. Those crimes are :

(a) Acts of high treason or treason against Greece ;

(b) Offenses against the national defense ;

(c) Offenses committed by a Greek holding a public office ;

(d) Acts against Greek public officials during the performance of their official duties, or with relation to such duties ;

(e) Perjury in a proceeding pending before a Greek authority ;

(f) Piracy ;

(g) Offenses against the currency;
(h) Unlawful traffic in narcotics;
(i) Commerce in obscene literature;
(j) Any offense for which the application of Greek law is provided by international agreement.

Articles 9, 10, and 11 specify that if the perpetrator has committed a crime abroad and was convicted or acquitted, or if the prosecution of the act has been barred for lapse of time, or pardoned, or if prosecution has not been requested by the foreign country, it may not be prosecuted in Greece. If the perpetrator has served part of the sentence, that time shall be deducted from a punishment subsequently imposed by the Greek court for the same offense (Article 10). If a Greek national has been convicted abroad for a crime which entails additional punishment according to Greek law, the Greek court may impose such punishment. Likewise, the Greek court may impose security measures, if they are provided for by the Greek law. A translation of the above-mentioned Articles follows in the Appendix.

APPENDIX: TRANSLATION FROM THE GREEK

Articles 5–11, Greek Criminal Code

Art. 5, par. 1. Greek criminal laws shall apply to all offenses committed within the State, even if the offender is an alien.

Par. 2. Greek ships and planes shall be regarded as Greek territory, wherever they are, unless subject to alien jurisdiction, in accordance with international law.

Art. 6. par. 1. Greek criminal laws shall apply to major and minor crimes committed abroad by Greek citizens if such acts are punishable according to the law of the place of the commission, or if that place is not subject to the sovereignty of any State.

Par. 2. Prosecution may be instituted against an alien who was a Greek at the time of the commission of the crime as well as against anyone who acquired Greek citizenship after the commission of the act.

Par. 3. In the case of minor crimes, it is necessary for the application of paragraphs 1 and 2 that either the injured party or the country where the act occurs, requests the prosecution of the perpetrator.

Par. 4. Petty offenses committed abroad are punished only where the law expressly provides therefor.

Art. 7, par. 1. The Greek criminal law shall apply to acts committed by aliens abroad against Greek nationals if such acts are major or minor crimes under Greek law and are also offences where committed or if the place of commission is not subject to the sovereignty of any State.

Par. 2. The provisions of paragraphs 3 and 4 of Article 6 shall be applicable to this Article.

Art. 8. The Greek criminal laws shall apply to the following acts regardless of the nationality of the perpetrator and the place of commission:
(1) High treason or treason against the Greek State;
(2) Offenses against the national defense;
(3) Offenses committed by Greek officials;
(4) Acts against Greek officials during the performance of their duties or in relation to such duties;
(5) Perjury in proceedings pending before Greek authorities;
(6) Piracy;
(7) Offenses against the currency;
(8) Slave traffic;
(9) Unlawful traffic in narcotics;
(10) Commerce in obscene literature;
(11) Any other case where the application of Greek law is provided for by international agreements.

Art. 9, par. 1. Prosecution for an act committed abroad may not be instituted:
(a) If the perpetrator was tried abroad and acquitted or has served the penalty imposed;
(b) If the prosecution of the act or the penalty imposed has been barred for lapse of time;
(c) If no prosecution was requested, although required by the law of the place of commission.

Par. 2. These provisions do not apply to the acts specified in Article 5.

Art. 10. A punishment executed abroad shall be deducted from a punishment subsequently imposed for the same offense by the Greek courts.

Art. 11, par. 1. If a Greek national was convicted abroad of an act which entails additional punishment according to Greek law, the Greek court may impose such punishment.

Par. 2. Likewise, the Greek court may impose security measures upon a Greek citizen who has been convicted or acquitted by foreign courts, if such measures are provided for by the Greek law.

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INDIA

1. The Indian Penal Code 1860 [1] does not follow the tripartite division, as suggested by the proposed code. However, the Penal Code is divided into twenty three chapters each having grouped into it a number of similar offenses on the same subject. Thus, there is a subject division of the offenses in the Indian Penal Code. A reference to the contents in the attached Xerox copy will show how divisions are made.

Chapter I is formal, relating to the title and extent of operation of the Code. Chapter II contains an explanation of the terms used in the Code while Chapter III has the punishments provided in the Code. Those acts, commission of which constitutes no offense, are given in Chapter IV; abetment and abettor are dealt with in Chapter V, while the shortest Chapter V–A has the punishments for criminal conspiracy. Chapter VI through Chapter XXIII each deal with separate offenses, e.g., offenses against the State; offenses relating to the Army, Navy and Air Force; and offenses against the public tranquility, etc.

2. The Indian Penal Code has a continuous numbering system from section 1 through section 511. There are no blank numbers. Amendments in the future are likely to be either in the form of an addition to a section or by the substitution of a section. In the case of a substitution, the old section disappears from the Code; when a section is added, which is rather rare, a letter is added to the chapter number, e.g., chapter V–A and section 120–A, 120–B. Since the enactment of the Code in 1860, the amendments have been few and far between.

3. The Indian Code has no section corresponding to section 302(1) of the proposed code. The different kinds of culpability, not separately defined but included within various sections of the code, are intentionally, knowingly, voluntarily, rashly, fraudulently and dishonestly. Of these, the expressions dishonestly, fraudulently and voluntarily are defined in sections 24, 25 and 39 respectively.

The principle of mens rea, as enunciated by the English law, is inapplicable to the Indian law since the Indian Penal Code and each of its sections provide all the ingredients required to be proved for bringing home the guilt of the defendant. According to Mayne: [2]

"Every offense is defined, and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was

[1] III India Code, Delhi, Government of India, Ministry of Law, 1965.
[2] John Dawson Mayne, Mayne's Criminal Law of India 9, (4th ed. 1914).

doing it. It must have been done knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have intended."

For instance, theft must be committed dishonestly, cheating must be committed fraudulently, murder must be committed either intentionally or knowingly.

Every man is presumed to intend the natural consequences of his act or acts, and intention has to be inferred from the facts and attending circumstances of each case. The Supreme Court of India, in the case of Bhikari v. the State of Uttar Pradesh [3] observed as follows:

"The burden of proving an offence is always on the prosecution; it never shifts. Intention when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances."

By virtue of section 32, the expression "act" includes also illegal omissions. The defendant's state of mind determines the guilt and not the degree of guilt or the sentence. All that the prosecution has to do in India is to prove that a particular act committed by the accused answers the various ingredients of the offense in the particular section of the Indian Penal Code.

4. There is no section in the Indian Penal Code corresponding to section 305 in the proposed draft. Of course, participation of the defendant has to be established either alone or jointly with another or others.

Section 39 of the Code defines the expression "voluntarily" which, in fact, has reference to causation of effects and not to the doing of the acts from which those effects follow. The Indian Code makes no distinction between cases in which a man causes an effect designedly and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. If the effect is a probable consequence of the means used by him, he causes it "voluntarily" whether he really meant to cause it or not.[4]

Writing about the causal relationship between the doer and the deed to be established, Gour says: [5]

"The question whether the effect produced was premeditated or known to be probable by the author is, therefore, always a question of fact to be determined according to the particular circumstances of each case. But whatever the facts, the prosecution have to prove them with sufficient clearness so as to establish a causal relationship between the doer and the deed * * *."

5. The defense of insanity is contained in section 84 of the Code (Xerox copy attached).

There are four kinds of persons who may be said to be non compos mentis (not of sound mind) under the defense of insanity in the Indian Code: (1) an idiot; (2) one made non compos by illness; (3) a lunatic or a madman; and (4) one who is drunk. Under the section, if a defense of insanity is established by a defendant, he is exonerated from liability for his criminal act and no provision is made in the Code for giving him medical care.

(1) An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity and without lucid interval. Those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their father or mothers, or the like.

(2) A person made non compos mentis by illness is excused in criminal cases from such acts as are committed by him while under the influence of his disorder. Several causes may be assigned to the disorder; sometimes from the distemper of the humours of the body; sometimes from the violence of a disease, as a fever; sometimes from a concussion or harm to the brain; and, as it is more or less violent, it is distinguishable in kind or degree, from total alienation of the mind, or from complete madness.

(3) A lunatic is one who is, as described by English writers, afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason. Such persons during their frenzy are criminally as irresponsible as those whose disorder is fixed and permanent.

(4) Insanity as a defense to criminal conduct, when caused by drunkenness, is as much a defense for exoneration as lunacy, etc. Insanity by drunkenness in fact operates in this section as an exception to the rule contained in section

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[3] [1956] All India Rptr., Supreme Court 488, 490.
[4] Rattan Lal & Dhiraj Lal, The Law of Crimes 71 (1971).
[5] Dr. Sir Hari Sigh Gour, The Penal Law of India 279 (8th ed. 1966).

85 of the Indian Code. Section 85 says drunkenness when voluntary will not be a defense to any criminal act of a defendant. However, under section 84 herein, if drunkenness causes a disease which produces such incapacity as to result in the defendant's mind failing to appreciate his actions, the defense of insanity by drunkenness, even though voluntary, is provided to the defendant. Such drunkenness creates intemperance as to lead to a total deprivation of self-control, or creation of delusions, as in delirium tremens. Insanity in such cases may have been caused by any means such as excessive drinking, habitual drinking, drugs, etc. It remains a question of fact for determination in each case.

The defendant must establish insanity and to obtain acquittal he must not only prove insanity but also the additional fact that at the time of the commission of the act, he was, in consequence of the insanity, incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. This principle, adopted by the law, was based on the well known McNaughten case.[6]

A plea of insanity under the Indian Code entitles the defendant to acquittal. As for the burden of proof, the onus on prosecution is to prove guilt beyond a reasonable doubt and it is then for the defendant to establish, by adducing evidence, his defense of insanity. Under section 45 of the Indian Evidence Act 1872,[7] the opinion of an expert will be relevant in determining the question of the insanity of a defendant. Though such an opinion is neither conclusive nor binding on the court, it cannot be brushed aside lightly. The defendant's onus in proving his insanity plea is not as heavy as that of the prosecution to prove guilt since the burden is light and no more than the requirement in civil matters of proving the probabilities of the insanity. For onus of proof the Supreme Court of India in the case of Bhikari v. The State of Uttar Pradesh [8] observed as follows:

"The burden of proving an offence is always on the prosecution; it never shifts. Intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. For example, if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the nature of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden resting upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon.

"Section 84, Penal Code, can be invoked by the accused for nullifying the evidence produced by the prosecution. This he can do by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. The prosecution need not establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts. It is for this reason that S. 105 of the Evidence Act places upon the accused person the burden of proving the exception relied upon by him."

As is evident from reasoning in the aforesaid decision, the Court does not attempt to prove the defense of the defendant by calling a psychiatrist on its own for an examination. It is not for the courts to assist the defendant or make up for his deficiencies in ascertaining the plea of insanity by calling its own witnesses.

6. The law with regard to intoxication as a defense, though not similarly worded as section 503 of the proposed draft is included in section 84 of the Indian Penal Code. Section 502 of the proposed code corresponds to section 85 read with 86 of the Indian Penal Code.

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[6] 4 State Trials (N.S.) 847 (Central Criminal Court 1843).
[7] IV India Code, Government of India, Ministry of Law, Delhi, 1965.
[8] 72 India Crim. L.J.R. 63, 65 (1965).

Under the Indian law, voluntarily getting intoxicated and then committing a crime would be no defense to criminal conduct. However, where such voluntary intoxication created a failure of the mind to discriminate between lawful conduct and criminal conduct, intoxication even though voluntary would operate as a defense of insanity provided the moment of insanity coincided with actual criminality. In certain cases drunkenness produces a frenzy of madness and it is then only when the mind gets diseased (as in the case of most habitual addicts) that drunkenness affords the defense of insanity.

Sections 85 and 86 crystallize the law relating to intoxication or drunkenness as a defense or plea in mitigation of a criminal offense. Section 85 gives the same protection as section 84 does to a person of unsound mind, who is by reason of intoxication "incapable" of knowing the nature of the act or that he is doing what is either wrong or contrary to law, provided that the thing which intoxicated him was administered without his knowledge or against his will. A person who gets into a state of intoxication voluntarily is, under section 86, presumed to have the same knowledge as he would have had if he had not been intoxicated, when the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only be punished on the basis of knowledge and not for any particular intention.

The foundation of the law in sections 85 and 86 is based on the principle that criminal liability follows criminal intention and that a person who is drunk is in the same predicament as a person temporarily insane. Indeed, such a state has been termed dementia affectata—a form of lunacy in which the functions of the mind are temporarily suspended. But since no man can be permitted to wear the cloak of immunity by getting drunk, the rule justly excludes cases of voluntary drunkenness. But while such drunkenness is never a defense to a crime, it is relevant in determining the question of intention and for that purpose it is permissible to prove as a defense that the prisoner was suffering from a habitual and fixed frenzy brought on by drunkenness.

The Supreme Court of India is summing up the law on the subject in the case of Basdev v. The State of Pepsu [9] observed as follows:

"So far as knowledge is concerned the court must attribute to the intoxicated man the same knowledge as if he was quite sober but so far as intent or intention is concerned, the court must gather it from the attending circumstances of the case paying due regard to the degree of intoxication. If the man was beside his mind altogether for the time being, it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking and from the facts it could be found that he knew what he was about the court will apply the rule that a man is presumed to intend the natural consequence of his act or acts."

The rule of law is well settled:

"1. That insanity, whether produced by drunkeness or otherwise, is a defence to the crime charged;

"2. The evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent;

"3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts."

7. Right of self-defense is known as the right of private defense under the Indian law. The law with regard to the private defense of the body and other persons, and defense of property is contained in sections 96 to 106 of the Indian Penal Code (kindly refer to Xerox copy). Limits of the right are contained in sections 97 and 99; the extent of right in sections 100, 101, 103, 104 and 106; and the commencement and continuance are dealt with by section 105.

The first clause of section 97 provides for the defense of the body, one's own or of any other person, irrespective of any relationship, against any offense affecting the human body. The second clause provides for the defense of prop-

[9] [1956] India S. Ct. 363.

erty against an act which amounts to the commission of certain offenses involving theft, robbery, mischief or criminal trespass, or attempted theft, robbery, mischief or criminal trespass under the Indian Penal Code. So that in matters of self defense, one may do for himself as he may do for anyone else under similar circumstances. This right is not dependent upon the actual criminality of the person resisted; it depends solely on the wrongful or apparently wrongful character of the act attempted. It is lawful to kill a lunatic who attacks a man, though the lunatic is not punishable for the act under section 98. If the apprehension is real and reasonable, it makes no difference that it is mistaken. It is even lawful under section 106 to run the risk of injuring an innocent person, where that risk is inseparable from the proper exercise of the right of resisting a criminal act.

Section 98 states that for the purpose of exercising the right of self defense, physical or mental capacity of the person against whom the right is exercised is no bar. In other words, the right of defense of the body exists against all attackers—whether with or without mens rea. The two statutory illustrations within the section itself further elaborate the explanation.

Section 99 states two acts against which the right of private defense of the body cannot be exercised. There is no right of private defense of the body:

(a) Against an act which does not reasonably cause the apprehension of death or of grievous hurt if done, or attempted to be done, by (or by the direction of) a public servant acting in good faith under color of his office, though that act (or direction) may not be strictly justifiable by law.

By virtue of explanation 1, such defense will prevail if the person exercising it did not know nor have any reason to believe that the attacker was such a public servant.

The right of private defense will also prevail when the act is done by the direction of a public servant who does not state his authority for so acting, when it is so demanded. This is evident from explanation 2 of the section.

The right of private defense against a public servant can be exercised in the following cases:

(i) when the act of the public servant reasonably causes apprehension of death or grevious hurt;

(ii) when the public servant does not act in good faith under color of his office;

(iii) when the person exercising the right does not know or have any reason to believe that the attacker is a public servant or acts by the direction of a public servant.

(b) There is no right of private defense of the body in cases in which there is time to have recourse to the protection of the public authorities.

Section 99 then proceeds to prescribe the extent to which the right of private defense of the body may be exercised. It says:

"The right of private defence of the body in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

Thus, the measure of the right of private defense of the body must be judged in proportion to the force used by the attacker. In the case of Mammun & others v. Emperor[10] the defendants, five in number, went out on a moonlit night armed with clubs and assaulted a man who was cutting rice in their field in such a manner that he received six distinct wounds and he died on the spot. The defendants pleaded the right of private defense and defense of property. It was held that the defendants failed in their duty to have recourse to the protection of public authorities when there was time for the same and moreover the force used by the defendants was disproportionate to the force necessary to counter the attack.

Section 102 says the right begins as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offense, though the offense may not have been committed. The right continues so long as such apprehension of danger to the body continues.

Section 100 gives the extent to which the right of private defense of the body can be extended to the causing of the death of the assailant. There are seven situations when the defendant has a right to cause the death of the assailant. They are: When the assailant causes reasonable apprehension of (i)

[10] 18 India Crim. L.J.R. 367 (1917).

death; (ii) grievous hurt; (iii) rape; (iv) unnatural offense; (v) kidnapping; (vi) abduction; or (vii) wrongful confinement.

Any harm short of death can be inflicted in exercising the right of private defense in any case which does not fall in any of the preceding seven situations.

Every person has a right to defend the property (whether movable or immovable) of himself or of any other:

(a) against the offense of theft, robbery, mischief or criminal trespass (section 97).

(b) against the act of a lunatic, a minor, or an intoxicated person, or a person acting under a misconception of fact (section 98).

The limitations to the right of private defense of property are stated in section 99. There are two acts stated in section 99 against which the right of private defense of property cannot be exercised—

(i) Against an act which does not reasonably cause apprehension of death or grievous hurt, if done, or attempted to be done, by (or by the direction of) a public servant acting in good faith under color of his office, though that act (or direction) may not be strictly justifiable by law (section 99).

Such a defense will prevail if the person exercising the right did not know nor had any reason to believe that the assailant was a public servant (explanation 1 to section 99). Such right also exists when the act is done by the direction of public servant who does not state or produce his authority for so acting, after the same has been demanded (explanation 2 to section 99);

(ii) if the defendant had time to have recourse to the intervention of the public authorities (section 99).

Section 99 also describes the limit to which the defendant can go in the right of private defense of property by saying that the right in no case extends to the infliction of more harm than is necessary to inflict for the purposes of defense.

Section 103 enumerates the cases when the right of private defense of property extends to the causing of death in defense of property. Section 104 enumerates cases in which the right extends to the causing of harm other than and short of death. The right commences when a reasonable apprehension of danger to property begins (section 105); and by virtue of the same section the right continues:

(i) In case of theft, till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained or the property is recovered;

(ii) In case of robbery, as long as the offender causes to any person death, or hurt or wrongful restraint, or the fear of instant death, or of instant hurt, or instant personal restraint continues;

(iii) In case of criminal trespass or mischief, as long as the offender continues in the commission;

(iv) In case of housebreaking by night, as long as the house-trespass continues.

A person employed to guard the property of his employer is protected by sections 97, 99, 103 and 105 if he causes death in safe-guarding his employer's property when there is reason to apprehend that the person whose death has been caused was about to commit one of the offenses mentioned in this section or to attempt one of those offenses. A person whose duty it is to guard a public building is in the same position, that is to say, it is his duty to protect the property of his employer and he may take such steps for this purpose as the law permits. The fact that the property to be guarded is public property does not extend the protection given to a guard. Therefore, a police constable on guard duty at a magazine or other public building is not entitled to fire at a person merely because the latter does not answer his challenge.[11]

8. The criminal law does not lay down any classification of offenses based on punishments or otherwise.

Under the Code of Criminal Procedure,[12] which governs criminal trials before the criminal courts, offenses are, under section 4 of that code, described either as cognizable or noncognizable, or bailable and non-bailable. These expressions are defined thus:

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[11] King Emperor v. Jamuna Sigh, 23 Indian L.R., Patna Ser. 908 (1944).

[12] III India Code, Delhi, Government of India, Ministry of Law, 1965.

"4. (f) Cognizable offence means an offence for, and cognizable case means a case in which a police-officer, within or without the presidency-towns, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant;

"(n) Non-cognizable offence means an offence for, and non-cognizable case means a case in. which a police-officer, within or without a presidency-town, may not arrest without warrant."

In a cognizable case, the police officer can take cognizance without a warrant. He can also investigate and search without an order of the Magistrate's court.

"4. (b) Bailable offence means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and non-bailable offence means any other offence."

9. The law of punishments under the criminal law is contained in chapter V (sections 53 to 75) of the Indian Penal Code. There are four kinds of punishments prescribed by law: (1) Sentence of death; (2) Sentence of imprisonment; (3) forfeiture of property; and (4) fines.

(1) Sentence of death may be awarded in any of seven offenses: waging or attempting to wage war or abetting waging of war against the Government of India (section 121); abetting of mutiny, if mutiny is committed in consequence thereof (section 132); murder (section 302); abetment of suicide of child or insane person (section 305); dacoity (robbery) with murder (section 396); and attempt to murder (section 307).

(2) Sections 55, 60 and 73 to 74 describe three types of imprisonment, namely rigorous, i.e., with hard work, simple and solitary. The first two are most commonly awarded. The maximum sentence that can be awarded is 14 years under section 55 and the minimum would be a day's imprisonment.

Solitary imprisonment under sections 73 and 74 are rarely inflicted since they cause mental derangement, and limits have thus been placed for imposing such a sentence. The limitations are that: (i) It can be inflicted for offenses which are punishable with rigorous imprisonment only; (ii) the total number of months of solitary confinement cannot exceed a total of three months. These three months cannot be served all at one time; (iii) it shall not exceed one month where the term of imprisonment is six months, etc.

(3) Forfeiture of property is one of the punishments inflicted for the offenses of—(i) committing depredation on territories of any power at peace with the State (section 126); knowingly receiving property taken as above-mentioned or in waging war against any Asiatic Power at peace with the State (section 127); improperly purchasing property which, by virtue of his office, a pubic servant is legally prohibited from purchasing (section 169).

(4) Fines are covered in sections 63 to 70. Where no sum is specified, the amount is unlimited but shall not be excessive (section 63). Where a sentence of imprisonment, in addition to a fine is imposed, the sentence of imprisonment that may be ordered to be served in default of the payment of the fine, shall be in addition to the sentence of imprisonment already ordered. The measure of imprisonment that can be awarded in default of the payment of the fine is described in sections 65 to 70. Under sections 65–66, if the offense is punishable with imprisonment as well as a fine, then the imprisonment in default of the fine shall not exceed one-forth of the term of imprisonment that can be awarded for the offense. If the offense charged may be punishable with a fine only, then the scale of imprisonment in default of payment of the fine is as follows: (i) 2 months when the fine is up to Rs. 50; (ii) 4 months when the fine is up to Rs. 100; (iii) any term not exceeding 6 months in any other case (section 67).

If the fine is paid during the time when imprisonment in default of the fine is being served, sections 68 and 69 state that such imprisonment shall terminate on payment of the fine. Section 70 declares that the fine or any part of it which is unpaid may be realized within six years of the passing of the sentence.

Suspension of execution of the sentence is provided in section 382 whereby execution of a capital sentence on pregnant women is postponed. Section 388 provides for suspension of execution of the sentence of imprisonment when punishment is in the form of a fine only; and section 401 deals with the power of the appropriate government to suspend the execution of the sentence of imprisonment or remit such sentence conditionally or unconditionally. A Xerox

copy of the aforesaid sections of the Criminal Procedure Code is attached for reference.

Apart from section 401 of the Code of Criminal Procedure [13] there is no law of parole in India. However, to mitigate the rigors and penalties of criminal law, particularly in respect to its application to youthful and juvenile offenders, the Central Government of India enacted the Probation of Offenders Act, 1958.[14] In the case of probation, a convict can be released by the court conditionally or unconditionally under supervision of the Probation Officer appointed under section 13 of the Act. A Xerox copy of the Act is enclosed.

Section 75 deals with enhanced punishment for a subsequent offense. By virtue of this section hardened criminals, who have no respect for law and are incorrigible, are given long term sentences of imprisonment, in the hope that society will have long periods of relief by such long internments of these convicts. The section in effect states that an offender already convicted by a Court, of an offense against coin, stamp or property, punishable with three years or more, on a subsequent conviction of any such offense, is liable to imprisonment up to 10 years or imprisonment for life. (Refer to the attached Xerox copy.)

There is no section parallel to section 3007 of the proposed code in the Indian law. However, the expression "person" defined in the Indian Penal Code (section 11) states "the word 'person' includes any Company or Association, or body of persons, whether incorporated or not." Regarding conviction and proceedings against a company, the Court in the case of Anath Bandhu Samanta v. Corporation of Calcutta [15] observed as follows:

"In a case of conviction under s. 497 read with s. 488 of the Calcutta Municipal Act and a sentence of a fine of Rupees five hundred only, of a person as a proprietor of a limited liability company, dealing with adulterated mustard oil, against which a complaint was also filed, the contention was that there could not be a proprietor of such a company and the person in charge of the said company should have been proceeded against, the question for decision arose whether under the Indian law a limited liability company could be proceeded against under the Criminal law or whether the person in charge of the said company is to be charged with the abetment of the substantive offence by the company.

"Held, If there is anything in the definition or content of a particular section in the statute, which will prevent the application of the section to a limited company, certainly a limited company cannot be proceeded against.

"Under the Indian Penal Code, where it is physically impossible for a limited company to commit offences or where "Mens rea" is essential or where the only punishment is imprisonment the limited company cannot be proceeded against.

"There is nothing in the Indian law which precludes the trial of a limited company where it is possible. The expression committed for trial has got different meanings under the English and Indian laws.

"In England according to the explanation under the Interpretation Act 1889 (52 and 53 Vic. C. 63) committed for trial in relation to a person, shall, unless the contrary intention appears, mean, committed to prison with a view to being tried before a judge or jury.

"But in the Indian law, there is no such definition as committed for trial. So the words committed for trial or being prosecuted do not mean being actually detained in prison.

"The reasons given in English decisions, therefore, so not apply to the trial of a case of a limited company in India."

The Indian law has no equivalent to the proposed section 3003—Persistent Misdemeanant.

Regarding the giving of reasons in a judgment, it is a mandatory provision of law that the court must deal with each point of difference, i.e., issue and consider the evidence and give conclusions with reasons thereof. Section 367 of the Code of Criminal Procedure [16] reads as follows:

"367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court [or from the dic-

[13] III India Code, Delhi, Government of India, Ministry of Law, 1965.
[14] Acts of Parliament, Government of India, Ministry of Law, 1959.
[15] [1954] Indian L.R. [Calcutta Ser.] 403 (1952).
[16] III India Code, Delhi, Government of India, Ministry of Law, 1965.

tation of such presiding officer] in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it [and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him].

"(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced."

Sentence forms part of the judgment and the reasons given in the judgment will apply to the sentence as well. However, there is no particular section enjoining on a judge giving reasons for the quantum of sentence inflicted. Conventionally, however, the judges do explain, by reasoning, their exercise of discretion for the quantum of sentence.

Higher courts in India have powers under sections 435 and 439 of the Code of Criminal Procedure [17] to revise sentences and enhance them. The sections read as follows:

"435. (1) The High Court or any Sessions Judge or District Magistrate, or any Sub-divisional Magistrate empowered by the State Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court [and may, when calling for such record, direct that the execution of any sentence [or order] be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

"Explanation.—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this subsection and of section 437.]

"(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

* * * * * * *

"(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its decretion, exercise any of the powers conferred on a Court of appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided in section 429.

"(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

So that the court's powers in revision and appeal enable it to enhance a sentence. The power of the court in appeal is contained in section 423 fo the Code of Criminal Procedure [18] which reads as follows:

"423. Powers of Appellate Court in disposing of appeal. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under [section 411A, sub-section (2), or section 417], the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law; (b) in an appeal from a

[17] III India Code, Delhi, Government of India, Ministry of Law, 1965.
[18] III India Code, Delhi, Government of India, Ministry of Law, 1965.

conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;

* * * * * * *

"[(1A) Where an appeal from a conviction lies to the High Court, it may enhance the sentence, notwithstanding anything inconsistent herewith contained in clause (b) of subsection (1) : * * *]"

The Indian criminal law follows the system of concurrent or consecutive sentences and not joint sentences. Section 35 of the Code of Criminal Procedure [19] relevant for the purpose reads as follows:

"35. Sentence in cases of conviction of several offences at one trial. (1) [When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code,] sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently."

Consequently the sentences, in the absence of an order that they shall run concurrently, shall be deemed to run consecutively.

The courts at the time of passing a sentence of fine only, or a sentence of imprisonment and fine, order that in case of non-payment of the fine, an additional sentence in lieu of or in default of payment of fine, shall be served.

10. Sections 76 and 79 (refer to attached Xerox copies) of the Indian Penal Code lay down that mistake of fact is sometimes a good defense. However, it must be mistake of fact and not of law. Section 76 therefore says that nothing is an offense which is done by a person who, owing to a mistake of fact and not a mistake of law, in good faith, believes himself to be bound by law to do that act. Under the Indian law, mistake of law is no defense. Everybody is bound to know the law of the land.

Although mistake of fact is a defense, it is no defense if the act itself is illegal. One cannot do an illegal act and then plead ignorance of a fact.

Illustration.—If, while intending to kill A, I kill B by mistake, the plea of mistake of fact cannot apply to me because the act itself is illegal and cannot be pleaded as a defense (section 76).

Whereas under section 76, a defendant has a good defense of mistake of fact if, in the commission of the act which was initially lawful, he is a person bound by law to do that act; under section 79, however, a defendant is protected if he, in good faith, believed himself to be justified by law in doing that act. (See illustration with the attached Xerox copy.)

11. There is no such jurisdictional separation, as suggested in the proposed code. The matter of jurisdiction and trial of defendants and others for crimes is governed by chapter XV of the Code of Criminal Procedure [20] and a Xerox copy of the same is enclosed for easy reference. The offenses are triable by the machinery of courts established under the jurisdiction of each State and the Central Government of India has no separate criminal court to try other offenses. The place of trial and jurisdiction of a court is to be found by a reference to this chapter of the Code of Criminal Procedure. As it may be found, the usual rule is to try an offense at a place where the offense was committed.

12. Sections 3 and 4 of the Indian Penal Code, read with section 188, indicate the extra-territorial operaton of the code.

The words of this section postulate the existence of a law that an act constituting an offense in India shall also be an offense when committed outside India. This section, as held in the case of Haider v. Issa Syed,[21] is operative only so far as offenses punishable under the Penal Code are concerned, since the explanation in section 4 also indicates that the word "offense" included every act, which, if committed in India, would be punishable under this Code.

[19] III India Code, Delhi, Government of India, Ministry of Law, 1965.
[20] III India Code, Delhi, Government of India, Ministry of Law, 1965.
[21] [1938] India Crim. L.J.R. 651 (1937).

Section 4 lays down that where an offense is committed beyond the limits of India but the offender is found within its limits, then:

(i) he may be given up for trial in the country where the offense was committed (extradition), or

(ii) he may be tried in India (extra-territorial jurisdiction). Section 188 gives the jurisdiction to the court for the trial of the offense.

13. The law of criminal conspiracy is contained in sections 120-A and 120-B of the Indian Penal Code (refer to attached Xerox copy). Definition of the offense of criminal conspiracy is given in section 120-A and it says that to constitute an offense under it, there must be an agreement between two or more persons to do an act which is illegal or which is to be done by illegal means. Punishment for the offense is given in section 120-B. In this section, a distinction is drawn between an agreement to commit an offense, and an agreement of which either the object or the methods employed are illegal but do not constitute an offense. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there must be some act done by one or more of the parties to the agreement to effect the object thereof, that is, there must be an overt act.

14. The offense of murder or culpable homicide amounting to murder is described in section 300. Section 302 of the Indian Code provides the punishment for the offense (refer to attached Xerox copy). The definition requires that to constitute the offense of murder, the act which causes death should be done intentionally, or with the knowledge or means of knowing that death is a natural consequence of the act. An offense cannot amount to murder unless it falls with the definition of culpable homicide, and this section points out the cases in which culpable homicide is murder. But an offense may amount of culpable homicide without amounting to murder.

It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions to section 300. To render culpable homicide murder the case must come within the provisions of clauses 1, 2, 3, or 4 of section 300.

This section states that culpable homicide is murder if the act by which the death is caused is done: (1) With the intention of causing death; or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or (3) with the intention of causing bodily injury to any person and bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk thereof.

So that murder includes culpable homicide but all culpable homicide is not murder. Culpable homicide will become murder under the circumstances mentioned in the aforesaid cases. Statutory illustrations in the section itself will further exemplify.

Section 300 then proceeds to give five different circumstances under which the offense of murder is reduced to that of culpable homicide not amounting to murder. Of course, these are five defenses which an accused person has to prove if he is charged with the offense of murder. They are not exactly defenses, but they are in the nature of extenuating circumstances, which will reduce the offense of murder to that of culpable homicide not amounting to murder. As described herein before, the real defenses, to any charge under the Indian Penal Code are laid down in the general exceptions like insanity, etc., in Chapter IV.

The circumstances which reduce the offense of murder to that of culpable homicide not amounting to murder are:

(1) provocation;

(2) right of private defense;

(3) public servant exceeding his powers;

(4) sudden fight, and

(5) consent.

If the defendant proves any one of these five circumstances he will not be entitled to an acquittal. He will only be guilty of culpable homicide not amounting to murder, a lesser offense.

15. The first part of the question does not apply since all offenses in India are triable by courts established by the State Governments. The Central Gov-

ernment of India (federal in nature) does not control prosecution and exercises no exclusive jurisdiction over crimes, as suggested in the first part of the question.

As for the second part relating to Rioting, for a comparison, refer to the Xerox copy of sections 107, 141-143, 146 and 147 of the Indian Penal Code.

As the definition in section 146 suggests, riot is an unlawful assembly in a particular state of activity, which activity is accompanied by the use of force or violence. Since the use of force or violence allegedly is by an unlawful assembly, a reference to section 141 would be useful as the same defines the "unlawful assembly." Therefore, construing section 146 and 141 together, a riot implies the use of force or violence by five or more persons if their common object was:

(1) To overthrow by criminal force: (a) The Central Government, or (b) The State Government, or (c) The Legislature, or (d) any public servant in the exercise of lawful power.

(2) To resist the execution of law or legal process.

(3) To commit mischief, criminal trespass, or any other offense.

(4) By criminal force: (a) To take or obtain possesion of any property, or (b) To deprive any person of any incorporeal right, or (c) to enforce any right or supposed right.

(5) By criminal force to compel any person: (a) To do what he is not legally bound to do, or (b) to omit what he is legally entitled to do.

A riot therefore must be preceded by the formation of an unlawful assembly with an unlawful purpose as defined in section 141 and the assembly must use force. It is the use of force that distinguishes unlawful assembly from a riot. If the assembly which is allegedly unlawful does not have an object as provided in section 141, even its use of force would not constitute a riot.

When anyone is found to induce people to riot, it is usual to associate section 107 in the offense and charge him under the offense of abetment, which includes inducement and incitement.

16. There is no offense under the head "para-military activities" in the Indian Penal Code. However, since the offense suggested is against the State, it is assumed that section 122 of the Indian Penal Code will come nearest to it. (Refer to attached Xerox copy.)

Under this section even preparation to wage war with an intention of either waging war or being prepared to wage war against the State constitutes an offense. Under the Indian criminal law, it is the commission of an offense or an attempt to commit an offense which is chargeable. In this case, however, even preparation for the offense, under section 122, is penal. This is intended to put down with a heavy hand any preparation to wage war against the State.

17. Sections 274, 275 and 276 deal with the offenses for adulteration, sale of adulterated drugs and sale of drugs as a different drug, respectively, On comparison, it may be found that there was not much similarity between the aforesaid sections and sections 1821-1829 of the proposed criminal code. This may be due to the fact that the legislators in India did not foresee the present situation.

Section 274 is enacted to preserve the purity of drugs sold for medicinal purposes. To support a conviction under this section, it is sufficient to show that the efficacy of a drug is lessened; it need not necessarily become noxious to life. Section 275 prohibits selling, or offering, or exposing for sale, or issuing from any dispensary, an adulterated drug as unadulterated. Under section 276, however, a chemist is chargeable for an offense if he sells a drug which in fact it does not purport to be.

Causing miscarriage (or abortion) of a women is dealt with in sections 312, 313 and 314 of the Indian Penal Code.

When the consent of the woman is not given the offense comes under section 313; and if consent of the woman is given, the offense falls under section 312.

The elements essential to be established for completion of the offense are: (i) Voluntarily causing a woman with child to miscarry; (ii) such miscarriage should not have been caused in good faith for the purpose of saving the life of the woman.

Section 314 provides for the case where death of the woman has occurred in causing miscarriage. A person who does an act, with the intention of thereby preventing that child from being born alive or causing it to die after its birth, would be punishable under section 315.

Gambling, as such, under the Penal Code does not exist as a separate offense. However, since gambling, at times causes inconvenience and annoyance to the public at large, it is dealt with under the offense of Public Nuisance section (268). Under this section, any act or illegal omission which causes injury or annoyance to the public has to be dealt with as public nuisance. Gambling (or sometimes in vernacular form "satta") in a public place is treated under section 268. In the case of Hapoor Mal v. Emperor,[22] defendants, while gambling created an obstruction in the public way and were convicted under section 290. Some of the other High Courts have, however, held that gambling is not such an offense as is defined in this section. In fact, as a result of the confusion, some of the State Governments in India have promulgated gambling acts separately.

The law against prostitution is contained in sections 372 and 373 of the Indian Penal Code. These sections together punish both the giver as well as the receiver of a person, under eighteen years, for an immoral purpose. Both the sections relate to the same subject-matter. The former contemplates an offense committed by the person who sells, lets to hire, or otherwise disposes of any person under the age of eighteen years, with the requisite intent or knowledge. The first section charges any defendant who sells a person under the age of eighteen and the latter charges any one who buys such a person.

Section 372 requires: (1) Selling, or letting to hire, or other disposal of person; (2) Such person should be under the age of eighteen years; (3) The selling, letting to hire, or other disposal must be with intent or knowledge or likelihood that the person shall at any age be employed or used for, (i) prostitution, or (ii) illicit intercourse with any person, or (iii) any unlawful and immoral purpose.

This section applies to males or females under eighteen years of age. It applies to a married or an unmarried female, even where such female, prior to sale or purchase, was leading an immoral life.

Section 373 deals with the sale of such a person while the subject matter remains the same as described in the preceding section.

Section 294 defines and provides punishment for the offense of obscenity providing that any annoyance caused to others by an act or word in a public place shall constitute the offense of obscenity.

Homosexuality under the Indian criminal law is termed as an unnatural offense contained in section 377. It is meant to punish the offense of sodomy and bestiality. The offense consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.

18. There are no provisions in the Indian Penal Code analogous to those contained in sections 1811-1814 of the proposed code. For security purposes, however, the Central Government of India has enacted the Arms Act 1959.[23]

This comprehensive legislation, as its preamble states its purpose as to consolidate and amend the law relating to the arms and ammunition, controls the possession, acquisition, sale and production of arms and ammunition. Under this law, any one found in possession of arms without a license, etc., shall be charged and punished. Since the Act is long extending to 46 sections, a Xerox copy if it is attached. Section 25, which is the penal section, declares penalties for possession, carrying, importing and manufacturing of arms and ammunition in contravention of the provisions of the Arms Act 1959. A licensed dealer is required to maintain, further under this law, a strict record of his dealings of sale and purchase of the arms, etc., which is subject to inspection by the authorities. Non-compliance of this section is also declared an offense.

19. The penalty of capital punishment was dealt with in the answer to question 9.

There is no provision in the Code of Criminal Procedure warranting a separate hearing for the infliction of capital punishment, and it would seem superfluous in the absence of a jury trial.

20. The analogous law, relating to the multiple related offenses, is dealt with under the heading "joinder of charges" in sections 233 to 240 of the Code of Criminal Procedure.[24] A Xerox copy is attached.

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[22] [1925] India Crim. L.R.J. 135 (1924).
[23] Acts of Parliament, 1959, Government of India, Ministry of Law, New Delhi.
[24] III India Code, Delhi, Government of India, Ministry of Law, 1965.

Section 233 states that every defendant should be separately charged and separately tried for every distinct offense. The object of this section is to see that the defendant is not bewildered in his defense by having to meet several charges in no way connected with one another. The illustration to this section elaborates the same point.

Sections 234 and 235 would seem to be exceptions to the rule enunciated in section 233, inasmuch as these sections postulate trial of several offenses at one time. The object of these sections is to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials and to join in one trial those offenses with regard to which the evidence would overlap. Section 234 limits the trial to three offenses and not three charges nor does it imply that the prisoner cannot be charged and tried separately in one day for more than three distinct offenses of the same kind committed during the year. The question of applicability of section 235 arises only where separate offenses, that is, offenses of a different nature, may form part of the same transaction and not where the question of different offenses of the same nature is under consideration. Sub-section (1) of section 235 and section 236 are mutually exclusive and if a case is governed by one of them, it cannot be governed by the other.

Sections 236 and 237 state that a defendant cannot be charged with one offense and convicted for another. The basis is that, when there is no difficulty about the facts and it is alleged that the defendant has done a single act or series of acts but they are of such a nature that it is doubtful which of the several offenses the defendant has committed on those facts, he may be convicted for an offense different from that one for which he was charged. Section 238 states that when a defendant has been charged for a serious offense but the facts proved constitute a minor offense, he may be convicted of the latter even though not charged for the same. Section 239 deals with the defendants who can be tried together.

The basic principle of English law "autrefois acquit and autrefois convict" is contained in section 403 of the Code of Criminal Procedure.[25] A Xerox copy is attached. The principle rests upon the rule of common law that a man may not be put twice in peril for the same offense In view of the provisions of this section, a defendant, who was once tried and convicted or acquitted by a court of competent jurisdiction, shall not, while the conviction or acquittal holds good, be tried again for the same or a different charge on the same facts (in case a charge for a different offense could have been brought earlier but was not brought). Sub-sections (2), (3), (4) and (5) are exceptions to this rule.

Under the Indian criminal law, there is no separate federal and state jurisdiction.

Prepared by Krishan S. Nehra, Legal Specialist, American-British Law Division, Law Library, Library of Congress, March 1972.

The Code of Criminal Procedure

(B. B. Mitra, B.A., B.L.)

[Edited by Surajit Chandra Lahiri, M.A., LL.B., formerly Chief Justice, Calcutta High Court and Vice-Chancellor, Calcutta University, and Sudhindra Kumar Palit, Advocate, Calcutta High Court and Lecturer, University College of Law, Calcutta, 1967]

PART VI. PROCEEDINGS IN PROSECUTIONS

Chapter XV. Of the Jurisdiction of the Criminal Courts in Inquiries and Trials

A.—Place of inquiry or trial

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

178. Notwithstanding anything contained in section 177, the State Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division:

Provided, That such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861,[1] [or section 107 of the Government of India Act, 1915],[2] [or section 224

[25] III India Code, Delhi, Government of India, Ministry of Law, 1965.
[1] Ins. by Act 13 of 1916, s. 2 and Sch.
[2] Ins. by the A.O. 1937.

of the Government of India Act, 1935],[3] [or Article 227 of the Constitution] or under this Code, section 526.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Illustrations

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried either by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in[4] [the State of[5] [Madras]], and dies of his wounds in Poona. The offence of causing A's death may be inquired into and tried in Poona.

180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Illustrations

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

[(3)[6] The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.]

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or

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[3] Ins. by the A.O. 1950.
[4] Subs. by the A.O. 1950 for "the Native State of Baroda".
[5] Subs. by the Adaptation of Laws (No. 2) Order, 1956, for "Saurashtra".
[6] Subs. by Act of 1923, s. 42, for the original sub-section.

abducted was kidnapped or abducted or was conveyed or concealed or detained.

182. When it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

184. All offences against the provisions of any law for the time being in force relating to Railways,[1] Telegraphs,[2] the Post-office[3] or Arms and Ammunition[4] may be inquired into or tried in a presidency-town, whether the offence is stated to have been committed within such town or not:

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

[185.[5] (1) Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court.

(2) Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides all other proceedings against such person in respect of such offence shall be discontinued. If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court, within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued.]

186. (1) When a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate, or, if he is specially empowered in this behalf by the State Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without[6] [India]) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in[6] [India], such Magistrate may inquire into the offence as if it had been committed within such local limits and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

(2) When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

187. (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the police-officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued.

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court

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[1] *See* the Indian Railways Act, 1890 (9 of 1890).
[2] *See* the Indian Telegraphs Act, 1885 (13 of 1885).
[3] *See* the Indian Post Office Act, 1898 (6 of 1898).
[4] *See* the Indian Arms Act, 1878 (11 of 1878).
[5] Subs. by Act 18 of 1923, s. 43, for the original s. 185.
[6] Subs. by Act 1 of 1951 for "the States".

in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

188.[1] [When an offence is committed by—(a) any citizen of India in any place without and beyond India; or (b) any person on any ship or aircraft registered in India, wherever it may be]; he may be dealt with in respect of such offence as if it had been committed at any place within[2] [India] at which he may be found:

Provided, That[3] [notwithstanding anything in any of the preceding sections of this Chapter] no charge as to any such offence shall be inquired into in[2] [India] unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in[2] [India]; and, where there is no Political Agent, the sanction of the State Government shall be required:

Provided also, That any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in[2] [India] shall be a bar to further proceedings against him under[1] [the Indian Extradition Act, 1903], in respect of the same offence in any territory beyond the limits of[2] [India].

189. Whenever any such offence as is referred to in section 188 is being inquired into or tried, the State Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a judicial officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

B.—*Conditions requisite for initiation of proceedings*

190. (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—(a) upon receiving a complaint of facts which constitute such offence; [(b)[3] upon a report in writing of such facts made by any police-officer;] (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

(2) The State Government, or the District Magistrate subject to the general or special orders of the State Government, may empower the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

231. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

232 (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration

A is convicted of an offence, under section 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If

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[1] Subs. by the A.O. 1950 for certain former words.
[2] Subs. by Act 1 of 1951 for "the States".
[3] Ins. by Act 18 of 1923, s. 44.
[1] Subs. by Act 1 of 1951 for "the States".
[2] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "the Foreign Jurisdiction and Extradition Act, 1879".
[3] Subs. by Act 18 of 1923, s. 45, for the original cl. (b).

the Court thinks it probable that A had such knowledge, and that he was missled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Joinder of charges

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236, and 239.

Illustration

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences,[1] [whether in respect of the same person or not], he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law:

[*Provided*, That, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.] [1]

235. (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code.

(b) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code.

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code.

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code. A may be separately charged with, and convicted of the possession of each seal under section 473 of the Indian Penal Code.

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[1] Ins. by Act 18 of 1923, s. 62.

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charges. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time.

(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code.

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code. A may be separately charged with, and convicted of, offences under sections 471 (read with 466) and 196 of the same Code.

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections, 323, 392 and 394 of the Indian Penal Code.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Illustrations

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

237. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.[1]

[1] Sub-section (2) was rep. by Act 18 of 1923, s. 63.

Illustration

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

[(2A) [1] When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.]

(3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations

(a) A is charged, under section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(b) A is charged, under section 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code.

[239.[2] The following persons may be charged and tried together, namely:

(a) Persons accused of the same offence committed in the course of the same transaction;

(b) Persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence:

(c) Persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months;

(d) Persons accused of different offences committed in the course of the same transaction;

(e) Persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) Persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and

(g) Persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.]

240. When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or

[1] Ins. by Act 18 of 1923, s. 64.

[2] Subs. by s. 65, *ibid.*, for the original s. 239.

charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Chapter XXX. Of Previous Acquittals or Convictions

403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or of section 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under secton 273, is not an acquittal for the purposes of this section.

Illustrations

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

GOVERNMENT OF INDIA, MINISTRY OF LAW, ACTS OF PARLIAMENT, 1958

THE PROBATION OF OFFENDERS ACT, 1958

AN ACT to provide for the release of offenders on probation or after due admonition and for matters connected therewith.

Be it enacted by Parliament in the Ninth Year of the Republic of India as follows:

1. (1) This Act may be called the Probation of Offenders Act, 1958.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force in a State on such date as the State Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different parts of the State.

2. In this Act, unless the context otherwise requires, (a) "Code" means the Code of Criminal Procedure, 1898; (b) "probation officer" means an officer appointed to be a probation officer or recognised as such under section 13; (c) "prescribed" means prescribed by rules made under this Act; (d) words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1898, shall have the meanings respectively assigned to them in that Code.

3. When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition.

Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4.

4. (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided, That the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

5. (1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay—

(a) Such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) Such costs of the proceedings as the court thinks reasonable.

(2) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of sections 386 and 387 of the Code.

(3) A civil court trying may suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages.

6. (1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

7. The report of a probation officer referred to in sub-section (2) of section 4 or sub-section (2) of section 6 shall be treated as confidential:

Provided, That the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.

8. (1) If, on the application of a probation officer, any court which passes an order under section 4 in respect of an offender is of opinion that in the interests of the offender and the public it is expedient or necessary to vary the conditions of any bond entered into by the offender, it may, at any time during the period when the bond is effective, vary the bond by extending or diminishing the duration thereof so, however, that it shall not exceed three years from the date of the original order or by altering the conditions thereof or by inserting additional conditions therein:

Provided, That no such variation shall be made without giving the offender and the surety or sureties mentioned in the bond an opportunity of being heard.

(2) If any surety refuses to consent to any variation proposed to be made under sub-section (1), the court may require the offender to enter into a fresh bond and if the offender refuses or fails to do so, the court may sentence him for the offence of which he was found guilty.

(3) Notwithstanding anything hereinbefore contained, the court which passes an order under section 4 in respect of an offender may, if it is satisfied on an application made by the probation officer, that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds entered into by him.

9. (1) If the court which passes an order under section 4 in respect of an offender or any court which could have dealt with the offender in respect of his original offence has reason to believe, on the report of a probation officer or otherwise, that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may issue a warrant for his arrest or may, if it thinks fit, issue a summons to him and his sureties, if any, requiring him or them to attend before it at such time as may be specified in the summons.

(2) The court before which an offender is so brought or appears may either remand him to custody until the case is concluded or it may grant him bail, with or without surety, to appear on the date which it may fix for hearing.

(3) If the court, after hearing the case, is satisfied that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may forthwith—

(a) sentence him for the original offence; or

(b) Where the failure is for the first time, then, without prejudice to the continuance in force of the bond, impose upon him a penalty not exceeding fifty rupees.

(4) If a penalty imposed under clause (b) of sub-section (3) is not paid within such period as the court may fix, the court may sentence the offender for the original offence.

10. The provisions of sections 122, 126, 126A, 406A, 514, 514A, 514B and 515 of the Code shall, so far as may be, apply in the case of bonds and sureties given under this Act.

11. (1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law:

Provided, That the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty.

12. Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:

Provided, That nothing in this section shall apply to a person who, after his release under section 4, is subsequently sentenced for the original offence.

13. (1) A probation officer under this Act shall be—

(a) A person appointed to be a probation officer by the State Government or recognised as such by the State Government; or

(b) A person provided for this purpose by a society recognised in this behalf by the State Government; or

(c) In any exceptional case, any other person who, in the opinion of the court, is fit to act as a probation officer in the special circumstances of the case.

(2) A court which passes an order under section 4 or the district magistrate of the district in which the offender for the time being resides may, at any time, appoint any probation officer in the place of the person named in the supervision order.

Explanation.—For the purposes of this section, a presidency town shall be deemed to be a district and chief presidency magistrate shall be deemed to be the district magistrate of that district.

(3) A probation officer, in the exercise of his duties under this Act, shall be subject to the control of the district magistrate of the district in which the offender for the time being resides.

14. A probation officer shall, subject to such conditions and restrictions, as may be prescribed—

(a) Inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him and submit reports to the court;

(b) Supervise probationers and other persons placed under his supervision and, where necessary, endeavour to find them suitable employment;

(c) Advise and assist offenders in the payment of compensation or costs ordered by the court;

(d) Advise and assist, in such cases and in such manner as may be prescribed, persons who have been released under section 4; and

(e) Perform such other duties as may be prescribed.

15. Every probation officer and every other officer appointed in pursuance of this Act shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

16. No suit or other legal proceeding shall lie against the State Government or any probation officer or any other appointed under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

17. (1) The State Government may, with the approval of the Central Government, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:

(a) Appointment of probation officers, the terms and conditions of their service and the area within which they are to exercise jurisdiction;

(b) Duties of probation officers under this Act and the submission of reports by them;

(c) The conditions on which societies may be recognised for the purposes of clause (b) of sub-section (1) of section 13;

(d) The payment of remuneration and expenses to probation officers or of a subsidy to any society which provides probation officers; and

(e) Any other matter which is to be, or may be, prescribed.

(3) All rules made under this section shall be subject to the condition of previous publication and shall, as soon as may be after they are made, be laid before the State Legislature.

18. Nothing in this Act shall affect the provisions of section 31 of the Reformatory Schools Act, 1897, or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 or the Suppression of Immoral Traffic in Women and Girls Act, 1956, or of any law in force in any State relating to juvenile offenders or borstal schools.

19. Subject to the provisions of section 18, section 562 of the Code shall cease to apply to the States or parts thereof in which this Act is brought into force.

GOVERNMENT OF INDIA, MINISTRY OF LAW: ACTS OF PARLIAMENT, 1959

THE ARMS ACT, 1959

Chapter I. Preliminary

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Chapter II. Acquisition, Possession, Manufacture, Sale, Import, Export and Transport of Arms and Ammunition

3. Licence for acquisition and possession of firearms and ammunition.
4. Licence for acquisition and possession of arms of specified description in certain cases.
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7. Prohibition of acquisition or possession, or of manufacture or sale, of prohibited arms or prohibited ammunition.
8. Prohibition of sale or transfer of firearms not bearing identification marks.
9. Prohibition of acquisition or possession by, or of sale or transfer to, young persons and certain other persons of firearms, etc.

10. Licence for import and export of arms, etc.
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39. Previous sanction of the district magistrate necessary in certain cases.
40. Protection of action taken in good faith.
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43. Power to delegate.
44. Power to make rules.
45. Act not to apply in certain cases
46. Repeal of Act 11 of 1878.

THE ARMS ACT, 1959

AN ACT to consolidate and amend the law relating to arms and ammunition.

Be it enacted by Parliament in the Tenth Year of the Republic of India as follows:

Chapter I. Preliminary

1. (1) This Act may be called the Arms Act, 1959.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. (1) In this Act, unless the context otherwise requires—

(a) "Acquisition", with its grammatical variations and cognate expressions, includes hiring, borrowing, or accepting as a gift;

(b) "Ammunition" means ammunition for any firearm, and includes—

(i) Rockets, bombs, grenades, shells and other like missiles,

(ii) Articles designed for torpedo service and submarine mining,

(iii) Other articles containing, or designed or adapted to contain, explosive, fulminating or fissionable material or noxious liquid, gas or other such thing, whether capable of use with firearms or not,

(iv) Charges for firearms and accessories for such charges,

(v) Fuses and friction tubes,

(vi) Parts of, and machinery for manufacturing, ammunition, and

(vii) Such ingredients of ammunition as the Central Government may, by notification in the Official Gazette, specify in this behalf;

(c) "Arms" means articles of any description designed or adapted as weapons for offence or defence and includes firearms, sharpedged and other deadly weapons, and parts of, and machinery for manufacturing, arms, but does not include articles designed solely for domestic or agricultural uses such as a lathi or an ordinary walking stick and weapons incapable of being used otherwise than as toys or of being converted into serviceable weapons;

(d) "District magistrate", in relation to a presidency-town or the city of Hyderabad, means the Commissioner of Police thereof;

(e) "Firearms" means arms of any description designed or adapted to discharge a projectile or projectiles of any kind by the action of any explosive or other forms of energy, and includes—

(i) Artillery, hand-grenades, riot-pistols or weapons of any kind designed or adapted for the dischrge of any noxious liquid, gas or other such thing,

(ii) Accessories for any such firearm designed or adapted to diminish the noise or flash caused by the firing thereof,

(iii) Parts of, and machinery for manufacturing, firearms, and

(iv) Carriages, platforms and appliances for mounting, transporting and serving artillery;

(f) "Licensing authority" means an officer or authority empowered to grant or renew licences under rules made under this Act, and includes the Government;

(g) "Prescribed" means prescribed by rules made under this Act;

(h) "Prohibited ammunition" means any ammunition containing, or designed or adapted to contain, any noxious liquid, gas or other such thing, and includes rockets, bombs, grenades, shells, articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition;

(i) "Prohibited arms" means—(i) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty, or (ii) Weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing—and includes artillery, anti-aircraft and anti-tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms;

(j) "Public servant" has the same meaning as in section 21 of the Indian Penal Code;

(k) "Transfer", with its grammatical variations and cognate expressions, includes letting on hire, lending, giving and parting with possession.

(2) For the purposes of this Act, the length of the barrel of a firearm shall be measured from the muzzle to the point at which the charge is exploded on firing.

(3) Any reference in this Act of any law which is not in force in any area shall, in relation to that area, be construed as a reference to the corresponding law, if any, in force in that area.

(4) Any reference in this Act to any officer or authority shall, in relation to any area in which there is no officer or authority with the same designation, be construed as a reference to such officer or authority as may be specified by the Central Government by notification in the Official Gazette.

Chapter II. Acquisition, Possession, Manufacture, Sale, Import, Export and Transport of Arms and Ammunition

3. No person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder:

Provided, That a person may, without himself holding a licence, carry any firearm or ammunition in the presence, or under the written authority, of the holder of the licence for repair or for renewal of the licence or for use by such holder.

4. If the Central Government is of opinion that having regard to the circumstances prevailing in any area it is necessary or expedient in the public interest that the acquisition, possession or carrying of arms other than firearms should also be regulated, it may, by notification in the Official Gazette, direct that this section shall apply to the area specified in the notification, and thereupon no person shall acquire, have in his possession or carry in that area arms of such class or description as may be specified in that notification unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder.

5. No person shall—(a) manufacture, sell, transfer, convert, repair, test or prove, or (b) expose or offer for sale or transfer or have in his possesssion for sale, transfer, conversion, repair, test or proof—any firearm or any other arms of such class or description as may be prescribed or any ammunition, unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder:

Provided, That a person may, without holding a licence in this behalf, sell or transfer any arms or ammunition which he lawfully possesses for his own private use to another person who is entitled by virtue of this Act or any other law for the time being in force to have, or is not prohibited by this Act or such other law from having, in his possession, such arms or ammunition; but the person who has sold or transferred any firearm or ammunition in respect of which a licence is required under section 3 or any arms in respect of which a licence is required under section 4, shall, immediately after the sale or transfer, inform in writing the district magistrate having jurisdiction or the officer in charge of the nearest police station, of such sale or transfer and the name and address of the other person to whom the firearm, ammunition or other arms has or have been sold or transferred.

6. No person shall shorten the barrel of a firearm or convert an imitation firearm into a firearm unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder.

Explanation.—In this section, the expression "imitation firearm" means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not.

7. No person shall—(a) Acquire, have in his possession or carry; or (b) Manufacture, sell, transfer, convert, repair, test or prove; or (c) Expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof—any prohibited arms or prohibited ammunition unless he has been specially authorised by the Central Government in this behalf.

8. (1) No person shall obliterate, remove, alter or forge any name, number or other identification mark stamped or otherwise shown on a firearm.

(2) No person shall sell or transfer any firearm which does not bear the name of the maker, manufacturer's number or other identification mark stamped or otherwise shown thereon in a manner approved by the Central Government.

(3) Whenever any person has in his possession any firearm without such name, number or other identification mark or on which such name, number or other identification mark has been obliterated, removed, altered or forged, it shall be presumed unless the contrary is proved, that he has obliterated, removed, altered or forged that name, number or other identification mark:

Provided, That in relation to a person who has in his possession at the commencement of this Act any firearm without such name, number or other identification mark stamped or otherwise shown thereon, the provisions of this sub-section shall not take effect until after the expiration of one year from such commencement.

9. (1) Notwithstanding anything in the foregoing provisions of this Act—

(a) No person—(i) who has not completed the age of sixteen years, or (ii) who has been sentenced on conviction of any offence involving violence or moral turpitude to imprisonment for a term of not less than six months, at any time during a period of five years after the expiration of the sentence, or (iii) who has been ordered to execute under Chapter VIII of the Code of Criminal Proce-

dure, 1898, a bond for keeping the peace or for good behaviour, at any time during the term of the bond—shall acquire, have in his possession or carry any firearm or ammunition:

(b) No person shall sell or transfer any firearm or ammunition to, or convert, repair, test or prove any firearm or ammunition for, any other person whom he knows, or has reason to believe—(i) to be prohibited under clause (a) from acquiring, having in his possession or carrying any firearm or ammunition, or (ii) to be of unsound mind at the time of such sale or transfer, or such conversion, repair, test or proof.

(2) Notwithstanding anything in sub-clause (i) of clause (a) of sub-section (1), a person who has attained the prescribed age-limit may use under prescribed conditions such firearms as may be prescribed in the course of his training in the use of such firearms:

Provided, That different age-limits may be prescribed in relation to different types of firearms.

10. (1) No person shall bring into, or take out of, India by sea, land or air any arms or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder:

Provided, That—

(a) A person who is entitled by virtue of this Act or any other law for the time being in force to have, or is not prohibited by this Act or such other law from having, in his possession any arms or ammunition, may without a licence in this behalf bring into, or take out of, India such arms or ammunition in reasonable quantities for his own private use;

(b) A person being a *bona fide* tourist belonging to any such country as the Central Government may, by notification in the Official Gazette, specify, who is not prohibited by the laws of that country from having in his possession any arms or ammunition, may, without a licence under this section but in accordance with such conditions as may be prescribed, bring with him into India arms and ammunition in reasonable quantities for use by him for purposes only of sport and for no other purpose;

Explanation.—For the purposes of clause (b) of this proviso, the word "tourist" means a person who not being a citizen of India visits India for a period not exceeding six months with no other object than recreation, sight-seeing, or participation in a representative capacity in meetings convened by the Central Government or in international conferences, associations or other bodies.

(2) Notwithstanding anything contained in the proviso to subsection (1), where the collector of customs or any other officer empowered by the Central Government in this behalf has any doubt as to the applicability of clause (a) or clause (b) of that proviso to any person who claims that such clause is applicable to him, or as to the reasonableness of the quantities of arms or ammunition in the possession of any person referred to in such clause, or as to the use to which such arms or ammunition may be put by such person, may detain the arms or ammunition in the possession of such person until he receives the order of the Central Government in relation thereto.

(3) Arms and ammunition taken from one part of India to another by sea or air or across any intervening territory not forming part of India, are taken out of, and brought into, India within the meaning of this section.

11. The Central Government may, by notification in the Official Gazette, prohibit the bringing into, or the taking out of, India, arms or ammunition of such classes and descriptions as may be specified in the notification.

12. (1) The Central Government may by notification in the Official Gazette—(a) direct that no person shall transport over India or any part thereof arms or ammunition of such classes and descriptions as may be specified in the notification unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder; or (b) prohibit such transport altogether.

(2) Arms or ammunition trans-shipped at a seaport or an airport in India are transported within the meaning of this section.

Chapter III. Provisions Relating to Licenses

13. (1) An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.

(2) On receipt of an application, the licensing authority, after making such inquiry, if any, as it may consider necessary, shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same.

(3) The licensing authority shall grant—

(a) A licence under section 3 where the licence is required—(i) by a citizen of India in respect of a smooth bore gun having a barrel of not less than twenty inches in length to be used for protection or sport or in respect of a muzzle loading gun to be used for *bona fide* crop protection: *Provided*, That where having regard to the circumstances of any case, the licensing authority is satisfied that a muzzle loading gun will not be sufficient for crop protection, the licensing authority may grant a licence in respect of any other smooth bore gun as aforesaid for such protection, or (ii) in respect of a point 22 bore rifle or an air rifle to be used for target practice by a member of a rifle club or rifle association licensed or recognised by the Central Government;

(b) A licence under section 3 in any other case or a licence under section 4, section 5, section 6, section 10 or section 12, if the licensing authority is satisfied that the person by whom the licence is required has a good reason for obtaining the same.

14. (1) Notwithstanding anything in section 13, the licensing authority shall refuse to grant—

(a) A licence under section 3, section 4, or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;

(b) A licence in any other case under Chapter II—(i) where such licence is required by a person whom the licensing authority has reason to believe (1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or (2) to be of unsound mind, or (3) to be for any reason unfit for a licence under this Act; or (ii) where the licensing authority deems it necessary for the security of the public peace for public safety to refuse to grant such licence.

(2) The licensing authority shall not refuse to grant any license to any person merely on the ground that such person does not own or possess sufficient property.

(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

15. (1) A licence under section 3 shall, unless revoked earlier, continue in force for a period of three years from the date on which it is granted:

Provided, That such a licence may be granted for a shorter period if the person by whom the licence is required so desires or if the licensing authority for reasons to be recorded in writing considers in any case that the licence should be granted for a shorter period.

(2) A licence under any other provision of Chapter II shall, unless revoked earlier, continue in force for such period from the date on which it is granted as the licensing authority may in each case determine.

(3) Every licence shall, unless the licensing authority for reasons to be recorded in writing otherwise decides in any case, be renewable for the same period for which the licence was originally granted and shall be so renewable from time to time, and the provisions of sections 13 and 14 shall apply to the renewal of a licence as they apply to the grant thereof.

16. The fees on payment of which, the conditions subject to which and the form in which a licence shall be granted or renewed shall be such as may be prescribed:

Provided, That different fees, different conditions and different forms may be prescribed for different types of licences:

Provided further, That a licence may contain in addition to prescribed conditions such other conditions as may be considered necessary by the licensing authority in any particular case.

17. (1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a license, also vary the conditions of the license except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence—

(a) If the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) If the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) If the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) If any of the conditions of the licence has been contravened; or

(e) If the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence:

Provided, That if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation.

18. (1) Any person aggrieved by an order of the licensing authority refusing to grant a licence or varying the conditions of a licence or by an order of the licensing authority or the authority to whom the licensing authority is subordinate, suspending or revoking a license may prefer an appeal against that order to such authority (hereinafter referred to as the appelate authority) and within such period as may be prescribed:

Provided, That no appeal shall lie against any order made by, or under the direction of, the Government.

(2) No appeal shall be admitted if it is preferred after the expiry of the period prescribed therefor:

Provided, That an appeal may be admitted after the expiry of the period prescribed therefor if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within that period.

(3) The period prescribed for an appeal shall be computed in accordance with the provision of the Indian Limitation Act, 1908, with respect to the computation of periods of limitation thereunder.

(4) Every appeal under this section shall be made by a petition in writing and shall be accompanied by a brief statement of the reasons for the order appealed against where such statement has been furnished to the appellant and by such fee as may be prescribed.

(5) In disposing of an appeal the appellate authority shall follow such procedure as may be prescribed:

Provided, That no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of being heard.

(6) The order appealed against shall, unless the appellate authority conditionally or unconditionally directs otherwise, be in force pending the disposal of the appeal against such order.

(7) Every order of the appellate authority confirming, modifying or reversing the order appealed against shall be final.

Chapter IV. Powers and procedure

19. (1) Any police officer or any other officer specially empowered in this behalf by the Central Government may demand the production of his licence from any person who is carrying any arms or ammunition.

(2) If the person upon whom a demand is made refuses or fails to produce the licence or to show that he is entitled by virtue of this Act or any other law for the time being in force to carry such arms or ammunition without a license, the officer concerned may require him to give his name and address and if such officer considers it necessary, seize from that person the arms or ammunition which he is carrying.

(3) If that person refuses to give his name and address or if the officer concerned suspects that person of giving a false name or address or of intending to abscond, such officer may arrest him without warrant.

20. Where any person is found carrying or conveying any arms or ammunition whether covered by a licence or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are or is being carried by him with intent to use them, or that the same may be used, for any unlawful purpose, any magistrate, any police officer or any other public servant or any person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, may arrest him without warrant and seize from him such arms or ammunition.

21. (1) Any person having in his possession any arms or ammunition the possession whereof has, in consequence of the expiration of the duration of a licence or of the suspension or revocation of a licence or by the issue of a notification under section 4 or by any reason whatever, ceased to be lawful, shall without unnecessary delay deposit the same either with the officer in charge of the nearest police station or subject to such conditions as may be prescribed, with a licensed dealer or where such person is a member of the armed forces of the Union, in a unit armoury.

Explanation.—In this sub-section "unit armoury" includes an armoury in a ship or establishment of the Indian Navy.

(2) Where arms or ammunition have or has been deposited under sub-section (1), the depositor or in the case of his death, his legal representative, shall, at any time before the expiry of such period as may be prescribed, be entitled—

(a) To receive back anything so deposited on his becoming entitled by virtue of this Act or any other law for the time being in force to have the same in his possession, or

(b) To dispose, or authorise the disposal, of anything so deposited by sale or otherwise to any person entitled by virtue of this Act or any other law for the time being in force to have, or not prohibited by this Act or such other law from having, the same in his possession and to receive the proceeds of any such disposal:

Provided, That nothing in this sub-section shall be deemed to authorise the return or disposal of anything of which confiscation has been directed under section 32.

(3) All things deposited and not received back or disposed of under sub-section (2) within the period therein referred to shall be forfeited to Government by order of the district magistrate:

Provided, That in the case of suspension of a license no such forfeiture shall be ordered in respect of a thing covered by the licence during the period of suspension.

(4) Before making an order under sub-section (3) the district magistrate shall, by notice in writing to be served upon the depositor or in the case of his death, upon his legal representative, in the prescribed manner, require him to show cause within thirty days from the service of the notice why the things specified in the notice shall not be forfeited.

(5) After considering the cause, if any, shown by the depositor or, as the case may be, his legal representative, the district magistrate shall pass such order as he thinks fit.

(6) The Government may at any time return to the depositor or his legal representative things forfeited to it or the proceeds of disposal thereof wholly or in part.

22. (1) Whenever any magistrate has reason to believe—(a) That any person residing within the local limits of his jurisdiction has in his possession any arms or ammunition for any unlawful purpose, or (b) That such person cannot be left in the possession of any arms or ammunition without danger to the public peace or safety—the magistrate may, after having recorded the reasons for his belief, cause a search to be made of the house or premises occupied by such person or in which the magistrate has reason to believe that such arms or ammunition are or is to be found and may have such arms or ammunition, if any, seized and detain the same in safe custody for such period as he thinks necessary, although that person may be entitled by virtue of this Act or any other law for the time being in force to have the same in his possession.

(2) Every search under this section shall be conducted by or in the presence of a magistrate or by or in the presence of some officer specially empowered in this behalf by the Central Government.

23. Any magistrate, any police officer or any other officer specially empowered in this behalf by the Central Government, may for the purpose of ascertaining whether any contravention of this Act or the rules made thereunder is being or is likely to be committed, stop and search any vessel, vehicle or other means of conveyance and seize any arms or ammunition that may be found therein along with such vessel, vehicle or other means of conveyance.

24. The Central Government may at any time order the seizure of any arms or ammunition in the possession of any person, notwithstanding that such person is entitled by virtue of this Act or any other law for the time being in force to have the same in his possession, and may detain the same for such period as it thinks necessary for the public peace and safety.

Chapter V. Offences and Penalties

25. (1) Whoever—

(a) Acquires, has in his possession or carries any firearm or ammunition in contravention of section 3; or

(b) Acquires, has in his possession or carries in any place specified by notification under section 4 any arms of such class or description as has been specified in that notification, in contravention of that section; or

(c) Manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5; or

(d) Shortens the barrel of a firearm or converts an imitation firearm into a firearm in contravention of section 6; or

(e) Acquires, has in his possession or carries, or manufactures, sells, transfers, converts, repairs, tests or proves, or exposes or offers for sale or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any prohibited arms or prohibited ammunition in contravention of section 7; or

(f) Sells or transfers any firearm which does not bear the name of the maker, manufacturer's number or other identification mark stamped or otherwise shown thereon as required by sub-section (2) of section 8 or does any act in contravention of sub-section (1) of that section; or

(g) Being a person to whom sub-clause (ii) or sub-clause (iii) of clause (a) of sub-section (1) of section 9 applies, acquires, has in his possession or carries any firearm or ammunition in contravention of that section; or

(h) Sells or transfers, or converts, repairs, tests or proves any firearm or ammunition in contravention of clause (b) of sub-section (1) of section 9; or

(i) Brings into, or takes out of, India, any arms or ammunition in contravention of section 10; or

(j) Brings into, or takes out of, India, arms or ammunition of any class or description in contravention of section 11; or

(k) Transports any arms or ammunition in contravention of section 12; or

(l) Fails to deposit arms or ammunition as required by sub-section (1) of section 21; or

(m) Being a manufacturer of, or dealer in, arms or ammunition, fails, on being required to do so by rules made under section 44, to maintain a record or account or to make therein all such entries as are required by such rules or intentionally makes a false entry therein or prevents or obstructs the inspection of such record or account or the making of copies of entries therefrom or prevents or obstructs the entry into any premises or other place where arms or ammunition are or is manufactured or kept or intentionally fails to exhibit or conceals such arms or ammunition or refuses to point out where the same are or is manufactured or kept; shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

(2) Whoever being a person to whom sub-clause (i) of clause (a) of sub-section (1) of section 9 applies, acquires, has in his possession or carries any firearm or ammunition in contravention of that section shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(3) Whoever having sold or transferred any firearms or ammunition or other arms under the proviso to section 5 fails to inform the district magistrate having jurisdiction or the officer in charge of the nearest police station, of such sale or transfer shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.

(4) Whoever fails to deliver-up a licence when so required by the licensing authority under sub-section (1) of section 17 for the purpose of varying the conditions specified in the licence or fails to surrender a licence to the appropriate authority under sub-section (10) of that section on its suspension or revocation shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.

(5) Whoever, when required under section 19 to give his name and address, refuses to give such name and address or gives a name or address which subsequently transpires to be false shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to two hundred rupees, or with both.

26. Whoever—

(a) Does any act in contravention of any of the provisions of sections 3, 4, 5, 6, 7, 10, 11 or 12 in such manner as to indicate an intention that such act may not be known to any public servant or to any person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance; or

(b) On any search being made under section 22 conceals or attempts to conceal any arms or ammunition;

shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

27. Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried into effect or not, be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

28. Whoever makes or attempts to make any use whatsoever of a firearm or an imitation firearm with intent to resist or prevent the lawful arrest or detention of himself or any other person shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

Explanation.—In this section the expression "imitation firearm" has the same meaning as in section 6.

29. Whoever—

(a) Purchases any firearms or any other arms of such class or description as may be prescribed or any ammunition from any other person knowing that such other person is not licensed or authorised under section 5; or

(b) Delivers any arms or ammunition into the possession of another person without previously ascertaining that such other person is entitled by virtue of this Act or any other law for the time being in force to have, and is not prohibited by this Act or such other law from having, in his possession the same;

shall be punishable with imprisonment for a term which may extend to six months, or with fine of an amount which may extend to five hundred rupees, or with both.

30. Whoever contravenes any condition of a licence or any provision of this Act or any rule made thereunder, for which no punishment is provided elsewhere in this Act shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

31. Whoever having been convicted of an offence under this Act is again convicted of an offence under this Act shall be punishable with double the penalty provided for the latter offence.

32. (1) When any person is convicted under this Act of any offence committed by him in respect of any arms or ammunition, it shall be in the discretion of the convicting court further to direct that the whole or any portion of such arms or ammunition, and any vessel, vehicle or other means of conveyance and any receptacle or thing containing, or used to conceal, the arms or ammunition shall be confiscated:

Provided, That if the conviction is set aside on appeal or otherwise, the order of confiscation shall become void.

(2) An order of confiscation may also be made by the appellate court or by the High Court when exercising its powers of revision.

33. (1) Whenever an offence under this Act has been committed by a company, every person who at the time the offence was committed was in the charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided, That nothing contained in this sub-section shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—(a) "company" means any body corporate, and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

Chapter VI. Miscellaneous

34. Notwithstanding anything contained in the Sea Customs Act, 1878, no arms or ammunition shall be deposited in any warehouse licensed under section 16 of that Act without the sanction of the Central Government.

35. Where any arms or ammunition in respect of which any offence under this Act has been or is being committed are or is found in any premises, vehicle or other place in the joint occupation or under the joint control of several persons, each of such persons in respect of whom there is reason to believe that he was aware of the existence of the arms or ammunition in the premises, vehicle or other place shall, unless the contrary is proved, be liable for that offence in the same manner as if it has been or is being committed by him alone.

36. (1) Every person aware of the commission of any offence under this Act shall, in the absence of reasonable excuse the burden of proving which shall lie upon such person, give information of the same to the officer in charge of the nearest police station or the magistrate having jurisdiction.

(2) Every person employed or working upon any railway, aircraft, vessel, vehicle or other means of conveyance shall, in the absence of reasonable excuse the burden of proving which shall lie upon such person, give information to the officer in charge of the nearest police station regarding any box, package or bale in transit which he may have reason to suspect contains arms or ammunition in respect of which an offence under this Act has been or is being committed.

37. Save as otherwise provided in this Act,—

(a) All arrests and searches made under this Act or under any rules made thereunder shall be carried out in accordance with the provisions of the Code

of Criminal Procedure, 1898, relating respectively to arrests and searches made under that Code;

(b) Any person arrested and any arms or ammunition seized under this Act by a person not being a magistrate or a police officer shall be delivered without delay to the officer in charge of the nearest police station and that officer shall—(i) either release that person on his executing a bond with or without sureties to appear before a magistrate and keep the things seized in his custody till the appearance of that person before the magistrate, or (ii) should that person fail to execute the bond and to furnish, if so required, sufficient sureties, produce that person and those things without delay before the magistrate.

38. Every offence under this Act shall be cognizable within the meaning of the Code of Criminal Procedure, 1898.

39. No prosecution shall be instituted against any person in respect of any offence under section 3 without the previous sanction of the district magistrate.

40. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

41. Where the Central Government is of the opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette and subject to such conditions, if any, as it may specify in the notification—

(a) Exempt any person or class of persons, or exclude any description of arms or ammunition, or withdraw any part of India, from the operation of all or any of the provisions of this Act; and

(b) As often as may be, cancel any such notification and again subject, by a like notification, the person or class of persons or the description of arms and ammunition or the part of India to the operation of such provisions.

42. (1) The Central Government may, by notification in the Official Gazette, direct a census to be taken of all firearms in any area and empower any officer of Government to take such census.

(2) On the issue of any such notification all persons having in their possession any firearm in that area shall furnish to the officer concerned such information as he may require in relation thereto and shall produce before him such firearms if he so requires.

43. (1) The Central Government may, by notification in the Official Gazette, direct that any power or function which may be exercised or performed by it under this Act other than the power under section 41 or the power under section 44 may, in relation to such matters and subject to such conditions, if any, as it may specify in the notification, be exercised or performed also by—(a) such officer or authority subordinate to the Central Government, or (b) such State Government or such officer or authority subordinate to the State Government; as may be specified in the notification.

(2) Any rules made by the Central Government under this Act may confer powers or impose duties or authorise the conferring of powers or imposition of duties upon any State Government or any officer or authority subordinate thereto.

44. (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) The appointment, jurisdiction, control and functions of licensing authorities;

(b) The form and particulars of application for the grant or renewal of a licence and where the application is for the renewal of a licence, the time within which it shall be made;

(c) The form in which and the conditions subject to which any licence may be granted or refused, renewed, varied, suspended or revoked;

(d) Where no period has been specified in this Act, the period for which any licence shall continue to be in force;

(e) The fees payable in respect of any application for the grant or renewal of a licence and in respect of any licence granted or renewed and the manner of paying the same;

(f) The manner in which the maker's name, the manufacturer's number or other identification mark of a firearm shall be stamped or otherwise shown thereon;

(g) The procedure for the test or proof of any firearms;

(h) The firearms that may be used in the course of training, the age-limits of persons who may use them and the conditions for their use by such persons;

(i) The authority to whom appeals may be preferred under section 18, the procedure to be followed by such authority and the period within which appeals shall be preferred, the fees to be paid in respect of such appeals and the refund of such fees;

(j) The maintenance of records or accounts of anything done under a licence other than a licence under section 3 or section 4, the form of, and the entires to be made in, such records or accounts and the exhibition of such records or accounts to any police officer or to any officer of Government empowered in this behalf;

(k) The entry and inspection by any police officer or by any officer of Government empowered in this behalf of any premises or other place in which arms or ammunition are or is manufactured or in which arms or ammunition are or is kept by a manufacturer of or dealer in such arms or ammunition and the exhibition of the same to such officer;

(l) The conditions subject to which arms or ammunition may be deposited with a licensed dealer or in a unit armoury as required by sub-section (1) of section 21 and the period on the expiry of which the things so deposited may be forfeited;

(m) Any other matter which is to be, or may be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

45. Nothing in this Act shall apply to—

(a) Arms or ammunition on board any sea-going vessel or any aircraft and forming part of the ordinary armament or equipment of such vessel or aircraft;

(b) The acquisition, possession or carrying, the manufacture, repair, conversion, test or proof, the sale or transfer or the import, export or transport of arms or ammunition—(i) by or under orders of the Central Government, or (ii) by a public servant in the course of his duty as such public servant, or (iii) by a member of the National Cadet Corps raised and maintained under the National Cadet Corps Act, 1948, or by any officer or enrolled person of the Territorial Army raised and maintained under the Territorial Army Act, 1948, or by any member of any other forces raised and maintained or that may hereafter be raised and maintained under any Central Act, or by any member of such other forces as the Central Government may, by notification in the Official Gazette, specify, in the course of his duty as such member, officer or enrolled person;

(c) Any weapon of an obsolete pattern or of antiquarian value or in disrepair which is not capable of being used as a Firearm either with or without repair;

(d) The acquisition, possession or carrying by a person of minor parts of arms or ammunition which are not intended to be used along with complementary parts acquired or possessed by that or any other person.

46. (1) The Indian Arms Act, 1878, is hereby repealed.

(2) Notwithstanding the repeal of the Indian Arms Act, 1878, and without prejudice to the provisions of sections 6 and 24 of the General Clauses Act, 1897, every licence granted or renewed under the first-mentioned Act and in force immediately before the commencement of this Act shall, unless sooner revoked, continue in force after such commencement for the unexpired portion of the period for which it has been granted or renewed.

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177. Furnishing false information.
178. Refusing oath or affirmation when duly required by public servant to make it.
179. Refusing to answer public servant authorized to question.
180. Refusing to sign statement.
181. False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation.
182. False information with intent to cause public servant to use his lawful power to the injury of another person.
183. Resistance to the taking of property by the lawful authority of a public servant.
184. Obstructing sale of property offered for sale by authority of public servant.
185. Illegal purchase or bid for property offered for sale by authority of public servant.
186. Obstructing public servant in discharge of public functions.
187. Omission to assist public servant when bound by law to give assistance.
188. Disobedience to order duly promulgated by public servant.
189. Threat of injury to public servant.
190. Threat of injury to induce person to refrain from applying for protection to public servant.

Chapter XI

Of False Evidence and Offences Against Public Justice

191. Giving false evidence.
192. Fabricating false evidence.
193. Punishment for false evidence.
194. Giving or fabricating false evidence with intent to procure conviction of capital offence—
    if innocent person be thereby convicted and executed.
195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment.
196. Using evidence known to be false.
197. Issuing or signing false certificate.
198. Using as true a certificate known to be false.
199. False statement made in declaration which is by law receivable as evidence.
200. Using as true such declaration knowing it to be false.
201. Causing disappearance of evidence of offence, or giving false information, to screen offender—
    if a capital offence;
    if punishable with imprisonment for life;
    if punishable with less than ten years' imprisonment.
202. Intentional omission to give information of offence by person bound to inform.
203. Giving false information respecting an offence committed.
204. Destruction of document to prevent its production as evidence.
205. False personation for purpose of act or proceeding in suit or prosecution.
206. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.
207. Fraudulent claim to property to prevent its seizure as forfeited or in execution.

208. Fraudulently suffering decree for sum not due.
209. Dishonestly making false claim in Court.
210. Fraudulently obtaining decree for sum not due.
211. False charge of offence made with intent to injure.
212. Harbouring offender—
if a capital offence;
if punishable with imprisonment for life, or with imprisonment.
213. Taking gift, etc., to screen an offender from punishment—
if a capital offence;
if punishable with imprisonment for life, or with imprisonment.
214. Offering gift or restoration of property in consideration of screening offenders.
if a capital offence;
if punishable with imprisonment for life, or with imprisonment.
215. Taking gift to help to recover stolen property, etc.
216. Harbouring offender who has escaped from custody or whose apprehension has been ordered—
if a capital offence;
if punishable with imprisonment for life, or with imprisonment.
216A. Penalty for harbouring robbers or dacoits.
216B. [*Repealed.*]
217. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.
218. Publis servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.
219. Public servant in judicial proceeding corruptly making report, etc., contrary to law.
220. Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.
221. Intentional omission to apprehend on the part of public servant bound to apprehend.
222. Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.
223. Escape from confinement or custody negligently suffered by public servant.
224. Resistance or obstruction by a person to his lawful apprehension.
225. Resistance or obstruction to lawful apprehension of another person.
225A. Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for.
225B. Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.
226. [*Repealed.*]
227. Violation of condition of remission of punishment.
228. Intentional insult or interruption to public servant sitting in judicial proceeding.
229. Personation of a juror or assessor

Chapter XII

Of Offences Relating to Coin and Government Stamps

230. "Coin" defined.
Indian coin.
231. Counterfeiting coin.
232. Counterfeiting Indian coin.
233. Making or selling instrument for counterfeiting coin.
234. Making or selling instrument for counterfeiting Indian coins.
235. Possession of instrument or material for the purpose of using the same for counterfeiting coin: if Indian coin.
236. Abetting in India the counterfeiting out of India of coin.
237. Import or export of counterfeit coin.
238. Import or export of counterfeits of the Indian coin.
239. Delivery of coin, possessed with knowledge that it is counterfeit.
240. Delivery of Indian coin, possessed with knowledge that it is counterfeit.

241. Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.
242. Possession of counterfeit coin by person who knew it to be counterfeit.
243. Possession of India coin by person who knew it to be counterfeit when he became possessed thereof.
244. Person employed in mint causing coin to be of different weight or composition from that fixed by law.
245. Unlawfully taking coining instrument from mint.
246. Fraudulently or dishonestly diminishing weight or altering composition of coin.
247. Fraudulently or dishonestly diminishing weight or altering composition of Indian coin.
248. Altering appearance of coin with intent that it shall pass as coin of different description.
249. Altering appearance of Indian coin with intent that it shall pass as coin of different description.
250. Delivery of coin possessed with knowledge that it is altered.
251. Delivery of Indian coin possessed with knowledge that it is altered.
252. Possession of coin by person who knew it to be altered when he became possessed thereof.
253. Possession of Indian coin by person who knew it to be altered when he became possessed thereof.
254. Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered.
255. Counterfeiting Government stamp.
256. Having possession of instrument or material for counterfeiting Government stamp.
257. Making or selling instrument for counterfeiting Government stamp.
258. Sale of counterfeit Government stamp.
259. Having possession of counterfeit Government stamp.
260. Using as genuine a Government stamp known to be counterfeit.
261. Effacing writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.
262. Using Government stamp known to have been before used.
263A. Prohibition of fictitious stamps.

Chapter XIII

Of Offences Relating to Weights and Measures

264. Fraudulent use of false instrument for weighing.
265. Fraudulent use of false weight or measure.
266. Being in possession of false weight or measure.
267. Making or selling false weight or measure.

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

268. Public nuisance.
269. Negligent act likely to spread infection of disease dangerous to life.
270. Malignant act likely to spread infection of disease dangerous to life.
271. Disobedience to quarantine rule.
272. Adulteration of food or drink intended for sale.
273. Sale of noxious food or drink.
274. Adulteration of drugs.
275. Sale of adulterated drugs.
276. Sale of drug as a different drug or preparation.
277. Fouling water of public spring or reservoir.
278. Making atmosphere noxious to health.
279. Rash driving or riding on a public way.
280. Rash navigation of vessel.
281. Exhibition of false light, mark or buoy.
282. Conveying person by water for hire in unsafe or overloaded vessel.
283. Danger or obstruction in public way or line of navigation.

284. Negligent conduct with respect to poisonous substance.
285. Negligent conduct with respect to fire or combustible matter.
286. Negligent conduct with respect to explosive substance.
287. Negligent conduct with respect to machinery.
288. Negligent conduct with respect to pulling down or repairing buildings.
289. Negligent conduct with respect to animal.
290. Punishment for public nuisance in cases not otherwise provided for.
291. Continuance of nuisance after injunction to discontinue.
292. Sale, etc., of obscene books, etc.
293. Sale, etc., of obscene objects to young person.
294. Obscene acts and songs.
294A. Keeping lottery-office.

Chapter XV

Of Offences Relating to Religion

295. Injuring or defiling place of worship with intent to insult religion of any class.
295A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.
296. Disturbing religious assembly.
297. Trespassing on burial places, etc.
298. Uttering words, etc., with deliberate intent to wound religious feelings.

Chapter XVI

Of Offences Affecting the Human Body

Of offences affecting life

299. Culpable homicide.
300. Murder.
When culpable homicide is not murder.
301. Culpable homicide by causing death of person other than person whose death was intended.
302. Punishment for murder.
303. Punishment for murder by life-convict.
304. Punishment for culpable homicide not amounting to murder.
304A. Causing death by negligence.
305. Abetment of suicide of child or insane person.
306. Abetment of suicide.
307. Attempt to murder.
Attempts by life-convicts.
308. Attempt to commit culpable homicide.
309. Attempt to commit suicide.
310. Thug.
311. Punishment.

Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of birth.

312. Causing miscarriage.
313. Causing miscarriage without woman's consent.
314. Death caused by act done with intent to cause miscarriage.
If act done without woman's consent.
315. Act done with intent to prevent child being born alive or to cause it to die after birth.
316. Causing death of quick unborn child by act amounting to culpable homicide.
317. Exposure and abandonment of child under twelve years, by parent or person having care of it.
318. Concealment of birth by secret disposal of dead body.

Of hurt

319. Hurt.
320. Grievous hurt.
321. Voluntarily causing hurt.

322. Voluntarily causing grievous hurt.
323. Punishment for voluntarily causing hurt.
324. Voluntarily causing hurt by dangerous weapons or means.
325. Punishment for voluntarily causing grievous hurt.
326. Voluntarily causing grievous hurt by dangerous weapons or means.
327. Voluntarily causing hurt to extort property, or to constrain to an illegal act.
328. Causing hurt by means of poison, etc., with intent to commit an offense.
329. Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.
330. Voluntarily causing hurt to extort confession, or to compel restoration of property.
331. Voluntarily causing grievous hurt to extort confession, or to compel restoration of property.
332. Voluntarily causing hurt to deter public servant from his duty.
333. Voluntarily causing grievous hurt to deter public servant from his duty.
334. Voluntarily causing hurt on provocation.
335. Voluntarily causing grievous hurt on provocation.
336. Act endangering life or personal safety of others.
337. Causing hurt by act endangering life or personal safety of others.
338. Causing grievous hurt by act endangering life or personal safety of others.

Of wrongful restraint and wrongful confinement

339. Wrongful restraint.
340. Wrongful confinement.
341. Punishment for wrongful restraint.
342. Punishment for wrongful confinement.
343. Wrongful confinement for three or more days.
344. Wrongful confinement for ten or more days.
345. Wrongful confinement of person for whose liberation writ has been issued.
346. Wrongful confinement in secret.
347. Wrongful confinement to extort property, or constrain to illegal act.
348. Wrongful confinement to extort confession, or compel restoration of property.

Of criminal force and assault

349. Force.
350. Criminal force.
351. Assault.
352. Punishment for assault or criminal force otherwise than on grave provocation.
353. Assault or criminal force to deter public servant from discharge of his duty.
354. Assault or criminal force to woman with intent to outrage her modesty.
355. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.
356. Assault or criminal force in attempt to commit theft of property carried by a person.
357. Assault or criminal force in attempt wrongfully to confine a person.
358. Assault or criminal force on grave provocation.

Of kidnapping, abduction, slavery and forced labour

359. Kidnapping.
360. Kidnapping from India.
361. Kidnapping from lawful guardianship.
362. Abduction.
363. Punishment for kidnapping.
363A. Kidnapping or maiming a minor for purposes of begging.
364. Kidnapping or abducting in order to murder.
365. Kidnapping, abducting with intent secretly and wrongfully to confine person.
366. Kidnapping, abducting or inducing woman to compel her marriage, etc.
366A. Procuration of minor girl.
366B. Importation of girl from foreign country.

367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.
368. Wrongfully concealing or keeping in confinement kidnapped or abducted person.
369. Kidnapping or abducting child under ten years with intent to steal from its person.
370. Buying or disposing of any person as a slave.
371. Habitual dealing in slaves.
372. Selling minor for purposes of prostitution, etc.
373. Buying minor for purposes of prostitution, etc.
374. Unlawful compulsory labour.

Of rape.

375. Rape.
376. Punishment for rape.

Of unnatural offences

377. Unnatural offences.

Chapter XVII

Of Offences against Property

Of theft

378. Theft.
379. Punishment for theft.
380. Theft in dwelling house, etc.
381. Theft by clerk or servant of property in possession of master.
382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.

Of extortion

383. Extortion.
384. Punishment for extortion.
385. Putting person in fear of injury in order to commit exortion.
386. Extortion by putting a person in fear of death or grievous hurt.
387. Putting person in fear of death or of grievous hurt, in order to commit extortion.
388. Extortion by threat of accusation of an offence punishable with death or imprisonment of life, etc.
389. Putting person in fear of accusation of offence, in order to commit extortion.

Of robbery and dacoity

390. Robbery.
When theft is robbery.
When extortion is robbery.
391. Dacoity.
392. Punishment for robbery.
393. Attempt to commit robbery.
394. Voluntarily causing hurt in committing robbery.
395. Punishment for dacoity.
396. Dacoity with murder.
397. Robbery or dacoity, with attempt to cause death or grievous hurt.
398. Attempt to commit robbery or dacoity when armed with deadly weapon.
399. Making preparation to commit dacoity.
400. Punishment for belonging to gang of dacoits.
401. Punishment for belonging to gang of thieves.
402. Assembling for purpose of committing dacoity.

Of criminal misappropriation of property

403. Dishonest misappropriation of property.
404. Dishonest misappropriation of property possessed by deceased person at the time of his death.

Of criminal breach of trust

405. Criminal breach of trust.
406. Punishment for criminal breach of trust.
407. Criminal breach of trust by carrier, etc.

408. Criminal breach of trust by clerk or servant.
409. Criminal breach of trust by public servant, or by banker, merchant or agent.

Of the receiving of stolen property

410. Stolen property.
411. Dishonestly receiving stolen property.
412. Dishonestly receiving property stolen in the commission of a dacoity.
413. Habitually dealing in stolen property.
414. Assisting in concealment of stolen property.

Of cheating

415. Cheating.
416. Cheating by personation.
417. Punishment for cheating.
418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.
419. Punishment for cheating by personation.
420. Cheating and dishonesty inducing delivery of property.

Of fraudulent deeds and dispositions of property

421. Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.
422. Dishonestly or fraudulently preventing debt being available for creditors.
423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.
424. Dishonest or fraudulent removal or concealment of property.

Of mischief

425. Mischief.
426. Punishment for mischief.
427. Mischief causing damage to the amount of fifty rupees.
428. Mischief by killing or maiming animal of the value of ten rupees.
429. Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.
430. Mischief by injury to works of irrigation or by wrongfully diverting water.
431. Mischief by injury to public road, bridge, river or channel.
432. Mischief by causing inundation or obstruction to public drainage attended with damage.
433. Mischief by destroying, moving or rendering less useful a light-house or sea-mark.
434. Mischief by destroying or moving, etc., a land-mark fixed by public authority.
435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.
436. Mischief by fire or explosive substance with intent to destroy house, etc.
437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.
438. Punishment for the mischief described in section 437 committed by fire or explosive substance.
439. Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.
440. Mischief committed after preparation made for causing death or hurt.

Of Criminal trespass

441. Criminal trespass.
442. House-trespass.
443. Lurking house-trespass.
444. Lurking house-trespass by night.
445. House-breaking.
446. House-breaking by night.
447. Punishment for criminal trespass.
448. Punishment for house-trespass.
449. House-trespass in order to commit offence punishable with death.

450. House-trespass in order to commit offence punishable with imprisonment for life.
451. House-trespass in order to commit offence punishable with imprisonment.
452. House-trespass after preparation for hurt, assault or wrongful restraint.
453. Punishment for lurking house-trespass or house-breaking.
454. Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.
455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.
456. Punishment for lurking house-trespass or house-breaking by night.
457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.
458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.
459. Grievous hurt caused whilst committing lurking house trespass or house-breaking.
460. All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.
461. Dishonestly breaking open receptacle containing property.
462. Punishment for same offence when committed by person entrusted with custody.

Chapter XVIII

Of Offences Relating to Documents and to Property Marks

463. Forgery.
464. Making a false document.
465. Punishment for forgery.
466. Forgery of record of Court or of public register, etc.
467. Forgery of valuable security, will, etc.
468. Forgery for purpose of cheating.
469. Forgery for purpose of harming reputation.
470. Forged document.
471. Using as genuine a forged document.
472. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.
473. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.
474. Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.
475. Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.
476. Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.
477. Fraudulent cancellation, destruction, etc. of will, authority to adopt, or valuable security.
477A. Falsification of accounts.

Of property and other marks

478. [*Repealed.*]
479. Property mark.
480. [*Repealed.*]
481. Using a false property mark.
482. Punishment for using a false property mark.
483. Counterfeiting a property mark used by another.
484. Counterfeiting a mark used by a public servant.
485. Making or possession of any instrument for counterfeiting a property mark.
486. Selling goods marked with a counterfeit property mark.
487. Making a false mark upon any receptacle containing goods.
488. Punishment for making use of any such false mark.
489. Tampering with property mark with intent to cause injury.

Of currency-notes and bank-notes
489A. Counterfeiting currency-notes or bank-notes.
489B. Using as genuine, forged or counterfeit currency-notes or bank-notes.
489C. Possession of forged or counterfeit currency-notes or bank-notes.
489D. Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.
489E. Making or using documents resembling currency-notes or bank-notes.

Chapter XIX

Of the Criminal Breach or Contracts of Service

490. [*Repealed.*]
491. Breach of contract to attend on and supply wants of helpless person.
492. [*Repealed.*]

Chapter XX

Of Offences Relating to Marriage

493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.
494. Marrying again during life-time of husband or wife.
495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.
496. Marriage ceremony fraudulently gone through without lawful marriage.
497. Adultery.
498. Enticing or taking away or detaining with criminal intent a married woman.

Chapter XXI

Of Defamation

499. Defamation.
Imputation of truth which public good requires to be made or published.
Public conduct of public servants.
Conduct of any person touching any public question.
Publication of reports of proceedings of Courts.
Merits of case decided in Court or conduct of witnesses and others concerned.
Merits of public performance.
Censure passed in good faith by person having lawful authority over another.
Accusation preferred in good faith to authorized person.
Imputation made in good faith by person for protection of his or other's interest.
Caution intended for good of person to whom conveyed or for public good.
500. Punishment for defamation.
501. Printing or engraving matter know to be defamatory.
502. Sale of printed or engraved substance containing defamatory matter.

Chapter XXII

Of Criminal Intimidation, Insult and Annoyance

503. Criminal intimidation.
504. Intentional insult with intent to provoke breach of the peace.
505. Statements conducing to public mischief.
506. Punishment for criminal intimidation.
If threat be to cause death or grievous hurt, etc.
507. Criminal intimation by an anonymous communication.
508. Act caused by inducing person to believe that he will be rendered an object of the Divine displeasure.
509. Word, gesture or act intended to insult the modesty of a woman.
510. Misconduct in public by a drunken person.

Chapter XXIII

Of Attempts to Commit Offences

511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.

THE INDIAN PENAL CODE, 1860

ACT NO. 45 OF 1060

Chapter I

Introduction

WHEREAS it is expedient to provide a general Penal Code for [1] [India] ;

It is enacted as follows :—

1. This Act shall be called the Indian Penal Code, and shall [2] [extend to the whole of India [3] [except the State of Jammu and Kashmir]].

2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within [4] [India] [5] * * *.

3. Any person liable, by any [6] [Indian law], to be tried for an offence committed beyond [4] [India] shall be dealt with according to the provisions of this Code for any act committed beyond [4] [India] in the same manner as if such act had been committed within [4] [India].

[7] [4. The provisions of this Code apply also to any offence committed by—

[8] [(1) any citizen of India in any place without and beyond India ;

(2) any person on any ship or aircraft registered in India wherever it may be.]

Explanation.—In this section the word "offence" includes every act committed outside [4] [India] which, if committed in [4] [India] would be punishable under this Code.

[9] [*Illustration*]

[10] * * * A, [11] [who is [12] [a citizen of India]], commits a murder in Uganda. He can be tried and convicted of murder in any place in [13] [India] in which he may be found.

[14] * * * * * * *

[15] [5. Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provision of any special or local law.]

Chapter II

General Explanations

6. Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject ot the exceptions contained in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision or illustration.

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[1] Subs. by Act 3 of 1951 for "the whole of India except Part B States".
[2] Subs. by the A.O. 1948 for "take effect * * * throughout British India". The words and figures "on and from the first day of May, 1861" occuring between the words "effect" and "throughout" were rep. by Act 12 of 1891.
[3] Subs. by Act 3 of 1951 for "except Part B States".
[4] Subs., *ibid.*, for "the States".
[5] The words and figures "on or after the said first day of May, 1861" omitted by Act 12 of 1891.
[6] Subs. by the A. O. 1937 for "law passed by the Governor-General of India in Council".
[7] Subs. by Act 4 of 1898, s. 2, for the original s. 4.
[8] Subs. by the A. O. 1950 for the original clauses (*1*) to (*4*).
[9] Subs. by Act 36 of 1957, s. 3 and Sch. II, for "*Illustrations*".
[10] The brackets and letter '(*a*)' omitted by s. 3 and Sch. II, *ibid.*
[11] Subs. by the A. O. 1948 for "a coolie, who is a Native Indian subject".
[12] Subs. by the A. O. 1950 for "a British subject of Indian domicile".
[13] Subs. by Act 3 of 1951 for "the States".
[14] Illustrations (*b*), (*c*) and (*d*) were rep. by the A. O. 1950.
[15] Subs., *ibid.*, for the former s. 5.

Illustrations

(*a*) The sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(*b*) A, a police-officer, without warrant, apprehends Z who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.

11. The word "person" includes any Company or Association, or body of persons, whether incorporated or not.

12. The word "public" includes any class of the public or any community.

13. ["*Queen*".] *Rep. by the A. O. 1950.*

[1] [14. The words "servant of Government" denote any officer or servant continued, appointed or employed in India by or under the authority of Government.]

15. [*Definition of "British India"*.] *Rep. by the A. O. 1937.*

16. [*Definition of "Government of India"*.] *Rep.*, ibid.

[2] [17. The word "Government" denotes the Central Government or the Government of a [3]* * * State.]

[4] [18. "India" means the territory of India excluding the State of Jammu and Kashmir.]

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations

(a) A collector exercising jurisdiction in a suit under Act 10 of 1859 is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(c) A member of a panchayat which has power, under [5] Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration

A Panchayat acting under [5] Regulation VII, 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—

[6] * * * * * * *

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[1] Subs. by the A.O. 1950, for s. 14.
[2] Subs., *ibid.*, for s. 17.
[3] The words "Part A" omitted by Act 3 of 1951.
[4] Subs., *ibid.*, for s. 18.
[5] Rep. by the Madras Civil Courts Act, 1873 (3 of 1873).
[6] Cl. *First* omitted by the A. O. 1950.

Second.—Every Commissioned Officer in the Military, [1] [Naval or Air] Forces [2] [[3]* * * of India] ;

[1] [*Third.*—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions ;]

Fourth.—Every officer of a Court of Justice [5] [(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties ;

Fifth.—Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant ;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement.

Eighth.—Every officer of the [7][Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the [5] [Government], or to make any survey, assessment or contract on behalf of the [5] [Government], or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the [5] [Government], or to prevent the infraction of any law for the protection of the pecuniary interests of the [5] [Government], and every officer in the service or pay of the [5] [Government] or remunerated by fees or commission for the performance of any public duty ;

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose, of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district ;

Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Illustration

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

[6] [*Explanation 3.*—The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.]

[7] * * * * * * *

22. The words "movable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

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[1] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "or Naval".
[2] Subs. by the A. O. 1948, for "of the Queen while serving under any Government in British India or the Crown Representative".
[3] The words "of the Dominion" omitted by the A. O. 1950.
[4] Subs. by Act 40 of 1964, s. 2, for cl. *Third*.
[5] Ins. by s. 2, *ibid*.
[6] Ins. by Act 39 of 1920, s. 2.
[7] *Explanation 4* ins. by Act 2 of 1958, s. 2, omitted by Act 40 of 1964, s. 2.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

26. A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing but not otherwise.

27. When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk, or servant, is a clerk or servant within the meaning of this section.

28. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

[1] [*Explanation 1.*—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.]

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by merchantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by merchantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security".

31. The words "a will" denote any testamentary document.

32. In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

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[1] Subs. by Act 1 of 1889, s. 9, for the original *Explanations*.

33. The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

[1] [34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.]

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations

(*a*) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(*b*) A and B are joint jailors, and as such, have the charge of Z, a prisoner, alternatively for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. A and B are guilty of the murder of Z.

(*c*) A, a jailor, has the charge of Z, a prisoner. A intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but, as A did not co-operate with B, A is guilty only of an attempt to commit murder.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

39. A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act: yet, if he knew that he was likely to cause death, he has caused death voluntarily.

[2] [40. Except in the [3] [Chapters] and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.]

In Chapter IV, [4] [Chapter VA] and in the following sections, namely sections

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[1] Subs. by Act 27 of 1870, s. 1, for the original section.
[2] Subs. by Act 27 of 1870, s. 2, for the original s. 40.
[3] Subs. by Act 8 of 1930, s. 2 and Sch. I, for "chapter".
[4] Ins. by Act 8 of 1913, s. 2.

[1][64, 65, 66, [2][67], 71], 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.]

41. A "special law" is a law applicable to a particular subject.

42. A "local law" is a law applicable only to a particular part of [3][[4]* * * [5][India]].

43. The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

46. The word "death" denotes the death of a human being unless the contrary appears from the context.

47. The word "animal" denotes any living creature, other than a human being.

48. The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

50. The word "section" denotes one of those portions of a Chapter of this Code which are distinguished by prefixed numeral figures.

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

52. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

[6][52A. Except in section 157, and in section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.]

Chapter III

Of Punishments

53. The punishment to which offenders are liable under the provisions of this Code are,—

First.—Death;

[7][*Secondly.*—Imprisonment for life;]

[8]* * * * * * *

Fourthly.—Imprisonment, which is of two descriptions, namely:—

(*1*) Rigorous, that is with hard labour;

(*2*) Simple;

Fifthly.—Forfeiture of property;

Sixthly.—Fine.

[9][53A. (*1*) Subject to the provisions of subsection (*2*) and subsection (*3*), any reference to "transportation for life" in any other law for the time being

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[1] Ins. by Act 8 of 1882, s. 1.
[2] Ins. by Act 10 of 1886, s. 21 (*1*).
[3] Subs. by the A. O. 1948 for "British India".
[4] The words "the territories comprised in" were rep. by Act 48 of 1952, s. 3 and Sch. II.
[5] Subs. by Act 3 of 1951 for "the States".
[6] Ins. by Act 8 of 1942, s. 2.
[7] Subs. by Act 26 of 1955, s. 117 and Sch., for "Secondly.—Transportation".
[8] Clause "Thirdly" was rep. by Act 17 of 1949 (with effect from 6-4-1949).

in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to "imprisonment for life".

(2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, [1] [1955], the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.

(3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.

(4) Any reference to "transportation" in any law for the time being in force shall,—

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter term, be deemed to have been omitted.]

54. In every case in which sentence of death shall have been passed [2] [the appropriate Government] may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

55. In every case in which sentence of [3] [imprisonment] for life shall have been passed, [4] [the appropriate Government] may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

[5] [55A. In sections fifty-four and fifty-five the expression "appropriate Government" means—

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.]

56. [*Sentence of Europeans and Americans to penal servitude. Proviso as to sentence for term exceeding ten years but not for life.*] *Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949) (with effect from 6-4-1949).*

57. In calculating fractions of terms of punishment, [1] [imprisonment] for life shall be reckoned as equivalent to [6] [imprisonment] for twenty years.

58. [*Offenders sentenced to transportation how dealt with until transported.*] *Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955 s. 117 and Sch.*

59. [*Transportation instead of imprisonment.*] *Rep., ibid.*

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple or that any part of such imprisonment shall be rigorous and the rest simple.

61. [*Sentence of forfeiture of property.*] *Rep. by the Indian Penal Code (Amendment) Act, 1921 (16 of 1921), s. 4.*

62. [*Forfeiture of property, in respect of offenders punishable with death, transportation or imprisonment.*] *Rep., ibid.*

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. [7] [In every case of an offense punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

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[6] Subs. by Act 26 of 1955, s. 117 and Sch.

[1] Subs. by Act 36 of 1957, s. 3 and Sch. II, for "1954".

[2] Subs. by the A. O. 1950 for "the Central Government or the Provincial Government of the Province within which the offender shall have been sentenced".

[3] Subs. by Act 26 of 1955, s. 117 and Sch.

[4] Subs. by the A. O. 1950 for "the Provincial Government of the Province within which the offender shall have been sentenced".

[5] Subs., *ibid.*, for s. 55A which had been ins. by the A. O. 1937.

[6] Ins. by Act of 1955, s. 117 and Sch.

[7] Subs. by Act 8 of 1882, s. 2, for "in every case in which an offender is sentenced to a fine".

and in every case of an offence punishable [1][with imprisonment or fine, or] with fine only, in which the offenders is sentenced to a fine,]

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

67. If the offence be punishable with fine only, [2][the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Chapter IV

General Exceptions

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations

(*a*) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(*b*) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment of order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

Illustration

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

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[1] Ins. by Act 10 of 1886, s. 21(2).
[2] Ins. by Act 8 of 1882, s. 3.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation.—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations

(*a*) A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down C.

(*b*) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

82. Nothing is an offence which is done by a child under seven years of age.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

85. Nothing is an offense which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

87. Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

88. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under the painful complaint, but not intending to cause Z's death, and intending, in good faith Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

89. Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person: Provided—

First.—That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

91. The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

92. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided—

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations

(*a*) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(*b*) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(*d*) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

Explanation.—Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

94. Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Of the Right of Private Defence

96. Nothing is an offence which is done in the exercise of the right of private defence.

97. Every person has a right, subject to the restrictions contained in section 99, to defend—

First.—His own body, and the body of any other person, against any offence affecting the human body;

Secondly.—The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(*a*) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(*b*) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

99. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.—An assault with the intention of committing rape;

Fourthly.—An assault with the intention of gratifying unnatural lust;

Fifthly.—An assault with the intention of kidnapping or abducting;

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

101. If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99 to the voluntary causing to the assailant of any harm other than death.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

103. The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:—

First.—Robbery;

Secondly.—House-breaking by night;

Thirdly.—Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.—Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. If the offence, the committing of which, or the attempting to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

105. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

106. If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

Chapter V

Of Abetment

107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

108. A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor or any guilty intention or knowledge.

Illustrations

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d) A intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence the abetment of such an abetment is also an offence.

Illustration

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

Illustration

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.

[1] [108A. A person abets an offence within the meaning of this Code who, in [2] [India], abets the commission of any act without and beyond [2] [India] which would constitute an offence if committed in [2] [India].

Illustration

A, in [2] [India], instigates B, a foreigner in Goa, to commit a murder in Goa A is guilty of abetting murder.]

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161.

(*b*) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(*c*) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

110. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations

(*a*) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(*b*) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(*c*) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

112. If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitute a distinct offence, the abettor is liable to punishment for each of the offences.

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[1] Added by Act 4 of 1898, s. 3.

[2] Subs. by Act 3 of 1951 for "the States".

Illustration

A instigates B to resist by force a distress made by a public servant. B, in consequence resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress A will also be liable to punishment for each of the offences.

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

114. Whenever any person who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

115. Whoever abets the commission of an offence punishable with death or [1][imprisonment for life], shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or [1][imprisonment for life]. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

116. Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence, or with both;

and if the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(*b*) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

(*c*) A, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) B abets the commission of a robbery by A, a police-officer, whose duty it is to prevent that offence. Here though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

117. Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

118. Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or [1][imprisonment for life],

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence or makes any representation which he knows to be false respecting such design,

shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description, for a term which may extend to three years; and in either case shall also be liable to fine.

Illustration

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

119. Whoever, being a public servant intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

or, if the offence be punishable with death or [1] [imprisonment for life], with imprisonment of either description for a term which may extend to ten years;

or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment or with such fine as is provided for the offence, or with both.

Illustration

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design and is liable to punishment according to the provision of this section.

120. Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

[1] [*Chapter VA*

Criminal Conspiracy

120A. When two or more persons agree to do, or cause to be done,—

(*1*) an illegal act, or

(*2*) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120B. (*1*) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [2] [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(*2*) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

Chapter VI

Of Offences against the State

121. Whoever wages war against the [3] [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [4] [imprisonment for life], [5] [and shall also be liable to fine].

[6] [*Illustration.*]

[7] * * * A joins an insurrection against the [3] [Government of India]. A has committed the offence defined in this section.

[8] * * * * * * *

[9] [121A. Whoever within or without [10] [India] conspires to commit any of the offences punishable by section 121, [11] * * * or conspires to overawe, by means of criminal force or the show of criminal force, [12] [the Central Government or any State Government [13] * * *], shall be punished with [14] [imprisonment for life], or with imprisonment of either description which may extend to ten years,[15] [and shall also be liable to fine].

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.]

122. Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against

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[1] Ins. by Act 8 of 1913, s. 3.
[2] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation".
[3] Subs by the A.O. 1950 for "Queen".
[4] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[5] Subs. by Act 16 of 1921, s. 2, for "and shall forfeit all his property".
[6] Subs. by Act 36 of 1957, s. 3 and Sch. II for "Illustrations".
[7] The brackets and letter "(*a*)" omitted by s. 3 and Sch. II, *ibid.*
[8] Illustration (*b*) rep. by the A. O. 1950.
[9] S. 121 A ins. by Act 27 of 1870, s. 4.
[10] Subs. by Act 3 of 1951 for "the States".
[11] The words "or to deprive the Queen of the sovereignty of the Provinces or of any part thereof" omitted by the A. O. 1950.
[12] Subs. by the A. O. 1937 for "the G. of I. or any L. G.".
[13] The words "or the Govt. of Burma" rep. by the A. O. 1948.
[14] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life or any shorter term".
[15] Ins. by Act 16 of 1921, s. 3.

the [1] [Government of India], shall be punished with [2] [imprisonment for life] or imprisonment of either description for a term not exceeding ten years,[3] [and shall also be liable to fine].

123. Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the [1] [Government of India], intending by such concealment will facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

124. Whoever, with the intention of inducing or compelling the [4] [President] of India, or [5] [Governor [6]] of any State,[7] * * * [8] * * * [9]

to exercise or refrain from exercising in any maner any of the lawful powers of such [10] [President or [Governor [6] * * *]],

assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such [10] [President or [11] [Governor [12] * * *]].

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[13] [124A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards,[14] * * * the Government established by law in [15] [India].[16] * * * shall be punished with [17] [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.]

125. Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the [15] [Government] or attempts to wage such war, or abets the waging of such war, shall be punished with [19] [imprisonment for life], to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

126. Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the [18] [Government], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

127. Whoever receives any property knowing the same to have been taken in

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[1] Subs. by the A. O. 1950 for "Queen".
[2] Subs. by Act 26 of 1955, s. 117, and Sch., for "transportation for life".
[3] Subs. by Act 16 of 1921, s. 2, for "and shall forfeit all his property".
[4] Subs. by the A. O. 1950 for "Governor General".
[5] Subs. by Act 3 of 1951 for "Governor".
[6] The words "or Rajpramukh" omitted by the Adaptation of Laws (No. 2) Order, 1956.
[7] The words "or a Lieutenant-Governor" rep. by the A. O. 1937.
[8] The words "or a Member of the Council of the Governor General of India" rep. by the A. O. 1948.
[9] The words "or of the Council of any Presidency" rep. by the A. O. 1937.
[10] The original words "Governor General, Governor, Lieutenant-Governor or Member of Council" have successively been amended by the A. O. 1937, A. O. 1948 and A. O. 1950 to read as above.
[11] Subs. by Act 3 of 1951 for "Governor".
[12] The words "or Rajpramukh" omitted by the Adaptation of Laws (No. 2) Order, 1956.
[13] Subs. by Act 4 of 1898, s. 4, for the original s. 124A which had been ins. by Act 27 of 1870, s. 5.
[14] The words "Her Majesty or" rep. by the A. O. 1950. The words "or the Crown Representative" ins. after the word "Majesty" by the A. O. 1937 were rep. by the A. O. 1948.
[15] Subs. by the Act 3 of 1951 for "the States".
[16] The words "or British Burma" ins. by the A. O. 1937 rep. by the A. O. 1948.
[17] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life or any shorter term".
[18] Subs. by the A. O. 1950 for "Queen".
[19] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

128. Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with [1] [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

129. Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

130. Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A State prisoner of prisoner of war, who is permitted to be at large on his parole within certain limits in [2] [India], is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

Chapter VII

Of Offences Relatng to the Army, [3] [Navy and Air Force]

131. Whoever abets the committing of mutiny by an officer, soldier, [4] [sailor or airman], in the Army, [5] [Navy or Air Force] of the [6] [Government of India] or attempts to seduce any such officer, soldier, [4] [Sailor or airman] from his allegiance or his duty, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[7] [*Explanation.*—In this section the words "officer", [8] ["soldier"], [9] ["sailor"] ["airman"] include any person subject to the [10] [Army Act], [11] [the Army Act, 1950], [9] [the Naval Discipline Act, [12] * * * the Indian Navy (Discipline) Act, 1934] [13] [the Air Force Act or [14] [the Air Force Act, 1950]], as the case may be].]

132. Whoever abets the committing of mutiny by an officer, soldier, [4] [sailor or airman], in the Army,[5] [Navy or Air Force] of the [15] [Government of India], shall, if mutiny be committed in consequence of that abetment, be punished with death or with [1] [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

133. Whoever abets an assault by an officer, soldier, [4] [sailor or airman], in the Army [1] [Navy or Air Force] of the [15] [Government of India], on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

An assault by an officer, soldier,[4] [sailor or airman], in the Army,[4] [Navy or Air Force] of the [15] [Government of India], on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] Subs. by Act 3 of 1951 for "the States".
[3] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "and Navy".
[4] Subs. by s. 2 and Sch. I, *ibid.*, for "or sailor".
[5] Subs. by s. 2 and Sch. I, *ibid.*, for "or Navy".
[6] Subs. by the A. O. 1950 for "Queen".
[7] Ins. by Act 27 of 1870, s. 6.
[8] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "and 'soldier' ".
[9] Ins. by Act 36 of 1934, s. 2 and Sch.
[10] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "Articles of War, for the better government of Her Majesty s Army, or to the Articles of War contained in Act No. 5 of 1869".
[11] Subs. by Act 3 of 1951 for "the Indian Army Act, 1911".
[12] The words "or that Act as modified by" were rep. by the A. O. 1950.
[13] Subs. by Act 14 of 1932, s. 130 and Sch., for "or the Air Force Act".
[14] Subs. by Act 3 of 1951 for "the Indian Air Force Act, 1932".
[15] Subs. by the A. O. 1950 for "Queen".

abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

135. Whoever abets the desertion of any officer, soldier, [1][sailor or airman], in the Army, [2][Navy or Air Force] of the [3][Government of India], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

136. Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, [1][sailor or airman], in the Army, [2][Navy or Air Force] of the [3][Government of India], has deserted, harbours such officer, soldier, [3][sailor or airman], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

137. The master or person in charge of a merchant vessel, on board of which any deserter from the Army, [2][Navy or Air Force] of the [3][Government of India] is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

138. Whoever abets what he knows to be an act of insubordination by an officer, soldier, [1][sailor or airman], in the Army, [2][Navy or Air Force], of the [3][Government of India], shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

138A. [*Application of foregoing sections to the Indian Marine Service.*] *Rep. by the Amending Act, 1934 (35 of 1934), s. 2 and Sch. Sch.*

139. No person subject to [4][the Army Act, [5][the Army Act, 1950], the Naval Discipline Act, [6][[7]* * * the Indian Navy (Discipline) Act, 1934,] [8][the Air Force Act or [9][the Air Force Act, 1950]]], is subject to punishment under this Code for any of the offences defined in this Chapter.

140. Whoever, not being a soldier, [10][sailor or airman] in the Military, [11][Naval or Air] service of the [3][Government of India], wears any garb or carries any token resembling any garb or token used by such a soldier, [10][sailor or airman] with the intention that it may be believed that he is such a soldier, [10][sailor or airman], shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Chapter VIII

Of Offenses Against the Public Tranquillity

141. An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

First.—To overawe by criminal force, or show of criminal force, [12][the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

Fourth.—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the

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[1] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "or sailor".
[2] Subs. by s. 2 and Sch. I, *ibid.*, for "or Navy".
[3] Subs. by the A. O. 1950 for "Queen".
[4] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy".
[5] Subs. by Act 3 of 1951 for "the Indian Army Act, 1911".
[6] Ins. by Act 35 of 1934, s. 2 and Sch.
[7] The words "or that Act as modified by" were rep. by the A. O. 1950.
[8] Subs. by Act 14 of 1932, s. 130 and Sch., for "or the Air Force Act".
[9] Subs. by Act 3 of 1951 for "the Indian Air Force Act, 1932".
[10] Ins. by Act 10 of 1927, s. 2 and Sch. I.
[11] Subs. by s. 2 and Sch. I, *ibid.*, for "or Naval".
[12] Subs. by the A. O. 1950 for "the Central or any Provincial Government or Legislature".

enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

142. Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine or with both.

144. Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Whover is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

148. Whover is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

150. Whover hires or engages, or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

151. Whover knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Exploration.—If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

152. Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

153. Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed,

with Imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[1] [153A. Whoever—

(*a*) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes, or attempts to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, feelings of enmity or hatred between different religious, racial or language groups or castes or communities, or

(*b*) commits any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which disturbs or is likely to disturb the public tranquillity,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.]

154. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

157. Whosoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

158. Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

and whoever, being so engaged or hired as aforesaid, goes armed or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

159. When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray".

160. Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

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[1] Subs. by Act 41 of 1961, s. 2, for s. 153A which was ins. by Act 4 of 1898, s. 5.

Chapter IX

Of Offenses by or Relating to Public Servants

161. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with [1] [the Central or any State Government or Parliament or the Legislature of any State] [2] [or with any local authority, corporation or Government company referred to in section 21], or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—"Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offense defined in this section.

"Gratification." The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.

"Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government, which he serves, to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations

(*a*) A, munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section.

(*b*) A, holding the office of [3] [Consul in a Foreign State], accepts a lakh of rupees from the Minister of [4] [that State]. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to [4] [that State] with the [5] [Government of India]. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to [4] [that State]. A has committed the offence defined in this section.

(*c*) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

162. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any persons, with [6] [the Central or Any State Government or Parliament or the Legislature of any State] [7] [or with any local authority, corporation or Government company referred to in section 21], or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the offi-

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[1] Subs. by the A. O. 1950, for "the Central or any Provincial Government or Legislature".
[2] Ins. by Act 40 of 1964, s. 2.
[3] Subs. by the A. O. 1950, for "Resident at the Court of a subsidiary Power".
[4] Subs., *ibid.*, for "that Power".
[5] Subs., *ibid.*, for "British Government".
[6] Subs., *ibid.*, for "the Central or any Provincial Government or Legislature".
[7] Ins. by Act 40 of 1964, s. 2.

cial functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with [1][the Central or any State Government or Parliament or the Legislature of any State] [2][or with any local authority, corporation or Government company referred to in section 21], or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustrations

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust,—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with [3][imprisonment of either description for a term which may extend to three years], or with fine, or with both.

Illustrations

(*a*) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in goodfaith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(*b*) A, a Judge, buys of Z, who has a cause pending in A's Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(*c*) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

[4][165A. Whoever, abets any office punishable under section 161 or section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

166. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

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[1] Subs. by the A. O. 1950, for "the Central or any Provincial Government or Legislature".
[2] Ins. by Act 40 of 1964, s. 2.
[3] Subs. by Act 46 of 1952, s. 2, for "simple imprisonment for a term which may extend to two years".
[4] Ins. by Act 46 of 1952, s. 3.

Illustration

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

167. Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

168. Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

169. Whoever, being a public servant, and being legally bound as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

171. Whoever, not belonging to a certain class of public servants wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description, for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

[1] [*Chapter IX*A

Of Offences Relating to Elections

171A. For the purposes of this Chapter—

(*a*) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat: provided that he is subsequently nominated as a candidate at such election;

(*b*) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.

171B. (*1*) Whoever—

(*i*) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(*ii*) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery:

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(*2*) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(*3*) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

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[1] Chapter IXA was ins. by Act 39 of 1920, s. 2.

171C. (*1*) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offense of undue influence at an election.

(*2*) Without prejudice to the generality of the provisions of subsection (*1*), whoever—

(*a*) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(*b*) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (*1*).

(*3*) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

171D. Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election.

171E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation.—"Treating" means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

171F. Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.

171G. Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

171H. Whoever without the general or special authority in writing of a candidate incurs or authorizes expenses on account of the holding of any public meeting or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

171I. Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.]

Chapter X

Of Contempts of the Lawful Authority of Public Servants

172. Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

174. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

(*a*) A, being legally bound to appear before the [1] [High Court] at Calcutta in obedience to a subpoena issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(*b*) A, being legally bound to appear before a [2] [District Judge], as a witness, in obedience to a summons issued by that [3] [District Judge] intentionally omits to appear. A has committed the offence defined in this section.

175. Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustration

A, being legally bound to produce a document before a [3] [District Court], intentionally omits to produce the same. A has committed the offence defined in this section.

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

[4] [or, if the notice or information required to be given is required by an order passed under sub-section (*1*) of section 565 of the Code of Criminal Procedure, 1898, with imprisonment of either description for a term which may extend

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[1] Subs. by the A. O. 1950 for "Supreme Court".
[2] Subs., *ibid.*, for "Zila Judge".
[3] Subs., *ibid.*, for "Zila Court".
[4] Ins. by Act 22 of 1939, s. 2.

to six months, or with fine which may extend to one thousand rupees, or with both.]

177. Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(*a*) A, a landholder, knowing of the commisison of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(*b*) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound under clause 5, section VII, [1] Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police-station, wilfully misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in the latter part of this section.

[2] [*Explanation.*—In section 176 and in this section the word "offence" includes any act committed at any place out of [3] [India], which, if committed in [3] [India], would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word "offender" includes any person who is alleged to have been guilty of any such act.]

178. Whoever refuses to bind himself by an oath [4] [or affirmation] to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

179. Whoever, being legally bound to state the truth on any subject to any pjublic servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

180. Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

181. Whoever, being legally bound by an oath [4] [or affirmation] to state the truth on any subject to any public servant or other person authorized by law to administer such oath [1] [or affirmation], makes, to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[5] [182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

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[1] Rep. by Act 17 of 1862.
[2] Ins. by Act 3 of 1894, s. 5.
[3] Subs. by Act 3 of 1951 for "the States".
[4] Ins. by Act 10 of 1873, s. 15.
[5] Subs. by Act 3 of 1895, s. 1, for the original s. 182.

(*a*) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(*b*) to use the lawful power of such public servant to the injury or annoyance of any person.

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

(*a*) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(*b*) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(*c*) A falsely informs a policeman that he has been assaulted and robbed in the neighborhod of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.]

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

184. Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

185. Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

186. Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

187. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

188. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend

to one month or with fine which may extend to two hundred rupees, or with both :

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

Illustration

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both.

190. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Chapter XI

Of False Evidence and Offences Against Public Justice

191. Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this section whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations

(*a*) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(*b*) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(*c*) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(*d*) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(*e*) A, an interpretor or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

192. Whoever causes any circumstances to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding is said "to fabricate false evidence."

Illustrations

(*a*) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(*b*) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(*c*) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. A has fabricated false evidence.

193. Whoever intentionally gives false evidence in any stage of a judical proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a court-martial [1] * * * is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital [2] [by the laws for the time being in force in [3] [India]] shall be punished with [4] [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

195. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which [3] [by the law for the time being in force in [2] [India]] is not

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[1] The words "or before a Military Court of Request" were omitted by the Cantonments Act, 1889 (13 of 1889).

[2] Subs. by Act 3 of 1951 for "the States".

[3] Subs. by the A. O. 1948 for "by the law of British India or England".

[4] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

capital, but punishable with [1] [imprisonment for life], or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Illustration

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is [2] [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to [2] [imprisonment for life] or imprisonment, with or without fine.

196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

197. Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

198. Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if the offence is punishable with [1] [imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Illustration

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

203. Whoever, knowing or having reason to believe that an offense has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "such transportation".
[2] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[1] [*Explanation.*—In sections 201 and 202 and in this section the word "offence" includes any act committed at any place out of [2] [India], which, if committed in [2] [India], would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.]

204. Whoever secrets or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

205. Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment or either description for a term which may extend to three years, or with fine, or with both.

206. Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

207. Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practices any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

208. Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offense under this section.

209. Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

210. Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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[1] Ins. by Act 3 of 1894, s. 7.
[2] Subs. by Act 3 of 1951 for "the States".

211. Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceedings against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if such criminal proceeding be instituted on a false charge of an offense punishable with death, [1] [imprisonment for life], or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

212. Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment,

shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and also be liable to fine.

and if the offence is punishable with [1] [imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punishable with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

[2] ["Offence" in this section includes any act committed at any place out of [3] [India], which, if committed in [3] [India], would be punishable under any of the following sections, namely 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty if it in [4] [India].]

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to [1] [imprisonment for life], A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

213. Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

shall if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine:

and if the offence is punishable with [1] [imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or [4] [restores or causes the restoration of] any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

shall, if the offence is punishable with death, be punished with imprisonment

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] Ins. by Act 3 of 1894, s. 7.
[3] Subs. by Act 3 of 1951 for "the States".
[4] Sub. by Act of 1953, s. 4 and Sch. III, for "to restore or cause the restoration of".

of either description for a term which may extend to seven years, and may also be liable to fine;

and if the offence is punishable with [1] [imprisonment for life] or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term or imprisonment provided for the offence, or with fine, or with both.

[2] [*Exception.*—The provisions of section 213 and 214 do not extend to any case in which the offence may lawfully be compounded.]

[*Illustrations.*] *Rep. by the Code of Criminal Procedure, 1882 (10 of 1882).*

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

216. Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody,

or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,

If the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine:

If the offence is punishable with [3] [imprisonment for life] or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence or with fine, or with both.

[3] ["Offence" in this section includes also any act or omission of which a person is alleged to have been guilty of [4] [India] which if he had been guilty he is, [4] [India] would have been punishable as an offence, and for which he is, under any law relating to extradition, [5] * * *, or otherwise liable to be apprehended or detained in custody in [4] [India], and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in [4] [India].]

Exception.—The provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

[6] [216A. Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without [4] [India].

Exception.—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.]

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] Subs. by Act 8 of 1882, s. 6 for the original Exception.
[3] Ins. by Act 10 of 1886, s. 23.
[4] Subs. by Act 3 of 1951 for "the States".
[5] The words "or under the Fugitive Offenders Act, 1881" were omitted, *ibid.*
[6] Ins. by Act 3 of 1894, s. 8.

216B. [*Definition of harbour" in sections 212, 216 and 216A.*] *Rep. by the Indian Penal Code (Amendment) Act, 1942 (8 of 1942), s. 3.*

217. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

218. Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

221. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death ; or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with [1] [imprisonment for life] or imprisonment for a term which may extend to ten years ; or

With imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

222. Whoever, being a public servant, legally bound as such public servant to apprehend tor to keep in confinement any person under sentence of a Court of Justice for any offence [2] [or lawfully committed to custody], intentionally omits to apprehended such person, or intentionally suffers such person to escape or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

with [1] [imprisonment for life] or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death ; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[2] Ins. by Act 27 of 1870, s. 8.

a commutation of such sentence, to [1] [imprisonment for life] [2] * * * [3] * * * [4] * * * [5] * * * or imprisonment for a term of ten years or upwards; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years [1] [or if the person was lawfully committed to custody].

223. Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence [1] [or lawfully committed to custody], negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

225. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with [1][imprisonment for life] or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to [1] [imprisonment for life], [3] * * * [4] * * * [6] * * * or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with [1][imprisonment for life] or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

[7] [225A. Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished—

(*a*) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine or with both; and

(*b*) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

225B. Whoever, in any case not provided for in section 224 or section 225 or in any other law for the time being in force, intentionally offers any resistance

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[1] Subs. by Act 26 of 1955 s. 117 and Sch. for "transportation for life".
[2] The words "or penal servitude for life" were omitted by Act 17 of 1949, s. 2.
[3] The words "or to" omitted by Act 36 of 1957 s. 3 and Sch. II.
[4] The word "transportation" was omitted by Act 26 of 1955 s. 117 and Sch.
[5] The words "or penal servitude" were omitted by Act 17 of 1949 s. 2.
[6] The words "penal servitude" were rep. by Act 17 of 1949 s. 2.
[7] Ss. 225A and 225B were subs. by Act 10 of 1886 s. 24(*1*) for s. 225A which had been ins. by Act 27 of 1870 s. 9.

or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

226. [*Unlawful return from transportation.*] *Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), s. 117 and Sch.*

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

228. Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Chapter XII

Of Offences Relating to Coin and Government Stamps

230. [1] [Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.]

[2] [Indian coin is metal stamped and issued by the authority of the Government of India in order to be used as money; and metal which has been so stamped and issued shall continue to be Indian coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.]

Illustrations

(*a*) Cowries are not coin.

(*b*) Lumps of unstamped copper, though used as money, are not coin.

(*c*) Medals are not coin, inasmuch as they are not intended to be used as money.

(*d*) The coin denominated as the Company's rupee is [3] [Indian coin].

[4] [(*e*) The "Farukhabad" rupee, which was formerly used as money under the authority of the Government of India, is [3] [Indian coin] although it is no longer so used.]

231. Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A person commits this offence who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

232. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting [3] [Indian coin], shall be punished with [5] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprison-

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[1] Subs. by Act 19 of 1872 for the original paragraph.
[2] Subs. by the A.O. 1950 for the former paragraph.
[3] Subs., *ibid.*, for "the Queen's coin".
[4] Ins. by Act 6 of 1896 s. 1 (2).
[5] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

ment of either description for a term which may extend to three years, and shall also be liable to fine.

234. Whoever makes or mends, or performs any part of the process of making or mending or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting [1] [Indian coin], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

235. Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the coin to be counterfeited is [1] [Indian coin], shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

236. Whoever, being within [2] [India], abets the counterfeiting of coin out of [2] [India] shall be punished in the same manner as if he abetted the counterfeiting of such coin within [2] [India].

237. whoever imports into [2] [India], or exports therefrom, and counterfeit coin, knowingly or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

238. Whoever imports into [2] [India], or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of [1] [Indian coin], shall be punished with [3] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

239. Whoever, having any counterfeit coin, which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

240. Whoever, having any counterfeit coin, which is a counterfeit of [1] [Indian coin], and which, at the time when he became possessed of it, he knew to be a a counterfeit of [1] [Indian coin], fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240, as the case may be.

242. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

243. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of [1] [Indian coin], having

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[1] Subs. by the A.O. 1950 for "the Queen's coin".
[2] Subs. by Act 3 of 1951 for "the States".
[3] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

244. Whoever, being employed in any mint lawfully established in [1] [India], does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in [1] [India], any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

246. Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—A person who scoops out part of the coin and puts anything else into the cavity alters the composition of the coin.

247. Whoever fraudulently or dishonestly performs on [2] [any Indian coin] any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

249. Whoever performs on [2] [any Indian coin] any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

250. Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

251. Whoever, having coin in his possession with repect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

252. Whoever fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

253. Whoever fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247, or 249 has been committed having known at the time of becoming possessed thereof, that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249

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[1] Subs. by Act 3 of 1951 for "the States".
[2] Subs. by the A.O. 1950 for "any of the Queen's coin".

has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

255. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with [1] [imprisonment for life] or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

256. Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

257. Whoever makes or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

259. Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

261. Whoever fraudulently or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

262. Whoever fraudulently or with intend to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

263. Whoever fraudulently or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark, put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession or sells or disposes of any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[2] [263A. (*1*) Whoever—

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp, or

(*c*) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[2] S. 263A ins. by Act 3 of 1895, s. 2.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp[1] [may be seized and, if seized] shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word "Government" when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.]

Chapter XIII

Of Offences Relating to Weights and Measures

264. Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

265. Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

266. Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, [2] * * * intending that the same may be fradulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

267. Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order that the same be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

269. Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

270. Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

271. Whoever knowingly disobeys any rule made and promulgated [3] [by the [4] * * * Government [5] * * *] for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

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[1] Subs. by Act 42 of 1953, s. 4 and Sch. III, for "may be seized and".
[2] The word "and" was omitted by Act 42 of 1953, s. 4 and Sch. III.
[3] Subs. by the A.O. 1937 for "by the G. of I., or by any Govt. ".
[4] The words "Central or any Provincial" were rep. by the A.O. 1950.
[5] The words "or the Crown Representative" were rep. by the A.O. 1948.

272. Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

274. Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

275. Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extent to six months, or with fine which may extend to one thousand rupees, or with both.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

277. Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

279. Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

280. Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

281. Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

282. Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person,

or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against probable danger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fire which may extend to one thousand rupees, or with both.

286. Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

289. Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

291. Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

[1] [292. Whoever—

(*a*) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(*b*) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(*c*) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

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[1] Subs. by Act 8 of 1925, s. 2, for the original s. 292.

(*d*) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(*e*) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bonâ fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]

[1] [293. Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

[2] [294. Whoever, to the annoyance of others,

(*a*) does any obscene act in any public place, or

(*b*) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

[3] [294A. Whoever keeps any office or place for the purpose of drawing any lottery [4] [not being [5] [a State lottery] or a lottery authorized by the State Government] shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery shall be punished with fine which may extend to one thousand rupees.]

Chapter XV

Of Offences Relating to Religion

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[6] [295A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [7] [citizens of India],[8] [by words, either spoken or written, or by signs or by visible representations or otherwise] insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [9] [three years], or with fine, or with both.]

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

297. Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

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[1] Subs. by Act 8 of 1925, s. 2, for the original s. 293.
[2] Subs. byAct 3 of 1895, s. 3, for the original s. 294.
[3] S. 294A ins. by Act 27 of 1870, s. 10.
[4] Subs. by the A.O. 1937 for "not authorized by Govt.".
[5] Subs. by Act 3 of 1951 for "a lottery organised by the Central Government or the Government of a Part A State or a Part B State" which had been subs. by the A.O. 1950 for "a State lottery".
[6] Ins. by Act 25 of 1927, s. 2.
[7] Subs. by the A.O. of 1950 for "His Majesty's subjects".
[8] Subs. by Act 41 of 1961, s. 3, for certain words.
[9] Subs. by s. 3, *ibid.*, for "two years".

commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

298. Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Chapter XVI

Of Offences Affecting the Human Body

Of offences affecting life

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(*a*) A lay sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(*b*) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(*c*) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(*a*) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(*b*) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a per-

son in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(*c*) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(*d*) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enought to prevent the offence from amounting to murder is a question of fact.

Illustrations

(*a*) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(*b*) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(*c*) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(*e*) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(*f*) Z strikes B. B is by this provocation excited to violent rage. A, a by-stander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence or person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

302. Whoever commits murder shall be punished with death, or [1][imprisonment for life], and shall also be liable to fine.

303. Whoever, being under sentence of [1][imprisonment for life], commits murder, shall be punished with death.

304. Whoever commits culpable homicide not amounting to murder shall be punished with [1] [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

[2] [304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or [1] [imprisonment for life], or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

306. If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

307. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to [1] [imprisonment for life], or to such punishment as is hereinbefore mentioned.

[3] [When any person offending under this section is under sentence of [1] [imprisonment for life], he may, if hurt is caused, be punished with death.]

Illustrations

(*a*) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(*b*) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] S. 304A was ins. by Act 27 of 1870, s. 12.
[3] Ins. by Act. 24 of 1870, s. 11.

(*c*) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of [1] [the first paragraph of] this section.

(*d*) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

308. Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

309. Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year [2] [or with fine, or with both].

310. Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

311. Whoever is a thug, shall be punished with [3] [imprisonment for life], and shall also be liable to fine.

Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births.

312. Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

313. Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [3] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

and if the act is done without the consent of the woman, shall be punished either with [3] [imprisonment for life], or with the punishment above mentioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

316. Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the

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[1] Ins. by Act 12 of 1891, Sch. II.
[2] Subs. by Act 8 of 1882, s. 7, for "and shall also be liable to fine".
[3] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

317. Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die inconsequence of the exposure.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Of hurt

319. Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

320. The following kinds of hurt only are designated as "grievous":—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A his voluntarily caused grievous hurt.

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt be means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive sub-

stance, or by means of explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

326. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substances, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

327. Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

328. Whoever administers to or causes to be taken by any person any poison or any stupefying intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with [1] [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

330. Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations

(*a*) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(*b*) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(*c*) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(*d*) A, a zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of an offense or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such

[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

335. Whoever [1] [voluntarily] causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Of wrongful restraint and wrongful confinement.

339. Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations

(*a*) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(*b*) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

341. Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

342. Whoever wrongfully confines any person, shall be punished with imprisonment or either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

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[1] Ins. by Act of 1882, s. 8.

343. Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

344. Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

347. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Of criminal force and assault

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion, or to cease to move.

350. Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations

(*a*) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(*b*) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(*c*) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(*d*) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(*e*) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(*f*) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(*g*) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has therefore intentionally used force to Z; and if he has done this without Z's consent intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(*h*) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

351. Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(*a*) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(*b*) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(*c*) A takes up a stick, saying to Z, "I will give you a beating". Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

353. Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both.

354. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or wtih fine, or with both.

356. Whoever assaults or uses criminal force to any person in attempting to commit theft on any property which that person is then wearing or carrying shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

357. Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Explanation.—The last section is subject to the same explanation as section 352.

Of Kidnapping, Abduction, Slavery and Forced Labour

359. Kidnapping is of two kinds: kidnapping from [1] [India], and kidnapping from lawful guardianship.

360. Whoever conveys any person beyond the limits of [1][India] without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from [1] [India].

361. Whoever takes or entices any minor under [2] [sixteen] years of age if a male, or under [3] [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

362. Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.

363. Whoever kidnaps any person from [1] [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[4] [363A. (*1*) Whoever kidnaps any minor, or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(*2*) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life, and shall also be liable to fine.

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[1] Subs. by Act 3 of 1951 for "the States".
[2] Subs. by Act 42 of 1949, s. 2, for "fourteen".
[3] Subs., *ibid.*, for "sixteen".
[4] Ins. by Act 52 of 1959, s. 2 (w.e.f. 15-1-1960).

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section,—

(*a*) "begging" means—

(*i*) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;

(*ii*) entering on any private premises for the purpose of soliciting or receiving alms;

(*iii*) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

(*iv*) using a minor as an exhibit for the purpose of soliciting or receiving alms;

(*b*) "minor" means—

(*i*) in the case of a male, a person under sixteen years of age; and

(*ii*) in the case of a female, a person under eighteen years of age]

364. Whoever kidnaps or abducts any persons in order that such person may be murdered or may be so disposed of as to put in danger of being murdered, shall be punished with [1] [imprisonment for life] or rigorous imprisonment for a term which may be extend to ten years, and shall also be liable to fine.

Illustrations

(*a*) A kidnaps Z from [2] [India], intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(*b*) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

365. Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Whoever kidnaps or abducts any woman with intent that she mey be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [3][and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

[4] [336A. Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

336B. Whoever imports into [2] [India] from any country outside India [5] [or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person,

[6] * * *

shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] Subs. by Act 3 of 1951, s. 3 and Sch., for "the States".
[3] Ins. by Act 20 of 1923, s. 2.
[4] Ins. by Act 20 of 1923, s. 3.
[5] Ins. by s. 3 adn Sch., *ibid.*
[6] Certain words omitted by s. 3 and Sch., *ibid.*

367. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kiddnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

369. Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

370. Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

371. Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with [1][imprisonment for life], or with imprisonment of either description for a term not exceedng ten years, and shall also be liable to fine.

372. Whoever sells, lets to hire or otherwise disposes of any [2][person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose or knowing it to be likely that such person will at any age be] employed or used for any such purpose shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

[3][*Explanation I.*—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage, or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a *quasi*-marital relation.]

373. Whoever buys, hires or otherwise obtains possession of any [2][person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[4][*Explanation I.*—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—"Illicit intercourse" has the same meaning as in section 372.]

374. Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[2] Subs. by Act 18 of 1924, s. 2, for "minor under the age of eighteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be".

[3] Ins. by s. 3, *ibid.*

[4] Ins. by s. 4, ibid.

Of rape

375. A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under [1] [sixteen] years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under [1] [fifteen] years of age, is not rape.

376. Whoever commits rape shall be punished with [2] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, [3] [unless the woman raped is his own wife, and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, of with fine, or with both.]

Of Unnatural Offences

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with [2] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Chapter XVII

Of Offences Against Property

Of Theft

378. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft ; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(*a*) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(*b*) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession

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[1] The original word "ten" has successively been amended by Acts 10 of 1891, 29 of 1925 and Act 42 of 1949, s. 3, to read as above.

[2] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[3] Ins. by Act 29 of 1925, s. 3.

without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(*c*) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soons as the bullock begins to move, A has committed theft of the treasure.

(*d*) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with plate, without Z's consent. A has committed theft.

(*e*) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(*f*) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(*g*) A finds a ring lying on the high-road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(*h*) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(*i*) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(*j*) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(*k*) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

(*l*) A takes an article belonging to Z out of Z's possession without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(*m*) A, being an friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(*n*) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(*o*) A is the paramour of Z's wife. She gives a valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(*p*) A, in good faith, believing property belonging to Z to be A's own property takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three year, or with fine, or with both.

380. Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

381. Whoever being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(*a*) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(*b*) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Of Extortion

383. Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person to put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(*a*) A threatens to publish a dafamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*b*) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion.

(*c*) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(*d*) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

385. Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

388. Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with [1] [imprisonment for life], or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence to be punishable under section 377 of this Code, may be punished with [1] [imprisonment for life].

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with

[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[1] [imprisonment for life], or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with [1] [imprisonment for life].

Of Robbery and Dacoity

390. In all robbery there is either theft or extortion.

Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(*a*) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(*b*) A meets B on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extored the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(*c*) A meets Z and Z's child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(*d*) A obtains property from Z by saying—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with [1] [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

395. Whoever commits dacoity shall be punished with [1] [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or [1] [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

399. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

400. Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with [1] [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of *thugs* or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Of Criminal Misappropriation of Property

403. Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(*a*) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations

(*a*) A finds a rupee on the high-road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(*e*) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(*f*) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

404. Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Of Criminal Breach of Trust

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

Illustrations

(*a*) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(*b*) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(*c*) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(*d*) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(*e*) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

407. Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust, in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

408. Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

409. Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Of the receiving of stolen property

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which [2] * * * criminal breach of trust has been committed, is designated as 'stolen property", [3] [whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without [4] [India]]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

411. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

412. Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with [1][imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

414. Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Of Cheating

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] The words "the" and "offence of" were rep. by Act 12 of 1891, and Act 8 of 1882, s. 9, respectively.
[3] Ins. by Act 8 of 1882, s. 9.
[4] Subs. by Act 3 of 1951 for "the States".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(*a*) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(*b*) A, by putting a counterfeit mark on an article, intentially deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(*c*) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(*d*) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(*e*) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(*f*) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(*g*) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(*h*) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(*i*) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(*a*) A cheats by pretending to be a certain rich banker of the same name. A cheats my personation.

(*b*) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Of Fraudulent Deeds and Dispositions of Property

421. Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

423. Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

424. Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Of Mischief

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of theproperty injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(*a*) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committeed mischief.

(*b*) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(*c*) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(*d*) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(*e*) A having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(*f*) A causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.

(*g*) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(*h*) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

428. Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

429. Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for fod or drink for human beings or fo r animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

431. Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artifical, impassable or less safe for travelling or conveying propetry, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

432. Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation of an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

434. Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

435. Whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upward [1] [or (where the property is agricultural produce) ten rupees or upwards], shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

436. Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with [2] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

437. Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

438. Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with [2] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

439. Whoever intentionaly runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

440. Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of

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[1] Ins. by Act 8 of 1882, s. 10.
[2] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

441. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass".

442. Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

443. Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

444. Whoever commits lurking house-trespass after sunset and before sunrise is said to commit "lurking house-trespass by night".

445. A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :—

First.—If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(*a*) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is a house-breaking.

(*b*) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(*c*) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(*d*) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(*e*) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(*f*) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(*g*) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(*h*) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

446. Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night".

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with [1] [imprisonment for life], or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

450. Whoever commits house-trespass in order to the committing of any offence punishable with [1] [imprisonment for life], shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

452. Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

453. Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

454. Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

455. Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

456. Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

457. Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

458. Whoever commits lurking house-trespass by night or house-breaking by night, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

459. Whoever, whilst committing lurking house-trespass or house-breaking, causes grevious hurt to any person or attempts to cause death or grevious hurt to any person, shall be punished with [1] [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

460. If, at the time of the committing of lurking-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grevious hurt to any person, every person jointly concerned in committing such a lurking house-trespass by night or house-breaking by night, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

461. Whoever dishonesty or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

462. Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Chapter XVIII

Of Offences Relating to Documents and to [2] * * * Property Marks

463. Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

464. A person is said to make a false document—

First.—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

Illustrations

(*a*) A has a letter of credit upon B for rupees 10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 100,000 intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(*b*) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B and thereby of obtaining from B the purchase-money. A has committed forgery.

(*c*) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(*d*) A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

(*e*) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

[2] The words "Trade or" omitted by Act 43 of 1958, s.135 and Sch. (w.e.f. 25-11-1959).

deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(*f*) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(*g*) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order" and signing the endorsement. B dishonestly erases the words "Pay to Z or his order", and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(*h*) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(*i*) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(*j*) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(*k*) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations

(*a*) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(*b*) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(*c*) A picks up a bill of exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable; here A has committed forgery.

(*d*) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate, to Z at a nominal rent and for a long period and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(*e*) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2.—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

466. Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

467. Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

469. Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

470. A false document made wholly or in part by forgery is designated "a forged document."

471. Whoever fraudently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

472. Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punishable with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

473. Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

474. Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with [1] [imprisonment for life], or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

475. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

476. Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document other than the

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".

documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

477. Whoever fraudently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with [1] [imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[2] [477A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, willfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.]

Of [3] * * * Property and Other Marks

478. [Trade Mark.] Rep. by the Trade and Merchandise Marks Act, 1958 (43 of 1958), s. 135 and Sch. (w.e.f. 25th November, 1959).

[4] [479. A mark used for denoting that movable property belongs to a particular person is called a property mark.

480. [Using a false trade mark.] Rep. by the Trade and Merchandise Marks Act, 1958 (43 of 1958), s. 135 and Sch. (w.e.f. 25th November, 1959).

481. Whoever marks any movable property or goods or any case, package or other receptacle containing movable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

482. Whoever uses [5] * * * any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

483. Whoever counterfeits any [6] * * * property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

484. Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[7] [485. Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a property mark, or has in his possession a property mark for the purpose of denoting that any goods belong to a

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation for life".
[2] Ins. by Act 3 of 1895, s. 4.
[3] The word "trade", omitted by Act 43 of 1958, s. 135 and Sch. (w.e.f. 25-11-1959).
[4] Ss. 479 to 489 were subs. by Act 4 of 1889, s. 3, for the original sections.
[5] The words "any false trade mark or" omitted by Act 43 of 1958, s. 135 and Sch. (w.e.f. 25-11-1959).
[6] The words "trade mark or" omitted by s. 135 and Sch., *ibid.* (w.e.f. 25-11-1959).
[7] Subs. by Act 43 of 1958, s. 135 and Sch., for the former section (w.e.f. 25-11-1959).

person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

486. [1] [Whoever sells, or exposes, or has in possession for sale, any goods or things with a counterfeit property mark] affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section he had at the time of the commission of the alleged offence no reason to suspect the genuiness of the mark, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

he punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

Of currency-notes and bank-notes

[2] [489A. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with [3] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—For the purposes of this section and of sections 489B, [4] [489C, 489D and 489E], the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Soverign Power, and intended to be used as equivalent to, or as a substitute for money.

489B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with [3] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

489C. Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

489D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with [3] [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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[1] Subs. by s. 135 and Sch., *ibid.*, for certain words (w.e.f. 25-11-1959).
[2] Ss. 489A to 489D were ins. by Act 12 of 1899, s. 2.
[3] Subs. by Act of 26 of 1955, s. 117 and Sch., for "transportation for life".
[4] Subs. by Act 35 of 1950 for "489C and 489D".

[1][489E. (*1*) Whoever makes, or causes to be made, or usse for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note shall be punished with fine which may extend to one hundred rupees.

(*2*) If any person, whose name appears on a document the making of which is an offence under sub-section (*1*), refuses, without lawful excuse, to disclose to a police-officer on being so required the name and address of the person by whom it was printed or otherwise made, he shall be punished with fine which may extend to two hundred rupees.

(*3*) Where the name of any person appears on any document in respect of which any person is charged with an offence under subsection (*1*) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that that person caused the document to be made.

Chapter XIX

Of the Criminal Breach of Contracts of Service

490. [*Breach of contract of service during voyage or journey.*] *Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (3 of 1925), s. 2 and Sch.*

491. Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

492. [*Breach of contract to serve at distant place to which servant is conveyed at master's expense.*] *Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (3 of 1925), s. 2 and Sch.*

Chapter XX

Of Offences Relating to Marriage

493. Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

495. Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

496. Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

497. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the

[1] S. 489E was ins. by Act 6 of 1943, s. 2.

offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Chapter XXI

Of Defamation

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(*a*) A says—"Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(*b*) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character; so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever excepting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

(*a*) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(*b*) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity"; A is not within this exception, inasmuch as the opinion which expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by Z—"Z's book is foolish, Z must be a weak man. Z's book is indecent, Z must be a man of impure mind." A is within the exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(*e*) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Ninth Exception.—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations

(*a*) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

501. Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Chapter XXII

Of Criminal Intimidation, Insult and Annoyance

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing B to resist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

504. Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[1] [505. Whoever makes, publishes or circulates any statement, rumour or report,—

(*a*) with intent to cause, or which is likely to cause, any officer, soldier, [2] [sailor or airman] in the Army, [3] [Navy or Air Force] [4] [of India] to mutiny or otherwise disregard or fail in his duty as such; or

(*b*) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; or

(*c*) with intent to incite, or which is likely to incite, any class or community or persons to commit any offence against any other class or community,

shall be punished with imprisonment which may extend to [5] [three years], or with fine, or with both.

Exception.—It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement,

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[1] Subs. by Act 4 of 1898, s. 6, for the original section.
[2] Subs. by Act 10 of 1927, s. 2 and Sch. I, for "or sailor".
[3] Subs. by s. 2 and Sch. I, *ibid.*, for "or navy".
[4] Subs. by the A.O. 1950 for "of Her Majesty or in Imperial Service Troops". The words "or in the Royal Indian Marine" occurring after the word "Majesty" were rep. by Act 35 of 1934.
[5] Subs. by Act 41 of 1961, s. 4, for "two years".

rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.]

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both:

and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [1] [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

508. Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(*a*) A sits dhurna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of Divine displeasure. A has committed the offence defined in this section.

(*b*) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it as a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

Chapter XXIII

Of Attempts to Commit Offences

511. Whoever attempts to commit an offence punishable by this Code with [1] [imprisonment for life] or imprisonment, or to cause an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [2] [imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.

Illustrations

(*a*) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

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[1] Subs. by Act 26 of 1955, s. 117 and Sch., for "transportation".
[2] Subs., *ibid.*, for certain words.

(*b*) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

JAPAN

The present Penal Code of Japan has been in force since 1908. While several important revisions have been made in the Code itself, it still governs most of the fundamental aspects of the present-day administration of criminal justice in Japan. In 1961, the Japanese Government after a 5 year study by the Preparatory Commission, published *A Preparatory Draft for the Revised Penal Code* (referred to as the Preparatory Draft Code) which has yet to be enacted. The questionnaire will be answered largely on the basis of the present Penal Code unless significant changes are proposed in the Preparatory Draft Code.

1. The present Code consisting of the General Provisions (Part I) and Crimes (Part II) does not provide a sentencing system which would maintain the mechanical correlation between detailed degree of penalty and detailed degree of apparant gravity of criminal acts. Part I of the Preparatory Draft Code, however, contains a chapter dealing with sentencing (Articles 7 to 58; for more information see question No. 9 (a) below).

2. No numbering system is used; new articles are added to the original ones, e.g., Article 100, Article 100–1, Article 100–3, etc.

3. One of the two types of a state of mind, intent or negligence, is recognized as an essential element of any crime. In most cases, criminal intent is required; at a minimum, negligence is necessary. There is no statutory definition of either intent or negligence. Article 38 of the present Code briefly states that "an act done without criminal intent is not punishable except as otherwise specifically provided by statute" (also Article 18 of the Preparatory Code). The present Code specifically enumerates the following seven negligences as punishable: (1) Negligent fire (Articles 116 and 117–2); (2) Negligent explosion (Article 117); (3) Negligent flooding (Article 122); (4) Negligent obstruction of traffic (Article 129); (5) Negligent injury (Article 209); (6) Negligent homicide (Article 210); and (7) Causing death or personal injury through professional or gross negligence (Article 211).

In the case of intent, the Penal Code imposes a heavier penalty than in the case of negligence. A person who fails to use such care as is required in the conduct of his profession or occupation and thereby kills or injures another is considered to have committed a more serious offense and is dealt with more severely; a person who is guilty of gross negligence is treated similarly.

The present Penal Code, as well as the Preparatory Draft Code relating to the subjective element of crimes are intended to extend the coverage of the culpability principle as a restraint on the imposition of punishment (sentencing). The lack of specificity of the offender's criminal intent, defects in his mental capacity short of insanity, environmental factors contributing to the commission of crime, etc. are all considered by the sentencing court as circumstances mitigating the defendants' blameworthiness or culpability. (Juhei Takeuchi, "Introduction," *A Preparatory Draft for the Revised Penal Code of Japan*, 1961, South Hackensack, N.J., Fred B. Rothman & Co., 1964, p. 4).

4. Neither the present Code nor the Preparatory Draft Code provide articles relating to causation.

5. On the basis of the continental European concept of diminished responsibility, the punishment of a mentally disordered person may be reduced or acquittal may be granted as stated in Article 39 of the present Code: "an act of a person of unsound mind is not punishable. Punishment shall be reduced for acts of weak-minded persons."

The present Code's concern with the treatment of the offender is exclusively based upon punishment in the traditional sense and upon its derivatives such as conditional release and suspension of the execution of sentence including probation. Accordingly, the court loses its jurisdiction over an insane and dangerous defendant once it has acquitted him. Likewise, a mentally abnormal offender entitled to reduced punishment may be released from prison before his mental condition is improved and his criminal propensity corrected.

Under the Mental Health Law of 1950, the governor of a prefecture may, on the basis of concurring certificates by two or more psychiatrists, commit any mentally disordered person dangerous to himself or others to a public mental hospital. Nevertheless, the governor's opinion as to the necessity to detain an acquitted defendant might differ from that of the court, and there might also be a gap in time between acquittal and commitment. Furthermore, such administrative commitment is sometimes criticized because of the lack of adequate facilities for the treatment of the mentally disabled.

As a possible solution to this problem, the Preparatory Code adopts the system of so-called "security measures." Security measures, now widely used in many European countries, are measures specifically designed for the isolation and the medical or educative treatment of certain kinds of offenders whose criminality creates special danger for society. Also, security measures generally devoid of punitive connotations, and their duration is determined according not to degree of culpability, but to need for treatment. (See Takeuchi, *A Preparatory Draft for the Revised Penal Code of Japan, 1961*, p. 14–15.) The following are the relevant provisions concerning the definition and the procedural aspects of insanity under the Preparatory Draft Code:

Article 15 (Mental Disorder). (1) Acts committed by a person who, as a result of mental disorder, lacks capacity to discriminate as to the propriety of his conduct or to act according to such discrimination are not punishable.

(2) Punishment for acts of a person whose capacity as set out in paragraph (1) is markedly diminished as the result of mental disorder may be reduced.

Article 110 (Curative Measures). A person suffering from a mental disorder who has committed acts punishable by confinement or a heavier punishment, to whom the court has applied the provisions of Article 15, may by order be subjected to curative measures if the court finds that he is likely in the future to commit similarly punishable acts and that such measures are necessary to protect the safety of the public.

Article 111 (Nature of Curative Measures). A person subjected to curative measures shall be committed to a security institution and given such curative and protective treatment as he requires.

Article 112 (Duration of Curative Measures). Curative measures shall continue for a five year period: Provided, that the court may extend such measures for as many three year periods as are necessary.

Article 113 (Release). (1) A person subjected to curative measures must be released by administrative action if his continued commitment has become unnecessary. Application of curative measures shall then be deemed complete.

(2) There must be at least one administrative review each year to determine if a person subjected to curative measures shall be relieved from such measures.

Provisional release accompanied by curative supervision may be granted administratively to inmates of an institution (Article 124). Punishment and curative measures imposed on the same person may be enforced consecutively, but the execution of the one may be dispensed with if it becomes unnecessary after the execution of the order. (Articles 120 and 122).

Under Article 165 of the Code of Criminal Procedure, it is required that only the judge selects a psychiatrist to examine the defendant and renders the decision regarding insanity, taking into consideration the psychiatrist's report.

6. Under the present Code, there is no express provision dealing with the problems of alcohol and drug intoxication; they are generally considered under Article 39 (persons of unsound mind or weak-minded persons). The Preparatory Code, however, provides abstinence measures for alcoholic or narcotic addicts The relevant provisions of the Preparatory Code are as follows:

Article 115 (Abstinence Measures). A person who commits acts punishable by confinement or a heavier punishment because of his habitual addiction to excessive use of alcoholic beverages or to narcotics or nerve stimulants may by order be subjected to abstinence measures if he is likely to commit similarly punishable acts in the future unless his addiction is cured.

Article 116 (Nature of Abstinence Measures). (1) A person subjected to abstinence measures shall be committed to a security institution and given abstinence therapy and other treatment necessary to cure his addiction.

(2) The court may, instead of committing such person to a security institution, subject him to administrative abstinence supervision if it appears that his addiction can be cured without commitment.

(3) A person subjected to such supervision may be committed to a security institution by administrative action upon approval by the court if circumstances indicate such commitment to be necessary.

Article 117 (Duration of Abstinence Measures). Abstinence measures shall continue for a one year period; Provided, that if necessary the court may order a single one-year extention.

Article 118 (Discharge). (1) A person subjected to abstinence measures must be discharged by administrative action whenever such measures become unnecessary.

(2) There must be at least one administrative review every six months to determine if there shall be discharge from such measures.

Article 119 to *Article 123* [omitted.]

7. The Penal Code contains the following:

Article 36 (Self-Defense). (1) An act unavoidably occurring in the protection of one's own rights or the rights of another person against imminent and unjust infringement is not punishable.

(2) Punishment for an act which exceeds the limits of defense may be reduced or remitted according to the circumstances.

Article 37 (Averting Imminent Danger). (1) An act unavoidably done to avert a present danger to the life, person, liberty, or property of oneself or another person is not punishable only in case the injury produced by such act is not out of proportion to the injury which was sought to be averted. However, the punishment for an act which is out of proportion may be reduced or remitted according to the circumstances.

(2) The provisions of the preceding paragraph do not apply to a person who has a special professional or occupational duty.

The Preparatory Code Provides:

Article 13 (Justifiable Defense). (1) Unavoidable acts done to protect one's own interest or threat of another against imminent unlawful infringement are not punishable.

(2) If such acts exceed the limits of justifiable defense, punishment may be reduced in light of the circumstances. Such acts are not punishable when committed by one to whom blame cannot be imputed because he acted in a state of extreme shock or excitement.

Article 14 (Averting Imminent Danger). (1) Acts unavoidably done to avert danger which is imminent to one's own interest or that of another and which cannot otherwise be avoided are not punishable if the harm resulting therefrom does not exceed the harm sought to be averted.

(2) Where acts done to avert such danger are excessive, the provisions of Article 13 (2) shall apply with necessary modifications.

Both the present Code and Preparatory code are not as elaborate as the U.S. Draft Code.

8. There is no distinction between felony and misdemeanor.

Article 9 of the present Code provides: Principal penalties are death, imprisonment with forced labor, imprisonment, fine, penal detention, minor fine; confiscation being an additional penalty.

Article 32 of the Preparatory Code states:

Punishments are of the following kinds: (1) death; (2) imprisonment; (3) confinement; (4) fine; (5) penal detention; (6) minor fine.

Article 32 of the suggested Alternative Draft provides:

Punishments are of the following kinds: (1) death; (2) incarceration; (3) fine; (4) penal detention; (5) minor fine.

9a. The present Code does not provide the court with any specific guides in fixing sentences or suspending the execution of sentences; the broad judicial discretion in sentencing under the Code, coupled with the emphasis on the culpability principle, has resulted in moderate or even lenient sentences in general and short prison sentences in particular. However, Article 47 of the Preparatory Code sets forth general standards for sentencing in Part I:

Article 47 (General Standards). (1) Punishment shall be assessed commensurate with the culpability of the offender.

(2) Punishment shall be imposed for the purpose of redressing offenses and reforming and rehabilitating offenders, in light of the age, character, career and environment of the offender, the motive, method, result and impact on society of the offense, and the attitude of the offender after the offense.

(3) Punishment shall not exceed in kind or amount that which is necessary to maintain legal order. The death penalty shall be invoked only with great caution.

There has been much discussion about the usefulness of such general standards, and most lawyers are apparently skeptical about the practical value of such abstract criteria. Additional provisions for sentencing include: Imposition of Fines and Minor Fines (Article 48); Pronouncement of Fine or Minor Fine in Terms of Days (Article 49—deleted); Surrender (Article 50); Conversion of Imprisonment into Confinement (Article 51—deleted); Special Rules for Crimes Committed for Gain (Article 52); Extent of Reduction by Law (Article 53); Alternative Punishments and Reduction by Law (Article 54); Reduction by Virtue of Extenuating Circumstances (Article 55); Pronouncement of Fine in Lieu of Incarceration (Article 56); Order of Increase and Reduction Penalty (Article 58).

It should be noted however, that the main thrust of the Preparatory Draft Code which incorporates the provision of Articles 47 to 58 into Part I is not directed toward reducing the discretionary power of the court in any manner.

b. The present Code sets forth only suspension of execution of sentence (Articles 25–27), while the Draft Code provides for both suspension of execution of sentence (Articles 78–83) and suspension of pronouncement of sentence (Articles 84–87).

c. Probation is a form of suspension of sentence. It must be noted that under Japanese law the mode of placing the convict on probation is not necessarily the same as in the United States. If the judge finds the accused guilty, he must pronounce an appropriate sentence. If the judge sees fit, however, he may, under certain limitations, suspend the execution of the sentence for a certain period. He may then place the probationer under the supervision of a probation officer, but this is not a mandatory step except in certain cases prescribed by law. The term "probation" is used here in its broader sense.

d. Under Article 25–2 of the present Code, defendants granted suspension of execution of their sentences may be placed under the supervision of a probation officer who is assisted by voluntary probation workers.

e. Indeterminate sentence has never been adopted in Japanese criminal law, except for youthful offenders under twenty years of age (Article 29 of the Juvenile Law). The Preparatory Draft, however, empowers the court to impose indeterminate sentences on habitual offenders with two or more prior convictions:

Article 61 (Habitual Recidivism). An habitual recidivist is an offender who has committed another crime after having been earlier sentenced to imprisonment for six months or more as a recidivist and is to be punished again as a recidivist by a limited term of imprisonment, and whom the court finds as a fact to be an habitual offender.

Article 62 (Imposition of Indeterminate Sentence). (1) An indeterminate sentence may be imposed upon an habitual recidivist.

(2) An indeterminate sentence may be imposed in a case of concurrent crimes, in which one crime carries an indeterminate sentence and the other does not, only when the crime for which an indeterminate sentence can be imposed, controls under Article 64 [Punishment for concurrent crimes].

(3) An indeterminate sentence pronounced pursuant to paragraph (1) shall prescribe maximum and minimum terms within the limits otherwise authorized by law: Provided, that the minimum term may not be less than one year even though the minimum otherwise authorized is less than that.

f. Without defining what constitutes dangerous special offenders, Articles 56 and 57 of the present Code provide:

Article 56 (Subsequent Offenses). (1) When a person who has been sentenced to imprisonment at forced labor within five years from the day on which the execution has been completed or remitted, again commits a crime punishable with imprisonment at forced labor, this crime constitute a subsequent offense [recidivism].

(2) The same applies when a person who has been sentenced to death for a crime of the same nature as one punishable by imprisonment at forced labor again commits a crime punishable by imprisonment at forced labor for a limited term within the period provided in the preceding paragraph, as computed from the day when (his former) sentence was remitted or from the day when the execution was completed or remitted if the punishment (of his former sentence) was commuted to imprisonment at forced labor.

(3) When a sentence of imprisonment at forced labor would have been rendered for one crime which is a constituent part of consolidated crimes, a person who has been sentenced for such consolidated crimes shall, even though such constituent crime is not the gravest, be deemed to have been sentenced to imprisonment at forced labor for the purpose of application of provisions relating to subsequent offenses.

Article 57 (Punishment for Subsequent Offenses). Punishment for a subsequent offense shall not exceed twice the maximum term of imprisonment at forced labor provided for such crime.

g. Punishments of crimes concerning foreign aggression under the present Penal Code are as follows: conspiring with a foreign state and causing use of armed forces against Japan—the maximum penalty is death (Article 82); siding with enemy state, engaging in military service of such state, or otherwise affording military advantage to such state—the maximum is death or life imprisonment and the minimum, two years (Article 82); preparing or conspiring with another to join with or render aid and assistance to enemy state—the maximum is ten years and the minimum, one year (Article 88).

h. Certain crimes carry mandatory minimum prison sentences. For example, Article 177 of the present Penal Code provides that "a person who, through violence or intimidation, has sexual intercourse with a female person of not less than thirteen years of age, commits the crime of rape and shall be punished with imprisonment at forced labor for a limited term of not less than two years."

i. Parole is provided in Part I (Articles 28 and 29) of the present Penal Code. More elaborate provisions concerning parole are set forth in Part I (Articles 88 to 93) of the Preparatory Draft Code, but these provisions are still not as elaborate as those mentioned in Chapter 34 of the U.S. Draft Code.

j. Granting of parole is discretionary with the parole board known as the District Offenders Rehabilitation Commission whose decision is subject to review by the National Commission (See the Offenders Prevention and Rehabilitation Law).

k. No.

l. No.

m. For similar provisions, see Articles 56 and 57 cited in Question 9 (f).

n. Neither the Penal Code nor the Code of Criminal Procedure has provisions concerning the preparation of the written adjudication; the matter is left to rules (Article 53 of the Rule Concerning the Criminal Procedure). Nevertheless, judgments assessing penalties, and probably other adjudication as well, ought usually to be prepared in written form or set out in the protocol of trial. Reasons for sentences are usually included in the citation of applicable laws and penal provisions (Article 219 of the Rule Concerning the Criminal Procedure).

o. Sentences are subject to review on appeal by appellate courts including the Supreme Court. Japanese appellate courts generally have the power to raise or lower the sentences imposed by lower courts (Articles 400 and 412 of the Code of Criminal Procedure). However, no heavier penalty than that imposed by the original judgment may be pronounced when the defendant appeals (Article 402 of the Code of Criminal Procedure).

p. Both the Government and the defendant may appeal (Article 351 of the Code of Criminal Procedure).

q. The Code of Criminal Procedure contains the following relevant provisions:

Article 381: In the event that a motion of Koso-appeal has been made on the ground that the penalty is improper, the facts which are entered in the record of proceedings and the evidence examined in the original court and which sufficiently make it believable that the penalty is improper shall be referred to in the statement of reasons for Koso-appeal.

Article 392: (1) An appellate court shall investigate such matters as contained in the statement of reasons for Koso-appeal.

(2) [Omitted]

Article 393: (1) An appellate court may, when it is necessary to conduct the investigation as mentioned in the preceding Article, examine facts upon request of a public procurator, the accused, or the counsel, or upon its own authority: Provided, that the facts, the explanation as mentioned in Article

382-2 of which has been made shall be examined only when they are indispensable for proving the penalty determined improperly or the errors in and/or of facts to affect the judgment.

(2) An appellate court may, when deems necessary, conduct upon its own authority the examination in regard to such circumstances as emerged after the judgment in the first instance and as should affect the penalty determined.

(3)–(4) [Omitted]

Article 394: Any evidence that could be used as evidence in the first instance may be made as evidence even in an appellate instance.

r. Not applicable.

s. Chapter VIII (Concurrent Crimes) of the Preparatory Draft Code contains the following Articles:

Articles 63 (Concurrent Crimes). Concurrent crimes are two or more crimes concerning which no finally-binding adjudication has yet been made. However, if confinement or a heavier punishment has been imposed by a finally-binding adjudication for a given crime, only such crime and those crimes which were committed before such adjudication became finally binding shall constitute concurrent crimes.

Article 64 (Punishment for Concurrent Crimes). (1) When concurrent crimes, one or more of which are punishable by confinement or a heavier punishment, are to be jointly adjudicated, only the punishment prescribed for the most serious crime shall be utilized in sentencing: Provided, however, that the court shall not impose a sentence lighter than the minimum punishment prescribed for any of the other crimes.

(2) The court may also impose cumulatively a fine or minor fine in cases falling within paragraph (1).

Article 65 (Increase in Term of Imprisonment of Confinement). When two or more of such concurrent crimes are punishable by imprisonment or confinement for a limited term, the sentence may exceed the maximum term of punishment otherwise authorized. In such case the maximum term shall be increased by one-half: Provided, however, that the sentence shall not exceed the cumulative maxima of all the crimes.

Article 66 (Cumulative Imposition of Fine, Penal Detention or Minor Fine). (1) When two or more of such concurrent crimes are punishable by fine, sentence shall be imposed within the limits of their cumulative maxima.

(2) A fine shall be imposed cumulatively with either penal detention or a minor fine.

(3) Penal detention or a minor fine shall be imposed cumulatively with other penal detention or minor fine.

Article 67 (Disposition of Unadjudicated Crimes). When a finally-binding adjudication has been made concerning certain concurrent crimes but not concerning others, a further adjudication shall be made concerning the latter.

Article 68 (Execution of Sentence). (1) When two or more finally-binding adjudications have been made concerning concurrent crimes, all sentences so imposed shall be executed cumulatively: Provided, that when one such adjudication imposes the death penalty, or imprisonment or confinement for life, no other punishment except a fine or minor fine shall be executed.

(2) If cumulative execution of sentences of imprisonment or confinement for a limited term is markedly inconsistent with the purposes of Articles 64 and 65, the court may in consideration of such purposes remit the execution of a part of the punishment imposed.

t. The Preparatory Draft has similar provisions:

Article 52 (Special Rules for Crimes Committed for Gain). Punishment shall be imposed on a person who has committed a crime for purposes of gain pursuant to the following rules:

(i) when the court has determined to impose imprisonment, or confinement it may also impose a fine even though such cumulative imposition is not specifically authorized. In such cases, if no fine is prescribed for the crime the maximum fine is 300,000 yen.

(ii) when the court has determined to impose a fine only, the maximum permissible fine is three times that specified for the crime.

u. An adjudication imposing a fine, minor fine, etc. is enforced upon the order of a public prosecutor and his order is as enforceable as a confession of judgment on an obligation (Article 490 (1) of the Code of Criminal Procedure). The provisions of the Code of Civil Procedure relating to confession of

judgment apply by analogy to this kind of order, but no copy of the adjudication has to be served before enforcement (Article 490 (2) of the Code of Criminal Procedure; See also Article 46 of the Bankruptcy Law; Article 44 of the Debtor's Composition Law; and Articles 528 (1) and 560 of the Code of Civil Procedure).

v. *Article 49* of the Preparatory Draft Code had originally proposed pronouncement of a fine or a minor fine in terms of number of days, but it was deleted.

w. *Article 48* of the Preparatory Code states: In imposing a fine or a minor fine, the assets, income and other financial circumstances of the offender shall also be taken into consideration.

10. *Article 38*, paragraph 3 of the present Code concerns itself only with mistake of law: An ignorance of the law cannot be deemed to constitute a lack of intention to commit a crime, but punishment may be reduced according to the circumstances.

Article 20 of the Preparatory Draft states:

(1) Ignorance of law shall not mean the absence of intent: Provided, that punishment may be reduced in light of the circumstances.

(2) A person who acts without knowing that his acts are not permitted by law shall not be punished, if there is adequate reason for his ignorance.

Regarding ignorance or mistake of fact, *Article 19* of the Preparatory Draft provides:

(1) A person who acts without realizing the existence of facts which make his act criminal shall not be deemed to have acted intentionally.

(2) A person who commits a crime graver than the one he intends to commit, without knowing that at the time of his act the facts aggravating the crime, shall not be punished for the graver crime.

11. No.

12. The Preparatory Draft contains the following: Crimes committed abroad by Japanese nationals (Article 2); Crimes committed abroad by public officials (Article 3); Certain crimes committed abroad (Article 4); and Crimes committed abroad by aliens (Article 5).

13. The Japanese Penal Code follows that of the European countries, but it provides only for conspiracy to commit insurrection, foreign aggression or private war, as set forth in Articles 78, 88 and 93:

Article 78 (Preparation and Conspiracy). A person who makes preparations or conspires with another to commit an insurrection shall be punished with imprisonment for not less than one year nor more than ten years.

Article 88 (Preparation and Conspiracy). A person who makes preparations or conspires with another to commit the crimes mentioned in Articles 81 and 82 (foreign aggression and assistant to enemy) shall be punished with imprisonment at forced labor for not less than one year nor more than ten years.

Article 93 (Preparation and Conspiracy for Private Wars). A person who makes preparations or conspires with another to wage a private war against a foreign state shall be punished with imprisonment for not less than three months nor more than five years, but the punishment of a person who denounces himself shall be remitted.

The present Penal Code divides accomplices, instigators, and accessories; it provides that "two or more persons who have jointly executed a crime are all principals," (Article 60) that "a person who has instigated and caused another to execute a crime" is an instigator (Article 61), and that "a person who has assisted a principal is an accessory" (Article 62). Although this system follows the lines of the French and German codes, the Japanese court developed the concept of a "conspiratorial-coprincipal" through cases interpreting Article 60, beyond the limits set by the Penal Code.

The conspiratory-coprincipal theory has much in common with the Anglo-American law of conspiracy, but this theory requires that criminal activity progress beyond the simple overt act to a stage where actual harm is done to society before criminal liability is attached. (See Ryuichi Hirano, "The Accused and Society: Some Aspect of Japanese Criminal Law," *Law in Japan*, ed. by Arthur Taylor von Meheren, Cambridge, Harvard University Press, 1963, p. 290.)

14. The felony-murder rule was often criticized by Japanese lawyers. In Japan, if a person dies as a result of a train wreck, rape, or robbery, the death penalty or life imprisonment is imposed on the person who committed

the original criminal act. A killing in connection with arson is not specifically punished, but arson itself carries the death penalty. The term "murder" is not used in these cases, but in fact the same results are reached as under the felony-murder rule. However, most scholars argue that even in these cases negligence turned toward the graver harm on the part of the actor should be required. The Draft Penal Code adopts this view as set forth in Article 21: "if aggravated punishment is prescribed on the basis of the results of a crime, but it was impossible to forsee such results, such aggravated punishment cannot be imposed." (Hirano, *Law in Japan*, p. 284.)

15. No.

16. No.

17. Japan has enacted five separate laws, each prescribing appropriate control measures within its respective areas. They are the Penal Code, the Opium Law (Law No. 71 of 1954); the Narcotic Control Law (Law No. 14, 1953); the Taima (Cannabis sativa, L.) Control Law (Law No. 124 of 1948); and the Awakening Drugs Control Law (Law No. 252 of 1951). Articles 136 to 141 of the Penal Code prohibits importation, manufacture, or sale of smoking opium and implements used for smoking it.

The present Penal Code provides for absolute prohibition of all forms of gambling, lotteries, and operation of gambling establishments, with only one exception—betting on "objects provided for monetary entertainment" (Articles 185–187).

The present Penal Code prohibits abortion by any means, whether self-induced or performed by another person (Articles 212–216). The Eugenic Protection Law (Law No. 156 of 1948), however, legalizes abortion within broad limits. In particular, this Law provides that an abortion can be performed whenever, in the judgment of a single authorized physician, "it is feared that the continued pregnancy or childbirth will for physical or economic reasons markedly injure the health of the mother's body" (Article 14(1)(iv)).

The Penal Code does not provide for the crime of prostitution. The Prostitution Prevention Law (Law No. 118 of 1956) prohibits the maintenance of houses of prostitution, but the act of prostitution itself is not treated as a crime. Article 3 of the Law states that "no person shall engage in prostitution nor become the other party thereto," but no criminal sanctions are imposed for violation of this Article.

Although the Penal Code prohibits public indecency and the distribution of pornographic literature in Articles 174–175, these are not strictly enforced in Japan. The Supreme Court of Japan held in 1957 that the translation of *Lady Chatterley's Lover* was an obscene publication, while a large number of pulp magazines were free from restraint.

Homosexuality, incest and sodomy are not punishable either under the Penal Code or Draft Code.

18. *Article 117* of the Penal Code states: A person who causes an explosion of gunpower, a steam-boiler, or other potentially explosive object and thereby damages or destroys an object mentioned in Article 108 (setting fire to dwellings) or an object mentioned in Article 109 (setting fire to structures other than dwellings) which belongs to another shall be dealt with in the same way as provided for arson. The same also applies to a person who damages or destroys an object mentioned in Article 109 which belongs to him or an object mentioned in Article 110, and thereby endangers the public.

Firearms are not governed by the present Code, but are rigidly controlled by the Law Concerning the Control of the Possession of Firearms and Swords (Law No. 6 of 1958).

19. The heaviest penalty under the Penal Code is death by hanging. Japanese courts have declared that such penalty is not contrary to the constitutional provision prohibiting cruel punishments. Under the present Code, capital punishment may be imposed for the following 12 offenses:

(1) Insurrection.

(2) Rendering aid and assistance to the enemy.

(3) Arson of inhabited structures, such as a house, train, electric car, or ship.

(4) Causing damage to structures used as a human habitation, or causing damage to structures in which people are actually present, thereby causing death.

(5) Overturning a train or electric car, capsizing a vessel, or otherwise endangering traffic, thereby causing death or injury.

(6) Adding poisonous substance to water main, thereby causing death.
(7) Murder.
(8) Killing one's or his spouse's lineal ascendants.
(9) Causing death while in the commission of rape and robbery.
(10) Causing death while in the commission of an offense of robbery.
(11) Destroying aircraft in flight or causing it to fall.
(12) Causing death by use of explosives.

The Penal Code provides no separate proceeding to determine sentence in a capital case.

20. Article 256 (5) of the Code of Criminal Procedure provides: "Multiple counts or citations of penal provisions may be alleged conjunctively or in the alternative [in the indictment]." Professor Dando in his work, *The Japanese Law of Criminal Procedure*, commented as follows:

Even if there is but one criminal transaction, if various legal provisions may be applied to it they must be alleged in multiple counts. For example, if it is not clear whether the property in question was in the legal possession of the injured party, there must be a count alleging that the facts constitute theft and another that they constitute wrongful appropriation of lost property. Consequently, counts can be included either conjunctively (theft—but if not theft then wrongful appropriation of lost property). . . . Penal provisions may also be cited conjunctively or alternatively in a single count. For example, since there is a difference of opinion whether pilfering the contents of a package with which one has been entrusted is legally theft or wrongful appropriation, if such facts are alleged in the counts it is probably permissible to cite as applicable provisions both Penal Code Articles 235 (theft) and 252 (wrongful appropriation). (See Shigemtsu Dando, *The Japanese Law of Criminal Procedure*, trans. by B. J. George, Jr., South Hackensack, N.J., Fred B. Rothman & Co., 1965, p. 171.)

With respect to the case belonging to another jurisdiction, *Article 258* of the Code of Criminal Procedure states:

A public prosecutor shall, when he considers that a case does not come within the jurisdiction of the court corresponding to the public prosecutor's office to which he belongs, send the said case to a public prosecutor of the public prosecutor's office corresponding to the court having the jurisdiction together with the documents and evidence.

Under *Article 338* of the Code of Criminal Procedure, the public prosecution shall be dismissed in the following cases:

(1) [Omitted.]
(2) In a case where the public prosecution has been instituted in violation of the provisions of Article 340 (dismissal of prosecution by revocation and re-indictment);
(3) In a case where the public prosecution was instituted, the public prosecution has again been instituted for the same case with the same court;
(4) In a case where the procedure for the institution of public prosecution is void due to the violation of the provisions thereof.

The Republic Of Korea

1. The Penal Code of 1953 consists of two parts. Part I contains the general provisions (Articles 1 to 86) and Part II the specific provisions (Articles 87 to 372). The former deals with the general principles, including sentencing, that are to be applied to the latter. Sentences are designated for the specific crimes desscribed in each Article of Part II.

2. No numbering system is used: new provisions are added to the original ones, e.g., Article 1, Article 1–2, Article 1–3, etc.

3. On the basis of German law, two elements of a state of mind, intent and negligence, are provided for in the Penal Code. This distinction leaves no room for the intermediate concept of "recklessness" as conceived by Anglo-American law. There is no statutory definition of either intent or negligence. Article 13 and 14 of the Penal Code simply provide:

Article 13 (Criminal Intent). Criminal conduct due to ignorance of facts which constitute the elements of a crime is not punishable.

Article 14 (Negligence). Conduct in ignorance, due to neglect of normal attention of facts which constitute the elements of a crime, shall be punishable only where the law specifically so prescribes.

The Penal Code specifically enumerates five crimes of negligence which are subject to punishment: (1) setting fire by negligence (Articles 180 and 171); (2) inundation by negligence (Article 181); (3) obstruction of traffic by negligence (Article 189); (4) bodily injury and homicide by negligence (Articles 266, 267, and 268); (5) crimes concerning stolen property committed by negligence (Article 364).

In the case of intent, the Penal Code imposes a heavier penalty than in the case of negligence. Dean Ryu made a comparative study of negligence in the following terms: . . . the crimes of negligence in Korea are less numerous than in Germany, but more numerous than in Anglo-American law, in which the crime of negligence is a very exceptional phenomenon. The Korean Code rather resembles the Anglo-American pattern in accepting certain acts as criminal only if committed by gross negligence, in contrast to simple negligence. Thus, the crimes of receiving stolen property are punishable only when committed by gross negligence (or negligence in the conduct of a trade). In case of setting fire, obstructing traffic, bodily injury and homicide, due to gross negligence, the punishment is aggravated. (*The Korean Criminal Code*, trans. by Paul Ryu, South Hackensack, N.J., Fred B. Rothman & Co., 1960, pp. 7–8.)

4. *Article 17* (Casual Relationship) of the Penal Code) Conduct not connected with causation of the risk which is an element of a crime, shall not be punishable although a harm occurs.

5. *Article 10* (Persons Suffering from Mental Disorders) of the Penal Code: (1) A person who, due to a mental disorder is unable to pass rational judgments or to control his will, is not punishable.

(2) The punishment of a person who, due to a mental disorder, is deficient in the capacity mentioned in the preceding paragraph, shall be mitigated.

(3) The provisions of the preceding two paragraphs shall not apply to the criminal conduct of a person who, anticipating the risk of committing crime, has intentionally incurred mental disorder.

In commenting on Article 10, Dean Ryu notes that: A simple provision for reduction of penalty in cases of diminished responsibility tends to oversimplify this important issue of criminal legislation. The uncritical reception by the Korean Code of the continental European concept of diminished responsibility is regrettable. (Ryu, *op. cit.*, p. 28.)

There are neither provisions concerning medical treatment nor commitment of mentally disordered defendants to a mental institution under the Penal Code. The judge selects a psychiatrist and renders a judgment of insanity, taking into consideration the psychiatrist's report.

6. No provisions under the Penal Code.

7. *Article 21* (Self-Defense) of the Penal Code: (1) Conduct in order to prevent impending and unjust infringement of the accused's or another person's interest shall not be punishable, provided that there are reasonable grounds therefor.

(2) Where conduct in self-defense has exceeded reasonable limits the punishment may be mitigated or remitted depending upon the extent of the available extenuating circumstances.

(3) In the situation described in the preceding paragraph, conduct due to fear, surprise, excitement, or confusion at night-time or under other insecure circumstances, is not punishable.

Article 22 (Necessity). (1) Conduct in order to avert impending danger to the legal interest of the accused or another person shall not be punishable provided that there are reasonable grounds therefor.

(2) The provisions of the preceding paragraph shall not apply to a person charged with the duty not to avoid the danger.

(3) The provisions of paragraphs 3 and 4 of the preceding Article shall apply *mutatis mutandis* to the present Article.

Article 23 (Self-help). (1) Where it is impossible by legal procedure to preserve a claim, conduct in order to avoid the impossibility or serious difficulties of its enforcement shall not be punishable provided that there are reasonable grounds therefor.

(2) Where conduct as described in the preceding paragraph has exceeded reasonable limits, the punishment may be mitigated or remitted depending upon the extent of the available extenuating circumstances.

8. *Article 41* (Classification of Punishment) of the Penal Code: Punishment shall be classified as follows: (1) Death penalty; (2) Penal servitude; (3) Im-

prisonment; (4) Deprivation of qualifications; (5) Suspension of qualifications; (6) Fine; (7) Detention; (8) Minor fine; (9) Confiscation. Each penalty is explained in Articles 42 to 50.

9.a. *Article 51* (Criteria of Determination of Sentence) of the Penal Code: In determining sentence the following matter shall be taken into consideration: (1) The age, character and conduct, intellect and environment of the offender; (2) Circumstances regarding the victim; (3) The motive, the means and the result of the criminal conduct; (4) Circumstances after the commission of the crime.

9.b. The Penal Code provides both suspension of imposition of sentence (Articles 59–61) and suspension of execution of sentence (Articles 62–65).

9.c. Probation is a form of suspension of sentence.

9.d. There is no provision concerning supervision by a probation officer under the Penal Code. At present, only a juvenile offender under twenty years of age may be placed under the supervision of a probation officer. (Article 32 of the Juvenile Law, Law No. 489 of 1958, *Legal Dictionary*, ed. by Zung-ham Kim, Seoul, Pommunsa, 1968, p. 405.)

9.e. Indeterminate sentence may be imposed only on the juvenile offender under the Youth Law (Article 54 of the Youth Law).

9.f. There is no definition of dangerous special offenders, but the Penal Code provides the following relevant provisions:

Article 35 (Repeated Crimes). (1) Where, within three years after completion or remission of the execution of a punishment, a person is convicted of an offense punishable by imprisonment or by a more severe punishment, he shall be sentenced as a repeating offender.

(2) Punishment for a repeated crime shall be twice the maximum term of that specified for that crime.

Article 36 (Discovery of Repeated Crime After the Imposition of Sentence). Where, after imposition of a sentence, the crime is discovered to be a repeated one, the punishment may be determined *de novo* by increasing that imposed by sentence at the trial, except where the execution of that sentence has been completed or the punishment remitted.

9.g. Chapter I, Crimes of Insurrection (Article 87–90) of the Penal Code contains the following provisions:

Article 87 (Insurrection). A person who creates a disorder for the purpose of usurping the national territory of subverting the National Constitution shall be punished according to the following classification:

(1) A ringleader shall be punished by death, penal servitude for life or imprisonment for life.

(2) A person who participates in, or directs the plot, or engages in other important activities shall be punished by death, penal servitude, or imprisonment for life or for not less than five years; the same shall also apply to a person who has himself engaged in killing, wounding, destroying or plundering.

(3) A person who merely responds to the agitation and follows the lead of another or merely joins in the disorder shall be punished by penal servitude or imprisonment for not more than five years.

Article 88 (Homicide for the Purpose of Insurrection). A person who kills another for the purpose of usurping the national territory or subverting the National Constitution shall be punished by death, penal servitude for life or imprisonment for life.

Article 89 (Attempts). Attempts to commit the crimes of the preceding two Articles shall be punished.

Article 90 (Preparations, Conspiracies, Agitation, or Propaganda). (1) Anyone who makes preparations or conspires with intent to commit the crimes of Articles 87 or 88 shall be punished by limit penal servitude or imprisonment for not less than three years, but when a self-determination is made before the intended crime has reached the commencement stage, the punishment shall be mitigated or remitted.

(2) The preceding paragraph shall apply to a person who agitates or propagates the commission of the crimes of Articles 87 or 88.

9.h. Certain crimes carry mandatory prison sentences. For example, Article 241 of the Penal Code states:

Article 241 (Adultery). (1) A married person who commits adultery shall be punished by penal servitude for not more than two years. The same shall apply to the other participant.

(2) [Omitted]

9.i. *Article 72* (Parole Requisities) of the Penal Code: A person serving a sentence of penal servitude or imprisonment whose behavior has been good and who has shown sincere repentance may be provisionally released by an act of administrative discretion after he has served ten years of a life sentence or one-third of a limited term of punishment.

(2) If a fine or minor fine has been imposed concurrently with the punishment specified in the preceding paragraph, the amount thereof shall be paid in full.

Article 73 (Custody Before Imposition of Sentence and Parole). (1) For the purpose of release on parole, the number of days of custody before imposition of sentence, included in the period of sentence, shall be calculated as time served.

(2) In the case of paragraph 2 of the preceding Article, the number of days of custody before imposition of sentence calculated as the period of internment in lieu of a fine or minor fine shall be deemed to be the payment of a corresponding amount.

Article 74 (Nullification of Parole). Where, during the period of parole, a judgment imposing a sentence of imprisonment or a more severe punishment becomes final, the release on parole shall lose its effect; this shall not apply where the sentence is imposed upon a crime of negligence.

Article 75 (Revocation of Parole). Where a person released on parole violates the parole regulations concerning surveillance, the parole may be revoked.

Article 76 (Effect of Parole). (1) Where since the granting of parole, ten years of a life sentence, or the remaining term of a limited punishment, elapses without nullification or revocation of the parole, the execution of punishment shall be deemed to have been completed.

(2) In the case of the preceding two Articles, the number of days spent during parole shall not be included in the term of punishment.

9.j. Prisoners are released on parole by an administrative agency known as the Parole Administration Committee which is under the jurisdiction of the Minister of Justice (Articles 49 to 52 of the Penal Administration Law, Law No. 1222 of 1962; the Offenders Rehabilitaiton Law, Law No. 730 of 1961).

9.k. No.

9.l. No

9.m. For similar provisions, see Question 9.f.

9.n. Under Article 323 of the Code of Criminal Procedure, it is provided that in pronouncing sentence, the reasons for the judgment shall contain facts constituting crimes, the gist of the evidence and application of relevant laws.

9.o. Sentences are subject to review by the Appellate Courts including the Supreme Court. The Appelate Court has the power to raise or lower the sentence imposed by a lower court, but it cannot impose a penalty heavier than that imposed by the trial court in a case appealed by the defendant (Articles 364 (6), 368 and 396 of the Code of Criminal Procedure).

9.p. Both the Government and the defandant may appeal (Article 338 of the Code of Criminal Procedure).

9.q. There are no standards for review of sentencing under the Penal Code. The Code of Criminal Procedure, however, lists, *inter alia*, an "improper sentence" as one of the grounds for appeal to the court of second instance, which must be alledged in writing (Article 361-5 of the Code of Criminal Procedure). Also included as grounds for appeal to the Supreme Court is "an inappropriateness of sentence in a case in which the death penalty or penal servitude or imprisonment for not less than ten years has been adjudged" (Article 383 of the Code of Criminal Procedure). Generally, an Appelate Court and the Supreme Court decide only the issues raised by the appellant in writing. Thus the Code of Criminal Procedure provides:

Article 364 (Judgment by the Appellate Court). (1) The appellate court shall render a decision on the basis of the grounds stated in the reasons for appeal.

(2) [Omitted]

Article 384 (The Scope of Appeal). The Supreme Court shall render a decision on the basis of the grounds stated in the reasons for appeal. . . .

9.r. Not applicable.

9.s. The Penal Code has the following Articles:

Article 38 (Concurrent Crimes and Application of Punishment). (1) When concurrent crimes are adjudicated at the same time, punishment shall be imposed in accordance with the following standards:

(1) In the event that the punishment specified for the most severe crime is a death penalty or penal servitude for life or imprisonment for life, the punishment provided for the most severe crime shall be imposed.

(2) In the event that the punishments specified for each crime are of the same kind, other than a death penalty or penal servitude for life or imprisonment for life, the maximum term or maximum amount for the most severe crime shall be increased by one half thereof, but shall not exceed the sum total of the maximum terms or maximum amounts of the punishments specified for each crime, except that several minor fines or several confiscations may be imposed together.

(3) In the event that the punishments specified for each crime are of a different kind, other than penal servitude for life or imprisonments for life, they shall run consecutively.

(2) As to each paragraph of the preceding Section, penal servitude and imprisonment shall be regarded as the same kind of punishment.

Article 39 (Concurrent Crimes not Adjudicated: Several Judgments and Concurrent Crimes: and Execution of Punishment and Concurrent Crimes). (1) Where, of several concurrent crimes, one or more have not been adjudicated, sentence shall be imposed for the latter.

(2) Where several judgments as set forth in the preceding Section have been rendered, they shall be executed in accordance with provisions of the preceding Article.

(3) Where a person sentenced for concurrent crimes receives amnesty or remission of the execution of punishment with regard to any one of them, punishment for the remaining crimes shall be determined *de novo*.

(4) In the execution of punishment specified in the preceding three Sections, the period of sentence already served shall be taken into account.

Article 40 (Compound Crimes). When conduct constitutes several crimes, punishment provided for the most severe crime shall be imposed.

9.t. No.

9.u. A judgment imposing a fine, minor fine, etc. is enforced upon the order of a public prosecutor and his order is as enforceable as a confession of judgment on an obligation (Article 477 of the Code of Criminal Procedure). In this case, the provisions of the Code of Civil Procedure relating to confession of judgment apply by analogy to this kind of order. Article 70 of the Penal Code also provides that "when rendering a sentence of a fine or minor fine, the court shall simultaneously determine and decree a substitutive term of internment in a workhouse in the event that payment of such fine or minor fine is not made in full."

9.v. *Article 69* (Fine and Minor Fine) of the Penal Code: (1) A fine and a minor fine shall be paid within thirty days from the day when the judgment has become final, but when a fine is imposed, interment in a workhouse in lieu of the fine unless and until the amount is paid in full may be concurrently ordered.

(2) A person who does not pay a fine in full shall be interned in a workhouse and work for a term of not less than one month nor more than three years, or, in case of a minor fine, of not less than one day but not more than thirty days.

9.w. A fine is fixed depending upon the gravity of the offense of which the defendant is convicted.

10. The Penal Code provides the following:

Article 15 (Mistake of Fact). (1) Criminal conduct in ignorance of facts which aggrevate a crime is not punishable as the aggrevated crime.

(2) [Omitted]

Article 16 (Mistake of Law). Where a person commits a crime in the belief that his conduct does not constitute a crime under existing law, he shall not be punishable only when his mistake is based on reasonable grounds.

Under the provision of Article 16, an unreasonable mistake of law affords no excuse whatever, except in case of extenuating circumstances.

11. No.

12. The Penal Code contains crimes committed by Koreans and by aliens (Articles 3 and 5); crimes committed by aliens on board a Korean vessel or aircraft outside Korea (Article 4); crimes committed abroad against the Republic of Korea and Korean nationals (Article 6).

13. The Penal Code provides only for conspiracy to commit insurrection, foreign aggression or private war, as prescribed in Articles 90, 101 and 111:

Article 90 (Preparations, Conspiracies, Agitation, or Propaganda). (1) Anyone who makes preparations or conspires with intent to commit the crimes of Articles 87 or 88 (insurrection) shall be punished by limited penal servitude or imprisonment for not less than three years, but when a self-denunciation is made before the intended crime has reached the commencement stage, the punishment shall be mitigated or remitted.

(2) [Omitted]

Article 101 (Preparations, Conspiracies, Agitation or Propaganda). (1) A person who makes preparations or conspires with intent to commit any of the crimes of Articles 92 through 99 shall be sentenced to penal servitude for a limited term of not less than two years; but when self-denunciation is made before the intended crime has reached the commencement stage, the punishment shall be mitigated or remitted.

(2) [Omitted]

Article 111 (Private War Against Foreign Countries). (1) A person who wages a private war against a foreign country shall be punished by limited imprisonment for not less than one year.

(2) Attempts to commit crimes described in the preceding paragraph shall be punished.

(3) A person who makes reparations or conspires with intent to commit the crime of paragraph 1 shall be punished by imprisonment for not more than three years or fined not more than twenty-five thousand hwan. . . .

14. *Article 15* of the Penal Code provides that "where, due to certain consequences of a crime, a more severe punishment is imposed thereon, the more severe punishment shall not be applied if such consequences were not foreseeable." Under the above provision, A, an instigator, is responsible for instigating an aggravated bodily injury only if, at the time when he instigated B to inflict a bodily injury upon C, the latter's death was foreseeable.

15. No.

16. No.

17. The Penal Code prohibits importation, manufacture, or sale of smoking opium and implements used for smoking it (Articles 198 to 206). There exists the Opium Law which is designed to control importation, exportation, sale or distribution of raw opium, marijuana and other narcotics Law No. 1954 of 1957).

The Penal Code prohibits abortion by any means, whether self-induced or performed by another person including a doctor, midwife and pharmacist (Articles 269 to 270), but it is not well enforced as Professor Hahm describes:

The apprehension and prosecution of offenders has been sporadic. There has been no public outcry that might have prompted a more vigorous enforcement of the law. In a few cases where an abortion results in the death of a woman, the law-enforcement agencies institute criminal proceedings against the offenders. In the overwhelming majority of the cases, however, where abortions are successful, the law remains utterly unconcerned. (Pyong-Choon Hahm, *The Korean Political Tradition and Law*, Seoul, Hollym Corporation, 1967, p. 234.)

The Penal Code provides for absolute prohibition of gambling, betting, lotteries for gain, and operation of gambling establishments (Articles 246–249). Although the Code does not provide for the crime of prostitution, the Prostitution Prevention Law (Law No. 771 of 1961) carries penal sanctions for the maintenance of houses of prostitution and for the parties of prostitution. An indecent act performed in public is punishable and distribution or sale of any pornographic writing, picture, or other object, or displaying the same in public is made a criminal act (Articles 243–245). Homosexual activity is not punishable.

18. Firearms are not regulated by the Penal Code, but are strictly controlled by the Gun and Gunpowder Control Law (Law No. 835 of 1961). On the control of explosives, the Penal Code provides:

Article 119 (Use of Explosives). (1) One who injures a person or damages property or disturbs the public peace by using explosives shall be punished by death, penal servitude for life or for not less than seven years.

(2) A person who commits the crimes of the preceding paragraph in time of war, a calamity or other (warlike) incident shall be punished by death or penal servitude for life.

(3) Attempts to commit the crimes of the preceding two paragraphs shall be punished.

Article 172 (Destruction by Explosives). (1) A person who causes an explosion of gunpowder, a steam boiler, or other potentially explosive object and thereby damages or destroys an item mentioned in Articles 164 through 167 (arson) shall be punished in accordance with the provisions for arson.

(2) Where the conduct of the preceding paragraph is caused by negligence, it shall be punished in accordance with the provisions for fire caused by negligence.

19. Under the Penal Code the following offenses are subject to capital punishment: (1) Insurrection; (2) Rendering aid in collaborating with the enemy; (3) Espionage; (4) Causing injuries to a person or damages to property by using explosives; (5) Arson of dwellings; (6) Obstruction of traffic causing death or injury of another; (7) Obstruction of use of drinking water causing death or injury of another; (8) Murder; (9) Murder upon request by fraudulent means; (10) Robbery-murder: death; (11) Piracy.

20. The Code of Criminal Procedure contains the following Article:

Article 254 (Method of Instituting Public Action). (1) The institution of public prosecution shall be made by filing an indictment.

(2)–(4) [Omitted]

(5) Facts constituting several offenses (multiple counts) and penal provisions may be stated conjunctively or in the alternative.

Under the above Article, if a person is suspected of having committed more than one offense, the prosecutor can state in the indictment all the alleged offenses together, or can state only the most serious one. (The Republic of Korea, The Supreme Court, *Korean Legal System*, 1970, p. 34.) Other relevant provisions of the same Code include:

Article 258 (Sending cases to other jurisdiction). If a prosecutor considers that the case does not come within the jurisdiction of the court corresponding to the prosecutor's office to which he belongs, he shall transfer the case, together with the documents and evidence, to a prosecutor of the prosecutor's office corresponding to the court having jurisdiction.

Article 327 (Judgment dismissing public action). The public prosecution shall be dismissed by a judgment in the following cases:

(1) In a case the court has no jurisdiction over the accused;

(2) In a case the public prosecution has been instituted in violation of the procedure prescribed by law;

(3) In a case where the public prosecution was instituted, the public prosecution has again been instituted with the same case;

(4) In a case where the public prosecution has been instituted in violation of Article 329 (cancellation of public prosecution and re-indictment).

(5)–(6) [Omitted]

Pakistan

The Indian Penal Code 1860 and the Code of Criminal Procedure 1898 applied to the whole of the former British-India sub-continent, which presently comprises the territories of Pakistan and India. After the Independence of Pakistan in 1947, these Codes were adopted in Pakistan by virtue of the provisions of Indian Independence Act 1947, and continue to be applicable under the title of The Pakistan Penal Code 1860 [1] and Code of Criminal Procedure 1898.[2]

A Xerox copy of the contents of the Pakistan Penal Code will show that the laws of the Penal Code correspond to those of the Indian Penal Code. So that the criminal laws in India and Pakistan are alike and the answers to the questionnaire relating to India will apply to Pakistan also.

As for question 18, a copy of the Arms Act 1878,[3] is attached. The provisions of this law consolidate and amend the law relating to Arms, Ammunition and Military Stores. The Government has in this law the power to control the sale, purchase, and import dealings in the arms and ammunition, etc. Strict penalties are provided for infringement of the law. Penalties for contravention are prescribed in Chapter VI of the Act.

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[1] The Pakistan Penal Code, Rawalpindi, Government of Pakistan, Ministry of Law & Parliamentary Affairs, Law Division, 1966.

[2] IV The Pakistan Code, Karachi, Government of Pakistan, Ministry of Law & Parliamentary Affairs, Law Division, 1966.

[3] II The Pakistan Code, Karachi, Government of Pakistan, Ministry of Law & Parliamentary Affairs, Law Division, 1966.

GOVERNMENT OF PAKISTAN, MINISTRY OF LAW AND PARLIAMENTARY AFFAIRS—THE PAKISTAN CODE

THE ARMS ACT, 1878

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ACT NO. XI OF 1878 [1]

[15th March, 1878]

An Act to consolidate and amend the law relating to Arms, Ammunition and Military Stores.

Preamble.

Whereas it is expedient to consolidate and amend the law relating to arms, ammunition and military stores; It is hereby enacted as follows:—

I.—PRELIMINARY

Short Local extent.

1. This Act may be called the [2] Arms Act, 1878; and it extends to [3] [the whole of Pakistan].

Savings—L of 1950.

But nothing herein contained shall apply to—

(a) Arms, ammunition or military stores on board any seagoing vessel and forming part of her ordinary armament or equipment, or

(b) The manufacture, conversion, sale, import, export, transport, bearing or possession of arms, ammunition or military stores by order of [4] the Central

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[1] For the Statement of Objects and Reasons, *see* Gazette of India, 1877, Pt. V, p. 650; for discussions in Council, *see ibid.*, 1877, Supplement, pp. 3016 and 3030; *ibid.*, 1878, Supplement, pp. 435 and 453.

The functions of the Central Government under certain provisions of this Act, subject to certain conditions, were entrusted to—

(a) Provincial Governments with their consent, for a period of three years (with effect from the 1st April, 1951), *see* Gaz. of P., 1951, Pt. I, p. 181; and

(b) The Chief Commissioner of Karachi, for the period 28th April, 1952 to 31st March, 1957, *see* Gaz. of P., 1954, Pt. I, p. 136.

The Act has been applied to—

(*i*) Baluchistan by Regulation III of 1940 with certain restrictions and modifications.

(*ii*) Phulera in the Excluded Area of Upper Tanawal to the extent the Act is applicable in the N.-W.F.P. (Upper Tanawal) (Excluded Area) Laws Regulation, 1950.

(*iii*) Excluded Area of Upper Tanawal other than Phulera, by the N.-W.F.P. (Upper Tanawal) (Excluded Area) Laws Regulation, 1950 and declared to be in force in that area with effect from 1st June, 1951; *see* N.-W.F.P. Gazette, Ext., dated 1st June, 1951; and

(*iv*) The Leased Areas of Baluchistan, *see* the Leased Areas (Laws) Order, 1950 (G.G.O. 3 of 1950); and applied in the Federated Areas of Baluchistan; *see* Gazette of India, 1937, Pt. I, p. 1499.

It has been extended to the Baluchistan States Union by the Baluchistan States Union (Federal Laws) (Extension) Order, 1953 (G.G.O. 4 of 1953), as amended.

The Act has been and shall be deemed to has been brought into force in Gwadur with effect from the 8th September, 1958 by the Gwadur (Application of Central Laws) Ordinance, 1960 (37 of 1960), s. 2.

It is in force throughout the province of Assam except the Lushai Hills, *see* Notification No. 2443-T., dated the 1st June, 1914, Assam Gazette, 1914, Pt. II, p. 843.

A license granted under the Explosives Act, 1884 (4 of 1884), for the manufacture, possession, sale, transport or importation of an explosive may be given the effect of a like license granted under the Arms Act, 1878 (11 of 1878), *see* Act 4 of 1884, s. 15.

As to the possession, manufacture and export of arms, ammunition and gun-powder in the Chittagong Hill Tracts, *see* the Chittagong Hill Tracts Regulation, 1900 (1 of 1900), ss. 11 and 12.

As to further law relating to unlawful manufacture and posession of explosive substances, *see* the Explosive Substances Act, 1908 (6 of 1908), ss. 4 (b) and 5.

This Act has been repealed in its application to the Province of West Pakistan except certain provisions by West Pakistan Ordinance 20 of 1965, s. 29 (with effect from the 8th June, 1965).

The Act has been amended in Bengal by the Bengal Criminal Law (Arms and Explosives) Act, 1932 (Ben. 21 of 1932), and the Bengal Criminal Law (Amendment) Act, 1934 (Ben. 7 of 1934); and in the N.-W.F.P. by the Indian Arms (N.-W.F.P. Amdt.) Act, 1934 (N.-W.F.P. 1 of 1934) and Sind Act 10 of 1953 s. 12.

[2] The word "Indian" omitted by A.O., 1949, Sch.

[3] Subs. by the Central Laws (Statute Reform) Ordinance, 1960 (21 of 1960), s. 3 and 2nd Sch. (with effect from the 14th October, 1955), for "all the Provinces and the Capital of the Federation" which had been subs. by A.O., 1949, Arts. 3(2) and 4, for "the whole of British India".

[4] Subs. by A.O., 1949, Sch., for "any Govt. in British India", which had been subs. by A.O., 1937, for "the Govt.".

Government or any Provincial Government], or by a public servant or [1][a member of the forces constituted by the Pakistan Territorial Force Act, 1950] in the course of his duty as such public servant or [2][member].

Commencement.

2. This Act shall come into force on such day[3] as the[4] [Central Government] by notification in the[5] [Official Gazette] appoints.

3. [*Repeal of enactments.*] *Rep. by the Repealing Act, 1938 (I of 1938), s. 2 and Sch.*

Interpretation clause.

4. In this Act, unless there be something repugnant in the subject or context,—

"cannon" includes also all howitzers, mortars, wall-pieces, mitrailleuses and other ordnance and machine-guns, all parts of the same, and all carriages, platforms and appliances for mounting, transporting and serving the same:

[6]["appropriate Government" means, in relation to matters enumerated in the Third Schedule to the Constitution,

the Central Government and, in relation to other matters, the Provincial Government:]

"arms" includes fire-arms, bayonets, swords, daggers, spears, spearheads and bows and arrows, also cannon and parts of arms, and machinery for manufacturing arms;

"ammunition" includes also all articles specially designed for torpedo service and submarine mining, rockets, gun-cotton, dynamite, lithofracteur and other explosive or fulminating material, gun-flint, gun-wards, percussion-caps, fuses and fraction-tubes, all parts of ammunition and all machinery for manufacturing ammunition, but does not include lead, sulphur or saltpetre:

"military stores", in any section of this Act as applied to any part of [7][Pakistan], means any military stores to which the [8][Central Government] may from time to time, by notification in the [9][Official Gazette], specially extend such section in such part, and includes also all lead, sulphur, saltpetre and other material to which the [8][Central Government] may from time to time so extend such section:

"license" means a license granted under this Act, and "licensed" means holding such license.

II.—MANUFACTURE, CONVERSION AND SALE

5. No person shall manufacture, convert or sell, or keep, offer or expose for sale, any arms, ammunition or military stores, except under a license and in the manner and to the extent permitted thereby.

Nothing herein contained shall prevent any person from selling any arms or ammunition which he lawfully possesses for his own private use to any person who is not by an enactment for the time being in force prohibited from possessing the same; but every person so selling arms or ammunition to any person other than a person entitled to possess the same by reason of an exemption under section 27 of this Act shall, without unnecessary delay, give to the Magistrate of the district, or to the officer in charge of the nearest police-station, notice of the sale and of the purchaser's name and address.

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[1] Subs. by the Federal Laws (Revision and Declaration) Act, 1951 (26 of 1951), s. 4 and III Sch., for "a member of either of the forces constituted by the Indian Territorial Force Act, 1920 or the Auxiliary Force Act, 1920", which had been subs. for "a Volunteer enrolled under the Indian Volunteers Act, 1869" by the Auxiliary Force Act, 1920 (49 of 1920), s. 35.

[2] Subs. *ibid.*, for "Volunteer".

[3] 1st October 1878—*see* Gazette of India, 1878, Pt. 1, p. 389.

[4] Subs. by A.O., 1937, for "G. G. in C."

[5] Subs. *ibid.*, for "Gazette of India".

[6] The definition was ins. by A.O. 1964. Art. 2 and Sch.

[7] Subs. by the Central Laws (Statute Reform) Ordinance, 1960 (21 of 1960) s. 3 and 2nd Sch. (with effect from the 14th October, 1955), for "the Provinces and the Capital of the Federation" which had been subs. by A. O., 1949, Arts. 3(2) and 4, for "British India."

[8] Subs. by A. O., 1937, for "G. G. in C."

[9] Subs. *ibid.*, for "Gazette of India".

III.—IMPORT, EXPORT AND TRANSPORT

6. No person shall bring or take by sea or by land into or out of [1] [Pakistan] any arms, ammunition or military stores except under a license and in the manner and to the extent permitted by such license.

Nothing in the first clause of this section extends to arms (other than cannon) or ammunition imported or exported in reasonable quantities for his own private use by any person lawfully entitled to possess such arms or ammunition; but the Collector of Customs or any officer empowered by the [2] [Central Government] in this behalf by name or in virtue of his office may at any time detain such arms or ammunition until he receives the orders of the [2] [Central Government] thereon.

Explanation.—Arms, ammunition and military stores taken from one part of of [1] [Pakistan] to another by sea or across intervening territory not being part of [1] [Pakistan] are taken out of and brought into [1] [Pakistan] within the meaning of this section.

7. Notwithstanding anything contained in the Sea Customs Act, 1878, no arms, ammunition or military stores shall be deposited in any warehouse licensed under section 16 of that Act without the sanction of the [2] [Central Government].

8. [*Levy of duties on arms, etc., imported by sea.*] *Rep. by the Amending Act, 1891 (XII of 1891).*

9. [*Power to impose duty on import by land.*] *Rep. by the Amending Act, 1891 (XII of 1891).*

10. The [3] [appropriate Government] may, from time to time, by notification in the [4] [official Gazette],—

(a) regulate or prohibit the transport of any description of arms, ammunition or military stores over [5] [the whole of Pakistan] or any part thereof, either altogether or except under a license and to the extent in the manner permitted by such license, and

(b) cancel any such notification.

Explanation.—Arms, ammunition or military stores transhipped at a port in [1] [Pakistan] are transported within the meaning of this section.

(III.—IMPORT, EXPORT AND TRANSPORT. IV.—GOING ARMED AND POSSESSING ARMS, ETC.)

11. The [2] [Central Government] [6] * * * may, at any places along the boundary-line between [1] [Pakistan] and foreign territory [7] * * *, and at such distance within such line as it deems expedient, establish, searching-posts at which all vessels, carts and baggage-animals, and all boxes, bales and packages in transit, may be stopped and searched for arms, ammunition and military stores by any officer empowered by [8] [the Central Government] in this behalf by name or in virtue of his office.

12. When any person is found carrying or conveying any arms, ammunition or military stores, whether covered by a license or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are being carried by him with intent to use them, or that the same may be used, for any unlawful purpose, any person may without warrant apprehend him and take such arms, ammunition or military stores from him.

Any person so apprehended, and any arms, ammunition or military stores so taken by a person not being a Magistrate or Police-officer, shall be delivered over as soon as possible to a Police-officer.

All persons apprehended by, or delivered to, a Police-officer, and all arms and ammunition seized by or delivered to any such officer under this section, shall be taken without unnecessary delay before a Magistrate.

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[1] *See* footnote 7 on preceding page.
[2] Subs. by A. O., 1937, for "L. G.".
[3] Subs. by A. O., 1964, Art. 2 and Sch., for "Central Government" which had been subs. by A. O., 1937, for "G. G. in C.".
[4] Subs. by A. O., 1937, for "Gazette of India".
[5] *See* footnote 2 on page 396, *supra*.
[6] The words "with the previous sanction of the Governor General to Council" rep., *ibid.*
[7] The words "or between a Province and an Acceding State", which were ins. by A. O., 1949, Sch., have been omitted by A. O., 1964, Art. 2, and Sch.
[8] Subs. by A. O., 1937, for "such Govt."

IV.—GOING ARMED AND POSSESSING ARMS, ETC.

13. No person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby.

Any person so going armed without a license or in contravention of its provisions may be disarmed by any Magistrate, Police-officer or other person empowered by the [1] [appropriate Government] in this behalf by name or by virtue of his office.

14. No person shall have in his possession or under his control any cannon or fire-arms, or any ammunition or military stores, except under a license and in the manner and to the extent permitted thereby.

[2] * * * * * * *

15. In any place to which section 32, clause 2, of Act No. XXXI of 1860 [3] applies at the time this Act comes into force or to which [4] [the appropriate Government] may by notification in the [5] [official Gazette] specially extend this section,[4] no person shall have in his possession any arms of any description, except under a license and in the manner and to the extent permitted thereby.

[6] [16.—(1) Any person possessing arms, ammunition or military stores the possession wherof has, in consequence of the cancellation or expiry of a license or of an exemption or by the issue of a notification under section 15 or otherwise, become unlawful, shall without unnecessary delay deposit the same either with the officer in charge of the nearest police-station or, at his option and subject to such conditions as the [7] [appropriate Government] may by rule prescribe, with a licensed dealer.

(2) When arms, ammunition or military stores have been deposited under sub-section (1) or before the first day of January, 1920, under the provisions of any law for the time being in force, the depositors shall, at any time before the expiry of such period as the [1] [appropriate Government] may by rule prescribe, be entitled—

(*a*) to receive back any thing so deposited the possession of which by him has become lawful, and

(*b*) to dispose, or authorize the disposal, of any thing so deposited by sale or otherwise to any person whose possession of the same would be lawful; and to receive the proceeds of any such sale:

Provided that nothing in this sub-section shall be deemed to authorize the return or disposal of any thing the confiscation of which has been directed under section 24.

(3) All things deposited as aforesaid and not returned or disposed of under sub-section (2) within the prescribed period therein referred to shall be forfeited to [8] [Government].

(4) *a*) The [7] [appropriate Government] may make rules consistent with this Act for carrying into effect the provisions of this section.

Possession of arms of any description without license prohibited in certain places.

15. In any place to which section 32, clause 2, of Act No. XXXI of 1860 [9] applies at the time this Act comes into force or to which [10] [the appropriate Government] may by notification in the [5] [official Gazette] specially extend this

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[1] Subs. by A. O., 1964, Art. 2 and Sch., for "Central Government" which had been subs. by A. O., 1937 for "L. G.".

[2] The last three paras. of section 14 were rep. by Amending Act, 1891 (12 of 1891).

[3] Act 31 of 1860 was rep. by s. 3 of this Act.

[4] The original words "the Local Government with the previous sanction of the Governor General in Council" were first subs. by A. O., 1937 and then amended by A. O., 1964, Art. 2 and Sch., to read as above.

[5] Subs. by A. O., 1937, for "local official Gazette".

[6] S. 15 has been especially extended to—

(1) Places in the Punjab, *see* Punjab Gazette, 1899, Pt. I, p. 285; *ibid.*, 1900, Pt. I, p. 810.

(2) Places in Assam, *see* Assam Gazette, Extra., dated 23rd March, 1923.

[7] Subs. by the Indian Arms (Amdt.) Act, 1919 (20 of 1919), s. 2, for the original section.

[8] Subs. by A. O., 1961, Art. 2, for "His Majesty" (with effect from the 23rd March 1956).

[9] Act 31 of 1860 was rep. by s. 3 of this Act.

[10] The original words "the Local Government with the previous sanction of the Governor General in Council" were first subs. by A.O., 1937 and then amended by A.O., 1964, Art. 2 and Sch., to read as above.

section,[1] no person shall have in his possession any arms of any description, except under a license and in the manner and to the extent permitted thereby.

In certain cases arms to be deposited at police-stations or with licensed dealers.

[2]16.—(1) Any person possessing arms, ammunition or military stores the possession whereof has, in consequence of the cancellation or expiry of a license or of an exemption or by the issue of a notification under section 15 or otherwise, become unlawful, shall without unnecessary delay deposit the same either with the officer in charge of the nearest police-station or, at his option and subject to such conditions as the [3][appropriate Government] may by rule prescribe, with a licensed dealer.

(2) When arms, ammunition or military stores have been deposited under sub-section (1) or before the first day of January, 1920, under the provisions of any law for the time being in force, the depositor shall, at any time before the expiry of such period as the [4][appropriate Government] may by rule prescribe, be entitled—

(a) To receive back any thing so deposited the possession of which by him has become lawful, and

(b) To dispose, or authorize the disposal, of any thing so deposited by sale or otherwise to any person whose possession of the same would be lawful; and to receive the proceeds of any such sale:

Provided that nothing in this sub-section shall be deemed to authorize the return or disposal of any thing the confiscation of which has been directed under section 24.

(3) All things deposited as aforesaid and not returned or disposed of under sub-section (2) within the prescribed period therein referred to shall be forfeited to [4][Government].

(4)(a) The [3][appropriate Government] may make rules consistent with this Act for carrying into effect the provision of this section.

(b) In particular and without prejudice to the generality of the foregoing provision, the [3][appropriate Government] may by rule prescribe—

(i) The conditions subject to which arms, ammunition and military stores may be deposited with a licensed dealer, and

(ii) The period after the expiry of which things deposited as aforesaid shall be forfeited under sub-section (3).]

V.—LICENCES

Power to make rule as to licenses.

17. The [3][appropriate Government] may from time to time, by notification in the [5][official Gazette], make rules to determine the officers by whom the form in which, and the terms and conditions on and subject to which, any license shall be granted [6]; and may by such rules among other matters—

(a) Fix the period for which such license shall continue in force;

(b) Fix a fee payable by stamp or otherwise in respect of any such license granted in a place to which section 32, clause 2, of Act No. XXXI of 1860[7] applies at the time this Act comes into force or in respect of any such license other than a license for possession granted in any other place;

(c) Direct that the holder of any such license other than a license for possession shall keep a record or account, in such form as the [1][appropriate

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[1] S. 15 has been especially extended to—(1) Places in the Punjab, *see* Punjab Gazette, 1899, Pt. I, p. 285; *ibid.*, 1900, Pt. I, p. 810. (2) Places in Assam, *see* Assam Gazette, Extra., dated 23rd March, 1923.

[2] Subs. by the Indian Arms (Amdt.) Act, 1919 (20 of 1919), s. 2, for the original section.

[3] *See* footnote 6 on preceding page.

[4] Subs. by A.O., 1961, Art. 2, for "His Majesty" (with effect from the 23rd March, 1956).

[5] Subs. by A.O., 1937, for "Gazette of India".

[6] For Rules as to licences, *see* the Indian Arms Rules, 1924, Genl. R.&O., Vol. II.

[7] Act 31 of 1860 was rep. by s. 3 of this Act.

Government] may prescribe, of anything done under such license, and exhibit such record or account when called upon by an officer of Government to do so;

(d) Empower any officer of Government to enter and inspect any premises in which, and the terms and conditions on and subject to which, any license any person holding a license of the description referred to in section 5 or section 6;

(e) Direct that any such person shall exhibit the entire stock of arms, ammunition and military stores in his possession or under his control to any officer of Government so empowered; and

(f) Require the person holding any license or acting under any license to produce the same, and to produce or account for the arms, ammunition or military stores covered by the same when called upon by an officer of Government so to do.

Cancelling and suspension of license.

18. Any license may be cancelled or suspended—

(a) By the officer by whom the same was granted, or by any authority to which he may be subordinate, or by any Magistrate of a district,[1] * * *, within the local limits of whose jurisdiction the holder of such license may be, when, for reasons to be recorded in writing, such officer, authority, Magistrate[2] * * * deems it necessary for the security of the public peace to cancel or suspend such license; or

(b) By any Judge or Magistrate before whom the holder of such license is convicted of an offence against this Act, or against the rules made under this Act; and

[3][the] [4][appropriate Government] may by a notification in the official Gazette cancel or suspend all or any licenses throughout [5][Pakistan or the Province, as the case may be, or any part thereof].

VI.—PENALTIES

For breach of sections 5, 6, 10, 13 to 17.

[6]19. Whoever commits any of the following offences (namely):—

(a) Manufactures, converts or sells, or keeps offers or exposes for sale, any arms, ammunition or military stores in contravention of the provisions of section 5;

(b) Fails to give notice as required by the same section;

(c) Imports or exports any arms, ammunition or military stores in contravention of the provisions of section 6;

(d) Transports any arms, ammunition or military stores in contravention of a regulation or prohibition issued under section 10;

(e) Goes armed in contravention of the provisions of section 13;

(f) Has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section 14 or section 15;

(g) Intentionally makes any false entry in a record or account which, by a rule made under section 17, clause (c), he is required to keep;

(h) Intentionally fails to exhibit anything which, by a rule made under section 17, clause (e), he is required to exhibit; or

(i) Fails to deposit arms, ammunition or military stores, as required by section 14 or section 16;

shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.[7]

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[1] The words "or Commissioner of Police in a presidency-town" omitted by A.O., 1949, Sch.

[2] The words "or Commissioner" omitted, *ibid.*

[3] Subs. by A.O., 1937, for "the L.G. may at its discretion, by a notification in the local official Gazette, cancel or suspend all or any licences throughout the whole or any portion of the territories under its administration."

[4] Subs. by A.O., 1964, Art 2 and Sch., for "Central Government".

[5] The original words "the whole or any portion of British India" were first subs. by A.O., 1949, Sch. and then amended by the Central Laws (Statute Reform) Ordiance, 1960 (21 of 1960), s. 3 and 2nd Sch. (with effect from the 14th October, 1955) and A.O., 1964, Art. 2 and Sch., to read as above.

[6] Offences under this section are bailable, *see* Code of Criminal Procedure, 1898 (Act 5 of 1898), Sch. II.

[7] After this section, a new s. 19A, prescribing a heavier penalty for offenses under cl. (*a*) (*c*), (*e*) or (*f*) of s. 19 in respect of certain arms, has been inserted in Bengal. *See* the Bengal Criminal Law (Arms and Explosives) Act, 1932 (Ben. 21 of 1932), s. 3 and the Bengal Criminal Law Amdt. Act, 1934 (Ben. 7 of 1934), s. 3.

For secret breaches of sections 5, 6, 10, 14, and 15—XLV of 1860.

20. Whoever does any act mentioned in clause (a), (c), (d) or (f) of section 19, in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Pakistan Penal Code, or to any person employed upon a railway or to the servant of any public carrier,

For concealing arms, etc.

And whoever, on any search being made under section 25, conceals or attempts to conceal any arms, ammunition or military stores,

Shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.[1]

For breach of license.

21. Whoever, in violation of a condition subject to which a license has been granted, does or omits to do any act shall, when the doing or omitting to do such act is not punishable under section 19 or section 20, be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

For knowingly purchasing arms, etc., from unlicensed person.

22. Whoever knowingly purchases any arms, ammunition or military stores from any person not licensed or authorized under the proviso to section 5 to sell the same; or

Delivers any arms, ammunition or military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same,

For delivering arms, etc., to person not authorized to possess them.

Shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Penalty for breach of rule.

23. Any person violating any rule made under this Act, and for the violation of which no penalty is provided by this Act, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Power to confiscate.

24. When any person is convicted of an offense punishable under this Act, committed by him in respect of any arms, ammunition or military stores, it shall be in the discretion of the convicting Court or Magistrate further to direct that the whole or any portion of such arms, ammunition or military stores, and any vessel, cart or baggage-animal used to convey the same, and any box, package or bale in which the same may have been concealed, together with the other contents of such box, package or bale, shall be confiscated.

VII.—MISCELLANEOUS

Search and seizure by Magistrate.

25. Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose, or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate, having first recorded the grounds of his belief, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, and may seize and detain the same, although covered by a license, in safe custody for such time as he thinks necessary.

The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name or in virtue of his office by the[2] [appropriate Government].

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[1] A proviso, prescribing a heavier penalty for offences under this section in respect of certain arms, has been inserted in Bengal; *see* Ben. Act 21 of 1932, s. 4. After this section, a new s. 20A prescribing heavier penalty in certain cases has been inserted in Bengal; *see* Ben. Act 7 of 1934, s. 4.

[2] *See* footnote 4, preceding page.

Seizure and detention by appropriate Government.

26. The [1][appropriate Government] may at any time order or cause to be seized any arms, ammunition or military stores in the possession of any person, notwithstanding that such person is licensed to possess the same, and may detain the same for such time as it thinks necessary for the public safety.

Power to exempt.

27. The [1] [appropriate Government] may from time to time, by notification [2] published in the [3] [official Gazette],—

[4] (a) Exempt any person by name or in virtue of his office, or any class of persons or exclude, any description of arms or ammunition, or withdraw any part of [5] [Pakistan],[7] [or of the Province, as the case may be,] from the operation of any prohibition or direction contained in this Act; and

(b) Cancel any such notification, and again subject the persons or things or the part of [6] [Pakistan] [6] [or Province] comprised therein to the operation of such prohibition or direction.[7]

Information to be given regarding offences.

28. Every person aware of the commission of any offence punishable under this Act shall, in the absence of reasonable excuse, the burden of proving which shall lie upon such person, give information of the same to the nearest Police-officer or Magistrate, and every person employed upon any railway or by any public carrier shall, in the absence of reasonable excuse, the burden of proving which shall lie upon such person, give information to the nearest Police officer regarding any box, package or bale in transit which he may have reason to suspect contains arms, ammunition or military stores in respect of which an offence against this Act has been or is being committed.

Sanction required to certain proceedings under section 19, clause (f).

[8] 29. Where an offence punishable under section 19, clause (f), has been committed within three months from the date [9] on which this Act comes into force in any province, district or place to which section 32, clause 2, of Act [10]XXXI of 1860 [10] applies at such date, or where such an offense has been committed in any part of [5] [Pakistan] not being such a district, province or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district [11] * * *.

Searches in the case of offences against section 19, clause (f), how conducted.

30. Where a search is to be made under the Code of Criminal Procedure [12] [13] * * *, in the course of any proceedings instituted in respect of an offence punishable under section 19, clause (f), such search shall, notwithstanding anything contained in the said Code [14] * * *, be made in the presence of some officer specially appointed by name or in virtue of his office by the [9][appropriate Government] in this behalf, and not otherwise.

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[1] *See* footnote 4 on page 2527, *supra*.

[2] For exemptions and withdrawals under s. 27 (a) *see* rule 3 and Schedules I to IV of the Indian Arms Rules, 1924.

[3] Subs. by A.O., 1937, for "Gazette of India".

[4] For notifn. under this clause, *see* Gaz. of P., 1953, Pt. I, p. 188; and *ibid.*, 1961, Pt. I, p. 247.

[5] *See* footnote 7 on page 2523, *supra*.

[6] Ins. by A.O., 1964, Art. 2 and Sch.

[7] For notification declaring arms, etc., brought into a Pakistan port and declared under manifest to be consignments without transhipment to any port on the sea board of the Persian Gulf, to be liable to the prohibitions and directions contained in s. 6, *see* No. 902-P., dated 27th April, 1904, Gazette of India, 1904, pt. I, p. 296. As to exemtion of small parcels under certain conditions or of arms, etc., exported under license and intransit at an intermediate port, *see ibid.*

[8] This section has been rep. in its aplication to the N.-W.F.P. by the Indian Arms (N.-W.F.P. Admdt.) Act, 1934 (N.-W.F.P. 1 of 1934).

[9] The 1st October, 1878.

[10] Act 31 of 1860 was rep. by s. 3 of this Act.

[11] The words "or, in a presidency-town, of the Commissioner of Police" omitted by A.O., 1949, Sch.

[12] *See* now the Code of Criminal Procedure, 1898 (5 of 1898).

[13] The words comma and figures "or the Presidency Magistrate Act, 1877" omitted by the Central Laws (Statute Reform) Ordinance, 1960 (21 of 1960), s. 3 and 2nd Sch. (with effect from the 14th October, 1955)

[14] The words "or Act" omitted *ibid.* (with effect from the 14th October, 1955).

Operation of other laws not barred.

31. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act or the rules made under it, or from being liable under such other law to any higher punishment or penalty than that provided by this Act: Provided that no person shall be punished twice for the same offence.

Power to take census of fire-arms.

32. The [1] [appropriate Government] may from time to time, by notification in the [2] [official Gazette], direct a census to be taken of all fire-arms in any local area, and empower any person by name or in virtue of his office to take such census.

On the issue of any such notification, all persons possessing any such arms in such area shall furnish to the person so empowered such information as he may require in reference thereto, and shall produce such arms to him if he so requires.

Any person refusing or neglecting to produce any such arms when so required shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Notice and limitation of proceedings.

33. No proceeding other than a suit shall be commenced against any person for anything done in pursuance of this Act, without having given him at least one month's previous notice in writing of the intended proceeding and of the cause thereof, nor after the expiration of three months from the accrual of such cause.

THE FIRST SCHEDULE.—(Enactments repealed.) Rep. by the Repealing Act, 1938 (I of 1938), s. 2 and Sch.

THE SECOND SCHEDULE.—[Arms, etc., liable to Duty.] Rep. by the Amending Act, 1891 (XII of 1891).

[1][The Punjab Laws (Amendment) Act, 1878]

Act No. XII of 1878

[*28th March*, 1878]

An Act for the further Amendment of the Punjab Laws Act, 1872

Preamble—IV of 1872.

For the purpose of further amending the Punjab Laws Act, 1872; It is hereby enacted as follows:—

1 to 6. *Repealed.*[4]

Penalty for breach of rules under Act IV of 1872.

[5]7. Whoever breaks any rule made by the [6] [Provincial Government] under the [7]same Act shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to fifty rupees, or with both.[8] * * *.

8. [*Recovery of advances made by Government.*] *Rep. by the Amending Act, 1903 (I of 1903), s. 4 and Sch. III.*

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[1] See footnote 3 on page 2524, *supra*.

[2] Subs. by A.O., 1937, for "local official Gazette."

[3] Short title given by the Amending Act, 1903 (1 of 1903). For Statement of Objects and Reasons, *see* Gazette of India, 1877, Pt. V, p. 489; for Proceedings in Council, *see ibid.*, Supplement, pp. 2792, 2769 and *ibid.*, 1878, p. 481.

[4] Ss. 1 and 5 have been rep. by the Repealing Act, 1938 (1 of 1938), s. 2 by the Punjab Pre-emption Act, 1905 (Punjab 2 of 1905), ss. 3 and 4 by the Punjab Court of Wards Act, 1903 (Punjab 2 of 1903), and s. 6 by the Amending Act, 1891 (12 of 1891).

[5] S. 7 has been rep. in the N.-W.F.P. by the N.-W.F.P. Law and Justice Regulation, 1901 (7 of 1901), s. 5 and Sch. III.

[6] Subs. by A.O., 1937, for "L.G.".

[7] I.e. the Punjab Laws Act, 1872 (4 of 1872).

[8] The second sentence of s. 7 was rep. by Act 12 of 1891, s. 2 and Sch. I.

GOVERNMENT OF PAKISTAN, MINISTRY OF LAW AND PARLIAMENTARY AFFAIRS—THE PAKISTAN PENAL CODE

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203. Giving false information respecting an offence committed.
204. Destruction of document to prevent its production as evidence.
205. False personation for purpose of act or proceeding in suit or prosecution.
206. Fradulent removal or concealment of property to prevent its seizure as forfeited or in execution.

207. Fraudulent claim to property to prevent its seizure as forfeited or in execution.
208. Fraudulently suffering decree for sum not due.
209. Dishonestly making false claim in Court.
210. Fraudulently obtaining decree for sum not due.
211. False charge of offence made with intent to injure.
212. Harbouring offender—
if a capital offence;
if punishable with transportation for life, or with imprisonment.
213. Taking gift, etc., to screen an offender from punishment—
if a capital offence;
if punishable with transportation for life, or with imprisonment.
214. Offering gift or restoration of property in consideration of screening offender—
if a capital offence;
if punishable with transportation for life, or with imprisonment.
215. Taking gift to help to recover stolen property, etc.
216. Harbouring offender who has escaped from custody or whose apprehension has been ordered—
if a capital offence;
if punishable with transportation for life, or with imprisonment.
216A. Penalty for harbouring robbers or dacoits.
216B. [*Omitted.*]
217. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.
218. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.
219. Public servant in judicial proceeding corrupting making report, etc., contrary to law.
220. Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.
221. Intentional omission to apprehend on the part of public servant bound to apprehend.
222. Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.
223. Escape from confinement or custody negligently suffered by public servant.
224. Resistance or obstruction by a person to his lawful apprehension.
225. Resistance or obstruction to lawful apprehension of another person.
225A. Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for.
225B. Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.
226. Unlawful return from transportation.
227. Violation of condition of remission of punishment.
228. Intentional insult or interruption to public servant sitting in judicial proceeding.
229. Personation of a juror or assessor.

Chapter XII

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

230. "Coin" defined.
Pakistan coin.
231. Counterfeiting coin.
232. Counterfeiting Pakistan coin.
233. Making or selling instrument for counterfeiting coin.
234. Making or selling instrument for counterfeiting Pakistan coin.
235. Possession of instrument or material for the purpose of using the same for counterfeiting coin; if Pakistan coin.
236. Abetting in Pakistan the counterfeiting out of Pakistan of coin.
237. Import or export of counterfeit coin.
238. Import or export of counterfeit of Pakistan coin.
239. Delivery of coin, possessed with knowledge that it is counterfeit.

240. Delivery of Pakistan coin, possessed with knowledge that it is counterfeit.
241. Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.
242. Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.
243. Possession of Pakistan coin by person who knew it to be counterfeit when he became possessed thereof.
244. Person employed in mint causing coin to be of different weight or composition from that fixed by law.
245. Unlawfully taking coining instrument from mint.
246. Fraudulently or dishonestly diminishing weight or altering composition of coin.
247. Fraudulently or dishonestly diminishing weight or altering composition of Pakistan coin.
248. Altering appearance of coin with intent that it shall pass as coin of different description.
249. Altering appearance of Pakistan coin, with intent that it shall pass as coin of different description.
250. Delivery of coin, possessed with knowledge that it is altered.
251. Delivery of Pakistan coin, possessed with knowledge that it is altered.
252. Possession of coin by person who knew it to be altered when he became possessed thereof.
253. Possession or Pakistan coin by person who knew it to be altered when he became possessed thereof.
254. Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered.
255. Counterfeiting Government stamp.
256. Having possession of instrument or material for counterfeiting Government stamp.
257. Making or selling instrument for counterfeiting Government stamp.
258. Sale of counterfeit Government stamp.
259. Having possession of counterfeit Government stamp.
260. Using as genuine a Government stamp known to be counterfeit.
261. Effacing writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.
262. Using Government stamp known to have been before used.
263. Erasure of mark denoting that stamp has been used.
263A. Prohibition of fictitious stamps.

Chapter XIII

OF OFFENCES RELATING TO WEIGHTS AND MEASURES

264. Fraudulent use of false instrument for weighing.
265. Fraudulent use of false weight or measure.
266. Being in possession of false weight or measure.
267. Making, or selling false weight or measure.

Chapter XIV

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS

268. Public nuisance.
269. Negligent act likely to spread infection of disease dangerous to life.
270. Malignant act likely to spread infection of disease dangerous to life.
271. Disobedience to quarantine rule.
272. Adulteration of food or drink intended for sale.
273. Sale of noxious food or drink.
274. Adulteration of drugs.
275. Sale of adulterated drugs.
276. Sale of drug as a different drug or preparation.
277. Fouling water or public spring or reservoir.
278. Making atmosphere noxious to health.

279. Rash driving or riding on a public way.
280. Rash navigation of vessel.
281. Exhibition of false light, mark or buoy.
282. Conveying person by water for hire in unsafe or overloaded vessel.
283. Danger or obstruction in public way or line of navigation.
284. Negligent conduct with respect to poisonous substance.
285. Negligent conduct with respect to fire or combustible matter.
286. Negligent conduct with respect to explosive substance.
287. Negligent conduct with respect to machinery.
288. Negligent conduct with respect to pulling down or repairing buildings.
289. Negligent conduct with respect to animal.
290. Punishment for public nuisance in cases not otherwise provided for.
291. Continuance of nuisance after injunction to discontinue.
292. Sale, etc., of obscene books, etc.
293. Sale, etc., of obscene objects to young person.
294. Obscene acts and songs.
294A. Keeping lottery-office.
294B. Offering of prize in connection with trade, etc.

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OF OFFENCES RELATING TO RELIGION

295. Injuring or defiling place of worship, with intent to insult the religion of any class.
295A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.
296. Disturbing religious assembly.
297. Trespassing on burial places, etc.
298. Uttering words, etc., with deliberate intent to wound religious feelings.

Chapter XVI

OF OFFENCES AFFECTING THE HUMAN BODY

Of Offences affecting Life

299. Culpable homicide.
200. Murder.
When culpable homicide is not murder.
301. Culpable homicide by causing death of person other than person whose death was intended.
302. Punishment for murder.
303. Punishment for murder by life-convict.
304. Punishment for culpable homicide not amounting to murder.
304A. Causing death by negligence.
305. Abetment of suicide of child or insane person.
306. Abetment of suicide.
307. Attempt to murder.
308. Attempt to commit culpable homicide.
Attempts by life-convicts.
309. Attempt to commit suicide.
310. Thug.
311. Punishment.

Of the causing of Miscarriage of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.

312. Causing miscarriage.
313. Causing miscarriage without woman's consent.
314. Death caused by act done with intent to cause miscarriage. If act done without women's consent.
315. Act done with intent to prevent child being born alive or to cause it to die after birth.
316. Causing death of quick unborn child by act amounting to culpable homicide.

317. Exposure and abandonment of child under twelve years, by parent or person having care of it.
318. Concealment of birth by secret disposal of dead body.

Of Hurt

319. Hurt.
320. Grievous hurt.
321. Voluntarily causing hurt.
322. Voluntarily causing grievous hurt.
323. Punishment for voluntarily causing hurt.
324. Voluntarily causing hurt by dangerous weapons or means.
325. Punishment for voluntarily causing grevious hurt.
326. Voluntarily causing grevious hurt by dangerous weapons or means.
327. Voluntarily causing hurt to extort property, or to constrain to an illegal act.
328. Causing hurt by means of poison, etc., with intent to commit an offence.
329. Voluntarily causing grevious hurt to extort property, or to constrain to an illegal act.
330. Voluntarily causing hurt to extort confession, or to compel restoration of property.
331. Voluntarily causing grevious hurt to extort confession, or to compel restoration of property.
332. Voluntarily causing hurt to deter public servant from his duty.
333. Voluntarily causing grievous hurt to deter public servant from his duty.
334. Voluntarily causing hurt on provocation.
335. Voluntarily causing grievous hurt on provocation.
336. Act endangering life or personal safety of others.
337. Causing hurt by act endangering life or personal safety of others.
338. Causing grievous hurt by act endangering life or personal safety of others.

Of Wrongful Restraint and Wrongful Confinement

339. Wrongful restraint.
340. Wrongful confinement.
341. Punishment for wrongful restraint.
342. Punishment for wrongful confinement.
343. Wrongful confinement for three or more days.
344. Wrongful confinement for ten or more days.
345. Wrongful confinement of person for whose liberation writ has been issued.
346. Wrongful confinement in secret.
347. Wrongful confinement to extort property, or constrain to illegal act.
348. Wrongful confinement to extort confession, or compel restoration of property.

Of Criminal Force and Assault

349. Force.
350. Criminal force.
351. Assault.
352. Punishment for assault or criminal force otherwise than on grave provocation.
353. Assault or criminal force to deter public servant from discharge of his duty.
354. Assault or criminal force to woman with intent to outrage her modesty.
355. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.
356. Assault or criminal force in attempt to commit theft of property carried by a person.
357. Assault or criminal force in attempt wrongfully to confine a person.
358. Assault or criminal force on grave provocation.

Of Kidnapping, Abduction, Slavery and Forced Labour

359. Kidnapping.
360. Kidnapping from Pakistan, etc.
361. Kidnapping from lawful guaradianship.
362. Abduction.
363. Punishment for kidnapping.
364. Kidnapping or abducting in order to murder.
364A. Kidnapping or abducting a person under the age of ten.
365. Kidnapping or abducting with intent secretly and wrongfully to confine person.
366. Kidnapping, abducting or inducing woman to compel her marriage, etc.
366A. Procuration of minor girl.
366B. Importation of girl from foreign country.
367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.
368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.
369. Kidnapping or abducting child under ten years with intent to steal from its person.
370. Buying or disposing of any person as a slave.
371. Habitual dealing in slaves.
372. Selling minor for purposes of prostitution, etc.
373. Buying minor for purposes of prostitution, etc.
374. Unlawful compulsory labour.

Of Rape

375. Rape.
376. Punishment for rape.

Of Unnatural Offences

377. Unnatural offences.

CHAPTER XVII

OF OFFENCES AGAINST PROPERTY

Of Theft

378. Theft.
379. Punishment for theft.
380. Theft in dwelling-house, etc.
381. Theft by clerk or servant of property in possession of master.
382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.

Of Extortion

383. Extortion.
384. Punishment for extortion.
385. Putting person in fear of injury in order to commit extortion.
386. Extortion by putting a person in fear of death or grevious hurt.
387. Putting person in fear of death or of grievous hurt, in order to commit extortion.
388. Extortion by threat of accusation of an offence punishable with death or transportation, etc.
389. Putting person in fear of accusation of offence, in order to commit extortion.

Of Robbery and Dacoity

390. Robbery.
When theft is robbery.
391. Dacoity.
392. Punishment for robbery.
393. Attempt to commit robbery.
394. Voluntarily causing hurt in committing robbery.
395. Punishment for dacoity.
396. Dacoity with murder.

397. Robbery or dacoity, with attempt to cause death or grevious hurt.
398. Attempt to commit robbery or dacoity when armed with deadly weapon.
399. Making preparation to commit dacoity.
400. Punishment for belonging to gang of dacoits.
401. Punishment for belonging to gang of thieves.
402. Assembling for purpose of committing dacoity.

Of Criminal Misappropriation of Property

403. Dishonest misappropriation of property.
404. Dishonest misappropriation of property possessed by deceased person at the time of his death.

Of Criminal Breach of Trust

405. Criminal breach of trust.
406. Punishment for criminal breach of trust.
407. Criminal breach of trust by carrier, etc.
408. Criminal breach of trust by clerk or servant.
409. Criminal breach of trust by public servant, or by banker, merchant or agent.

Of the Receiving of Stolen Property

410. Stolen property.
411. Dishonestly receiving stolen property.
412. Dishonestly receiving property stolen in the commission of a dacoity.
413. Habitually dealing in stolen property.
414. Assisting in concealment of stolen property.

Of Cheating

415. Cheating.
416. Cheating by personation.
417. Punishment for cheating.
418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.
419. Punishment for cheating by personation.
420. Cheating and dishonestly inducing delivery of property.

Of Fraudulent Deeds and Dispositions of Property

421. Dishonest or fradulent removal or concealment of property to prevent distribution among creditors.
422. Dishonesty or fradulently preventing debt being available for creditors.
423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.
424. Dishonest or fraudulent removal or concealment of property.

Of Mischief

425. Mischief.
426. Punishment for mischief.
427. Mischief causing damage to the amount of fifty rupees.
428. Mischief by killing or maiming animal of the value of ten rupees.
429. Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.
430. Mischief by injury to works of irrigation or by wrongfully diverting water.
431. Mischief by injury to public road, bridge, river or channel.
432. Mischief by causing ununddation or obstruction to public drainage attended with damage.
433. Mischief by destroying, moving or rendering less useful a light-house or sea-mark.
434. Mischief by destroying or moving, etc., a land-mark fixed by public authority.
435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.

436. Mischief by fire or explosive substance with intent to destroy house, etc.
437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.
438. Punishment for the mischief described in section 437 committed by fire or explosive substance.
439. Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.
440. Mischief committed after preparation made for causing death or hurt.

Of Criminal Trespass

441. Criminal trespass.
442. House-trespass.
443. Lurking house-trespass.
444. Lurking house-trespass by night.
445. House-breaking.
446. House-breaking by night.
447. Punishment for criminal trespass.
448. Punishment for house-trespass.
449. House-trespass in order to commit offence punishable with death.
450. House-trespass in order to commit offence punishable with transportation for life.
451. House-trespass in order to commit offence punishable with imprisonment.
452. House-trespass after preparation for hurt, assault or wrongful restraint.
453. Punishment for lurking house-trespass or house-breaking.
454. Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.
455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.
456. Punishment for lurking house-trespass or housebreaking by night.
457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.
458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.
459. Grievous hurt caused whilst committing lurking house-trespass or house-breaking.
460. All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.
461. Dishonestly breaking open receptacle containing property.
462. Punishment for same offence when committed by person entrusted with custody.

Chapter XVIII

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS

463. Forgery.
464. Making a false document.
465. Punishment for forgery.
466. Forgery of record of Court or of public register, etc.
467. Forgery of valuable security, will, etc.
468. Forgery for purpose of cheating.
469. Forgery for purpose of harming reputation.
470. Forged document.
471. Using as genuine a forged document.
472. Making or possessing counterfeit seal, etc. with intent to commit forgery punishable under section 467.
473. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.
474. Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.
475. Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.

476. Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.
477. Fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security.
477A. Falsification of accounts.

Of Trade, Property and other Marks

478. Trade mark.
479. Property mark.
480. Using a false trade mark.
481. Using a false property mark.
482. Punishment for using a false trade mark or property mark.
483. Counterfeiting a trade mark or property mark used by another.
484. Counterfeiting a mark used by a public servant.
485. Making or possession of any instrument for counterfeiting a trade mark or property mark.
486. Selling goods marked with a counterfeit trade mark or property mark.
487. Making a false mark upon any receptacle containing goods.
488. Punishment for making use of any such false mark.
489. Tampering with property mark with intent to cause injury.

Of Currency-Notes and Bank-Notes

489A. Counterfeiting currenty-notes or bank notes.
489B. Using as genuine, forged or counterfeit currenty-notes or bank-notes.
489C. Possession of forged or counterfeit currency-notes or bank-notes.
489D. Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.
489E. Making or using documents resembling currenty-notes or bank-notes.

CHAPTER XIX

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE

490. [*Repealed.*]
491. Breach of contract to attend on and supply wants of helpless person.
492. [*Repealed.*]

CHAPTER XX

OF OFFENCES RELATING TO MARRIAGE

493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.
494. Marrying again during life-time of husband or wife.
495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.
496. Marriage ceremony fraudulently gone through without lawful marriage.
497. Adultery.
498. Enticing or taking away or detaining with criminal intent a married woman.

CHAPTER XXI

OF DEFAMATION

499. Defamation.
Imputation of truth which public good requires to be made or published.
Public conduct of public servants.
Conduct of any person touching any public question.
Publication of reports of proceedings of Courts.
Merits of case decided in Court or conduct of witnesses and others concerned.
Merits of public performance.
Censure passed in good faith by person having lawful authority over another.
Accusation preferred in good faith to authorized person.

Imputation made in good faith by person for protection of his or other's interests.
Caution intended for good of person to whom conveyed or for public good.
500. Punishment for defamation.
501. Printing or engraving matter known to be defamatory.
502. Sale of printed or engraved substance containing defamatory matter.

CHAPTER XXII

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

503. Criminal intimidation.
504. Intentional insult with intent to provoke breach of the peace.
505. Statements conducing to public mischief.
506. Punishment for criminal intimidation.
If threat be to cause death or grievous hurt, etc.
507. Criminal intimidation by an anonymous communication.
508. Act caused by inducing person to believe that he will be rendered an object of the Divine displeasure.
509. Word, gesture or act intended to insult the modesty of a woman.
510. Misconduct in public by a drunken person.

CHAPTER XXIII

OF ATTEMPTS TO COMMIT OFFENCES

511. Punishment for attempting to commit offences punishable with transportation or imprisonment.

PHILLIPPINES

The criminal law of the Philippines is patterned after the Spanish Penal Code of 1870 which was extended to the Philippines by an 1886 royal order of the Spanish Crown and made effective in this former Spanish colony in 1887. The Spanish Code was based on the classical theory of criminal science which dictates that criminal responsibility can only be demanded or exacted on grounds of imputability (or actor's knowledge or free will) and that penalty imposed by way of retribution must be proportionate to the harm done, not only quantitatively but also qualitatively; i.e., the emphasis is on the *act* and not on the *doer*. The same theory, not surprisingly, pervades the current basic criminal law of the Philippines, the Revised Penal Code, which was approved by the former Philippine Legislature on December 8, 1930 and took effect on January 1, 1932. The Code has since undergone several changes.[1]

Criminal procedure which, along with other procedural rules in the Philippines, comes under the general heading, "Remedial Law," is governed basically by the Rules of Court as revised on January 1, 1964. We hope to discuss briefly the relvant rules and other special procedural laws as required. At this point, it should be pointed out that the Philippines has one central government with all political subdivisions made subordinate to it. There is one Supreme Court, one Court of Appeals, quite a number of courts of first instance and other inferior courts distributed over designated judicial districts. A court's jurisdiction rests on such factors as personal circumstances, subject matter, gravity of offense charged, etc., prescribed by law. The basic codes are applicable nationally. The penal code, however, is enforceable not only within the Philippines but also outside the country in certain cases, such as those involving offenses committed on board Philippine ships or airships; those concerning counterfeiting or Philippine coins or currency, etc.; those against national security; and others committed in the exercise of official functions by government employees abroad.

As amended to date, the Revised Penal Code contains 367 articles, numbered consecutively starting at 1. It is divided into Books I and II. Book I consists of two parts: (1) the basic principles affecting criminal liability (Articles

[1] The Revised Penal Code (Act 3815, as amended), 1964 ed., Central Book Supply Co., Manila [1964]. 158 p.

1–20); and (2) the provisions on penalties, including both criminal and civil liabilities (Articles 21–113). Felonies are defined in Book II with the corresponding penalties classified and grouped under 14 titles (Articles 114–365).

Felonies, Intent or Culpability

Pursuant to Article 3, they are "acts and omissions" divided into: (1) intentional felonies committed "by means of deceit *(dolo)*"; and (2) culpable felonies committed "by means of fault *(culpa)*." Luis B. Reyes, in a widely-used commentary on the Code, makes the following pertinent observation:

In intentional felonies, the act or omission of the offender is *malicious*. In the language of Art. 3, the act is performed with deliberate intent (with malice). The offender, in performing the act or in incurring the omission, *has the intention to cause an injury* to another. In culpable felonies, the act or omission of the offender is not malicious. The injury caused by the offender to another person is "unintentional, it being simply the incident of another act performed *without* malice" [1]

By way of illustration, the same author cites a felony by omission as follows: "Anyone who fails to render assistance to any person whom he finds in an uninhabited place, wounded or in danger of dying, is liable for abandonment of persons in danger (Art. 275, par. 1, Revised Penal Code)." [2] Note, however, that for an omission to be a felony there must be an express provision of law, making it so and punishing it as such. Common law crimes or those which do not rest for their authority upon any express declaration of the legislature, are not recognized in the Philippines. In this jurisdiction what is controlling is the maxim *nullum crimen, nulla poena sine lege* (there is no crime where there is no law punishing it).

In both felonies committed either by *dolo* or *culpa*, the acts or omissions must be voluntary. Those committed by means of *dolo* are considered performed voluntarily or with deliberate intent, it being presumed in all cases that negligent acts or omissions are voluntary. Deliberate intent refers to criminal intent.

Defenses

Mistake of fact (not mistake of law) constitutes a defense provided, however, the following requisites are present: (1) That the act done would have been lawful had the facts been as the accused believed them to be; (2) That the intention of the accused in performing the act should be lawful; (3) That the mistake must be without fault or carelessness on the part of the accused.

Insanity as a defense is covered in Article 12 which treats with exempting circumstances. In this connection, Judge Reyes, quoting a famous Filipino criminologist, states that an imbecile—one who while advanced in age has a mental development comparable to that of a child of two or seven years of age—is exempt in all cases from criminal liability because of the absence of the conditions of free will and voluntariness in any of his actions; whereas, an insane person may not be so exempt if it can be shown that he acted during a lucid interval.[3]

On the matter of self-defense, the Code provides:

Art. 11. *Justifying circumstances.*—The following do not incur any criminal liability:

1. Anyone who acts in defense of his person or rights, provided that the following circumstances concur:

First. Unlawful aggression;

Second. Reasonable necessity of the means employed to prevent or repel it;

Third. Lack of sufficient provocation on the part of the person defending himself.

2. Anyone who acts in defense of the person or rights of his spouse, ascendants, descendants, or legitimate, natural or adopted brothers or sisters, or of his relatives by affinity in the same degrees, and those by consanguinity within the fourth civil degree, provided that the first and second requisites prescribed in the next preceding circumstance are present, and the further requisite, in case the provocation was given by the person attacked, that the one making defense had no part therein.

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[1] Reyes, Luis B. The Revised Penal Code, criminal law, 8 ed., Reyes Bros., Quezon City, 1969. Vol. 1, p. 37.
[2] *Ibid.*, p. 35.
[3] *Ibid.*, p. 192.

3. Anyone who acts in defense of the person or rights of a stranger, provided that the first and second requisites mentioned in the first circumstance of this article are present and that the person defending be not induced by revenge, resentment, or other evil motive.

Aggression within the context of the above article refers to actual or imminent aggression, and the "reasonableness of the necessity" to repel or prevent aggression is measured in terms of the type of weapon used, physical condition of both the attacker and the victim and other circumstances.

Under paragraph 2 of the article on defense, "relatives" extend to those connected by affinity (in-laws) or consanguinity (blood relatives) up to the "fourth civil degree" such as first cousins, provided however the circumstances stipulated in sub-paragraphs 1 and 2, supra, are present and that if there was any provocation at all, the person undertaking the defense had no part in it whatsoever.

Procedural Matters

Sentences or judgments appealed to a higher court may be lowered, raised, confirmed or remanded back to the trial courts for new trial, as the circumstances may warrant. Under applicable rules, only questions of law are directly appealable to the Supreme Court. Generally, both questions of fact and questions of law may, under certain standards, be appealable to the Court of Appeals. Written reasons for decisions are required, unless they involve decisions handed down by inferior courts which are not of record; i.e., municipal courts.

All offenses under the Revised Penal Code calling for capital punishment, such as murder and kidnapping, if given the death penalty by a court of first instance, are automatically appealed to the Supreme Court which can only confirm the death sentence by a unanimous vote of the Justices.

On multiple prosecutions for related offenses and others concerned with prosecutions barred by a former prosecution for another offense, the Rules of Court follow more or less the same procedural patterns of the American judicial system.

Crimes Without Victims

Abortion, gambling, prostitution are not, under any circumstances, exempt from criminal liability and are dealt with more or less severely. Homosexual activity, however, is generally prosecuted under vagrancy provisions of the Code.

Parole

Indeterminate sentencing in the Philippines is covered by a special law, Act 4103 of 1933, otherwise known as the Indeterminate Sentence Law. This law formalized and established the present-day administrative machinery for implementing an effective parole system in the country. It provided the guidelines for the application by the Court of the minimum and maximum penalties for the offense defined by the Revised Penal Code and other laws in accordance with the prescribed rules, and the procedure for releasing on parole certain convicts whose behavior, training and good potentials merit "a second change" at a normal life. Provisions of the law are implemented by a Board of Indeterminate Sentence with broad powers of investigation and the discretion to authorize the release of prisoners who have served the minimum penalty but subject to re-arrest and confinement should the conditions of the parole be violated.[1]

Penalties

Attached is a copy of a table excerpted from the Code itself, showing the duration and category of each penalty. This should put in a better light the provisions of the proposed U.S. Federal Code on concurrent and consecutive terms of imprisonment in relation to Article 70 of the Revised Penal Code which provides as follows:

Art. 70. *Successive service of sentences.*—When the culprit has to serve two or more penalties, he shall serve them simultaneously if the nature of the penalties will so permit; otherwise, the following rules shall be observed:

[1] Bunye, Alfredo M. An analytical study of the application of penalties in the Revised Penal Code, in relation to the provisions of the Indeterminate Sentence Law in Decision Law Journal, vol. 5, January 31, 1949, pp. 1–11.

In the imposition of the penalties, the order of their respective severity shall be followed so that they may be executed successively or as nearly as may be possible, should a pardon have been granted as to the penalty or penalties first imposed, or should they have been served out.

For the purpose of applying the provisions of the next preceding paragraph the respective severity of the penalties shall be determined in accordance with the following scale:

1. Death,
2. *Reclusión perpetua,*
3. *Reclusión temporal,*
4. *Prisión mayor.*
5. *Prision correccional,*
6. *Arresto mayor,*
7. *Arresto menor,*
8. *Destierro,*
9. Perpetual absolute disqualification,
10. Temporary absolute disqualification,
11. Suspension from public office, the right to vote and be voted for, the right to follow profession or calling, and
12. Public censure.

Notwithstanding the provisions of the rule next preceding, the maximum duration of the convict's sentence shall not be more than threefold the length of time corresponding to the most severe of the penalties imposed upon him. No other penalty to which he may be liable shall be inflicted after the sum total of those imposed equals the same maximum period.

The preceding should be read together with Article 81 which specifically states that "death sentence shall be executed with preference to another. . ."

Proposed Philippine Code of Crimes

The Revised Penal Code of the Philippines is in the process of total revision. You might find the ideas from this current revision effort enlightening. In 1947, the President of the Philippines created a Code Commission to revise "all existing substantive laws and codify them in conformity with the customs and traditions of the people and with modern trend in legislation and the progressive principles of law." Several years and several commissions later, a Code of Crimes was drafted but, for one reason or another, was never enacted into law. Recently, however, a leading Manila paper,[1] carried the story that President Marcos certified for immediate enactment by the Philippine Congress what appears to be the same draft code. This draft and relevant periodical literature[2] might prove more interesting and useful for your purposes. The general structure of the proposed Code of Crimes may be gleaned from "rationale" of the Code Commission, which is excerpted as follows:

The first and most far-reaching task of the Code Commission was to determine the basic philosophy of the new Code of Crimes. For this purpose, the conflict between two opposite theories or schools—the classical or juristic, and the positivist or realistic—had to be examined . . . To the classicist, and specifically the framers of the Spanish Penal Code of 1870, man is essentially a moral creature with an absolutely free will to choose between good and evil. They assert that man should be adjudged and held accountable for wrongful acts, so long as that free will appears unimpaired . . . However, eventually, the classical method of considering the offender as an abstract being, and of prefixing for him, through a series of hard-and-fast rules, a great multitude of penalties with scant regard to the human element, found stubborn and severe critics in the persons of Dr. Cesare Lombroso and Professors Rafael Garofalo and Enrico Ferri, who were the forerunners and founders of the positivist school of criminology. . .

The positivists hold that man is subdued occasionally by a strange and morbid phenomenon which constrains him to do wrong, in spite of or contrary to his volition. It is for this reason that the central idea of all positivist thinking is the defense of the community from anti-social activities, whether actual or potential, against the morbid type of man who is called a "socially dangerous person." To forestall the social danger and to achieve social defense, the posi-

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[1] *The Manila Times*, February 12 (?), 1972.

[2] Guevara, Guillermo B. *The anatomy ofthe code of crimes.* In Philippine Law Journal, vol. 33, May 1968, p. 146. See also: Lawyers Journal, Jan. 28, 1950, pp. 83–86.

tivist philosophy has thus chosen a different path. Premised upon the proposition that man is primary, while the deed is only secondary, the new school takes the view that crime is essentially a social and natural phenomenon, and as such, it cannot be treated and checked by the application of abstract principles of law and jurisprudence nor by the imposition of a punishment, fixed and determined *a priori;* but rather through the enforcement of individual measures in each particular case after a thorough, personal and individual investigation conducted by a competent body of psychiatrists and social scientists.

After a deliberate and careful study of the vast field of criminal science, the Commission came to the conclusion that no particular school of thought or theory could claim perfection and monopoly of the true and rightful approach toward the administration of criminal justice . . .

The foregoing reasons, among others, kept the Commission from committing itself entirely to either of the two opposing schools of thought. The Commission prefers to follow the path of Criminal Politic which may be considered as the *giusto mezzo* or the happy medium between the two extreme theories.

For this purpose, the Commission retains the principle of moral blame or free will in every act or omission (Articles 14 and 16), but at the same time the man or the actor is considered as more important than the act itself. (Arts. 106 to 112) [1]

The proposed Code contains 951 articles as compared with 367 of the present Code. Among the new concepts introduced are: (1) a crime is either consummated or attempted, discarding in effect the classical distinction between attempted, frustrated and consummated crimes; (2) the accessory after the fact whose guilt depended largely upon the guilt of the principal under the present Code became the principal of a separate and different crime (Arts. 32, 384–390); (3) the idea of a quasi-offense was scraped and a bi-partite classification of offenses was adopted; i.e., an act is either a crime or a misdemeanor (Article 13); (4) the requisites for self-defense were enlarged to include defense of property and a *juris tantum* presumption that the injury inflicted upon an intruder was reasonably necessary to prevent or repel the aggression; (5) wealth dishonestly accumulated by a public official is made subject to forfeiture in favor of the government (Art. 445); (6) the right against self-incrimination has been restricted (Art. 446); (7) persons judicially declared "socially dangerous" are subject to curative security measures until such time that they have been pronounced no longer dangerous to society (Arts. 561–562); (8) the refusal of any person to aid an officer of the law in the arrest of any lawbreaker, or in the maintenance of peace and order is penalized as a misdemeanor against the public administration (Art. 804); and (9) the principles enunciated in Article 247 of the Revised Penal Code have been abrogated. The article in question, a most interesting and intriguing one, provides in part: "any legally married person, who having suprised his sponse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injuries, shall suffer the penalty of *destierro.* This penalty is simple banishment to an area outside of the commission of the crime. The same article further provides that if the injuries inflicted are not serious, there is an absolute exemption from criminal liability. Under the proposed Code, repressions of imprisonment are provided.

Conclusion

Hopefully, this report on both the Revised Penal Code and the proposed Code of Crimes of the Philippines will help put in a better perspective the pros and cons surrounding the current moves to further develop American criminal jurisprudence.

Scandinavian Countries

QUESTIONS 1, 2, 6, 7, 8

The Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary has, as of January 26, 1972, requested information about a large number of subjects related to the criminal codes of

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[1] Code of Crimes prepared and submitted by the Code Commission, Bureau of Printing, Manila, 1950.

Denmark, Norway and Sweden. The inquiries are arranged under 20 numbered questions, and detailed separate reports have been prepared for some of the numbered questions (Nos. 3, 4, 5, 11 and 12), but the time factor does not allow a similar detailed discussion of the remaining questions. The purpose of this report is give a tentative answer to the total inquiry, primarily by references to Professor Andenaes' standard text on Norwegian criminal law [1] and to the available translations of the Danish Criminal Code,[2] the Norwegian Penal Code,[3] and the Swedish Penal Code.[4]

QUESTION 1

The history of the current Scandinavian criminal codes is normally dated back to the criminal law reform movement of the 19th century. The Danish, Norwegian, and Swedish Penal Codes were originally composed of two parts. First a general part which applied to all crimes, regardless of whether they were described in the criminal codes called the special part, which described the offenses which traditionally have been considered crimes in Scandinavia. The contents of these special parts may very roughly be compared to the common law concept of felonies and more serious misdemeanors. However, Scandinavian criminal law has not expanded this concept nearly as much as the common law concept of felonies has been in Anglo-American law. The Danish and the Norwegian Penal Codes are still divided into this two-part arrangement, but approximately the latter half of the general part of the Danish Criminal Code [5] is really a subpart on sentencing. The Swedish Penal Code was divided in 1965 into three parts in an arrangement which has some similarity to that of the Proposed Federal Criminal Code.[6] One of the explanations given for the Swedish rearrangement is that the draftsmen assumed that the code should give information on what is punishable, not only to lawyers but also to the general public. It was felt that the definitions of the individual crimes was of most interest to the general public. Consequently, the highly technical provisions about punishment were moved to the end of the Swedish Penal Code.[7]

QUESTION 2

The numbering system of the Danish and the Norwegian Criminal Codes runs consecutively from Section 1 to Section 305 or Section 436, respectively, regardless of the division of the codes into parts and chapters. This reflects the usual Danish-Norwegian way of citing a statutory provision, namely by name, date, and section number. The numbering system of the Swedish Penal Code runs consecutively from Chapter 38, regardless of the division into parts. Each chapter is divided into sections which are numbered consecutively from Section 1 to the end of the Chapter. Also, the Swedish arrangement reflects the usual Swedish way of citing a statutory provision, namely by the popular name of the statute, by the chapter number and by the section number. The few unused section numbers in the Scandinavian criminal codes indicate repealed provisions. A few code sections have been expanded by the use of lower case letters. For instance, Sections 39, 39a, 39b and 39c of the Norwegian Penal Code.

The numbering system of the Proposed Federal Criminal Code indicates the chapter number in the first digit(s) of the section number. A somewhat similar numbering system is to be found in the Uniform Commerical Code. The Scandinavian countries use the traditional numbering system for statutes, but

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[1] Johannes Andenaes, *The General Part of the Criminal Law of Norway*. South Hackensack, N.J., Fred. B. Rothman, 1965. The parts of this text which are referred to in this report are attached as *Appendix A*.

[2] *The Danish Criminal Code;* with an Introduction by Knud Waaben. Copenhagen, G.E.C. Gad, 1958. The introduction and code sections which are referred to in this report are attached as *Appendix B*.

[3] *The Norwegian Penal Code;* with an Introduction by Johannes Andenaes. South Hackensack, N.J., Fred. B. Rothman, 1961. The introduction and code sections which are referred to in this report are attached as *Appendix C*.

[4] *The Penal Code of Sweden;* with an Introduction by Ivar Strahl. Stockholm, Ministry of Justice 1965. The introduction and code sections which are referred to in this report are attached as *Appendix D*.

[5] *The Danish Criminal Code*, Secs. 31–91.

[6] *U.S. Congress, Senate, Committee on the Judiciary*. Hearings before the Subcommittee on Criminal Laws and Procedures, February 10, 1971. Washington, D.C., G.P.O., 1971. Part 1, p. 133–517.

[7] *The Penal Code of Sweden, supra* note 4 *at* p. 8 (the Introduction).

they have gone one step further and applied an outright decimal classification system for technical regulations, e.g., the Swedish Building Standards,[1] where the chapter number is followed by a decimal which indicates the exact section. The advantage of the decimal system is that the possibilities for expansion are practically limitless. However, such numbering techniques would scarcely be applied to more permanent statutory enactments, such as the criminal codes.

QUESTION 6

Section 502 of the proposed Federal Criminal Code establishes the rather generally accepted principle that voluntary intoxication does not in itself relieve the perpetrator of criminal liability. However, as it was explained under Question 5, Scandinavian criminal law basically accepts the medical (psychiatric) criteria for mental diseases and defects, and a school of thought exists which would apply the same approach to voluntary intoxication. For instance, the original Section 45 (from 1902 to 1929) of the Norwegian Penal Code would punish many seriously intoxicated perpetrators only for negligent crimes. The result was, as explained by Professor Andenaes in Appendix A (p. 265–267), that the Norwegian courts handed down some decisions which directly created an uproar. Section 45 of the Norwegian Penal Code was amended in 1929, and it now has a somewhat stronger wording than the corresponding Section 18 of the Danish Criminal Code and Chapter 1, Section 2, of the Penal Code of Sweden.

The Norwegian interpretation of Section 45 is explained by Andenaes in Appendix A (p. 263–272). Danish[2] and Swedish[3] practice is, in spite of the different wordings of the statutory provisions, not too different from the Norwegian. This is so because it is a relatively rare case that a perpetrator is completely unconscious, and because also Denmark and Swenden recognize that so-called pathologic intoxication is an involunatry intoxication. Cases where a relatively small amount of alcohol or drugs have a completely abnormal effect are examples of pathological intoxication. In brief, the Scandinavian attitude toward voluntary intoxication seems to be slightly more liberal than Section 502 of the Proposed Federal Criminal Code.

The intoxicated perpetrator is often treated differently for sentencing purposes in Scandinavia. Section 85 cfr. Section 72 of the Danish Criminal Code and Section 56 cfr. Section 39 of the Norwegian Penal Code allow the courts to reduce the punishment for an intoxicated perpetrator and to issue suitable injunctions or conditions for parole, or the like. The Swedish practice seems to be very similar.[4] On the other hand, the security measures which were discussed under Qusetion 5, may possibly be used if the perpetrator is an alcholic or an addict. See the Danish Criminal Code, Section 73 cfr. 70, the Norwegian Penal Code Sections 39–39e, and the Penal Code of Sweden, Chapter 31 "Of Surrender for Special Care."

QUESTION 7

Chapter 6 of the proposed Federal Criminal Code[5] deals with defenses involving justification and excuse. Both the Danish Criminal Code[6] and the Norwegian Penal Code[7] have provisions in their general parts which, in principle, cover the same subjects as does the proposed Chapter 6. The Swedish Chapter 24, "Of Self-Defense and Other Acts of Necessity," has much likeness to the mentioned Danish and Norwegian provisions, but the Swedish provisions are systematically placed in "Part Two" on specific criminal offenses (the special part). The reason for this systematic arrangement seems to be that the provisions on self-defense and other acts of necessity may be said to modify each of the statutory definitions of individual criminal offenses in "Part Two" of the Penal Code of Sweden.[8]

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[1] Sweden. Statens Planverk. *Svensk Byggnorm 67*. Stockholm, 1967.
[2] Stephan Hurwitz. *Den Danske Kriminalret*. 4th ed. by Knud Waaben. Copenhagen, G.E.C. Gad, 1967, p. 310–311.
[3] Nils Beckman, *co-author*, *1 Brottsbalken*. 3rd ed. Stockholm, Norstedt, 1970, p. 34–36.
[4] The Penal Code of Sweden, *supra* note 4 *at* p. 18–19 (the Introduction).
[5] *Supra* note 6.
[6] *The Danish Criminal Code*, Secs. 13–14.
[7] *The Norwegian Penal Code*, Secs. 47–48.
[8] *The Penal Code of Sweden*, Chapter 24 "Of Self-Defense and Other Acts of Necessity." *See also* p. 8–9 of the Introduction to the Code.

The Scandinavian provisions are much briefer than the proposed Chapter 6. They avoid technical definitions and clearly leave this whole subject area to be filled in by the courts and by jurisprudential literature. Scandinavian legal writers normally deal with self-defense and other acts of necessity under the heading of "Grounds of Impunity" rather than under that of Defenses Involving Justification and Excuses." The difference in terminology indicates, inter alia, that the full burden of proof for grounds of impunity does not fall on the Scandinavian defendant. A leading Danish writer states clearly that reasonable doubts (in dubio pro reo) as to grounds of impunity must be resolved in favor of the defendant.[1]

The Norwegian law on self-defense and other acts of necessity is discussed in some detail by Professor Andenaes in Appendix A (p. 143–173). This discussion is representative also of Danish and Swedish jurisprudence.

QUESTION 8

Section 3002 of the proposed Federal Code[2] classifies criminal offenses or Class A Felonies, Class B Felonies, Class C Felonies, Class A Misdemeanors, Class B Misdemeanors, and Infractions. It is further stated as a justification for this classification in the comments on Section 3202 of the proposal that under existing law an authorized [prison] term indicates the outer limit of the virtually unfettered discretion which a judge may exercise in sentencting an offender to prison. This description refers to present Federal criminal law, but it gives also a good description of present Scandinavian criminal law.

Professor Andenaes has taken a very critical attitude toward the proposed Section 3002, explaining his point of view in detail *in* 3 *Working Papers* 1462–1464.[3] This writer has nothing to add to Andenaes' comments since he also covers Danish and Swedish criminal law, and seems to be very representative of Scandinavian jurisprudence in this matter.[4]

QUESTION 9

(1) *In General*

Professor Andenaes has made rather detailed comments to Part C. "The Sentencing System," of the proposed Federal Criminal Code[5] in 3 *Working Papers* 1461–1471.[6] These comments cover all of the Scandinavian countries, and they are, generally speaking, very representative of Scandinavian jurisprudence. Andenaes has treated the question of sentencing, or rather the question of reactions of society against infractions of the criminal laws, in-depth in his standard text on Norwegian Criminal Law.[7] Unfortunately, this part of the text was not included in its English version. Also the standard Danish text has a substantial part on the system of sanctions.[8] Among the Scandinavian texts on special subjects mention should be made on the one on meting out punishment[9] and another on suspended sentences and probation.[10] Also a standard work on deprivation of freedom by administrative agencies[11] is of interest, because Scandinavian criminal law employs security measures which are not, technically considered, punishment. The rather uniform Scandinavian rejection of indeterminate sentences can be traced back to the third

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[1] Hurwitz, *supra* note 9 *at* p. 179–180.

[2] *Supra*, note 6.

[3] *The National Commission on Reform of Federal Criminal Laws.* Working papers. Washington, D.C., G.P.O. 1970–1971. 3 v.

[4] W. E. von Eyben, Strafudmaling; lovens Rammer og Dommerens Udfyldning. Copenhagen, G.E.C. Cad, 1950. 502 p. *See also:* Stephan Hurwitz, *Den Danske Kriminalret.* 2nd ed. Copenhagen, G.E.C. Gad, 1961. Kapitel XIX: Fastsaettelse af Sankton I det enkelte tilfaelde (p. 600–707 ; *and* JohannesAndenaes, *Almindelg Strafferet.* Oslo, Akademisk Forlag, 1956. Section 43: Lovens strafferammer og adgangen tll at fravige dem & Section 44: Strafudmaling (p. 369–398).

[5] *Supra*, note 6 (question 1).

[6] *Supra*, note 3.

[7] Johannes Andenaes, *Almindelig Strafferett.* Oslo, Akademisk Forlag, 1965. Reaktionssystemet, p. 322–477.

[8] Stephan Hurwitz, *Den Danske Kriminalret.* 2nd ed., Copenhagen, G.E.C. Gad, 1961 Chapter 13–19, p. 518–749.

[9] E. von Epben. *Strafudmaling; Lovens Rammer og Dommerens Udfyldelse.* Copenhagen, G.E.C. Gad, 1950. 502 p.

[10] Knud Waaben, *Betingede Straffedomme; en Kritisk Vurdering af Dansk Rets Regler.* Copenhagen, Gyldendalski Boghandel, Nordisk Forlag, 1948.

[11] Tyge Haarløv, *Administrative Frihedsberøvelse.* Copenhagen. Socialt Tidsskrift, 1948.

meeting (1952) of Scandinavian Criminalists,[1] and to the periodical literature of that time.[2]

(2) *Suspended Sentences and Probation*

Scandinavian judges have, as explained by Andenaes in 3 *Working Papers* 1464–1465, a choice between giving a suspended sentence or placing the perpetrator on probation. The relevant provisions are to be found in the Danish Criminal Code, Sections 62–69, the Norwegian Penal Code Sections 52–54, and the Penal Code of Sweden, Chapter 27 "Of Conditional Sentences."

Scandinavian judges have the discretion to decide that a defendant should not be supervised during the probation period, or that a special ad hoc supervision be arranged. This is done very seldom, and by far the most probations are supervised by probation officers who are provided by special administrative agencies. These agencies are supervised by the Ministry of Justice, rather than by the individual courts. Full-time probation officers are trained as social workers or as lawyers, and the police does not have active functions in the supervision of probation.[3] Voluntary probation officers are used to stretch the staff of professional full-time probation officers, and it is quite usual that Scandinavian police officers are involved in community activities, such as youth clubs, and the like. It is possible that some Scandinavian police officers are acting as voluntary probation officers and that they are well qualified for this work. However, they would have to retire as police officers, if they desire to become full-time probation officers.

Most of the North-European countries, except Norway, have provisions which in principle, are like the provision about unconditional discharge in Section 3101 of the Proposed Federal Criminal Code. To the German and Swedish provisions which are mentioned by Andenaes in 3 *Working Papers* 1465 should be added Section 85 of the Danish Criminal Code. Furthermore, Section 937 of The Danish Procedural Code provides about less serious criminal offenses.[4]

Sec. 937, Subsec. 1: The judge is authorized to close a case with a warning if he finds that the defendant is guilty, but that the case because of the kind of criminal infraction, for instance, especially when a first time offender has committed a minor infraction, is suitable for decision by warning. The defendant has the right to reject such decision and to request a formal judgment [which may be appealed] unless this is excluded by other provisions.[5]

Subsec. 2: The decision to close a case with a warning should be made in writing in the official court record.

(3) *Indeterminate Sentences*

Professor Andenaes states correctly in 3 *Working Papers* 1465–1466 that adult and completely normal offenders are not, as the general rule, subjected to indeterminate sentences in Scandinavia, and most Scandinavian legal writers seem to share Andenaes' apprehension against this form of sentencing.[6] However, it was explained under Question 5 above that a substantial part of those sentenced persons who in the United States would have to serve close to the maximum of their indeterminate term, would, in Scandinavia, have been subjected to security measures.[7] Such security measures in Scandinavia are considered treatment, rather than punishment. However, they are handled down by a court in the form of a sentence, and they are most definitely indetermi-

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[1] Forhandligsgrundlag for det Tredie Nordiske Kriminalistmode i Kobenhavn d. 3.–7. juni 1952, in 40 *Nordisk Tidsskrift for Kriminalvidenskab* (1952) 1–164.

[2] K. Kirchheiner, "Er der betaenkeligheder ved udviklingen i den moderne kriminalitetsbekaempelse?", *in* 39 *Nordisk Tidsskrift for Kriminalvidenskab* (1951) 195–202, *see also:* Thorsten Sellin, "Obestämd Dom och obestämd behandling," *in* 1947 *Svensk Juristtidning* 481–493.

[3] This statement refers to the supervision as such, and not to the fact that the probation agencies and the police are cooperating. For instance, Section 58 (now Section 59) of the Danish Criminal Code in Appendix B deals with prosecutions for parole violations. The reference to "the Public Prosecutor" means, in practice, that most of the decisions to prosecute are made by the local police chief, rather than by the local probation agency.

[4] Translated from: Lov om Rettens Plej nr. 90 af 11. april 1916, as amended. Copenhagen, G.E.C. Gad, 1971.

[5] This refers especially to the fact that judgments about very small fines, e.g., a parking ticket, cannot be appealed as a right in Denmark.

[6] *Supra*, notes 1–2.

[7] *See* the *Danish Criminal Code*, Sections 70–78; the *Norwegian Penal Code*, Sections 39–39c; the *Penal Code of Sweden*, Chapter 31, "Of Surrender for Special Care."

nate. That the practical difference between the United States and Scandinavia is less than the theoretical one is illustrated by the Danish types of specialized imprisonment which are all indeterminate with broad ranges between minimum and maximum terms. See, for instance, the Danish Criminal Code Sections 41–43 about youth prison and Sections 62–69 about workhouses for habitual criminals and preventive detention of dangerous criminals for up to twenty years or more (Sections 65–66). Furthermore, Section 73 of the Danish Criminal Code is an example of the case where indeterminate treatment for alcholism in an institution may be imposed besides the usual definite sentence.

(4) *Extended Term Prison Sentences for Dangerous Special Offenders*

Section 3202 of the proposed Federal Criminal Code makes it possible to apply very long prison terms to dangerous special offenders when this "is required for the protection of the public from further criminal conduct." The Scandinavian Criminal Codes have social defense provisions which, in practice, have a very similar effect, but they are looked upon as security measures, rather than as punishment. The practical result of this philosophy is that the special institutions for this type of prisoners offer unusually good material treatment inside their walls, while their safety measures toward the outside exceed that of any other type of prison. The relevant Scandinavian provisions are to be found in the Danish Criminal Code, Sections 66–69; the Norwegian Penal Code, Sections 39–39c; and the Penal Code of Sweden, Chapter 30, "Of Intent."

(5) *Authorized Prison Sentences*

The Scandinavian Criminal Codes have, as explained by Andenaes in 3 *Working Papers* 1461–1476, broad authorized prison sentences which leave much discretion with the courts. A good example is Section 237 about murder and manslaughter in the Danish Criminal Code. This provision is not graded, and it states simply:

Any person who kills some other person shall be guilty of homicide and liable to imprisonment for any term ranging from five years to life.

(*See Appendix B* for the related offenses in Sections 238–241).

(6) *Mandatory Minimum Sentences*

The Scandinavian minimum sentences for individual crimes, such as the 5 year minimum in Section 237 of the Danish Criminal Code (*see* (5) above), cannot be described as mandatory, because they may be modified by the mitigating circumstances which are described in the general part of the codes. *See*, for instance, Sections 84–85 of the Danish Criminal Code.

The statutory minima for certain kinds of punishments are mandatory. For instance, the Danish Criminal Code Section 44 establishes a mandatory minimum of seven days for the punishment of simple detention, and Section 33 establishes the mandatory minimum of 30 days for the punishment of imprisonment.

Professor Andenaes mentions in 3 *Working Papers* 1468 that there is a common European movement away from the very short prison terms. This movements has gained momentum since Andenaes submitted his comments to the proposed Federal Criminal Code. The Danish Ministry of Justice held in June of 1971 a conference on the policy on crimes. Ombudsman Nordskov Nielsen explained here that the Danish courts already were moving away from terms of imprisonment of 4 months or less, and that the courts were using fines and probation more often than previously.[1] The summarized report of the meeting indicates that Denmark is not going to follow West Germany which has abolished imprisonment of 6 months or less.[2] Danish terms of imprisonment of 4 months or less will probably not be used very much in the future. One of the conclusions of the conference seems to have been that short imprisonment ought to be preserved in the Criminal Code, because it, inter alia, may be needed to terminate a sudden wave of very active criminality.[3] This statement is not explained in more detail, but it would refer to demonstrations such as those in Washington, D.C., in May of 1971.

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[1] L. Nordskov Nielsen, "Et oplaeg til droftelse of de korte frihedsatraffe," *in* 1972 *Juristen* 50–61. (January 15, 1972).

[2] *Ib.* at 53.

[3] Hans Henrik Brydenholt, "Seminariets konklusioner," *in* 1972 *Juristen* 64 (January 15, 1972).

(7) *Release on Parole*

The Proposed Federal Criminal Code has in Chapter 34 provisions on release on parole. The corresponding Scandinavian provisions are to be found in the Danish Criminal Code, Sections 38–40, 42–43, 63 and 66; in the Penal Code of Sweden, Chapter 26, Sections 6–22; and the Norwegian statute on prisons,[1] Sections 35–47. The main difference from the proposed Federal Criminal Code is that the right to be considered for parole in Scandinavia comes at a clearly defined time, normally when two-thirds of the sentence has been served. This is a simple consequense of the Scandinavian preference for determinate sentences for normal and adult offenders. The decision on parole is made by the Ministry of Justice which, in practice, means the State Directorate for the Prisons. The prisoner has a right to appeal to a quasi-judicial body, and the large majority of prisoners with regular prison terms (as opposed to security measures) are released when they have served two-thirds of their time.

(8) *Special Sanction for Organizations*

Section 3007 of the proposed Federal Criminal Code allows the court to require an organization to give notice of its convictions to the persons or class of persons ostensibly harmed by the offense. Scandinavian criminal law does not have a similar general provision. There is not much need for such a provision in Scandinavia, because the Scandinavian news media give good coverage to this type of conviction. Some highly specialized provisions, such as the Danish Criminal Codes' Sections 164 (malicious prosecution) and 273 (libel and slander) keeps the defendant[2] liable for the cost of the publication of the judgment. Similar Scandinavian provisions would probably be implemented for other subject areas, if need were felt for them.

(9) *Publicity for Convictions*

Convictions are in Scandinavia published through the ordinary news media, and through the printed court reports. This seems to be sufficient. There have not, to the knowledge of this writer, been Scandinavian proposals on using differently colored license plates or the like for persons previously convicted for drunken driving. The Scandinavian reaction is rather to completely deny such persons the privilege of driving motor vehicles.

(10) *Persistent Misdemeanants*

It has been explained above that the Scandinavian reaction against habitual criminals with a long record of minor criminality would be security measures, rather than punishment. It has also been explained above that the practical difference between Scandianavia and the United States is less than the theoretical one. Especially Section 62 of the Danish Criminal Code defines at length a habitual criminal, the definition coming very close to the persistent misdemeanant in Section 3003 of the proposed Federal Criminal Code. Moreover, this Danish sanction "in lieu of punishment" is practically speaking nothing more than a regular indeterminate sentence. The Norwegian and Swedish sanctions against persistent misdemeanants are couched more in the terms of regular security measures, but the general Scandinavian attitude seems not to be very different.

(11) *Sentences to be in Writing*

The provisions which require Scandinavian judges to give reasons in writing for sentences imposed are to be found in the Scandinavian Procedural Codes, rather than in the Criminal Codes.

(12) *Appeals*

Scandinavian criminal sentences are, when we speak in general terms with disregard minor differences between the individual countries, subject to one ordinary appeal to a higher court. Both the defendant and the prosecution have

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[1] Lov Nr. 7 av 12. desember 1958 om fengselsvesenet, *in Norges Lover* 1682–1969, Oslo Grøndahl, 1970, p. 2027–2035.

[2] The Danish courts prefer to make a physical person, e.g., the responsible corporation officer, liable. However, legal writers claim that this liability could be placed directly on the juristic person, i.e., the corporation. The question is mostly theoretical, because Danish corporation law requires a corporation to have one director who is the legally responsible director of the corporation. *See* on the collective penal liability: Hurwitz, *Den Danske Strafferetspleje*, 2nd ed. Copenhagen, G.E.C. Gad, 1961, p. 387–389.

this right to appeal the entire case once. It is considered a matter of course that the higher court has the right both to increase and to lower the punishment, since one of the justifications for the institute of appeal is the desire for some degree of uniformity. Appeal to the Supreme (Highest) Court will normally require certiorari, and the Supreme Court will not consider the guilt of the defendant. The purpose of these Supreme Court reviews are to decide legal questions, and to reconsider the meting out of punishment.

The Scandinavian Procedural Codes have, through these limitations on the right to ordinary appeals and requests for new trials, succeeded in making it practically impossible to postpone a criminal case almost indefinitely through procedural maneuvers. Already the possibility of a higher punishment in the appellate court prevents many spurious appeals, and reduction of punishment by the Supreme Court has in Scandinavia been sufficient to guide the lower courts without having to go as far as to discard well-established interpretations of the Constitution.

There exists in Scandinavia, besides the right to ordinary appeal, a right to extraordinary appeal. Such extraordinary appeal is granted in the very few cases where *new* evidence makes it likely that the defendant should not have been found guilty, and in the extremely few cases where grave procedural errors have been committed.

Attached as Appendix E is a brief outline of Danish-Norwegian criminal law and procedure. Appeals are discussed under Nos. 2–3 and 16 (p. 229–230 and p. 230–239).[1] The Swedish procedural provisions are available in translation, and they are attached as Appendix F.[2]

(13) *Concurrent and Consecutive Terms of Imprisonment*

Section 3204 of the Proposed Federal Criminal Code is discussed by Professor Andenaes in 3 *Working Papers* 1473 which strongly suggests that the Anglo-American practice of concurrent or consecutive sentences be abolished in favor of the European system of "joint sentences."

The relevant provisions of the Scandinavian criminal codes are to be found in the Danish Criminal Code, Sections 88–89 and 93, Subsection 2, the Norwegian Penal Code, Sections 62–64, and the Penal Code of Sweden, Chapter 1, Section 1. The generally accepted European theories about "Plurality of Offenses" are explained by Andenaes in *Appendix A* (p. 303–307). This writer has nothing to add, with the exception that Andenaes' treatment of this matter is very representative of Scandinavian jurisprudence.

The subquestion about what happens if *one*, but not all of the convictions under a single sentence, is reversed on appeal may be answered most easily with a reference to the character of the joint sentence. It follows of the concept itself that the new joint sentence would have to be based on the crimes it actually covers, and that it probably would be milder. *See*, for instance the Danish Criminal Code, Section 88: "one penalty shall be fixed for these offenses within the statutory range of the punishment prescribed. . . ." Furthermore, Section 89, Subsection 2, gives instructions for some difficult problems, such as a latter conversion of an indeterminate sentence into a determinate sentence.

(14) *Fines*

Chapter 33, Fines, of the Proposed Federal Criminal Code is discussed at some length by Professor Andenaes in 3 *Working Papers* 1474–1475, and more briefly by Professor Damaska in 3 *Working Papers* 1485. The corresponding Scandinavian provisions are to be found in the Danish Criminal Code, Sections 50–54, the Norwegian Penal Code, Sections 27–28, and the Penal Code of Sweden, Chapter 25, Of Fines, etc.

Collection of fines does not represent any serious problem in Scandinavia. Fines are collected under the threat of imprisonment, and the Scandinavian and European conventions on the validity of criminal judgments[3] make it possible to enforce collection wherever the defendant may be found within the borders of Western Europe.

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[1] The Danish Committee on Comparative Law, *Danish and Norwegian Law; a general survey*. Copenhagen, G.E.C. Gad, 1963. p. 208–228. *See also:* Andenaes, 3 *Working Papers* 1476.

[2] *The Swedish Code of Judicial Procedures*, South Hackensack, N.J., Rothman, 1968. p. 218–258.

[3] *See* the separate report on Questions 11–12.

The so-called day-fines are discussed in a separate report entitled "Fines Proportional to the Income of the Offender in the Nordic Countries," which is enclosed as *Appendix G*. The purpose of these fines is to treat the rich and the poor defendant alike. They do require time-consuming investigations of the financial ability of the defendant and they cannot be described as a very successful experiment. An influential Danish legal writer has recently suggested to postpone the decision on the actual number of days to be served until it is established that the defendant can not, or will not, pay the fine. This would allow for leniency in cases where the defendant cannot be blamed for his inability to pay, and the writer states that Sweden has established somewhat similar practice.[1] It is probably against this kind of background that Andenaes in 3 *Working Papers* 1475 suggests to leave imposition of fines to the discretion of the court, rather than to suggest a system similar to the Scandinavian day-fines.

QUESTION 10

Mistakes of law and mistakes of fact are, in Scandinavia, normally dealt with under the heading of Subjective Guilt (mens rea), rather than as a specific defense. The differences in the systematic approach indicates basically that a mistake, if it is acceptable at all, will have the effect of negating the intent of the perpetrator.

The Scandinavian law on mistakes is primarily established by the court and by the jurisprudential literature. Professor Andenaes has discussed mistakes of law in 3 *Working Papers* 1460–1461 and he gives a much more detailed discussion of both mistakes of fact and mistakes of law in *Appendix A* (p. 201–209 & p. 227–239). This broader discussion is representative of the Scandinavian jurisprudence on mistakes. Besides the quoted Swedish Professor Thornstedt there ought to be mentioned the standard Danish text.[2]

QUESTION 11–12

(The separate report covers both Question 11 and Question 12).

SCANDINAVIAN COUNTRIES—QUESTION 3

A. *In General*

The Roman law maxim "actus non facit reum, nisi mens sit rea" (An act does not make [its perpetrator] guilty, unless the mind be guilty; that is unless the intention be criminal)[3] is almost universally accepted, but this element of guilt is far from the same in all legal systems. English law developed different requirements about mens rea for different types of offenses. This common law development has been described by J. W. C. Turner[4] who points out that it is possible to bring the common law requirements for acting recklessly, acting knowingly and acting intentionally together under the broad requirement about voluntary conduct with some foresight of the consequences. The main distinction consequently, differentiates between wilful crimes and merely negligent ones. Section 2.02 of the Proposed Official Draft of the Model Penal Code (1962)[5] continues this concept of common law by defining non-negligent culpability as purposely, knowingly, or recklessly. Section 302 of the Proposed Federal Criminal Code[6] goes a step further by defining as wilful crimes as those which are committed intentionally, knowingly, or recklessly.

The developments on the European Continent followed different trends. They were based more directly on the Roman law concepts of *dolus* (fraud, wilfulness or intentionality)[7] and *culpa* (fault, neglect, negligence)[8] as these con-

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[1] H. H. Brydensholst, Reformovervejelser inden for eet krimi nalretlige amrade, *in:* 1972 *Juristen* 46–47 (January 15, 1972).

[2] Hurwitz, *supra* note 2 (question 6) at *at* 238–240 & 256–271.

[3] *Black's Law Dictionary*, 4th ed. St. Paul, Minn., West Publ. Co., 1968, p. 55.

[4] J. W. C. Turner, "The Mental Elements in Crimes at Common Law," *in The Modern Approach to Criminal Law: Collected Essays*. London, MacMillan and Co., 1945. p. 195–272. *See also* Rollin M. Perkins, "A Rationale of Mens Rea," 52 Harvard Law Review, 1939, p. 905–928.

[5] Sanford H. Kadish *and* Monrad G. Paulsen, *Criminal Law and its Processes*, 2nd ed. Boston, Little, Brown and Co., 1969, p. 219–223.

[6] *U.S. Congress, Senate Committee on the Judiciary*, Hearings before the Subcommittee on Criminal Laws and Procedures February 10, 1971. Washington, D.C., G.P.O., 1971. Part 1, p. 181–184.

[7] *Black's Law Dictionary*, supra, note 3 *at* p. 570.

[8] *Id.*, p. 453.

cepts had been developed by the Glossators and by canon law. One of the main differences was that reckless conduct here became a subdivision under negligence, rather than a subdivision under *dolus*. Another major difference was that *dolus* and *culpa* on the Continent developed as general concepts which were applied rather uniformly to all crimes. One of the difficulties in understanding the Continental European terminology is merely a matter of translation. It is quite usual to translate the vernacular[1] word for the Latin *dolus* as intent, even though *dolus* includes conduct engaged in intentionally, knowingly and, to a very limited degree, recklessly. The latter is most often discussed under the heading of *dolus eventualis*. On the other hand, *culpa* is, on the European Continent, mostly used to describe blameworthy conduct in connection with negligence,[2] even though it must be admitted that the American use of culpability as including acting intentionally, knowingly, recklessly and negligently is linguistically correct.

Scandinavian jurisprudence has, since the middle of the 19th century, followed Continental European jurisprudence on the matter of subjective guilt. It is easy to trace the impact of German jurisprudence on the concept of subjective guilt (*mens rea*), even though Scandinavian jurisprudence always has been more pragmatic and less theoretical than the German. Professor Andenaes' comments on Section 302 of the proposed Federal Criminal Code[3] (*Appendix A*) reflect the European way of thinking, as does Chapter 6 on subjective guilt (*mens rea*). This may be seen in his standard text on Norwegian criminal law which is attached as *Appendix A*.[4] The Danish Professor Waaben has made an even larger contribution by writing a broad comparative text on the concept of *dolus* or intention in criminal law. The English summary of this text[5] is attached in *Appendix B*, while *Appendix C* contains translations of the sections of the Scandinavian criminal codes which are referred to below.

B. *Intent (Dolus)*

The Scandinavian criminal codes do not attempt to define intent or *dolus*. Neither do the codes attempt to define the blameworthy conduct (*culpa*) which is required to establish criminal negligence, including recklessness. The codes refer in numerous cases to the well-established concepts which have been laid down by the courts and by jurisprudential literature over a long period of time. See, for instance, the Swedish Penal Code, Chapter 1, Section 2 ("intentionally"); and the Norwegian Penal Code, Section 40 ("unintentionally" . . . "negligent"); and the Danish Criminal Code, Section 19 ("negligence") and Section 21 (2) "criminal intention").

The 1917 and 1923 drafts of the present Danish criminal code of 1930 contained definitions of criminal intent or *dolus*,[6] and of culpable negligence.[7] However, these definitions were omitted by the legislature, because they were found to be superfluous. Scandinavian writers seem to agree that it would be extremely difficult to draft satisfactory definitions. It is usual in this context to refer to the extensive German literature about the volition theories (based on defendant's will) and the consciousness theories (based on defendant's conception)[8] and to the later results of the psychological sciences which would make it difficult to formulate "correct" definitions in this subject area. Also contributing to the difficulties is the fact that Scandinavian courts, and jurisprudence recognize a concept which has been called "veiled intent."[9] This term was coined by the President of the Danish Supreme Court Ib Trolle, and refers basically to the fact that practical life often produces situations which

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[1] Danish: forsaet; Dutch: opzet; French: dol (intention); German: vorsatz; Norwegian: forsett; Swedish: uppsat.

[2] Danish: unagtsombed; Dutch: onachtzaamheid; French: faute (improdueen. négligence); German: fahrlässigkeit; Norwegian: uaktsomhet; Swedish: oaktsomhet.

[3] *The National Commission on Reform of Federal Criminal Laws*. 3 Working papers, Wash., D.C., G.P.O., 1971, p. 1455.

[4] Johannes Andenaes, *The General Part of the Criminal Law of Norway*, Chapter 6: Subjective Guilt (*Mens Rea*) South Hackensack, N.J., Rothman, 1965, p. 192–246.

[5] Knud Waaben, *Det Kriminalle Forsaet*, Copenhagen, Gyldendal, 1957. Summary in English, p. 363–366.

[6] Stephen Hurwitz, *Den Danske Kriminalret*, 4th ed. by Knud Waaben, Copenhagen, G.E.C. Gad, 1967, p. 223.

[7] *Id.*, p. 242.

[8] *Id.*, p. 222-225. *See also:* Andenaes, *Supra*, not 4 *at* p. 210, *and Waaben*, *Supra*, note 11 at p. 14–31.

[9] Andenaes, *Supra*, note 4 *at* p. 215-216. *See also* Hurwitz, *Supra*, note 6 *at* p. 233–234, and Waaben, *Supra*, note 5 *at* 98–103 and 348.

tend to defy theoretical definitions, even though a situation is relatively easy to judge when it is considered in the light of all the accompanying circumstances. The Scandinavian criminal codes follow the rather generally accepted approach of leaving it to the courts and to the scholarly tradition to define the different kinds of culpability. Practical experience from this approach has been good, and Professor Andenaes' comments about the definition in Section 302 of the proposed Federal Criminal Code[1] should be read against this background. Some comments should be made about the generally accepted Scandinavian concepts of subjective guilt (*mens rea*).

The Swedish concept of *dolus* (intent) is somewhat different from the Danish-Norwegian concept and probably closer to the Continental European concepts. Swedish writers normally divide *dolus* into three subdivisions: the term *dolus directus* (direct intent) is used when the consequences are exactly what the perpetrator desired, while the term *dolus indirectus* (indirect intent) is used when the perpetrator should have seen that the consequences were (practically) unavoidable, even though he did not exactly desire these circumstances to materialize. *Dolus eventualis* is in Sweden used to establish intent (*dolus*) in a situation where the perpetrator should have known that the consequences were possible (although not necessarily unavoidable) *and* that it furthermore is probable that the perpetrator would not have acted otherwise, even though he had understood that the consequences would occur.[2] This is often referred to as "the hypothetical test."

The Danish-Norwegian concept of direct intent corresponds to the Swedish, while Denmark and Norway, as explained by Andenaes, would establish indirect intent (*dolus indirectus*) if it is considered probable that the perpetrator realized the consequences as being certain or preponderantly possible.[3] *Dolus eventualis* is recognized in Danish-Norwegian jurisprudence, but, as has been pointed out by a leading Danish writer, there is very little practical use for *dolus eventualis* when probability is used to define indirect intent.[4] A Swedish case of 1939 illustrates the differences between Swedish and Danish-Norwegian practice.

Two Swedish defendants were accused of attempted murder for having hit a police officer, who tried to stop them, with their car. The highest Swedish prosecutor asked the court to accept the Danish-Norwegian rule which would establish indirect intent (*dolus*) in a case like this where it was preponderantly possible that the police officer would have been killed, and he pointed also to the fact that the traditional hypothetical rule for Swedish *dolus eventualis* did not apply to the facts in this case. The defendants claimed that they hoped that the police officer would jump away from the path of the car, which he actually must have done since he was injured, rather than killed. The Swedish Supreme court upheld the traditional hypothetical rule and acquitted the defendants of attempted murder, while it may be assumed that they would have been found guilty of attempted murder in Denmark.

C. *Negligence*

It has been mentioned already that the Scandinavian criminal codes do not attempt to define negligence, and that the Scandinavian term "Uagtsomhed" has a somewhat broader meaning than the Anglo-American term negligence. The essence of Scandinavian criminal negligence consists of different types of blameworthy conduct (*culpa*) which does not amount to intent (*dolus*), but which, under public policy, is being discouraged by the sanction of a punishment which is always much lower than that prescribed for the corresponding intentional crime. It is usual to divide Scandinavian criminal negligence into conscious and unconscious negligence. The former group is very close to the wilfull crime of recklessness, and the previously discussed Swedish case illustrates how difficult it often is, in practice, to distinguish between an intentional crime and one of conscious negligence. The category of unconscious negligence corresponds rather closely to the usual Anglo-American concept of criminal negligence. Andenaes discusses negligence at some length in his gen-

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[1] 3 Working papers, *supra*, note 3 *at* p. 1455.
[2] Niels Arvid Teodor Beckman *and others*, *I Brottsbalken*. 3rd ed. Stockholm, Norstedt, 1976, p 25–31.
[3] Andenaes, *supra*, note 4 *at* p. 209–217. *See also* Hurwitz *supra*, note 6 *at* 222–240.
[4] Hurwitz, *supra*, note 6 *at* 229.

eral text[1] and this explains the rather brief sentences in his comments on the proposed Federal Criminal Code.[2] The matter of differences between tort standards and criminal law standards for negligence has a special interest for Scandinavians, because a very large number of their tort cases are settled in the same court proceedings as are the corresponding criminal cases. This adjudicating of civil claims in criminal proceedings has greatly simplified, for instance, traffic accident cases.[3]

D. *Criminal Liability Without Subjective Guilt*

The requirement of subjective guilt has had a very strong influence on the development of Scandinavian criminal law. It is very generally accepted, but it does not prevent the law under certain circumstances from dispensing with the requirement and making the criminal liability dependent upon purely objective elements. This will occur especially when a strong public policy is involved. It is common to discuss mistakes in this connection, because an honest mistake of law may be said to preclude subjective guilt. However, the maxim "ignorantia legis neminem excusat"[4] is widely accepted also in Scandinavia. The matter of mistake will be discussed in more detail under Question 10.

Strict criminal liability is frowned upon by the Scandinavian courts. Andenaes mentions the rules on the owner's liability for animals as a current example of strict criminal liability.[5] Other writers seem inclined to explain such provisions as merely presumptive,[6] even though they admit that the presumption may be rather strong.

Corporate criminal liability in the form of fines, etc., is widely used in Scandinavia.[7] Older theories criticized this, because it is a fiction to talk about the subjective guilt of a legal entity such as a corporation or a cooperative. Contemporary writers feel that such fines are justified for offenses in economic life. They tend to restrict the protection of "actus non facit reum, nisi mens sit rea" to physical persons.

THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY

By Johannes Andenaes, Dr.jur., Translated by Thomas P. Ogle, LL.B.

SUBJECTIVE GUILT (MENS REA)

§ 19. Survey

I. General considerations

It is an almost universal rule of modern penal law, that before criminal liability can exist there must be not only an objective breach of a penal provision but also subjective guilt (*mens rea*) on the part of the actor, usually intent, but at least negligence. A driver who accidentally kills a small child crossing the path of the car has, objectively, caused the death of a human being (Penal Code, § 223). A man who remarries in the mistaken belief that his former wife is dead has, objectively, violated the law against bigamy (Penal Code, § 220: see Marital Laws, § 9). Neither person is criminally liable, however, because the necessary guilt is lacking.

"Guilt" as a legal concept.—When used in this connection, "guilt" is not a moral, but a legal concept. There is, undoubtedly, a close relationship between the legal and the moral concept of guilt. Both are built on the proposition that the perpetrator can be *blamed* for acting as he did, and the moral and legal reproach will normally follow one another. But this is not always so. A person who has acted according to his own conscience is perhaps free from blame *morally*—one must obey God rather than man—but guilt in a legal sense may nevertheless be present. As mentioned earlier, we see that the idea of guilt and

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[1] Andenaes, *supra*, note 4 *at* p. 217–227.
[2] 3 Working papers, *supra*, note 3 *at* p. 1455.
[3] Halfdan Krag Jespersen, "Adjudicating civil claims in criminal proceedings," *in* 15 *Scandinavian Studies in Law*, (1971). p. 130–142.
[4] *Black's Law Dictionary*, *supra*, note 3 *at* p. 882.
[5] Andenaes, *supra*, note 4 *at* p. 240–242.
[6] Hurwitz, *supra*, note 4 at p. 274–280.
[7] Andenaes, *supra*, note 4 *at* p. 242–245.

blame becomes problematical to the extent that a deterministic view of human action is accepted.[1] And in any discussions about the future formation of the penal law, it is difficult to avoid this problem. But the meaning of the requirement of guilt under positive law can largely be presented and treated without having to deal with these difficult questions.[2]

II. The guilt must exist at the moment of the act

The guilt must exist at the moment the act which creates liability is committed. A later approval of the act does not have the same effect. If I happen to kill my neighbor accidentlally, I do not become a murderer by thereafter expressing joy over his death. My happiness over the result is not the same as a willingness to commit the illegal act.

However, where a continuing activity is concerned I can be held criminally liable if I cut timber in my neighbor's forest because I have made an error as to the boundaries, I cannot be punished for larceny; but the result would be different, of course, if I continued to do so after having been told where the boundary is. If I buy a stolen object in good faith, I am not guilty of receiving stolen goods; but if I dispose of the goods after learning that they were stolen, I may be punished for embezzlement.

Depending upon the circumstances, a subsequent failure to prevent or limit a harm can also bring about criminal liability, if the person who accidentally set the cause in motion learns of the danger while he still has control over the further course of events (see pp. 2566–2567).

§ 20. What Degree of Guilt is Required?

I. Intention is required as a general rule

The general rule on the degree of guilt required for criminal liability is set out in Penal Code, § 40, para. 1: "The penal provisions of this Code do not apply to an act committed unintentionally unless it is explicitly provided or unmistakably implied that a negligent act is also punishable."

The special degrees of intention, which are purpose and premeditation, are required only when they are explicitly mentioned in the provision in question. Of especially great practical significance is the purpose to secure for oneself or others an unwarranted gain, which is a common element of the offenses for gain (larceny, embezzlement, robbery, etc.). Premeditation is a concept which has its greatest significance in the offense of homicide (Penal Code, § 233, para. 2).

Where the law applies to negligent acts, there are often two different penal provisions, a more severe one for the intentional offense, and a milder one for the negligent offense. Penal Code, § 233, which deals with intentional homicide, provides for a minimum penalty of six years, while the ordinary punishment in Penal Code, § 239, for negligent homicide, is imprisonment from twenty-one days to three years.

There also exist, however, certain provisions which place intentional and negligent offenses on equal footing; see Penal Code, §§ 359, 360 and 362. The question of which degree of guilt exists becomes significant in these cases only for the determination of the punishment to be imposed. Such an equalization of intentional and negligent offenses can exist only where lesser offenses are concerned. In more serious offenses, the difference in culpability between the intentional and the negligent offense is so great that both forms cannot well be treated in one penal provision.

An examination of the penal law will reveal that there are many serious offenses which are not punishable when committed through negligence This applies, for example, to deprivation of freedom (Penal Code, § 223), most offenses against decency and morals (Penal Code, chap. 19), and placing another in a helpless condition (Penal Code, § 242). The legislature has clearly provided punishment for negligence where a negligent violation has great practical significance, but not where it will exist only in rare and exceptional cases. Negligent rape is theoretically possible (the man interprets the passivity of the woman as consent, while in reality she is paralyzed by fear), but does not

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[1] See above, 2557ff.

[2] See, however, the discussion on Penal Code, § 43, below, pp. 2566ff, and on the concept of negligence, above, pp. 2558ff.

play such a great role in practice as to cause the legislature to make special provision for it.

II. The special rule for misdemeanors by omission

Penal Code, § 40, para. 2, has a special rule for misdemeanors "consisting of omission to act." Here, the general rule is reversed:
The misdemeanor is punishable even when committed by negligence, "unless the contrary is explicitly provided or unmistakably implied." Thus, the intentional and the negligent violations are equalized; the degree of guilt will have significance only in determining the punishment to be imposed.

The reason for this rule is that it is also necessary to punish negligence in most penal provisions of this type, since it is almost impossible to prove intention. "When the law imposes upon people a whole line of duties, such as testifying as witnesses, acting as jurors, sweeping the street in front of their houses, and informing the authorities of deaths, the main purpose of the law would most probably be frustrated if it had to accept the defendant's excuse that he had not intentionally violated the law, but had done so only because of forgetfulness" (S.K.M., p. 59). This in itself necessitates only that the negligent act be also punishable; it does not require that the negligent and the intentional offense be treated equally. But it can be argued in favor of equal treatment, that even in their intentional form, these offenses are merely minor misdemeanors having no serious effects, and thus the intentional and the negligent offense can be treated in one penal provision within the same penal framework. Because of the rule in Penal Code, § 40, para. 2, it has been necessary for certain penal provisions to state expressly that only an intentional breach is punishable (Penal Code, §§ 324, 347).

These considerations are not so strong in the case of felonies by omission. The general rule in Penal Code, § 40, para. 1, comes into play here. The negligent violation is punishable only when criminal liability is explicitly provided or unmistakably implied.

The rule in Penal Code, § 40, para. 2, seems simple and clear at first sight, but closer examination reveals that it contains many difficulties of interpretation.[1] The situation would have been clearer if the rule did not exist; then the legislature would have had to state expressly in each case whether the penal provision should also apply to negligence.

As we have seen earlier, penal provisions directed mainly toward action may sometimes be violated by passivity as well. The first question which arises here is this: Does the expression "misdemeanor consisting of omission to act" apply to all misdemeanors committed by an omission or only to the genuine non-action misdemeanors (see above, § 13. I)? The words used suggest the former, but it appears from the legislative history that the latter is the correct interpretation (S.K.M., p. 59). This is also the natural solution. It would not be reasonable to treat the passive violation of a penal provision more strictly than the ordinary active violation.

Thus, the rule applies only to those penal provisions which refer expressly to a failure to act. Of course, the precise expressions "fail to act" or "omission" need not be used. One who "neglects" to make a report, or "fails to appear," or "fails to fulfill" or "does not heed" his duties, will fall within the rule. However if the law penalizes one who "refuses" (Penal Code, §§ 327, para. 2, 333 *et al.*) or "declines" (Penal Code, §§ 326, 344 *et al.*), intent is required whether the provision is violated by an act or by an omission.

III. The requirement of guilt for offenses outside the Penal Code

As a general rule, according to Penal Code, § 1, the general part the Code applies to all crimes, even those which are covered by legislation outside the Penal Code itself. But this general rule holds true only when the opposite is not provided, and Penal Code, § 40, para. 1, expressly limits its rule to "the penal provisions of this code." In other words, there is no general provision as to what degree of guilt is required in offenses against other laws. On the other hand, the rule in Penal Code, § 40, para. 2, which deals with the non-action misdemeanors, has no such limitations on its sphere of applicability. This rule therefore applies to all offenses (see Rt. 1933, p. 1179).

Acts creating new offenses often contain express provisions as to the degree of guilt which they require. Some, such as the Act against unfair competition

[1] For further details, see Andenaes, *Straffbar unnlatelse*, § 32 (Oslo, 1942).

of July 7, 1922, § 11, require a specific purpose. Others, such as the Patent Act of July 2, 1910 (No. 4), § 37, require intent. Many laws expressly equate intent and negligence; an example is the Vagrancy Act, §§ 16 and 17 (one who intentionally or negligently becomes intoxicated). Others, such as the Price Act of June 24, 1953, 52, have special punishment provisions for the two forms, with a more severe punishment for an intentional violation. In some laws it is unmistakably implied that a negligent violation is also punishable, since the law contains rules about increase of punishment where the violation is intentional.

There nevertheless remain many instances where the law has no provision on the form of guilt. What rule should be followed in these cases?

In order to answer this question, it is necessary to know something about the historical background. The Criminal Code of 1842, like the Penal Code of 1902, limited its rule on the degree of guilt to those Acts which fell within the Code itself. And, in practice, the enactments in other laws were, to a large extent, applied to negligent breaches as well as intentional ones. The Penal Code of 1902 intended to retain the earlier practice in this area (see Innst. O.L. for 1901/1902, p. 31). This has also been the interpretation of the courts. In a judgment of the Supreme Court (Rt. 1939, p. 623), which dealt with the so-called police legislation, it was stated that "the silence of the law does not mean that intent is a prerequisite to liability, but that this issue must be resolved by an interpretation of the individual legal provision, according to its content and purpose. It has been held that where the legal provision will not effectively attain its purpose if it applies only to intentional violations, it must be supposed that the purpose of the law is to cover negligent violations as well." There is a long line of decisions to this effect.

Thus, it is established practice that Penal Code, § 40, para. 1, cannot be applied to legislation outside the Code itself. But this situation is hardly satisfactory. The law usually gives no concrete clue as to which degree of guilt is required, and the judge must therefore render his decision chiefly on a determination as to what degree of guilt *ought* to be required. In other words, the evaluation which the legislature ought to have made is left to the judge. The chapters on misdemeanors in the present Penal Code contain a number of provisions of much the same kind as can be found in other laws. There is little consistency in holding that under Penal Code, § 40, intent is required in one case because the penal provision is in the Penal Code itself, but negligence will suffice in a similar case, where the penal provision is in another law. The resulting uncertainty can be removed only by legislation giving definite rules on the degree of guilt which is required. This is still often neglected when new offenses are created. There can be complete order and logic only after a thorough examination and revision of the older legislation with this question in mind.

When a law contains many penal provisions, an interpretation or the purpose of the law may lead to the requirement of intent in one section and the sufficiency of negligence in another. This is also true when a law has a common punishment provision against "one who violates some provision of the law." That the penal provision is common does not warrant the conclusion that the requirement of guilt is the same in all sections (see statements in Rt. 1939, p. 624).

§ 21. The Elements of Guilt

I. Survey

In order for an offense to be intentional, the *act itself* must be intentional (consciously willed). A person who happens to strike another by an involuntary movement has not acted intentionally. The same is true when a movement is coerced beyond the physical power to resist. It is often stated that involuntary or coerced movement is not an act at all, and for this reason alone is free from liability.

Of course, something more than the mere intentional commission of an act is required for criminal liability for an intentional offense. One who shoots at an elk but hits a person, has *shot* intentionally, but he has not intentionally *caused the death of another*. One who remarries under the belief that his previous spouse is dead, has intentionally entered into a new marital relationship, but not intentionally into one "which is void due to previous marriage" (Penal Code, § 220). Liability for an intentional offense requires that the intent en-

compass not only the *act* itself, but also the consequences and the circumstances which make it an offense.

We shall consider this a bit more closely. The special problems of acts committed under the influence of alcohol, however, shall be reserved for a later section (see below, § 30).

1. The intention must encompass the consequences which the penal provision mentions

First of all, the intention must encompass the consequences which are mentioned in the penal provision—a person's death under Penal Code, § 233, physical injury under § 229, and destruction of or damage to a chattel under § 291. Similarly, if the provision penalizes the creation of a danger, then the danger must be intentionally created.

The intention need not encompass the individual steps in the course of events.—However, the intention need not encompass the individual steps in the course of events. When the result is what the perpetrator intended it to be, it makes no difference that it has come about in an unexpected manner. Examples: (1) A hits B on the head with an axe and then, thinking that he is dead, throws him into a lake. An autopsy shows that B was in reality only unconscious, and that the cause of death was drowning. (2) A throws himself at B in order to kill him; B steps aside to avoid A, and in so doing falls into a lake and drowns. In both cases, A is guilty of intentional homicide. This is true even if A, in example 1, had already regretted his act when he lowered the "corpse" into the water. There would be no intention at that moment, but there was intent when he set in motion the course of events which led to the death, and that is sufficient.

The sequence of events may become so extraordinary, however, that liability for the result is excluded, the result being too remote (see above, § 12, V). In such a case, there will be punishment only for an attempt.

Aberratio ictus.—A special case is the one which is called *aberratio ictus*, "erroneous hit." A sends a box of poisoned chocolates to his rival B; B gives them away to child C, who eats some and dies. A intended to kill, and he has killed, but he did not intend to kill C. The general opinion here is that he cannot be punished for the completed murder of C, but only for the attempted murder of B. This question has no great practical significance, since in such cases of attempt a special rule in Penal Code, § 51, para. 2, allows the infliction of the same punishment which would apply to a completed offense.

2. The intention must cover all objective elements of the crime.

The intention must also encompass the remaining portions of the penal provision's description of the crime. It must, as the expression goes, cover the entire *objective elements of the crime*. Liability for bigamy (Penal Code, § 220) requires knowledge that the former marriage still exists. Liability for incest (Penal Code, § 207) requires knowledge of the relationship. Liability for usury (Penal Code, § 295) requires knowledge that there exists "distress, carelessness, lack of judgment or dependence" in the other party, and also requires that the gain is "unmistabkably out of proportion" to what is given in return. If the perpetrator believes that it is only the other's vanity which he exploits, or if he makes a mistake as to the value of his gain so that he does not understand the lack of proportion, he cannot be punished.

The enactment in Penal Code § 42 as to mistake.—All this follows from the general rule in Penal Code, § 40, that intention is required for criminal liability. But for emphasis, the law states it expressly in Penal Code, § 42: "To a person who has committed an act in ignorance of circumstances determining the punishability of the act or increasing his liability for punishment, these circumstances are not attributable."

Penal Code, 42, speaks not only of circumstances which determine, but also of those which increase the penal guilt. § 182 can be mentioned as an example. Forgery of documents is generally punished with imprisonment up to two years, "but up to four years if the document is a Norwegian or foreign official document." One who uses a false document without knowing the circumstances which make it an official document can be punished only under the milder penal provision. Another example: One who uses violence toward a civil servant in the belief that he is a private person cannot be held liable under the special enactment in Penal Code, § 127, as to violence toward civil servants, but only under the general provision on assault in Penal Code, § 228.

At times, the law has a general provision on punishment against a certain type of act, but also has exceptions which provide for decreased punishment or complete impunity under certain conditions. Penal Code, § 163 and 166, contain general provisions against false oath and false testimony in court, but the provisions are supplemented by Penal Code, § 167, which grants impunity or a decrease in punishment to one who was charged with an offense when he testified falsely, or who could not tell the truth without exposing himself or one of his next-of-kin to punishment or loss of public esteem. The principle in Penal Code, § 42, also comes into play on such occasions, even though its wording does not fit so well here. One who erroneously believes that he is in such a situation as Penal Code, § 167, mentions, will therefore benefit from it (see Rt. 1934, p. 97).

An error with respect to *punishably equal factors*, however, has no significance. If the usurer believes that he exploits his victim's carelessness, while it is actually distress which is exploited, the error will not create impunity since the law equates distress with carelessness. The principle also applies where mistake of persons is involved (*error in persona*). A defames, assaults or kills a person who he thinks is his enemy B, while in reality it is the innocent C. Here, the error does not relate to "circumstances determining the punishability of the act or increasing his liability for punishment."

3. Further about the effective area for § 42

The principle in Penal Code, § 42, also applies to circumstances which are significant for liability even though they are not mentioned in the penal provision in question, such as those grounds of impunity which are mentioned in the general part of the Penal Code. One who believes that he is in a situation of self-defense or emergency cannot be punished for an intentional breach of the law if his act would have been justified under the circumstances which he believed to exist. The same applies to the unwritten grounds of impunity, such as consent or lawful forcible redress of a wrong.

4. "Subjective excess"

Some penal provisions are not satisfied with an intention covering merely the objective elements of the crime, but set up certain subjective requirements in addition. They may, for example, require a *purpose* which goes beyond what is objectively required (see below, § 22, V).

II. Incorrect understanding of the expression of the law does not preclude intention

As we have seen, the principle is that the actor shall be judged according to his perception of the factual situation. An incorrect understanding of the meaning of the legal expressions, however, does not have the same effect. Let us once again look at the usury case. If the usurer incorrectly believes that his gain is not "unmistakably out of proportion" with what he renders, it can *either* be because he makes a mistake as to the value of the consideration to be rendered by one of the parties, *or* because he interprets "unmistakably out of proportion" differently than did the legislature. In the first case, his mistake is judged according to Penal Code, § 42; in the latter case it is a mistake of law which is judged according to Penal Code, § 57, and which does not create impunity to the same extent. The same result will follow if the actor makes an error as to the meaning of other words which the law uses, such as "significant damage," "public place," "unreasonable price," and "indecent act."

Lack of knowledge as to the illegality of the act does not preclude intent.— Knowledge that the act is punishable or at least unlawful is not necessary to the existence of intention. This is also true where the penal provision itself expressly demands that the act shall be "illegal," "unlawful," or "unjustified" (see S.K.M., pp. 98–99). If the actor makes a mistake with respect to factual circumstances which are of significance for lawfulness, this mistake is judged according to Penal Code, § 42, but if he knows the conditions and errs only as to the legal question, this is a mistake of law which is judged according to Penal Code, § 57, not according to Penal Code, § 42. This is at least the starting point. We shall later see that it is often difficult to distinguish between the two provisions (see below, § 24, IV).

III. Exceptions to the main rule

The rule that the intention must encompass every factor which is of importance for ciminal liability has certain exceptions.

1. Penal Code, § 42, para. 3

We have such an exception in Penal Code, § 42, para. 3: "Error regarding the value of an object or the estimated amount of damages caused will be taken into account only when punishability depends thereon."

Some penal provisions let the scope of punishment depend on the value of the object which is taken or the degree of the damage which is caused by the act; see, for example, Penal Code, §§ 183, para. 2 ("damage of more than one thousand kroner"), 256, para. 2 ("whether considerable values are involved"). Here, the value of the object or the degree of the damage is not conclusive for the question of punishability, but has significance only for the degree of punishment. It therefore follows from Penal Code, § 42, para. 3, that it is the objective value which counts and not the value which the perpetrator estimated. The rule is based on considerations of convenience. The actor's opinion of the value, if he had any at all, is not easy to determine. Thus, the actual value is used in determining the seriousness of the offense. The Penal Commission held that "there can be no danger in this solution because of the law's broad scope of punishment" (S.K.M., p. 64).

It is only *monetary value* which does not have to be encompassed by the intent. When the physical extent of the harm is involved, the general rule in Penal Code, § 40, applies. A person is not liable for consequences greater than he counted on at the moment of action.

The Penal Code has no provisions which make liability depend directly on the value of an object or the degree of the damage in so far as intentional offenses are concerned. But the value can be indirectly determinative for the question of criminal liability. An example of this is usury, where the value of each consideration determines whether the contract yields "a return unmistakably out of proportion." Similarly, the value of an object may be determinative as to whether an act is legal because of necessity or self-defense. Mistake by the actor in these cases is judged according to the main rule in Penal Code, § 42, para. 1 (see S.K.M., p. 64).

2. Penal Code, § 43

Another important group of exceptions to the main rule is the one covered by Penal Code, § 43: cases where an increased punishment is provided because a punishable act has caused an unintentional result. The law has a large number of such enactments. Of special practical significance is Penal Code, § 228, para. 2, dealing with assault which causes death or serious injury. The provision does not explicitly state that death does not have to be encompassed by the intent. But this is clearly demonstrated by a comparison with the provision on intentional homicide, which has a much more severe punishment. As a general rule, a provision which increases punishment where an act results in harm does not require that the harm be intended (see, for example, Penal Code, §§ 157, 228, 229). The law's choice of language is very much varied on this point, but its meaning is generally clear.

Purely accidental results do not cause punishment to be increased under Penal Code, §§ 43. The perpetrator must have been able to foresee the possibility of such a result, or, having later become aware of the danger, must have failed to prevent it, despite his ability to do so.

According to the law's formulation, the decisive fact is whether the *perpetrator* could have foreseen the possibility. Thus, the judge must take his knowledge, intelligence and experience into consideration. There must, in other words, be a certain degree of guilt, but it need not amount to criminal negligence as to the result. The perpetrator can be held liable for assault resulting in death even though there is no basis for holding him liable for negligent homicide.[1] In legal writings, the term *culpa levissima* has been used.

If one builds on the deterministic theory of an absolute causality in human life with respect to thought and action also, one can say that the expression "could have foreseen" has no real meaning. For when the actor really *has not* foreseen the danger it may also be said that he *could not* have foreseen it. What the law must mean is this: Would he have foreseen the danger if he

[1] In Danish and Swedish law, negligence is now required with respect to punishment-increasing results (Danish Penal Code, § 20; Swedish Penal Code, chap. 5, § 12). The same is true for Germany (after an amendment of 1953, St.G.B., § 56). But since the law of these countries requires less for negligence than Norwegian law, the difference on this point is perhaps not overly great.

had used his abilities and knowledge in the way the law requires? The law takes into account the actor's particular abilities, but poses an objective requirement of attention and thoughtfulness. Similar questions arise in determining whether the act is negligent (for further detail, see below, § 23, II). The degree of risk is less under Penal Code, § 43, than when negligence is involved, but the principles for the evaluation otherwise seen to be the same.

It is difficult to specify what is required with any more precision. If the law is interpreted liberally, the purely theoretical possibility that the harm might occur ought to suffice. This is certainly not the meaning; there must exist a degree of danger of such magnitude that it is counted upon in ordinary life. This can hardly be expressed more clearly without the aid of examples. A case which arises not too infrequently is this: During an assault or a fight, one of the parties receives a heavy blow, stumbles backwards, falls, hits his head against the pavement or the edge of the sidewalk, cracks his skull and dies (see, for example, Rt. 1939, p. 6). This is such a foreseeable possibility that if the perpetrator is guilty of assault, he will be convicted of assault resulting in death (Penal Code, § 228, para. 2). The result would be different if the blows were insignificant in themselves, and the fall occurred because the victim stumbled. The following German case gives an example of an unforeseen consequence. Two workers enter into a quarrel and both strike a few light blows, grapple, push and shove for a while, but then separate. When one of them begins to put on his hat, he sways, holds his hands over his heart and falls dead to the ground. The autopsy reveals that the excitement and stress caused by the fight led to a heart attack because of an organic defect. This is a development which is so alien to the thoughts of an ordinary layman that there can be a conviction only for ordinary assault.

In certain cases, the possibility of harm can be determined by pure statistics. The mortality rate by chloroform narcosis is deemed to be one in 1,500–5,000 cases (the figures vary). Suppose that a burglar chloroforms a sleeping apartment-dweller in order to be able to look through the apartment in peace; because of a physical weakness, the victim dies from the chloroform. The perpetrator can be held liable for robbery (Penal Code, § 267), but can he be convicted of robbery resulting in death? If he did not know that the victim was old and frail, the answer must be that such a result was too remote to create liability.

According to Penal Code, § 43, even though the perpetrator could not have foreseen the possibility of harm at the moment he acted, he can nevertheless be held liable for the result if, after becoming aware of the danger, he fails to prevent it despite his ability to do so. Moreover, it should be noted here that the later omission can possibly lead to criminal liability for intentionally causing the result (see above, § 13, V, 1). If I knock an innocent person to the ground and calmly watch him bleed to death, I will hardly get away with assault resulting in death; I must be prepared to be convicted of intentional murder. If there exists no intent to kill in my failure to act, however, the rules on assault resulting in death will be used.

3. Purely objective conditions for criminal liability

It has already been mentioned that conditions for an *increase in punishment* need not be encompassed by the intent. The same is true where certain conditions for liability are concerned. Here we can speak about *purely objective conditions for liability.*

(a) *Consequences.* In certain cases a specific consequence does not have to be encompassed by the intent. This applies to Penal Code, § 285, with respect to the consequence that the creditors are caused a loss, and to Penal Code, § 240 and 388, with respect to the consequence that the woman is placed in a state of helplessness or distress.

Whether Penal Code, § 43, can be applied by analogy in these cases is debatable. The words of the law are against such an analogical application. When Penal Code, § 42, speaks not only about circumstances which determine liability but also circumstances which increase the punishment, while Penal Code, § 43, restricts its rule to the latter category, it must be presumed that the legislature actually meant to limit the rule in this way. Nevertheless, it seems to be the general opinion that Penal Code, § 43, can be used analogically, in that it is regarded as a casuistical expression of the general principle that purely ac-

cidental consequences have no significance on the issue of criminal liability. The question has little practical significance, since a consequence of such a type will very rarely be unforeseeable.

(b) *Accompanying circumstances.* The objective condition for liability may be an accompanying circumstance rather than a consequence. The most important example exists in the provisions concerning sexual offenses against children. In order to make the prosecution of such offenses less difficult, an amendment of 1927 provided in most such cases that a mistake as to age does not preclude liability (see Penal Code, §§ 195–198, 201 and 212). One who had intercourse with a girl below sixteen years of age (Penal Code, § 196) was not free from punishment even if he felt certain that she was above this age. At times, this rule could be very harsh, and in 1960 the Penal Law Commission proposed a rule to the effect that the perpetrator should be free from liability if his mistake as to the girl's age was not due to any negligence. In Parliament the Bill caused a hard struggle. In the end the majority accepted the Bill as far as the sixteen-year limit is concerned, whereas the old rule was retained with respect to the fourteen-year limit in § 195 (Amendment of February 15, 1963).

We have another important example in the provisions on defamation. Defamations are generally punishable only if they are untrue (Penal Code, § 249, para. 1). If one were to apply the error provisions of Penal Code, § 42, it would lead to a situation where the accused could be punished only when he knew of the falsity. But this is not the rule. The defamation must be intentional to the extent that the defamer must know that he is defaming. If, for example, he makes a mistake as to the meaning of the words he is using, so that he does not know that he is saying something defamatory, he cannot be punished. But with respect to the falsity, special rules as to guilt apply, and they are to be found in Penal Code, § 249, para. 3. If the defamer had the duty or obligation to express himself, or expressed himself in legitimate protection of his own or another's interests, he can be held criminally liable only if he was negligent with respect to the falsity, and the burden of proving that care has been exercised is placed upon him. Where there is no such reason for making the statement, the defamer is criminally liable even if he reasonably believed that he was speaking the truth. Truth is his only defense. Stated in another way, the falsity is a purely objective condition of liability. The legislature has found it necessary to depart from the principle of guilt in order to give sufficient protection to honor and reputation. We have a special provision in Penal Code, § 248, covering accusations made in bad faith.

IV. Mistake as to one's own responsibility

The principle in Penal Code, § 40 and 42, applies to circumstances of the *act*, not to circumstances which determine the criminal responsibility of the actor. If a boy erroneously believes that he has not reached the age of fourteen, he is nevertheless criminally liable. Considerations of expediency have led the legislature to fix a definite limit in the process of maturity; when this limit is reached, the law presupposes the the person has achieved the maturity which will allow him to be fully responsible. The perpetrator's own ideas as to his age are of no consequence. A similar rule applies if a person considers himself to be insane.

V. Liability for negligence

If intention is lacking with respect to a single element of the crime, punishment for an intentional offense is precluded. Instead, liability for negligence may exist. This presupposes first that the law makes the act punishable in its negligent form, and secondly that negligence exists with respect to those factors of punishability where intention is lacking (see Penal Code, § 42, para. 2). For example, a person destroys an object in the erroneous belief that it is his own. If the error can be attributed to negligence, he may be punished for negligent destruction of another person's property, but only if the damage is of such a nature as is mentioned in Penal Code, § 292, since negligent causation of damage of lesser magnitude is not punishable (Penal Code, § 391, para. 3). A person who appropriates an object in the belief that it is his own cannot be punished, even if his negligence is quite considerable, since neither Penal Code, § 257, on larceny, nor Penal Code, § 392, on illegal deprivation of possession, applies to negligence.

§ 22. Intention, Purpose and Premeditation

I. Survey

Our Penal Code, as distinguished from many foreign codes and drafts, has not tried to define the concepts of intention (with purpose and premeditation as special forms) and negligence. Their meaning must therefore be established by theory and practice.[1]

In everyday life, the expressions intention, purpose and premeditation are generally used haphazardly without any clear understanding of the differences between them. In penal law, however, each of these concepts has its own definite technical meaning.

In any close study of the precise meaning of intention, there are two basic viewpoints, either of which may be used as a foundation: the *volition theory* on the one hand, and the *consciousness theory* on the other. According to the volition theory, intention may be defined as *the will to commit an act of a nature which the penal provision describes.* According to the consciousness theory it can be defined as *the consciousness of committing such an act.* The difference between the two interpretations, however, is more often one of expression than of reality. In the main, both formulas lead to the same results, and where doubtful borderline cases arise, the solution is not obtained merely from the basic principle, for both theories can be interpreted in various ways. The real problem is to distinguish between the most blame-worthy cases which belong under intention, and those less blame-worthy, which belong under negligence. This cannot be done by a single formula; a combination of many factors may be required. The correct procedure is to deal with the various groups of cases and solve them by considering the natural meaning of the words in the penal provision, judicial precedent and expediency.

II. Intention exists if the consequence is desired

With respect to a harmful result, intention exists first of all where *purpose* exists, that is, where the actor desires to cause the particular result by his act. In such cases, the thought of the result is a motive for doing the act. Whether the probability that the result will occur is great or small makes no difference. A person who shoots at another in order to kill him is acting with the intent to kill even if the distance between them is so great that it is quite unlikely that the bullet will hit its target. The woman who undertakes an abortion just for safety's sake is acting intentionally even though she deems it unlikely that she is actually pregnant. The limitation here is in the requirement of adequacy: the danger may be so remote that the law does not take it into account, even though some odd person does (see above, § 12, V and § 14, V). Some, by the way, include this limitation in the concept of intention; they say that in such cases the perpetrator does not act with the necessary intention. In my opinion, it is more natural to consider the concept of adequacy as a limitation on the objective range of the penal provision, but this is a purely terminological question.

III. Intention with respect to probable consequences

Intention also exists as to undesired consequences, *if the perpetrator considered them certain or preponderantly probable.* A person who sets fire to his house in order to collect the insurance is an intentional murderer if he thought it certain or preponderantly probably that the tenant would burn to death. The fact that he may regret the death does not free him from full liability, since he foresaw what would occur as a result of his act. And similarly, intent exists with respect to those *circumstances* of the act which he considered certain or preponderantly probable. A man who remarries is an intentional bigamist if he thinks it certain or preponderantly probable that his former wife is still living, even though he hopes that she is not. Of course, it is not the actual degree of probability which matters, but the probability which the perpetrator deems to exist.

These propositions can be regarded as established by judicial practice. What is doubtful is the degree of probability required. Does "preponderantly proba-

[1] The most thorough discussion of the problem in Scandinavian jurisprudence is given by Waaben, *Det kriminelle forsæt* (Copenhagen, 1957). See also the discussion of the 22nd Nordic meeting of jurists (Reykjavik, 1960) with introductory statements by Andenaes.

ble" refer to the borderline of certainty, or is it enough that the harm more likely than not is going to materialize? Or does the concept lie somewhere in between these points? It is difficult to give a definite answer to this question. In older treatises and judicial decisions, a very high degree of probability was undoubtedly considered necessary; the draft bill to the Penal Code thus uses the expression "quite preponderantly probable" (S.K.M., p. 38). More recent decisions have tended to be satisfied with a lower degree of probability,[1] and with pure possibilities.[2] In any event, this last proposition goes too far. Whether mere possibilities *in connection with other factors* can be sufficient will be discussed under IV. When the determination of whether intention exists rests entirely on the actor's opinion as to probability, it must at least be required that he thought it *more probable* than not that the offensive result would occur.

A situation may be assumed where it is uncertain whether a result will occur, but the actor knows that it will occur if he attains his goal. During an inflamed political situation there is a plan to derail a train in order to assassinate a prominent politician who is travelling on that train. The would-be assassin thinks it highly improbable that the plot will succeed at all, since he expects that the train crew will discover the attempt and prevent the accident. But he must know that if he succeeds, many other passengers will also be killed. In other words, this is a *necessary feature* of the desired goal. Here there is intent to kill not only the politician, but also the other passengers.

IV. The consequence presented itself as possible

The most doubtful case arises when the offensive result is neither desired (II) nor considered certain or preponderantly probable (III), but has merely presented itself to the perpetrator as more or less possible. What is said in the following about future results of the act applies similarly when the uncertainty is related to other elements of the crime.

It is generally agreed that intention exists in some of these cases—the term *dolus eventualis* is often used here—but not in others. There is less agreement on where the borderline is to be drawn.

The psychological situation of the perpetrator can be different in these cases.

1. Dolus eventualis

The perpetrator may have decided that he desires the act done even though the unfortunate consequence should follow. In a way he has accepted the result in his mind. Suppose a second-hand dealer is offered some silver objects for sale. He reflects on the possibility that they are stolen goods, but decides that even though this may be so, it shall not prevent him from making a good buy. It is often said that the perpetrator has *accepted the result as part of the bargain*, an expression which is a bit dangerous since it is also used differently in other contexts. There is general agreement that intention is present here. But it is of no great practical significance, since it rarely will be possible to prove the thought of the perpetrator.

A strange case from Denmark is referred to in UfR 1918, p. 946: A carpenter who was depressed over the unfaithfulness of his wife stood by his work bench, lit his pipe, threw the match behind him into the wood shavings, and then walked out of the room saying: "Happen what may." He had vaguely imagined that in case of fire he would leave the region, and that it would then be possible to work out a better relationship with his wife. He was convicted of intentional arson.

2. Conscious negligence

The opposite situation may exist: the perpetrator thinks that if his plan should develop so badly that the evil result follows, he would wish the act undone, but he acts in the hope that it will go well; he "takes a chance." In this

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[1] Rhus, *Riksadvokatens Meddelelsesblad*, 25, p. 88 (Oslo): "The accused knew that his accusation against S. would probably lead to an unlawful deprivation of his freedom" (a conviction for intentional deprivation of freedom).

[2] See: (1948) *Norsk Retstidende*, p. 715 ("very near possibilities"); (1946) *Norsk Retstidende*, p. 437 ("the accused was conscious of the fact that her information could have such result"); (1947) *Norsk Retstidende*, p. 13: The fact that the accused knew that there was a more or less distant possibility of arrest was not sufficient to justify a conviction for intentional deprivation of freedom.

case, no intention exists, unless the result was considered overwhelmingly probable (see III). The fact that the perpetrator has consciously taken a risk is not enough for intent; this is the area of the so-called *conscious (or advertent) negligence*. There is occasionally some uncertainty on this point in court

3. Hypothetical intention

In many cases, the perpetrator has not made a definite choice whether he would prefer to act or refrain from acting, should the undesired result follow. He knows that there is a risk and he acts without further thought on the matter.

A concept which seems to be generally accepted in Swedish jurisprudence is that the judge must ask himself whether the accused would have committed the act, had he counted on the result as certain or overwhelmingly probable. If the answer is yes, intention exists; if the answer is no, there is only negligence. This concept is often called the *hypothetical consent theory*, in contrast to the *positive consent theory*, which recognizes intent only in group 1.

Strong objections may be raised against this solution. One may argue that intent should imply a certain element of volition in the defendant's attitude toward the result at the moment of action. Under the hypothetical formulation, however, criminal liability depends not on what the perpetrator actually *thought* at the moment of action, but on what he *would have thought* under certain conditions. Where two acts are committed by two actors, each having exactly the same thoughts about the results, one can be held to have acted intentionally, the other only negligently, on the basis of the judge's knowledge of the character of the actor and of his interest in the act.

It can be said in favor of the hypothetical formulation that despite these objections it provides a useful distinction between the subjectively more aggravating and less aggravating acts. There are also Norwegian decisions which seem to apply it, such as Rt. 1933, p. 1132. Some young men were accused under Penal Code, § 95, for having lowered and destroyed a Swastika flag which had been raised on May 1 over the German consulate in Narvik. The provision imposes punishment on anyone who publicly insults the flag or national symbol of a foreign state, and the issue was whether the accused's intention had encompassed the fact that the Swastika flag was the official flag of the German state, or whether they had regarded it merely as a party emblem. The Supreme Court unanimously held that it was sufficient that the accused had conceived the possibility that it could be the official flag of Germany and that they would have committed the act even if they had had certain knowledge of this fact. (See also the *Quisling Case* in Rt. 1945, pp. 109, 111.) None of these decisions is completely clear in its reasons, however; the reasoning of the latter case fits in just as well with the positive consent theory. It cannot be generally said that the hypothetical consent theory is *established* judicial practice, and I believe that the best reasons militate against its recognition. Moreover, when intention is extended as far in the direction of probable consequences as it is in modern judicial practice (see above under III), the practical necessity for recognition of hypothetical consent is greatly reduced.

In recent years, a Swedish judicial decision has caused discussion about situations where the actor consciously fails to obtain information on a doubtful point so as to be able to use the defense of "good faith." The Swedish case, which resulted in criminal liability, involved indecent conduct with a girl below the age of fifteen.[1] This case is of little practical significance for us because of our special rule that mistake as to age does not prevent punishment, but similar questions may arise with respect to other offenses, such as receiving stolen goods. The buyer of a stolen object may have doubts, and yet may consciously fail to make inquiry. If he had had positive knowledge that the goods were stolen, perhaps he would not have made the purchase. According to the hypothetical formulation, intent cannot be established in such a case. The positive consent theory, however, can lead to the finding of intent. When the buyer makes sure that he remains in ignorance, it shows that the possibility of the goods being stolen does not influence him as long as he believes that he has a pretense under which to avoid punishment.

[1] See: (1941) *Nytt juridiskt arkiv*, I, p. 466; comments by Strahl, in (1945) *Svensk Juristtidning*, pp. 32–34; Alexanderhon, *op. cit.*, p. 295; von Eyben, in (1951) *Nordisk Tidsskrift for Kriminalvidenskab*, pp. 297–298; Hurwitz, *Den danske kriminalret*, p. 325.

The perpetrator must have conceived the possibility of the result.—An absolute condition for the finding of intent is that the perpetrator at least *conceived the possibility of the result.* Had he not done so at all, there is no intent, even though it is clear that nothing would have deterred him.

R. Mbl. 42, p. 16: During World War II, a provisional decree issued by the Norwegian Government in exile in London prohibited the purchase of objects confiscated by the German occupation forces in Norway. The accused had bought two such objects without knowing they were confiscated, but she declared in court that it would have made no difference even if she had known. This was held insufficient for intent; she must also have thought of this possibility.

The "veiled" intent.—The previous presentation has perhaps given a somewhat misleading impression of the offender as a person who acts with crystal-clear consciousness and who calculates the risk in percentages. The situation is often quite different. The perpetrator either acts quickly and impulsively, without any thought of the consequences, or else his ability to think is curtailed by excitement or fear. There can also be cases of psychological self-delusion, where the perpetrator veils the character of the act for himself, and thus commits the crime in a sort of semi-consciousness.[1] A clear consciousness is not required; the concept of intention also includes the half-clear, veiled intention. But there are reasons for exercising a certain care in evaluating the proof. Injustice may easily be done by a judge who supposes that a person who acted impulsively or in excitement *has* actually conceived everything which he *would have* conceived in quiet contemplation.

V. Purpose

In some instances, the law is not satisfied with intention, but requires a definite purpose (see above, II). Here the law generally requires this specific purpose in addition to an intention which covers the objective elements of the act. Penal Code, § 161, provides punishment for anyone who obtains explosives "with intent to commit a felony thereby"; Penal Code, § 174, refers to anyone who counterfeits money "with the intent of putting it into circulation." In these cases it is the additional purpose which gives an otherwise harmless act its offensive character. The most important offenses where a definite purpose has significance are the *offenses for gain*, in which the act must have been committed for the purpose of obtaining an unlawful gain for oneself or others (see, *e.g.*, Penal Code, § 257, on larceny). It is not necessary, however, that this purpose be actually attained in order for the offense to be complete.

VI. Premeditation

Premeditation is different from purpose. This concept at one time had a greater significance than it has today. According to the Criminal Code of 1842, intentional homicide committed with premeditation was murder, and the punishment for murder was death; only an amendment of 1874 gave the court power to impose life imprisonment instead. The concept of murder does not exist in the new Penal Code. The fact that homicide is committed with premeditation does not cause an increase of the minimum penalty, but it is one of the factors which permit imprisonment for life (Penal Code, § 233, para. 2). Premeditation has been given a certain significance in the infliction of serious bodily injury (Penal Code, § 231) as well as in homicide.

Premeditation exists when the crime has been committed as a result of a *considered decision* and not a spontaneous impulse. Generally, the determining factor will be whether the perpetrator had the time and the occasion for peaceful contemplation. But even if he had, no premeditation will exist unless he *actually* weighed the matter, and not, for example, when he was in a state of emotional excitement, precluding any peaceful premeditation (Rt. 1948, p. 1042; 1949, p. 402; see also the statements in Rt. 1954, p. 823). Purpose may exist without premeditation. A person who, immediately upon seeing another take out a wallet, gets the sudden impulse to strike him to the ground and rob the corpse, acts with purpose but not with premeditation. On the other hand, premeditation can exist without purpose. The owner of a house who sets fire to it so that he can collect the insurance money, even though he realizes that the tenant's family will probably burn to death, acts with premeditation but not with murderous purpose.

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[1] See Jørgen Trolle, *Det "sløvede" Forsæt*, Festskrift tillagnad Karl Schlyter, pp. 358–366 (Stockholm, 1949).

VII. Special provisions as to the degree of guilt

In certain penal provisions, the law uses expressions which raise the question whether ordinary intention is required or something more or less.

When the law requires "reliable information" as a condition for criminal liability (Penal Code, § 139), this means something more than ordinary intention; the same is true when the law speaks about "testimony which he knows to be false" (Penal Code, § 165). *Dolus eventualis* is not enough, and a greater degree of probability is undoubtedly required here than elsewhere. Something less than ordinary intent is required when the law speaks about "knowing or presuming" (Penal Code, § 155). Whether the law makes any exceptions from the general requirement of intent, and what is required in such a case, must be determined by an interpretation of the individual provision.

§ 23. Negligence

I. The negligent offense also requires an intentional act

As a general rule, the negligent offense also requires an intentional (consciously willed) act or ommission. But this is not an absolute rule. A negligent omission may be due to a person's failure even to think of the necessity of acting; in other words, he does not make any decision one way or the other. As far as acts are concerned, the negligence may be due to the fact that the actor did not exercise the necessary control over his movements. A doctor who is performing an operation, for example, may sever a muscle because of lack of attention or carelessness. He undoubtedly wanted to do an act, but not *such an act* as he actually has done.

In contrast to the intentional offense, here, even though the act itself is generally intentional, the intention does not encompass all elements of the act. It is sufficient if intention is lacking even as to a single element. The essence of the concept of negligence is that the actor has failed to behave as a knowledgeable and reasonable person would have done. However, this is nothing more than a starting point which must be considered in detail later.

II. Violations of integrity

We shall first examine negligence in the infliction of harm to persons or property, the so-called violations of integrity.

The distinction between conscious and unconscious negligence.—In theory, there is a distinction between *conscious* (advertent) and *unconscious* (inadvertent) negligence. The former exists when the perpetrator knows that he is exposing his surroundings to danger; the latter exists when the possibility of danger is not in his mind at all. A motorist who speeds in order to catch a train, with his heart in his throat for fear that there might be an accident, acts with conscious negligence. If, however, he sits behind the steering wheel so engulfed in his own thoughts that he does not react fast enough when a small child runs out into the street, his negligence is unconscious. The term conscious negligence is used whenever the actor knows of the danger created by the act, even though he does not himself consider the act as negligent. Something less than the name would imply is actually required.

The two forms of negligence are psychologically very different. To employ a figure of speech, it can be said that conscious negligence is a lack of *consideration* while unconscious negligence is a lack of *attentiveness*. The latter may be caused by excessive strain (a guard falls asleep on duty), or an improper diversion of attention (a scientist is so engrossed in his problem that he is blind and deaf to the dangers of the traffic). It is not easy, however, to distinguish between conscious and unconscious negligence in practice, and the negligence provisions of the Penal Code treat both forms the same way, The code, however, has many special provisions against the *intentional causing of danger*, such as Penal Code, §§ 150, 156, 157. These provisions apply to behavior which, *with respect to the harmful result*, constitutes conscious negligence. The fact that the mere creation of a danger may be punished is significant in that punishment can be imposed even though the harmful result does not occur.

The difference between conscious and unconscious negligence does not coincide with the difference between *gross* and *ordinary* negligence. Conscious negligence will generally be more aggravated than unconscious negligence, but the former *can* be very excusable, and the latter very serious. As Skeie expresses

it: "The reckless character of a man who causes harm is often demonstrated by the fact that he does not bother to think about the interests of others" (I, p. 233). Some penal provisions require gross negligence (see for example, Penal Code, §§ 86a, 140, para. 2), but the degree of negligence is otherwise significant only for the measure of punishment.

The evaluation of negligence.—Even though conscious and unconscious negligence are treated the same way in practice, it can be helpful to build on the distinction for purposes of analysis.

(a) *Conscious* negligence borders on intention. The lower limit of intention is also the upper limit of negligence. Therefore, I can refer here to the presentation above (§ 22, III and IV).

Beneath negligence, on the same graded scale, is the guilt-free (objectivlely legal) act. An act is not negligent merely because the actor knows that it entails certain dangers. An apprehensive motorist may be painfully aware of the danger that a small child may suddenly dart into the street. Should an accident occur, his awareness that it might happen will not make him liable if he drives with moderate speed, and according to the rules. Here, see again the concept of *permissible risk* (§ 14, V). The actor's own judgment of his act is of no significance. If he is of a thoughtful and especially careful nature, and blames himself where no one else would find any faults, he will not be liable merely because of that. And conversely, if he is of a very bold and aggressive nature, and thinks it permissible to take more chances than general opinion would accept, this does not relieve him of liability.

(b) The greatest practical difficulties arise in the appraisal of unconscious negligence. No difficulties of delimitation arise in relation to intention. When the actor has not even thought of the possibility of the harmful result, intention can never exist. But the difficulties are great in determining the boundary in relation to the impunitive act. Here relatively little of a general nature can be said; the difficulty lies in determining whether negligence exists in the concrete case.

In many areas of life, rather definite norms of evaluation are created, such as norms about how a motorist should drive, how a doctor should dress a wound, how a miner should blast, and how a carpenter should do his job. In other situations, there is nothing to fall back upon except a judgment as to how an ordinary reasonable man—a *bonus pater familias* to use the expression of the Roman law—would have acted. Such differences as may exist because of employment, education and position must be considered, however. An expert may be able to detect a danger which a layman would not have thought about. A farmer has a different area of experience than has a city dweller, a labourer's experience is different from that of a white collar worker. This is significant when they are faced with dangers outside of their trade. No single set of norms will suffice; many must be used.

Negligence according to the law of torts and penal law.—Not every depravture from the norm is negligence, creating criminal liability. And the requirements of the penal law are different from those of tort law. The question in torts is who is to bear the burden of the damage, the innocent victim or the person causing it? Here it may be reasonable to be satisfied with a lesser degree of negligence. It is an entirely different matter when a question of punishment is involved. "It is absolutely clear, in reality," says the Penal Code Commission, "that just as the law sometimes does not punish the unintentional breach at all, there will, in other instances, be good reasons to limit the imposition of punishment to the more serious cases of carelessness, foolishness or thoughtlessness. To go so far as to punish each and every attributable negligence is an aimless waste of a measure which, above all else, should be used moderately and with care" (S.K.M., p. 62). It often happens in legal practice that a person who is acquitted of criminal negligence is nevertheless required to pay damages (see, for example, Rt. 1930, p. 1383; 1932, p. 969; 1933, p. 110).

A finding of negligence must always be made on the basis of the *individual situation*. For example, if an automobile accident is involved, it is not enough to ascertain the speed at which the car was travelling, and how the driver operated it. One must also consider such circumstances as the width of the road, general visibility, light conditions and whether the road was slippery. A factor which must always be considered is whether or not the actor had sufficient

time to act. An error committed in a difficult situation must be judged in a different manner than one committed where there was sufficient time for calm contemplation.

Subjective or objective judgment of negligence.—Whether the determination of negligence shall be *subjective* to the extent that it considers the individual peculiarities of the actor is a completely different question. Should the intelligent person and the foolish person, the thoughtful and the careless, the calm and the nervous be treated differently? The question is extremely complicated, and little thought out in legal literature. And judicial practice is generally not very illuminating, for the courts hardly ever give any detailed explanation of the general viewpoint which lies behind the decision in the concrete case. The problem cannot be solved by any general formula, *e.g.*, that an objective standard is applied in tort law, but a subjective one in penal law. Here, there is room only for some guiding points.

It should be clear from the above that the basic requirement for liability is that the act conflicts with the objective norm of justifiable behavior. If the actor keeps within the norm, no inquiry is called for as to whether he could have done even better by exercising some special ability possessed by him. Therefore, the issue whether a subjective standard should be used as a basis for decision will have its greatest importance in the form of the question whether subjective grounds for excuse can lead to an acquittal even though objectively a wrong has been committed. But it is necessary to remember that when factors such as knowledge of local conditions or of the actual situation are given significance, no normal measure can be set up. The individual must be judged according to his *actual knowledge*, unless he can be blamed for not obtaining such knowledge.

If the objectively wrongful act is caused by a lack of attentiveness, then the scale is the same for all. It will not help a person to claim that he is a notoriously careless person, and has shown the attentiveness which he usually does. The purpose of imposing liability for negligence is to enforce attentiveness. On the other hand, an especially attentive person will not be held liable for failing to live up to his usual standard if he has nevertheless fulfilled general reasonable requirements. As a rule, it is also unimportant to know the reasons for the lack of attentiveness; whether, for example, the absent-minded motorist was pondering over life's great questions, or whether he was thinking of his adventures last night.

However, the rule as to the objective measurement scale can hardly be maintained to its fullest extent. It is often natural to impose stricter requirements of attention on one who acts in an area where he has no knowledge and experience than on one who is able and experienced. A person lacking knowledge and experience must compensate for this, so to speak, by an increased amount of care. Similar rules apply to one who, because of a defect of sight or hearing, is more likely than others to cause damage. On the other hand, there are good reasons for relaxing the requirements where young persons are concerned. There is no reason to punish a sixteen-year-old for failing to show the same care as an adult. The degree of maturity must be considered in determining his carelessness in the tort law as well, where the question has been especially important in the field of contributory negligence.

However, if the error is due to a lack of intelligence, experience, calmness, physical strength, etc., the scale of measurement will be subjective in principle. The actor is not punishable if he did the best he could. The general sense of justice makes a distinction between what the perpetrator "can help" and what he "cannot help." It is only the former which forms the basis for *reproach* and thus, for a judgment of *guilt*. We blame a person because he exhibits carelessness, recklessness or a lack of consideration, but not because he is stupid, color-blind or easily frightened. The judgment of negligence in criminal law builds on this general way of thinking. But the distinction becomes more problematical upon closer analysis. Is not the carelessness of the perpetrator the outcome of heredity and environment, just as his other qualities are? From a deterministic point of view, it is unreasonable to say that a person can help one trait more than another. But the distinction may have another justification. To threaten punishment for a lack of attentiveness has the practical effect of inviting greater attentiveness; to threaten punishment for stupidity, color-blindness or a lack of mental ability, however, has no rational purpose, for such matters are not under the control of the will, and thus cannot be influenced by threats of punishment.

Nevertheless, the arguments in favor of an objective adjudication of negligence in the penal law are by and large those which can be voiced in favor of criminal liability independent of subjective guilt in general. It is easier to determine the existence of an objective error than to analyze the reasons why the error was made. By cutting off subjective reasons for defense, the rules of liability could be made easier to apply and acquittals due to difficulties of proof could be avoided. This argument is not strong enough to justify ignoring the individual inferiority of the actor, but it cannot be denied that the question as to *which* individual weaknesses should be considered in the determination is filled with many problems, both theoretical and practical.

Those cases where a person voluntarily engages in an activity which requires special knowledge or special skill, such as driving a car, mining, and conducting physical and chemical experiments, must be discussed separately. It may be that it is negligent of him even to begin this activity with the inferior capacity he may have. A person practices medicine without education; someone drives a car without a license or while over-tired; a color-blind person takes a job which requires perception of color, etc. He will then be liable if he makes a mistake. But if the individual cannot be blamed in this respect, he can hardly be held liable merely because his knowledge, talents or other abilities are not up to par. The doctor who has passed his exams must be permitted to act on the assumption that he has that knowledge which is necessary for general practice; one who has been given a driver's license is entitled to consider his abilities good enough for ordinary traffic. If, for example, the motorist's ability fails in a difficult situation—in confusion, he steps on the gas instead of on the brake—he cannot be held criminally liable. We have had a case where a locomotive driver in an unexpected situation became so confused that he drove directly against a red light. No matter how serious the mistake is from an objective point of view, the result in a criminal case must be an acquittal if the accident cannot be blamed upon inattentiveness, but upon the fact that the locomotive driver froze into paralysis. The result may be different in tort law. In that area, there is more reason to use the *risk viewpoint* as a foundation.

The difference is illustrated by a Supreme Court decision in Rt. 1951, p. 1028. A truck driver wanted to pass a bus which had stopped on the road to pick up a passenger. The road was a bit narrow, because of a pole on the other side, and the truck driver, misjudging the distance, dented the side of the bus. The driver was prosecuted under Motor Vehicle Act, § 29 (cpr., § 17, para. 2), for negligent driving, but was acquitted. His attempt to pass the bus could not be held against him; he had not "taken a chance" and his misjudgment could not be characterized as punishable negligence. However, there is hardly any doubt but that the driver would be held liable in a compensation case. It was stated, by the way, in the criminal case that he had paid the costs of repairing the bus.

III. Negligence outside of the area of violations against integrity

Negligence plays a part in many other penal provisions besides those which deal with harm to persons or property. Much of what has been said above will also be true in these areas. Here as well, the key to the concept of negligence is the behavior which a knowledgeable and reasonable man uses, and the same principles with respect to the significance of individual inferiority in the actor also apply. But it must be emphasized that the question of what amount of care is required must be discussed in connection with the individual legal provisions. To illustrate, I shall mention some types of penal provisions where liability for negligence is of practical importance.

1. Negligent causing of danger

Some penal provisions describe the offense as a negligent, danger-creating behavior. To this type belongs Penal Code, § 352, para. 2, penalizing one who "by careless handling of fire or inflammable materials causes danger of fire," and Motor Vehicle Act, § 17, para. 2, which states that a driver "shall drive carefully, and watch out as best he can, so that he does not cause damage and inconvenience to others." In practice, a lesser degree of negligence is required to be convicted under such provisions, than to be held criminally liable for the results of negligent behavior. It thus happens not infrequently that a driver who has hit a person is sentenced for the breach of Motor Vehicle Act, § 17,

para. 2, but at the same time is acquitted of negligent homicide (involuntary manslaughter, Penal Code, § 239) (see, for example, Rt. 1931, p. 816).

There seems to be a greater reluctance against convicting a man for negligent homicide in Norway than in many other countries.[1] In the five years from 1947 to 1951, only twenty-five persons were punished for negligent homicide, an average of five per year. A similar number were sentenced for negligent causing of bodily harm. In Sweden the comparable figure for negligent homicide was 169 and in Denmark forty-five per year. Even if one takes into consideration the difference in the population and in the density of the traffic, it is obvious that different scales are being used in these countries. In Germany in 1930 there were more than 30,000 sentences for negligent homicide or negligent causing of bodily harm.[2] Such figures show that provisions which apparently have the same contents can in practice mean something completely different.

The fact that the accused has acted as carefully as most, does not absolutely guarantee his acquittal. One who has exercised the normal degree of care may be free from liability in general, but the courts will not accept a traditional practice which they regard as unwarranted.

2. Breach of security provisions

Legislation also contains a long list of *preventive provisions* which apply to such matters as safety measures in industrial plants, the handling of explosives, and the equipment and driving of automobiles. A violation is generally met with punishment. These provisions seek to prevent harm by forcing a higher degree of care than is required by the general norm of carefulness. Even though a person has intentionally violated such preventive provisions—by consciously breaking the speed regulations of Motor Vehicle Act, § 20, for example—it is not certain that his actions can be characterized as negligent with regard to possible harm.

Very often, the breach of a safety provision is also punishable in its negligent form. The breach of the speed regulations is thus punishable, even though the driver has not looked at the speedometer and was not aware of the fact that the speed was above the permissible limit. Here, a conviction for negligence naturally requires something different from what is required in a case involving the breach of Motor Vehicle Act, § 17, para. 2 (careless driving), or in a case involving negligent homicide. The decisive question is whether the accused has exhibited the attentiveness which it is reasonable to require *with respect to this particualr penal provision.*

3. Breach of business provisions

The legislature has passed a number of provisions concerning the conduct of business, such as those dealing with maximum prices, rationing, closing time, and the sale of alcoholic beverages. Here the purpose is not to prevent harm to person or property, but to protect other interests of society. But when a negligent violation is a penal offense, the question here as well will be: Has he done what reasonably can be demanded for avoiding a violation of the provision invoived? The breach may have been committed not by the businessman himself, but by one of his employees. The question will then be: Has he instructed the employees as he should have and kept such control over them as can reasonably be required?[3]

4. The significance of the interest which is to be protected

This should suffice to show that the question of what "negligence" is resolves into a number of individual questions regarding the degree of care required in relation to the various penal provisions. In general, it can be said that the requirements must be adjusted according to the significance of the interests which the penal provision seeks to protect.

IV. Punishment for lack of judgment

Penal Code, § 325, provides punishment for a public servant who "shows gross lack of judgment in his duty"; see also the Responsibility Act of February 5, 1932, § 10 of which provides punishment for a member of the Cabinet

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[1] See Andenaes, *Straffbar unnlatelse*, p. 256, n. 3 (Oslo, 1942).
[2] See Exner, *Kriminologie*, p. 97 (Berlin, 3rd ed., 1949).
[3] Compare Andenaes, *op. cit.*, p. 304, and judicial decisions in (1949) *Norsk Retstidende*, p. 780, and (1952), p. 738.

who shows neglect or lack of judgment in his duties. According to these provisions, it does not help a civil servant or a Cabinet Minister to claim that he is not very sensible, intelligent or wise, and that he has done his best. When the law mentions lack of judgment as well as neglect and carelessness, it must mean that the failure to live up to certain standards as to knowledge and sensibility is also punishable. One who voluntarily accepts an official position which requires special insight and understanding, thereby assumes a certain objective obligation to fulfill these requirements. Mere forgetfulness, however, cannot result in a conviction (Rt. 1954, p. 1151).

§ 24. Mistake of Law

I. Survey

The defendant in a criminal case sometimes wishes to exculpate himself by stating that he acted in good faith, because he did not know that his action violated any law. It may be that he did not even know that any rules of law existed in this area. Or he may have known that rules existed but had been given incorrect information about the contents of the rules, by a lawyer whom he asked for advice, for example. Or perhaps he both knew of and studied the provision, but interpreted it in a way which the court finds erroneous. In all these cases, we speak about *mistake of law*.

The issue of mistake of law arises most often with respect to misdemeanors and legislation outside the Penal Code, less often when more serious crimes, such as assault, murder, defamation and theft are involved. These penal provisions are generally known by all normal adult persons. But a person can undoubtedly make a mistake as to the age limits in the sections on sex offenses, or a businessman, because of his hard-boiled business morals, may not realize that his behavior constitutes a fraud. A person may also make a mistake with respect to a ground of impunity. He may believe that the law gives him greater right to self-defense or use of necessity measures than it actually does, or he overestimates the legal significance of consent of the victim.

Conscientious offenders.—No mistake of law exists where the actor believes that he has a moral or religious obligation to violate the law (such a person is called a conscientious offender). The pacifist who publicly urges the refusal of military service (Rt. 1918, I, p. 465), and the worker who supports an illegal strike (Rt. 1939, p. 602), are perhaps acting in the belief that they are following a higher law. The same may be true on a larger scale in political offenses. In all these cases, the actor knows that the law of the land forbids or requires, and thus no mistake of law exists.

The conscientious offender represents a tragic conflict for the legal system. As far as possible, rules should be formed so that no one is forced to choose between them and his own conscience. As examples of legal attempts to avoid such conflicts, we can mention the rule which allows a person who, on religious grounds, does not want to take an oath, to use an affirmation (on his honor and conscience), and the rule which allows a pacifist to do civilian work instead of military service. But when serious attacks on the interests of society are involved, society finds it necessary to protect itself with punishment, even though the offender honestly believes his action to be morally right. His motive may then have a bearing on the measure of punishment solely.

II. Penal Code, § 57

Mistake of law is treated very differently in different countries.[1] The rule in many jurisdictions is that a mistake of law will not make for impunity at all, or will do so only in very exceptional cases. In other jurisdictions punishability presupposes the mistake of law to have been incurred at least negligently. Some make no distinction as to whether the mistake of law is negligent, but solve the problem according to the *nature* of the mistake. Thus, the earlier German Reichsgericht in practice stressed whether the mistake was of a penal or non-penal nature: the latter type of mistake exculpated, but not the former. In the writings on criminal law, it has often been held that knowledge of punishability or at least of illegality is part of the intent: if such knowledge is lacking no conviction for intentional breach should take place.

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[1] A detailed discussion is found in Thornstedt, *Om rättsvillfarelse* (Stockholm, 1956). See also Andenaes, "Ignorantia Legis in Scandinavian Criminal Law," in *Essays in Criminal Science*, p. 215 *et seq.* (ed. Mueller, 1961).

Penal Code, § 57, provides: "If a person was ignorant of the illegal nature of an act at the time of its commission, the court may reduce the punishment to less than the minimum provided for such an act, and to a milder form of punishment, provided the court does not decide to acquit him for this reason."

The expression "ignorant of the illegal nature" gives no clear picture of the scope of the provision. One who acts in good faith because of a factual mistake, also errs with respect to the illegal nature of the act, such as where a person takes someone else's property, mistaking it for his own. But Penal Code, § 57, was not meant to apply to cases of factual mistake. It is Penal Code, § 42, which applies to them. We will later consider in greater detail the distinctions between these two provisions (see IV).

The provision speaks only about mistake as to *illegality*, not as to *punishability*. If the actor known that the act is unlawful, it can never be impunitive merely because he does not know that it is punishable as well. A farmhand may break a contract of employment because he has received a better offer. He knows that it is unlawful to break the contract, but he does not know that it is also punishable (Penal Code, § 409; see Rt. 1921, p. 510; 1924, p. 702). However, when the acts do not appear to violate any interests, the mistake as to punishability and the mistake as to illegality generally coincide. This is the case with respect to many violations of the penal provisions outside the Penal Code. If I do not know of the penal provision, I also do not know that the act is forbidden.

What Penal Code, § 57, directly provides is that a mistake as to illegality *may* lead to a decrease in punishment. The section also permits the court to *refuse* to grant such a decrease. And the paragraph presupposes that the court can *acquit completely* because of the mistake. There are, then, four alternatives from which the judge can choose; he may: (1) acquit completely; (2) reduce the punishment below the general minimum or to a milder form; (3) consider the mistake as an extenuating circumstance within the general framework of the law; (4) attach no significance to the mistake at all.

This seems unreasonable at first sight. The number of legal provisions are so overwhelming today that no person could have knowledge of more than a fraction of them. How, then, can one hold it against a defendant that he does not have knowledge of a particular provision? To this one can say that no one need know all the rules. There are two requirements: First, knowledge of the general legal rules governing community living which apply to all persons: Secondly, knowledge of the special rules of the trade or occupation in which the individual is engaged. One who wishes to build a house, drive a car, or start a trade must obey the rules which apply to the activity concerned. But a fisherman does not have to know the rules pertaining to industry, and a farmer can live happily without any knowledge of maritime law.

An examination of the cases in this area reveals a certain discrepancy between the judge and the lay judges.[1] We often come upon decisions in country or city courts which acquit a person because of his mistake of law, the lay judges having outvoted the judge, but which are reversed by the Supreme Court (see, for example, Rt. 1959, pp. 105, 796; 1953, p. 459). The lay judges clearly place themselves in the position of the accused, and find it natural that he did not know about the provision in the law; perhaps they themselves learned about it for the first time in the courtroom. The professional judge thinks more about the necessity of an effective enforcement of the law. Actually, this is but a simple example of the general conflict between professional and lay judges. The layman looks chiefly at the individual case; the lawyer considers the wider implications. In the years from 1954 to 1958, there was only one reported case in which the Supreme Court upheld an acquittal because of an excusable mistake of law. During the same period, eight cases were reported where the lower court acquitted on this ground, but where the decision was reversed by the Supreme Court. In six of the eight cases, the lay judges had outvoted the judge.

The accused's position.—Great weight must be given to the position of the accused. Strong demands must be made on the owner or manager of an enterprise. On the other hand, the subordinate must generally be free from liability

[1] County and city courts in Norway are composed of one professional judge and two lay judges, the laymen having equal votes with the professional judge.

when he has acted according to his superior's instructions, without having any special reason for suspicion.

The accused's education and mental abilities.—One must also take into consideration the accused's education and mental abilities (see Rt. 1926, p. 948). This is so at least with respect to general rules of community living. Where special rules for a profession are involved, it will probably be more difficult to acquit because of lack of intelligence or experience.

The rule is new.—One reason for holding the mistake of law excusable is that the rule is new (see Rt. 1939, p. 430). Here, however, the general situation of the times must be considered. During war, when provisions of a serious nature are constantly being enacted, the excuse that the provision is new carries less weight; the people must be required to keep informed (see Rt. 1940, p. 514).

The actor is a stranger.—Another reason for excuse is that the actor is a stranger to the jurisdiction. A foreign tourist cannot be required to acquaint himself with the mysteries of our liquor law, but a foreign trawl-fisher can be required to learn our rules on territorial waters and foreigners' rights to fish (see Rt. 1934, p. 727). It can also be excusable for Norwegian citizens to be unfamiliar with regulations in force in a place to which they have recently moved or through which they are travelling.

The meaning of the law has been doubtful.—A third reason for excuse is that the meaning of the law has been doubtful. The accused may have relied on an interpretation of the law which was expressed in the draft bill, in earlier practice, or in statements by public authorities. Because of this, he cannot be blamed if the court now adopts another interpretation.

However, the main question is not whether the meaning was more or less legally doubtful, but whether or not the accused acted faithfully according to this understanding of the purpose of the law. A person who has set out to exploit the loopholes in the law cannot expect any charity if he makes a mistake, even though the interpretation was quite doubtful from a judicial point of view.

> Rt. 1906, p. 562: It was forbidden to serve liquor in connection with selling and buying. A country merchant who had previously been fined for serving liquor to his customers, conducted himself in such a manner that he did not serve in connection with the customers' purchase, but when they came to settle their monthly accounts; he then took them into a private room next to the store and served them there. One of the judges felt that this conduct was outside the scope of the law. But the majority felt that the law also covered a serving of this nature and upheld the lower court's finding of guilt. Only one of those voting wanted to reverse because of good faith.

The total judgment of the method of action is of the essence.—Not an isolated judgment as to whether the *mistake of law* is excusable, but a *total judgment of the method of action* is of the essence. Only that mistake of law which makes the act itself justifiable will generally be accepted as excluding punishment. Thus, the phrase "excusable mistake of law" does not give a completely accurate picture of what actually happens in practice.

IV. The distinction between § 42 and § 57

At times the distinction between the areas to which Penal Code, §§ 42 and 57, apply is doubtful.[1] If the mistake in the concrete case is accepted as excusable, it makes no difference which of the two sections was applicable; the result must be an acquittal in either case. The question is of importance, however, if negligent mistake exists with reference to a penal provision which requires intent. Here, the mistake will result in impunity if Penal Code, § 42, applies, but not if Penal Code, § 57, applies.

1. Penal Code, § 57, also applies to special rules for limited areas or groups

Penal Code, § 57, applies not only to ignorance of general laws and provisions, but also of special rules for a limited area or a limited group, such as a community, a part of a city, or the University of Oslo.

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[1] Some modern judicial decisions on this point are referred to in Skeie, *Den norske strafferett*, I pp. 475–479 (Oslo 1946). See also Skeie, *Afhandlinger om forskjellige retsspörgamall*, pp. 134–136 and 191–193 (Kristiania, 1913).

Rt. 1939, p. 623: The accused fished in an inlet which by royal decree was preserved from fishing. He knew about this preservation law (Act No. 20 of June 25, 1937), but he did not know that the inlet in question had been preserved. The Supreme Court decided that this was a mistake of law under Penal Code, § 57.

Territorial limits and community limits.—A mistake as to jurisdictional boundaries must be decided under Penal Code, § 57, when the boundary is determinative for the punishability of the act. Example: An English trawler is caught within territorial waters; the skipper excused himself by saying that he kept outside of the territorial waters as they were marked out on his English chart. This is a mistake as to how far the Norwegian prohibition against trawl-fishing extends, and is judged according to Penal Code, § 57. The result would be different if he knew about the boundaries, but made a mistake as to his actual position. That would be a mistake of fact which would be judged according to Penal Code, § 42 (Rt. 1953, p. 1537; 1954, p. 679).

2. Existence or contents of a judicial or administrative decision

A mistake concerning the existence or contents of a *judicial or administrative decision in an individual case*, such as a restraining order, a divorce decree, or an importation permit, however, is judged according to Penal Code, § 42, as a mistake of fact (Rt. 1950, p. 242). The decision becomes more difficult if the actor knows about the existence and contents of the decision but, because of a mistake of law, errs about its judicial effects. On this point, see below under 3.

3. The distinction between mistake of situation and mistake of norm

It is presupposed both in theory and in practice that not every mistake of law should be judged according to Penal Code, § 57, and this concept finds some support in the legislative history.[1]

A misconception of legal rules, according to this interpretation, may also cause a person to err with respect to "circumstances determining the punishability of the act, or increasing his liability for punishment" (Penal Code, § 42). In judicial practice, this is generally called a mistake of the *situation*, as distinguished from a mistake of the *norm*, which falls under Penal Code, § 57.

Mistakes as to rights and status. Thus, *a mistake of the existence of the right or the legal status which the penal provision seeks to protect*, is judged according to Penal Code, § 42, and not according to Penal Code, § 57, regardless of whether the mistake concerns the actual circumstances or a legal rule. The mistake may concern property rights, contractual rights or family rights. Example 1: A man who has received a deathbed gift from a friend accepts and uses the gift, not knowing that such gifts are invalid. He cannot be punished for larceny, embezzlement or the unlawful use of another man's property. Example 2: A woman has been deserted by her husband, and she has not heard from him since. She has been told that the marriage ends automatically when the spouses have not seen each other for seven years. She cannot be punished for bigamy if she remarries when the seven years are over.

Skeie wishes to limit the doctrine to apply only to mistakes about legal rights or status.[2] Hagerup expresses the rule more generally: "Penal Code, § 42, applies to the concrete circumstances which determine the criminal nature of the act, and which are *a condition for the judgment* passed on the act by the law: § 57 refers to this very judgment itself."[3] The line of thought behind this abstract formula is the following: For penal provisions which seek to protect property rights, it is a requirement of punishability that the property actually belongs to someone else. One who commits an error with respect to the property law is not unfamiliar with the commandment "thou shalt not steal," but he errs with respect to "a circumstance determining the punishability of the act." (Penal Code, § 42.) Similarly, a penal provision which seeks to protect the marital relationship presupposes that a marriage exists; one who believes that the marriage has terminated is not ignorant of the prohibition against bigamy, but of a condition determining punishability. The same reasoning applies in other cases.

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[1] See S.K.M., p. 98, the note, with reference to Getz, *Foreløbigt Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge. Første Del med Motiver*, pp. 74–76 (Kristiania, 1887).

[2] Skeie, *Den norske straffelov*, pp. 249, 250, 271 (Oslo, 1946).

[3] Hagerup, *op. cit.*, p. 324.

The distinction lacks a logical basis.—This may seem both simple and reasonable at first sight. However, upon closer analysis, one must arrive at the conclusion that the distinction lacks any logical basis. It becomes a question of linguistic formulation whether one should say that a mistake of law concerns a condition for the judgment passed on the act by the law or this judgment itself. Let us discuss the examples mentioned above: Objectively, the law prohibits appropriation of deathbed gifts; it prohibits remarriage as long as the other spouse is alive, even though he has been gone for seven or eight years. Thus, a mistake concerning the property law or the law of domestic relations is also a mistake as to how far the penal norm extends, or, in other words, a mistake about the judgment which the law passes on the act. On the other hand, however, it is not difficult to phrase the rule so that a mistake concerns the conditions for the judgment of the law even in cases where it is agreed that the mistake should be judged under Penal Code, § 57. A man, for example, sells goods in violation of a rationing provision which he does not know about. He is, to rephrase Hagerup's words, not ignorant of the commandment "You shall not sell rationed objects without coupons," but he is ignorant about the condition for application of this commandment, that this particular object is rationed.

When the actor knows about the actual relevant conditions, but believes the act is legal, this is always a mistake with respect to the scope of the penal provision, regardless of whether the mistake pertains directly to the extent of the provision's *descriptive expressions*, or the extent of the *legal concepts* with which it operates. However, the thoughts of the actor will often concern the existence of the right or the legal status without any knowledge of the legal ground on which it builds. A son, for example, hears from his father that their farm has timber rights in a neighbour's woods, but he has no knowledge about the basis of the right. A mistake of this type must be considered a mistake of fact.

An examination of judicial practice shows that the distinction between a "mistake with respect to situation" and a "mistake with respect to norm" is often obscure, and that a reason for deciding such matters one way or another is hardly ever given. And this should come as no surprise: the distinction pretends to be of a fundamental conceptual nature while, as we have seen, there is no logical basis for it.

Policy considerations.—It may be asked whether there are any important policy reasons for segregating certain groups of legal mistakes, such as those regarding rights and legal status, for special treatment, despite the difficulties in making the distinction.

From a practical point of view, there may be a difference between an ordinary mistake of law and a mistake about rights and legal status. But in the more serious crimes there is very seldom an issue of good faith due to a general mistake of law. Even though the perpetrator does not know positively that the act is forbidden, he at least knows its character as a violation of interests. Because of a mistake as to a legal right or a legal status, however, he may violate an interest which he does not know exists. It may seem unreasonable to convict a person of a serious felony when he is in good faith, even though his good faith can be held against him as negligent.

Secondly, with respect to the penal provision's effectiveness, it is less necessary to inculcate knowledge of legal rules which have only a peripheral significance for the scope of the provision, than it is to inculcate knowledge about the penal provision itself.

All mistakes of law ought to be encompassed by Penal Code, § 57.—In jurisdictions which do not give mistake of law an impunitive effect, or do so only under very strict conditions, unreasonable results can be avoided by separating certain groups of judicial mistakes and by treating them as factual mistakes. A strict adherence to the traditional doctrine that only the excusable mistake of law can be impunitive, would require that such a method of avoidance also be recognized under Norwegian law.

There is, however, a more natural and more satisfying solution. Both according to its wording and according to the legislature's intentions, Penal Code, § 57, gives the judge the authority to decrease the punishment or acquit completely according to his own opinion in the individual case. By relying on Penal Code, § 57, the judge can go right into the matter and decide whether it is necessary and reasonable to impose punishment despite the mistake of law, instead of seeking the solution in an obscure distinction between "mistake

with respect to situation" and "mistake with respect to norm." Such an interpretation of the law, of course, does not exclude the possibility that court practice can develop more definite rules in typical cases. The formula "excusable mistake of law" provides a satisfactory solution in the great majority of cases where a question about the significance of mistake of law arises, such as cases of violation of provisions for the public order, business regulations and other legislation outside the Penal Code. But it is an untenable generalization to say that the contents of Penal Code, § 57, are exhausted by this. With offenses of a more serious nature, one ought to reply upon the freedom which the law gives the judge, so that he can determine more carefully what significance the mistake of law should have in light of the letter and spirit of the penal provision.

That the question cannot be solved by a completely general formula is confirmed by a scrutiny of the individual penal provisions.

The formulation of some penal provisions clearly indicates that a mistake of law will be deemed impunitive even if it is negligent. The provisions on larceny and other offenses for gain require a purpose of obtaining for oneself or for others an unwarranted gain. A person who is in good faith with respect to his right, lacks this purpose and thus cannot be punished for larceny. But even under the Criminal Code of 1842, which (until an 1889 amendment) did not require a purpose of gain, the courts consistently acquitted for larceny when the perpetrator had acted in good faith.[1] This was so even though he did not believe that he exercised a personal right, but only a public right, such as an alleged right to free seaweed harvesting on another person's property. This practice is well founded. It would seem offensive to convict for larceny when the defendant did not act dishonestly. On the other hand, the Supreme Court has not accepted as impunitive such a mistake as to public right when the accusation concerns the violation of an owner's right to hunt or fish (Penal Code, § 407).[2]

From a practical point of view it could hardly be criticized that the belief of exercising a public right is given an impunitive effect with respect to an accusation of larceny, but not with respect to the violation of hunting or fishing rights under Penal Code § 407.

Another instance where the penal provision clearly presupposes knowledge of the illegality is Penal Code, § 110, which decrees punishment for the judge who acts "against his better judgment." It is not sufficient for a finding of guilt that the judge has negligently committed an error as to legal rules.

§ 25. Criminal Liability Without Subjective Guilt (Strict Liability)

I. Provisions about criminal liability without guilt

As we have seen, the law often dispenses with the requirement of guilt with respect to a single element of otherwise intentional offenses (see above, § 21, III). However, we also have some penal provisions which waive the requirement of guilt completely and make liability depend upon purely objective elements. There are no such provisions in the Penal Code itself, but the Act about the coming into force of the Code, § 8, para. 1, presupposes that there are rules about objective criminal liability (strict liability) in the legislation outside the Code.

We have some such rules concerning *liability for animals*. Of some importance were the provisions in the Enclosure Act (Act on the preservation of land of May 16, 1860), §§ 21-24 and 38, which dealt with those cases where domestic animals go wandering onto another person's property. The new Act of June 16, 1961, has abolished the objective liability and requires intent or negligence on the part of the owner. Objective penal responsibility for dog owners is found in § 1 of the Act of July 9, 1926, on liability for damage to cattle caused by dogs. The Act on reindeer holding of May 12, 1933, §§ 74 and 96, also contains rules imposing objective liability if animals stray onto forbidden areas. None of these statutes directly provides that liability is independent of guilt, but it is settled in judicial practice that they must be so interpreted (see Rt. 1907, p. 289, 1938, p. 411, and 1960, p. 755). In any event, the maximum punishment under each of these statutes is a fine. And according to the

[1] Rt. 1871, p. 233; Rt. 1890, p. 45.
[2] Rt. 1907, p. 742; Rt. 1912, p. 810.

Act about the coming into force of the Penal Code, fines may not be converted into imprisonment unless guilt is actually proved. In other words, the fines can be collected only by civil execution.

Policy considerations.—When the law makes criminal liability objective in these cases it is primarily because of policy reasons. An owner is usually able to control his animals if he exercises the necessary care, but in the individual case it may be difficult to disprove the existence of an accident. A rule providing for objective liability prevents the really unjustified acquittals which such difficulties of proof might cause. Strictly speaking, it can be argued that this consideration goes no further than to justify placing upon an owner the burden of proving that care has been shown. But by making liability completely objective, the legislature perhaps hopes to stimulate a higher degree of care than that which is otherwise necessary for the avoidance of criminal liability. Thus, there exists a preventive consideration which is related to that often mentioned in support of strict liability in tort law. How great a weight it has it is not easy to say.

Comparable considerations may exist with respect to other relationships, such as that of employer and employee. Foreign laws often contain purely objective rules concerning the liability of the principal which are parallel to the employer's liability under civil law. Our former rules about this type of liability have gradually been abrogated and have been replaced by rules which impose the burden on the employer of proving impunity (see above, § 9, II). It is only when the employer is a "legal person" that liability in some cases is placed on him (see below, § 26, II). Perhaps the axiom that punishment cannot be imposed without subjective guilt has been carried too far. A fine which may not be converted into imprisonment acts only as a purely economic obligation, comparable to a duty to pay damages or to make redress. And if such an economic sanction is a suitable method for the prevention of certain offenses, there can hardly be any decisive arguments against it.

In times long past even serious punishments were imposed on an objective basis, such as in the form of joint criminal liability for offenses committed by one's close relatives. Today, this would offend the general sense of justice. Nor is there any practical necessity for such an objective liability. But the question arises under military occupation, when the occupation forces must count on opposition from the population as a whole. Here, sanctions which are imposed without respect to individual guilt, such as arrests of hostages or executions of prominent citizens as retributions for attacks, can be effective. The moral consciousness condemns such a sacrifice of innocent persons. But experience shows that military necessity will often cause moral scruples to topple.

II. Other sanctions of penal character

Occasionally, someone other than the guilty party is burdened with a liability which differs from punishment in name only. We have such a case in the Purchase Tax Act of May 19, 1933, § 3, para 2. One who violates the rules about purchase tax is punished by a fine and is also obliged to pay twice the amount to the Treasury, and four times the amount in case of repetition. From a formal point of view, the additional amount is a civil legal consequence and not a penal one, but in reality it is a sanction of penal character (see above, § 1, IV). And for this liability "a seller or owner [must answer] for his assistant's acts, and also a husband for his wife's and children's acts." The most important example of sanctions which are not regarded formally as punishment, but which have the same effects, are found in the provisions on *forfeitures*, which often apply also against persons other than the law-breaker himself.[1]

§ 26. Criminal Liability for Legal Persons (Corporate Criminal Liability) [2]

I. Posing the problem

When a crime has been committed on behalf of a legal person, such as a corporation, a trade-union or a co-operative, the question arises whether criminal liability may be imposed not only upon the actor, but also upon the legal

[1] See the discussion of the 20th Nordic meeting of jurists (Oslo, 1954).

[2] See Hurwitz, *Bidrag til Laeren om kollektive Enheders pönale Ansvar* (Copenhagen, 1933).

person itself. In tort law a legal person is liable for whatever damage is caused by its organs or servants. Can there be a similar criminal liability? It is obvious that not all types of punishment can be imposed upon a legal person; imprisonment and capital punishment both presuppose a physical person. On the other hand, fines, forfeitures, loss of rights (such as the right to trade) and dissolution are all possible in the case of legal entities.

In older theory the question was often solved by conceptual deductions from the purposes of punishment and the nature of legal persons. One argument was that punishment is a sanction directed against the criminal mind and therefore cannot fulfill its objective in the case of a legal person which has no mind in a natural sense. The opposite argument was that the legal person actually has its own mind, different from the individual minds of its members, and that therefore it can also be guilty of offenses and ought to be subject to punishment.

Such arguments have no value. The mind and the acts of the legal person are of course nothing else but the mind and acts of the persons who act on its behalf. To speak about "the organization's decisions," "the activity of the corporation" and "the community's offer," is merely to use a metaphorical way of expression which is practical and easy, but which does not correspond to a psychological reality. But this does not rule out the possibility of criminal liability for the legal person. This is a practical legislative question which must be answered by considerations of policy. *De lege ferenda*, the problem is as follows: Is there a need for such a liability? And if so, are there any counter arguments of a decisive character?

Policy considerations.—Clearly it is not a question of *replacing* the individual liability with the collective. As a starting point, we must accept the proposition that the liability which is imposed upon the guilty person directly is the most effective. The question is whether there is any reason to *supplement* this individual liability by a liability of the legal person, generally or in particular areas.

For those members of an organization who are not guilty of the illegality, the liability of the legal person really constitutes a sort of criminal liability without guilt, a liability which, it is true, affects them only indirectly through their interest in the organization. The arguments for and against such liability are therefore on many points similar to those for and against objective criminal liability.

First, if the law restricts itself to an individual liability contingent upon subjective guilt, it will often be difficult to get at the one who is actually guilty. When the act is committed by a larger organization, such as an industry or a trade union, it is perhaps impossible to learn where the fault is, or, at most, the subordinate who has performed the penalized act itself is discovered while the actual guilt lies higher up in the leadership. Even though the formal head of the organization is reached, the real power may lie in interests even beyond this. By making the organization itself liable, the law makes sure that the offense will not be without consequences, and it opens up the door to an economic sanction proportional to the significance of the violation, while fines otherwise must generally be determined with relation to the economic condition of the individual who is personally liable (see Penal Code, § 27). By placing the liability on the organization, the law hopes to create in the leaders and membership a positive interest in preventing illegalities. Generally, the violations have been committed in the interest of the organization, and if liability is imposed only on the one who is directly guilty, the leadership and members would actually escape liability, unless the law imposes joint liability.

The elimination of the organization's interest in the violation may create a different psychological attitude in the one who acts on its behalf. As long as he risks only a personal liability, he may count on the organization's gratitude for his zeal, and a possible fine might be paid by it as a part of its operating expenses. When the organization itself must pay, he cannot expect the same gratitude.

The most important opposing consideration, that of imposing punishment on innocent persons, does not weigh as heavily as otherwise, since such persons are affected only in that sphere of their interests which is related to the organization. This interest stands and falls with the knowledge and care which is shown by the organization's leaders and employees, and there is nothing

strange or repulsive about the idea of holding their violations in behalf of the legal entity against that legal entity by imposing sanctions upon it.

What weight these general considerations carry, varies greatly with the different areas. For ordinary criminal offenses, such as murder, larceny and fraud, there will be no need for such a corporate criminal liability. The question has its greatest significance for those offenses which can be characterized as *offenses in economic life*: violations of building and business laws, price and rationing provisions, taxation and revenue laws, and last, not least, breaches of those rules which society has established for the activities of the organization itself, such as legislation on labor disputes and monopolistic practices. Here and in other countries, the tendency has been toward recognition of criminal liability for legal persons in those cases where practical considerations suggest it, and it is possible that the strong development of the economic and trade organizations of our time will lead to a continued development in this direction.

> Hurwitz points out that the modern problem of criminal liability for legal persons is but a part of a greater problem of the need of imposing liability upon the collective entity of which the offender is a member, and that the historical development in this area has been in a wave-like motion (see the book cited in footnote 24, §§ 1 and 2). At the primitive level, it was natural to make the then predominant collective entities, the tribe and the family, liable for their members' offenses, a practice which we see in ancient Germanic and Roman law. In the later Roman law, with its individualistic touch, purely personal liability became the rule. In the middle ages collective liability reappeared, especially in its application to cities and guilds. For example, when the French city of Montpellier rebelled against a royal tax increase and some royal servicemen were killed during the fighting, it was punished in 1379 by losing its university, city hall and all its privileges; in addition, it was fined heavily, some of its town walls were torn down, and its moats filled; lastly, 600 of its most guilty citizens were sentenced to death. Collective liability for cities and guilds was practised all the time till the end of the eighteenth century. During the time of enlightenment, the thought developed that justice requires all punishment to be based on individual guilt. Former provisions on collective liability were regarded as remnants of a primitive stage of law. The more recent development of organizational life, together with offenses under modern economic legislation, have given the problem new significance.

II. The main rule: No criminal liability for legal persons

The main rule in our law is that criminal liability can only be imposed upon one who is personally guilty and not upon the legal person. Even in cases of nonfeasance, in breach of duty imposed upon the corporation, criminal liability lies with the individuals responsible for the omission, not with the legal person itself. On the other hand, measures without penal character may be used, primarily forfeiture of the profits obtained by the offense (Penal Code, § 36). The Penal Law Commission states that "By this means, one achieves for the most part what is intended by those favoring corporate criminal liability" (S.K.M., p. 53; see p. 44). This is probably too optimistic. The risk of having to part with the profit if the offense is discovered may have its preventive effect, but it cannot be expected to be very great.

Exceptions.—Some provisions contain exceptions to the rule:

1. Fines to avoid unnecessary litigation.—§ 202, para. 3, of the Courts of Justice Act (see §§ 203, 204) threatens fines to avoid unnecessary litigation: "If it is not shown upon whom the liability rests among those who have the authority to make decisions on the affairs of a community an organization, a firm, an institution, a savings bank, or an estate, the corporate party litigant itself may be fined." As can be seen, the corporate liability is subsidiary: if it is determined who the guilty individual is, the rules do not apply. The provision is motivated by purely practical considerations: if this type of fine shall attain its purpose, it must be capable of immediate imposition, without any necessity for a special investigation to determine who is liable.

2. Economic legislation.—The most important provisions affecting corporate criminal liability are contained in the *economic regulatory statutes.* The Price Act of June 26, 1953, § 53, provides that if the Act is violated by anyone

acting on behalf of a firm, an institution or an organization, the firm, institution or organization is subject to fines and the loss of the right to continue business activities, provided, however, that the violation has been committed in order to further the interests of the legal person; or when the legal person must be presumed to have substantially benefited from the violation. Such rules about punishment for organizations which violate the price laws were first enacted at the beginning of World War II. Subsequently they were also introduced into economic legislation; see, for example, the temporary enactments on importation and exportation prohibitions of December 13, 1946, § 6, para. 1.

The prerequisite for the organization's liability, according to the Price Act, is that a "punishable act" has been committed; that is, it must be shown that the requirements for punishment of an individual person do exist. The law has not gone so far as to burden the organization with criminal liability on the basis of a purely objective breach, where the actor was irresponsible or did not have subjective guilt or *mens rea*. But the organization may be punished even if the actor himself is not prosecuted.

KNUD WAABEN

DET KRIMINELLE FORSAET

Summary in English

It is an almost universally accepted principle that no punishment should be inflicted unless some mental element, or rather a kind of legal fault, is involved in the offence committed. The doctrine on this element of guilt is not the same in all criminal systems. In his treatise "Mens rea in German and English Criminal Law" (Journal of Comparative Legislation and International Law, 17–18, 1935-36), *Hermann Mannheim* has pointed out some characteristic dissimilarities between German and English law. In Denmark, as in the other Scandinavian countries, the principles of criminal responsibility have many features in common with those of German criminal law. The legal concepts of „forsaet" German "Vorsatz") and „uagtsomhed" (German: "Fahrlassigkeit") denote two categories of guilt, like the Roman law concepts of "dolus" and "culpa". The subject matter of the present study is the concept of *criminal intention* (dolus) in Danish law.

In Chapter I a brief historical outline is given of the principles of liability; the main contents of German and Scandinavian jurisprudence since the 19th century are stated, and a comparison is made between the principles adopted by some Continental legal systems and the doctrine of "mens rea" in English law. It is pointed out that, apart from the analytical concepts presented by *Bentham* and *Austin*, general definitions of "intention", "recklessness", "negligence", etc. have played a minor role in England. Recently, however, *J. W. C. Turner* and *Glanville Williams* have endeavoured to view the common law and statutory rules on criminal liability in the light of general notions of "foresight of consequences", etc.

Chapter II,1 deals with the relations betwen theoretical statements on liability and the rules of law laid down in the practice of the courts. Particular attention is given to the fact that the difinitions of analytical theory cannot be indentified with actual law. Jurisprudential analysis has exerted a considerable influence on the development of positive law, e.g. by showing that different offences should to some extent be judged by general standards or principles concerning foresight of consequences, mistake of fact, etc. However, German authors have often gone too far in their attempts to reduce the formulas of liability to a few brief definitions intended to cover every case arising in court practice.

Chapter II,2 is devoted to the problems of *proof* of criminal intention. Furthermore, the question is raised as to the extent to which it is possible to infer the principles of liability from the statements of the courts in criminal cases.

Chapter III–VII deal with some of the principal groups of cases involving questions of criminal intention. The basic element in criminal guilt is denoted by the concept of "*voluntary act*" (in German doctrine: "die Handlung", defined as "Willensbetatigung"). This aspect of criminal intention is dealt with in Chapter III,2.

Chapter IV contains an inquiry into the type of intention presenting the greatest number of problems in the practice of the courts; it is frequently

asked whether the offender has had sufficient *knowledge* of the facts characterizing or surrounding the criminal act or omission. It may for instance be questioned whether he knew that a statement made by him was false, that a document had been falsified by others, that a person against whom the act of the offender was directed was in a state of mental abnormality, or that he was a public officer engaged in the execution of his duties, etc. (Chapter IV, 1-3). Two offences of outstanding practical importance are specially dealt with. In some sexual offences it may be a matter of doubt whether the offender knew that a young person was under 15 (or 18) years of age (IV,4). Similarly, as regards the receiving of stolen property, it will often be a decisive question of fact whether the accused knew that the goods received had been stolen (IV,5).

Chapter V deals with the intentional causation of certain *consequences of an act*. The most striking illustration of this type of criminal intention is presented by intentional homicide (V,1). Various provisions in penal legislation have made it a criminal offence to cause a *risk* of damage to physical objects or *danger* to the life or health of other persons. These offences are specified in Chapter VI. In legal doctrine it has been a matter of dispute whether criminal intention implies only knowledge of the material circumstances connected with the dangerous situation, or whether the offender should also realize that under such circumstances there is a risk of some future damage. In the present study the latter view is supported.

Chapter VII deals with a group of *offences against property*, including larceny, embezzlement and fraud. The mental elements of these offences are outlined, and consideration is given to various special problems of intention, e.g. mistakes of fact excluding liability.

In Chapters VIII—IX attention is focused on the relations of criminal intention to other concepts of considerable importance within the general theory of responsibility: *criminal attempt* (VIII,1), *participation in crime* (VIII,2), *mental abnormality* (IX,1), and drunkenness (IX,2).—

The primary object of this book is to consider whether it is possible to give a general definition of the concept of criminal intention laid down by Danish courts. A brief statement of the main points of the discussion is given below.

When the definition of a crime requires a certain consequence of an act (e.g. death or bodily harm), the consequence in question may have been *desired* or *aimed at* by the offender,—though not necessarily as an ultimate end. In German doctrine this type of intention—desire of the consequences—is termed "Absicht" (in Danish: "hensigt").

In many crimes, however, the material element is a certain circumstance accompanying or surrounding the act of the offender (e.g. the age of a child). In such cases the first degree of criminal intention is actual *knowledge* of the circumstances required by law.

In German and Scandinavian jurisprudence it is generally admitted that the scope of criminal intention cannot be kept within the limits indicated by the expressions "desire of consequences" or "knowledge". On the other hand, intention does not include all cases where the offender has been aware of the fact that harmful consequences might possibly ensue from his act, or that it was possible that the elements constituting the crime were present. In Danish criminal law "recklessness" is not treated as a separate form of guilt, but the states of mind covered by that term are classified partly as criminal intention, partly as criminal negligence. Consequently, some difficulty arises in drawing the line separating intention from the form of criminal negligence called "advertent negligence" (in German: "bewusste Fahrlassigkeit").

In German legal theory it is usually stressed that only a narrow scope of criminal intention beyond the limits of "desire of consequences" or "positive knowledge" is admissible. If the offender has not been aiming at the criminal effect, or has not been certain that such effect would ensue or that some external circumstance was present at the time of the act, punishment for an intentional offence is excluded, unless he has acted with so-called "dolus eventualis". The meaning of this concept is explained by *Mannheim* in the above-mentioned study on "mens rea". Swedish theory generally follows the definitions just referred to, and Swedish courts have frequently applied the test of "dolus eventualis" described by the German author *Reinhard Frank*: intention is present in an act if the court is of opinion that, although the offender did only regard the criminal result as possible or probable, he would nevertheless have acted in the same manner even if he had foreseen it as a

certainty.—In Danish and Norwegian doctrine it is held that the foresight of *probability* may be classed with actual knowledge or certainty; consequently the courts should resort to the tests of "dolus eventualis" only if the offender has regarded the consequences or the circumstances specified in the rule of law as merely possible.

The inquiries carried out in the preceding chapters have shown that it is extremely difficult to make certain how the limits of intention are drawn in Danish court practice. There can be no doubt, however, that considerable importance is attached to the criterion of "*probability*". It is hardly possible to specify the degree of probability generally required by the courts, but the offender should at least have regarded the criminal consequence or circumstance as the more probable alternative. Similar conclusions have been expressed in Danish theory by *Hurwitz*, in Norwegian theory by *Andenaes;* these authors have pointed out that the definition of criminal intention cannot be restricted to the high degrees of probability indicated by some previous legal writers: a probability coming near to positive knowledge or certainty. Furthermore, it is stressed that the courts are not likely to require the same degree of probability in all criminal offences. As regards the concept of "dolus eventualis", it is submitted that none of the theories on this form of criminal intention seems to have been definitely accepted by Danish courts. It may be suggested—in accordance with the view held in Danish theory by *Hurwitz* and *von Eyben*—that the limits of intention are to some extent determined by the discretion of the courts, taking into consideration the character of the offence, the nature of the evidence, and other factors which cannot be included in a definition of general validity. However, the concept of intention is not nearly as flexible as the standard of negligence.

In German theory on criminal liability there is a permanent controversy between "Willenstheorien" (e. g. *R. von Hippel*) and "Vorstellungstheorien" (e. g. *Reinhard Frank*). This controversy, which can be traced in Scandinavian theory too, is almost exclusively of a terminological nature. If the arguments of the theories are critically examined, the latter theory appears to be better suited to characterize the various types of criminal intention.

The problems of ignorance of law have not been considered in the present study, apart from fragmentary remarks on cases in which some understanding of legal qualities, etc. are relevant to the question of criminal intention. Nor does the study concern itself with the problems of responsibility for unintentional offences. As has been mentioned above, "criminal negligence" is a second category of guilt in Danish law, consisting either in "advertent negligence" (recklessness) or in "blameworthy inattention". As regards petty offences, intention and negligence are generally punishable under the same legal provisions, whereas liability for major offences is often restricted to criminal intention. The standard of negligence is narrower in criminal law than in the law of torts.

The Norwegian Penal Code

(Translated by Harald Schjoldager, LL.M. and Chief of Division Finn Backer;

with an Introduction by Professor Dr.jur. Johs. Andenaes)

CHAPTER 3—CONDITIONS DETERMINING PUNISHABILITY

Section 40

The penal provisions of this code do not apply to an act committed unintentionally unless it is explicitly provided or unmistakably implied that a negligent act is also punishable.

A misdemeanor consisting of omission to act is also punishable when committed by negligence, unless the contrary is explicitly provided or unmistakably implied.

Section 41

In cases where a superior cannot be punished for a misdemeanor committed by somebody in his service, the subordinate can always be held responsible, even if the penal provision, according to its wording alone, is directed against the superior.

Section 42

To a person who has committed an act in ignorance of circumstances determining the punishability of the act or increasing his liability for punishment, these circumstances are not attributable.

Where the ignorance can be ascribed to negligence, the punishment provided for a negligent act is applied, if negligence is punishable.

Error regarding the value of an object or the estimated amount of damages caused will be taken into account only when punishability depends thereon.

Section 43

Where the law provides that an unintentional consequence of a punishable act entails increased punishment, the more severe punishment applies only where the offender could have foreseen the possibility of such a consequence, or where, in spite of his ability to do so, he has failed to prevent such a consequence after having been made aware of the danger.

SCANDINAVIAN COUNTRIES

Question 4:

Legal writers usually distinguish between the objective and subjective conditions for criminal guilt, and it is usual to mention among the objective conditions that there must be a chain of events which causally links the defendant to the offense, be it a positive act or an omission. There seems also to be rather general agreement that there are situations where this causal connection between the defendant and the offense is too weak to justify criminal liability. American writers tend to express this by their requirement of proximate cause, and European writers express much the same idea when they require both causation and adequacy in order to establish criminal liability. Continental European, and especially German, jurisprudence has produced a substantial and highly theoretical literature about the causation and adequacy theories. These theories are most vehemently rejected by Scandinavian jurisprudence which, by and large, is close to Anglo-American law in the matter of causation. The Scandinavian criminal codes do not attempt to define causation, and the relatively scarce Scandinavian literature on causation in criminal law reflects that such definitions are not needed.

It is against this background that Professor Andenaes speaks a word of caution in regard to Section 305 in his comments on the Proposed Federal Criminal Code.[1] His more detailed remarks on "Causation and Adequacy," from his text on Norwegian criminal law,[2] is attached as *Appendix A*, because they are representative of Scandinavian jurisprudence on the matter of causation. Andenaes is directly aiming at the Continental European theories when he states on p. 114:

"It is especially the doctrine of *conditio sine qua non*, which has been given the honor of representing logic. This theory is untenable for two reasons. First, it is not possible to speak of *the* logical and *the* natural scientific concept. Within both philosophy and natural science, the concept is interpreted in different ways.

"Secondly, the theory ignores the fact that a judicial question about interpretation is involved, and that this question must be solved by legal consideration, not by reference to the terminology of other sciences. It is the concept of legal causation which is in issue, not that of logic or natural science. It is even possible that such expressions as 'being about,' 'cause' and 'lead to' can have a different meaning depending on the connection in which they are used, in the same way as other legal expressions."

The standard Swedish [3] and Danish [4] texts contain statements which are briefer, but rather similar to the above. In this connection it should be mentioned that the two leading Danish writers [5] give their wholehearted endorse-

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[1] *The National Commission on Reform of Federal Criminal Laws.* 3 Working papers, Wash., D.C., G.P.O., 1971. p. 1456.

[2] Johannes Andenaes. *The General Part of the Criminal Law of Norway.* South Hackensack, N.J., Rothman, 1965. p. 112–127.

[3] Ivar Agge, *Straffrättens Allmänna Del.* Stockholm, Nordstedt, 1961. p. 291.

[4] Stephan Hurwitz. *Den Danske Kriminalret.* 4th ed. *by* Knud Waaben. Copenhagen, G.E.C. Gad, 1965. p. 165–166 & p. 169.

[5] *Id.*, at 162.

ment to a discussion of causation which is to be found in a well known English text:[1]

. . . The images and metaphors, the fluid and indeterminate language, upon which both courts and textbook writers (even when most anxious to jettison traditional ideas) still fall back when deciding issues of causal terminology, or explaining such issues to others, have their roots in certain features of a variety of concepts which permeate the daily nonlegal discourse of ordinary men. These features need to be brought to light and described in literal terms; for the assertion often made by the courts, especially in England, that it is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned, seems to us to be true. At least it is true that the plain man's causal notions function as a species of basic model in the light of which the courts see issue before them, and to which they seek analogies, although the issues are often very different in kind and complexity from those that confront the plain man. These notions have very deep roots in our thinking and in common ideas of when it is just or fair to punish or exact compensation. Hence even lawyers who most wish the law cut loose from traditional ways of talking about causation concede that at certain points popular conceptions of justice demand attention to them.

This English text is of interest also because it contains a rather full summary of the above-mentioned Continental European theories on causation and adequacy. These two chapters on "Individualizing Theories and Theory of Conditions (*Bedingungstheorie*)" and "The Generalizing Theories: Adequate Cause," respectively are attached as *Appendix B*.[2]

§ 12. CAUSATION AND ADEQUACY[3]

I. Posing the problem

In the law of torts, before liability may be imposed there must be established to exist a causal relationship between the act upon which the liability is based and the damage for which compensation is demanded. The question of causation does not have the same importance within penal law. Most penal provisions do not describe the offense in terms of the causation of a certain result; instead, they speak, *e.g.*, about "appropriating" or "carrying away" an object (Penal Code, §§ 255 and 257), "giving false testimony" (§ 166), and "using" false documents (§ 182). The interpretation of the individual expressions of the penal provisions does not necessarily involve the concept of causation.

Nevertheless, a large number of provisions do involve this concept, especially those which are directed against a physical harm inflicted on person or on property. At times, the law penalizes the person who "causes" a harm (*e.g.*, Penal Code, § 233, on homicide), at times it uses other expressions which mean the same. For example, it speaks about "injuring" another in body or health (§ 229), "bringing about" danger (§ 150), "destroying" an object (§ 291). The same idea is present when the law increases the punishment because harm has become the "result" of an offense (§§ 148 and 169). Moreover, when the law refers to "forcing" or "inducing" someone to commit an act (§§ 266 and 270), causal relationship is required; but these terms also constitute a characterization of the act in question.

Thus, whenever a penal provision uses the term causation or a similar expression, a discussion of the meaning of causation becomes part of the interpretation of the provision. And since the question is involved in a large number of provisions, it is only natural to discuss it in the general part of the criminal law.

A great deal of confusion has been created in the study of causation by the often advanced theory that the solution to the problem is to be found outside of jurisprudence, in logic or in the natural sciences. In Norwegian theory, Stang has been a strong proponent of this view: "The question of the meaning of the expressions, cause and effect, belongs to the common basis of all sci-

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[1] H.L.A. Hart & A.M. Honoré, *Causation in the Law*, Oxford, Clarendon Press, 1959, p. 1.
[2] *Id.*, at 381–441.
[3] For further details, see Andenaes, *Straffbar unnlatelse* [Criminal omissions], § 13, and references cited therein.

ences: logic."[1] It is especially the doctrine of *conditio sine qua non*, which has been given the honor of representing logic. This theory is untenable for two reasons. First, it is not possible to speak of *the* logical or *the* natural scientific causal concept. Within both philosophy and natural science, the concept is interpreted in different ways.[2]

Secondly, the theory ignores the fact that a judicial question of interpretation is involved, and that this question must be solved by legal considerations not by references to the terminology of other sciences. It is the concept of legal causation which is in issue, not that of logic or natural science. It is even possible that such expressions as "bring about," "cause" and "lead to" can have a different meaning depending on the connection in which they are used, in the same way as other legal expressions.

II. The condition theory

The usual starting point in Norwegian theory has been the condition theory, which holds that every necessary condition—every *conditio sine qua non*—is to be regarded as a cause. To determine whether or not a particular act is the cause of a particular harm, one thus asks: Would the harm have occurred if the act had not been committed? A kind of differentiation computation is made: the actual result is compared with what would have happened had there been no act; it is the difference for which the perpetrator must answer. According to this terminology, every act has an eternity of causes, both coordinate and successive. For example, two old enemies, A and B, meet on a road and start to quarrel. One word leads to another, and it ends with A stabbing B. If A had taken another road, or if he had left his knife at home, or if he had not originally been in a bad mood because of a quarrel with his wife, the killing would not have occurred. Had B, on the other hand, been out a little bit later, or had he controlled his tongue a little better, it would not have happened either. And each one of these causes itself has a long line of other causes of a more or less remote nature.

People are not that theoretical in the language of ordinary life. One would not say that the now deceased third person who originally introduced A's parents to each other caused B's death, even though it is quite clear that had they not met, A would never have existed and thus no killing would have occurred. When one questions the causes for something, it is for the purpose of obtaining an explanation. And we designate as causes that or those foregiong events which give us the explanation, which make us understand the occurrence. The answer often depends on the practical purpose which one is seeking. The doctor determines the immediate cause of death: loss of blood due to stabbing. The judge asks *who* caused the death. The forensic psychologist goes back even further, to the motives of the murderer and to any other factor which may explain the act.

The fact that the condition theory goes further than common language usage in attaching causation to more distant factors, gives it a somewhat theoretical and distant aspect, but it is of little practical importance for the application of this concept of causation in law. The necessary limitation is created by other prerequisties of criminal liability, an *unlawful act* and *subjective guilt*. Thus, a broad formulation of the requirement of causation is not so dangerous. In the penal law, liability must be based upon an unlawful act (or omission). It then becomes decisive whether this act can be considered a cause; if other factors, for which no one can be made responsible, may also be described in the same way is without legal significance.

The formula *conditio sine qua non* can well serve as a point of origin in determining criminal liability for an unlawful act. When the causal relationship is not altogether clear, it is quite natural to ask what the situation would have been if the act had not been committed. But a closer analysis will show that this formula cannot be used without modifications and explanations, and that the determination will often have to be made by a subjective interpreta-

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[1] Fredrik Stang, *Erstatningsansvar* [Tort liability], p. 64 (Kristiania, 1919).

[2] For further information, see, for example, Nordic Summer University 1951, *Årsaksproblemet* (Copenhagen, 1952). To a large extent, modern natural science has freed itself from the concept of causation. If a formula for the relationship between the phenomena could be set up (as is the case, for example, in the laws of mechanics for the movements of bodies), the scientific problem would be solved without any necessity to speak of cause and effect.

tion, where there might be reasonable differences of opinion as to the solution of the individual case. This is natural enough. Legal problems can rarely be solved by a simple formula. The limits can be fixed only through paraphrasing, explanations and exemplification. But the very formulation of the condition theory tends to create the illusion that the solution is easily obtained by a simple mathematical formula.

III. Harm inflicted by one person alone

The first situation to be considered is where only one person inflicts harm. Under the condition theory, the following considerations must be made: If the unlawful act is imagined as non-existent, the result, for which the question of criminal liability has been raised, would sometimes not have occurred; at other times it would have occurred in exactly the same way. The question of causation is usually clear in such cases. But there are also cases which fall in between, where the difference is that the result would have occurred at another time, at another place, or at least in another way. If A had not killed B, he would nevertheless have died sooner or later; he might even have been suffering from an incurable disease. This fact can be taken into consideration in the law of torts, because damages are assessed so as to coincide precisely with the *difference in interest*.[1] If damages are to be paid to the survivors for the loss of the person who supported them, the sum will not be computed on the theory that the deceased would have lived forever. The computation must be based upon his life expectancy; if he was fatally ill, the compensation would be nil. This principle of the difference in interest is not carried to its ultimate conclusion even in the law of torts. Funeral expenses, for example, must either be paid fully or not at all. And if a person has been killed, or an object has been destroyed or damaged, the total liability will usually be placed on the perpetrator, even if it is clear that other causes would have produced the same result and the act in question had not been committed. If I set fire to a house, common tort doctrine will require me to pay full compensation, even if the entire town is destroyed the next week by an earthquake.

The situation is different in penal law. The Penal Code speaks about one who causes another's death, but not about one who accelerates the death of another, or who brings about his death at another place or in another manner than would otherwise have been the case. It speaks about one who destroys or damages another person's property, not about one who merely brings about a change in the mode of destruction. A choice must therefore be made; the change must either be considered a cause leading to criminal liability for murder, or for destruction of property, or there must be a complete acquittal (or, in felony-cases, punishment for attempt). The main rule must be that every *substantial change* as to time, place or method, is deemed sufficient to constitute a causal relationship. It does not help the perpetrator to show that other causes would have interfered had he not committed the act. One who shoots and kills a traveller who is on the way to the airport is guilty of murder even though the plane on which the deceased was to depart crashes, leaving no survivors. This follows from a natural interpretation of the penal provision. It is directed against one who causes another's death, and this the murderer has done. Similarly, one who has set fire to a house has undoubtedly destroyed or damaged it (Penal Code, § 291), even though it is quite clear that it would have burned down anyway for other reasons. This issue was faced squarely in a case in the German Reichsgericht. While a house was on fire, the defendants had set fire to other parts of the house. It was clear that the house would have burned down anyway, but the defendants were nevertheless convicted of causing damage. This result would also have been reached under Norwegian law. Whether the fact that the fire was already burning should be taken into consideration in determining whether the damage is "substantial," is another question which may be of importance for the classification of the vandalism as "serious" (§ 292). Since the house was doomed at the time the act was committed, the damage was really nil from an *economic* point of view.

Conceivably the change created by the act may be so insignificant that it would be unnatural to give it any legal relevance. If an error by a doctor or nurse shortens the life of a dying person by a few minutes or seconds, the

[1] For further details, see Andenaes, in (1941) *Tidsskrift for Rettsvitenskap*, pp. 279–295.

error would hardly be punished as negligent manslaughter; on the other hand, when the acceleration is substantial, the fact that death was inevitable will constitute no defense. In many cases, one is faced with a question of opinion, where the condition theory gives no single answer.

The following hypotheticals may serve as illustrations: (1) the mother of a new-born baby places it out in the cold, and it freezes to death. The post-mortem shows that the child was asphyxiated and would probably have died from a lack of respiration if the mother had placed it in a warm bed immediately after birth. The cold air acted as a stimulant and set the respiration in motion. By exposing the child to death by freezing, the mother saved it from suffocation. She is no doubt liable for completed child murder. In reality, only the danger to which she has exposed the child has had a chance to work, not the danger of suffocation. The fact that the act on which liability rests has warded off another danger is not an exculpating circumstance. (2) A person is about to bleed to death after an accident. Another person comes to his aid and prevents him from bleeding to death by stopping the flow of blood, but he negligently uses a dirty bandage which causes an infection leading to death. He is guilty of negligent homicide. (3) A local anesthetic must be given to a child who is to undergo surgery. The doctor mistakenly uses cocain instead of novocain as the anesthetic. The child dies while still under the anesthetic, but experts can prove that novocain would also have caused death because of a hidden constitutional defect in the child. In this example, which is taken from a German case,[1] the result would have been an acquittal. A causal connection between the *act* and the harm is not sufficient; there must also be a causal connection between the *fault* and the harm. The process, of course, would not have been absolutely the same if the correct method had been used, but the difference is nevertheless so small that the result must be regarded as legally equivalent. (4) The same is true for the following example: A motorist drives with defective brakes. A child runs across the road, the driver is unable to slow down, and the child is run over. Expert testimony reveals, however, that it would have been impossible to avoid the accident even with proper brakes.

IV. Harm inflicted by several persons

We shall now assume that more than one person is charged with responsibility for the same harm.

The usual case is where several persons have acted *jointly*. If A, B and C, acting together according to a common plan, assault and kill a fourth person, they are all responsible for the murder, and not merely the one who struck the fatal blow. And if one of them argues that the other two would have managed as well without his help, this will not free him from criminal liability for the murder. The situation is considered a *joint act* for which all participants are liable. The solution would probably have been the same even if the law had directed itself only against the one who causes the death of another. But, as a security device, the law, in its provisions against homicide, assault, vandalism, etc., has expressly mentioned complicity besides causation. A person can be penalized as an accomplice even though his participation was not necessary to the result. We shall return to this question under the theory of complicity. (See below, §§ 31–32.)

Even in the absence of such intentional cooperation, there are times when the condition criteria fail.[2]

(a) One example is the concurrence of *independent causes*. A and B, independent of each other, both give a fatal dose of poison to the victim. Two factories lie on a river, and emit refuse into the water; the refuse of each is enough to pollute the water (compare Penal Code, § 398). A gives a sedative to a railroad signalman, but before it begins to take effect, the signalman is assaulted by B, who ties his legs and hands. When the signalman is supposed to perform his duties, he is both unconscious and tied up, and a train accident occurs. In these instances, either act could be imagined absent, and the result would nevertheless occur.

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[1] Unpublished, but referred to and commented on by: Exner, *Festgabe fur Reinhard v. Frank*, pp. 583 and 587–588 (1930); Mezger, *Strafrecht*, Vorwort, p. VII (1933); Eberh. Schmidt, *Der Arzt im Strafrecht*, pp. 161–162 and 200–202 (1939).

[2] For further details, see Andenæs, "Konkurrerende skadeårsaker," in (1941) *Tidsskrift for Rettsvitenskap*, pp. 245–298; Phillips Hult, *Juridisk debatt*, pp. 90X136 (Uppsala, 1952); Vihma, in (1946) *Tidsskrift for Rettsvitenskap*, pp. 500–524.

According to the condition theory, neither A nor B would have caused the damage. The events, of course, have not occurred in precisely the same way as they would have if only one of the causes had been present, but there is not such a substantial difference as would normally be required. Common sense would rather treat it as the existence of a double set of causes; thus there are two explanatory reasons, each of which alone would suffice. And there can be no doubt that both must be held liable. This is quite obvious as far as the liability to pay damages is concerned: one who is damaged cannot be left without legal remedy merely because there were two persons involved in the causation of the damage. The same must hold true in penal law. To punish for attempt in such cases would be artificial, and for misdemeanors and negligent felonies, the result would have to be an absolute acquittal, because here—as a rule—attempt is not punishable. As a prerequisite, both causes must have been operative: if only one of them accomplished the result, liability for completed murder will attach only to that cause. A administers a deadly poison to the victim, but before the poison has had time to take effect, B kills the dying person with an axe. A can be punished for attempted murder, but B will be punished for murder.

It is possible that A's act, instead of coinciding with that of B, coincides with a natural phenomenon of some other event for which no one can be held responsible. In the example of the signalman who was given a sedative, suppose that before the sedative began to take effect, a flood destroyed a bridge which he had to cross in order to perform his functions. At the critical moment he is unconscious, but under no circumstances would he have been able to perform his duties.

In such instances, the better reasoning would probably not hold A liable for inflicting the harm. Logically it might appear difficult to distinguish the coincidence of two attributable acts from that of one attributable act and one act of nature. However, there is this difference, that in the latter group of cases the damage would have occurred even though no unlawful act had been committed at all. This argument is especially applicable where the damage question is involved. When two attributable acts coincide, the *conditio sine qua non* requirement must be disregarded, since it is obvious that compensation must be paid even though there are two persons involved in the causation of the damage. When the attributable act coincides with an act of nature, however, it is natural to reason that the act has not caused any greater damage than would have occurred in any case, and that compensation therefore should not be paid. There is hardly any reason to require a different solution in penal law. But where an intentional felony is involved, its perpetrator may of course be punished for attempt.

(b) Another combination is that which has been designated as *excess of causes*. Suppose that five grams of poison is needed to kill a person. The victim's wife, the cook, and the chambermaid, not acting in concert, give him three grams each, for the purpose of killing him. None of the causes is sufficient in itself to produce death, but there is such an excess of them that one cause could be excluded without changing the result. Here, each individual must be deemed to have full criminal liability, even though the condition criteria have not been fulfilled.

(c) A third combination is also possible: two causal elements work together; one could have produced the effect by itself, the other could not have done so. The man who needed five grams of poison to die is given six grams by his wife and, independently, three grams by the cook. According to the condition criteria, the former has caused the death, not the latter. It seems more natural, however, to say that both participated in the causation, although in varying degrees.[1]

Such concurrences of unlawful and independent acts as we have mentioned (a–c) have little practical importance.

At times it is quite clear that *either* A or B has caused the harmful result, but it may be uncertain which one of them did. Both A and B have shot at the victim, but he was hit by only one bullet, and it is impossible to determine

[1] This question is in dispute. Of the same opinion as the author is Astrup Hoel, *Risiko og ansvar* [Risk and liability], pp. 96–97 (Oslo, 1929). For the opposite view, see Overgaard, *Norsk erstatningsrett* [Norwegian law of torts], pp. 23–24 (2nd ed., Oslo, 1951).

from whose gun it came. Whether such an evidentiary doubt should lead to joint liability of A and B in the law of torts has often been discussed.[1] In penal law it is clear that the benefit of the doubt, here as always, must be given to the accused. As previously mentioned, if A and B have cooperated in the effort to kill C, they will both be deemed guilty. But, if they have acted independently of each other, as in the case above, they can be punished only for attempted murder.

V. The theory of adequate causation

The chain of events can develop so fortuitously that a comparatively innocent act may lead to drastic consequences. The question then arises, within both the law of torts and the penal law, whether liability extends as far as the causal connection. Already Orsted held that there had to be a *reasonable connection* between the unlawful act and the harm.[2]

The German author von Kries created the expressions *adequate* and *inadequate* causal connection, which have become common in modern theory. In one practical and important situation the requirement of adequate cause has obtained legal recognition and has at the same time been defined somewhat more precisely (Penal Code, § 43; see below). Aside from this provision, there is no express legal authority to limit liability to adequate consequences, but the idea has been approved by most authors. With respect to the precise meaning of the concept, however, we have not come much further than Orsted's requirement of a reasonable connection.[3]

An analysis of what is meant by the requirement of adequacy can be divided into two parts. First, the act must entail a certain risk of harm; it must have a certain *general causative capability*. Secondly, the danger must have *been produced in a fairly normal manner*. The following presentation concerns only the penal law and not the law of torts, where the problems are somewhat different, partly because subjective guilt does not play such a great role there as it does in the penal law, partly because the rules are less determined by written law, and partly because the law of torts deals with economic damage, while the penal law, as a rule, is concerned with liability for certain concrete harms, such as death and bodily injury.

General causative capability

1. I shall first discuss the requirement of the act's causative capability. This requirement has little significance in penal law as an independent condition of liability. The necessary limitation is generally to be found in the requirement of *subjective guilt*. If the act itself creates no risk of harm, then there is neither intent nor negligence in the event some harm should actually occur because of unforeseen circumstances. I stop a person on the street and speak to him; when he moves on, a falling brick hits him on the head. I persuade my uncle to take a cruise; the ship hits a mine and sinks with all hands aboard. Had I not interfered with the course of events, the other person would have escaped the accident. But I obviously cannot be held liable for these results.

However, an intent to harm may exist even though the risk is very small. The reason why I persuade my uncle to take the cruise is precisely that I hope he will die by an accident so that I will inherit his estate. Even though my wish actually comes true, I cannot be punished for murder. And, what is equally important from a practical point of view, I cannot be found guilty of attempted murder if the hope is not fulfilled. In such cases, freedom from liability follows from the fact that I have not committed an unlawful act. I am within the area of permitted and free action, where no one questions any motions (compare below, § 14, V).

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[1] Stang, *Skade voldt av flere*, § 6 (Kristiania, 1918); Ussing, *Erstatningsret*, pp. 203–205 (new reprint, Copenhagen, 1947); Hartmann, in (1950) *Tidsskrift for Rettsvitenskap*, pp. 232–241.

[2] *Haandbog over den danske og norske Lovkyndighed*, Vol. 5, pp. 8–12 (Copenhagen, 1832).

[3] The most recent complete exposition of the adequacy concept is given by A. Vinding Kruse, in (1951) *Tidsskrift for Rettsvitenskap*, pp. 321–425. He considers mainly the law of torts, but cites also the basic propositions of Orsted and von Kries. See also Carl Bonnevie, *Adekvanslæren og beslektede rettsfelter* (Oslo, 1942), and, especially for the penal law, Skeie, *Den norske straffelov*, I. pp. 129–135 (2nd Ed., Oslo, 1946).

But suppose that I induced him to take the trip by giving him false information. Then there exist both an unlawful act and an intent as to the consequences. If the risk is as small as it usually is under normal cruise conditions, I would hardly be sentenced for murder anyway (or even attempted murder). Here the adequacy concept comes into play. When the danger is so small that in practice it is not taken into account, the accidental result will be considered inadequate, even though a particular individual may have taken it into account. (The solution will be different if I knew of certain dangers, such as a plot to sink the ship, or the fact that it is not seaworthy.) The result must be legally justified on the ground that the law's threat of punishment against one who "causes a person's death" cannot reasonably be interpreted to include such peculiar "acts of homicide." Not only will the degree of probability be considered, but also the nature of the act itself. If a person shoots at another with intent to kill, he cannot hope for an acquittal even if the distance between them is so great that there is very little likelihood of hitting the victim. If he misses, he will be guilty of attempt; if he hits and kills, he will be guilty of murder.

These are theoretical problems of little practical significance. However, the requirement of adequacy is of more importance in relation to those offenses where the punishment may be increased because of *unintentional consequences*. A typical example is Penal Code, § 228, on assault, which substantially increases the punishment where the act results in death, or harm to body or health. The assault itself must be intentional, but the effect giving rise to increased punishment need not be. (If the effect is intended, then the act is either intentional causing of bodily harm (Penal Code, § 229) or intentional homicide (Penal Code, § 233). Penal Code, § 43, states that the increased punishment in such cases applies only "where the offender could have foreseen the possibility of such a consequence" or "where in spite of his ability to do so, he has failed to prevent such a consequence after having become aware of the danger." For further details, see below, § 21, III, 2.

Unforeseen course of events

2. It may happen that the act is inherently dangerous, but that the damage occurs in a strange or unforeseen way. A shoots at B for the purpose of killing him; he misses, but B's fear causes a fatal heart attack. Should A be punished for murder or merely for attempted murder? A is working with explosives in a grossly negligent manner, causing an explosion; B is hit by a stone fragment and receives a small injury but, since he is a bleeder, the flow of blood cannot be stopped, and he dies. Can A be punished for negligent homicide or merely for his careless conduct? (Penal Code, § 352.) B is injured by a reckless driver. The injury is not fatal, but it necessitates an operation, and B dies during the narcosis. Has the driver of the car negligently caused B's death?

Such a deviation from the normal course of events is generally not a defense to a criminal charge. If A has tried to kill B and has succeeded, it is difficult to see any reason why he should be punished only for attempt, merely because the course of events was not the anticipated one. The same is true in the negligence cases: a person has negligently caused danger to human life, and human life has actually been lost as a result of his act; there is hardly any reason to absolve him of criminal liability merely because it was difficult to foresee the precise manner in which the harm would occur. It may be argued that liability should not depend on mere chance. But the answer to this is that the difference between an attempt and a completed crime depends precisely on the chance of the result having occurred. For negligent felonies (and misdemeanors), the same chance determines the entire question of liability. If the harmful result does not materialize, the perpetrator benefits from that fact; if it does materialize, he must be held liable.

The damage has no connection with the inherent danger of the act. Nevertheless, this principle cannot be followed completely. Von Kries mentions the following example in one of his treatises.[1] A coachman falls asleep and his horse takes the wrong road; a bolt of lighting strikes and kills the passenger.

[1] Von Kries, *Über den Begriff der objektiven Möglichkeit und einige Anwendungen desselben. Vierteljahresschrift fur wissenschaftliche Philosophie,* XII, p. 201 (Leipzig, 1888).

The coachman's act has been negligent; if the horse and coach had fallen into a ditch, he would have been responsible for any injury to the passenger. And had the coachman taken the correct route, the passenger would not have been hit by the lightning. So far the causal connection is clear. The general sense of justice nevertheless rebels against convicting him of negligent homicide (or imposing upon him the obligation of compensating the survivors). The harm here has *no connection with the danger inherent in the act.* It could just as easily have happened that the passenger was saved from the lightning because of the detour. There is a great difference between this example and the previous ones where, despite the uncalculated course of events, it was nevertheless the *dangers inherent in the act* which were realized.

Remote and indirect causal connection. These cases in which the harm has no connection with the inherent dangers of the act are clear. In practice, however, one would probably go somewhat further and exclude criminal liability even where there is a certain connection between the harm caused and the danger inherent in th act. Exampl 1: A, with intent to kill, strikes B on the head with an axe. B recovers from the assault, but becomes somewhat deaf because of the blow. Later, but before A has been brought to court, B is hit by a car and killed because he did not hear the sound of the horn. If A had not attacked B, the latter would still be alive; thus, there is a connection between the assault and the death. A powerful blow on the head creates a certain danger of impairing one's hearing, and diminished hearing leads to increased risk in traffic. Thus, there could also be said to be a *general* connection between the assault and the fatal accident. Nevertheless, A would most probably be convicted only of attempted homicide. Example 2: A woman is hit by a negligent driver and is seriously injured. She is recovering well but is still depressed when one day she sees her mutilated face in the mirror, and becomes so despondent over her lost beauty that she commits suicide. The motorist will probably not be found guilty of negligent homicide.

The foreseeability of events is hardly any less in these cases than in others where liability will be imposed. But the damage is remote and indirect. In English law there is a doctrine that *remote* causes cannot lead to liability. Such a rule cannot be set up under Norwegian law, but the remoteness of the causal connection can nevertheless be significant. In particular, where some time has elapsed after a damaging act, so that the situation has become stabilized (example 1), and then a new independent cause comes into play and brings about new consequences, the latter cause will dominate the picture so completely that it would be felt unnatural to extend the liability for the first act so far as to cover the consequences of the intervening act.

Older theory sometimes held that legally the causal connection is severed when the result is due to an intervening free act which breaks into the chain of events and which is due to the victim himself or to an independent third person (see example 2).[1] The proposition that only the person who commits the last act is liable for the further consequences cannot be accepted in its absolute form. But the obvious essence of this theory is that it is often felt unnatural to stretch liability for the first act that far; the intervening act is the one which dominates the picture of causation.

The requirement of adequacy as a safety valve. The requirement of adequacy may be regarded as a safety valve, which permits a judge to exclude a liability which he does not consider reasonable. Not only will the degree of probability be emphasized in attempting to solve the problem, but also such other factors as the degree of guilt, the closeness of the causal connection, and the nature of the surrounding circumstances.

Terminological and systematical questions. Terminologically, the adequacy concept can be expressed in various ways. It can be said that only adequate causal connection is *causal connection within the meaning of the law.* Or it can be said that, *in addition* to the requirement of causal connection, there is this further requirement that the connection be adequate. The first expression is closer to the words of the law. For aside from those examples which are dealt with in Penal Code, § 43, the limits of liability must be determined by a natural interpretation of the individual penal provision and not by any ready-made theory of adequacy. The question here as elsewhere in the doctrine of causation, is this: What connections does the law require when it uses the

[1] See Goos, *Den danske Strafferets almindelige Del. Forste Afsnit: On Forbrydelsen,* pp. 174–185 (Copenhagen, 1878).

terms "to cause," "to bring about," "to injure," "to destroy" and so on.[1] In newer jurisprudence it has often been said that the older theories of legal causation mix together the concepts of causation and adequacy. This reproach is not justified.

To sort out in one special chapter the problems which are treated in this section (V) may have its advantages from a systematic and terminological point of view. But a certain danger is bound to exist when one operates with the concept of adequacy as something which is given *a priori*, and which is added on to the individual descriptions of the acts, while in fact this concept should be found in an inductive way, based on an interpretation of the different provisions.

Causation in the Law

By H. L. A. Hart, Prof. of Jurisprudence in the University of Oxford, and A. M. Honoré, Rhodes Reader in Roman-Dutch Law in the University of Oxford

Part III—The Continental Theories

XVI—Individualizing Theories and Theory of Conditions (Bedingungstheorie)

In this and the next chapter we examine some of the more prominent theories of causation propounded on the continent. The interest of doing so, from the point of view of the student of the common law, may lie in learning how the causal problems with which he is familiar appear to lawyers who do not share his empirical outlook and who view legal concepts against the background of systematic philosophy. In order to emphasize the difference of approach we touch only lightly on the views of those, such as the French writers, who distrust systems and tolerate inconsistencies, and concentrate instead on the German language writers who have invented and systematized the main theories.[2] Their work has been elaborated by writers in other European countries and in Latin American and accepted by the courts in many of these countries. On the other hand we have attempted to make the theories more intelligible by citing freely from the decisions of the courts which purport to apply them. Most of the theories were designed to meet the problems of criminal law in the first place and, accordingly, the reader will find a greater emphasis on these problems and on the decisions of criminal courts than we would expect in a discussion of causation in the common law.

The expression 'theories of causation' is used because the writers with whom we are dealing do not regard an inquiry into causal principles in principle different from an attempt to construct a scientific theory. In our view this is a mistake; the 'theories' are in fact conceptual, not empirical investigations. But the use of the word is inveterate and it would distort the views of continental writers to present them as if they purported to give an analysis of the meaning or use of 'cause' in the law.

Unlike the Anglo-American writers who have made piecemeal contributions to the study of causation, continental jurists have not hesitated to apply to the law philosophical doctrines of considerable complexity.[3] Indeed some German writers have sought to identify the legal notion of cause either with Kant's doctrine, embodied in the statement that 'everything which occurs presupposes some other thing upon which it follows in accordance with a rule'[4] or with Mill's doctrine of a cause as a complex of conditions invariably followed by a given type of consequence. Von Kries on the other hand constructed on the basis of a philosophical theory about the nature of probability

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[1] Very much in point are those Danish decisions in which the accused is acquitted of negligent homicide because the causal connection is too remote, and in which it is said that the death is not deemed "to have been caused in such a way" as the provision on negligent homicide requires (see Hurwitz, *Den danske kriminalret*, pp. 252–253 (Copenhagen, 1952)).

[2] 'Le problème casual en matière de responsabilité etait fait pour séduire l'esprit des juristes d'Allemagne.' Marty, (1939) *Revue trimestrielle de droit civil*, pp. 685, 689.

[3] This applies primarily to those writing in German and to a lesser extent to those writing in Italian, Spanish, and Dutch. The French contributions, on the other hand, are decidedly empirical, perhaps more so than the English. See Marty, 'La Relation de cause à effet comme condition de la responsabilité civile', (1939) *Revue trimestrielle de droit civil*, pp. 685, 700.

[4] Leonhard, *Die Kausalität als Erklarung durch Eränzung*, pp. 26, 31; Liepmann, 'Zur Lehr von der adäquaten Verursachung', *Goltdammers Archiv*, 326; *Einleitung in das Strafrecht* (1900), p. 50.

a theory of causation[1] specially adapted for use by lawyers. Other writers have distinguished the legal and philosophical notions of cause and have pointed, in particular, to the fact that the law is not primarily concerned with explanation[2] but rather with fixing the limits of responsibility; yet even those writers who refuse to identify the legal and philosophical notions of cause are influenced by systematic philosophy to a far greater extent than are Anglo-American writers.

One corollary of this is that the continental writers are reluctant to admit that common sense or the ordinary use of causal expressions outside the law is a reliable guide for the lawyer.[3] To this von Kries and the adequacy theorists form a partial exception, for they considered that the causal judgments of the ordinary man confusedly reflected the fact that the alleged case had or had not 'increased the objective probability' of the consequence.[4] A second corollary is that, despite the profusion of different 'causal' expressions to be found in the codes[5] the writers on the whole treat 'causal connexion' as a uniform and unvarying element in legal responsibility.[6]

Generalizing and Individualizing Theories

The fundamental distinction recognized by continental theorists is between those theories which recognize that every particular casual statement is implicitly general, in the sense that its truth is dependent on the truth of some general statement of regularities, and those theories which do not recognize this. Theories of the first kind are known as '*generalizing* theories'; those of the second kind as '*individualizing* theories'. To English readers, who have had the benefit of Hume's and Mill's analyses of causation and a long empirical tradition in philosophy, an individualizing theory which completely divorces the notion of causation from causal generalizations or laws may seem strange; literally taken, such theories seem to insist that there is a quality of 'being a cause' or 'being causally efficacious' which inheres in or belongs to particular acts or events and perhaps also to omissions, so that, just as a blow may have the quality or attribute of being heavy, so it may have the quality or attribute of being a cause or being causally efficient. On this view the causal quality or efficacy of a particular action or event is primary, not a feature derived from the fact that it is an instance of a kind of event believed to be regularly or generally connected with an event of some other kind. There is, however, still some merit in these theories as a reminder that the claim, characteristic of the British empiricists, that the whole meaning of causal connexion is to be found in the notion of regular sequence is mistaken. We have seen that the circumstances of individual cases have much to do with the distinction between causes and mere conditions.[7]

As their name suggests, the generalizing theories insist that, if a particular act or event is a cause of something, its status as a cause is derived from the fact that it is of a kind believed to be generally connected with an event of some other kind.

The individualizing theories themselves divide into two main types: the first of these, 'necessity' theories, insist not only that 'being a cause' is an intrinsic attribute of particular events, but that if an event is genuinely a cause it *nec-*

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[1] Viz. the 'adequate cause' theory: see Chap. XVII, p. 412.

[2] Tarnowski, *Die systematische Bedeutung der adäquaten Kausalitat*, p. 70; Radbruch, *Die Lehre von der adaquaten Verursachung*, p. 325. But Radbruch inconsistently adds that the law gives psychological explanations of physical events while science gives physical explanations of psychological events.

[3] Nagler, *Leipziger Kommentar zum Strafgesetzbuch*, i. 24; Tarnowski, pp. 60, 64.

[4] Chap. XVII, p. 415. Rümelin, 'Die Verwendung der Kausalbegriffe in Straf- und Zivilrecht', *Archiv für die civ. Praxis*, pp. 171, 190.

[5] e.g. German: *St. G.B.*, s. 211 (tötet), *St. G.B.*, s. 222 (den Tod verursacht), *St. G.B.*, s. 263 (dadurch beschädigt), *St. G.B.*, s. 48 (bestimmt hat), *B.G.B.*, s. 287 (während des Verzugs durch Zufall eintretende Unmöglichkeit); French: Code pénal, art. 319 (quiconque aura commis un homicide ou en aura été la cause), art. 309 (s'il est résulté), ibid. (auront été suivies), ibid. (l'ont occasionnée); panish: list compiled by L. Jiménez de Asúa from Latin American Penal Codes: (causar, producir, provocar, **procurar, verificar, ocasionar, originar, acarrear, crear, dar motivo (causa, ocasión,** lugar), nacer surgir, resultar, tener por resultado, sobrevenir, derivar, proceder, ocurl, a consecuencia de, por efecto de, seguldo de). *Tratado de Derecho Penal* (1951), iii. 515–16.

[6] Köstlin, *Neue Revision der Grundbegriffe des Kriminalrechts*, p. 455; Von Buri, *Die Kausalitat und ihre strafrechtlichen Beziehungen*, p. 11; Enneccerus-Lehmann, ii. 61 nn. 3–4.

[7] Chapt. II, p. 31.

essarily produces its effect because of its own nature, because 'it is what it is in itself'.[1] A 'mortal' wound[2] is a cause of death *necessarily*; for if it did not cause death, it would not be a mortal wound. Perhaps the only plausibility which this theory has is due to its failure to distinguish between two senses of the dangerous word 'necessity'. The meaning of 'mortal' may be so defined that as a matter of logic nothing shall count as a mortal wound if death does not result; but this incorporation of a causal relation into the meaning of a general expression does not show the causal relation to be a necessary one or more than an instance of a regular sequence.

The second type of individualizing theory is the 'efficiency' theory. This also insists that the relationship between a particular cause and its effect is not derived from their status as instances of a regularity; but differs from the necessity theory in allowing that events may possess causal efficacy in varying degrees or proportions. A cause, to be a cause, must, as a particular act or event, be efficient; but the concurrence of several factors may be required to contribute the 'causal energy' needed for the production of an effect. This strange terminology, like the English metaphors of varying causal 'potency' which are its counterparts, is an attempt to analyse the concept of causation in terms of the most familiar case: that of a moving thing causing another to move. Like all extensions of a single case to the whole field, it fails mainly because it provides no criteria for determining the existence of the property of causal efficiency or the measurement of its varying degrees.

Between the individualizing and generalizing theories we must place the continental variant of the doctrine of the equivalence of conditions, the 'theory of conditions'.[3] Some have adopted this doctrine in the form that any necessary condition is entitled to be called a cause; others in the form that the word 'cause' is reserved for the totality of all necessary conditions. It might well be thought that this theory should be classed with the generalizing theories on the ground that a condition X can only be shown to be a necessary condition of an occurrence Y by appeal to general laws showing that Y never occurs without X. But most German theorists have thought that the classification of a condition as necessary can be made, without recourse to known generalizations,[4] by an appeal to the imagination.[5] The generalizing theories, of which the most important is the 'adequate cause' theory, make contact with modern ideas of probability. According to the adequate cause theory, which is widely received by civil courts on the continent, a contingency is for legal purposes a cause of harm if it increases the probability of the occurrence of harm of that sort.[6] The generalizing theories accord with the principles we have extracted from common sense in their insistence both on the essential connexion in the central case between particular causal statements and certain generalizations and on the importance of the contrast between normal and abnormal conditions.

Lastly there is one curious strand in German philosophical thought in connexion with human action that demands attention. Most thinkers rigidly adhere to the view that in considering whether a human actor has caused harm only the actor's physical movements may be regarded as relevant, not his state of mind: once it is found that such movements were the cause of harm the question whether the act was deliberate, mistaken, or accidental is relevant only to the question of fault or *mens rea*. 'The disposition of the will can add nothing to and take nothing that the existence of the act and its causal property'.[7] This view is a reflection of the sharp distinction made by Kant between imputation (*Zurechnung*) and causation,[8] and is based on the identification of causation with physical processes.

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[1] For an English version of this theory see H. W. B. Joseph, *An Introduction to Logic*, p. 408, and for a criticism A. J. Ayer, *Foundations of Empirical Knowledge*, pp. 201–2.

[2] On this expression see also Chapt. VIII, p. 221.

[3] *Bedingungstheorie*, *Äquivalenztheorie*.

[4] An outstanding example is von Kries. See p. 415 below. The fact that a reference to general laws is necessary in order to establish that an event was a necessary condition of another event is recognized by Engisch, *Die Kausalität als Merkmal der strafrechtlichen Tatbestände* (1931), p. 18.

[5] I.e. whether we can imagine Y without X. See below, p. 391.

[6] For a detailed exposition and criticism see Chapt. VII, p. 412.

[7] *R.G. St.* 19 (1888), 141, 146. Jescheck, 'Anstiftung uzw.' (1956) 71 *Schw. Z. St.* 225, 226.

[8] Zurechnung (imputatio) in moralischer Bedeutung ist das Urteil, wodurch jemand als Urheber (causa libera) einer Handlung, die alsdann Tat (factum) heisst und unter Gesetzen steht, angesehen wird.' *Rechtslehre, Einleitung* p. 29. Cf. *Prolegomena*, pp. 114X19; Antolisèi, *Il Rapporto di Causalità in Diritto Penale*, p. 180.

Sometimes this identification is expressed in the aphorism 'Kausalitat ist blind, Finalitat sehend'. Their emphasis on this identification prevents German writers from recognizing that in causal inquiries it is sometimes illuminating to cite voluntary conduct, sometimes conduct which is less than fully voluntary and sometimes mere physical movements as the cause of an event.[1] Much depends on the context. In some contexts physical movements described as such are appropriately cited as the cause of harm; a doctor may cite a sudden movement as the cause of a heart attack. In other contexts the search for an explanation, quite apart from considerations of fault, may make an answer in terms of some person's deliberate act the appropriate answer to the question what was the cause of the harm; e.g. the deliberate act of the deceased in swallowing poison, as opposed to his mistakenly swallowing poison administered by another.

We proceed, after an historical introduction, to analyse in detail the two most important theories, the theory of conditions and the adequacy theory.

I. Individualizing Theories of Causation

Causation has been intensively discussed by continental lawyers for the last 150 years. Whereas in the Anglo-American world one can point only to Leon Green's *Rationale of Proximate Cause* as a comprehensive study of the subject, on the continent dozens of books have been published dealing solely or substantially with causation, and numerous theories and variants of theories have been propounded. Some observers have thought that this torrent of speculation and systematization has produced only a weiter of fruitless and confusing abstractions[2] and that the problem would be better left to the unfettered discretion of the judge.[3] Nevertheless, the German courts and, to a varying extent, the courts of other European countries, have adopted and adhered to one of the main theories: most criminal courts adopt the theory of conditions while civil courts adopt the adequacy of some similar theory.

'Necessary' Causes

At the beginning of the nineteenth century lawyers generally took the view that a cause in law meant a 'necessary' cause in the sense that, given the alleged cause, the alleged consequence necessarily followed[4] by virtue of an intrinsic property of the alleged cause. This was applied particularly to the law of homicide and a distinction was drawn between mortal and non-mortal wounds.[5] If the accused gave a mortal wound and the victim died he had caused death in the legal sense but not if he gave a non-mortal wound and the victim died through the concurrence of gangrene, unskilful treatment, or some other intervening factor.

This view was unduly favourable to the accused and depended on the notion that lethality was an attribute inherent in some wounds and not others. It was criticized by Stubel[6] with those works the scientific discussion of causation in the legal sphere really began. Stubel and later Kostlin[7] pointed out that human experience did not provide any examples of 'necessary' causes and the law did not, in order to establish causal connexion, require that the act under consideration should have been 'necessary or even sufficient, predominant, or indispensable in the circumstances'.[8] On the contrary each act presupposes, in order to achieve its effect, a number of external circumstances and conditions as subsidiary causes; only the sum of all subjective and objective conditions can together be considered as the cause of the effect in the sense of being indispensable[9] in the circumstances.

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[1] This range of possible cases was perhaps overlooked by Lord Sumner in *Samuel* v. *Dumas*, [1924] A.C. 431, 462, where he decided that the cause of the scuttling of a ship was not the voluntary act of the master and crew who scuttled it but the entry of the sea-water. The majority of the House of Lords thought otherwise.

[2] Berner, *Lehrbuch des deutschen Strafrechts* (1898), p. 116.

[3] Dernburg, *Bürgerliches Recht* (1899), II. i. 65.

[4] Above, p. 383.

[5] In Spain this distinction continued to determine responsibility until late in the nineteenth century. See A. H. Ferrer, *La relacion de causalidad en la teoria del delito.*

[6] *Über den Tatbestand der Verbrechen, die Urheber derselben*, &c. (1803).

[7] C. R. Köstlin, *Neue Revision der Grundbegriffe des Kriminalrechts* (1843), p. 453.

[8] Kostlin, p. 453.

[9] But this is a muddle, for though the totality of all such conditions may have been together sufficient to produce the consequence one cannot conclude that the totality was indispensable in the circumstances, since there may have been another such set present on the same occasion. Above, Chap. V, p. 116.

According to Stubel the contrast between 'necessary' and 'accidental' or 'coincidental'[1] had no place in the law, whilst Kostlin wished to retain a distinction between what was coincidental in itself and coincidental only from the standpoint of the actor (i.e. unforeseen).[2] These writers were feeling their way towards certain distinctions which have been made explicit in more recent discussion.[3] On the one hand, even if a set of conditions of a certain kind were always followed by a given consequence this would not justify the conclusion that the conditions 'necessarily' produce the consequence by virtue of a special causal property. Secondly, it is very seldom possible to assert that a certain consequence always follows upon a *single* earlier condition. Clearly it does not in cases of 'intellectual origination'[4] or psychological influence; when one person is influenced by the promptings, suggestions, or threats of another it is by no means always true that he would always be influenced by the same threat, &c., in the same way. Similarly, in relation to natural events, a revolver shot in the shoulder may cause death on a particular occasion although such a shot is not *always* followed by death. The example of a mortal wound might seem to be to the contrary, but a wound is called 'mortal' (in one sense of the word)[5] only because it is nearly certain that counteracting conditions which would avert death will be absent. In general, the most that can be asserted of a single condition is that it is *frequently* followed by a given event.[6]

When the concept of a single condition, *necessarily* followed by a particular consequence, fell into discredit, legal science did not at once transfer its allegiance to the notion of a condition frequently or usually followed by a particular consequence. Instead a number of individualizing theories developed.[7] These are of the sort with which Anglo-American lawyers are familiar.

'Efficient' and similar causes[8]

The most important, perhaps, is the theory which treats as the cause of an event the *efficient* or the *most efficient* condition.[9] This theory is generally termed metaphysical[10] since it is said to have its roots in the Aristotelian concept of an efficient cause[11] or source of motion and, perhaps it is not unfair to add, is incapable of translation into literal terms, or at any rate into non-mechanical terms. The chief exponent of this theory was Birkmeyer[12] who argued that a certain quantity of energy attached to each condition of an event and that by 'cause' the law meant that condition to which the greatest quantity attached and which therefore made the greatest contribution to the result. In the event of equally great contributions made by two or more acts each might be regarded as a cause and so punishable. But the quantity of energy could not be exactly measured and 'the judge in determining the causal quality of a concrete event may decide in accordance with his full and unfettered discretion'.[13]

This theory had obvious metaphysical attractions while seeming to escape some of the difficulties of the necessity theory. It also claimed support from introspection, since it is asserted that we know from our own experience that some conditions are 'more efficient' than others and from that can infer, by the use of sympathy and understanding, that the experience of others is the same.[14] Children and primitive people, it is argued, naturally explain events in terms of substances and attribute greater or less force or activity to different sub-

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[1] *Zufallig.*
[2] Köstlin, p. 455.
[3] F. Leonhard, *Die Kausalität als Erklärung durch Ergänzung* (1946), p. 4.
[4] Köstlin, p. 455.
[5] For other senses see Chap. VIII, p. 221.
[6] Leonhard, op. cit., pp. 27–31.
[7] Above, p. 383.
[8] Above, p. 384.
[9] *Wirksamste Bedingung, condition génératrice.*
[10] E. S. K. English, *Die Kausalität als Merkmal der strafrechtlichen Tatbestände* (1931), p. 28.
[11] *Stossende Ursache, causa efficiente.* Aristotle. *Metaphysics,* 1. 3. 11.
[12] *Ursachenbegriff und Kausalzusammenhang im Strafrecht,* Rektoratsrede, Rostock (1885). See also R. Horn, *Kausalbegriff,* p. 66; Thyren, *Abhandlungen aus dem Strafrecht,* vol. 1.
[13] Birkmeyer, op. cit., p. 18; von Buri, *Die ausalität.* p. 9.
[14] Engisch, op. cit., p. 28. For an English version of this theory see A. C. Ewing, 'A Defence of Causality', (1932–3) 33 *Proc. Aristot. Soc.* 91.

stances, animate or inanimate.[1] But even if we are acquainted from introspection with degrees of causal efficiency this would not, in the minds of mature persons, justify the extension of the concept by analogy to animals or plants, still less to natural occurrences, with which the law is often concerned.[2]

Of von Buri's criticisms of Birkmeyer two are of particular importance and may be said to have led to the defeat of the individualizing school. The first is that, on Birkmeyer's own admission, no precise criteria can be given for the distinction between efficient and non-efficient causes and the decision must therefore be left to the discretion of the judge.[3] Birkmeyer gives some examples of efficient causes but does not further justify their characterization as such; he treats their efficiency as self-evident.

Secondly, so far as the notion of efficiency can be literally applied, it is not clear, argues von Buri, that the law does accept this criterion. For instance, in a case of participation in crime the principal may have pulled the trigger while the accessory stood by motionless keeping watch; yet accessory and principal are both held to have caused the state of affairs which is proscribed by the criminal law (*Tatbestand*),[4] the 'relative intensity with which their will has been expressed'[5] and so the relative 'efficiency' of their acts is taken into account only for purposes of punishment. To accommodate such cases Birkmeyer was obliged to distinguish between 'causing' and 'providing the occasion'[6] or 'influencing',[7] for he held, consistently with his general theory, that a free human decision could not be caused.[8] These points are indeed well taken and important,[9] but his theory suffered in German eyes from its failure, as compared with von Buri's, to provide a unified theory of causation for the criminal law.

Birkmeyer further held that an efficient cause may be interrupted in its operation, as when a mortally wounded man is struck by lightning, but failed to give a clear elucidation of the notion of interruption. In view of these defects and criticisms the notion of an efficient cause was eclipsed by the theory of conditions. In Germany it has not been resuscitated, though in Italian civil law[10] it is still preferred by some to the adequacy theory and its terminology makes an occasional reappearance when a writer or judge is momentarily caught off his guard.

Birkmeyer's theory is in fact not without its merits. A more literal account of the notion of the comparative efficiency of different conditions of the same event could be given in terms of the more or less dangerous character of the various conditions, and one factor in determining this would be the greater or less frequency with which they would be followed by harm of a defined sort.[11] In theory at least numerical values could be assigned to represent the frequency of the harm occurring given each condition, and the condition most frequently followed by harm would often be selected as the most dangerous and so as the cause. However, such a reconstructed theory of efficient causes would cease to be an individualizing theory,[12] since what is likely to happen can be ascertained only by reference to what happens or would happen on an average if a large number of examples were taken with a known basic condition in common, other conditions remaining unknown in advance in each particular case. But a theory based on likelihood encounters in turn a number of serious objections which we consider later in connexion with the adequacy theory.

Many nineteenth-century writers besides Birkmeyer adhered to one of the individualizing theories, most of which are variants of his. They held that the cause of an event was that condition which could be described as the principal

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[1] Leonhard, op. cit., pp. 9–11.
[2] Ibid., p. 12.
[3] M. von Buri, *Die Kausalität und ihre strafrechtlichen Beziehungen* (1885), pp. 7–9
[4] *Actus reus* is sometimes used in similar though not identical sense. Thus Turner defines *actus reus* as 'such result of human conduct as the law seeks to prevent' (*Kenny's Outlines*, p. 13).
[5] Von Buri, op. cit., pp. 4–5.
[6] *Veranlassung.*
[7] *Beeinflussung.*
[8] Von Buri, op. cit., p. 10.
[9] Above, Chap. II, pp. 40, 48.
[10] Teucro Brasiello, *Codice Civile, Libro delle Obbligazioni, Commentario* (1949), iii. 234.
[11] Another factor would be the seriousness of the harm which followed a given condition.
[12] Above, p. 383.

or most 'active' condition,[1] or as sufficient in itself to produce the event,[2] or, refining Birkmeyer's mechanics, the condition which is decisive in the sense of 'tilting the balance between forces in a state of equilibrium',[3] or of 'changing the direction of events',[4] or releasing 'potential energy' and supplying a driving force.[5] There is a striking similarity between such metaphors and those used by Anglo-American lawyers. The natural tendency of such theories is to select the event nearest in time to the alleged consequence as its cause. This view was adopted by Ortmann with the qualification that the cause must be the act of a free agent other than the injured party, 'free' being taken in a wide sense as compatible with negligent or accidental conduct.[6] The efficiency theory, however, has been altogether rejected, except in such specialized branches of the law as marine or industrial insurance where the question of the cause of a loss or the scope of an occupational risk arises. Such exceptions have been explained on the ground that in marine and industrial insurance the law is mainly concerned with responsibility for the consequences of natural events rather than of human conduct. The concept of efficiency, it is held, can be applied to natural events, perhaps because things have a measurable motion even if it must be rejected for human conduct. Heavy seas have a greater causal 'value' than ordinary waves; but human conduct may upset their relative values, e.g. by blowing a hole in the hull of the ship so that ordinary waves become more 'efficient' than they would otherwise be.[7]

Even, however, if we take into account the continued fondness of the French civil courts for the expression *cause generatrice*,[8] it must be recognized that in the twentieth century the individualizing theories have suffered a decline.[9] This is in marked contrast with the continued popularity of the metaphors of 'potency', &c., with Anglo-American courts and, to a lesser extent, writers. Though some German writers regard the individualizing theories as more in accordance with common sense than other views and so in principle the only correctly conceived theories,[10] the vague character of commonsense judgments of causation and the obscure metaphors involved in the individualizing theories themselves have stood in the way of their acceptance. Hence those who, like Nagler, wish to revive the individualizing point of view introduce nowadays a different criterion of cause—viz. that only such conditions of an event as are socially reprehensible are in the legal sense causes:[11] thus only those road users who have contravened traffic regulations or customs can be regarded as having in law caused a road accident.

II. Rise of the Theory of Conditions (Bedingungstheorie)

The germ of the theory of conditions is perhaps contained in the notion *versari in re illicita*[12] applied in many systems of criminal law in the past and in quite modern times by the Spanish Supreme Court.[13] One who takes part in an illegal activity is responsible for all harm which would not have occurred but for his participation. But in its modern form the theory was first expounded by the Austrian writer Glaser.[14]

If one attempts wholly to eliminate in thought[15] the alleged author [of the act] [he says] from the sum of the events in question and it then appears

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[1] Titmann. Cf. Treudelenburg, *Logische Untersuchungen* (3rd edn.), ii. 184–5 (*tätigste Bedingung*).

[2] Feuerbach, Grolman. At this point the necessity and efficiency theories are indistinguishable.

[3] Binding, *Normen* (1872), i. 113; ii. 472 (*Obergewichtstheorie*).

[4] Wachenfeld.

[5] Kohler, *Goltdammers Archiv*, 51, 327, 336 (*Kraftauslösende Bedingung*).

[6] Ortman, *Goltdammers Archiv*, 23, 268; 24, 94.

[7] H. Mayer, *Strafrecht; Allgemeiner Teil* (1953), 137.

[8] Planiol-Ripert-Esmein, *Traité pratique de droit civil français* (1952), vi. arts. 541–2; Suprema Corte (It.) 21. 3. 1952 (*causalita efficiente*).

[9] However, some Marxist writers say that each condition plays a defined part in bringing about a given consequence, the part of some being greater than that of others. Otherwise one would have to treat the peace-loving efforts of democratic peoples and the hysterical war-mongering of western Imperialists as equally important conditions of a future war. J. Lekschas, *Die Kausalität bei der verbrecherischen Handlung* (1952), p. 43.

[10] Nagler, *Leipziger Kommentar zum Strafgesetzbuch* (1954), i. 23.

[11] Nagler, op. cit., p. 24. This view was originally elaborated by Welzel.

[12] 'Cui in re illicita versatur imputantur omnia quae sequuntur ex delicto . . . tenetur etiam pro casu.'

[13] A. H. Ferrer, *La relación de causalidad en la teoria del delito*, chap. 1.

[14] *Abhandlungen aus demösterreichischen Strafrechte* (1858), i. 298.

[15] *Wegdenken, hinwegdenken.*

that nevertheless the sequence of intermediate causes remains the same, it is clear that the act and its consequence cannot be referred to him . . . but if it appears that, once the person in question is eliminated in thought from the scene, the consequences cannot come about, or that they can come about only in a completely different way, then one is fully justified in attributing the consequence to him and explaining it as the effect of his activity.[1]

This is a way of expressing the idea that every *sine qua non* or necessary condition of an event is its cause. We leave for later consideration the sense in which 'condition' is here to be understood and note merely that it is characteristic of the continental theory of conditions to decide whether a condition is a *sine qua non* by a process of elimination in thought (*hinwegdenken*) or assimilation (*hinzudenken*). The continental formulation suggests that the existence of causal connexion depends on the imaginative power of the judge; this difficulty is avoided by the usual Anglo-American formulation, 'Would compliance with the law have averted the harm?'

Shortly after Glaser, von Buri in Germany adopted a similar view.[2] His arguments were strongly influenced by the mechanical analogies favoured by the supporters of the theory of efficient cause. It is in general impossible to distinguish the different *parts* of a consequence,[3] he argued; if three thieves each take 1,000 marks from a chest containing 3,000 marks, the loss is divisible but usually, for instance if three persons attack and kill a fourth, the harm is indivisible.[4] Hence we cannot say that the act of each has caused a part of the harm. Can we say that each has caused the whole harm? Von Buri takes the analogy of a mill. Suppose that a certain quantity of water is required to turn the mill-wheel and that one mill-pond provided four-fifths of this quantity, another one-fifth, it would nevertheless be correct to say that the water from each mill-pond was the cause of the wheel turning since each was equally necessary and neither would produce any effect without the other.

To Birkmeyer's objection that, if each condition is ineffective without the others, only the sum of all the conditions can be the cause of an event,[5] von Buri gave no convincing reply. Indeed no satisfactory answer to this objection can be given unless appeal is made to the common-sense contrast of cause and condition which lies outside the scope of such theories. Thus Tarnowski, who is aware of the difficulty, states the theory of conditions as follows: 'The theory of conditions takes as its starting-point the proposition that all conditions of a consequence, which cannot be eliminated in thought without eliminating the consequence also, are equivalent and *therefore*[6] each single one of these necessary conditions can be regarded as a cause of the consequence.' The '*therefore*' hardly serves to conceal the *non sequitur*. The only arguments adduced to support this reasoning are that the legal concept of cause is not necessarily the same as the philosophical concept and that each condition is sufficient to produce the consequence provided that the other conditions are also present; each condition may be regarded as completing the set. But no reasons are given for borrowing some parts of the philosophical (i.e. Mill's) theory and omitting others.

Von Buri does not refer to Mill's writings. However, the theory of conditions soon became associated with Mill's name. Von Bar, a contemporary of von Buri, who held a different theory of causation, cites a long extract from Mill's *Logic*[7] dealing with the equivalence of conditions.[8] When the theory of conditions came to be accepted by continental criminal courts and writers, it was justified by the adoption of parts of Mill's philosophy rather than by von Buri's notion of the equal efficiency of conditions.[9]

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[1] Glaser, Ibid.

[2] *Teilnahme und Begünstigung* (1860); *Abhandlungen* (1862); *Goltdammers Archiv* (1863), pts. 11, 2 (1866), p. 12; Gerichtssaal (1870), p. 4; *Die Causalität* (1873); *Blätter für Rechtspflege* (1876), p. 193; *Zeitschrift für die gesammte Strafrechtswissenschaft* (1882), p. 233; *Die Kausalität und ihre strafrechtlichen Beziehungen* (1885).

[3] *Die Kausalitat und ihre strafr. Beziehungen*, p. 1.

[4] Chap. VIII, p. 208.

[5] Op. cit.; Gerichtssaal, xxxvii. 257, 261.

[6] Our italics.

[7] J. S. Mill, *Logic*, p. 217.

[8] L. von Bar, *Die Lehre vom Kausalzusammenhange im Rechte, besonders im Strafrechte* (1871), pp. 6–7.

[9] The Marjist writer Lekschas thinks that there is a sound core in the notion of a *sine qua non* but that the credit for discovering it belongs to Hobbes, *Principles of Philosophy* ix, s. 101. J. Lekschas, *Die Kausalitat bei der verbrecherischen Handlung* (1952), pp. 24–25.

The German Reichsgericht in its criminal division accepted the theory of conditions from the start. In a case decided in 1880 accused left a wine bottle containing a solution of arsenic on the windowsill and left the house, though she should have foreseen that her husband, addicted to drink, might taste it, which he did, with fatal consequences. She was convicted of negligent killing,[1] despite the intervening carelessness of the husband, since, 'without her act of putting in position and leaving the bottle of poison, the husband of the accused would not have been killed, hence the occurrence of the whole consequence was conditioned by this conduct on her part and therefore her conduct was fully *causal*'.[2] German criminal courts including the Bundesgerichtshof have with almost unbroken consistency adhered to this theory ever since and it has been adopted by the criminal courts of most other European countries, though the very extensive liability which would naturally follow from it has been limited by theories of fault or *mens rea* and unlawfulness.

Of the German writers who followed von Buri the most prominent exponents of the theory of conditions are von Liszt, Radbruch, Dohna, von Lilienthal, and Beling. The most recent writers on criminal law are, however, not nearly as whole-hearted in its support as the courts, for the theory of conditions makes causation an element of minor importance in criminal liability, reducing it to the issue of what American writers term 'cause-in-fact', with the result that matters which, from a common-sense viewpoint, turn on causation, have to be considered under another rubric, such as fault (*mens rea*) or unlawfulness. Hence even those writers who support the theory of conditions tend to introduce elements of the adequacy theory in some other part of the theory of criminal responsibility, or, like Antolisèi, to modify it by admitting exceptions, e.g. that if exceptional or very rare events have contributed to bring about the consequence the connexion between act and consequence is merely 'occasional', not causal.[3]

In civil law the theory of conditions has had very little success, courts preferring on the whole to make use of the adequacy theory or of the metaphors associated with the individualizing theories. Nevertheless, some notable writers, among whom the South African de Wet deserves particular mention,[4] have advocated it for civil law in view of its apparent simplicity and the ease with which it can be applied. It can further be argued in its favour that it reduces causation to a pure question of fact and is the only theory which avoids confusion with the requirement of fault.[5] It does, however, lead to a very complex theory of fault or unlawfulness,[6] designed to obviate the extension of responsibility beyond due limits.

III. The Notion of a Condition

We now deal in greater detail with the theory of conditions. There is a part of this theory which is common to it and the adequacy theory, viz. the analysis of the notion of a condition. Radbruch says that the theory of adequate cause starts from the same point as von Buri's theory, viz. the notion of a collective cause (or complex set of conditions) and the equivalence of all conditions.[7] Perhaps this is an overstatement, but at least the adequacy theory requires that every cause must first be a necessary condition of the consequence; it then accepts the equivalence of conditions in the sense that the only ground for distinguishing between them is derived from estimates of probability drawn from general statements of probabilities.

We consider first in what sense the theory of conditions understands 'a condition' and next what it says about equivalence.

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[1] *Fahrlässige Tötung* (*St. G.B.*, s. 222).

[2] *R.G. St.* 1 (1880), 373, 374.

[3] F. Antolisèi, *Il rapporto di causalità nel diritto penale* (1934), p. 193. 'Casual' and 'occasional' connexion are, according to Antolisèi, two species of the genus 'conditional' connexion.

[4] J. C. de Wet, 'Opmerkings oor die vraagstuk van veroorsaking' (1941), 5 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, p. 126; '"Estoppel by Representation" in die Suid-Afrikaanse Reg', p. 18; *Strafreg*, p. 22.

[5] De Wet does not admit that the notion of a *causa sine qua non* amounts to a theory of causation, since, he says, if causation is a pure question of fact there can be no theory of causation. 'Opmerkings', p. 133. Above, p. 381.

[6] Zevenbergen, *'Over het vraagstuk de Causaliteit in art. 1401 B.W.B.'* Meijers, W.P.N.R., 3442, p. 553 n. 10.

[7] Radbruch, p. 333.

We treat the notion of a condition under the following headings: (i) sets of conditions; (ii) the difficulty about omissions; (iii) the generalization (description) of the consequence; (iv) the generalization of the condition; (v) the procedure of elimination and substitution; (vi) additional and alternative causation; (vii) interpersonal transactions; (viii) proof in hypothetical inquiries.

(i) *Sets of conditions.* As we have seen, the conduct of the actor is usually stated to be a condition of a consequence, 'if once it is eliminated in thought, the consequence at once falls away'.[1] The procedure of elimination, however, presupposes that the condition being investigated may be a member of a complex set of conditions or collective cause.[2] Does such a set contain a limited or unlimited number of members? Sometimes it is suggested that the number is limited and the complete set theoretically enumerable: thus Grispigni objects to the view that exceptional conditions exclude liability because, he says, there is always *some* unforeseeable or exceptional condition of an event, but it may not amount to more than one-hundredth part of the causal complex.[3] This can meaningfully be said only if a complete count of the conditions is possible. But most writers agree that the conditions of an event are unlimited, at least if the negative conditions are included. The notion of the sum of the conditions of an event 'leads to infinity'.[4] For instance, it is a condition of the spread of a fire which could have been extinguished that A did not put it out, B did not put it out, &c., for an indefinite series of persons; hence it is impossible to state the whole set of conditions in a particular case.[5] This, however, is not really fatal to the procedure of elimination or to the notion of a necessary condition[6] since it is in many cases possible to state a limited number of positive conditions of an event which suffice to produce it in the absence of counteracting conditions,[7] and causal laws or natural laws do usually contain just such specifications of the positive conditions of events.[8] The absence of counteracting conditions may be treated for practical purposes as a single negative condition, and there is no need for the unattainable complete enumeration.

(ii) *The difficulty about omissions.* This difficulty has been felt more acutely in continental than in Anglo-American law. The objections to treating an omission as a cause apply equally to treating it as a condition; hence they are dealt with here. It is said of omissions that they (*a*) are nothing[9] and (*b*) are not movements.

If omissions are nothing, there seems no reason why they should figure even theoretically among the conditions of an event; it would actually be superfluous and pointless to mention them, for nothing would thereby be added to what is already known of the event. But in fact it is in many circumstances not pointless to mention an omission among the conditions of an event, for instance to mention that X, who was suffering from a disease of which he died, failed to consult a doctor. The explanation of this is that we sometimes know how to prevent a harmful occurrence though we may not know how it is caused. The theory that negative descriptions of conduct are nothing, coupled with the obvious fact that there is sometimes point in drawing attention to omissions, has led to heroic attempts to demonstrate that omissions are 'really' something, i.e. positive acts. To this end it has been said that omissions, though they have no existence in the physical world, exert a psychological influence.[10] It is true that sometimes, for instance, silence gives consent. If a husband keeps silent when his wife declares her intention to kill their child his omission to speak may

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[1] *R.G. St.* 66 (1932), 181, 184. Above, p. 392.
[2] *Gesamtursache.* Köstlin, p. 453. Leonhard, op. cit., p. 5.
[3] Grispigni, 'Il nesso causale nel doritto penale', (1935) *Riv. it. dir. pen.* xiii, 3, 14–15.
[4] Von Bar, p. 8.
[5] Nagler, op. cit., p. 18 n. 3.
[6] Engisch, however, op. cit., p. 20, makes the point that the notion of necessary condition is derivative from that of causal law or generalization and hence wishes to substitute the notion of 'condition in accordance with a (causal) law' for 'necessary condition'.
[7] Von Bar, op. cit., p. 11.
[8] Engisch, op. cit., p. 21.
[9] Enneccerus-Lehmann, ii. 70, 'Ein Nichtgeschehen kann nicht wirken, ein Nichts kann keine Folgen haben.' The author thinks that under certain circumstances an omission may be *treated* by the law as equivalent to a positive act, though it is not really so. Antolisei, chap. 5.
[10] Geyer, *Grundriss zu Vorlesungen uber gemeines deutsches Strafrecht.*

encourage her to act and so exert a psychological influence. But this is not always true, even when human conduct is in question: a warder's omission to guard a lunatic, so that he escapes and does harm, does not exert a psychological influence on the lunatic, but merely provides him with an opportunity.[1] Still less does my omission to turn off a tap exert a psychological influence on the water which then floods my neighbour's property.

Another argument for assimilating omissions to positive acts is that a positive act precedes or accompanies the omission and it is this which is really the condition or cause of the event. Partly this merely reflects the familiar theory that a duty to act can only be based on a preceding act of the person subject to the duty, e.g. a doctor has a duty to attend a patient only if he has undertaken to do so, never merely because the patient needs attention; but this is inconsistent with positive law[2] and with ordinary usage. Another form of the same argument is that omissions to perform a duty, with which the law is mainly concerned, are themselves the consequences of positive acts, i.e. of the act of repressing the actor's inclination to perform the duty or of 'driving the possibility of having the inclination underground' so that it never, so to speak, comes to the surface.[3] This presupposes that consciousness of the duty is an essential condition of breach of duty, a doctrine which receives some support from legal writers[4] but would not account for those instances in ordinary usage where we speak of inadvertent omissions, e.g. when someone has failed to turn up at a meeting because he has forgotten the date of it. However, von Buri was prepared to cater for such cases of inadvertent omission on the theory that the positive act involved was busying oneself at the relevant time with other ideas and thereby preventing the consciousness of duty from obtruding itself.[5] But even if it is conceded that there always are some such psychological conditions of an omission they are not usually treated as acts: on the contrary they are contrasted with acts. Further, it is not the psychological antecedent which commonsense or law treats as significant, but the omission to perform the duty, which may have many and varying psychological antecedents.

Another attempt to view omissions as 'really' positive asserts that an omission is equivalent to the removal of an obstacle to the occurrence of a consequence;[6] such removal is itself positive. An 'obstacle' primarily refers to a factor which is known or assumed to be present and which would prevent a purpose from being achieved. If a warder fails to guard a lunatic, who then commits suicide, the warder's omission is indeed equivalent to the removal of an obstacle in the way of the lunatic's purposes; but an employer's failure to guard dangerous machinery is not naturally described as the removal of an obstacle to the workman's injury, since the workman does not intend to injure himself.

A related view is that an omission does not set causal laws in motion but removes an obstacle to their operation.[7] Not rescuing a drowning man removes an obstacle to the operation of the physical and physiological laws involved in drowning. The arguments we have just considered also apply to the use of 'obstacle' here. But partly this view reflects the belief that, since causal principles are usually stated in positive terms, they cannot incorporate negative descriptions, so that the apparently negative conditions must be shown to be 'really' positive. This is obviously a *non sequitur*.

Nevertheless, continental writers have continued to feel a difficulty about the causal status of omissions, and underlying this feeling is a genuine distinction between two types of knowledge, viz. knowledge of what will, in normal circumstances, produce a given result and knowledge of what will, in normal cir-

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[1] *B.G. St.* (1882), 332.

[2] E.g., the crimes of *omission de porter secours* and *unterlassene Hilfeleistung*. Code pénal, art. 63; *St. G.B.*, s. 330 c. Similarly the duty of support often depends on family relationships, not on prior undertakings or acts: children must support parents though they have not begotten them and have not promised to support them.

[3] Von Buri, p. 15.

[4] It is usually held that consciousness of unlawfulness (*das Bewusstsein der Rechtswidrigkeit*) is part of the notion of fault. Mezger, *Strafrecht*, I. 174.

[5] Op. cit., p. 16.

[6] Nagler, op. cit., p. 38.

[7] Englisch, pp. 27–28. An alternative development is the view taken by Welzel that causation is not an essential element in crimes of omission but is replaced by a different relation, i.e. 'not preventing'.

cumstances, prevent it. There is indeed a contrast between causing by intervening and by not preventing. The cases in which an omission is said to be a cause are mostly those in which the law requires precautions to be taken to prevent harm.

The argument that causation always involves movement has attracted some writers.[1] The objections to it were noted in Chapter II.[2]

(iii) *Generalization (description) of the consequence.* The continental writers speak of the generalization rather than of the description of a consequence. The problems which, under this name, have vexed continental theorists arise from the fact which we have had occasion to stress, that any particular may be classified under a number of different descriptions of different levels of specificity and only the context can determine which is appropriate for legal purposes. These problems have been the more acute because some writers appear to entertain the notion that there is in principle an ideal complete description of every event, which for the purposes of the law undergoes abstraction. The complete description is called the 'concrete description'.

Of what must a wrongful act be shown to be a necessary condition?[3] If we ask this in a case of homicide, we are first inclined to answer 'death', for homicide is unlawfully causing death; but if all men are mortal, no act can be a necessary condition of a man's death. Hence 'death' is too wide.[4] Suppose then we say that the act must be a condition of the particular death in all its details.[5] This at once appears too narrow, for if A when killed by B is wearing a coat sold him by C, C's act in selling him the coat is a necessary condition of A's death while wearing this coat: and his wearing this coat is one of the 'details' of his death.[6] Hence the writers make various attempts to steer a course between these two extremes.

Trager's test[7] was whether without the wrongful act the consequence would have been different from the point of view of legal appraisal. Bodily injury and death are two legally different categories; hence the act of the accused may be a condition of death, according to Trager's view, even if the deceased person would in any case have been wounded. Suppose, however, that B is attempting to wound C when A shouts. C turns towards A and so is wounded in the side, not in the back as he would otherwise have been. Is A's shout a necessary condition of C's wound? The legal category would be the same without his shout. Trager is in a difficulty, which he solves arbitrarily by making a distinction between the case where A intended a warning and where he intended to distract C's attention. He maintains that the shout is not a condition of the wound in the first case but is in the second, there being a special doctrine of the law relating to accessories that the slightest difference in the consequence is sufficient to make an act of assistance a condition and so to support a charge of aiding and abetting.

Trager also maintained that large differences in the time of death, wounding, &c., or in the seriousness of a wound were significant and entered into the description of the consequence, while small ones were neglected. But law and common sense agree that it is possible to kill a man who is certain to die very shortly:[8] a mortally wounded man may be murdered. To deal with cases of additional causation,[9] as when two men simultaneously shoot and kill a third, Trager introduced the argument that the consequence would not be the same without the act of one of the attackers, since death from one mortal wound is not the same as death from two mortal wounds; but this is to adopt arbitrarily, for a limited purpose, the view that a consequence must be described 'concretely' in all its details.

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[1] *Alle Verursachung ist Bewegung.* Krückmann, op. cit.; *Jherings Jahrbuch* 55, 25.

[2] P. 28.

[3] Unless otherwise stated this means necessary in the sense of the theory of conditions, i.e. such that in its absence the consequence would not have occurred.

[4] Tarnowski, op. cit., p. 39.

[5] Von Liszt-Schmidt, *Lehrbuch des deutschen Strafrechts*, p. 157: 'What is of significance is not whether B would have died without the expression of A's will but whether he would have died on this day, in this way, and under these circumstances.'

[6] Engisch, op. cit., p. 9, gives a similar example: A paints a vase, B throws it on the ground and breaks it: A's act is a necessary condition of the fact that a painted vase was broken. For the distinction between conditions *sine qua non* merely incidentally connected with the harm and causally relevant factors see p. 109.

[7] *Der Kausalbegriff im Straf- und Zivilrecht*, p. 46.

[8] Tarnowski, op. cit., p. 41.

[9] Below, p. 403.

Radbruch argued that we must distinguish characteristics of the consequence which interest us from those which do not.[1] Only the interesting factors form part of the description of the consequence. Tarnowski's view is comparable; he asserts that the description depends on the nature and circumstances of the crime and that no general formula for all crimes is possible.[2] The question remains whether some closer guide to the interesting or relevant factors can be given.

M. L. Muller,[3] reacting against Trager's view, proposed a 'concrete' description of the consequence, at least so far as details of time and place are concerned; but he nevertheless regarded the fact that a broken vase was painted or the victim of a murder wearing a particular coat as irrelevant. The legal category was relevant, he maintained, to the description of the condition, not of the consequence. The Reichsgericht appeared to adopt his view in a case in which the accused was convicted of arson when he had set fire to part of a house already on fire;[4] it then appeared to adopt a different view in a case in which a doctor who administered cocaine instead of novocaine as an anaesthetic was acquitted of negligent killing, since the novocaine would probably also have led to death.[5]

None of these views is satisfactory since the difficulties spring from the fundamental defects of necessary condition as a test of causation. In general, the appropriate description of harm will be the description implied in the relevant legal rule (e.g. death). The fact that the harm may also be described in further detail ('in a red coat', 'on a Monday') is only of importance because a reference to some of this detail will be required to show that a particular unique instance of the legally proscribed harm has occurred. The fact that acts such as selling a red coat to the victim will be necessary conditions of the harm thus described is irrelevant. Moreover, in cases of additional and alternative causes the test of necessary condition must break down altogether unless supplemented by that of generally sufficient conditions.

Further, a theory of how consequences should be described for legal purposes may be made to embody special legal doctrines. Thus Hartmann[6] thinks that the 'way' in which the consequence occurs should be incorporated into its description: when a rail accident occurs because the signalman was drugged we should speak of the consequence not as a 'rail accident' but of a 'rail accident occurring because a signalman was drugged'; this ensures that the drugging of the signalman counts as a necessary condition of the accident and excludes the argument that it was not a condition because the signalman was also handcuffed independently of the drugging. But even if 'way' could be sufficiently defined.[7] Hartmann's view would be no more than an attempt to base responsibility on whether the actor's conduct made a difference to the 'way' in which the consequence occurs. This restriction on responsibility requires to be justified and in fact few lawyers would wish to treat differently the case where A and B independently and simultaneously shoot C, when the consequence would have occurred in the same way (shooting) without A's act, and the case where A shoots C while B independently and simultaneously strangles him, where, but for A's act, the consequence would have occurred in a different way. In any case, references to the manner of occurrence such as 'accident occcurring because a signalman was drugged' involve a knowledge of causal processes which depends on common sense principles.

Except where the special features of events which, like death, are certain to occur at some time create difficulties, the German puzzles will be avoided by using not the notion of necessary condition, but that of a condition which is generally sufficient, with others, to produce the harm, described in terms of the relevant legal rule.[8] This description may require some further qualification in the following type of case. Suppose a man would with normal medical treatment die of 'a disease in five years' time. Dr. A treats him so unskilfully that

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[1] Op. cit., p. 82.
[2] Op. cit., p. 39.
[3] *Die Bedeutung des Kausalzusammenhangs im Straf- und Schadenersatzrecht* (1912), p. 10.
[4] *R.G. St.* 22 (1892), 325.
[5] *H.R.R.* 1930, no. 2034 (R.G.); H. Mayer, op. cit., p. 134. Chap. VIII. p. 229.
[6] *Das Kausalproblem im Strafrecht* (1900), p. 77.
[7] It could only be defined by reference to causal processes.
[8] Chap. VIII, p. 216.

he dies in two years' time; or Dr. B treats him so skilfully that he lives for ten years. The treatment by each doctor is sufficient, with other conditions, to produce the patient's death, though after differing intervals of time: yet we are not at all inclined to call B's treatment a condition of the patient's death. This is because, when a consequence is described as 'death', it is implied that it occurred before the time it would normally have been expected on the information available when the alleged cause occurred. The patient's death would with normal treatment have been expected in five years' time. Hence A's treatment is causally connected with his death. B's treatment would be causally connected with the prolongation of his life. The law would surely adopt this implication of the ordinary usage of terms like 'death'. Accordingly descriptions such as 'death' implied in the relevant legal rule should usually be adopted but interpreted as follows: 'Death' means any dying before the deceased would normally have died; 'bodily injury' prima facie means any bodily injury, since persons do not in the normal course of things suffer bodily injury; the destruction of property means its destruction before it would normally disintegrate. There is a distinction between killing and prolonging life, improving a wound and making it worse, damaging an object and repairing it. Sometimes the law may express or imply a more detailed description; killing a Norman was once a more serious crime than just killing. But usually a rule referring to killing will be satisfied by proof of any killing, i.e. of any instance of death occurring before it would normally occur. The details of the killing are only relevant in showing that the facts of the case present an instance of the state of affairs proscribed by the law.

(iv) *Generalization of the condition.* This presents serious difficulties for the adequacy theory but less for the theory of conditions. We can accept Muller's conclusion that the condition must be described in accordance with legal categories: e.g. 'false pretences or the perversion or suppression of the truth';[1] the prosecutor or plaintiff must prove an instance of what is described, and for this purpose must adduce details, e.g. that A falsely told B on such-and-such a date at such-and-such a place that he had a suitcase full of banknotes.

(v) *The procedure of elimination and substitution.* As will be remembered, Glaser first proposed and von Buri adopted the procedure of hypothetical elimination in order to test whether an act or omission was a necessary condition of a consequence.[2] The two main problems that arise for them in this connexion are whether the act or omission is simply eliminated or whether another is substituted for it;[3] and whether there is difference between acts and omissions in this respect.

It is simplest to take the case of omissions first. Suppose accused was riding a bicycle without a light: the court wishes to determine whether this was a condition of a collision. Obviously it can do so only by asking whether a collision would have occurred if the other conditions had been similar but accused's bicycle had had a light. The elimination of the condition, according to the terminology of the German courts, involves the substitution of the act which accused omitted. Thus in one case[4] accused and his brother were riding bicycles without lights at night; the deceased coming in the opposite direction collided with the brother and was killed. Accused was charged with negligent killing and the prosecution argued that, had the accused had a light, the deceased would have been able to see his brother's bicycle. The trial court held that there was no causal connexion between the failure to have a light and the death, because it eliminated accused from the scene altogether, and concluded that the accident would still have occurred. On appeal it was pointed out that the true inquiry was what would have occurred had the accused been present with a lighted bicycle.[5] If the procedure of elimination without substitution is applied to omissions, no omission can be a condition of an event.

Probably the best solvents of scepticism on this point are the licence cases. In German and French law it has been held that to drive a car without a lic-

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[1] *St. G.B.*, s. 263.

[2] Above, p. 392.

[3] Apparently 'elimination with substitution' is the supposition that the actor was in a position to which the law violated by him applies and that he complied with it (e.g. by driving with a licence). 'Simple elimination' is the supposition that he was not in a situation to which the law applies (e.g. not driving) and that the situation remained in all other respects unchanged (e.g. no one else drove).

[4] *R.G. St.* 63 (1930), 392.

[5] Accused was acquitted on the ground that he owed no duty to light his bicycle for the benefit of the deceased. Above, p. 228.

ence or employ a worker without an identity card is not necessarily the cause of a road or industrial accident in which the car or worker is involved.[1] Whether it is depends on whether the driver, if he had had a licence, would have driven more skilfully and thereby avoided the accident; similarly for the permit case. It seems clear that this conclusion can only be reached by going beyond simple elimination of the condition and supposing that the actor was driving and complied with the law by having a licence.

However the Reichsgericht before the war in certain cases purported to adopt a procedure of elimination without substitution.[2] This was to avoid denying liability in cases of alternative causation, e.g. when if A had not shot B, C would have done so at the same place and time. Since the war it has been recognized that substitution is necessary. But the recognition has come in an unsatisfactory way, because it too has occurred in cases[3] of alternative causation which are anomalous.

The procedure of simple elimination seems more satisfactory when the alleged cause is a positive act. If accused shot deceased with a revolver it seems necessary only to notice that, if accused's shot is eliminated, deceased's death is eliminated also. It seems unnecessary to inquire what else would have happened if accused had not fired; indeed, even if, in that event, someone else would have shot deceased, this would not, from a common-sense point of view, prevent our considering that the act of accused was the cause of death. However, cases of additional causation present a difficulty for the elimination theory and we now consider these.

(vi) *Additional and alternative causation.* It is unnecessary to repeat the definitions of these terms, which were set out in Chapter VIII.[4] What we have termed 'additional' causation is often called 'cumulative' by continental writers.

It is agreed that in cases of additional causation, as where A and B simultaneously shoot C in a fatal part of the body, both should be legally responsible for the death; but this seems inconsistent with the theory of conditions if elimination is taken as the test of whether an act is a condition. Some half-hearted attempts have been made to circumvent or obviate the difficulty. Enneccerus[5] mentions the fiction that the consequence occurs twice, the fact that the law is primarily concerned with fixing responsibility and the argument that each act is a necessary condition *for itself*. Tarnowski[6] argues that, in the case of simultaneous shots by A and B, we cannot say that the victim's death would have occurred in the absence of A's shot, since this presupposes that B's shot is a necessary condition of the death; this turns on an ambiguity in the expression 'necessary condition'. What is presupposed is that B's shot is sufficient, with other circumstances, to produce death; not that no other similarly sufficient condition was present on this occasion. Tarnowski also argues that the 'class' of lethal shots must be eliminated,[7] and presents this as a theory of how conditions should be described, but this would only demonstrate that some lethal shot was necessary, not that any particular member of the class was.

None of the arguments adduced to reconcile the theory of conditions with the need to impose liability on both actors in cases of additional (including overtaking)[8] causation seems convincing. The notion of a necessary condition requires to be supplemented by that of a sufficient condition.

Alternative causation presents analogous difficulties for the theory of conditions. The German cases have been analysed in Chapter VIII and the arguments adduced by the writers do not add to what has already been said on the subject.[9]

(vii) *Interpersonal transactions.* Continental writers usually designate interpersonal transactions by the unsuitable phrase 'psychological causation'—

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[1] For French law see Civ. 20. 10. 1932 (driver without licence not liable to pedestrian run over if he was driving properly); Cass. Soc. 7.5.1943; *Sirey* 1943: I. 106; *Dalloz* 4. 1943. 51 (employer not responsible for industrial accident to foreign worker unlawfully employed without identity card). Anglo-American law is similar: Chapt. VIII, p. 193.

[2] *R.G.Z.* 141 (1933), 365.

[3] e.g. *Neue Juristische Wochenschrift* 6 (II) (1953), 977.

[4] Pp. 189, 216, 225.

[5] Op. cit. ii, 69.

[6] Op. cit., p. 46.

[7] Op. cit., p. 47.

[8] Chap. VIII, p. 224.

[9] Leonhard, p. 9. Engisch, p. 17. Chap. VIII pp. 225, 229.

unsuitable because it more naturally applies to causal processes which operate 'through the mind' analogously with physical processes, e.g. hypnotism.[1]

When one person provides the reason or part of the reason for another to act it is often but not always the case that the latter would not have acted as he did but for the act of the former.[2] When accused was charged with obtaining a premium of 600 marks by false pretences the prosecution failed since the widow who had paid the money in order to obtain a loan of a larger amount admitted that she would have done so even had she known that accused was lending on his own account and not on behalf of an imaginary H.[3] This admission was taken to mean that the false statement was no part of her reason for paying the money. But when accused falsely told certain guards that deceased had killed several inmates of concentration camps, and one of the guards then shot deceased dead, it was held that accused was rightly convicted of instigating the guard to commit malicious wounding with fatal consequences even if the guard had already decided to beat up deceased and would have done so without being prompted by accused.[4] The cases are distinguishable only if we assume that the guard, unlike the widow, was influenced by the false statements at least to the extent that his determination to do violence to the deceased was thereby reinforced. The court in the second case did not appear to notice that its decision was inconsistent with the theory of conditions as normally interpreted.

(viii) *Proof in hypothetical inquiries.* Whether an act is a condition of a given consequence involves consideration of what would have happened upon a hypothetical set of facts.[5] According to the German cases the hypothetical event and so the status of the act as a condition must be established with certainty or with a probability bordering on certainty. It was held to be error in the trial court to convict accused when the evidence merely showed that the harm, an outbreak of fire, *could* or *might* have been excluded by taking certain precautions.[6] There is often a doubt what the reaction of a human being would have been in hypothetical circumstances; since we do not command evidence that human conduct is completely determined such questions can never be answered with more than a high degree of probability. When the question was whether a doctor, if consulted, would have continued a certain treatment the fact that the treatment was medically appropriate and that there was no reason for him to discontinue it was held sufficient to permit the court to conclude with a probability bordering on certainly that he would have continued it.[7]

IV. The Identication of Causes and Conditions

The identification of causes and conditions required by the theory of conditions creates certain difficulties for the criminal courts which adopt the theory of conditions. We have seen how they are sometimes embarrassed by the fact that an act which from a common-sense point of view is the cause of harm would not, upon a literal interpretation ot the theory of conditions, count as a conditions.[8] We may now ask how the courts deal with the converse difficulties which arise when harm which from a commonsense point of view would not count as caused by an act is treated by the theory, owing to the identification of causes and conditions, as a consequence in law.

The identification leads to liability in cases of coexisting conditions such as the susceptibility of the victim,[9] of contributory negligence,[10] and of the concurrent negligence of a third party.[11] This is acceptable unless the negligence is gross or unnatural. The awkward cases, in which the theory of conditions ap-

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[1] Chap. II, p. 54.
[2] Chap. VII, p. 177.
[3] *R.G. St.* 1 (1879), 48.
[4] *2 B.G.H. St.* (1952), 223.
[5] Chap. XV, p. 368.
[6] *R.G. St.* 75 (1940), 50; *B.G.H. St.* 11 (1958), 1.
[7] *R.G. St.* 15 (1886), 151.
[8] Above, pp. 403–5.
[9] *R.G. St.* 5 (1881), 29; 27 (1895), 93; 54 (1920), 349. Maurach, op cit., p. 157. The Bundesgerichthof affirmed this course of decisions in *B.G.H. St.* 1 (1951), 332; the classical case is that of the haemophiliac. *R.G. St.* 54 (1920), 349, above. For similar Spanish decisions see Ferrer, p. 354.
[10] *R.G. St.* 1 (1880), 373; 6 (1882), 249; 22 (1891), 173; 5 (1881), 202; 57 (1923), 393. An example is where the occupier of a house set on fire by the accused returned to recover property and was burned to death. *R.G. St.* 5 (1881), 202.
[11] *R.G. St.* 57 (1922), 148; 67 (1931), 12; 34 (1901), 91; 7 (1882), 111; 66 (1932), 181; *B.G.H. St.* 4(1953), 360.

pears too strict, are cases of voluntary interventions and intervening abnormal or coincidental acts or events, including grossly negligent acts.

Voluntary interventions. It was once thought that voluntary interventions could be regarded as a statutory exception to the theory of conditions in view of the provisions dealing with aiding and abetting crimes, which would be superfluous if the theory of conditions were literally applied.[1] Frank argued that there was an implied prohibition[2] on inquiry into the causes of volutary acts. From this it is deduced that there is no liability for negligent instigation or assistance of the principal offender or for instigation of or assistance in committing suicide, where suicide is not a crime.[3] However, the courts have reached the conclusion that this statutory exception, if it exists at all, does not extend beyond instigation, assistance, and perhaps suicide.[4] The main reason for this conclusion is that Frank's view would make it impossible for accused to be found guilty of crimes of negligence when he had neglected a duty to guard against the voluntary act of another. Thus a seller was convicted of negligent export of forbidden goods when he sent them to a person living near the frontier without inquiring whether they were intended for export, though from the circumstances it appeared probable that they were.[5] Again a husband was convicted of negligently killing his child when he deserted the household without informing relatives or the police, although his wife had frequently threatened to kill herself and the child, which she did.[6]

In consequence of these and other decisions on negligence many authors have adopted the view that cases of the intervention of free and voluntary acts form no exception to the theory of conditions.[7] However, this cannot be taken as finally settled. The main argument in favour of their view is that words such as 'kills' or 'killing' are presumably used in the same sense by the legislature in creating the crimes of intentional killing and negligent killing; so whatever causal relation is implied by the one is implied also by the other. The theory of conditions, it is asserted, provides an account of the only relation which would hold in both classes of case. On the other hand the description of the deserting husband's act as 'negligently killing his child' seems somewhat artificial and it may be that the law is in such cases extending the meaning of words such as 'kills', 'wounds', and 'burns' for reasons of policy; so that the relation of 'providing an opportunity for killing' or 'not preventing killing', which would more naturally be used to describe the conduct of accused, may not be the same as the causal relation implied by the use of 'kills', &c., in ordinary speech or in other contexts of the law.

The Italian penal code expressly makes this distinction, for after providing that no one is guilty of a crime unless the harmful or dangerous event which forms part of the crime is the consequence of his act, it goes on to say that failing to prevent an event, in the case of one who has a legal duty to prevent it, is equivalent to causing it.[8]

German courts have on other occasions appeared to recognize that voluntary intervening conduct negatives causal connexion between condition and consequence. In a case where three persons not acting in concert attacked and killed a fourth, the court said that when one person has given a mortal wound he can be convicted only of attempted homicide if the death is subsequently accelerated by the independent act of another.[9] But on the facts it was held open to the jury to find that two of the three were guilty of intentional homicide since the act of the second did not accelerate the death. This decision appears to recognize that the intervention of a voluntary actor negatives causal connexion; but this is consistent with the theory of conditions.[10]

German military courts also recgonize the importance of a voluntary intervention from the point of view of causal connexion. An N.C.O. was charged

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[1] *St. G.B.*, ss. 48, 49.
[2] *Regressverbot or Rückgriffverbot.*
[3] Engisch, p. 82. Cf. Chap. XII, 294–5.
[4] *R.G. St.* 64 (1930), 316; 64 (1930), 370.
[5] *R.G. St.* 58 (1924), 366.
[6] *B.G.H. St.* 7 (1954), 268.
[7] Nagler, op. cit., p. 19. Maurach, p. 164.
[8] Codice Penale, art. 40: 'non ompedire un evento, che si has l'obbligo giuridico di impedire, equivale a cagionarlo'.
[9] *R.G. St.* 19 (1888), 141.
[10] The decision appears in any event to contravene the theory of conditions since the same consequence would have occurred without the intervention of the second actor. On additional causation see p. 403.

with 'disobedience whereby danger of serious prejudice [to military discipline] was brought about'. He had collected and sold empty cartridge cases and applied the proceeds for purchasing equipment for his men. It was held that if the disobedience consisted in the sale of the cartridge cases and the prejudice arose from the application of the proceeds the accused could not be convicted because the sale and application were not causally connected.[1] The reason why there was no causal connexion is clearly that, although the sale was a *sine qua non* of the application of the proceeds, a voluntary decision intervened.

In Germany the status of a voluntary intervention from the point of view of the theory of conditions must therefore be regarded as undecided. In Spain, where the theory of conditions is taken by the courts as the starting-point, an exception is made when there is the 'express and deliberate fault of the victim'[2] or the 'voluntary act of a third person'.[3] This, according to Ferrer, cannot be explained on any causal theory but only by the fact that the law is concerned not with causation but with responsibility, which is a teleological problem.[4] In Italy the legislature has enacted that the concurrence of pre-existing, simultaneous or subsequent causes, even if independent of the act or omission of accused, does not exclude causal connexion between the act or omission and the result, but subject to the proviso that subsequent causes exclude causal connexion when they are *sufficient by themselves* to determine the result.[5] Many writers have pointed out that the proviso cannot be interpreted literally; but it appears to leave room for some mitigation of the awkward results of the theory of conditions. Subsequent voluntary conduct might be regarded as within the proviso.

Abnormal intervening events and acts. The courts have met the difficulty of reconciling the theory of conditions with the requirements of common-sense in cases of coincidence and extraordinary intervening events or acts in various ways. In one recent case the Bundesgerichtshof stated that while reaffirming its adherence to the theory of conditions, it was unnecessary to decide what the position would be as regards causal connexion if a victim wounded by the accused was struck and killed by lightning in the place where he was immobilized by the wounding, or if he was killed in an accident while on the way to consult the doctor.[6] The more usual approach, however, is to deal with the difficulty under the heading of fault. Two cases may be contrasted. In one accused drove a lorry in the early morning with an unlighted trailer. He was stopped by the police and then ordered to drive to the nearest petrol station, the policeman intending to follow behind him in a car and so protect him from collision from the rear. However, before the police car was in position another lorry collided with the unlighted trailer from the rear and the driver was killed. Accused was convicted of negligent killing because his omission to light the trailer was a necessary condition of the death and he was negligent (in relation to the death) because the course of events was not unforeseeable or beyond all probability.[7]

In another case, however, accused, who was drunk, was wheeling his bicycle home at night when he fell in the road. A passing motorist stopped and removed him to the side of the road, but as he was returning to his car another motorist driving negligently from behind collided with the first motorist's car and killed his wife. Accused was acquitted of negligent killing since, though his act was casually connected with the death according to the theory of conditions, he was not negligent because the combination of the attempt at rescue and the negligence of the second motorist made the course of events unforeseeable, though neither was unforeseeable by itself.[8]

This shows how the awkward effects of the theory of conditions may be mitigated by the use of a doctrine that negligence is relative to the course of events. By an application of common-sense principles of causation the same conclusion might well have been reached but for different reasons. In the first case the fact that a collision occurred with an unlighted vehicle just at the moment before the police vehicle was in position would not, perhaps, be re-

[1] *R.M.G.* 10 (1906), 40. Cf. *R.M.G.* 18, 58; 20, 237.
[2] S. 6.2.1923. A. H. Ferrer, p. 360.
[3] S. 30. 9. 1909. Ferrer, ibid.
[4] Ferrer, p. 376.
[5] Codice penale, art. 41.
[6] *B.G.H. St.* 1 (1951), 332, 334.
[7] *B.G.H. St.* 4 (1953), 360.
[8] *B.G.H. St.* 3 (1952), 62.

garded as a coincidence negativing casual connexion, since there is, even during a short period of time, an appreciable likelihood that an unlighted vehicle on a road will be struck by another from behind in conditions of poor visibility. On the other hand, the likelihood that a lighted vehicle which has stopped at the side of the road for a short period will be struck from behind, as in the second case, is so small that the occurrence might reasonably be regarded as a coincidence; and the court's language indicates that it was the combination or coincidence of the two events which it regarded as the decisive factor.

The German writers themselves have made a number of objectives to the application of the theory of conditions in criminal law. First, it departs from ordinary usage, as we have repeatedly emphasized, and hence on this ground Beling, for example, who had first accepted the theory, later rejected it. Secondly, it leads to what is regarded as too extensive responsibility in some classes of case. One of these is the egg-shell skull or haemophiliac type of case; it is thought too harsh to hold an accused person liable for harm of which the pre-existing susceptibility of the victim is a concurrent cause. The adequacy theory, which is preferred in this respect, is only a part cure for the mischief, because it relieves an actor from liability not when there is an abnormal auxiliary condition but when the act does not significantly raise the probability of the harm. On this basis accused is not guilty of homicide if he has given a very light blow; but if he has given a fairly heavy blow which has resulted in death because the victim was a haemophiliac, he is liable. Common-sense principles do not of course, afford a remedy for this difficulty, since they draw a distinction between pre-existing conditions of the victim and subsequent abnormal events.

Another objectionable class of case is felt to be that of crimes aggravated by their consequences,[1] such as malicious wounding with fatal consequences. This may seem strange to an Anglo-American lawyer, who is used to the felony-murder doctrine, which may make accused liable for the full crime of murder in circumstances where there is no initial crime as serious as malicious wounding. But in Germany the injustice has been felt to be such that the legislature has intervened by adding an extra requirement of fault or *mens rea* in such cases, viz. that the ultimate harm must have been at least negligently brought about;[2] this enables the court to consider not only whether the ultimate harm was foreseeable by the accused at the time of his act but also whether the actual course of events has been 'outside all experience',[3] and hence to relieve from liability in the event of a coincidence.

The cases least catered for by any of the possible correctives to the theory of conditions are those in which accused does an act intended to produce the harm but the harm occurs through the intervention of a subsequent voluntary act or abnormal event or act; for example, A wounds B intending to kill him and B is on his way to consult a doctor when he is deliberately killed by C or struck by a falling tree, neither of which would have occurred but for the original wounding, since B would not otherwise have been at that place. The theory of conditions does not provide a satisfactory solution of this difficulty and in practice, as we have seen, common-sense causal limitations *are introduced* in a disguised form as part of the theory of fault.

XVII—THE GENERALIZING THEORIES: ADEQUATE CAUSE

The theory of conditions, described in the last chapter, has been accepted by the criminal courts of Germany and several other countries for the last seventy years. Not all writers, however, even in the field of criminal law, have been satisfied with it and in civil law it has failed to gain the allegiance of the courts, which have felt that it would lead to an undue extention of civil liability. Instead, civil courts have turned to the so-called generalizing theories[4] for guidance; of these the most successful and multiform has been the *adequate cause* or *adequacy theory*.[5]

The generalizing theories differ from the individualizing theories in that, though they also concentrate on the selection of one from among a set of con-

[1] *Erfolgsqualifizierte Delikte*, viz. cases where an act already punishable is more severely punished if it has certain consequences.
[2] *St. G.B.*, s. 56.
[3] On the relativity of negligence see Chap. IX, p. 235.
[4] See Chap. XVI, p. 383.
[5] *Theorie der adaquaten Verursachung; Adäquanztheorie.*

ditions of an event as its cause, they select a particular condition as the cause of an event because it is of a kind which is connected with such events by a generalization or statement of regular sequence. Most individualizing writers, on the other hand, were satisfied to select a condition as the cause of an event if it 'contributed' more of the 'energy' needed to 'produce' the event on a particular occasion than any other condition. The generalizing writers, however, are not satisfied by the demonstration that if an identical set of conditions is assembled on another occasion then, at least when natural occurrences are involved, an event of the same kind will follow, and that in this sense every condition of an event is *generally* connected with it. They seek rather a general connexion between a condition and a subsequent event in the sense of a relation which will hold good although the condition is combined with a varying set of other conditions. So 'general' here primarily means 'not confined to a determinate *set* of conditions'.

Von Bar was the forerunner of the generalizing school. He took as his starting-point the theory of conditions as expounded by Glaser[1] but denied Glaser's conclusion that every condition is entitled to be called a cause. 'Every cause of an event', says von Bar, 'must necessarily be a condition but it is incorrect to call every condition a cause.'[2] The selection of causes is relative to the purpose of the inquiry; when a stone is dropped gravitation is the cause of its fall for the scientist, the act of letting it go for the lawyer or moralist. Our notion of cause, he asserts, is derived from our experience as children that our body regularly obeys our will and that, by exploiting a knowledge of regular sequences practical purposes can be achieved. But all such regular sequences, including statements of natural laws, presuppose the existence of auxiliary conditions which are regarded as being *regularly* present and the absence of counteracting conditions, which are regarded as exceptional.[3] These regular or normal conditions are not causes; on the contrary, their existence is presupposed by any causal statement. A cause is a condition which *departs* from the ordinary or regular course of events. 'A man is in the legal sense the cause of an occurrence to the extent that he may be regarded as the condition by virtue of which what would be otherwise regarded as the regular course of events in human experience is altered.'[4] On the other hand, one must not identify 'being the cause of an event' with doing an act which foreseeably will be followed by that event. Thus, a doctor undertaking a dangerous but necessary operation, which in fact results in the patient's death, foresees death but is not, according to von Bar, the cause of it.[5]

The example of the dangerous operation illustrates one of the weaknesses in von Bar's exposition: his failure to distinguish clearly between the requisites of fault, unlawfulness and causal connexion.[6] The doctor's act in performing the dangerous operation would, unless he failed to use due care, be necessary and not so unlawful. Hence he would not be legally responsible even if his act were causally connected with the patient's death.

However, von Bar's emphasis on the importance of the 'regular course of events'[7] in causal contexts marked an important advance, for the notion of the 'normal course of events' is indeed fundamental in the analysis of causation.

I. Rise of the Adequate Cause Theory

The theory of adequate cause appeared to offer both a justification for and a more precise formulation of von Bar's reference to the 'regular course of events'. It was the Freiburg physiologist von Kries who first advanced this theory in the 1880's.[8] Von Kries was interested in the mathematical theory of

[1] Von Bar, op. cit., p. 4. Above, p. 391.
[2] Ibid.
[3] Op. cit., pp. 9–11.
[4] Op. cit., p. 11.
[5] Op. cit., p. 14.
[6] Now said by some Ango-American lawyers to be a virtue. *Roe* v. *Minister of Health*, [1954] 2 Q.B. 66, 84, *per* Denning L.J.
[7] 'Cours habituel des choses', Bouzat, *Traite de Droit Penal*, p. 49 n.
[8] J. von Kries, *Die Prinzipien der Wahrscheinlichgeitsrechnung* (1886). *Über den Begriff der objektiven Möglishkeit und einiger Anwendungen desselben* (1888); *Über die Begriffe der Wahrscheinlichkeit und Möglichkeit und ihre Bedeutung im Strafrechte* (1889—*Z. St. W.* ix. 528. Andolisel, op. cit., p. 117 advanced its Germanic origin as a reason for rejecting the adeqlate cause theory. Grispigni ('Ilnesso causale nel diritto penale', (1935) *Rivista italiana di diritto penale* 13. 31) replied that the theory of conditions was also of German origin and that the adequate cause theory had been adumbrated by the Italians Romagnosi and Carrara (*Programma* 1, s. 1093).

probability and also in the statistical aspects of sociology [1] and considered that the notion of probability could be applied to the law also. Objective probability [2] (*Moglichkeit*), he argued, must be distinguished from subjective probability (*Warscheinlichkeit*), for objective probability is a relationship between events independent of our knowledge.

Von Kries appears to use 'objective' to make at least three different points: (i) that a statement of the relative frequencies [3] of classes of events is independent of our knowledge or expectation. Thus if a die shaped as a regular cube is thrown a large number of times it is found that a six turns up approximately one-sixth of the total number of throws; hence the relative frequency of sixes to throws is about one-sixth. On the basis of a knowledge of this frequency one might assert that the probability of a particular throw being a six was about one-sixth; this would be to apply to a particular case a statement of regular frequencies and so to apply an objective relation between classes of events in making a particular probability statement. One important sort of particular probability statement is indeed a statement applying relative frequencies in this way and von Kries's point is therefore of importance; but this is not the only way in which the probability of a particular occurrence is estimated.[4]

It is important to realize that frequency generalizations, though 'objective', are relative to the class of events chosen for comparison and to the description of the class. Thus, though one might loosely speak of the 'frequency of deaths from tuberculosis', in order to estimate probabilities we must know the frequency as a proportion of some other class, e.g. deaths from all causes in Great Britain in a given year. This proportion will clearly not be the same as the relative frequency of deaths from tuberculosis to the total number of persons in Great Britain in a given year. There is nothing in the statement that the relative frequency of ordinary throws of a die and sixes is about one-sixth inconsistent with the possibility that a machine might be constructed which would always or nearly always throw a six. The relative frequency of *throws with the machine* and sixes would differ from the relative frequency of ordinary throws and sixes. Hence while statements of relative frequency are true, whatever our knowledge and expectation, statements applying such frequencies alone to determine the probability of a particular event are always based on incomplete information, since the person making the estimate knows only that there has been or will be an event of one class and is using the relative frequencies to determine the probability that this also was or will be an event of another class. If the person making the estimate knew more about the circumstances he would not need to rely merely on the relative frequencies of the two classes of events.

Von Kries's point is a good one; but the difficulty of ascertaining relative frequencies and of settling the description of the classes of events between which the frequencies hold is very great. Questions of description we leave for later consideration.[5]

(ii) Von Kries further treated statements of relative frequency as themselves merely the sign of more fundamental relations between classes of events; it is these more fundamental relations that are described by him as relations of objective probability. Thus, the objective probability, he says, of a regular die turning up a six is exactly one-sixth and the observed frequencies, which are not, of course, exactly one in six are merely signs of this. This part of his theory is open to criticism in so far as it assumes the existence of relations between classes of events which are real but not derived from observation. But for purposes of the legal theory of causation we may neglect this part of von Kries's theory and argue as if he was merely concerned with relative frequencies. We therefore speak henceforth of the (objective) probability

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[1] Lexis, *Zur Theorie der Massenerscheinungen in der menschlichen Gesellschaft* (Freiburg, 1877).

[2] The natural translation of this word is 'possibility' and *possibilite* was the word used by Laplace for probability in an objective sense; so also Cournot, *Exposition de la theorie des chances et des probabilites*, from whom von Kries drew his distinction. Kneale, *Probability and Induction*, p. 170. But the use of the term 'possibility' in this sense would be a source of confusion for the lawyer and we have therefore preferred 'objective probability'.

[3] See Kneale, op. cit., p. 152.

[4] Below, p. 415.

[5] Below, p. 424.

of B given A as if this were derived merely from the relative frequency of events of class A and class B.

(iii) Von Kries also argued that statements of probability were 'objective' in the sense of not being based on a *mistaken* estimate of the frequencies, such as might be made by a person asked to estimate the probability of a die turning up a six who did not realize that the die was loaded. But this is a trivial point; a person making any estimate may be mistaken about the facts on which he bases it.

Von Kries's substantial point is that statements of relative frequencies are objective in sense (i). It is important, however, to realize that when we say that a particular event B is more or less probable given another event A we are not always merely applying our knowledge of the relative frequencies of events of classes A and B. We may instead be drawing a tentative conclusion from a generalization for which the evidence is inconclusive, as when we say that X who is suffering from a certain disease will probably become blind, because there is strong but not conclusive evidence for the generalization that everyone who suffers from the disease becomes blind. Common to both these instances is the fact that a particular probability statement is made on the basis of incomplete knowledge; but the knowledge may be incomplete either because the best generalization available is a statement of frequencies or because the evidence, either for a particular fact or for a universal generalization, is inconclusive. Particular probability statements may be called 'objective' in von Kries's sense so far as they merely apply frequency generalizations.

Von Kries applies the concept of objective probability as a constituent element of causal statements in the following way. A given contingency will be the *adequate cause* of harm if and only if it satisfies two conditions: (i) it must be a *sine qua non* of the harm, (ii) it must have 'increased the objective probability' of the harm by a significant amount.[1] The idea of increasing objective probability may perhaps be made clear by the following example: a certain proportion of human beings suffer from tuberculosis; from this is inferred the objective probability of a human being's suffering from tuberculosis. A higher proportion of miners suffer from tuberculosis and the objective probability of a miner's so suffering is correspondingly greater. Hence a man's becoming a miner is said to increase the probability of his catching tuberculosis and, if he would not have caught it but for becoming a miner, to be the adequate cause of his catching the disease.[2] The bare relationship signified by *sine qua non* or necessary condition is treated by von Kries as a causal relationship distinguished from adequate cause as 'non-adequate' or 'coincidental';[3] this non-adequate relation can be established, says Von Kries, by attending solely to the particular case without applying generalizations.[4]

Von Kries further claims that the results reached by applying his notion of adequacy are very similar to those which a layman, and still more a lawyer with a trained sense of justice[5] would reach by appealing to the teachings of experience and the regular course of events, and offers his theory as a rational reconstruction of these more intuitive notions. Indeed the adequacy theory itself is sometimes stated not in the strict form given above but in the loose form that a condition is the adequate cause of a consequence if it has a tendency, according to human experience and in the ordinary course of events, to be followed by a consequence of that sort.[6]

The results obtained by the two approaches will indeed often converge. Thus becoming a miner is the adequate cause of catching tuberculosis because of the substantially greater frequency with which miners catch it than human beings as a whole. It is also true that the conditions which together with being a man, &c., suffice to produce tuberculosis, e.g. prolonged exposure to coal-dust, are such as miners are frequently exposed to. Such conditions may be called

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[1] The word *begunstigen* is used for 'to increase the objective probability'; its opposite is *gleichgultig sein* or *indifferent sein*.

[2] Von Kries, *Über die Begriffe der Wahrscheinlichkeit und Möglichkeit*, above, p. 412.

[3] *Zufalliger Erfolg*.

[4] In this he was mistaken, since generalizations are needed in order to establish the existence of the relationship of necessary condition.

[5] *Gebildetes Rechtsgefühl*. The difference between a trained and untrained sense of justice von Kries saw in the supposed fact that the untrained layman makes casual judgments without appealing to generalizations while the trained lawyer makes use of generalizations of probability for this purpose.

[6] Enneccerus-Lehmann, ii. 63.

normal for miners. Hence it will often be true that, when a condition has increased the objective probability of a consequence, the consequence will be found to have occurred in the ordinary course of events without the intervention of any abnormal contingency. There will, however, be a divergence if a consequence of the class of which there is a greater probability occurs, but only owing to the intervention of an abnormal contingency, e.g. a man takes a job as a miner in a certain town where he meets and marries a girl from whom he contracts tuberculosis. Here becoming a miner is the adequate cause of catching the disease but the disease has not occurred in the ordinary course of events (for a miner).

Von Kries gives an example of non-adequate causation the case of a coachman who in breach of duty falls asleep so that the coach deviates from the agreed route; during the course of the deviation the passenger is struck by lightning, which he would not have been on the correct route.[1] Here 'falling asleep' as opposed to 'keeping awake' does not significantly increase the probability of 'passenger being struck by lightning'.[2] The chances of being struck by lightning are in fact small whether the coachman is asleep or awake, and if the passenger is in fact struck by lightning this will ordinarily be described as something out of the ordinary course of events, and the fact that lightning struck at that particular spot will be treated from a common-sense point of view as a coincidence. Here a divergence between the two methods of approach is avoided only because the lightning is incorporated in the description of the consequence.

Hence, though there is not a complete correspondence between von Kries's theory and von Bar's appeal to the normal course of events, there is often a convergence. Von Kries indeed thinks that the use of the notion of the normal course of events has been well inspired and he admits that his stricter notion of increased probability cannot be applied with mathematical accuracy; there is no clear line between adequate and non-adequate causes.[3]

Von Kries does not explain whether by increasing the risk to a significant extent he is referring to an act which increases the risk considerably or to one which increases it to a considerable risk. This may be important in practice. Suppose that there is a rare disease, peculiar to bakers. The risk of a non-baker contracting the disease is nil and therefore A's act in becoming a baker increases the risk of it infinitely in relation to what it was for A previously. But becoming a baker does not entail any considerable risk of contracting the disease and therefore on a second possible interpretation A's act is not the adequate cause of contracting the disease. The second interpretation is more consistent with von Kries's general position.

Von Kries's work appeared to show that the promptings of common sense were scientifically reputable and his work was soon accepted and developed by those who felt the theory of conditions to be artificial and only tolerated it because of its supposed philosophical repute. The first to do this was a criminal law writer, Merkel.[4] Others soon followed suit; among the best known are Helmer,[5] Rumelin,[6] Leipmann,[7] and above all Trager.[8] The civil Senate of the Reichsgericht accepted the adequate cause theory in 1898[9] and it and the civil senate of the Bundesgerichshof have followed it since; it has also been accepted by the civil courts of Austria and Switzerland and to a varying extent of other continental countries.

Some have thought that von Kries's appeal to probability in solving causal now ceased to be even a theoretical idal of science to discover causal laws in

[1] Op. cit., p. 532.
[2] This illustrates how much turns on the description of the class of consequences. If the description were 'passenger being killed' falling asleep would increase the probability of it.
[3] Op. cit., p. 533.
[4] A. Merkel, *Lehrbuch des deutschen Strafrechts* (1899), p. 99.
[5] *Über den Begriff der fahrlässigen Täterschaft* (Strassburger Dissertation 1895).
[6] *Der Zufall im Recht* (1896), p. 44. *Die Verwendung der Kausalbegriffe im Strafund Zivilrecht* (1900).
[7] *Einleitung in das Strafrecht* (1900), p. 67.
[8] *Der Kausalbegriff im Straf- und Zivilrecht* (1904). This is the work on causation most frequently cited in German civil courts.
[9] *R.G.Z.* 42, 291 (breach of contract in storing goods susceptible to damp on ground not cause of damage to them by flood).

science and by the fact that in quantum theory it appears impossible in principle to formulate them otherwise.[1] Hence some have maintained that it has now ceased to be even a theoretical ideal of science to discover causal laws in the sense of statements of conditions which are invariably followed by a given event without exceptions.[2] Other scientists maintain the contrary and whichever group is right, the causal priciples to which we appeal in everyday life, if particular causal statements are challenged, are not thereby invalidated,[3] though it is proper to point out that their supposedly invariable character depends on consequences and conditions being somewhat roughly described. The law is satisfied, in deciding whether the negligence of a motorist caused a collision with another vehicle, with a description of the positions of the two vehicles which would not be accurate enough for the purposes of atomic physics.

Von Kries's claim that the conclusions of the adequacy theory would largely coincide with those reached by a 'trained sense of justice', however, met with opposition. Tarnowski argued that 'a trained sense of justice' was too vague and uncertain a notion to vindicate the adequate cause theory;[4] for not merely does the ordinary man's sense of justice leave him in uncertainty in borderline cases, but even when it leads to a clear decision, no one can say whether the decision is based on fault, causation, or some other element in responsibility. These criticisms led not to the abandonment of the notion of adequacy but to its derivation from a new principle. Tarnowski, Grispigni, and others argued that both civil and criminal law involve 'normative' judgments. The law decides that a person should or should not have done a given act at a given time. But, it is argued, such a judgment is only rational so far as the person in question had at that time[5] the possibility of influencing the actual course of events. Hence the 'normative' judgment cannot extend to an event of which the actor did not increase the probability though his act was a necessary condition of it.[6] The relation of adequacy is therefore a presupposition of any 'normative' judgment.

According to Tarnowski adequacy belongs to the 'factual', not the 'normative' part of the legal process; according to Grispigni, it belongs to the normative part, and the notion of cause is to be understood in the law in a normative sense.[7] Otherwise Grispigni's argument is very similar. The object of many norms is to forbid conduct because of its tendency to produce certain 'consequences' (known usually to follow from it.)[8] Hence we must look to the moment when the law's threat operates or should operate on the mind of the actor; if the consequence was probable given the act, if the act was 'capable' of producing it, the norm forbids the act in relation to that consequence, otherwise not.[9]

These views presuppose that the law's 'normative judgment' relates not merely to whether defendant or accused should have done the original act but to the whole *Tatbestand* consisting of act, conditional connexion and consequence. This seems inconsistent with the wording of continental codes which appear, like Anglo-American statutes, to forbid certain acts because of their tendency, in general, to produce harm, but not conditionally upon their being a specific probability in a particular case that the harm will occur. There appears to be in the works of Tarnowski and Grispigni a confusion between the rationale and content of a norm forbidding certain conduct. The reason for the imposition of a norm does not always define the limits of its operation.

There are several possible cases in which the law may hold a person responsible for the consequences of his conduct although, in a certain sense, the conduct did not significantly increase the probability of the harm. In the first place the law may forbid conduct because, although the amount by which the conduct would increase or fail to decrease the risk of harm occurring is very

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[1] W. Heisenberg, *Das Naturbild der heutigen Physik*, p. 27. The scientific controversy about this is by no means settled.

[2] H. Kelsen, *Vergeltung und Kausalitat* (1941), pp. 256–76.

[3] Leonhard, op. cit., p. 85.

[4] H. Tarnowski, *Die systematische Bedeutung der adäquaten Kausalität fur den Aufbau des Verbrechensbegriffs* (1927), p. 15.

[5] It is a further question, on which different views are held, whether the actor must have realized that he could by his conduct increase the probability of the harm.

[6] Tarnowski, op. cit., p. 339, no. 3. But why cannot an actor influence the course of events by failing to decrease the probability of harm?

[7] Op. cit., p. 17.

[8] Above, p. 415.

[9] Grispigni, op. cit., pp. 18–20.

small, the harm, if it did occur would be very great. Thus an employer may have a special duty to provide goggles for a one-eyed mechanic because, though his doing so would not greatly decrease the risk of blindness, which was small in any event, the possible harm is very serious.[1] Secondly the law may hold a person responsible for harm which is a consequence of his conduct although such conduct does not in general significantly increase the risk of such harm; the legislator may have miscalculated the probabilities. Finally, the act may, upon the description adopted by the legislator, significantly increase the risk of harm although in the light of the information available to the actor it does not do so. Thus 'administering poison' may be made a crime because of its tendency to injure health and life; yet on the information available to X, who gave Y poison, the risk may have been negligible, because X knew that Y regularly took an antidote. Suppose that on this occasion Y forgot to take the antidote and unexpectedly died. There seems no reason why X's conduct should not form the subject of a normative judgment; because the law may simply have forbidden the administration of poison, irrespective of whether *on the information available to the actor* on a given occasion the conduct would significantly increase the risk of harm.

This modern justification by Grispigni of the concept of adequacy means that adequacy is not necessarily now regarded as a theory of causation and the change has been marked by the fact that while the older generation spoke of the 'adequate cause' theory, recent writers speak of the 'adequacy' theory.[2]

Since the war the civil courts of the Federal Republic have emphatically interpreted the notion of adequacy as a means of setting fair limits to responsibility and in doing so have expressed themselves in terms to which many modern American writers would assent. 'Only if courts remain conscious of the fact', said the Bundesgerichtshof in the important *Edelweiss* case in 1951,[3] 'that the question is not really one of causation but of the fixing of the limits within which the author of a condition can fairly be made liable for its consequences, viz. basically one concerning a positive presupposition of liability, can they avoid schematizing the adequate cause formula and guarantee correct results.' The decision, however, did not depend on this view. Through defendant's negligence the *Edelweiss* jammed in a canal and there was evidence of subsequent mistakes on the part of professional persons in charge of the canal, of an unexpectedly sudden rise in the water level and of a failure of electric current. But for these contingencies the *Edelweiss* would not have sunk. The trial court 'ought to have examined whether the conjunction of these numerous conditions, partly set by incompetent persons and partly, perhaps, merely fortuitous, did not lie outside the normal range of experience,[4] since a wrongdoer is not responsible for the intervention of incompetent persons acting in a wholly unusual and inappropriate way. This is quite consistent with the common sense principles by which grossly negligent intervening acts or coincidental events negative responsibility.[5]

We discuss the detailed application of the adequacy theory later.

Variants of adequacy and cognate notions. Most of the other modern theories are variants of the adequacy theory or of von Bar's views. Some hold that an event is in law a consequence of a condition when the condition, i.e. the human act is *suited* to the production of the event in the sense that the event follows *typically* upon it.[6] This view has been more recently restated by the California writer Ehrenzweig,[7] as providing the key to a general theory of civil responsibility, not merely to the theory of causation. The notion of a typical consequence is a reformulation of von Bar's notion of a harmful consequence occurring 'in the normal course of events'. Much the same idea underlies the conclusion of Engisch who considers that the notion of causation can, for criminal law, be confined to that of a condition, but that there exist further essentials of liability, i.e. that the act of the accused should be dangerous

[1] *Paris* v. *Stepney B. C.*, [1951] A.C. 367.
[2] *Adäquanztheorie.* But Nagler refused to adopt the new form, regarding it as a philological barbarity.
[3] *B.G.H.Z.* 3 (1951), 261.
[4] Ibid., 261, 267.
[5] Chap. VI, pp. 153, 169.
[6] S. Ranieri, *La causalità nel diritto penale* (1936), p. 146. L. Jimenez de Asua makes 'typicity' part of the juridicial relevance of the sequence of events and holds that adequacy is an integral part of typicity. *Tratado de Derecho Penal,* iii. 497.
[7] 'Negligence without Fault.'

and that the danger should have been 'realized'.[1] To say that an act is dangerous is much the same as to say that harm follows it typically or in the ordinary course of events. The reference to 'realization of the danger' is intended to exclude responsibility in those cases in which the ultimate harm is typical but the causal process involves laws different from those which would be involved in the typical case, e.g. the victim of a serious wound dies of cholera through drinking dirty water in the hospital to which he goes to have his wounds treated. This argument, of course, presupposes causal laws in a sense other than that of typical sequence.

Krückmann's view, that the essence of causation in the law is to be found in the control of the actor over the external world [2] is closely related to the modern defence of the adequacy theory as resting on the sense of justice of the ordinary man. A defendant is only to be held responsible for events over which he had control and this excludes coincidence and is primarily determined by the foreseeability of a consequence at the moment of acting.

The theory of *relevance*, whose leading exponent is now Mezger, is really a version of the adequacy theory, not applied to causation but regarded as an independent element in liability. For causation the theory of conditions is held to suffice, but this must be supplemented by the notion of relevance to the consequence designated by the particular rule of law (death, bodily injury, fire, &c.). An accused person is only responsible if, in addition to having caused the harm, his act was appropriate to it (*Tatbestandsmassig*).[3] On another version [4] a consequence, in the sense of the theory of conditions is relevant or imputable if it may be regarded as under the control of the will. This must presumably be interpreted not literally, for on a literal view consequences of which the act in question is a necessary condition could always have been avoided if the actor had refrained from doing what he did and in that sense the fact that his act was a condition of the harm establishes that the harm was under the control of his will. However, we are presumably intended to regard control as primarily depending on foreseeability.

None of these recent views therefore appears on examination to be more than a variant of von Bar's views or of one of the forms of the adequacy theory. Some of the writers treat the notions of 'typical', 'dangerous', 'subject to control', 'relevant', &c., as part of the meaning of the concept of causation in the law: others treat them as independent requisites of responsibility. Since most of the writers do not purport to be reproducing a notion of causal connexion which has an application outside the law and there is no explicit legislative authority for any of these views, the difference between these two methods of treatment is more apparent than real.

Policy. As we have seen, the Bundesgerichtshof has recently affirmed that the adequacy theory is a vehicle for giving effect to the policy of setting fair limits to civil responsibility. Even in the nineteenth century some writers laid the main emphasis on the role of considerations of justice and indeed of personal preference in the decision of causal issues while others advocated that the decision in such cases should be left to the unfettered discretion of the judge. To the first group belonged Hess, who stressed the importance of ethical feeling in causal judgments and pointed to the influence which the judge's taste: outlook, character, and political views would have on his decisions.[5] In modern times the French writer Esmein has come to the conclusion that causal connexion in the law falls into two parts: one is factual, i.e. the *sine qua non* relation: the other comprises imputability, which Esmein equates with 'moral causation'.[6] This exists when the defendant *deserves* to pay compensation for the harm. The main guide to its existence is foreseeability.

Of the advocates of judicial discretion we may mention Berner who regarded theoretical discussion of causation as so much scholastic learning enveloped in fruitless and confusing abstractions.[7] His contemporary Dernburg held

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[1] Engisch, op. cit., p. 68. To the same effect Florian and, formerly, de Asúa, op. cit., p. 433.

[2] P. Krückmann, 'Verschuldensanrechnung, Gefährdungsanrechnung und Deliktsfähigkeit', *Jherings Jahrbuch*, 55, 25.

[3] Mezger, *Strafrecht I*, Allgemeiner Teil (1948), pp. 57–58.

[4] H. Mayer, *Strafrecht*, Allgemeiner Teil (1953), pp. 133, 137.

[5] A. Hess, *Über Kausalzusammenhang und unkörperliche Denksubstrate* (1895), p. 16.

[6] Planiol-Rinert-Esmein, op. cit., s. 541. For further discussion of these views see Chap. X, p. 270.

[7] *Lehrbuch des deutschen Strafrechts* (1898), p. 116.

that the decision of causal questions should be left to the reasonable discretion of the judge[1] and at the present day Enneccerus-Lehmann offers the same solution for doubtful cases.[2] Such views have a natural appeal in that they dispense the jurist from offering further guidance, but they cannot be regarded as characteristic of the continental views in either theory or practice.

Most recently Von Caemmerer has eloquently restated the modern American view that the notion of cause is really that of *sine qua non* and that any further questions 'are merely concerned with the purpose and scope of the rule imposing liability. The question of the limits of liability is to be solved by deploying the meaning and range of this particular rule, not by applying general causal formulae.'[3] However, he does not investigate, in his short description of this approach, cases where even after the purpose of a statute is identified questions of causation still remain. Criticisms of this too optimistic reliance on the scope or purpose of legal rules as a solution for all causal problems will be found in Chapter X. In any case courts have not yet ceased to take seriously the detailed formulation and application of the adequacy theory and it is this which we now consider.

II. Detailed Application of the Adequacy Theory

We have already considered the historical development of the adequacy theory.[4] Its details may be approached through a discussion of a famous case.[5] The owner of two lighters sued a contractor for breach of a contract by which the lighters were to be towed from Cuxhaven to Nordenham on 28 October 1909, on which day the weather was fine. The contractor began to tow on the 28th but despite the owner's objections returned to port. The weather forecast for the 29th was favourable and the lighters were towed on that day but during the voyage a storm broke out and they suffered severe damage. On appeal it was held that the delay by the contractor was the adequate cause of the damage. The court said that the damage need not be foreseeable; it was sufficient that the 'objective probability of a consequence of the sort that occurred was generally increased or favoured' by the breach. On the facts the delay had increased the risk of loss since, at the end of October, it is more likely that the weather will hold for a journey of six hours begun in good weather than it will hold on the following day, even if the weather forecast is favourable.[6]

The court also discussed the case from the standpoint of the common-sense or loose notion of the 'natural course of events'. It held that the consequence need not follow in accordance with a rule but that it must not occur only through the intervention of a contingency 'contrary to the natural course of events',[7] which could equally well have occurred without the breach of contract: a collision of the lighters with a steamer on the 29th, which would not have occurred in fact on the 28th since the steamer in question would then have been out of range, would have been such a contingency. But the storm was not unusual for the time of year.[8]

We deal first with the adequacy theory as strictly formulated and consider in turn: (i) the generalization (description) of the consequence; (ii) the generalization (description) of the condition; (iii) amount of the increase in probability required; (iv) alteration of risk; (v) calculation of probability; (vi) difficult cases; (vii) relation of the adequacy theory to the 'normal course of events'.

(i) *Generalization of the consequence.* The problem of the 'generalization' of the consequence, in the adequacy theory, is that of describing the class of events whose probability must be shown to have been significantly increased by the wrongful act. It is clear that the so-called concrete description of the consequence in 'all its details' advocated by some for the description of the consequence in order to ascertain whether an act is a condition,[9] cannot be applied here; the description must be 'abstract'.

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[1] *Bürgerliches Recht* (1899), ii: 1. 65 ff.
[2] Op. cit., ii. 61.
[3] *Das Problem des Kausalzusammenhangs im Privatrecht* (1956).
[4] Above, p. 412.
[5] *R.G.Z.* 81 (1913), 359. Cf. *R.G.Z.* 105 (1922), 264 (shooting by policeman the adequate cause of death in hospital from influenza during epidemic).
[6] *R.G.Z.* 81 (1913), p. 363.
[7] The contingency here is not the storm but the conjunction of the storm and the exposure of the ship to it while at sea.
[8] *R.G.Z.* 81 (1913), p. 362. Cf. Chap. VI, p. 157.
[9] Above, p. 398.

The adequacy theory is concerned with the relation of probablity between the condition and the ultimate consequence, not between the condition and any third factor which contributes to produce the ultimate harm.[1] But the probability of the occurrence of the third factor can be made indirectly relevant to the adequancy of the condition by incorporating the third factor in the description of the ultimate consequence. If defendant gravely wounds the victim and leaves him under a tree where he is struck by lightning and killed, the wounding may be adequate if the harm is described as 'death' but possibly not if it is described as 'death by lightning'. The incorporation, in the description of the consequence, of such a third factor enables the adequacy theory to reach almost the same conclusions as would be reached by applying the common-sense principle that an intervening coincidental event negatives causal connexion,[2] for if the conjunction of a wrongful act and an intervening contingency is very unlikely, the wrongful act will not often have significantly increased the risk of a conjunction of the intervening contingency and the ultimate harm. It is very unlikely that a tree will be struck by lightning just at the moment that accused has left his wounded victim beneath it; it will also in general be true that the act of accused in leaving his victim under the tree has not significantly increased the risk of the victim's being killed by lightning. Hence there is a tendency among the theorist of adequate cause to incorporate in the description of the consequence such third factors as will enable the results of applying the theory to accord with common-sense judgments about coincidences.

Thus Radbruch says that while strictly it is only the ultimate consequence whose adequacy falls to be determined one should also, in fixing the description of the consequence, take account of the 'most important points of transition from the bodily movement to the final consequence', according to their class description.[3] Another solution is to require, in addition to adequacy, 'typical causal sequence at least when the case concerns a crime aggravated by its consequences.[4] A third is to require, in addition to adequacy, that the probability relationship should not be unsuited to explaning the configuration of events, in view of later contingencies not imputable to the actor.[5] Von Kries himself states the adequacy theory at times in a form which is inconsistent with the requirement that it is only the ultimate harm for which the condition must be adequate. Thus he says that the problem is whether 'the connection... with the consequence is a genralised one or merely a particularlity of the case in question, whether the factor (the conduct in question) . . . is generally apt, or possesses a tendency, to bring about a consequence of that sort, or whether it has merely occasioned it accidentally'.[6] His contrast between having a tendency to bring about a consequence and bringing it about accidentally can only be sustained if those factors which might lead one to say that the consequence had followed accidentally or by a coincidence are incorporated in the description of the consequence.

But this would make the notion of increased probabilities quite unworkable. For even if we can settle what are the 'important' third factors which must be incorporated into the description of the consequence the same difficulties of description are met again in describing these factors.[7] If 'death' must be replaced by 'death by lightning', why not by 'death by forked lightning'? Where will the process extending the description stop? It could not logically stop short of including every factor relevant to the probability of the ultimate harm. The court will then be asking questions such as whether a light blow on the head significantly increases the risk of death under an anaesthetic for an alcholic who has suffered gunshot wounds in the war—the sort of question for answering which there are likely to be no statistics and which is too complicated for common sense to estimate. The estimates of probability which the

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[1] Radbruch, op. cit., p. 339; von Kries, op. cit., p. 532; Enneccerus-Lehmann, op. cit., p. 63. This is often expressed by asking whether the condition has a general tendency to bring about harm of the same kind as that which has occurred.

[2] Chap. VI, p. 153.

[3] Radbruch, op. cit., p. 339.

[4] Helmer, op. cit., p. 49.

[5] Liepmann, op. cit.

[6] *Vierteljahrsschrift fur wissenschaftliche Philosophie* (1888), xii. 179, 200–1. Accidentally = *in zufälliger Weise*.

[7] Parallel difficulties in Anglo-American law are discussed in Chap. VI, p. 153; Chap. IX, p. 232.

adequacy theory requries are practicable only if the description of the consequences remains fairly general. The only rule of description consistent with positive law is to adopt the description expressed or implied in the codes, 'death', 'bodily injury', &c., but subject to the proviso mentioned in our discussion of the notion of a condition, that this means 'death before it would normally occur', &c.[1] But this would at once reveal the divergence between the adequacy theory and commonsense judgments of causal connexion.

(ii) *Generalization of the condition.* Obviously whether the wrongful act increases the risk of the harm depends on its description. Thus, 'giving a man a light blow on the head' may not significantly increase the risk of death but 'giving a man with a weak heart a light blow on the head' might do so. One's first inclination is to favour a description of the act restricted to the terms of the statute: i.e. if the statute forbids 'wounding' to describe the act of an accused as 'wounding X'. But clearly the adequacy theorists need to distinguish between wounds of different degrees of seriousness, some adequate for their consequences, others not. Again, is one to stop short of an inclusion of all those factors which are relevant to the probability of a consequence of the class in question? If so, the reference to the weak heart of the victim must be incorporated in the description of the act, whether it was known or ascertainable at the time or not. Again, should we incorporate in the description of the act a reference to its relations with the future events, for example, speak of 'leaving a wounded victim under a tree about to be struck by lightning'? Most writers have felt the need to draw a line between a description restricted to the words of the rule of law in question and one which incorporates every feature of the act relevant to the probability of the consequence.

The problem what facts should be incorporated in the description of the wrongful act for purposes of the adequacy theory is called by the writers the problem of ontological considerations, to distinguish it from the problem what knowledge of laws or generalizations the person calculating probabilities is to be credited with (nomological considerations). The latter problem is discussed under (v) below.[2]

Wundt [3] held that only conditions existing at the time of the act should be incorporated in the description of the act. Radbruch objected that even if the conditions 'operated' later their causes existed earlier; from the point of view of determinism, they have been certain to 'operate' from eternity and, in any case, the notion of conditions 'operating' or 'intervening' is metaphysical; there is no particular movement at which the conditions other than the one in question 'receive it as a comrade in arms'.[4]

Von Kries's doctrine was that the act must be described in the light of what the actor knew at the time of his act; if he was misinformed, this should be taken into account. Thus, if accused set fire to what he mistakenly believed to be an empty house, the proper description of his act, for purposes of the adequacy theory, is 'setting fire to a house'; of course we cannot say 'setting fire to an empty house' for this would be a false description of his act. Others, such as Träger,[5] thought this too narrow and included in the description of the act those factors of which either the actor or an experienced man [6] or the most prudent [7] man, at the time of the act, should have known; Rümelin went further and included 'what was or has become known otherwise, for example, circumstances existing at the time of the wrongful act which have been discovered through the subsequent course of events'.[8] Rümelin's view involves a 'retrospective forecast',[9] or the use of 'hindsight'. Rümelin does not allow for the incorporation of future events, but if Radbruch's criticism of the distinction between existing conditions and future events is accepted, the description of the act would indirectly cover subsequent events and it would be rare indeed that it was not adequate for the consequence.

Rümelin attempted to meet this difficulty by an exception to his principle, viz. that, if the wrongful act merely brought the injured party to the place

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[1] Above, p. 401
[2] Pp. 2631 ff.
[3] *Logik*, i. 2, 342.
[4] Radbruch, op. cit., p. 344.
[5] Op. cit., pp. 159 ff. affirmed in *B.G.H.Z.* 3 (1951), 261, 266.
[6] *Allfeld, Kriegsmann* v. *Rohland, Köhler.*
[7] Von Hippel.
[8] *Kausalbegriffe*, p. 19. *Archiv für die zivilistiche Praxis* xc. 188, 216, 220, 260.
[9] *Nachtragliche Prognose.*

and at the time of a later event, then conditions existing at the time of the wrongful act are not incorporated in the description of the act if they were not known to or ascertainable by the actor at the time.[1] This view reflects indirectly the common-sense principle which confines the abnormal 'circumstances' which do not relieve a defendant of responsibility to conditions existing at the time and place of the wrongful act, but Rümelin's adoption of it appears arbitrary.

Rümelin's view has not met with general acceptance[2] and the prevalent opinion is that of Engisch[3] that the description should incorporate only circumstances known or knowable at the time of acting: it was at one time disputed whether this meant known or knowable to the actor[4] or, as Träger says,[5] to a 'most prudent man' who is 'the actor himself freed from the defects which hamper his powers of perception in any direction'. Thus, if the actor gave the victim a slight shove at the edge of a cliff and the victim fell over the cliff and was killed, von Kries's view would have been that for purposes of deciding whether the shove significantly increased the probability of death, the act should be described as 'giving a slight shove on the edge of a cliff' only if the actor knew that he was standing on the edge of a cliff; Träger would say that it must be so described if the most prudent of men would have realized this—as he might not if the events occurred in a thick fog; Rumelin's view was that the act should be so described, even though the most prudent of men would not have discovered the proximity of the cliff at the time. Träger's view has now been endorsed by the Bundesgerichtshof.[6]

Strictly speaking, the Träger principle of description should be stated in the negative, viz. that circumstances not known or knowable either to the actor or a most prudent man are excluded from the description. This caters for the possibility that the actor knows some circumstance which a very prudent man would not know. In this case what he knows should be taken into account in settling the description of his conduct.[7]

Apart from the description of the condition and consequence, a third problem of the same sort must be solved in order to apply the adequacy theory. This concerns the description of the initial class with which it is sought to compare the wrongful act; for the adequacy theory involves a comparison of the probability of the harm but for the act and given the act. This is not necessarily the same as a comparison of the probabilities before and after the act. Thus if the wrongful act consists in dispatching goods by the wrong aeroplane, this might well increase the risk of their destruction relatively to their not being dispatched at all, but not relatively to their being dispatched by the right plane, if the wrong plane was as safe as the right one. In this instance it is easy to make the right substitution, since it is clear what compliance with the law would have involved, and so to arrive at a description of the class of events with which comparison is sought. However, the same problems of the detail of description remain to be answered in this case too; thus, if the right plane had a leaking fuel tank, ought this to be included in a description of what compliance with the law would have involved, and if so should this be done in any event or only if the actor or a most prudent man would have noticed it?

For purposes of the adequacy theory the only general guide of value to the description of the wrongful act is the fact that, for causal purposes and for the calculation of relative frequencies, there is always an implied contrast which will often help toward an appropriate description of both; and in a legal context this contrast is usually between a wrongful act and the rightful act which should have taken its place.

On the problem of the degree of detail of description required there is no agreement among the continental writers. This is not surprising, for the problems are perplexing. In our discussion of the notion of a coincidence we

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[1] Op. cit., p. 130.
[2] In *B.G.H.Z.* 3 (1951), 261, 266 it was held too wide.
[3] Op. cit., p. 55.
[4] This was von Kries's view.
[5] Op. cit., p. 159; *einsichtigster Mensch*.
[6] *B.G.H.* (1951), 261, 266: the increased probability of the consequence must be judged in the light of 'alle zur Zeit des Eintritts der Begebenheit dem optimalen Beobachter erkennbaren Umstande'.
[7] H. Mayer, op. cit., p. 137.

pointed out that to make sense of this notion, the third intervening factor must be described as it would be by persons without special knowledge of the situation. This is more satisfactory than to make the description depend on the knowledge of the actor or of an 'optimal observer'.

The adequacy theorists are agreed that any special knowledge of the actor must be incorporated in the description of the act [1] but disagree whether this is an illogical exception to the adequacy theory. Thus H. Mayer asserts that imputability, not objective probability, is the test of causation, since otherwise the actor's special knowledge of extraordinary circumstances could not be taken into account, since this is 'nothing in the events themselves'.[2] However, this is to misunderstand the adequacy theory, for the probability of harm is no less 'objective' for being relative to the description of the condition.[3] There is of course a general justification for incorporating circumstances known to the actor in the description of an act, for the actor may be presumed to be exploiting them for his own purposes.

There is a great exaggeration of this truth about description in Antolisèi's doctrine of the 'sole human cause'. Antolisèi maintains that not only must all external factors, whether really instruments or not, taken into account by the actor be regarded as imputable to him [4] but also 'all the elements without distinction which he can employ for this purpose: in other words all the external factors which man can dominate'.[5] By this method the conclusion is reached that the act in question is often the *sole* cause of the harm, since all the other factors have been incorporated in it.[6] But causal problems are difficult enough without gratuitously introducing a fiction that the actor is exploiting or dominating circumstances of which he is in fact unaware.

(iii) *How great an increase in probability is required?* Von Kries, it will be remembered, held that the cause of an event in law was that condition which *significantly* increased the probability of the event. Not all subsequent theorists are agreed on this. Thus Tarnowski maintains that the *slightest* increase in probability is sufficient to make a condition an adequate cause.[7] His objection is partly to the vagueness of a 'significant' or 'considerable' increase.[8] This is part of his general objection to the application of common-sense distinctions in the law. He also complains, with a considerable measure of truth, that there is a confusion in many writings between the increase in the probability of harm attributable to the wrongful act and the resultant probability.[9]

Tarnowski's difficulty is the objection that if the slightest increase in probability makes a condition an adequate cause there will be no or few conditions which are not adequate. But the objection should not be overstated, for though there must have been some probability of the harmful consequence given the condition in question [10] this may have been less than the probability would have been without the condition. If one man snatches another from a lion's den there is no doubt some probability even outside the den that the man will be eaten by a lion but the act of snatching him from the den has certainly not increased the probability of this. If it is said that, since the harm has occurred, there must have been a very great probability of its happening at the time of the wrongful act in the particular case, this may be true on a description of the act which incorporates all the circumstances now known to have existed at the time, as in Rumelin's view, but may be quite untrue in relation to the ordinary man's or even the most prudent man's description.[11]

Even if a necessary condition does not always increase the risk of the harm that has occurred, it is argued that it does so in cases in which no one would think a causal connexion established. Von Kries gives the example of a railway accident caused by the fault of the defendant or accused; the victim is

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[1] Affirmed in *B.G.H.Z.* 3 (1951), 261, 267.
[2] Op. cit., p. 137.
[3] Above, p. 413.
[4] *Il rapporto di causalità nel diritto penale*, p. 186.
[5] Ibid., p. 188.
[6] Antolisèi adopts not the adequacy theory but the theory of conditions, subject to certain exceptions.
[7] Op. cit., pp. 177–8, 218–27.
[8] 'Berechenbar'-Liepmann, *Einleitung in das Strafrecht* (1902), p. 72. 'Beachtlich'-von Bar, *Gesetz und Schuld* (1907), p. 106.
[9] Op. cit., pp. 218, 222.
[10] H. Mayer, op. cit., p. 137.
[11] Above, p. 427.

obliged by the accident to spend some time in a town where he would not otherwise have stayed, and he there catches typhus. Von Kries says that the risk of catching typhus is increased by the accident but that the accident is not the adequate cause of catching typhus. Tarnowski argues that in the absence of detailed knowledge about different places along the railway line, the probability of catching typhus is taken to be the same at the victim's original destination as at the place where he caught typhus; hence the accident has not increased the risk of catching typhus, and is, even on Tarnowski's view, non-adequate.[1] Of course all depends on the description of the wrongful act which caused the accident; normally this would not be described as occurring near a place where a typhus epidemic was raging[2] and hence Tarnowski's exegesis of this case seems preferable to von Kries's.

Von Kries gives another example of a condition which increases the risk of the harm but in his view not significantly. If accused leaves open the door of his house this slightly increases the risk that someone will enter and kill an occupant; but no one would say that accused had caused the death. Tarnowski replies that though the probability is increased by leaving the door open it is a question depending on the positive law of participation in crime whether the free and intentional intervention of a third person is inconsistent with liability.[3] This suggests that the theory often diverges from common sense views of causation. Going for a walk is not the cause of being run over in a road accident, though it increases the probability of this happening.[4] Even a considerable increase of risk may be consistent with facts in which no one other than a blind adherent of the adequacy theory would hold the condition to be the cause of the harm; climbing up a mountain considerably increases the risk of falling down a mountain[5] but would not ordinarily be called its cause. The only plausible version of the adequacy theory is, indeed, that which requires that the act in question should increase the risk of the harm to a considerable or significant risk. No numerical value can be given to this; but the harm need not be more likely than not.[6] It seems too much even to demand that the resultant probability should be such that the consequence is 'typical', i.e. frequently instantiated,[7] for if a revolver shot is aimed at someone at a great distance the probability of the victim's being hit may be very small, yet if he is hit the person aiming the revolver has undoubtedly caused the wound or death.

This last example perhaps serves to bring out the weakness in the whole attempt to represent causal judgments as depending on estimates of increased probabilities or risks; for the common sense of the matter is that firing a resolver is the cause of injury if the shot hits the victim, and not the cause if it does not, irrespective of the probability at the time of the firing that the victim would be hit. The probabilities depend on the competence of the marksman, the range, the type of revolver, the strength of the wind, and many other factors; but causal judgments do not, at least directly; for the probabilities are relevant to them only in that they affect our weighing of the evidence. The improbability of the event may make us disinclined to believe that it *was* a consequence of the act in question. We may doubt whether the victim really was wounded by the shot which the accused fired, and be inclined to believe that some other shot *caused* the wound. But *if* we assert that defendant's shot caused the wound we must be prepared to support our assertion with something more than foreseeability. We would trace the causal connexion with the aid of generalizations, no doubt loosely formulated, about ignition, the movements of bodies and the bodily tissues of human beings, and would attempt to distinguish cases in which the consequence did not follow the shot.

Of course, if causal connexion is established at all, the events must be explicable in retrospect and there must therefore be *some* description of the condition which involves a certainty or very high probability of the harm occurring.

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[1] Op. cit., p. 220.

[2] But suppose that a 'most prudent man' would know of the epidemic in that place—this casts doubts on the utility of introducing, in order to settle the description a 'most perceptive man' bent on incorporating every detail he can.

[3] Op. cit., p. 222.

[4] Leonhard, op. cit., p. 32.

[4] Ibid., p. 33. Whether it is a universally necessary condition of falling down depends on whether there are other ways of getting up a mountain than climbing up it.

[6] Antolisèi, op. cit., p. 187.

[7] Kreigsmann, *Gerichtssaal*, 68 (1906), 143, 148.

But this consideration should not be allowed to obliterate the distinction between statements of causal connexion and statements of probability; for the use of the latter is to argue from one event to the other on the basis of limited knowledge, not to argue from one to another in the light of 'complete' knowledge. With the recognition of this distinction must disappear the whole claim to elucidate causal judgments with the help of the notion of increased probability, or indeed of probability at all.

(iv) *Changing the risk.* According to a version of the adequacy theory favoured by Enneccerus[1] a condition may be the adequate cause of an event, without increasing the risk of it, if it has *changed* the risk of it. 'Changing the risk' here means that, though the probability of the harm may not be greater than before, the factors other than the wrongful act which, in conjunction with it, will suffice to produce the harm, and which may be present, are different. Thus the seller who without urgent reason disregards the buyer's instructions as to delivery, by sending the goods by a different route, is responsible for the destruction of the goods on that route. This is intended to support Enneccerus's thesis that even when the law places the risk of loss on one of the parties, liability depends on the establishment of causal connexion between a breach of contract or tort and the loss.[2] But the words of the sections to which he refers are against this construction, for two of the three sections expressly state that the defendant is liable for loss even though it occurs through accident or coincidence in such cases.[3] Enneccerus says that although change of risk is sufficient to make a condition the adequate cause of an event, the condition is not an adequate cause if it is entirely indifferent or immaterial from the point of view of the event; an example of this is sending goods by one of two alternative rail routes from Frankfurt to Berlin. It is not easy to see why the risk is not changed in this case, for though the main possibility of harm to the goods may still be from, let us say, derailment, there is a difference between derailment on one line and on another. It is indeed difficult to imagine any condition of an event which does not 'change the risk' of it. Enneccerus's view can logically only lead back to the theory of conditions.

(v) *The calculation of the probabilities.* The matters here dealt with are the laws of principles available, the time at which the judgment of probability is to be made and the person making it.

The generalizations on the basis of which judgments of probability are to be made in order to apply the adequacy theory are discussed by the writers under the rubric 'nomological considerations'.[4] The view which clearly accords with von Kries's theory is that the estimate of probabilities should be based on the best available evidence; this includes all the known generalizations about the frequencies of the relevant classes. Thus the Reichsgericht said that adequacy must be judged from the standpoint of one who has at his disposal all the experience and knowledge of mankind,[5] and Engisch speaks of 'maximum knowledge of laws'.[6] The generalizations are not confined to the teachings of everyday experience but include those known only to experts and the Bundesgerichtshof has said that all experience available at the date of judgment should be taken into account.[7]

However, some writers consider that only those generalizations known at the time of the wrongful act should be taken into account, not those discovered later.[8] The reason given is the familiar one that for purposes of a normative judgment no attention should be paid to matters which could not have been taken into account by the actor.[9] But this also applies to expert knowledge of laws discovered before the act, which the actor did not know or could not discover. Rumelin therefore argues that all laws which were not available to ordinary human experience should be excluded and expert knowledge should be admitted for purposes of calculation only if an average expert would know

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[1] Op. cit. II. 64.
[2] *B.G.B.*, s. 287 (debtor in default liable for supervening impossibility); s. 447 (seller failing to obey buyer's instructions as to delivery); s. 848 (defendant wrongfully detaining plaintiff's goods).
[3] 'Durch Zufall eintretende Unmöglichkeit' (*B.G.B.*, s. 287); 'Haftung für Zufall bei Entziehung einer Sache' (*B.G.B.*, s. 848).
[4] Above, p. 426.
[5] 'Das gesamte deutsche Recht', p. 734. *R.G.v.* 81 (1913), 359, 360.
[6] Op. cit., p. 57; *nomologisches Höchstwissen.*
[7] *B.G.H.v.* 3 (1951), 261, 267.
[7] Engisch, ibid.
[8] Above.

them; for example, medical laws so far as an average doctor would know them.[1]

But these views strike at the roots of the adequacy theory, for they destroy its claim to base causal judgments on 'objective relations', which would require use of the best evidence of the relative frequencies available at the time of judgment, and not mistaken estimates of them which would have been made by a person with defective knowledge of natural laws. Hence to place typhus germs in one's wife's food was said not to be the adequate cause of her death when the bacillary theory of disease was not well established.[2] Surely this is an affront to the common-sense standards of judgment which the adequacy theory purports to respect, for a lawyer would ordinarily say that in such a case the husband's act was the cause of the death but that the element of fault or *mens rea* was lacking.

There has also been discussion of the person who is notionally to make the judgment of probability. According to Rumelin the judge, representing the average man, must estimate probabilities from his own knowledge of natural laws and his own experience, whereas Thon[3] considers that the judgment of a normal man should be taken. These are but further ways of restricting the evidence of the probabilities to be taken into account.

The only view really compatible with the adequacy theory is that all laws and all experiences should be used to make the best possible estimate of the probabilities; if a more accurate estimate is possible at the time of judgment than at the time of the wrongful act, so much the better. In the terminology of the German writers, 'ontological' restrictions, which affect the description of the wrongful act, can be admitted but nomological restrictions cannot.

(vi) *Difficult cases.* In this section we consider a number of cases which create real or apparent difficulty for the adequacy theory.

When the law places the risk of a defined loss on one of the parties[4] the adequacy theory cannot be applied; but if one abandons the view of Enneccerus[5] that in such cases causal connexion as analysed by the adequacy theory is an element and it is accepted that the wrongful act need only be a necessary condition of the harm, this difficulty is avoided.

The relation of the adequacy theory to intervening events, whether normal or amounting, in conjunction with the wrongful act, to coincidences, may create awkwardness. If accused gives the victim a slight wound and the wounded person is involved in a road accident on the way to the doctor, von Kries says that it is unjust to hold accused responsible for a crime aggravated by its consequences, such as malicious wounding with fatal consequences, and that the adequacy theory avoids this injustice.[6] In this case the light wound may not have significantly increased the risk of death and there is an intervening coincidence, so that the same result is achieved whether the adequacy theory or common-sense principles are applied. But if accused gives the victim a heavy blow which, however, does not immediately kill him and the victim is involved in a fatal accident on the way to the doctor, the adequacy theory requires that the death should be treated as the consequence of the blow. Such cases present difficulty on any theory of causation and responsibility.[7]

A problem of this sort arose in a case in which the defendant had undertaken to keep the plaintiff's goods 'absolutely dry'. He left them, however, at ground level in open sheds. A dam burst and the goods were flooded. The plaintiff claimed damages and alleged that the goods should have been stored on the first floor where they would have been safe. Here it would appear that the storage on the ground increased the risk of damage to the goods but the damage was caused by an act of God or coincidence, i.e. the bursting of the dam. The Reichsgericht held that the storage on the ground floor was wrongful, since there was a danger of humidity at ground level, but that the loss was not caused by the wrong.[8] The reason given was metaphorically expressed; the damage did not 'lie in the direction' of the obligation and the

[1] *Kausalbegriffe*, pp. 19–21. He was prepared to apply this even when the actor knew of laws which formed no part of ordinary human experience. Radbruch, op. cit., p. 368.
[2] 'Das gesamte deutsche Recht', p. 734.
[3] Op. cit., pp. 10–11. Similarly, Grispigni, op. cit., p. 26.
[4] Enneccerus-Lehmann, op. cit., p. 217. Swiss Code of Obligations, ss. 103, 306 (borrower for use not using in accordance with contract).
[5] Op. cit. ii. 62 n.
[6] Von Kreis, *Über den Begriff der objektiven Möglichkeit*, p. 125, Tarnowski, op. cit., p. 57.
[7] Antolisei, op. cit., p. 197 n. 1. Kostlin, op. cit., p. 461. Chap. VIII, p. 221.
[8] *R.G.Z.* 42 (1898), 291.

causal relation was 'broken' by an event amounting to *force majeure*. The decision, though supposed to be an application of the adequacy theory, appears easier to reconcile with common-sense causal principles than with the adequacy theory.

We have already set out the facts of a famous decision of the German courts in the case of the Cuxhaven lighters.[1] Here the court concluded that the delay of one day in the towing significantly increased the risk of damage to the ships. The case resembles the *Monarch*[2] case in English law, where it was held, though not in very clear language, that the outbreak of war and consequent diversion of the plaintiff's ship were not factors which negatived causal connexion between the wrongful delay caused by the defendants and the expenses incurred because of the ship's diversion. The *Monarch* can be justified on common-sense principles since the outbreak of war was much more likely when the ship arrived than when she should have arrived; and the Cuxhaven case could, perhaps, also be justified on the ground that the storm was much more likely on the 29th of October than on the 28th. On these facts the increase in the risk of the ultimate harm, which makes the condition adequate, and the increase in the likelihood of the intervening event, which is required for responsibility in common law systems, concur.

In other cases the wrongful act may not significantly increase the risk of harm but the harm may nevertheless occur without the intervention of an act of God or coincidence. Thus to give a man a slight scratch on the finger may not significantly increase the risk of death but nevertheless the finger might become infected; amputation might be necessary; the anaesthetist might be slightly careless and give the victim an overdose from which he died. It might be impossible to point to an intervening event which amounted to a coincidence and hence, from a common-sense point of view, the death might be treated as the consequence of the scratch although the scratch was not adequate for it. This is particularly likely when it is natural to describe the events in terms of a 'chain'—i.e. a series each connected to the preceding event as necessary condition to consequence. Some may feel that common-sense principles lead to injustice here; but the elements of fault or *mens rea* are intended to remedy any possible injustice.

Maurach propounds a difficult case.[3] Suppose that A and B each independently and without the knowledge of the other put half a lethal dose of poison in C's glass; C drinks the contents and dies. By the theory of conditions both A and B have caused C's death; by the adequacy theory neither has, since half a lethal dose does not significantly increase the risk of death. From a common-sense point of view the problem is to decide whether for each actor the fact that the other places a similar dose in the glass is to be treated as an intervening coincidental event or a circumstance of the act. One answer might be that the first actor has not caused C's death, since the act of the second was a coincidence negativing causal connexion; but the doctrine that an abnormal condition of the person or thing affected existing at the time of the act does not negative causal connexion might be extended to make the second actor liable.[4]

The difficulties of the adequacy theory in dealing with intervening coincidental events are also felt in dealing with unnatural or unreasonable reaction of animals or men. Thus, if A wounds B by a heavy blow and B is treated for his wound by a doctor in a way contrary to the most elementary rules of medicine, so that B dies, A's act is by the strict adequacy theory the cause of B's death; but the Reichsgericht made an exception to this when the doctor 'contrary to all medical rules and experience is guilty of a gross failure to take into account the elementary requirements of reasonable and reliable medical procedure';[5] in this case the further harm is not adequately caused by the orig-

[1] *R.G.Z.* 81 (1913), 359. Above, p. 423.
[2] *Monarch S.S. Co.* v. *A/B Karlshamns Oljefabriker*, [1949] A.C. 196. Chap. VI, p. 158.
[3] Op cit., p. 162(*b*).
[4] This solution is hardly satisfactory.
[5] *R.G.Z.* 102, 230. The case concerned an action against a doctor for the injury done to the patient when, through his failure to make a proper diagnosis, the patient went to hospital where he received further unskilful, but not outrageously unskilful, treatment. Recovery was allowed for the harm consequent upon the hospital mistreatment. Cf. *B.G.H.Z.* 3 (1951), 261, 268. Von Caemmerer, op. cit., p. 18.

inal injury. This illustrates the Protean character of the adequacy theory, for this result can only be reached by defining the harm as 'injury caused by gross medical mistakes'. Even so, it does not follow that, because such gross mistakes are happily rare, defendant's act did not appreciably increase the chances that one would occur. The increase in the risk may be great though the resultant probability is small; there is a standing danger of confusion, in the adequacy theory, between the notion of a substantial increase of the risk and that of increasing the risk to a substantial one. In any case it appears that the adequacy theory is once again surreptitiously filching the principles of common sense, for why should mistakes contrary to the nature of medicine be selected for incorporation in the description of the consequence rather than say, the routine mistakes of anaesthetists in administering anaesthetics or of nurses in handling round tea?[1]

Voluntary interventions may also be a source of difficulty for the adequacy theory. In one case[2] the security police wrongfully arrested deceased and while he was being transported under arrest he was (apparently) deliberately shot by a member of the force. It was argued that the defendant, who procured the arrest, was vicariously responsible for the act of arrest but not for the shooting. Hence plaintiff, widow of the deceased, argued that the shooting was the consequence of the arrest. The court rejected this argument, stating the adequacy theory in the form that conduct is only the adequate cause of an event if it has a tendency in the light of experience to bring about a consequence of the kind in question;[3] and decided that the arrest was not the adequate cause of the shooting; only the conduct of the security officers who shot deceased could be considered its cause.[4] This last observation is from a common-sense point of view correct but can hardly be derived from the adequacy theory. It is arguable that the arrest of someone during a time of civil disturbance does significantly increase the risk of his being shot, for example, while he or others are resisting arrest or while attempts at rescue are made; so that on the adequacy theory the decision should have been otherwise. If it is answered that arrest does not increase appreciably the risk of voluntary shooting, this, whether true or not, depends once more on the incorporation into the description of the consequence of a feature which is relevant to common-sense causal judgments.[5]

There is much the same divergence between the adequacy theory and common-sense principles in the case of voluntary interventions as for coincidences. The consequence may be of the same general kind of which the wrongful act increased the risk, yet may come about through a voluntary intervention. Thus accused may give the victim a heavy blow and leave him at the side of the road where a passing stranger murders him. On the other hand the wrongful act may not significantly increase the risk of the consequence, which may nevertheless occur through the concurrence of non-voluntary acts of others. Thus, the accused may give the victim a light blow which, owing to the victim's susceptibility, knocks him out so that he lies in the road where he is accidentally run over by a passing car, and killed. Here the death is the consequence of the light blow on common-sense principles[6] but not on the adequacy theory.

(vii) *Relation of adequacy to the 'normal course of events'.* It remains to note that the courts which apply the adequacy theory for the most part shift freely from asserting that causal connexion exists because the act significantly increased the risk of the harm to asserting that it exists because the harm occurred in the normal course of events and in accordance with human experience.[7] In cases of preexisting susceptibility of the victim the test of in-

[1] German courts have applied the same principle to the mistakes of professional lawyers. *R.G.Z.* 140 (1933), 1, 9.

[2] *R.G.Z.* 106 (1922), 14 Cf. *J.W.* 1912, 459; *R.G.Z.* 50 (1902), 219 (rescue not voluntary because done under legal or moral duty).

[3] *R.G.Z.* 106 (1922), p. 15.

[4] A French court decided that when defendant was responsible for X's death he was liable to X's heirs for damage to X's business consequent upon their having quarrelled after his death. Req. 18. 12. 1933. Gaz. Pal. 1934. 1. 395. This seems a harsh decision.

[5] The decision in *R.G.Z.* 135 (1932), 144, 154, holding defendant vicariously liable for the negligence of an employee in failing to guard a car, so that an unlicensed mechanic drove it away and injured the plaintiff, turns on the existence of a duty to guard against the voluntary act of the mechanic.

[6] Cf. *People* v. *Fowler* (1918), 178 Cal. 657, 174 Pac. 892.

[7] e.g. *R.G.Z.* 69 (1908), 57, 59.

creased risk is more likely to lead to responsibility being affirmed than that of the normal course of events. Thus it has been held that when a horse hit a man on the head and he suffered damage to his health the previous morbid nervous predisposition did not affect causal connexion.[1] A similar result was reached when a man suffering from heart disease was unexpectedly killed through rough handling by a police officer.[2] The notion of increased risk is also used to explain why recovery is often allowed for neurosis following bodily injury to the plaintiff,[3] or a child of the plaintiff.[4] On the other hand when the court wished to deny recovery to the owner of a mink farm for his loss when, owing to the noise of the defendant's aircraft, the mother mink killed their young, it gave as a reason that under normal circumstances harm of this sort does not follow such noise and vibration,[5] thus making use not of the notion of increased risk but of that of the normal course of events and using a narrow description of the consequences.

In this way the courts preserve a certain flexibility of approach and are able to achieve results which on the whole are acceptable to common sense by applying at times the notion of increased risk, at others that of normality. But this proves only that the adequacy theory is tolerable provided it is supplemented by common-sense tests whenever it would give inconvenient results.

III. Limitation of Responsibility by Reference to Common-Sense Causal Principles

In the nineteenth century, Kostlin[6] was one of the few writers who stressed the importance in the law of a characterization of those factors which negative causal connexion. However, several writers and courts have attributed some importance to the breaking[7] or interruption[8] of causal connexion owing to the intervention of a new causal sequence.[9] Thus Ferrer[10] sums up the decisions of the Spanish supreme court in criminal cases as follows: 'This investigation leads us to the result that the objective nexus of production is negatived only when there has intervened later the wilful or gravely culpable act of a third person or the intentional or grossly negligent act of the victim.' On the other hand the Spanish courts hold that the preexisting susceptibility of the victim does not negative causal connexion,[11] as when he has suffered previous injuries.[12] The negativing factors are called 'extraneous accidents'[13] and one may assume that they would include acts of God and coincidences though there do not seem to be any clear criminal law decisions on this point. In much more metaphorical language, the Spanish supreme court in civil cases has recommended to inferior tribunals in solving causal problems to attend to the purpose of the rule of law in question and continued: 'or even, what is less difficult, it will be sufficient for the court to direct its course of action towards the evaluation of those conditions or circumstances which common sense in each case may mark as indicative of responsibility, within the infinite chain of causes and effects'.[14]

The Reichsgericht and several German writers[15] at one time appeared to take the view that a new 'causal sequence' negatives causal connexion. The Reichsgericht did this in certain cases of procedural fraud[16] at a time when the court was not bound to accept the uncontradicted evidence of a party to

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[1] *Jur. Wochenschrift*, 1906, 739, no. 7 (*R.G.Z.*).
[2] *R.G.Z.* 91, 347; Cf. *R.G.Z.* 75, 19 (nervous disorder aggravated by legal proceedings—recovery allowed).
[3] *R.G.Z.* 159, 257.
[4] *R.G.Z.* 133, 272.
[5] *R.G.Z.* 158, 38. A similar decision was reached in *Madsen* v. *East Jordan Irrigation Co.* (1942), 101 Utah 552, 125 Pac. 2d 794 on the ground that the reaction of the mother mink was unforeseeable: cf. *Nova Mink* v. *T.C.A.*, [1951] 2 D.L.R. 241.
[6] Op. cit., p. 453.
[7] *Unterbrechung.*
[8] *Interruzione.*
[9] *Kausalreihe.*
[10] Op. cit., p. 363.
[11] Ferrer, op. cit., p. 354.
[12] Decision of 11.6.1934.
[13] *Accidentes extraños.*
[14] Decision of 25.1.1933, Romero and Jiménez, *Diccionario de Derecho Privado*, II, 3245.
[15] Nagler, op. cit., p. 19, no. 10. Wach, op. cit., p. 165. These writers still adhere to this view but do not explain what a new causal sequence is, except that Nagler says that the main case is the independent decision of another person.
[16] *R.G. St.* 1, 227; 2, 91; 5, 321; &c.

civil proceedings. In several prosecutions for the giving of fraudulent evidence in civil proceedings resulting in damage to the victim, the Reichsgericht held that the acceptance by the court of the evidence was an independent causal sequence which interrupted causal connexion between the fraud and the damage to the party who lost the action. Here of course the court was deceived by the false evidence, so that its acceptance of the evidence was not fully voluntary.[1] Later, the rules of procedure having been changed, the Reichsgericht decided differently in a similar case while repeating that the 'causal sequence' doctrine would apply to a case in which the judge decided not on the evidence but on other grounds. But then the false evidence would not be a necessary condition of the harm.

The argument about 'interrupting' causal connexion has mainly centred about voluntary acts. We discussed in connexion with the theory of conditions Frank's notion of *Regressverbot*,[2] that it is forbidden to inquire into the causes of a voluntary act and so to go behind a voluntary act in the search for a cause. Enneccerus is inconsistent in his attitude to the notion of 'breaking causal connexion' by voluntary acts; for, as a theory of causation, he condemns the notion,[3] yet he asserts that causal connexion is 'broken' when the immediate cause of a consequence is the 'independent act of a man resting on his own free decision',[4] though he makes certain reservations which, however, only amount to a preference for a narrow sense of 'voluntary' such as we ourselves propose. How this is reconciled with the adequacy theory or the theory of conditions remains obscure. In one case defendant's predecessor fraudulently misrepresented the earnings of a firm during the previous year and induced plaintiff thereby to purchase a business jointly with X. X defrauded the plaintiff in the management of the business and fled abroad. An action to claim compensation for the damage suffered through X's fraud failed, for though the fraudulent misrepresentation was a necessary condition of the loss the connexion was held so 'remote' that it could not reasonably be taken into account.[5] No reference was made in the Reichsgericht to the voluntary character of the intervening act.

From this survey it will be clear that though there are intermittent references by continental lawyers to certain factors negativing or interrupting or breaking causal connexion they are, so to speak, foreign bodies embedded in other material, and their presence is to be explained by the fact that it is impossible entirely to suppress the promptings of common sense.

Scandinavian Countries

Question 5:

Chapter 5 of the Proposed Federal Criminal Code[6] covers the age of criminal responsibility, mental diseases and defects, and intoxication. These subjects are also kept together in Scandinavian criminal law, but it is usually done under the heading of personal prerequisites for punishment, rather than under the Ango-American heading of a specific defense. This difference in terminology does not imply radically different concepts, but rather a somewhat different approach. Scandinavian linguistic usage indicates that the defendant does not have the full burden of proof for these matters. It also indicates that the physical person of the defendant (as represented through fingerprints, photographs, blood tests, etc.) in Scandinavian countries is considered on a par with the other evidence which is produced through the criminal investigation.[7] The Scandinavian defendant has the same right to refuse intellectual cooperation (e.g., to make incriminating statements, etc.) as has his Anglo-American counterpart. However, it cannot be said that he directly has the right to avail himself of the defense of insanity, or to reject a psychiatric examination. Hence,

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[1] *R.G. St.* 67 (1934), 44.
[2] Above, p. 406.
[3] Op. cit., p. 64 n. 3.
[4] Op. Cit., p. 67.
[5] *R.G.Z.* 78 (1912), 270: 'Eln so entfernter Zusammenhang'.
[6] *U.S. Congress, Senate, Committee on the Judiciary.* Hearings before the Subcommittee on Criminal Laws and Procedures on February 10, 1971. Washington, D.C., G.P.O., 1971. Part 1, p. 133–504.
[7] Stephen Hurwitz. *Dan Danske Strafferetspieje,* 2nd ed. Copenhagen, G.E.C. Gad. 1949. Section 53: Sigtedes person som undersogelsesobjekt, p. 618–625.

it is not usual in Scandinavia to directly classify these personal prerequisites for punishment as affirmative defenses, even though in practice they are often used in a somewhat similar way as is a defense in an Anglo-American court.

The Norwegian minimum age for criminal responsibility is 14 years, while the Danish and Swedish minimum age is 15 years.[1] The latter is rather close to the 15–16 years minimum age in Section 501 of the Proposed Federal Criminal Code.[2] Scandinavian juvenile delinquents (up to 18–21 years of age) are mostly dealt with by administrative agencies, rather than by the courts. The matter of intoxication (Sec. 502 of the Proposed Federal Criminal Code) is discussed under Question No. 6, and the main subject of this discussion under Question No. 5 will consequently be the defendant's mental diseases and defects (Sec. 503 of the Proposed Federal Criminal Code) *Section A* on mental diseases and defects describes how concepts such as insanity and unconsciousness in the Scandinavian countries are primarily understood to be medical, i.e., psychiatric, concepts. Norway, as Professor Andenaes discusses it in *Appendix A*,[3] prefers a strictly medical concept of insanity, while Denmark and Sweden use mixed medical-social concepts of insanity. *Section B* is a discussion of the actual provisions in the Scandinavian criminal codes, and the translations of these provisions are appended as *Appendix B*. *Section C* deals primarily with the procedural problems of producing psychiatric evidence in a practical way, and the relevant Norwegian and Swedish procedural provisions are appended as *Appendix C*. Finally, *Section D* contains a discussion of the Scandinavian reactions to the situation where the defendant has been acquitted, or where his criminal liability has been diminished, because of a lack of mental capacity.

A. *Mental Disease and Defects*

The idea that mental diseases and defects in their most outspoken forms ought to preclude criminal punishment has old roots in Scandinavian law. However, it was around the beginning of the 17th century that the opinion that insanity directly precluded criminal responsibility was generally accepted. Psychiatry developed into an independent discipline around 1800 and the philosophical theories about free will seem to have become generally accepted as the legal justification for exempting clearly insane persons from criminal responsibility at about the same time.[4] However, this philosophical concept of free will was generally rejected during the latter part of the 19th century. The German scholar Franz von Lizt,[5] who suggested basing criminal law on the best available results from the empirical sciences rather than on philosophical concepts, has had a very considerable impact on Scandinavian jurisprudence. There is, as implied by Andenaes,[6] a tendency in literature to define the reasons for irresponsibility as being either biological (also called medical) or psychological (also called metaphysical) or possibly a mixture of both. However, this report prefers narrower terms, such as medical (psychiatric).

The Scandinavian criminal codes do not attempt to define concepts such as insanity or unconsciousness. However, it is clear from legislative history, and from practice, that Scandinavian courts basically accept and apply the medical (psychiatric) criteria for mental diseases and defects. The courts usually prefer to use proper medical terms, such as psychosis, neurosis, psychopathy, defects of intelligence, and the like. The relatively minor differences between the individual countries are discussed below. It should be stressed here that Scandinavian courts normally impose measures for the purpose of safety, and this includes measures for the protection of public safety, when they omit or reduce punishment because of the lack or diminution of mental capacity. The question of insanity normally does not have quite the same importance in the Scandinavian courtroom, as it often has in the Anglo-American courtroom, because such safety measures may be, and very often are, applied to Scandinavian criminals who are mentally defective, even though they cannot be characterized as having been totally insane or completely without lucidity when they committed their crimes.

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[1] Stephan Hurwitz, *Den Danske Kriminalret*, 4th ed. by Knud Waaben, Copenhager, G.E.C. Gad, 1967. Section 42 : Aldersgraenser, p. 281–284.

[2] *Supra*, note 1, *at* p. 192.

[3] Johannes Andenaes, *The General Part of the Criminal Law of Norway*, South Hackensack, N.J. Rothman, 1965. Section 29 : Insanity and Unconsciousness, p. 252–263.

[4] Hurwitz, *supra* note 3 *at* p. 285–287.

[5] Franz von Liszt, *Strafrechtliche Aufsätze*, Berlin, 1905. (v. 1 : 1875–1892 ; v. 1892–1904).

[6] Andenaes, *supra* note 5 *at* p. 247–249.

1. Norway

The full texts of the relevant provisions of the Scandinavian criminal codes are to be found in *Appendix B*. The most essential Norwegian provisions are repeated here, because they illustrate the Scandinavian approach to mental diseases and defects very well:

Sec. 44. An act is not punishable if committed while the perpetrator was insane or unconscious.

Sec. 56. Subsec. 1. The court may reduce the punishment below the minimum provided for the offense and commute it to a milder form of punishment:

(a) (irrelevant)

(b) when the act is committed in justifiable anger, under compulsion or imminent danger or during strong reduction of consciousness not due to voluntary intoxication.

Sec. 39. Subsec. 1. If an otherwise punishable act is committed in a state of insanity or unconsciousness, or if an act is committed during unconsciousness due to voluntary intoxication (Sec. 45) or during temporarily reduced consciousness or by someone with underdeveloped or permanently impaired mental capacity, and there is danger that the perpetrator, because of his condition, will repeat such an act, the court may decide that, for the purpose of safety, the prosecution shall:

(a) assign or forbid him a certain place of residence,

(b) place him under supervision of the police or a specially appointed probation officer and order him to report to the police or the probation officer at designated intervals,

(c) forbid him to consume alcoholic beverages,

(d) place him in reliable, private care,

(e) place him in a mental hospital, sanatorium, nursing home, or workhouse, where possible, in accordance with general provisions promulgated by the King,

(f) keep him in custody [in prison].

Subsec. 2. If such condition involves danger of acts of the kind covered by sections 148, 149, 152 par. 2, 153, pars. 1–3, 154, 155, 159, 160, 161, 192–198, 200, 206, 212, 217, 224, 225, 227, 230, 231, 233, 245, par. 1, 258, 266, 267, 268 or 292 the court must decide to apply the security measures mentioned above.

Subsec. 3. These measures are terminated when they are no longer regarded as necessary, but may be resumed if there should be reason to do so. The security measures listed under (a)–(d) may be employed concurrently.

The court shall determine the maximum period for which security measures may be imposed without its further consent.

Subsec. 4. If the court has not decided otherwise, the prosecution may choose between the above-mentioned security measures.

The decision to terminate, resume or alter a security measure is made by the ministry [of justice] Before a decision about security measures or their termination is made, the opinion of a medical specialist must ordinarily be obtained. The same procedure should be followed at regular intervals during the period in which security measures are in force.

Subsec. 5. If security measures, as mentioned in Subsection 1 above, are imposed, the Ministry [of Justice] may decide to forego all or part of the punishment to which a transgressor might be sentenced.

(See *Appendix B* for the remainder of Sec. 39 a & b).

These Norwegian provisions date back to 1929, and are discussed in some detail by Professor Andenaes in *Appendix A*. Here it is only mentioned that it seems generally agreed that Norway uses a clearcut medical (psychiatric) criterion for mental diseases and defects, and that the Norwegian Government issued the following official justification for the 1929 amendment of the Penal Code:[1]

. . . This old idea of punishment as an ethical retribution is now abandoned by most, and is quite unfit as a basis for the foundation of a rational penal law. Punishment should not provide retribution but a method of *protecting society*, and any decision as to the nature and amount of the punishment must therefore be based upon the determination of what best protects society. . . . Under this principle, it is easy to see that there is no reason to punish par-

[1] Andenaes, *supra* note 5 *at* p. 262–263.

tially defective persons less than others. Defective persons are often the most dangerous ones, and of course it is not possible to argue that they will be more easily influenced by punishment than full normal persons, and therefore need less.

2. Denmark

The primary provisions on mental diseases and defects in the Danish Criminal Code are Sections 16, 17, and 70. The wording differs from the Norwegian provisions, but very similar approaches exist. The main difference is the concept of mental diseases and defects which, in Danish jurisprudence, is normally described as being a mixed medical-social criterion. The majority of the Royal Commission which prepared the draft of the present Criminal Code of 1930 suggested a clearcut medical criterion similar to the Norwegian. However, the Danish legislature followed a minority of the commission which wanted to give the courts more latitude. The minority used the term "social evaluation" and explained it by referring to the concept of normalcy which is generally accepted by society, and which at times differs from the medical (psychiatric) concept. The minority also referred to cases where it had been proved that certain insane persons could react completely normally to punishment or to the prospect of punishment. The minority preferred punishment in such cases and also in borderline cases where there was a possibility that punishment would serve its purpose. It also preferred the least burdensome solution for the defendant in case there was a choice between security measures and regular punishment.[1] It is quite clear that Denmark (and Sweden) use a mixed medical-social criterion in the described sense, but it is also quite clear from case law that by far the largest number of cases are decided squarly on the basis of the medical evidence alone.

The leading Danish writers state correctly that this freedom of the courts has not been used to attempt to reintroduce the previous theories about free will, or to introduce psychological criteria such as the psychological criteria suggested by Section 21 of the proposed (1960) German Criminal Code or the English M'Naughten rule.[2] However, even the very limited Danish and Swedish use of social evaluation does, from a theoretical point of view, justify Andenaes' statement[3] that practically all systems other than the Norwegian apply mixed biological (medical) and psychological criteria. Hence, this report states that Scandinavian courts basically accept and apply the medical (psychiatric) criteria for mental diseases and defects.

3. Sweden

It has already been mentioned that the basic Swedish approach to mental diseases and defects is similar to that of Denmark and Norway, and that the Swedish courts, like the Danish, apply a mixed medical (psychiatric)-social concept of insanity. The key Swedish provision is to be found in Chapter 33, Section 2, of the Swedish Penal Code: *(See Appendix B)*

For a crime which some one has committed under the influence of mental disease, feeblemindedness or other mental abnormality of such profound nature that it must be considered equivalent to mental disease, no other sanction may be applied than surrender for special care or, in cases specified in the second paragraph, fine or probation.

Fines may be imposed if they are found answering the purpose of deterring the defendant from further criminality. Probation may be imposed if in the view of the circumstances such sanction is considered more appropriate than special care; in such cases treatment provided for in Chapter 28, Section 3, may not be prescribed.

The defendant shall be free of sanctions if it is found that a sanction mentioned in this Section should not be imposed.

This provision is to be found in Chapter 33 on "Reduction and Exclusion of Sanctions." In other words, Sweden, from a theoretical point of view, considers mental diseases and defects as merely an exclusion from punishment while the absence of more serious mental diseases and defects in Denmark and Norway are considered as a prerequisite for punishment. The Swedish Penal Code

[1] Hurwitz, *supra* note 3 *at* p. 293.
[2] Hurwitz, *supra* note 3 *at* p. 293–294.
[3] Andenaes, *supra* note 5 *at* p. 248.

of 1965 is the newest of the Scandinavian codes, and it seems to contain the best description of Scandinavian law about this matter. The Scandinavian choice is practically always between general imprisonment, specialized imprisonment, or treatment. It occurs extremely seldom in Scandinavian criminal cases concerning a defendant with mental diseases and defects, that there is a choice between general punishment or no sanctions whatsoever.[1]

C. *Psychiatric Examinations*

Scandinavian criminal procedure is, as a general rule, based on the principle of adversary proceedings in a way which is rather similar to Anglo-American criminal procedure. Scandinavian criminal procedure before the reforms in the middle of the 19th century was greatly influenced by church law, and was definitely based more on the inquisitorial principle than was its Anglo-American counterpart. It is probably a result of this historical development that Scandinavian judges seem to be more inclined to ask questions directly of parties and witnesses than Anglo-American judges. There are a very few and strictly limited areas where it is primarily the court which has the duty to produce the evidence. The most important of these may be said to be expert evidence, even though it somewhat oversimplifies the problem. Scandinavian parties do have a right to produce their own evidence, but this right is practically never used. Normally the experts are appointed permanently, e.g., a district physician (public health), or they are appointed by the court for the individual case. Much emphasis is placed on the fact that both kinds of experts owe their loyalty to the court, rather than to the parties, and they are normally renumerated by the judiciary rather than by the prosecution or the defense.

Psychiatric examinations in Norway are described in some detail by Professor Andenaes in *Appendix A* (p. 259–260), and this discussion is representative of Denmark and Sweden as well. It should especially be noted that written reports from experts in more serious cases are sent to the statewide Commission on Forensic Medicine, and that the Commission provides guidance about the pros and cons if the examining experts should not be in complete agreement. The court is still free regarding the weight it will give to the medical evidence, but experience has shown that courts are inclined to follow the advice of their own experts.

The Norwegian[2] and the Swedish[3] procedural provisions about expert witnesses are included in *Appendix C*. The rather similar Danish provisions are not available in translation.

D. *Does the Scandinavian Administration of Criminal Justice in regard to Mental Diseases and Defects Work?*

Scandinavian criminal law, as described above, relies heavily on the medical (psychiatric) expert testimony on the question of mental diseases or defects, but how does the system work in practice? The answer is that it is probably impossible to design a completely perfect system, but that the Scandinavian approach, in the opinion of this writer, works better than the Anglo-American. However, at least two preconditions for this answer exist, and it may be impossible to meet these preconditions in the Anglo-American system. It would probably be difficult to win acceptance of procedural rules which completely eliminate the possibilities of provoking a "battle by experts" in the courtroom. We are traditionally more bound to the adversary principle, and not even the Scandinavian countries have gone as far as to prohibit the parties completely from producing their own medical (psychiatric) evidence. The other precondition refers to an attitude that some reaction or sanction normally has to be implemented in dealing with insane criminals. Denmark and Norway still formally provide acquittal because of insanity, while as discussed above, Sweden merely considers insanity as a reason for exemption from punishment. At any rate, well established Scandinavian practice, indicates that extremely seldom does a choice exist between general punishment on the one hand and complete acquittal without any sanctions or reactions on the other. The normal situa-

[1] Hurwitz, *supra* note 3 *at* p. 312.

[2] *Norwegian Laws, etc., selected for the Foreign Service.* Oslo, The Royal Ministry of Justice, 1963- (looseleaf). Chapter XVII: Administration of Justice; A: The Courts of Justice and the Judicial Process; 1: Excerpts from the Act of 1st July, 1887, relating to judicial procedure in penal cases. Chapter XVI: Experts and inquiry.

[3] *The Swedish Code of Judicial Procedure*, South Hackensack, N.J., Rothman, 1968. III. Regulations for both Civil and Criminal Cases; Chapter 40, Experts.

tion in the Scandinavian courtroom for more serious offenses is a choice between general imprisonment, specialized imprisonment (with good treatment facilities) or treatment.[1] The latter is normally given in a hospital and in such a way that consent by the court is necessary before any release may be implemented. The confined person has the right to a remedy which is similar to our habeas corpus proceedings.

APPENDIX A

The General Part of the Criminal Law of Norway

(By Johannes Andenæs, Dr. Jur.; Translated by Thomas P. Ogle, LL.B.)

Personal Prerequisites for Punishment

§ 27. Survey

I. The concept of responsibility

Criminal responsibility assumes a certain degree of mental health and maturity in the actor. If a person fulfills these requirements, he is criminally *responsible;* otherwise, he is not. The Penal Code does not use the expressions responsible and irresponsible, but they are part of traditional legal terminology. Instead of responsibility, we could speak about the faculty of punishable guilt. Only protective measures without penal character may be imposed on criminally irresponsible persons.

Attempts have been made to give a positive description of the nature of responsibility. The best known among these is the definition by v. Liszt: "Responsibility is the normal ability to be influenced by motives."[2] This points in the right direction, but it gives little help because it does not say *how great* the departure from the normal must be before irresponsibility can be said to exist. Both our laws and foreign laws confine themselves to stating what special circumstances preclude responsibility. Thus, responsibility is the norm; irresponsibility is something which requires special reasons. The delimitations of irresponsibility are different in various jurisdictions, and thus it is impossble to give a *universal* definition of responsibility and irresponsibility.

Various systems

One usually distinguishes between three different systems of defining the reasons for irresponsibility: the *biological* (also called the medical), the *psychological* (also called the *metaphysical*), and the *mixed*. According to the biological systems, the law describes the conditions which preclude responsibility by biological and medical terms (age, insanity, unconsciousness). According to the psychological system, the determining factor is the person's capacity for insight and free decision—the expressions vary greatly. According to the mixed system, both types of characteristics are used.

The Penal Code of 1902 originally had a mixed system. After the 1929 revision of the provisions on responsibility, however, it rests completely on a biological basis. It recognizes three reasons for irresponsibility: (1) insanity, including extreme feeble-mindedness; (2) unconsciousness, except when it is a consequence of voluntary intoxication; (3) age of less than fourteen years. According to Norwegian law, therefore, a person is responsible if he is over fourteen years of age, and is neither insane nor unconscious because of reasons other than voluntary intoxication.

Most foreign legal systems have a mixed system. A typical example is the German Penal Code of 1871, which has the following provision on responsibility in its § 51: "1. No act constitutes an offense if its perpetrator at the time of its commission was incapable of appreciating the unlawfulness of his deed or of acting in accordance with such appreciation, by reason of derangement of the senses, morbid disturbance of mental activity or mental deficiency." The Swiss Penal Code of 1937 has a very similar provision.

Such a definition limits the area of irresponsibility more than does our law. Illness must not only exist, but it must in addition either exclude understanding of the unlawfulness, or of the ability to act according to the understand-

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[1] Hurwitz, *supra* note 3 *at* p. 312.

[2] v. Liszt, *Strafrechtliche Aufsätze und Vorträge*, II, pp. 43 and 219 (Berlin, 1905).

ing. Insight into the illegal character of the act can be said to be of a psychological nature. The ability to act according to this insight is a metaphysical matter. The law presupposes that the normal person has such a power, and thus it builds upon an indeterministic hypothesis. It further presupposes that the insane person may lack this power, but it gives no real assistance to the determination of when this is the case. In some respects, the German concept of irresponsibility is broader than ours. It does not require insanity or unconsciousness; moreover, mental disturbances of a lesser kind may exempt from punishment if they have excluded the appreciation of the unlawfulness of the act, or the ability to act in accordance with such appreciation. Furthermore, it treats disturbances of consciousness caused by intoxication according to the exact same rules which govern other disturbances of consciousness.

The reasons for irresponsibility recognized by our law are of a greatly different nature. While insanity and unconsciousness are conditions of illness, or at least of abnormality, youth is a part of the normal development of the individual. Only in a comparison with the fully developed individual can one say that the child lacks normal qualifications. Unconsciousness is in a special position because it is usually a transitory condition, in contrast to the other reasons for irresponsibility. Unconsciousness due to voluntary intoxication does not preclude responsibility according to our law, not because it is psychologically different from other forms of unconsciousness, but purely for policy reasons.

The reason for the requirement of responsibility

The requirement of responsibility can be justified in different ways.

The starting point can be that it is *unjust* to punish one who acts under the influence of illness or disturbances of the consciousness. He cannot be regarded as responsible for his acts. And almost the same reason applies to one who has not yet reached a certain degree of maturity. This concept rests, consciously or unconsciously, on an indeterministic view. The thought here is that the normal person "can be blamed" for his acts, while the irresponsible person cannot. Thus, if society must be protected against the irresponsible person, provisions must be used which are not condemnatory and which do not have the infliction of suffering for their purpose.

However, one may also take practical policy considerations as a starting point. From an *individual preventive* point of view, punishment is not suitable to the groups which are involved here. Insane and feeble-minded persons can be more effectively cared for in special institutions than in prisons. As to delinquent children, education is more apt than punishment. From a *general preventive* point of view, the imposition of punishment upon persons who lack the capacity to be influenced by the penal threat serves no reasonable purpose. The exclusion of such persons from criminal liability will not lessen the effectiveness of punishment as a means of social control.

Thus, different points of view lead to the same result: certain mental conditions must exist before punishment may be imposed. On the other hand, the precise definition of irresponsibility may differ according to which viewpoint is adopted. Our prevailing rules have been created on the basis of an historical development, in which considerations of justice, general prevention, and individual prevention, have all had an influence.

II. Responsibility must exist at the moment of action

Responsibility must exist at the time the offence is committed. If the actor was insane, unconscious or under fourteen years of age at the moment of action, he cannot be punished even though the state of irresponsibility ends before the case comes before the court. By the same reasoning, if he was responsible at the moment of action, criminal liability will not terminate if he later becomes insane. The fact that the time of action is always determinative shows that treatment considerations have not been the primary basis for the formation of the rules.

As long as the perpetrator is insane, however, procedural rules preclude prosecution against him (Code of Criminal Procedure, § 285). If he becomes insane after sentencing, but before execution of the sentence, the punishment cannot be executed (Code of Criminal Procedue, § 474). If the serving of the sentence has already started when he becomes insane, he should be transferred to a mental institution (see the Prison Act of December 12, 1958, § 33).

A strange case is adjudicated in a Supreme Court decision in Rt. 1948, p. 1107. A Norwegian who worked as an interpreter for the German security po-

lice during the occupation was sentenced to death by the Assize Court for his participation in serious acts of torture. He had been insane for a while during custody, but he had not been insane at the time of the act, nor during the hearing of the case before the Assize Court. After he was sentenced to death, he again became insane, and the medical experts stated that there was no hope for a lasting improvement as long as the possibility of the death sentence lasted. In other words, there was no possibility of executing the death penalty unless the fact of his insanity at the moment of execution were to be disregarded. In accordance with this finding, the Supreme Court commuted the punishment to hard labour for life. The prisoner then recovered, so that the prison sentence could be executed.

It may happen that the criminal act itself is committed in a state of irresponsibility, but that the perpetrator could have foreseen this course of events at the outset. A traditional example is the following: A mother who knows that she usually throws herself back and forth in bed while asleep, nevertheless takes her child to bed with her, and crushes it to death in her sleep. She can be held liable for the course of events which she set into motion in a conscious state, just as a person who sets forces of nature in motion. In such cases one generally speaks about *actiones liberae in causa*, "acts which are free in their origin." One may impose liability for both intentional and negligent causation, depending on the actor's state of mind when setting the course of events into motion. Liability for an omission which has occurred while a person was in an irresponsible state may also be caused by a previous free action. Example: A railroad worker goes to sleep during working hours, the warning signal is not given, and an accident occurs.

§ 28. The Age of Criminal Responsibility

Children below fourteen years of age cannot be punished

"Nobody may be punished for an act committed before he has completed his fourteenth year" (Penal Code, § 46).

No personality change occurs, of course, at the moment a person becomes fourteen. The time of maturity varies from individual to individual; a boy of twelve or thirteen may be as mature as another of fourteen or fifteen. But there must be some limit, and the law has set it at a certain age for reasons of expedience, regardless of the individual's degree of maturity.

Educative measures for children

Obviously, the law must also have the opportunity to intervene when children below the age of criminal responsibility commit punishable acts, but this occurs in the form of educative measures, and not in the form of punishment (see the Child Welfare Act of July 17, 1953). Punishment of children by imprisonment is unfortunate and inhumane; fines imposed upon children will actually be a punishment of their parents. To a great extent, educational measures will also be used instead of punishment, even for children over fourteen years of age. Imprisonment of a fourteen-fifteen-year-old is hardly heard of any more. The criminal minimum age could be raised to sixteen or perhaps even higher, but in certain instances it can be expedient to have the possibility of imposing punishment, especially fines, for lesser offenses. If a fifteen-year-old messenger boy persistently violates traffic rules, it would be too drastic to place him in a reform school, but perhaps it is not enough merely to give him a warning. A reasonable fine which he would have to pay from his own earnings, however, would be remembered.

The opportunity to employ educative measures expires when the child has reached eighteen years of age (Child Welfare Act, § 16). Here the age when the sanction is imposed is determinative, not the age at the time of the action. If a thirteen-year-old commits a murder which is not discovered before he has become eighteen, the authorities have no basis for acting against him. However, if he is placed in a reform school before he becomes eighteen he can be held until he is twenty-one (Child Welfare Act, § 48).

§ 29. Insanity and Unconsciousness

I. Insanity

"An act is not punishable if committed while the perpetrator was insane or unconscious" (Penal Code § 44). 'Insanity," as the term is used in the law, has a wider meaning than it has in its ordinary usage. The expression in-

cludes the markedly mentally retarded as well as the actually insane. We shall consider first insanity proper, the *psychoses*.

1. Psychoses

A psychosis is an illness which affects the mind. Our knowledge about its causes is still rather limited. We know that certain psychoses are caused by purely organic processes in the brain, such as *paralysis generalis*, a psychosis which sometimes appears following syphilis. Head injuries and brain tumors may also cause psychic illnesses which must be classified as insanity.

In other cases, such as the most frequent forms of insanity, schizophrenia and manic-depression, external causes cannot be found. These mental diseases are connected to hereditary tendecies, but there are grounds for believing that purely emotional factors can also play a substantial part in their inception and development, without our knowing exactly what significance such factors have. Insanity is sometimes a mentally weak person's reaction to particular stresses, the so-called reactive psychoses. For example, there is the prison psychosis which may develop in susceptible indivduals in response to the fear, loneliness and insecurity which an imprisonment, especially a first imprisonment, may entail. Senility is also considered a mental disease when it is severe enough (*dementia senilis*).

I must refer to psychiatry for a description of the different psychoses. Insanity often attacks the intellectual faculties, the patient becomes dull and confused. In other cases intelligence may remain more or less intact, but the illness affects the person's emotional life. The patient may be heavily burdened with fears and guilt feelings without any ascertainable reasons. Or he may be unduly gay, cheerful and uncritical, and given to commit rash acts which bring him into conflict with the law. Moral decay is sometimes the most predominant trait. Older psychiatric textbooks even regard "moral insanity" to be a special form of insanity. This no longer corresponds to professional opinion; if the person shows no other signs of insanity, a poorly developed moral sense may rather be regarded as a psychopathic personality trait. In certain forms of insanity the patient has hallucinations; he sees visions or hears voices.

Mental illness varies just as much in degree as it does in kind. Many slightly psychotic persons get along reasonably well in free society. A layman might not even be able to observe anything unusual about their behavior, and therefore will be quite surprised when such a person is pronounced insane. These less serious forms of insanity have the greatest significance in criminal law, because the more obviously insane persons are often under treatment in some institution, and are thus excluded from free society.

Odegaard, in describing a mental hospital, gives a vivid picture of the great variations among the insane. "In some rooms, the deeply affected patients sit, unclean, unkempt, and practically without any ordered activity. One cannot converse with them; only when their empty expressions and withdrawn bearing are broken by a fit of rage can one suspect what is going on in their minds. Here, ethical decay is at its height: they take their neighbor's food, and, if the theft is discovered at all, the response may be a curse or a blow; they masturbate without embarrassment. Such conditions, however, are rare even here, and what characterizes the group is its maximum ethical passivity.

"But these rooms constitute the smallest part of the hospital. Communal life in many other sections can hardly be distinguished from that of any other well-organized dormitory, and the moral problems are the ordinary ones, neither more nor less. Theft is very rare despite the fact that, on the male side, 10–15 per cent. can have been convicted. Breaches of agreements are exceptions: promises to doctors and fellow patients are kept. Politeness and consideration are no more uncommon here than elsewhere. If something goes wrong, only a few would inform on a fellow patient, and solidarity is sometimes almost burdensome. If a conflict breaks out, self-control will not be lost any more than would be the case outside the walls. During the enemy occupation, the spirt was just about the same among the pateints as among the general population, although a few chronically querulous patients sought support from the new authorities."[1]

There is no clear line between insanity (psychosis) and other types of mental illness. "In the majority of cases, we can say with great certainty on which side of the line the patient is, and it would be quite wrong to say that there is an imperceptible transition between the normal and the insane. But

[1] Odegaard, in *Nordisk Tidsskrift for Strafferet* (1948), pp. 93–94.

there are nevertheless states where the transition is progressive, and where the dividing line is only a matter of opinion and judgment. And the worst part about this is that the uncertainty is not due to an imperfect examination technique (which could be corrected with time). There is no plain biological distinction between normal senility and a senility amounting to insanity, or between the reactive depression which must be considered neurotic and that which must be considered insane."[1] In addition to this uncertainty in the concept of insanity itself, there is the uncertainty resulting from the fact that the psychiatric expert has incomplete or unreliable materials on which to build. This is especially so when the expert must determine a person's mental condition at some earlier point in time, such as when the punishable act was committed. Similar difficulties arise in the civil law, as where, for example, the mental condition of a testator as of the time of signing the will must be determined.

Who is to be declared insane depends upon the current viewpoints and skills of psychiatry. The concept of responsibility thus shifts with the development of psychiatry. In older days, only the more extreme forms of insanity were recognized, and much of the idea that an insane person is one whom everybody recognizes to be mad still lingers on among the general public.

Insanity as a cause of criminality. The significance of insanity as a cause of criminality varies greatly among the different offenses. There is a large proportion of insane persons among the murderers in our country. A Norwegian study covering the twenty year period from 1930 to 1949 revealed that out of 104 murderers (of whom ninety-two had been psychiatrically examined) the experts found twenty-eight to be insane at the time of their acts.[2] Eighteen of these twenty-eight suffered from schizophrenia. Some of the insane suffered from a persecution complex and killed as a defensive measure against the imagined enemies. In other cases, the sick person had delusions of grandeur, believed that he was in direct communication with God, and acted on His behalf. Sometimes the motive for the killing is unexplainable from a normal psychological point of view; one of the patients explained that he killed because he wanted to be arrested so that he could be placed in a small room where he could survey his problems. Manic depressive murderers often regarded the future as so burdensome and gloomy that they thought it best to exterminate their whole family, and sometimes themselves as well.

As a rule, mental disease plays a much lesser role in offenses other than homicide, but each of the various forms of insanity has its typical criminal expression. Many paranoids make themselves persistently guilty of defamations and threats. In this category we find the incurable trouble-maker who fully believes that the whole world has ganged up on him, and who is strengthened in this belief with each new defeat he suffers. Senility due to old age (*dementia senilis*) not infrequently leads to indecent acts with small children. Other types of insanity can lead to theft or embezzlement, but such cases occur only infrequently.

2. The medical diagnosis is determinative

If the medical diagnosis is clear, then, under our penal law, penal inculpability is also clear, without any necessity of determining whether or not there is any connection between the mental illness and the punishable act. On the other hand if a disturbed mental condition cannot be characterized as insanity, the person is imputable even though the offense is a consequence of the condition (see Rt. 1940, p. 342). Both propositions are a consequence of the purely biological viewpoint of the law.

Objections to the biological principle. Certain objections can undoubtedly be raised against this solution. First, it is true that modern psychiatry rejects the concept of partial insanity. If a person is insane, the whole personality is affected. Nevertheless, it is far from true that insanity affects all areas of the mind in the same disturbing way, or that every act which the sick person performs is abnormally motivated. In some instances there is little likelihood of any connection between the mental affliction and the punishable act. Chronic querulants or insanely jealous persons may have such a highly developed sys-

[1] *Ibid.* p. 81.
[2] Ragnar Cristensen, in *Nordish Tidsskrift for Kriminalcidenskab* (1956), p. 285 *et seq.*

tem of delusions that the condition is characterized as insanity by the psychiatrists, although the person shows no other insane traits. If such a person is guilty of illegal distillation of spirits or price-transgressions, there is little reason to suppose that there is any connection between the mental illness and the act. The same is true if an habitual thief becomes insane and continues to steal as before. In civil law, the judge determines in the individual case whether or not the act of the insane person was precipitated by the sickness. Why cannot the same principle be followed in the penal law? When Sweden revised its rules on responsibility in 1945, it was made a requirement for impunity that the act be committed under the influence of the mental illness.[1]

Secondly, a person may be harmed as well as aided by a declaration that he is legally irresponsible. Many insane persons can get along well in free society, but if they are declared legally irresponsible, their freedom may have to be limited. "One can see persons with obvious, although minor, psychoses take care of their store sensibly and well, and it would thus seem somewhat unreasonable to declare them irresponsible if they start to cheat in their sales for the purpose of gain."[2] It seems especially odd, where breaches of the normal rules of daily life are involved, that a psychiatric examination should determine whether or not an individual can be fined.

The reasons for the principle. These objections have not been considered decisive in our law. Two main arguments to the contrary are advanced. First, one can never be sure that the insane person's act is normally motivated, even though it may appear to be, and the mere *possibility* of an insane motivation ought to be enough when such a serious matter as punishment is concerned. Secondly, from a *treatment point of view*, an insane person should never be put in a prison, but should rather be taken care of in a mental hospital, if necessary. This latter consideration does not apply, however, when only fines are involved, nor where the perpetrator has been cured of his mental illness by the time the case comes before the court.

Insanity may create a danger of new offenses. In such a case, the insane person will usually be kept in a mental hospital without any necessity of having a trial, according to the rules of the Mental Health Act of April 28, 1961, but he may also be sentenced to protective measures, according to the Penal Code, § 39.

II. Feeble-mindedness

Feeble-mindedness (*oligophrenia*) is an innate intellectual defect, or one acquired in earliest childhood. Certain mental diseases also affect the intellectual faculty, so that the individual's previous history must determine whether there exists insanity in the strict sense of the word, or feeble-mindedness. The causes of feeblemindedness can vary. The lesser degrees are most often hereditary, while the more serious types are generally due to external factors, such as brain-damage to the embryo, or to the child during birth, inflammation of the brain and hormone disturbances.

It is usual to set the limit for feeble-mindedness at an IQ of about seventy-five. But not all feeble-minded persons are criminally irresponsible. Only the extreme cases fall within the insanity concept of the penal law. Here, even more than in the case of mental illness, there are uncertain distinctions without any natural delimitation. In forensic psychiatric practice the limit has traditionally been drawn around an IQ of fifty. But this figure is not adhered to strictly; the decision in the individual case is made after an evaluation of the total personality, where the individual's character and ability for social adjustment also play a part. Feeble-mindedness which is not so pronounced as to free the perpetrator of imputability falls under the heading of "underdeveloped mental capacity," and may lead to the imposition of protective measures, instead of, or in addition to, punishment (Penal Code, § 39).

For the feeble-minded as well as for the insane, the diagnosis is made by general standards and not in relation to the perpetrator's ability to understand and evaluate the individual act. If he is penally imputable at all, he is so in all areas. However, intellectual development may be of significance in deter-

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[1] Swedish Penal Code, chap. 5, § 3; see Nytt, *Jurisdisk Arkiv* (1946), II. pp. 276–277, 289, which discuss the question.

[2] Helwek, *Den retslige psykiatri i kort omrids*, pp. 13–14, 2nd ed. (Copenhagen, 1949).

mining whether or not the perpetrator has acted with that guilt (intention of negligence) which the penal provision requires. For example, a person has bought stolen goods on the street at a very low price, and because of that is accused of receiving stolen goods. The judge will usually disregard the claim of good faith, if the accused is normally gifted, but he will not do so where an intellectually inferior person of the naive and simple-minded type is before him. Similarly, in cases where the normal person would be found negligent, the mentally defective person may be acquitted because he did not adequately understand the situation.

III. Unconsciousness

Unconsciousness is used in Penal Code, § 44, in a wider sense than in daily conversation. Normally, one thinks primarily of the unhealthy or abnormal conditions of unconsciousness, while sleep is also implied in the penal law. And while in daily usage one thinks about that condition where all ability of movement and perception is lacking, the complete coma, the expression in the penal law also includes a relative unconsciousness where the individual has his ability of movement intact, and also reacts to certain stimuli from his surroundings, but is otherwise blind and deaf, and acts without normal inhibitions. It may also be said that there is no functioning of the normal ego. These relative states of unconsciousness have the greatest significance in criminal law, since, under absolute unconsciousness, usually only offenses of omission can exist. Both the sleepwalker and the hypnotized person are unconscious according to the law. Other examples can be mentioned, such as fever deliria, exhaustion, epileptical confusion, disturbed consciousness in cases of concussion, hysterical fits, and abnormal intoxication. To a certain extent it is a matter of opinion where the line is to be drawn between reduced consciousness and unconsciousness.

Except for those states of intoxication which fall within Penal Code, § 45, unconsciousness makes for impunity regardless of whether it is self-imposed or not. But one who consciously places himself, or allows himself to be placed, in a state of unconsciousness, by hypnosis, for example, even though he knows or should know that he may commit offenses in such an unconscious state, may be held responsible (see § 27, II).

IV. Psychiatric examinations

If doubts arise as to the mental state of the accused at the time of his act, the court will appoint psychiatric experts to conduct examinations. Private experts who are called by the parties are very rare with us, even though the parties are expressly allowed to call them. There are two experts in an ordinary judicial examination (see Code of Criminal Procedure, § 191). But in the first stage the prosecution often obtains a so-called preliminary declaration from a person such as the police or prison physician who, on the basis of a summary examination, states only whether or not there is any reason to have a judicial examination. The Commission of Forensic Medicine acts as the highest authority of psychiatric expertize. It receives transcripts of all psychiatric statements submitted to the court, and indicates any serious defects which it finds in them.

The application of the biological principle leads to a situation where, practically speaking, the statements of the psychiatric experts are binding on the judge. Here, as elsewhere, the experts are principally only advisers, and the court is free in its decisions, but it could hardly be expected that a judge would overrule the appointed experts in a question of psychiatric diagnosis. The court will resolve any dispute between the two experts by ordering further examinations, and possibly by reference to new experts (see Code of Criminal Procedure, § 210).

Burden of proof

Nevertheless, there may be a difference between the experts and the courts as the the *conclusions*. In the practice of forensic psychiatry, the usual rule is that a person will be declared insane or unconscious only if the condition unambiguously is clear. If there is doubt, the conclusion will be "not insane (unconscious)," following the principle that it is the mental illness which must be proved, not its absence. The court, however, follows the ordinary criminal law principle that a doubt must be resolved in favor of the accused. If it is shown

by the psychiatric report that the state of mind is doubtful, the court will have to acquit. The situation is different in a civil case on the invalidity of an agreement or a will, where it is irresponsibility which must be proved (see Rt. 1900, p. 629 and 1927, p. 273).

V. The rules about irresponsibility are exhaustive in principle

The legislature has undoubtedly considered the rules on irresponsibility in Penal Code, § 44, as exhaustive. A permanent or temporary disturbance of the mind cannot create irresponsibility unless it amounts to insanity or unconsciousness in the meaning of the law.

Possible exceptions

It is doubtful, however, whether one can follow this through completely. Situations can exist where it would seem to offend the sense of justice to use punishment, although neither insanity nor unconsciousness could be said to exist.

Compulsion

Such a situation can be imagined for acts committed under serious compulsion. We can take as an example a situation which occurred frequently during enemy occupation, when the German security police had caught a member of the underground and tried to torture him into informing on his comrades. In such a case the arrested person might have known that his information would lead to the arrest of many of his friends, who will also be tortured and perhaps shot. He is conscious but has reached the point where his power of resistance is broken; he cannot take any further maltreatment, and thus he reveals the names. Neither unconsciousness nor the necessity situation (Penal Code, § 47) can be claimed in that case and, according to the provisions on compulsion (Penal Code, § 56, No. 1(b)), the punishment may only be reduced. A special provision of the Treason Act of February 21, 1947, § 5, however, provides for the possibility of remitting punishment completely.[1] But this possibility of acquittal applies only to *giving aid to the enemy*, not to charges of imprisonment and mistreatment to which he exposed his comrades (see R. Mbl. 56, p. 182).

Post-hypnotic conditions

The *post-hypnotic* state can also create difficulties. During hypnosis, the hypnotist can give his subject order to be followed after awakening. The subject has no recollection of what happened during hypnosis; after he awakens and fulfills the order, he will often find some apparently rational explanation for his behavior. Usually only harmless acts can be suggested in this way. But there are examples from abroad of unscrupulous hypnotists who, under very special circumstances, attain such power over their subjects that the latter commits serious offenses, otherwise alien to his nature, while in the post-hypnotic state. The hypnotist, of course, is liable for causing the offenses. But what is the position of the hypnotized subject? It is difficult to characterize the post-hypnotic state as insantiy or unconsciousness; what exists is an abnormal motivation of a special nature. And on the basis of the provisions of the law, it is difficult to justify an acquittal. Danish justice is more flexible here since it provides for the opportunity to find irresponsibility due to *situations which may be equated to insanity*.[2] Swedish law has a similar provision.

VI. Diminished responsibility

The law's grounds of irresponsibility do not correspond to any sharp borderlines in actual life. There are innumerable transitional states between the insane and the normal, the idiot and the normally gifted, the unconscious and the clearly conscious, and where the line should be drawn is often a question of both precedent and expediency.

If the lack of moral responsibility in the abnormal mind is considered as the basis for the rules about irresponsibility, one is therefore led to recognize a category of diminished responsibility, which stretches from the borderline of

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[1] This was the result in *Norsk Retstidende* (1948), p. 775. The accusation was only treason, not aiding in deprivation of liberty (Penal Code, §§ 228–229). See also Aulie, in *Nordisk Tidsskrift for Kriminalvidenskab* (1952), pp. 220–222, and Hurwitz, *Tortur og tilstaaelse*, in the book, *Respekt for mennesket*, pp. 111–118 (Copenhagen, 1951).

[2] Danish Penal Code, § 16; see Hurwitz, *Den danske kriminalret*, pp. 423–425 (Copenhagen, 1952).

the completely normal to the borderline of the completely irresponsible. A lowered moral responsibility should result in a lowered punishment, which in borderline cases of irresponsibility should be very low.

The Penal Code of 1902 built upon this point of view. It provided that the court could reduce the punishment below the usual minimum and to a milder type when the perpetrator suffered from "underdeveloped or pathologically disturbed mental capacity" but "not to such an extent, however, that penal guilt is excluded" (Penal Code, § 56; compare with Penal Code, § 44).

Strong arguments, however, can be made against such a provision from a treatment point of view. As the Penal Law Committee of 1922 says (S.K.I., 1925, p. 96): "It must be remembered that many of these persons are the most dangerous, or at least the most troublesome, habitual offenders. And if they are to be punished at all, it is not expedient to regard their offenses as insignificant. It could properly be argued that a more intensive punishment than otherwise is required if the penal threat is to deter them, and if the imposition of punishment is to induce them to conform; and if hope for such effects is abandoned, then long-term imprisonment at least has the undoubted advantage that it gives more protection than short-term imprisonment."

This view found certain opposition during the subsequent discussion of the Bill. It was held, according to guilt principles, that the poorly developed and permanently defective should receive a milder punishment than others, because of their poorer abilities, and that if they presented a special danger, protection against them should be attained by protective provisions. In any case, it was unreasonable, so it was argued, that the poorly endowed individuals should not only be punished according to the same scale as others, but should also be subjected to special protective measures because of their defects.

The result, however, was in accordance with the proposals of the Committee. The provision permitting the imposition of reduced punishment for those with diminished responsibility was removed from the law (amendment 1929). The present Penal Code, § 56, provides for decreased punishment where the act is committed during a *temporary* strong reduction of consciousness, but not by permanent states of defective functioning or mental impairment. Thus, the expression "diminished responsibility" no longer has any basis in the Code. Another matter, however, is that where offenders are of "underdeveloped or permanently defective mental capacity" protective measures may be imposed, and can take the place of punishment (Penal Code, § 39, No. 8, 1 and 5, and § 39(b), No. 1).

While it was general preventive considerations which served as justification for a departure from the principle of guilt in the drafting of Penal Code, § 45, individual preventive considerations were determinative in this case. The various views on punishment appear with particular clarity in the Government Bill to the amendment (Ot.prp. nr. 11 for 1928, pp. 6–7). After explaining that the retribution viewpoint must lead to reduced punishment for the partially defective because of their lowered moral guilt, the Ministry of Justice continued: "This old idea of punishment as an ethical retribution is now abandoned by most, and is quite unfit as a basis for the formation of a rational penal law. Punishment should not provide retribution but a method of *protecting society*, and any decision as to the nature and amount of the punishment must therefore be based upon the determination of what best protects society. . . . Under this principle, it is easy to see that there is no reason to punish partially defective persons less than others. Defective persons are often the most dangerous ones, and of course it is not possible to argue that they will be more easily influenced by punishment than fully normal persons, and therefore need less."

§ 30. Liability for Acts Committed under Intoxication

I. The problem

As previously mentioned, intoxication is a substantial cause of criminality. It is therefore important to determine how criminal acts committed while intoxicated will be punished. Alcohol intoxication creates the most important problem, but similar problems also arise from the use of other intoxicants (cocaine, morphine, opium, marijuana, etc.).

Lowering of the consciousness

As long as it merely *lowers* the consciousness and thus weakens moral inhibitions, intoxication will never preclude criminal liability. This applies also to involuntary intoxication. Suppose that an inexperienced young boy at a party

is tricked into drinking a strong cocktail in the belief that it is an innocent fruit drink, and that under the influence of the alcohol he becomes guilty of assault or attempted rape. He is liable for his acts. The intoxication will only be taken into account in the measure of punishment, as a possible factor in mitigation.

"Normal" and atypical alcohol-intoxication

Intoxication, however, can also lead to *unconsciousness*. As far as alcohol is concerned, one distinguishes between "normal" and pathological alcohol intoxication. In normal alchool intoxication, the consciousness is gradually lowered as the amount of alcohol is increased, and the capacity for purposeful movement is at the same time impaired; when the point of complete unconsciousness is reached, the intoxicated person generally has no ability to commit offenses other than those of omission. The picture is different with pathological intoxication. The mental disturbances here often arise suddenly and after consumption of relatively small quantities of alcohol. The general signs of intoxication, such as an uncertain walk and slurred speech, are lacking, but perception is seriously disturbed. Delusions and hallucinations may also appear. The individual usually does not remember anything that happened while he was intoxicated. Pathological intoxication generally occurs only in those individuals who are predisposed to it (epileptics, neurotics, psychopaths, persons with brain damage); but even persons who otherwise react normally to alcohol may sometimes under the influence of illness, exhaustion or serious mental stress, react abnormally. A person may commit serious crimes, such as rape or murder, while in an unconscious state. It is obvious that not all ideas and sensations ceased during pathological intoxication. Perhaps a more accurate picture of the situation is to be found in Swedish forensic psychiatry, which describes it as temporary insanity.

We must also suppose that there are many gradations between the completely normal and the obviously pathological intoxication.

A Swedish case provides an illustrating example of an offense committed during pathological intoxication.[1]

A twenty-five-year-old man had been with his wife and small son at a Christmas dinner with relatives and had taken a few drinks. He became brutal and unpleasant to his wife on the way home. Weeping, she begged him to desist until after they had come home and put the boy to bed. When they arrived at home, the man grabbed his wife by the throat with one hand and seized a big butcher knife with the other. The wife tore herself free and ran out of the house, screaming for help. Before the neighbors could come to her aid, the man had killed his son with the knife, and had jumped out of the window, inflicting serious injuries on himself.

It was later learned that when the man was about eighteen, he drank a few glasses of wine at a family party and suddenly became rebellious and acted indecently. After that, he abstained from alcohol until the fatal day when he made this one exception. He had then been married for a few years. The marriage was a happy one, the husband enjoyed his home life, and the little boy was the apple of his eye. Afterwards, he became deeply depressed over his conduct, which he could not explain, and he contemplated suicide. On the way home that fatal night an enormous rage had overcome him. "It was as if everything became red in front of my eyes." He could not remember what had happened from that moment on until he jumped out of the window. He hazily recalled the sound of the broken glass and the stinging pains from the glass splinters.

The original provision of the penal law

If the law had no special rule on acts committed during intoxication, the result would be the following:

If the perpetrator became intoxicated for the purpose of committing the punishable act, he would be fully liable if he performed the act in an unconscious state caused by the intoxication (see § 27, II). If he knew, or should have known (on the basis of past experience, for example), that he might commit punishable acts while intoxicated, he would be liable for negligent causation. But if he neither considered, nor should have considered, this possibility, he would be free from liability.

This was largely the situation under Penal Code, § 45, in its original form. But it increased the liability on one point; it provided that a person who be-

[1] Gösta Rylander and Erik Bendz, *Rättspsykiatri*, p. 67 (Stockholm, 1947).

comes unconscious through his own fault should *always* be punished for negligence if, while in this state, he commits an act which is punishable in its negligent form. Thus, liability for negligence would exist regardless of whether or not any actual negligence with respect to the harm caused could be proved in the concrete case.

The reason for Penal Code, § 45

When the law was revised in 1929, it was agreed that the earlier rules were too mild. The first objection was that many serious offenses were not punishable in their negligent form. The law has no punishment for negligent rape or negligent sexual offenses against children, because the negligent commission of such acts rarely occurs. As a result, a person who was unconscious because of intoxication and who committed such an offense could not be punished under Penal Code, § 45. Thus, there was very little logic in the rules: a person who committed assaults and malicious destruction of property while intoxicated could be punished, because the law applied to the negligent commission of such offenses, but one who committed the most serious sex offenses could not be punished. The second objection was that impunity benefited not only one who had actually been unconscious, but also one who could create such doubts about his condition that he would have to be acquitted under the principle that doubt must be resolved in favor of the accused. It was further argued that it would have a general educative effect, if a person were to be held fully responsible even for acts committed while intoxicated. But the strongest argument was the assertion that the general sense of justice, or at least the *sound* sense of justice, required full responsibility for intoxicated persons. The sense of justice, which was strongly expressed during the debate, is probably connected with the idea of retribution in its more primitive form, which concentrates on the act and its effects without going into deeper psychological considerations. Fundamental objections against all alcohol consumption undoubtedly influenced the views of certain groups.

Long debates resulted in the formulation of the present Penal Code, § 45: "Unconsciousness due to voluntary intoxication (produced by alcohol or other means) does not exclude punishment." In Penal Code, § 56, No. 2, we obtained at the same time a rule providing that the punishment in such cases can be reduced under especially extenuating circumstances.

The rule constitutes an important exception to the principle of proportionality between guilt and punishment. What the perpetrator can be blamed for is the fact that he has become intoxicated; what he does later, while unconscious, he cannot help. On one occasion he falls peacefully into sleep and thus will incur no punishment; on another occasion he kills a person, and will then be punished under Penal Code, § 233, with a minimum of six years' imprisonment, unless the provisions in Penal Code, § 56, No. 2, on especially extenuating circumstances, come into play. The rule is effective, but harsh, and because of this, it has been attacked by many.

During the debates on the Penal Code of 1902 there was a controversy over the evaluation of acts committed under intoxication, and some persons made demands for stricter rules. By the time the question was taken up by the Penal Code Commission in 1922, there had been some acquittals which had created an uproar. One of the political parties went as far as to put demands for increased punishment of acts committed while intoxicated into its party platform. The Penal Law Commission split into a majority and a minority. The majority proposed the solution which became law, but some within the majority wished to eliminate the possibility of reducing the punishment (Penal Code, § 56, No. 2), and even proposed to impose full liability upon acts committed during involuntary intoxication. The minority, on the other hand, proposed a special provision covering the person who, during unconsciousness because of voluntary intoxication, commits an otherwise punishable act; the punishment should be graduated according to the seriousness of the offense.[1] The final result—full liability under Penal Code, § 45, with a strictly limited recourse to decrease of punishment according to Penal Code, § 56—represents a compromise between the opposing views. The rule in Penal Code, § 45, was discussed by a number of speakers during the meeting of the Norwegian Association of Criminalists in 1935, and all opposed it. The psychiatrist Ragnar

[1] For a similar rule, see German Penal Code, § 330(*a*).

Vogt called it a stain on the law because it violated one of the basic rules of ethics: guilt as a basis for punishment.

The question is solved in various ways in foreign countries. In English and American law, the rules seem to lead on the whole to the same result as our Penal Code, § 45, while most countries on the continent treat unconsciousness due to intoxication as a reason for precluding liability, some having special provisions which correspond to the minority proposal of the Penal Law Commission of 1922.

The practical significance of the question

The practical significance of the question tends to be overrated. A study by Ornulf Odegaard of all forensic psychiatric statements which came into the Commission of Forensic Medicine in the years 1901 to 1926,[1] shows that there were only thirty cases, or about one per year, in which the experts had concluded that the perpetrator was unconscious because of intoxication at the time of commission of the act. The figures were as follows: less serious offenses of violence, threats, assaults, etc.: eleven; thefts: eight; sex offenses: seven; murder and infliction of serious harm: four. The statistics show that even if unconsciousness due to intoxication was often *claimed*, the plea usually did not succeed, even under the earlier system. In some cases, the accused may have been acquitted on the basis of unconsciousness, without a preceding psychiatric examination, but this hardly occurred with the serious offenses.

II. More about § 45

After this survey, we shall now look a little more closely at the question of interpretation which Penal Code, § 45, raises.

1. The same rule for all types of self-imposed intoxication

The provision applies to all kinds of voluntary intoxication regardless of what intoxicant is used, and how it is consumed (by drinking, by inhalation, or by injection). Nor does the law distinguish between normal and pathological intoxication. It cares only whether the intoxication is voluntary or not. However, a pathological intoxication, more easily than a normal intoxication, may be involuntary because it can occur after the consumption of a smaller quantity.

The problem, however, can sometimes be a difficult one. Let us imagine that the consumption of alcohol by an epileptic causes an epileptic state of fuzziness, and that he commits murder while in this state. It can be held that here the unconsciousness was not due to *intoxication*, but to epilepsy, and that it must therefore lead to an acquittal, regardless of whether or not it was self-imposed. But this is to read more into the word "intoxication" than is reasonable. The most accurate interpretation of the provision is probably that a condition is regarded as voluntary intoxication when it is caused by the use of alcohol or other intoxicants in such quantities that the person can be blamed for having lost control over himself (see below, under 4).

2. When can the unconscious person be punished as an intentional perpetrator?

Thus, unconsciousness due to voluntary intoxication does not preclude liability. But the law requires subjective guilt for punishability; usually intention, sometimes negligence, and sometimes a definite purpose. What influence will unconsciousness have on this requirement?

As we have mentioned before, "unconsciousness," like insanity, does not lead to the end of all activity of the mind. And one can conceive of the possibility of judging the perpetrator on the basis of the ideas which he actually had in his troubled state of mind.

If a person committed murder because of an ungovernable state of anger, but otherwise knew what he was doing, he should then be punished for intentional homicide. If, however, he was so confused that he thought that it was a lion with which he was dealing, or that he was the victim of an assault and that he was merely protecting himself, the result should be an acquittal.

It is difficult, however, to determine what has gone through the "unconscious person's" mind, and there seems to be little reason for basing a decision on the type of the conceptions he entertained. Nor has judicial practice gone into any such examination. Penal Code, § 45, must be interpreted as an acceptance of

[1] Ornulf Odegaard, *Trekk av bevvsens betydning i rettsmedisinen*, p. 20 *et seq.* (Oslo, 1928).

the proposition that, despite intoxication, the perpetrator should be adjudged *as if he had been sober*. The deciding factor, then, is how a sober man would have been treated in a similar situation. If, for example, the intoxicated person has raped a woman, he will be convicted of intentional rape. A similar act by a normal person would be intentional. As examples from decided cases, we may cite Rt. 1934, p. 1096 (rape) and 1939, p. 20 (indecent acts against minors). If the intoxicated person has taken a stranger's car, driven negligently and killed someone, he can be sentenced for *intentional* car theft (Penal Code, § 260), but only *negligent* homicide. A sober person would also be sentenced in this manner.

But difficulties arise in some cases. The intentional, the negligent and the innocent act are not always easily distinguishable; intention and negligence may depend on factors in the mind of the perpetrator which are not discernible in the actual situation. If I cut someone with a knife, I may have done so for the purpose of homicide, but my intention may have been only to wound, not to kill. Which alternative shall be chosen when the perpetrator was unconscious at the time of the act? The comments on the draft Bill state that the mildest solution must be chosen (S.K.I., 1925, p. 91), and this seems to be correct. The unconscious person cannot be convicted of an intentional offense unless the circumstances surrounding the act would clearly have marked it as intentional if it had been committed by a normal person. In the example of the knifing, the perpetrator could generally be punished for causing bodily injury, perhaps with death as its consequence (Penal Code, § 229; compare with Penal Code, § 232), but not for murder or attempted murder (Penal Code, § 233). Similarly, the unconscious person cannot be punished for negligence either, unless the surrounding circumstances would have marked the act as negligent if it had been committed by a normal person. Thus, the court must disregard those circumstances to which a sober person *perhaps*, but not certainly, would have paid attention.

These rules apply to persons who have acted in a state of unconsciousness. How is a person to be judged who is less intoxicated and merely misunderstands the situation by reason of his intoxication? For example, an intoxicated man sees a person advancing toward him with an object in his hand; in his hazy condition he believes that the other intends to attack him, and he strikes the imagined attacker. If the intoxicated person is unconscious, he will have to accept being treated as a normal person, and thus he will be held for intentional assault. If he is not unconscious, the Code gives no authority for departing from the general principle that the defendant must be judged according to his own perception about the actual situation (Penal Code, § 42). If the act, in his view of the situation, would be a justified act of self-defense, he can then be punished only for negligence (see Penal Code, § 45). It can be argued, however, that there is so little logic in this that, even as to the intoxicated person who is not unconscious, the mistake caused by the intoxication must be disregarded. This is the view taken by the Supreme Court (Rt. 1961, p. 547). Such an analogized use of the law to the detriment of the accused is of doubtful validity, especially when such a controversial rule as the provision in Penal Code, § 45, is involved.

The perpetrator's own perception of the situation must be used as a basis if, *after the intoxication has ended*, he acts under a mistake caused by the intoxication. He believes, for example, that he has been the victim of an assault, and accuses his supposed assailant. He then cannot be punished under Penal Code, § 168, for false accusation.

3. Penal provisions requiring purpose cannot be used

The comments in the draft Bill to Penal Code, § 45, seem to suggest that the rule cannot be applied to violations of penal provisions which require a definite *purpose* (S.K.I., 1925, p. 91). This is by no means obvious. No such limitation appears in the words of the law, and there is no inherent obstacle to the use of the same principle here as elsewhere. If the surrounding circumstances would characterize the act as purposeful if it had been committed by a sober person, it should be characterized in the same manner when committed by an unconscious person. As it is often stated: If the law can feign intention, it can also feign purpose.

The principle which the draft Bill comments express, however, has been accepted by the courts, and must now be regarded as settled law (Rt. 1933, p.

1180, and 1935, p. 52). If a person who is unconscious because of voluntary intoxication attacks another, and forcibly takes his watch and wallet, he cannot be punished for robbery unless he purposely became intoxicated in order to commit the act, because the law's provision on robbery (Penal Code, § 267) requires the specific purpose of obtaining for oneself or another an unlawful gain. However, the perpetrator can be punished for assault (Penal Code, § 228), for coercion (Penal Code, § 222) and for having unlawfully placed himself in possession of the objects (Penal Code, § 392), since all these provisions require only ordinary intention. And if he later sells the watch or spends the money which was in the wallet, he can be punished for embezzlement committed in a sober condition.

Apart from those provisions which require a definite purpose, cases can also be conceived where the rule in Penal Code, § 45, does not apply. We can imagine that A lies dead-drunk on a beach, where B is drowning. If A had been sober, and neglected to rescue B, he would have been guilty according to the general provision in Penal Code, § 387, about a person's duty "to help according to his ability a person whose life is in obvious and imminent danger." But when he does not actually have the ability to help, it would serve little purpose to invoke the penal provision.

4. What does voluntary mean?

Only an unconsciousness resulting from *voluntary* intoxication does not preclude punishment. Where shall the line be drawn?

Voluntary does not mean the same as intentional, but comes close to negligent. Intoxication is voluntary as soon as the perpetrator can be blamed for becoming intoxicated. Such is the case when he consumes such a large quantity of alcohol that he must know that he might lose full control over himself. How strict one is to be is a question of opinion. It is sufficient that the *intoxication* is voluntary; it makes no difference that the accused had no reason to belived that he would become *unconscious*. The general rule is that intoxication is voluntary, and special circumstances must exist before the contrary will be accepted. One can imagine, for example, that an inexperienced young boy is tricked into drinking champagne in the belief that it is ginger ale. It can also be imagined that a person consumed a small amount of alcohol which would not intoxicate him normally, but which has a special effect because of sickness, fatigue, or other reasons. Here he can be free from liability unless the situation is such that he should have counted on having less resistance than before.

APPENDIX B

The Danish Criminal Code

(With an Introduction by Dr. Knud Waaben, Professor A.I. in the University of Copenhagen)

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Chapter III

CONDITIONS REGARDING LIABILITY TO PUNISHMENT

13. (1) Acts commited in self-defense are not punishable if they were necessary to resist or avert an imminent or incipient unlawful attack, provided that such acts do not manifestly exceed what is reasonable, having regard to the danger inherent in the attack, the person of the aggressor, or the social importance of the interests endangered by the attack.

(2) Provided that any person who exceeds the limit of lawful self-defence shall not be liable to punishment if his act could in fairness be excused by the fear or excitement brought about by the attack.

(3) Similar rules shall apply to acts necessary to enforce lawful orders in a rightful manner, to carry out a lawful apprehension, or to prevent the escape of a prisoner or a person committed to an institution.

14. An act normally punishable shall not be punished if it was necessary in order to avert impending damage to a person or property and if the offence can only be regarded as of relatively minor importance.

15. Acts committed by children under 15 years of age are not punishable.

16. Acts committed by persons being irresponsible owing to insanity or similar conditions or pronounced mental deficiency are not punishable.

17. (1) If, at the time of committing the punishable act, the more permanent condition of the perpetrator involved defective development, or impairment or disturbance of his mental faculties, including sexual abnormality, of a nature other than that indicated in sect. 16 of this Act, the court shall decide, on the basis of a medical report and all other available evidence, whether he may be considered susceptible to punishment.

(2) If the court is satisfied that the accused is susceptible to punishment, it may decide that a penalty involving the deprivation of liberty inflicted on him shall be served in an institution or division of an institution intended for such persons. If appropriate, the Prison Commission may alter the decision as to where the penalty of imprisonment shall be served. If, during the term of imprisonment, it becomes evident that a continuation of such imprisonment will be useless or will be likely seriously to aggravate the condition of the convicted, then, at the request of the Director of the Prison Service, the case shall again be brought before the court which passed sentence in the last instance. This court shall decide, on the basis of a medical report, whether the penalty shall continue to be served or not.

(3) If a person in respect of whom preventive measures are taken under sect. 70 of this Act (cf. subsect. (1) of this section) for an offence committed by him has committed another offence, and if he is considered susceptible to punishment for offences of that nature, then, where the latter offence is of minor importance in relation to the offence in respect of which preventive measures are applied, the court may decide that no penalty shall be imposed.

18. Intoxication shall not preclude punishment being awarded, except where the perpetrator has acted while in an unconscious condition.

19. As regards the offences dealt with by this Act, acts which have been committed through negligence on the part of the perpetrator, shall not be punished, except where expressly provided. As regards other offences, the appropriate penal sanction shall apply, even where the offence has been committed through negligence, unless otherwise provided.

20. Where the statutory penalty, or aggravation of a penalty, refers to an intentional offence resulting in an unintentional effect, then that penalty shall take effect only where such consequence may be attributed to the negligence of the perepetrator or if he has failed to avert it to the best of his ability, after becoming aware of the danger.

Chapter IV

Attempt and complicity

21. (1) Acts aiming at promoting or carrying out an offence shall be punished as attempts, when the offence is not accomplished.

(2) The penalty prescribed for the offence may be mitigated in the case of attempts, particularly where the attempt gives evidence of little strength or persistence in the criminal intention.

(3) Unless otherwise provided, attempts shall be punished only where the offence is subject to a penalty more severe than simple detention.

22. Attempts shall not be punished if, spontaneously and not because of extraneous or independent obstacles against either completing the wrongful action or achieving his intention, the perpetrator desists from carrying further his intended act, or prevents its accomplishment or acts in such manner that his intervention would have prevented its accomplishment, even if, without his knowledge, the act had not failed in its purpose or otherwise been averted.

23. (1) The penalty in respect of an offence shall apply to any person who has contributed to the execution of the wrongful action by instigation, advice or action. The penalty may be mitigated in respect of a person who has intended to give assistance of minor importance only or to strengthen an intention already existing and, again, if the offence has not been accomplished or if an intended assistance has failed.

(2) Similarly, the penalty may be mitigated in respect of a person who has contributed to the breach of a duty in a special relationship in which he himself has no part.

(3) Unless otherwise provided, the penalty for participation in offences that are not subject to a penalty more severe than simple detention shall not take

effect if the accomplice had intended to give an assistance of minor importance only or to strengthen an intention already existing or, again, if his own complicity is due to negligence.

24. The accomplice shall not be punished if, under the conditions laid down in sect. 22 of this Act, he prevents the accomplishment of the punishable act or acts in such manner as would have prevented its accomplishment, even if, without his knowledge, the act had not failed in its purpose or otherwise been averted.

Chapter IX

Other legal effects of a punishable act

70. (1) Where an accused is acquitted under sect. 16 of this Act or where punishment is considered inapplicable under sect. 17 of this Act, while having regard to public safety it is deemed necessary that other measures be applied to him, the court shall decide on the nature of such measures. If public safety is unlikely to be guaranteed by imposing less rigorous measures, such as sureties, directions as to or prohibition against residence in a particular place, orders of the nature dealt with in sect. 72 of this Act, appointment of a supervisor or relegation to a state of minority, the person concerned shall be placed in a mental hospital, an institution for feeble-minded or other curative institution, an asylum for inebriates or in a special detention centre. Within the limits set by the court, the competent administrative authority shall decide upon any further arrangements that may be required by such measures.

(2) Where the accused is likely to be sentenced to placement in a hospital or an institution, the court may appoint a supervising guardian for him, if possible one of his near relatives, who is qualified for that task and has accepted it. The supervising guardian shall, on the one hand, assist the accused during the proceedings together with the counsel for the defence and, on the other hand, keep himself informed of his condition and see to it that his stay in the hospital or the institution be not extended beyond what is necessary.

(3) At the instance of the Public Prosecutor, of the director of the institution concerned or of the supervising guardian, the court which passed sentence in the first instance may at any time alter the earlier decision made concerning the nature of the measure or may, on the basis of a medical report, cancel it temporarily or absolutely. If a request on the part of the supervising guardian for cancelling or modifying the measures of security is not allowed by the court, the supervising guardian may submit a second request only after the expiration of one year: provided that, if warranted by special circumstances, such a request may be submitted at the expiration of not less than six months.

71. Where the perpetrator of a punishable act, after carrying it out but before having sentence passed on him, becomes more seriously affected by the conditions referred to in sect. 16 or sect. 17 of this Act, the court shall decide whether a penalty shall be inflicted or whether the penalty incurred shall be remitted. If deemed necessary, having regard to public safety, the court shall provide in the sentence that measures in conformity with the provisions of sect. 70 of this Act shall be applied in lieu of punishment or until the punishment can be carried out.

72. (1) Where a person is sentenced to a penalty involving the deprivation of liberty in respect of an offence covered by this Act, and if the court is satisfied that the offence has been committed under the influence of intoxicants, the convicted may be ordered by the court not to taste or buy intoxicants, on pain of being dealt with under the provision of sect. 138, subsect. (2), of this Act, for a specified period not exceeding five years as from his final release; a similar order may be made if the person concerned is acquitted under sect. 18 of this Act, where a penalty involving the deprivation of liberty would otherwise have been incurred. If, moreover, the person concerned is regarded as being addicted to intoxicants, such an order shall be made in all cases by the court.

(2) The Police shall, as far as possible, instruct restaurant keepers, tradesmen and retailers, on pain of liability of sect. 138, subsect. (3), of this Act, not to serve, sell or distribute intoxicants to a person convicted under subsect. (1) of this section.

73. Where it appears from a medical report and other available evidence that any person covered by sect. 72, subsect. (1), of this Act or any person liable to punishment under sect. 138, subsect. (1) or (2), of this Act is addicted

to intoxicants, it may be provided in the sentence that he shall be placed, after the penalty has been served or, in the case of suspended sentence, immediately, in a curative institution for inebriates, if necessary in a public institution or division of an insitution established for that particular purpose, until he can be regarded as having been cured. The maximum period of such detention shall be fixed in the sentence at 18 months, or in the case of recidivism at three years. If, prior to the expiration of the specified period, the person concerned is deemed to be cured or if the commitment appears to be ineffective, the Minister of Justice shall, on the recommendation of the governing body of the institution and on the basis of a medical report, decide whether the detention shall be discontinued.

74. Provisions may be made by Royal Order concerning the treatment of the persons detained in an institution under sect. 70 or sect. 73 of this Act concerning, inter alia, their employment at appropriate work.

75. If a person threatens death, fire or other misdeed, and if punishment is precluded or is not considered to afford adequate safety, the court may by a sentence passed after trial initiated by public prosecution, at the request of the person threatened or, if general considerations so require, without such request, order him to comply with the measures which the court finds necessary for obviating the apprehended menace and, if necessary, decide that he shall be taken into custody; if so, the court shall also decide whether the detention shall take place under the provisions governing arrest or in one of the institutions referred to in ss. 64, 67, 70 or 73 of this Act. The orders made or the measures taken may be rescinded by the Public Prosecutor if he deems it unnecessary to maintain them and if the person threatened agrees, or otherwise by a decision of the court which passed sentence in the first instance. At the request of the convicted, the case shall be brought before the court again, unless the Public Prosecutor is satisfied that the situation is exactly the same and if less than one year has passed after the promulgation of sentence or of a subsequent judicial decision.

76. (1) Where a foreigner, who during the last five years has not been permanently resident within the territory of the Danish State, is sentenced to imprisonment for two years or more, the court shall, except where special circumstances militate against it, order him to be expelled from the Kingdom after he has served his penalty. In other cases, where a foreigner is sentenced to imprisonment, the court may make such order, if appropriate in the circumstances.

(2) Prior to his expulsion, the convicted shall be notified of the criminal liability involved in any unlawful return, and this notification shall be entered in the records of the Police.

77. (1) Unless otherwise expressly provided, the court may decide that the following objects shall be confiscated for the benefit of the Exchequer:

(i) Objects produced in pursuance of a punishable act or which have been used or intended to be used for an intentional offence, provided they belong to any of the persons responsible for the act; or

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The Norwegian Penal Code

(Translated by Harald Schjoldager, LL.M. and Chief of Division Finn Backer)

Section 39

1. If an otherwise punishable act is committed in a state of insanity or unconsciousness, or if an offense is committed during unconsciousness due to voluntary intoxication (section 45) or during temporarily reduced consciousness or by someone with underdeveloped or permanently impaired mental capacity, and there is danger that the perpetrator because of his condition will repeat such an act, the court may decide that, for purposes of safety, the prosecution shall:

(a) assign or forbid him a certain place of residence,

(b) place him under the supervision of the police or a specially appointed probation officer and order him to report to the police or the probation officer at designated intervals,

(c) forbid him to consume alcoholic beverages,

(d) place him in reliable, private care,

(e) place him in a mental hospital, sanatorium, nursing home, or workhouse, where possible, in accordance with general provisions promulgated by the King.

(f) keep him in custody.

[2–22–1929]

2. If such condition involves danger of acts of the kind covered by sections 148, 149, 152 para. 2, 153 paras. 1 to 3, 154, 155, 159, 160, 161, 191, 192, 193, 195, 196, 197, 198, 200, 201, 202, 203, 204, 206, 212, 217, 224, 225, 227, 230, 231, 233, 245 para. 1, 258, 266, 267, 268 or 298, the court must decide to apply such security measures as are mentioned above.

[5–11–1951]

3. These measures are terminated when they are no longer regarded as necessary, but may be resumed if there should be reason to do so. The security measures listed under (a)–(d) may be employed concurrently.

The court shall determine the maximum period for which security measures may be imposed without its further consent.

4. If the court has not decided otherwise, the prosecution may choose between the above-mentioned security measures.

The decision to terminate, resume or alter a security measure is made by the ministry. Before a decision about security measures or their termination is made, the opinion of a medical specialist must ordinarily be obtained. The same procedure should be followed at regular intervals during the period in which security measures are in force.

5. If security measures, as mentioned in No. 1 above, are imposed, the ministry may decide to forgo all or part of the punishment to which a transgressor might be sentenced.

6. If the perpetrator is placed in a mental hospital and the court has not in advance decided that security measures are to be employed, the prosecution shall be notified before discharge. Discharge shall not take place until there has been opportunity to obtain the decision of the court on the imposition of further measures in accordance with this section. The offender may not be kept in the hospital waiting for such decision for more than three months after the director of the hospital has notified the prosecution that he will be certified as recovered.

7. If the perpetrator is not a Norwegian citizen, the ministry may decide to deport him instead of subjecting him to security measures according to this section, unless otherwise agreed by treaty with a foreign state.

Section 39a

1. If the defendant is guilty of several attempted or completed felonies punishable according to sections 148, 149, 152, para. 2, 153, paras. 1–3, 154, 159, 160, 161, 174, 178, *cf.* 174, 191, 192 193, 195, 196, 197, 198, 200, 201, 202, 203, 204, 206, 207, 212, 217, 224, 225, 227, 230, 231, 233, 245, para. 1, 258, 266, 267, 268, or 292, and the court has reason to assume that he will again commit a felony of the kind named above, the court shall decide that he is to be kept in preventive detention after he has served all or part of his sentence, so long as this is necessary.

The court shall determine the maximum period for which preventive detention may be imposed without its further consent.

[5–11–1951]

2. If the defendant is a person with underdeveloped or impaired mental capacity, the court may decide to employ security measures in accordance with section 39 instead of punishment and preventive detention in accordance with this section. Such decision may also be made by the ministry.

3. The ministry may decide to transfer the convict from prison to preventive detention when he has served at least one-third of the term to which he was sentenced.

4. The ministry may release the convict on probation when the punishment to which he is sentenced has been fully served, or when the punishment served and preventive detention together equal at least the prison term to which he was sentenced. As a condition for the release the ministry may assign or for-

bid him a certain place of residence, order him to report at regular intervals to the police or an appointed probation officer, forbid him to consume alcoholic beverages, and order him, within his financial capacity, to pay the victim compensation for economic loss and suffering.

If during the five years following his release on probation the convict has not committed any intentional felony and has acted in accordance with the conditions set, the release becomes final.

5. If the stipulated punishment has been served in part, it is regarded as completed as of the time the convict is released from preventive detention, unless he is again confined.

6. If the convict is not a Norwegian citizen the ministry may decide to deport him when the punishment to which he is sentenced is served, unless otherwise agreed upon by treaty with a foreign state.

[2-22-1929]

Section 39b

1. The prosecution may proceed according to section 39 without demanding punishment, provided the right to prosecute has not expired. In such a case proceedings may be brought regardless of whether the conditions mentioned in section 87 of the Code of Criminal Procedure are present. Request for prosecution by the victim is not required. Such proceedings must always be brought in the City or County Court, and must be treated according to the rules in the Code of Criminal Procedure.

2. In a criminal case, if no decision is made about security measures according to sections 39 or 39a, the prosecution may, where there are special reasons, bring the question before the court within one year after sentence has been served. The provisions in the last sentence of No. 1, above, apply in such cases.

3. When the court provides that security measures shall be imposed, or when a court denies a request for such measures, the decision shall be in the form of a judgment.

In cases before the Court of Appeals, security measures may not be imposed unless the jury, by more than six votes, has affirmed that the conditions listed in section 39, Nos. 1 and 2, or section 39a, No. 1, are present.

4. When a person is released on probation from a jail, sanatorium or nursing home, and the question of recommitment arises, the prosecution may have him arrested and, on specific instructions from the Magistrate's Court, keep him in custody until the matter is decided.

5. Detailed rules about the security measures mentioned in sections 39 and 39a, and about the questions to be presented to the jury as provided in No. 3, above, may be issued by the King.

[2-22-1929]

Chapter 3

Conditions determining punishability

Section 40

The penal provisions of this code do not apply to an act committed unintentionally unless it is explicitly provided or unmistakably implied that a negligent act is also punishable.

A misdemeanor consisting of omission to act is also punishable when committed by negligence, unless the contrary is explicitly provided or unmistakably implied.

Section 41

In cases where a superior cannot be punished for a misdemeanor committted by somebody in his service, the subordinate can always be held responsible, even if the penal provision, according to its wording alone, is directed against the superior.

Section 42

To a person who has committed an act in ignorance of circumstances determining the punishability of the act or increasing his liability for punishment, these circumstances are not attributable.

Where the ignorance can be ascribed to negligence, the punishment provided for a negligent act is applied, if negligence is punishable.

Error regarding the value of an object or the estimated amount of damages caused will be taken into account only when punishability depends thereon.

Section 43

Where the law provides that an unintentional consequence of a punishable act entails increased punishment, the more severe punishment applies only where the offender could have foreseen the possibility of such a consequence, or where, in spite of his ability to do so, he has failed to prevent such a consequence after having been made aware of the danger.

Section 44

An act is not punishable if committed while the perpetrator was insane or unconscious.

[2–22–1929]

Section 45

Unconsciousness due to voluntary intoxication (produced by alcohol or other means) does not exclude punishment.

[2–22–1929]

Section 46

Nobody may be punished for an act committed before he has completed his fourteenth year.

Section 47

Nobody may be punished for an act committed to save the person or property of another from an otherwise inevitable danger, where the circumstances justified him in regarding this danger as extremely significant in relation to the damage his act might cause.

Section 48

Nobody may be punished for an act committed in self-defense.

Self-defense exists when an otherwise punishable act is committed for the prevention of, or in defense against, an unlawful attack, as long as the act does not exceed what is necessary; moreover, in relation to the attack, the guilt of the assailant, and the legal values attacked, it must not be considered absolutely improper to inflict so great an evil as intended by the act of self-defense.

The above rule concerning the prevention of unlawful attack applies also to acts performed for the purpose of lawful arrest or for the prevention of a prisoner's escape from prison or custody.

Anybody who has exceeded the limits of self-defense is nevertheless not to be punished if the excess is due solely to emotional upset or derangement produced by the attack.

Section 54

When a suspended sentence is read to or served on the convict, he shall be acquainted with the meaning of a suspended sentence and with the consequences of not complying with the conditions. The judge should also give the convict such warning and admonition as his age and general circumstances might require. For this purpose the convict may be summoned to a special session of the court.

If the convict is placed under supervision, the judge shall explain to him the significance of the supervision and his duty to comply with the instructions provided under the supervision.

[6–3–1955]

Section 55

For offenses committed by a person under eighteen years of age, confinement for life may not be used and punishment of the kind specified may be reduced below the minimum provided for the act.

If the convict is under eighteen years of age at the time of sentencing, the court may refrain from imposing punishment and, instead, provide in the sentence for the Child Welfare Board to take action in accordance with the Child Welfare Law.

[6–3–1955]

Section 56

1. The court may reduce the punishment below the minimum provided for the offense and commute it to a milder form of punishment:

(a) when the act is committed in order to save the life or property of a person, but the limits for the right, as stated in sections 47 and 48, are exceeded;

(b) when the act is committed in justifiable anger, under compulsion or imminent danger or during temporary strong reduction of consciousness not due to voluntary intoxication.

2. When the act is committed in a state of unconsciousness due to voluntary intoxication (section 45), the punishment may, under extremely extenuating circumstances, be reduced to less than the minimum provided, unless the convict had become intoxicated for the purpose of committing the act.

[2-22-1929]

The Penal Code of Sweden

(Translated by Thorsten Sellin, University of Pennsylvania)

Chapter 33

of reduction and exclusion of sanctions

Sec. 1. No one may be sentenced to a sanction for a crime he committed before he reached fifteen years of age.

Sec. 2. For a crime which some one has committed under the influence of mental disease, feeblemindedness or other mental abnormality of such profound nature that it must be considered equivalent to mental disease, no other sanction may be applied than surrender for special care or, in cases specified in the second paragraph, fine or probation.

Fines may be imposed if they are found answering the purpose of deterring the defendant from further criminality. Probation may be imposed if in view of the circumstances such sanction is considered more appropriate than special care; in such case treatment provided for in Chapter 28, Section 3, may not be prescribed.

The defendant shall be free of sanctions if it is found that a sanction mentioned in this Section should not be imposed.

Sec. 3. If some one is sentenced to imprisonment for a fixed term, fines, suspension or disciplinary punishment in a case for which he has been detained in jail, it may be decided, if deemed reasonable in view of the circumstances, that the sentence shall be considered as having been wholly or partly served by such detension of the defendant.

If some one, who has begun to undergo youth imprisonment, internment or, subsequent to a sentence to probation, treatment provided by Chapter 28, Section 3, is instead sentenced to a punishment mentioned in the first paragraph, it may be decided, if deemed reasonable in view of the circumstances, that the sentence shall be considered as having been wholly or partly served by such institutional care or treatment.

A decision on a matter referred to in this section may be changed by a higher court when considering an appeal of the sanction imposed, even though the decision was not appealed.

Sec. 4. If some one has committed a crime before reaching the age of eighteen, a milder punishment than that provided for the crime may be imposed, depending on circumstances. If special reasons dictate it, a milder punishment may also be imposed for crime which some one committed under the influence of mental abnormality.

If very strong reasons dictate it and no obvious obstacle exists with reference to public law-obedience, a milder punishment than that provided for the crime may be imposed in other cases as well.

A sanction may be completely dispensed with, if because of special circumstances it is found obvious that no sanction for the crime is necessary.

APPENDIX C

Norwegian Laws

The taking of oath shall be effected subsequent to the examination.

§ *186.* In no case shall the taking of oath be demanded of:

(1) witnesses who have not reached the age of 15 years, or who on account of mental deficiency or defective development cannot have any clear understanding of the significance of the oath;

(2) witnesses who are convicted as principals or accessories to the act which forms the subject matter of the investigation, or on whom there rests suspicion of such guilt.

In cases relating to infraction of the customs legislation, persons who have aided in the act can, irrespective of the provision in item (2), be sworn, if prosecution against them has been waived.

§ *187.* The court may refrain from having witnesses sworn who pursuant to § 176 might have claimed exemption from giving evidence, or whose evidence by reason of its content or for other reasons must be deemed to be particularly unreliable.

The court may always refrain from administering the oath to private plaintiffs and aggrieved parties who have supported the public prosecution.

§ *188.* Persons who belong to a religious community which does not permit the taking of oath, shall with the same liability as if oath had been administered, affirm on their honour and a good conscience that they have spoken the unadulterated and whole truth and nothing concealed. The same applies to anyone who refuses to be sworn because this is contrary to his religious conviction, or because he does not believe in an almighty and omniscient God.

§ *189.* If a witness refuses to give evidence, oath or affirmation after this has by final ruling been enjoined on him, the court may rule that the witness shall be kept in custody until he complies with the injunction. But in no circumstance shall he in the same case or in another relating to the same subject matter be kept in prison for a period exceeding a total of 3 months.

If a witness meets in a state of intoxication, the court may decide that he shall be kept in custody until he is sober.

CHAPTER XVI. EXPERTS AND INQUIRY.

§ *190.* Anyone who is under an obligation to witness in the case is on appointment by the court bound to perform service as expert.

But the court should as far as possible absolve from this duty a person who shows that he cannot perform such service without considerable inconvenience to himself or to functions which he is discharging.

Before the court appoints anyone who is not a regular expert, it should be a rule ask him if he is willing. If he states his unwillingness, he should not be appointed, if there is a possibility of appointing someone else.

Experts are entitled to remuneration under a special statute.

§ *191.* The number of experts should as a rule be at least two, unless the parties are agreed on requesting only one.

In urgent cases, or when it relates to questions of minor significance, or if it would be connected with special difficulty or inconvenience or with disproportionate costs to procure several experts, one is sufficient.

The court may appoint new experts in addition to the one first appointed, if it finds this necessary.

The decisions of the court under this section cannot be challenged.

§ *192.* Where experts have been permanently commissioned for certain kinds of cases, these shall serve, unless special circumstances render this impossible or inadvisable.

Otherwise the court shall take the experts from among those who in public office or by vocation practise a science, art or other activity which postulates the special knowledge which is needed, or among those who are entered on the panel from which judicial surveyors shall be taken, conformably with the Act relating to the courts of justice, § 79.

When regard for skill or impartiality makes it necessary, the court may appoint experts outside the panels or outside the judicial circuit. If experts are

to be appointed outside the judicial circuit, the presiding judge may make application to the court concerned.

In the examination of women, for example in questions of pregnancy or birth, women should serve, when this is found to be sufficiently safe.

§ *193*. In so far as can be avoided, no one should be employed as expert if under the Act relating to the courts of justice, §106 or §108 he would be excluded from serving as member of the court.

Autopsy must, where it can be avoided, not be entrusted to the physician who has treated the deceased during his last illness. But this physician may be summoned if it is found desirable.

§ *194*. Before an expert is appointed, the court shall as far as possible give the parties opportunity of stating their opinion in respect of the choice.

§ *195*. A written statement may be demanded from the experts or, according to the rules applying to witnesses, they may be called before the court for examination.

The fact that they have made a statement earlier, either in court or in writing, is no obstacle to their being called in for examination during the main hearing. When the statement is given by a group of experts appointed for that purpose, it cannot be demanded, however, that more of the members of this group shall meet than one member for each of the different opinions into which it has been divided. The group shall itself select the members who are to meet.

§ *196*. The examination is performed according to the rules for examination of witnesses. But the experts may in general be present during the examination of the other experts; likewise it may be allowed them, at request, to take counsel with one another before they answer.

§ *197*. The experts shall by oath declare that they will perform (have performed) their assignment conscientiously and according to their best conviction.

Permanently commissioned experts may, when they are not summoned to the main hearing, make reference to their oath once given.

In case of a judicial inquiry, the oath shall be given prior to the court sitting. Otherwise it shall be given after the examination.

If it is uncertain whether an inquiry will take place, the experts may be summoned to a court sitting for giving a sworn confirmation of their written statement.

In the cases mentioned in § 188 an affirmation on honour and good conscience may take the place of an oath.

§ *200*. For an inspection and therewith connected survey which is to be held in court sittings other than the main hearing a judicial inquiry may be undertaken by the judge of the Court of Examination in unison with the court witness.

§ *201*. When in the opinion of the court an inquiry requires special skill, or on account of the doubtfulness or importance of the question it is deemed proper, experts shall be summoned. The summoning of court witness may in such case be omitted.

§ *202*. In judicial inquiries, witnesses may be called in respect of the subject matter of the inquiry.

§ *203*. In the court minutes a complete statement of the conditions found shall be entered, and it shall be noted, for example, whether there are clues or marks to which, according to the nature of the case, attention ought to be directed.

Where it will serve as a substantial help, effort should be made to procure drawings, plans and diagrams.

The conclusions gained by the inquiry shall be set forth. But the court may decide that it shall be left to the experts within a given time-limit to announce these, conformably with § 205.

§ *204*. If an inquiry requires further investigation or observations, or if undertaking thereof by the court for other reasons, such as regard for decency, makes this inconvenient or unnecessary, undertaking or continuation thereof may according to the decision of the court be entrusted to experts.

The court shall in that case stipulate a time-limit for the submitting of a report concerning the inquiry undertaken, prescribe its subject matter and pur-

pose and communicate all necessary information which it possesses. If the experts find that something is lacking in this respect, they shall advise the court thereof. The latter shall as far as possible give to the accused timely notice of the investigation.

§ *205*. In the cases mentioned in § 204 a written statement shall as a rule be submitted, which shall be drawn up according to the rules in § 203, and in addition contain a recital of the procedure followed and, in the event of a difference of opinion, an account of this. Points in respect of which no question has been asked, shall be included, in so far as the experts find them significant. If the court finds the statement defective, it may enjoin on the experts to revise or amplify it.

§ *206*. To experts who are permanently commissioned to undertake certain inquiries, the prosecuting authority can apply directly, and in that case it takes the place of the court with respect to the matters dealt with in § 204 and 205.

§ *207*. If an inquiry results in the subject matter thereof being destroyed or altered, a part of the subject matter should as far as possible be excluded from the investigation.

If the accused asks that a part shall be entrusted to him for independent investigation by an expert engaged by him, this shall as far as possible be granted him.

The accused is, besides, always entitled to allow an expert selected by him to attend in order to take part in the inquiry, when this can be done without major inconvenience.

§ *208*. The fact that an inquiry has been held does not preclude a new inquiry from taking place regarding the same subject matter, either by the same or other persons.

§ *209*. If there is any risk that it will not be possible for the subject matter to be preserved sufficiently unchanged, until an inquiry conformably with the above rules can be effected, the prosecuting authority shall take the place of the court, but without access to administer oaths.

§ *210*. If the statement of the experts leaves doubt whether an accused person is mentally sound, the court may, after a defending counsel has been appointed and heard, decide that he shall be placed in a mental asylum for further observation and examination.

If such decision is challenged within three days, the challenge shall have postponing effect.

§ *211*. When there is reason to assume that a person has not died a natural death, and that the death has been caused by a punishable act, an inquest, and, where the circumstances are suspicious, an autopsy shall at once be held, and persons who are able to give information concerning the deceased and the circumstances surrounding his death, shall be examined on the spot.

The Swedish Code of Judicial Procedure

Translated and with an Introduction by Anders Bruzelius, City Court Judge, Lund, Sweden, and Ruth Bader Ginsburg, Associate Professor of Law, Rutgers.

Section 5

Anyone possessing an object that can be brought conveniently to the courtroom, and that can be assumed to be of importance as proof, is obliged to make the object available for inspection at a view; however, in criminal cases, such an obligation is not imposed upon the suspect or upon any person related to him as stated in chapter 36, section 3. The provision in chapter 36, section 6, as to the privilege of a witness to refuse to testify shall correspondingly apply to the privilege of a party, or any other person, to refuse to make an object available for inspection at a view. As to the duty to produce a document for inspection at a view, the provisions in chapter 38, section 2, shall apply.

The provisions in chapter 38, sections 3 to 8, shall correspondingly apply to objects and documents which are to be made available for inspection at a view.

CHAPTER 40

EXPERTS

Section 1

If, for the determination of a matter, the appraisal of which requires special professional knowledge, it is found necessary to call upon an expert, the court may obtain an opinion on the the matter from a public authority or officer, or from any person specially licensed to furnish opinions on the matter, or commission one or more persons known for their integrity and their knowledge of the subject to deliver an opinion.

Section 2

A person whose relationship to a party or to the matter in controversy is such as to cast doubt upon his reliability may not be called as an expert.

Section 3

Before appointing an expert, the court should invite the parties to state their views thereon. If the parties agree upon an expert, he shall be used, provided that he is found suitable, and that there is no impediment to his appointment; however, the court may commission an additional expert.

Section 4

Except for persons who in their official capacity are obliged to assist as experts and those specially licensed to furnish opinions, no person is required to perform the commission of an expert unless he voluntarily undertakes to do so. A person who has undertaken such a commission may not avoid its performance without valid excuse. No expert, however, is obliged to disclose a trade secret, unless extraordinary cause requires that he give an opinion which would entail such disclosure.

Section 5

When, for the elucidation of a circumstance of importance for the task of the expert, a party or any other person should be examined, or any other investigation occur in court prior to the main hearing, the court may so order. The provisions on proof-taking outside a main hearing shall correspondingly apply.

If inspection is required of immovable property, objects that cannot be moved conveniently, or the scene of a special occurrence, the court may direct that the expert make an on the site inspection. At such inspections trade secrets may not be disclosed unless the court finds that there is extraordinary cause for such disclosure.

The court may direct that objects which, pursuant to chapter 39, section 5, a possessor is obliged to produce in court, shall be made available to the expert for inspection.

Section 6

If the presence of the parties at an expert's inspection is found appropriate, the court may direct that they shall be notified by the expert to attend the inspection. If a party has been so notified, his absence does not constitute an impediment to the occurrence of the inspection.

A record shall be made at the inspection which shall state the persons present and what occurred thereat.

Section 7

As to the reports of public authorities, or officers, or of persons specially licensed to furnish opinions, the specific provisions thereon and in other respects, established practice, shall govern.

Unless the court prescribes otherwise, any other expert shall submit a written opinion. The court shall direct the expert to submit the report within a fixed period.

The report shall state the reasoning and circumstances upon which the conclusions in the report are founded.

After the report is filed with the court, it shall be held accessible to the parties.

Section 8

An expert who has submitted a written opinion shall also be examined orally, if a party requests it, unless examination of the expert is plainly without importance, or if the court finds it necessary. As to a report obtained from a central administrative board, an academy, or any other official society, neither the board or society nor any person who participated in preparing the report may be examined orally, unless such examination is found unavoidably necessary; if several persons have cooperated in preparing the report, only one representative of each view expressed in the report may be called.

Section 9

Prior to testifying in the court, the expert, placing a hand on the Bible, shall take this oath:

"I (name) promise and assure before God Almighty and on his holy word that I will perform the expert task assigned to me to the best of my ability."

If the expert has submitted a report prior to his examination, the oath shall be adjusted accordingly.

After the expert has taken the oath, the court shall remind him of its significance.

As to substitution of an affirmation on honor and conscience in place of an oath, the provisions on the oath taken by witnesses shall apply.

Section 10

When an expert is examined orally, the examination is conducted by the court. However, with the consent of the court, an expert may be examined by the parties. The court and the parties may put questions to the expert.

The court shall exclude questions that are plainly irrelevant, confusing, or otherwise inappropriate.

If the expert has submittted a written opinion, and the court finds it suitable, all or part of the opinion may be read aloud.

Section 11

The provisions in chapter 36, section 7, paragraph 1, section 9, paragraph 2, and sections 15, 18 and 19 concerning witnesses shall correspondingly apply to experts.

Section 12

If a person who has undertaken to serve as an expert fails to submit his written opinion within the fixed period without a valid excuse, the court may order him to submit the report on penalty of fine.

Section 13

If an expert served with a notice to appear for examination does not appear, he shall be fined. If the case is postponed to a later date, the expert may be directed to appear on that date on penalty of fine.

Section 14

If an expert refuses without a valid excuse to take an oath or affirmation, to testify, or to respond to a question, the court shall direct the expert to perform his duty on penalty of fine.

Section 15

If the commission of an expert is withdrawn or otherwise discontinued, he may not thereafter be subjected to punishment or coercive measures under sections 12, 13 or 14.

Section 16

If an expert is liable for negligence or contumacy as stated in sections 12, 13 or 14, and a party occasions litigation costs thereby, the court, even if not requested to do so, may order the expert to furnish compensation for such costs to the extent found reasonable. Further, if a party was ordered by the court to compensate his adversary for such costs, upon payment, the party may claim reimbursement from the expert to the extent of the sum ordered by the court to be paid by the expert.

The prescriptions as to the liability of an expert to reimburse a party for expenses shall correspondingly apply to expenses paid out of public funds.

Section 17

When a report has been submitted by a public authority or officer, or by a person specially licensed to furnish opinions, compensation shall be paid only to the extent special provisions so prescribe. Any other expert is entitled to compensation for expenses accruing in the execution of his duties, and for expenditure of his time and effort in an amount found reasonable by the court.

In civil cases amenable to out of court settlement, and in prosecutions for offenses not within the domain of public prosecution, the compensation shall be paid by the parties jointly and severally or, if only one of the parties has requested employment of the expert, by that party alone. In all other cases, the compensation shall be paid out of public funds.

Section 18

An expert is entitled to advanced payment of his compensation in an amount found reasonable by the court. The advance payment shall be made by the party, or parties, or out of public funds, as stated in section 17.

Further regulations concerning advance payments are issued by the King.

Section 19

As to experts not appointed by the court, but claimed by a party, the provisions in sections 7 and 8 shall apply to the extent relevant.

In other respects, when such an expert is orally examined, the provisions concerning witnesses shall apply; however, if the court finds it suitable, all or part of a written opinion may be read aloud.

Section 20

Specific regulations prescribed by law or decree on the examination of experts in particular situations shall govern.

Chapter 41

PERPETUATION OF PROOF FOR THE FUTURE

Section 1

If there is a risk that proof concerning a circumstance of importance to a person's legal right may be lost, or difficult to obtain, and no action concerning the right is pending, a lower court may take and perpetuate for the future proof in the form of witness testimony, expert opinions, views, or documentary evidence. However, proof may not be taken pursuant to this chapter for the purpose of investigating a crime.

Section 2

Anyone desiring to take and perpetuate proof for the future shall apply to the court.

The application shall state that fact expected to be established by the proof, the nature of the proof, the grounds claimed by the applicant in support of the proposed proof-taking and, if possible, the other persons whose interests may be at stake.

Questions 11 and 12:

I. INTRODUCTION

Extraterritorial criminal jurisdiction is sometimes referred to as international criminal law. However, Scandinavian writers prefer to use this term only for the criminal laws which have originated from international institutions and from agreements between individual states.[1]

This report deals with the applicability of national provisions in respect to space, because it is difficult to discuss the somewhat narrower subject of extraterritorial jurisdiction alone. The basic jurisdictional principle of Scandinavian criminal law, as of Anglo-American criminal law, is the territorial principle. However, the Scandinavian countries have had supplementary provisions on extraterritorial jurisdiction for more than a century. There are also Scandinavian provisions which make it possible to consider that a criminal act has been committed where the actual or intended consequences of the act have taken effect, and it may be doubtful whether such jurisdiction should be considered as territorial or extraterritorial jurisdiction.[2]

Part II, about the historical development, deals briefly with the relative place of Scandinavian criminal law within the Western World, because it is desired to stress that the current Scandinavian codes are closely related both to Anglo-American and to Continental European criminal law. The Scandinavian emphasis on territorial jurisdiction points to the relationship with English law.

Part III, about the current criminal codes, discusses the actual Scandinavian provisions in some detail. The Scandinavian experience with dual territorial and extratorritorial jurisdiction has been good, and the current Scandinavian provisions have, in principle, great similarty to the jursdictional provisons of the proposed Federal Criminal Code.[3]

Appendices A, B, and C contain the translations of the jurisdictional provisions in the current criminal codes of Denmark,[4] Norway,[5] and Sweden[6] respectively. *Appendix D* is a copy of Chapter 10 on criminal jurisdiction in the English version of Professor Andenaes' standard text on Norwegian criminal law.[7] This appendix was included because it is representative of the way in which Danish, Norwegian, and Swedish writers normally present the rationale of the Scandinavian provisions on criminal jurisdiction. It also illustrates how easy it would be to apply this approach to Chapter 2 of the proposed Federal Criminal Code.[8] It is probably this kind of systematic or rational approach which Professor Damasks has in mind when he states that: "Continentals would consider traditional common law jurisdictional notions less rational than their own."[9]

II. THE DEVELOPMENT OF SCANDINAVIAN CRIMINAL LAW

The historical basis for Scandinavian criminal law is the same as that for Anglo-American criminal law, namely, the laws of the North Germanic peoples who settled around the North Sea. There was much interaction between these peoples who had excellent means of seaward transportation while their means of overland transportation were poor. This common development lasted up to

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[1] Stephan Hurwitz, *Dan Danske Kriminalret*. 4th ed. by Knud Waaben. Copenhagen, G.E.C. Gad, 1967, p. 109.

[2] *Id.*, p. 103.

[3] Final Report of the National Commission on Reform of Federal Criminal Laws: a Proposed new Federal Criminal Code (Title 18, United States Code), in *U.S. Congress. Senate. Committee on the Judiciary.* Hearings before the Subcommittee on Criminal Laws and Procedures on February 10, 1971. Washington, G.P.O., 1971. Part 1, p. 155–514.

[4] *The Danish Criminal Code;* with an introduction by Knud Waaben. Copenhagen, G.E.C. Gad, 1958. 119 p. Hereafter referred to as *The Danish Criminal Code.* (The use of the terms "criminal code" and "penal code" does not indicate any substantial difference between the Scandinavian codes. Both translations are correct).

[5] *The Norwegian Penal Code;* by Harald Scholdager and Finn Backer, *trans.* with an introduction by Johannes Andenaes. South Hackensack, N.J., Fred B. Rothman, 1961. 167 p. Hereafter referred to as *The Norwegian Penal Code.*

[6] *The Penal Code of Sweden;* by Thorsten Sellin *trans.* with an introduction by Ivar Strahl. Stockholm, the Ministry of Justice, 1965. 82 p. Hereafter referred to as *The Swedish Penal Code.*

[7] Johannes Andenaes. *The General Part of the Criminal Law of Norway.* South Hackensack, N.J., Fred. B. Rothman, 1965, p. 315–322.

[8] *Supra* note 3.

[9] *The National Commission on Reform of Federal Criminal Laws.* Working Papers. Washington, D.C., G.P.O. 1971. V. 3, p. 1479.

the Norman invasion of England in 1066. Two American scholars have discussed the later developments in such a way that they supplement each other. Orfield wrote in 1953:[1]

A study of the growth of criminal law in the Scandinavian states indicates that there are many close parallels with the growth of the criminal law in England. Concepts of private vengeance existed contemporaneously in both groups. There were outlawry, ordeals, and the use of compurgations and oath helpers in both groups. Movements to eliminate the wide use of the death penalty occurred side by side in both groups. A century ago the Scandinavians became interested in American methods of prison administration. During the past century all the Scandinavian states have developed modern codes of substantive and of procedural criminal law, which deserve study in other states when modernization of the criminal law is being attempted. The Scandinavian states have developed a unique alternative to the juvenile courts, namely, the use of committees and boards instead of courts. Criminal penalties are light, yet the Scandinavian states have a much lower percentage of crime than the United States. Scandinavian criminal procedure has moved away from the inquisitorial principle to the accusatorial.

Gerhard O. W. Mueller wrote a decade later:[2]

Here was a legal system which had spawned our own common law, which was thoroughly continental, yet, because of its historical ties with the British Isles, and a stubborn resistance against mid-European imperialization, had stayed somewhat aloof of the Roman law influences which had reshaped the law of the continent proper. Norwegian law, perhaps like Scandinavian law generally, has therefore become a virtual link between the Roman based continental legal systems and the common law though, without question, its legal ties, like its geography, are much closer with Central Europe than with England and America.

Professor Mueller seems to reflect the school of thought that it is possible to divide the entire Western World up into either common law systems or civil law systems. A Swedish writer has defended this view in some detail,[3] even though he also agrees with the late Professor Max Rheinstein that "the differences between the several families of the civil law group are so considerable that it might be justified to regard Nordic [i.e., Scandinavian] laws as another, though peculiar different, family of the civil law group."[4] However, most Scandinavian writers simply reject the idea that Scandinavian law can be classified as either civil law or as common law,[5] primarily because they feel that the so-called civil law group is too fragmentated to be considered one group.[6] The general Scandinavian (and to a large extent European) trend seems to be to consider all the legal systems of the Western World as belonging to one large group of relatively closely related legal systems. As it has been pointed out by the Swiss Professor Schnitzer,[7] all the legal systems of this Euro-American group are mixtures of Roman and Germanic law.

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[1] Lester Bernard Orfield, *The Growth of Scandinavian Law*, Philadelphia, Univ. of Pennsylvania Press, 1953, p. xv–xvi.

[2] Gerhard O. W. Mueller, "Editor's preface," in: *The General Part of the Criminal Law of Norway*, *supra*, note 7, p. x.

[3] Jacob W. F. Sundberg, "Civil Law, Common Law and the Scandinavians," *in* 13 *Scandinavian Studies in Law* p. 180–205 (1969).

[4] *Id.* p. 205.

[5] The Danish Committee on Comparative Law, *Danish and Norwegian Law*, Copenhagen, G.E.C. Gad, 1963, p. 68: "Danish-Norwegian Law is neither part of the "common law nor" of the "civil law" system"; Bernhard Gomard, "Civil Law, Common Law and Scandinavian Law, "*in* 5 *Scandinavian Studies in Law* p. 23 (1961): "the question whether Scandinavian law is a civil—or a common law system is not meaningful"; Peter Lodrup, "Norwegian Law: a Comparison with Common Law, "*in*: 6 *St. Louis University Law Journal* 520 (1961): "if Norwegian law is classified as "civil law" and thereby declared to be based on Roman Law, the labeling is simply incorrect"; Hilding Eek, "Evolution et structure du droit scandinave, *in* 14 *Revue Hellenique de Droit International* p. 38 (1961): Scandinavian law forms "un troisième système"; Folke Schmidt, "Preface, "*in* 1 *Scandinavian Studies in Law* p. 5 (1957): "Although the Scandinavian legal systems are historically independent, they undoubtedly have much in common both with the systems based on Roman law and with those based on common law."

[6] Stiig Juul, *Forelaesninger over Hovedlinier i Europaeisk Rets Udvikling fra Romerretten til Nutidon*. [Translated title: Lectures over the major trends within the development of European law from Roman Law [i.e., the fall of the Roman Empire] and until contemporary time] Copenhagen, G.E.C. Gad, 1970, 199 p.

[7] Adolf F. Schnitzer, *Vergleichende Rechtslehre*, 2nd ed. Basel, Varlag fur Recht und Gesellschaft, 1961, 2 v.

Schnitzer clarifies his theory further by stating that this whole group has "developed out of a mixed Roman and Germanic civilization imbued with Christianity."[1]

The Swedish Professor Malmström has written a good article in English[2] about the different comparative approaches, and his opinion seems to be representative of a rather generally held Scandinavian view when he accepts Schnitzer's proposal about organizing the individual legal systems in a way similar to that of a color scale according to the relative importance of Roman or Germanic elements. This would, according to Malmström, lead to the following arrangement:[3]

		CONTINENTAL EUROPEAN GROUP		
Common law (England, U.S.A., etc.)	Scandinavia	Germany Switzerland Austria	France Belgium Luxemburg Holland	Italy Spain Latin America
			LATIN GROUP	

Malmström himself admits that his grouping of the Euro-American legal systems is not a perfect solution, but it seems to be a more useful tool for comparative purposes than is the mere division of the Western World into "civil law systems" and "common law systems."

III. THE CURRENT CRIMINAL CODES

The jurisdictional provisions in the current criminal codes of Denmark,[4] Norway,[5] and Sweden[6] are all arranged in the same way: (A) the territorial principle is first established as the general jurisdictional principle; (B) the personality principle is then applied to fill in certain lacunae which have been left by the territorial provisions; (c) the universality principle is finally applied to fill in the lacunae which were left by the two previous principles. The provisions apply to all criminal offenses, regardless of whether they are described in the special part of the criminal codes or in other statutes.

The wording of the current Norwegian jurisdictional provisions has remained practically unchanged since 1951,[7] and the present provisions have much likeness to the corresponding provisions in the Norwegian Criminal Code of 1902.[8] Differently worded provisions which made the territorial, the personality, and the universality principles applicable to most serious crimes had already been introduced in the Norwegian Criminal Code of 1842.[9] The wording of the current Danish jurisdictional provisions has remained virtually unchanged since 1930,[10] and is quite similar to the original, somewhat weaker, provisions which were enacted in 1866.[11] The wording of the present Swedish jurisdictional provisions dates back to 1965,[12] and they were, in principle, introduced by the Swedish Criminal Code of 1864.[13] This Code was divided into

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[1] *Id.* v. 1, p. 139. [The quotation is translated from the German by the writer of this report].

[2] Ake Malmström, "The System of Legal Systems," *in* 13 *Scandinavian Studies in Law* (1969), p. 128–149.

[3] *Id.*, p. 148.

[4] *The Danish Criminal Code*, Chapter 2 (See Appendix A).

[5] *The Norwegian Penal Code*, Chapter 1 (See Appendix B).

[6] *The Swedish Penal Code*, Chapter 2 (See Appendix C).

[7] *Almindelig Borgerlig Straffelov av 22 Mai 1902* mad senere endringer og tilleg, sist ved Lov av 18 Juni 1971. Oslo, Grondahl & Son, 1971. p. 7–8. (The notes on page 6–7 indicates that the basic text of Sec. 12 was enacted in 1951, and that some minor changes were made in 1963 and in 1971).

[8] Francis Hagerup, *Almindelig Borgerlig Strafflov av 22 Mai 1902*. Kristiania, Aschehoug, 1903. p. 10–17.

[9] *Lov angaaende Forbrydelser av 20 August 1842 Sec. 1–8, in* 1842 *Love*. Anordninger, Kungjorelser, asbne Breve, Resolutioner, m.m. 1943. p. 354–355. Oslo, Grondahls Forlag.

[10] Lovbekendtgorelae Nr. 347 af 15. august 1967 af *Borgerlig Straffelov*. Copenhagen, Jespersen of Pios Forlag, 1970. p. 6–9 (An editorial change was made in Sec. 11 in 1939. *see* Straffeloven af 15. april 1930. Copenhagen, G.E.C. Gad, 1958. p. 12).

[11] *Almindelig borgerlig Straffelov* af 10. Februar 1866. Copenhagen, Jul. Schlichtkrull's Forlag, 1892. p. 1–3.

[12] *Brottsbalk*, Chapter 2, in Svariges Rikes Lag. 91st ed. Stockholm Norstedt, 1970, p. 712–719.

[13] Ivar Strahl, "Introduction" in *The Penal Codes of Sweden*, effective January 1, 1965. Stockholm, Ministry of Justice, 1965. p. 6–7.

a general and a specific part, as is usual in European criminal codes. However, the general arrangement of the Swedish Criminal Code was changed in 1965 in order to make it conform better with the original arrangement of 1754.[1] The Swedish Criminal Code is, technically, a chapter of the general Swedish lawbook or code, *Sveriges Rikes Lag*, which has been uninterruptedly in force since 1734.

A. Territorial jurisdiction

Scandinavian criminal law has from olden times recognized *the territorial principle* in the sense that the national criminal law (legal competence) applies to, and the national courts have jurisdiction (judicial competence) over, any crime committed within the national territory, regardless of the nationality of the perpetrator.[2] It is this territorial principle which the criminal codes of Denmark,[3] Norway,[4] and Sweden[5] have established as their basic jurisdictional principle. The Scandinavian words which have been translated as "territory" or "Realm" clearly include both the sea and air territory, and it seems to be generally agreed that the provisions also cover pursuit in continenti from the air or sea territory.[6] Denmark and Norway are extending the territorial principle to apply to Danish or Norwegian ships and airplanes respectively, while Sweden[7] considers such jurisdiction as extraterritorial.

B. Extraterritorial Jurisdiction

The territorial principle developed historically as a pragmatic and practical principle which reflected the traditional concept of sovereignty. It was never, in Scandinavia, accepted as a negative principle in the sense that a crime could be prosecuted only if it had been committed within the territorial jurisdiction.[8] The Scandinavian discussion in the middle of the 19th century indicates that it was not doubted that the state had the right to exercise extraterritorial jurisdiction, but that there was considerable doubt as to the practicability of the suggested version of the personality principle, because different countries had different concepts of what constituted a crime. Controversial subjects of the time, such as dueling and bigamy, were discussed.[9] It is interesting to note that the Royal Swedish Commission in its report of 1840 included a response from the law faculty at the University of Uppsala about the hypothetical prosecution of a returning Swedish citizen who, perfectly lawfully, had owned and sold slaves in the United States.[10]

1. *The Personality Principle.*—The personality principle fills in lacunae left by the territorial principle by extending jurisdiction to include crimes which have been committed abroad by citizens or permanent residents of the respective Scandinavian country. The Danish[11] and the Swedish[12] criminal codes describe the personality principle in sweeping terms, while the Norwegian code[13] describes exactly to which criminal acts the principle applies. The Norwegian method of drafting is probably preferable from an American point of view.

It appears, from the legislative history dating back to the middle of the 19th century, that the Scandinavian personality principle can scarcely be said to have been motivated by the allegiance that citizens and permanent residents owe to their country. The main motivation for the enactment was that the Scandinavian countries, as the general rule, do not extradite their citizens or permanent residents to non-Scandinavian countries, and that consequently, it had to be made possible to prosecute citizens or permanent residents for crimes which they had committed abroad. The 19th century discussions also indicate that it was felt that the general preventive effect of the criminal code

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[1] *Id.*, p. 5.
[2] Hurwitz, *supra* note 1 at 94.
[3] *Danish Criminal Code*, Sec. 6.
[4] *Norwegian Penal Code*, Sec. 12.
[5] *Swedish Penal Code*, Ch. 2, Sec. 1.
[6] Hurwitz, *supra* note 1 at 95.
[7] *Swedish Penal Code*, Ch. 2, Sec. 3, No. 1.
[8] Hurwitz, *supra* note 1 at p. 94–95.
[9] Hans Thornstadt, "Svensk medborgares ansvar for brott utomlands," *in* 51 *Svensk Juristtidning* (1966) p. 506–517.
[10] Sweden, *Lagcommiteen*, Utlotande i anledning af Ammärkningar wid Forslaget till Allmän Criminallag, 2nd ed., Stockholm, B.M. Bredberg, 1840, p. 40–43.
[11] *Danish Criminal* Code, Sec. 7.
[12] *Swedish Penal Code*, Ch. 2, Sec. 2.
[13] *Norwegian Penal Code*, Sec. 12, No. 3.

would be undermined if it should become impossible to prosecute a person present in the country for a crime which he undoubtedly had committed. It is a consequence of this philosophy that the relevant time for deciding citizenship or permanent residency, at least in Denmark, is the time when the criminal investigation is initiated, rather than the time when the crime was committed.[1]

The Danish and the Norwegian personality principle is limited to criminal acts which were also punishable in the country where they were committed, while Sweden does not extend this benefit to its citizens or permanent residents. These provisions reflect the discussions previously referred to about the different concepts of such crimes as duelling, bigamy, and slavery, and criticism has been made that the relatively new Swedish Criminal Code of 1965 does not follow Danish-Norwegian law on this point.[2] However, the present Swedish solution is motivated by the desire to offer international legal assistance by being able to prosecute criminals, rather than to extradite them.[3] The shortcoming of the Danish-Norwegian provisions is that prosecution becomes impossible, if the respective foreign country does not have a criminal offense which corresponds closely to an offense described in the Danish or the Norwegian Criminal Code. For instance, it has proved impossible to prosecute Danish citizens in Denmark for defrauding innkeepers in France, because France does not have any criminal offense which corresponds close enough to Section 298, No. 3, of the Danish Criminal Code.[4]

The Swedish reference to international legal assistance refers to the fact that European international cooperation within the field of law enforcement has greatly increased within the later decades. It has been a long-standing Scandinavian practice to prosecute for crimes committed in another Scandinavian country, and to execute criminal judgments handed down by the courts of the other Scandinavian countries. The latter field is now regulated by uniform Scandinavian laws,[5] while the former is based on informal agreements and mutual understandings. A very similar trend can be seen for all of the European countries, and this is reflected by the recent European convention on the international validity of criminal judgments.[6] Normally it is this body of law which Scandinavian writers refer to when they use the term "international criminal law."[7]

2. *The Universality Principle.*—The real[8] or universality[9] principle denotes that nonresidents/aliens may be prosecuted for acts committed abroad when the state has a special interest in protecting itself or its citizens against such acts. The universality principle is generally accepted in Scandinavia as an unavoidable supplement to the territorial and the personality principles.[10] The Swedish[11] and the Danish[12] provisions are drafted in sweeping terms, while the Norwegian,[13] as for the personality principle, describes accurately the crimes for which the universality principle applies.

C. Where Shall the Crime be Deemed Committed?

It is generally accepted principle within Scandinavian criminal law that a crime may always be considered to have been committed at the place where

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[1] Hurwitz, *Supra* note 1 at 98–99. *See also* Andenaes, *supra* note 7 at 318–319.
[2] Thornstedt, *supra* note 37 at 514–517.
[3] Nils Arvid Teodor Beckman *and others.* 1 *Brottsbalken.* 3rd ed. Stockholm, Norstedt, 1970, p. 66–69.
[4] Stephan Hurwitz, *Den Danske Kriminalret, Amindelig Del.* 2nd ed. Copenhagen, G.E.C. Gad, 1961. p. 151.
[5] *Danish* lov nr. 214 af 31. maj 1963 om samarbejde mellem Finland, Island, Norge og Sverige angaende fuldbyrdelse af straffedomme, m.v., *in* 2 *Karnows Lovaamling,* 7th ed. Copenhagen, Karnov, 1967. p. 1687–1690. *Finnish* lag nr. 326 av 20. juni 1963 om samarbete mellan Finland och de ovrige nordiska landerne vid verkatallighet av domar i brottmal, *in Finlands Lag.* Halsingfors, Finlands Juristforbund, 1969. p. 1112–1114. *Norwegian* lov av 15. november 1963 om fullbyrding av nordiske dommer pa straf m.v., *in* Norges Lover 1682—1969. Oslo, Grondahl og Son. 1970, p. 2305–2307. *Swedish* lag av 22. maj 1963 om samarbete med Danmark, Finland, Island och Norge ang. verkstallighet av straf m.m., *in Sveriges Rikes Lag.* 91st ed., Stockholm, Norstedt, 1970. p. 815–820.
[6] Lov nr. 522 af 23. december 1970 om fuldbyrdelse af europaeiske straffedomme, *in* 1970 *Lovtidende for Kongeriget Danmark A* p. 1811–1841. (Includes the full text of the European convention on the international validity of criminal judgments in English and Danish).
[7] Hurwitz, *supra* page 1 and note 1 at 109–114.
[8] Damaska, *supra* note 9 at 1478–1479.
[9] Hurwitz, *supra* note 1 at 99–102. *See also* Andenaes, *supra* note at 319–320.
[10] *Id.*
[11] The Swedish Penal Code, Ch. 2, Sec. 3.
[12] The Danish Criminal Code, Sec. 8.
[13] The Norwegian Penal Code, Sec. 12, No. 4.

the crime was executed, regardless of where the consequences of the act occurred. It is on this background that the criminal codes of Denmark,[1] Norway,[2] and Sweden[3] have provisions that a crime under certain circumstances may be "deemed" or "considered" as committed also where an actual or intended consequence took place. These provisions are not considered as mere extensions of the territorial principles, but as independent jurisdictional provisions, e.g., the unlawful mailing of a bomb is considered a committed crime both where the bomb was mailed and where it was received.[4]

It is generally agreed that the Scandinavian provisions about where a crime shall be deemed to have been committed also apply to attempts, cooperation, and crimes of omission.[5]

D. The Applicability of Foreign Law

The recognition of extraterritorial jurisdiction greatly enlarges the possibility of conflicts with foreign criminal codes. The Danish,[6] Norwegian,[7] and Swedish[8] codes state rather categorically that the national courts should apply national law. However, this recognition of *lex fori* does not prevent foreign law from being applied in a number of situations. For instance, it is a matter of course that questions arising in the civil law area, such as the question about marriage in a bigamy case, are always decided in accordance with the appropriate legal system.

The Scandinavian countries do not have any absolute prohibition against double jeopardy. However, Section 10, Subsection 3 of the Danish Criminal Code states expressly that foreign judgments for acquittal prevent prosecutions based on the personality principle. The same rule may normally be deduced from Sections 12 and 13 of the Norwegian Penal Code, and the rule seems also to be followed in the Swedish administrative practice based on Section 5 of the Swedish Penal Code.[9] The criminal codes of Denmark,[10] Norway,[11] and Sweden[12] also have provisions which make it mandatory for the courts to deduct punishment which has already been served abroad.[13]

E. International Law

The Scandinavian criminal codes[14] expressly state that their jurisdictional provisions are limited by generally acknowledged exceptions of international law. It is generally agreed that these provisions confer immunity to certain persons, such as foreign diplomats, the crews from foreign warships on visits, and the like. Scandinavian writers claim that, apart from such rules of immunity, it is disputable whether international law limits the right of individual countries to punish acts committed outside their territory by aliens. They often refer, in this connection, to the Cutting case of 1886 where the United States disputed that Mexico had jurisdiction over the United States citizen, A. K. Cutting.[15]

F. The Protected Interest

It should finally be mentioned that extraterritorial jurisdiction may be limited by the fact that the criminal offense is described in such a way that it, as a practical matter, has to have been committed inside the territorial borders.[16] For instance, Section 128 of the Danish Criminal Code provides:

> Any person who within the territory of the Danish State undertakes to recruit for war service with a foreign power shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

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[1] The Danish Criminal Code, Sec. 9.
[2] The Norwegian Penal Code, Sec. 12, Subsec. 2 (last subsec).
[3] The Swedish Penal Code, Ch. 2, Sec. 4.
[4] Hurwitz, *supra* note 1 at 102–109. *See also* Andenaes, *supra* note 7 at 320–321.
[5] Hurwitz, *supra* note 1 at 105. *See also* Andenaes, *supra* note 7 at 321.
[6] The Danish Criminal Code, Sec. 10, Subsec. 1.
[7] The Norwegian Penal Code, Sec. 12, Subsec. 1.
[8] The Swedish Penal Code, Ch. 2, Sec. 1–3.
[9] Beckman, *supra* note 3 (p. 2672) at 64.
[10] The Danish Criminal Code, Sec. 10, Subsec. 4.
[11] The Norwegian Penal Code, Sec. 13, Subsec. 3.
[12] The Swedish Penal Code, Ch. 2, Sec. 6.
[13] Hurwitz, *supra* note 1 at 107–109. *See also* Andenaes, *supra* note 7 at 321–322.
[14] Danish Criminal Code, Sec. 12; Norwegian Penal Code, Sec. 14; Swedish Penal Code, Ch. 2, Sec. 7.
[15] Hurwitz, *supra* note 1 at 112–114. *See also* Andenaes, *supra* note 7 at 316. For a resume of the Cutting case, *See* Jon Skeie, 1 *Den Norske Strafferet*, Oslo, Olaf Norlis, 1948, p. 85–86.
[16] Hurwitz, *supra* note 1 at 114–117. *See also* Andenaes, *supra* note 7 at 319.

Question 13:

The Anglo-American crime of criminal conspiracy is described in Section 1004 of the Proposed Federal Criminal Code. The Scandinavian Criminal Codes do not have any provisions in their special parts which can be described as the crime of conspiracy. However, the general provisions on attempt and complicity (cooperation) in the Scandinavian criminal Codes make it normally possible to establish a criminal offense which, as a practical matter, has much likeness to the Anglo-American concept of criminal conspiracy. The main difference seems to be that each participant in Scandinavia has to be considered individually. The relevant Scandinavian provisions are to be found in Sections 21–24 of the Danish Criminal Code, Sections 49–51, and 58, of the Norwegian Penal Code, and Chapter 23, "Of Attempt, Preparation, Conspiracy and complicity," of the Penal Code of Sweden.

It is against this background that Professor Andenaes discusses conspiracy in 3 *Working Papers* 1457–1458 as a subquestion in his coverage of Part A (the general part) of the Proposed Federal Criminal Code. The Norwegian (and Scandinavian) law on attempt and complicity is well covered by Andenaes *in Appendix A* (Part 2, p. 273–303), while Professor Damaska gives a broad survey of the different European approaches to the crime of conspiracy in 3 *Working Papers* 1498–1499.

Question 14:

The Anglo-American "felony-murder rule" is described in Section 1601, Murder, Subsection (c), of the Proposed Federal Criminal Code. This common law rule has been sharply criticized by Anglo-American legal writers,[1] and there does not exist any corresponding provision in Scandinavian criminal law. The Scandinavian law on attempt and complicity, which was discussed under Question 13 above, will, as a practical matter, often lead to a severe sentencing of a defendant who would fall under the Anglo-American felony-murder rule, but the Scandinavian judgment would always, technically, be based on acts or omissions committed by the defendant personally. Especially, the defendent would not be held responsible for murder, or attempted murder, unless it was proved that he had some intent to kill. A reference should in this connection be made to the broad Scandinavian concept of intent which was discussed under question 3 above. It includes not alone wilful acts, but also acts committed knowingly, and even some situations of reckless conduct. The latter was illustrated by a brief summary of a Swedish case about two defendants who were accused of attempting to kill a police officer with their car.

Professor Andenaes has not commented directly on the proposed Section 1601, but it is well known that he has a critical attitude to the common law felony-murder doctrine. This appears from a very broad Norwegian outline of American criminal law which he wrote in 1964:[2]

An important difference in comparison to Norwegian law is that the American criminal law does not have quite the same regard for the subjective guilt of the man who has broken the law. Admittedly, the general American rule is that punishment requires intent. This intent does not, however, have to be directed at all the elements of the crime in question, such as is usual in Norway. If the defendant has killed another person while he committed an intentional crime [felony], then he may be punished for murder even though the death was not caused by any intentional act. This is [a part of] the-so-called *felony-murder doctrine*. . .

It appears from the context that Andenaes probably oversimplified the problem in order to make it comprehensible for his audience. On the other hand, Professor Damaska is making a very good point when he states in 3 *Working Papers* 1502–1503 about felony murder that the main difference between the American and the European attitude is that practically all Europeans are very reluctant to label as a murderer a man who, no matter how violent, did not intend to kill. It should, in this connection, be mentioned that vicarious criminal liability is recognized in Scandinavian criminal law within such areas as

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[1] Sanford H. Kadish and Monrad G. Paulsen, *Criminal Law and Its Processes*. 2nd ed. Boston, Little, Brown and Comp. (b) The Felony-Murder Doctrine, p. 330–348.

[2] Johannes Andenaes, "Inntrykk fra amerikansk strafferettsplelе," *in* 52 *Nordisk Tidsskrift for Kriminalvidenskab* (1964) 7 (Translated from the Norwegian by Finn Henriksen, Legal Specialist, Library of Congress, Law Library).

employment relations,[1] and that Section 241 of the Danish Criminal Code is a good example of a Scandinavian provision where punishment depends on an unintended consequence (death) which may have occurred a long time after the criminal offense in itself was committed.

Question 15:

The subquestion about federal systems does not apply to the Scandinavian region. The Scandinavian countries have full independence of each other. However, this does not prevent them from cooperating very closely within the field of the administration of criminal justice.

Professor Damaska states in 3 *Working Papers* 1505 that the provisions in the Proposed Federal Criminal Code about riots etc. are very acceptable to one trained in the Continental systems. This statement applies also to the Scandinavian systems. The original codes were drafted in the middle of the 19th century which was a very unruly time in all of Europe. The pragmatic experience of the turmoil crystalized in provisions which strongly protect the right to free speech and the right to assemble, and which also, at the same time, protects society from abuses of these same rights. This is illustrated by, for instance, Sections 79–80 of *The Danish Constitution:*[2]

Sec. 79.—The citizens shall without previous permission be entitled to assemble unarmed. The police shall be entitled to be present at public meetings. Open-air meetings may be prohibited when it is feared that they may constitute a danger to the public peace.

Sec. 80.—In case of riots the armed forces, unless attacked, may take action only after the crowd in the name of the King and the Law has three times been called upon to disperse, and such warning has gone unheeded.

The Scandinavian provisions which most closely resemble Chapter 18 of the Proposed Federal Criminal Code are to be found in the Danish Criminal Code, Section 111, and Sections 133–143; the Norwegian Penal Code, Section 98, Sections 135–147 and 347–376; and the Penal Code of Sweden, Chapter 16. However, provisions which protect against riots and public disorder are spread out all over the Codes. For instance, Section 180 on arson in the Danish Criminal Code states:[3]

Any person who sets fire to his own property or to the property of others under such circumstances as must make him realize that the lives of persons are thereby exposed to imminent danger, or if it is done for the purpose of effecting extensive damage to the property of others or to incite sedition, looting or other similar disturbance of the public order, shall be liable to imprisonment for not less than four years.

It should be noted also that some of the misdemeanors in Sections 347–356 of the Norwegian Penal Code are covered by other regulatory statutes than the criminal codes in Denmark and Sweden.

Question 16:

The Scandinavian Criminal Codes do not have provisions which directly resemble Section 1104 about para-military activities in the Proposed Federal Criminal Code. However, other provisions make it rather impossible to establish para-military groups, and also private police or security forces are regulated to such an extent that they are close to being non-existent. The Scandinavian countries do not allow their citizens to carry arms, and the use of uniforms is closely regulated by, for instance, Sections 132–132 (a) of the Danish Criminal Code:[4]

Sec. 132, Subsec. 1. [as amended in 1961]—Any person who, intentionally or through negligence, makes use of

(1) any badge, uniform or clothing that is restricted to any Danish or foreign public authority or military persons,

(2) any badge or designation which is restricted to any personnel, institu-

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[1] Johannes Andenaes, *The General Part of the Criminal Law of Norway*, South Hackensack, N.J., Rothman, 1965, *see* p. 137–138 and 241 about criminal omissions such as lack of supervision of subordinates and about strictly objective criminal liability. *See also* p. 281 on the so called system of substitution in offense involving printed matters.

[2] *The Constitution of the Kingdom of Denmark Act 5th June, 1953*. Copenhagen, J. H. Schultz, 1953, p. 10.

[3] The Danish Criminal Code, Copenhagen, G.E.C. Gad, 1958, p. 84.

[4] Straffeloven af 15. april 1930 som optrykt ved lovbekendtgørelse nr 347 af 15. August 1967. Copenhagen, G.E.C. Gad, 1967, p. 86. (Translated by Finn Henriksen, Legal Specialist, Library of Congress, Law Library.)

tion or material designed to give assistance to wounded or sick persons in case of war, or

(3) identifications or names of international institutions, shall be liable to a fine.

Subsec. 2.—The provision in Subsection 1 applies also to copies or resemblances of the mentioned badges, uniforms, clothings, and designations.

Sec. 132(a). [*See* appendix B]—The provisions in Section 132 (a) on unlawful associations is the most effective and it reflects directly Section 78 of the Danish Constitution:[1]

Sec. 78. Subsec. 1.—The citizens shall be entitled without previous permission to form associations for any lawful purpose.

Subsec. 2.—Associations employing violence, or aiming at attaining their object by violence, by instigation to violence, or by similar punishable influence on people of other views, shall be dissolved by judgment.

Subsec. 3.—No association shall be dissolved by any government measure. However, an association may be temporarily prohibited, provided that proceedings be immediately taken against it for dissolution.

Subsec. 4.—Cases relating to dissolution of political associations may without special permission be brought before the highest court of the Realm.

Subsec. 5.—The legal effects of dissolution shall be determined by statute.

Question 17:

One of the most popular American casebooks on criminal law[2] spends its first 25 pages on "What Conduct Should Be Made Criminal? Crime and Morals," and these rather philosophical considerations are the introduction to the discussion of the most basic criminal law principle, the principle of legality. This writer employs a similar philosophical approach to the discussion of "Crimes without victims." At any rate, he would like to add the willing and consenting victims of a loan shark and of a confidence man, if the purpose of the philosophical discussion is to establish a norm on how far society ought to go in order to limit abuses of unbridled freedom.

It is not usual to find this type of philosophical discussions in Scandinavian criminal jurisprudence. It is easy to identify discussions about changes and improvements of the criminal codes, but they have a much more subordinate place. They are normally made either as comments de lege feranda (i.e. with future legislation in mind), or they are part of the continuing discussion of the policy on crimes. Especially the policy on crime approach (German: *Kriminalpolitik*) has contributed much to shape the Scandinavian criminal codes of today. The policy on crime approach is very pragmatic, and it prefers the results of the empirical sciences for philosophical considerations, if there exists such a choice. The theories of the German philosophers, such as Immanuel Kant and Nietzsche, cannot be said to be rejected as such by the Scandinavian criminal law reformers. There is rather a feeling that such philosophical theories contribute only little to the evolutionary process or continuous improvement of the Criminal Codes.

It was mentioned above under Question 11 that the Danish Ministry of Justice recently called a large number of experts in for a conference on the policy on crimes. A single example from the Conference, the discussion on the provisions on homosexuals, illustrates the difference between the philosophical and the policy on crime approach. The Danish Criminal Code, Section 225, subsection 3, about homosexual relations with a person below 21 years has been repealed, but Section 225, Subsection, still provides:

Any person who commits an act of sexual immorality with a person of the same sex under eighteen years of age shall be liable to imprisonment for any term not exceeding four years; provided that, where the persons concerned are of approximately the same age and development, punishment may be dispensed with.

The Danish homosexual minority is complaining bitterly, because this provision is much stricter than the age limitations on normal sexual relations. One point of view would be to find that this is an unreasonable discrimination which only adds to the many other social difficulties of a homosexual, and that

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[1] *The Constitution of the Kingdom of Denmark Act 5th June, 1953.* Copenhagen, J. H. Schultz, 1953, p. 10.

[2] Sanford H. Kadish & Monrad G. Paulsen, *Criminal Law and Its Processes*, 2nd ed., Boston, Little, Brown and Comp., 1969, p. 3–28.

Section 225, Subsection 2, consequently ought to be repealed. The policy on crime approach is not adverse to such a repeal for philosophical reasons, but it does ask the question about what the effect of the lowering of the age limit would be. Especially, to which extent young men who become part of the homosexual milieu will be more likely to become involved in social difficulties than those seeking normal sexual relations. The Danish Ministry of Justice has just commissioned an up-to-date study on this subject.[1] However, previous and rather convincing research does indicate that there exists a substantial need for special provisions for the protection of the young male.[2]

Question 18:

Possession and transfer of firearms and explosives are prohibited in Scandinavia. Violations are mostly punished by high fines, and requirements for licensing to carry a firearm, or to possess explosives, e.g., for construction work, are strict. However, these provisions are in statutes other than the Criminal Codes, because they are considered more of a regulatory nature than a criminal nature. Certain provisions, such as the Danish Criminal Code, Section 286 on larceny and burglary, authorize much higher punishment if the perpetrator was in possession of a weapon or another dangerous implement when he committed the crime. However, an act such as arming rioters would rather be prosecuted for violation of Section 111 of the Danish Criminal Code. The authorized punishment here goes up to life, and capital punishment might be possible, if the distribution was on behalf of a foreign power.

Question 19:

The highest punishment in the Scandinavian Criminal Codes is imprisonment for life. However, separate statutes make it possible to use capital punishment for treason under conditions of war. For instance, the Danish Act Nr. 227 of June 7, 1952, provides:[3]

Sec. 1. Subsec. 1.—The sentence of capital punishment may be used when the defendant during war, or during occupation by a foreign power, cfr. Section 99, Subsection 2, of the Criminal Code, for the promotion of a foreign interest and otherwise under aggravating circumstances has committed any of the crimes mentioned in Sections 98, 99, 102, Subsections 2, 111, or 237 of the Criminal Code.

Subsec. 2.—A person who had not reached 21 years of age when he committed the punishable act cannot be given the sentence of capital punishment.

Scandinavian courts do not have separate proceedings for capital cases, but the defendant would be entitled to a jury trial where the question on guilt is first decided by the jury. Most criminal cases in Scandinavia are decided by courts with lay judges (normally 2 lay judges and 1 law judge), rather than by jury trials. However, it is quite usual also in these cases to establish the guilt during the first stage of proceedings, and then to decide the sanctions. It was explained under Question 5 that sanctions or reactions normally are imposed, if the defendant is found to be insane, and the criminal code provisions, such as Section 16 of the Danish Criminal Code, directly require that the criminal act be proved. It is, consequently, most practical first to concentrate the proceedings on whether a criminal act, objectively speaking, has been committed.

The Scandinavian law on evidence is not burdened with restrictive rules, such as the law on hearsay evidence, which developed in order to protect the juries of Medieval England. Basically, the Scandinavian courts decide whether they feel the offered evidence is relevant or irrelevant. They are completely free as to the weight they will assign to, for instance, hearsay evidence. That Professor Andenaes has a rather critical attitude toward the Anglo-American law on evidence appears from his mentioned earlier article (in Norwegian) of 1964.[4]

These [hearsay] and similar rules on evidence have produced a voluminous literature and a very large number of court decisions. "Evidence" is a large

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[1] H. H. Brydenholt, "Reformovervejelser inden for det kriminalretlige omtade," *in* 1972 *Juristen* 48–49 (January 15, 1972).

[2] Jens Jersild, *Boy Prostitution*, Copenhagen, G.E.C. Gad, 1956, 101 p.

[3] The Danish Criminal Code, Copenhagen, G.E.C. Gad, 1958, p. 69.

[4] Johannes Andenaes, "Inntrykk fra amerikansk strafferettspleie," *in* 52 *Nordisk Tidsskrift for Kriminalvidenskab* (1964) 16 (Translated from the Norwegian by Finn Henriksen, Legal Specialist, Library of Congress, Law Library).

and independent discipline at all American law schools. The classical textbook on the subject is: *Wigmore on Evidence*, an enormous work of ten heavy volumes. There are probably some who are inclined to think that if the jury really is so eminently suited to decide questions of fact, as it is usually claimed to be, then it is remarkable that it, at the same time, should be necessary to treat the individual juror as a child who has to be protected against undesirable influence. The rules are such that it some times must be extremely difficult for the jury to use simple common sense. . . .

Question 20:

The problems covered by Sections 703 and 704 of the Proposed Criminal Code are most often solved by a "joint judgment" in Scandinavia, as was explained under Question 9, Subquestion 13, above. It follows under the principle of res judicata that a previous and final acquittal would have to be accepted during later proceedings.

The types of jurisdictional conflicts which are described under Question 20 would in Scandinavia have to occur between a national and a foreign legal system. The decision to prosecute, or not to prosecute, lie in Scandinavia with the highest state prosecutor for each country. His decision would override that of any lower prosecutor. It seems possible to construe a conflict only in the very few and relatively unimportant cases where the private citizen has been directly given a right to prosecute. The practically important question is the situation where a foreign court already may have decided the case. This situation was discussed under Question 11–12: Section D. The Applicability of Foreign Law. Normally, the result would also here be a "joint judgment."

Appendix A

The General Part of the Criminal Law of Norway

(By Johannes Andenaes, Dr.jur.; Translated by Thomas P. Ogle, LL.B.)

Editor's Preface

I

In the fall of 1963 the brotherhood of American archaeologists finally decided to extend official recognition to excavations of a Viking settlement on the coast of Newfoundland,[1] thereby ultimately settling the old dispute on whether the Vikings had or had not reached our continent a millennium ago. Professor Andenaes happened to be in town, and I paid him my compliments on the accomplishment of his forebears. He smiled and answered wryly: "It sure took Americans a long time to face the fact; you know, we have known that for a thousand years."

Yes, it was a thousand years ago that the seedling was planted which was to grow rapidly into what we now know as the Common Law. The seedling was carried on a Viking ship from a Norwegian fjord to a French peninsula, thereafter known as Normandy. The fleet was under the command of Rolf, or Rollo, who had been banished from Norway for ravaging the countryside.[2] Rolf's was just one of many fleets of the Norsemen, or Normans, who set out in all directions of the compass to start colonies, from the Black Sea to the Ice Sea, from Greenland to Africa. Some did manage to survive, like those in Greenland or Iceland, some did not, like that on our shores. But none of these was to have as much of an impact on world history as that founded by Rolf, the outlaw. Rolf became Duke of Normandy in A.D. 911. Within a century and a half his descendant William—appropriately given the appellation The Conqueror—was to send the mightiest army of Norsemen ever assembled across the channel. The rest is familiar. The law of the Normans, just like their customs, became the law of England and of nearly the entire English-speaking world. This is the Horatio Alger story of legal history: From a mere faint trace of order—which is barely discernible among the violence, mayhem, murder and retribution of the sagas—to the proud legal system of the common law.

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[1] See *New York Times*, November 6, 1963, p. 1, col. 3.
[2] Orfield, Lester B., *The Growth of Scandinavian Law* (Philadelphia, 1953), p. 129.

As I stood on a hill overlooking Oslo Fjord a few years ago, having just visited a few of the graceful millenarian Viking ships, musing about the men and ideas which had sailed from these waters to affect the destiny of human civilization, I wondered whether I should not endeavor to tell my criminal law colleagues in America what those Vikings who returned or stayed home had done with their law of wrongs.

Besides, the time was ripe for publishing a work on the general principles of continental criminal law in America, for none had ever been published in the English language. The desire to make this first continental criminal law text in English a Norwegian one increased, the more I learned about Norwegian criminal law. Here was a legal system which had spawned our own common law, which was thoroughly continental yet, because of its historic ties with the British Isles, and a stubborn resistance against mid-European imperialization, had stayed somewhat aloof of the Roman law influences which had reshaped the law of the continent proper.[1] Norwegian law, perhaps like Scandinavian law generally, has therefore become a virtual link between the Roman-based continental legal system and the common law though, without question, its legal ties, like its geography, are much closer with Central Europe than with England and America. If, therefore, our first text on continental criminal law were to be a Norwegian one, so I reasoned, would that not ease the difficulties of the common lawyer in finding his way into an alien system?

All these considerations clearly pointed to Norway. Yet there were other considerations. The experience of the Scandinavian countries in trading ideas on matters of criminal law has made for an amazing amount of theoretical uniformity, a first step toward peaceful, gradual, and voluntary unification in this constantly shrinking world. Whether we like it or not, we in the United States are sitting on the same shriveling globe and will do well to learn from the Scandinavian experience of international accommodation. Moreover, we had better open our doors to the criminological and legal ideas of that other system, for we will have to work together, unless the world is to return to the days before Rolf.

Lastly, and most importantly, in choosing Professor Andenaes' *The General Part of the Criminal Law* as our gate to the continental system of criminal law, it was the mind of the man himself which prompted our selection. As has been mentioned on previous occasions,[2] Professor Andenaes is a man of two worlds, at home in both, and thus an ideal writer on one legal system for the benefit of the other. Paternal and fraternal ties to our country, repute in our journals and universities nearly as great as in his own, the esteem of his students and colleagues on two continents, all these add up to the fact that his book is not really that of an alien.

II

The task began as a straight translation of the Norwegian edition, *Alminnelig Strafferett*.[3] But it soon became apparent that our common law reader should be told both less and more than a Norwegian one, and thus a process of editorial revision began which, in many respects, made this a new book. But what most certainly has not been changed is the general approach and the systemacy of presentation of the subject-matter, in the finest continental tradition. What has not been changed is the universality of outlook. This is a book of European as much as of Norwegian criminal theory, of which the constant references to primary and secondary sources of the other Scandinavian countries, of Germany, and of other nations are symptomatic; and the references to Anglo-American sources render this book virtually a global work.

What will strike the reader is the thorough methodology and classificatory skill of the continental scholarly mind. Even after the works of Hall in the United States,[4] and of Williams in England,[5] most Anglo-American criminal lawyers are as yet distrustful of that jurisprudential culture which is second nature to continental criminologists. More than anything, we hope that the in-

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[1] Orfield, *op. cit.*, pp. 213–214.

[2] Orfield Book Review (Andenaes, *Alminnelig Strafferett*), 42 Iowa L.Rev. 467 (1957); Mueller, Foreword to Schjoldager & Backer, *The Norwegian Penal Code* (Vol. 3, American Series of Foreign Penal Codes, South Hackensack and London, 1961), p. ix.

[3] Andenaes, *Alminnelig Strafferett* (Oslo, 1956).

[4] Hall, Jerome, *General Principles of Criminal Law* (Indianapolis, 1947; 2nd ed., 1960).

[5] Williams, Glanville, *Criminal Law—The General Part* (London, 1953; 2nd ed., 1961).

stant book will bring fresh thinking into the dimensions of Anglo-American criminal law theoreticians and practitioners. The very idea of a "General Part," with theoretically arrived-at generalizations for controversial legal issues, may still strike most Anglo-American readers as odd. A century ago the shock of exposure to a systematic continental criminal law treatise might have been too much for Anglo-American lawyers to bear. Today, we simply have proof that we are moving pretty much in the same direction as our continental confrères. Perhaps we are soon to meet at the fork in the road.

It is not, however, that change is all onesided, for as we become more systematic, continental jurists are more and more discovering the significance of the case. On this point, too, Professor Andenaes gives us ample evidence. From all this change there may well emerge—though not a uniform penal law of global dimensions—a world-wide system of criminal law among civilized nations.

III

Unlike an insurance release, which ends with a clause disclaiming all future liability, an editor's preface must end with the acceptance of all liability:

Professor Andenaes' graceful style could not be faithfully reproduced. Our book is a translation, and no amount of effort could change that fact. Translator, editorial assistants and editor have worked many months on the book. They have reached points at which they came close to discarding the enterprise altogether, and the author himself, I fear, was haunted by similar thoughts on many occasions. If Professor Andenaes had only written a novel, our task would have been simple.

Nevertheless, we now dare face the world. The editor himself, as the last one to revise the translation, assumes all responsibility for assaults upon the English and rape of the Norwegian languages.But the credit for the volume itself unquestionably belongs to two of my former students, Mr. Thomas Ogle, who made the original translation, and Dr. Patrick M. Wall, who prepared the first revised draft. Others have rendered editorial and secretarial assistance from time to time, among them Mr. Edward Wise, and the Misses Judith Chazen and Margaret Montana. To all of them and to our esteemed publishers, Messrs. Fred B. Rothman & Co., and Messrs. Sweet & Maxwell, Ltd., the editor extends his heartfelt thanks. He speaks for all of them when he salutes the author himself, Professor Johannes Andenaes, of the University of Oslo, Visiting Professor at the University of Pennsylvania and at New York University, scholar of two worlds—which just may turn into one for criminal science.

G. O. W. M.

From the Preface to the Norwegian Edition

* * * That a legal textbook contains so much material not of a directly legal nature is perhaps one of the points which will first strike the reader.[1]

This is the expression of a deliberate program. To be steeped in the law and capable of solving the problems of interpretation which it poses is not sufficient for the criminal lawyer of today. He should know the realities behind the law: what kind of people are affected by punishment and other measures of criminal policy, what brings them into conflict with the penal code, how do the reactions of society influence them and members of the society at large? In our course of law study we have no separate required course in criminology. For this reason it becomes the object of the course on penal law to give the necessary synthesis of legal and factual knowledge.

The lawyer should study the background of the rules from another viewpoint. Opposed to the lawbreaker stands the punishing society. Within this society the opinions on crime and punishment are neither uniform nor unchangeable. Rational and emotional elements are interwoven in an often mysterious manner. In our time penal law—or criminal law as many prefer to call it—is in a stage of fermentation. The traditional system is under review in the light of new developments within psychology, psychiatry, and sociology. Basic concepts such as guilt and responsibility are debated. Requests for medical, psychological, and pedagogical treatment of lawbreakers in lieu of punishment are advanced. Some would go as far as abolishing punishment altogether. Others would prefer the course of cautious reform. Experiments are made, experience

[1] Unfortunately, Professor Andenaes' treatment of punishment and sanctions had to be considerably shortened in the English edition.—Ed.

is reaped. A study of the law in force that takes no account of the debate on issues of criminal policy becomes less rich than it should be.

I am convinced that this program is right. But he who wishes to adopt such a program must venture into fields where he is not a specialist and where he must build on the material of other persons. Even an elementary presentation involves the unavoidable risk of error and misunderstanding. A criminal lawyer is neither a philosopher nor a sociologist, nor is he a psychologist, a psychiatrist, a prison specialist, or a social worker. But he needs access to all these special fields when attempting to form a balanced picture of the problems surrounding crime and punishment.

I have tried to reduce the risk of error and mistake by enlisting the assistance of experts in these various fields. * * *

JOHANNES ANDENAES.

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GROUNDS OF IMPUNITY

§ 14. GENERAL EXPLANATIONS

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In formulating a penal provision, not every special circumstance which may be of importance in characterizing the prohibited act can be taken into consideration. Thus, it sometimes happens that an act is covered by the description of a penal provision, but nevertheless is not punished. A ground of impunity exists. § 233 imposes punishment upon "anybody who causes a person's death, or is accessory thereto." This may seem clear enough. But by its terms the enactment applies not only to the usual murderer, but also to one who acts in self-defense, the hangman who executes the death sentence, and the soldier who kills the enemy in war-time. Numerically these legalized homicides have played a much larger role than criminal ones in Europe during the past century.

The Penal Code itself contains many rules which expressly make exceptions to the penal provisions when such grounds of impunity exist. Some of these

rules apply only to one or a few penal provisions. An example is Penal Code, § 167, which states, among other things, that punishment for false testimony and perjury will not apply to a person accused of a crime. Other rules of exception are of a general nature, especially those applying to necessity (§ 47) and self-defense (§ 48).

Not all grounds of impunity are set out in the Code. The *consent* of the victim is mentioned as a ground of impunity in some provisions, but there is no doubt that consent will have the same effect in many other situations. Other grounds of impunity not set out in the law include execution of public duty, *forcible redress of a wrong* and *negotiorum gestio*. During wartime, not only homicide and the infliction of bodily harm but also material destruction, coercion and other acts, ordinarily punishable, can be justified as *acts of war*.

It is natural to treat those grounds of impunity which have a more general application in the general part of the criminal law, while special grounds are better handled in the special part in connection with those provisions to which they apply. It is impossible to draw up an exhaustive list of all the grounds of impunity, because all the factors which might justify limiting the provisions cannot possibly be foreseen. One cannot be satisfied with ascertaining only that the act falls within the words of a penal provision and that there is no question of self-defense, necessity or any other well-known ground of impunity. For the main types of common felonies, such as homicide, assault and larceny, this is generally sufficient, since the circumstances excluding liability—even though the situation falls within the words of the law—have been laid down in established rules of exception in the course of many years. This is different in so far as the more unusual penal provisions are concerned. These statutes are often formulated with less care than the common offenses, and often without any clear general picture of the situations which are to be regulated. All the various reasons which may justify an acquittal contrary to the words of a statutory provision cannot possibly be collected in an exhaustive theoretical category.[1]

To decide whether an act falls within a penal provision but should be treated as non-punishable because of some special ground of impunity, or regarded as outside the statutory provision in the first place, may be a matter of discretion in many instances. When a doctor amputates a leg in order to save a patient's life, one may say that the doctor inflicts a bodily injury which is not culpable because of the curative purpose. But one may also say that he does not "injure another in body or health" at all (Penal Code, § 229). The only real judicial question is whether or not a reasonable interpretation of the law leads to the decision that such an act is not punishable. How the result should be expressed is merely a question of terminological utility.

Lack of criminal responsibility and guilt (*mens rea*) will also lead to impunity. In order to make clear the contrast between these subjective grounds of impunity and those of which we are speaking here, many authors use the expression *objective grounds of impunity* to describe the latter.[2] But there is a slight catch to this terminology. Subjective elements can also play a certain role in determining whether an otherwise objective ground of impunity exists. For example, it may be important to determine the purpose of an infliction of bodily harm which takes place with the consent of the other party (see below, § 17, III, 1; see also below, § V). I therefore prefer to call them merely grounds of impunity, implying, however, that we are keeping the questions of responsibility and guilt apart.

The grounds of impunity could be divided into two groups: Grounds of *justification* and grounds of *excuse*. In the first group the act is not unlawful, it may even be highly desirable from a social point of view. In the second group the act is still considered a wrong, but the circumstances are such that the law does not find it just or expedient to punish the wrongdoer. This distinction is of significance in some relations. Thus, if the act is lawful, it cannot be met with self-defense, since according to Penal Code, § 48, self-defense consists in prevention of or defense against "an unlawful attack." If there only exists a ground of excuse, the act is still unlawful and can be met with self-defense. In a prosecution against the actor, however, the distinction between justifica-

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[1] See for more detail Andenaes, *Straffbar unnlatelse* [Criminal omissions], pp. 193–197 (Oslo, 1942).

[2] See Agge, *Den svenska straffrättens almänna del i huvuddrag*, p. 178 *et seq.*; Hurwitz, *Den danske kriminalret*, p. 256 *et seq.* (Copenhagen, 1952).

tions and excuses is of no legal significance. Whether the alleged defense is one of justification or merely one of excuse, it leads to acquittal if it is accepted, and no procedural differences attach to the distinction. It is, therefore, not necessary for the court to decide whether the defense belongs to one group or another, *e.g.*, whether the rule exempting the accused person and his near relatives from punishment for false testimony in court is a rule of justification, implying a right to lie, or merely a rule of excuse.

Distinguishable from the grounds of impunity are those grounds upon which a judge may decide to remit punishment in an individual case. See, for example, Penal Code, § 58 and § 392, para. 2. Here it is the legal viewpoint that the offender is guilty and should be punished, but that the court can exercise a kind of pardoning power. In a jury trial the jury would have to return a verdict of guilty; it would be for the judge to decide whether punishment should be remitted or not.

II. The concept of illegality and its ambiguity

In German and Scandinavian legal writings it is usual to deal with the grounds of justification under the heading: *The requirement of illegality.* Illegality is then considered a general condition of punishability in addition to the requirements that the act must be covered by a particular penal provision and that responsibility and subjective guilt must exist.

There are no doubt practical advantages in having a positive expression to denote the absence of any grounds of justification. But at the same time, the use of the term "illegality" creates certain dangers. From a purely linguistic point of view, illegality means the opposite of legality; that is, it signifies that which is contrary to the legal system. If the expression is used in this manner, as it often is, it points to an absolute limit. The act is either in conflict with the law or it is not; that which is unlawful in one part of the legal system cannot be lawful in another; it also seems self-contradictory to say that an act is in accordance with the law in relation to A, but not to B.

The use of such a concept in the treatment of the positive law would be unfortunate. It should not be taken for granted that an act which leads to liability in one direction also leads to liability in another direction. To take an example.[1] Assume that I have for safe-keeping a valuable Stradivarius and smash it on the head of a burglar. This may be an unlawful destruction in relation to the owner if I could have chosen a less valuable object, but my action will not be a punishable assault on the thief, as long as I did not hit him harder than necessary. Self-defense makes the act impunitive and justified in relation to the thief, but not to the violin owner who has suffered a loss. Nor can one suppose that always the same requirements exist for punishability as for the duty to pay damages or other sanctions. The legislator may have reasons for counteracting certain types of conduct with one sanction, but not with others. And the courts which have to fill the void left by the legislator must have a similar freedom. For example, one cannot take it for granted that the conditions which have to be met to make consent a ground of impunity are identical to those required to make it a defense in a damage action. And to mention an example where legislation itself uses the concept of illegality: § 29 of the Contracts Act and Penal Code, § 222, both require that coercion be illegal (unlawful) to make the contract voidable and the act punishable, respectively. Good arguments can be made in favor of requiring more serious conditions to exist before punishment may be imposed, while being satisfied with less in order merely to release a person from a promise. A well-known decision in Rt. 1874, p. 484, illustrates the point. A prosperous merchant in a small town had been surprised one evening in the private garden of another, while sitting there and eating gooseberries. To avoid prosecution, he signed an I.O.U. for 1,200 kroner to the owner of the garden, who donated the instrument to the town treasury to be used for charitable purposes. The merchant later changed his mind, and a suit was brought for the money, as a result of which he was required to pay. Taking modern legal opinion into account, I would think today that the result would have been the opposite because of the amount of money involved. However, it would hardly be appropriate to punish the owner of the garden.

At times the term illegality is used in a more technical sense: That an act

[1] See Augdahl, *Nødverge* [Self-defense], p. 61 (Kristiania and Copenhagen, 1920).

is illegal will then mean that it meets the objective requirements of liability. It is, in other words, merely another way of expressing the fact that there is no ground of impunity. By this terminology, an act can be illegal in relation to one interest but not in relation to another, illegal in relation to the law of torts but not in relation to criminal law, etc.

Whether the word "illegal" is used in one sense or the other, one may say that in either case it remains a formal term. The definition does not say which acts are illegal. However, the discussions on illegality have also probed into the question of whether it is possible to find any *common denominator* for those acts which are contrary to the law, something which distinguishes them from the lawful acts. The definitions which try to set up such criteria for the distinction between illegal and legal acts can be said to aim at a *substantive concept* of illegality. Obviously, such definitions must become worthless if they tried to encompass the entire legal system, or large parts of it.

Experience has shown that the use of the term "illegality" within the systematical structure of the concept of crime will easily lead to confusion. It can cause one to overlook the fact that the general conditions of criminal liability must be formulated with the special legal sanction in mind. And it can lead to the false conclusion that the question of illegality and thus of punishability is determined by rules which exist *independent of the text of the penal provision*, while in reality, when the ground of impunity has no special basis in legislation, a *reasonable interpretation of the provision itself* must be the determining factor. To steer away from the dangers of confusion and false conclusions one had better avoid the terminology of illegality as far as possible, and rely instead on the negative formulation that the absence of a ground of impunity is a condition of punishability.[1]

III. Absolute and relative penal provisions

That punishabliity should be precluded when the requirements in the provision are met and responsibllity and guilt are present is almost unthinkable for some penal provisions. This applies, for example, to Penal Code, § 192, on rape. It is hard to believe that under any circumstances a person "who, by using force or by causing fear for life or health, compels somebody to indecent relations, or is accessory thereto," might be acting permissibly. In such circumstances, the term *absolute* penal provisions has been used in contrast to the rest, the *relative* ones.[2] Extreme care must be used, however, before a penal provision is declared absolute; peculiar combinations of circumstances which may make the penal provision non-operative can usually be imagined.[3]

But certainly there are great differences between various penal provisions in this respect. In some instances, the words of the provision and its meaning coincide so exactly that there is little or no room for exceptions; at other times the conflict between the words and the meaning is much greater. The penal provision would often be misleading if it did not contain a reservation stating that it is not meant to apply to every situation which falls within the general definition of the crime.

IV. Express reservations in the penal provisions

We now turn to the fact that many penal provisions themselves contain such reservations as "illegal," "unlawful" and "unwarranted," while similar reservations are absent in many other provisions. What significance is there in this differentiation?

The meaning of the expression "illegal" or "unlawful" in a penal provision may vary greatly. In some instances, it refers to rules in *other areas of the law*. Such is the case, for example, with Penal Code, § 410: "Anybody who unlawfully refuses to receive somebody or discharges somebody from his service,

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[1] The literature on the concept of illegality is voluminous, but the results of the discussions are not in proportion to the effort. I will confine myself to pointing out some of the latest works on the subject: Ussing, *Retstidighed* [Illegality]. Memorial monograph published by the University of Copenhagen (Copenhagen, 1949); Ross, "Opgor med retstridighetslaeren" [Settling the theory of illegality] (1951) *Tidsskrift for Rettsvitenskap*, pp. 205–231. The present author has treated the subject-matter in greater detail in *Straffbar unnlatelse* [Criminal omissions], p. 14 (Oslo, 1942).

[2] See Skeie, *Den norsk strafferet*, pp. 141–142 (2nd ed., Oslo, 1946).

[3] The law of marital relations imposes a duty on the wife to share board and bed with her husband, and a number of legal systems take the position that the husband cannot be punished for rape of his wife. In these jurisdictions even rape is not an absolute criminal offense. [Translator's note.]

shall be punished by fines." Here the Penal Code refers to the law of contracts and supplies it with penal sanctions. When "unlawfully" is mentioned in the provisions within chapter 8 ("Felonies against the independence and safety of the state"), this is mainly for the purpose of showing that these penal provisions must be understood in the light of all those limitations which follow from the general rules of International Law.

At times, even in the comments to the Draft Penal Code, one comes across the theory that the question of illegality is always determined by a system of norms taken from ouside the penal law; in other words, the use of the concept of illegality always refers to other areas of law.[1] This does not hold true. To seek the solution in other fields of law is of no avail in determining, *e.g.*, whether there exists an illegal coercion (Penal Code § 222, para. 2), or an illegal inducement (§ 270). It is no use, for example, in the interpretation of § 222 to seek the solutions in the rules on coercion established in the civil law; first, because one cannot suppose that the lines are drawn in the same manner in the two areas, and secondly, because the Contracts Act, § 29, also refers to the fact that the coercion must be illegal. The cases must be solved by an interpretation of the penal provision itself. The expression must be understood as a *general reservation by the legislature to the effect that the provision was not intended to cover all the situations which would otherwise be included in its definition*. Precisely how the limits are to be drawn is left to be decided by the judges. As Alf Ross has stated, the use of the reservation of illegality is often a sort of admission of helplessness on the part of the legislator: "In cases where it is difficult to find an adequate term to express the prerequisites of the sanction, the word 'illegal' or something similar is used as a buffer, a concept which is empty enough to be used as one wished under the pressure of the concrete circumstances."[2] The expression can often be translated into "undue," "unwarrantable," "reprehensible" or something expressing a similar characterization.

As has been mentioned before, a penal provision must often be given a more limited meaning than the words require, even though the term illegality has not been mentioned in the provision. The incorporation of "illegal" into the penal provision therefore has no great significance. "Illegal," "unlawful" "unwarranted" or similar limitations are generally incorporated into the penal provision when it is obvious that the definition would otherwise reach further than intended. Such a reservation can occasionally be significant for purposes of interpretation; the fact that the legislature itself has expressed the necessity of a qualification makes it easier to lay down a limitation in cases of doubt, than would have been the case had the words of the law been absolute. However, such a limitation would generally have been read into the law even in the absence of an express reservation. The presence or absence of a reservation often seems a rather arbitrary matter. For example, any real reason for inserting this reservation in § 246 (slander of personal honor) but not in § 247 (slander of reputation) is difficult to see. The circumstances which may make the act non-punishable are to a large extent the same for the two offenses (the truth of the statement, necessity, consent, etc.).

The effect of the reservation must in principle be determined by an interpretation of the individual penal provision. Similarly, when the reservation is used in one of the provisions in the general part of the Penal Code, as is done in § 48 which limits the right of self-defense to defenses against *unlawful* attacks, and in § 57 which speaks about ignorance of the *illegal* nature of an act.

V. The permissible risk

Even common and normal acts may often create a certain risk of harm. But one would not consider prohibiting them, or making the acting person liable for the harm, merely for this reason. As a rule, lack of criminal liability will follow from the doctrines of adequacy or guilt. But this is not always the case. A manufacturer of cars, planes or weapons cannot be blind to the fact that a certain number of accidents will occur by the use of his products; yet

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[1] See, for example, Hagerup, *Strafferettens almindelige del*, p. 230 (Kristiana, 1911); *Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge. II Motiver. Udarbeidet af den ved kgl.*, Resolution of November 14, 1885, nedsatte Kommission, p. 98 (Kristiania, 1896).

[2] Alf Ross, *Virkelighed og Gyldighed i Retslæren*, pp. 365–366 (Copenhagen, 1934).

this is no ground for making him liable. A cigarette manufacturer must know that a substantial number of people will get lung cancer from using his products. Life in modern society is based on the fact that a certain causation of danger is legal. The determining factor, as Getz expressed it in his famous treatise on cooperation in crimes of 1875, is "*the general judgment* which again stems from common practice."[1] Using an expression from Germany theory, one may speak of the *permissible risk*.

This must not be interpreted to mean that there is a certain degree of danger to which a person may always expose the surroundings. The estimate of the permissible risk varies with the nature of the act and its object. But, as Skeie expressed it, "one must leave to people a right to do also those acts which have no special beneficial purpose, a right to ordinary freedom of action."[2]

Impunity also for intentional harm

The question of the permissible risk arises most often in the study of negligence, and we shall return to it there (see below, § 23, II). But the rule of lack of liability may apply even if the harm is intentional, and the doctrine of permissible risk has significance as an *independent ground of impunity* precisely in these instances.

It is often a matter of personal taste whether the result should be expressed in such a way that liability is precluded because the damage is not adequate (compare above, § 12, V), or because the act is not unlawful (illegal). But, as mentioned, absence of liability exists even in those cases where the result was adequate. And not only will criminal liability be precluded but it is also precluded to resist or counter the act (prohibitions, self-defense, or damages). The act must therefore be characterized not only as impunitive but as absolutely legal.

Significance of purpose

Getz held as an absolute rule that the purpose of the actor can have no effect upon the question of legality. According to his views, if an act undertaken without evil purpose would not have been judged negligent, it could not entail liability, even if it were undertaken with the purpose of creating harm.[3] This view was strongly attacked by Knoph in his famous first work, *Hensiktens betydning for grensen mellem rett og urett* [The importance of purpose for the distinction between right and wrong] (1921). And it is now the prevailing opinion that purpose and other subjective elements may be of significance to the judge in determining whether or not an act is legal.[4]

But in the area which we are now discussing there is little doubt that the *general rule* must be that the act which objectively is within the general limits of freedom of action will not be punishable even if it is committed for the purpose of doing harm or from other bad motives. Everyone who arranges boxing matches or auto races because of a sick desire to witness accidents, is acting lawfully as long as there is nothing wrong with his conduct from an objective point of view. This rule has been justified on the ground that an objective criterion is necessary for protection against malicious prosecutions.[5] This argument hardly has much bearing. The prosecuting authorities have more important matters to do than to maliciously prosecute the individual. But other considerations of legal policy can explain the rule. Neither from an individual preventive nor from a general preventive point of view is it of any great interest for society to react against one who remains within the normal limits of freedom of action. In many instances this could be in direct conflict with the interests of society, because the act is socially beneficial, even though its motives might be bad. And since evidence of a person's evil purpose in such cases really can be obtained only by his own confession, an adjudication on this basis would be extremely haphazard. However, under present law a person who commits an objectively normal and harmless act may incur criminal liability for *attempt* to commit an offense, when he assumes that his act is likely

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[1] Getz, *Juridiske afhandlinger. Udgivne af Francis Hagerup*, p. 52 (Kristiania, 1903); compare with p. 58.

[2] Skeie, *op. cit.* I, pp. 140–141.

[3] Getze, *op. cit.*, 54–57.

[4] In German theory, the term "subjektive Unrechtselemente" is used in such a case.

[5] Skeie, *op. cit.*, I, p. 140; Torp, *Den danske Strafferets almindelige Del*, p. 261 (Copenhagen, 1905).

to produce a harmful result, due to a mistake of fact. This applies for example, to one who puts sugar in another person's coffee, believing it to be arsenic, or to the thief who mistakenly removes a thing which turns out to be his own. We will return to these questions when considering the doctrine of attempt (see below, § 34, V).

A German decision (*Entscheidungen des Reichsgerichts in Strafsachen*, p. 321, Vol. 37) is instructive in many ways. A prisoner escaped with the aid of his wife, who distracted the attention of the police guard. She had previously mentioned her plan to her lawyer, who had told her not to do anything but who had also stated (incorrectly, by the way) that as the wife of the prisoner, she could not be punished for aiding him to escape. The lawyer was prosecuted as an accomplice in the escape, and was convicted in the lower court on the theory that his statement had strengthened the wife in her illegal purpose. The conviction was reversed by the Reichsgericht, which held that a lawyer or other expert who does nothing more than give his professional opinion cannot generally be punished for intentional cooperation even though he realizes that his statement will lead to an offense. Much can be said about the reasoning of the Reichsgericht, but the decision illustrates both the question of permissible risk, and the role which motive and purpose may play in the process of adjudication.

§ 15. Self-Defense[1]

I. A form of personal enforcement of the law

It is a natural principle that one who is attacked has a right to defend himself, even to the extent of harming the aggressor. A person cannot be expected to accept an attack calmly and confine himself to holding the assailant liable after the harm is done. Self-defense is a type of personal enforcement of the law. Penal Code, § 48, states that no one can be punished for acts committed in self-defense. But the law undoubtedly means that the act of self-defense is not only unpunishable but also lawful. This is also presupposed in § 24 of the Act on the coming into force of the Penal Code, which mentions harm *lawfully* inflicted in the prevention of a threatening danger. That the act of self-defense is lawful is shown by the fact that it does not entail liability for damages, and also by the fact that the aggressor cannot counter it by self-defense on his own part.

Preventive, not re-establishing

Self-defense is a preventive enforcement of the law, as distinguished from forcible redress of a wrong. It is not self-defense when the owner recovers the stolen object from the thief, at least not unless the thief was caught in the act. Neither is it self-defense when a person entitled to a negative easement starts to tear down a building which has been erected contrary to the easement. This is taking the law into one's own hands (forcible redress) which otherwise may be lawful under certain circumstances (see below, § 18, III).

II. The attack

The type of self-defense which primarily comes to mind is self-defense against an attack upon the person. But Penal Code, § 48, goes much further, for it permits self-defense against *every unlawful attack*.

1. Self-defense to protect any type of legal right

The right of self-defense applies regardless of the type of legal right attacked. A person has the right of self-defense not only to protect his person, but also to protect his property, his honor (see Rt. 1936, p. 740) and his other legal rights.

The law does not distinguish between an attack on the defender or on a third party. If I witness an assault, I have the same right to ward it off as the offended party himself.[2] This shows clearly that self-defense is a form of legal enforcement and not merely a subjective ground of excuse. Self-defense may

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[1] Augdahl, *Nodverge* [Self-defense] (Kristiania and Copenhagen, 1920).

[2] Admittedly the term "self-defense" is not very adequate in these cases, but it is used here for lack of a term more exactly corresponding to the Norwegian concept "nodverge" which literally may be translated into "need-ward" or "emergency-defense" (German: Notwehr). [Translator's note.]

also be asserted to protect *public interests*, as where, for example, I see a traitor or spy about to flee to the enemy with military secrets.

In practice, the issue of self-defense arises most often in cases of physical assaults. It is very common for an accused to assert that he was attacked or threatened by the other party, and therefore acted in self-defense. He must be acquitted if there is a reasonable doubt on this issue. Here, as elsewhere, the doubt must be resolved in favor of the accused, who does not have the burden of proving self-defense. Compare above, § 9, II.

2. "Attack" normally presupposes an active violation of interests

Occasionally there may be doubts as to what is meant by an attack. Generally it presupposes an active violation of interests. If a person refuses to fulfill a duty, *e.g.*, to return an object or pay a sum of money, this is not what the law considers an attack which would justify self-defense on the part of the person aggrieved. Exceptions can be imagined, however. The comments to the Draft Penal Code mention, as examples, cases where one who has imprisoned another refuses to release him, or that a person, in order to prevent a rescue, remains sitting in such a place that he obstructs the opening through which the rescue work would have to be performed (S.K.M., pp. 87–88). The same would be true in other circumstances where omission is equivalent to an act causing harm, such as where a guide refuses to rescue a tourist from a dangerous situation, or where a mother refuses to feed her child. This question of interpretation has no great practical significance. In such cases the doctrine of necessity (Penal Code, § 47) will generally provide the basis for that compulsion or use of force which is necessary to ensure that the duty is fulfilled.

A more practical problem is dispute about the use of real property. A not too infrequent example is this: A and B are in constant dispute about a right of way which A claims he is entitled to on B's land. One day, B builds a fence across the road. A sees it and tears it down. If A has actually used the road then the building of the fence must be regarded as an attack by B, even though he builds it on his own road. A then has the right of self-defense while the fence is being built. But once it is erected, a new situation is created, so that A would be guilty of an attack if he should tear down the fence. This does not solve the case, however, for it must be determined whether there is lawful forcible redress of a wrong on either side (see below, § 18, III).

Attack against public interests. As mentioned before, self-defense can also be exercised in defense of public interests. However, a mere violation of a police regulation will not be considered an attack which provides the proper basis for self-defense. That would imply granting to private individuals extensive police powers over each other.

3. Self-defense against future attacks

The law does not require that the attack should have begun or that it is imminent. Self-defense can also be necessary against future attacks, for example, the comments to the Draft Code mention the case where a skipper has learned of a conspiracy among the sailors to murder him in a few days when the ship is expected to arrive at a certain spot well suited for this purpose (S.K.M., pp. 86–87). He certainly cannot be required to wait until the ship has arrived at the place where the murder is planned to be committed. A more practical example of preventive acts against a future attack is the setting up of trap guns and similar preventive measures which are directed toward an indefinite group (see below, V).

4. The attack must be unlawful

A condition for the right of self-defense is that the attack is unlawful (illegal). It need not be punishable, however.

Whether the act is unlawful depends on the rules of public and private law. As a starting point it can be said that every attack against a legally protected interest is illegal in the absence of any special ground which makes it legal, such as emergency, official acts of authority, and lawful forcible redress of a wrong. If such a special ground does exist, the assaulted party must accept the attack and has no right of self-defense.

Rt. 1948, p. 75: During the German occupation in World War II, a garage was visited by saboteurs from the Resistance Movement, who came to destroy the machines of the garage, which was working for the German forces. The owner defended his garage and hit one of the saboteurs in the shoulder with a bullet. After the war he was indicted and convicted of treason and attempted murder. He was held not to have the right of self-defense since the saboteurs were engaged in a lawful enterprise from a Norwegian point of view, and the owner knew this. See also, R.Mbl. 38, p. 58 (77), and 49, p. 150 (157): A justifiable act of self-defense cannot be met with self-defense from the assailant.

According to prevailing jurisprudence, illegality is valued objectively. Even though the assailant acts in good faith so that he cannot be blamed, this will not preclude the right to self-defense but will affect only the question of how drastically the victim may react (see below, III). But if there is time and opportunity, obviously the victim must try to clarify the matter before he resorts to defense measures. The right of self-defense is not precluded by the fact that the assailant is not responsible for his acts because of insanity, for example.

Attacks from animals. It is generally understood, however, that there is no right of self-defense against an attack by an animal unless the animal is used as a tool by some human being. This is based on the proposition that the law is written for people, and not for animals; thus, an animal cannot act "unlawfully." The authority for the defense here could only be § 47 (emergency). When a human being is attacked, the rules of emergency will generally suffice. But these rules are not completely satisfactory when the attack is directed towards another animal, or other types of property. According to § 47, necessity will serve as justification for an otherwise punishable act only in those instances where it protects a considerably higher value in comparison with the interests sacrificed by the act. If I have to kill my neighbor's German police dog in order to prevent my small Pekinese from being harmed, this would be punishable unless the latter was a much more valuable animal than the former. Much could be said in favor of interpreting § 48 analogically, making the defense act legal at least in all cases where the value which is saved is as great as or greater than the harm inflicted on the attacking animal.

The term "unlawful" is understood as a reference to the remainder of the legal rules. But this can hardly be interpreted so strictly that there can be no "unlawful attack" in relation to § 48, unless the act entails other legal sanctions. The courts must be able to declare an attack illegal in relation to § 48 when the attack is commonly considered clearly improper, even though the legal system contains no judicial sanctions against it. This can be especially significant for violations of a psychic nature—legally, the soul is not so well protected as body and property. The individual's religious feelings are not protected by the criminal law—Penal Code, § 142, applies only to one who publicly insults religion, and because of the nature of the offense the question of payment of damages or other legal sanctions cannot very well arise. But if a person enjoys hurting a devout Christian by showering him with the rawest insults about his faith, the insulted person should not be denied the right to put an end to the insults by a box on the ear, for example, even though one must agree with Augdahl that a milder form of self-assertion would generally be more natural in such a situation because of the nature of the interests involved.[1]

5. Provocation

Whether or not the attack is provoked is immaterial as far as the right of self-defense is concerned, as long as it is unlawful. The rules of self-defense do not protect only the blameless. If I taunt a man until he loses control of his temper and attacks me, I will nevertheless have the right to self-defense, but my provocative conduct will have significance both on the question of damages and on how far I may go in defending myself. I may also be criminally liable because of my act of provocation. Suppose I tease an intoxicated person so that he attacks me with a knife, and I do so with the purpose of being able to hit him in self-defense. Even though the act of self-defense is considered legal because it is the only way in which I can save my life, I should be liable for assault (or homicide if death ensues) since it was my intentional act of provocation which caused the further course of events.

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[1] Augdahl, *op. cit.*, p. 27.

6. Penal Code, § 48, para. 3

According to Penal Code, § 48, para. 3, the rules on self-defense will also apply to acts performed for the purpose of lawful arrest or for the prevention of a prisoner's escape from prison or custody. Without such a special provision, one could not have applied the right of self-defense in such a case, for a fleeing prisoner could not reasonably be regarded as an attacker. According to Code of Criminal Procedure, § 232, a private person can also make a lawful arrest when the suspect is met or is pursued after a recently committed act or in hot pursuit. It follows from § 48, para. 3, that the rules on self-defense are also applicable in this case. Example: I awaken one night because a thief is breaking into the house. He flees, and I follow him, managing to stop him by a shot in the leg. Whether this is to be considered a punishable causing of physical damage or a justifiable act of self-defense will have to be judged according to the principles of Penal Code, § 48.

III. The act of self-defense

The act of self-defense must not go further than is necessary to prevent the attack. This applies both to the degree of force used and to the time when it is used. The assaulted cannot shoot the assailant in the heart if a shot in the leg would be sufficient to make him harmless. And it is not self-defense if I give him a good beating after I have prevented the attack.

Opinion has been divided on the issue whether the assaulted always may do what is necessary to prevent the attack no matter how small the violation of the law and no matter how hard the act of self-defense will affect the assailant. Should a certain proportionality be required between the interest which is endangered and the damage which will be done by the act of self-defense? Such a requirement may cause the assaulted to submit to the violation because the only defense which he has is too powerful. The penal law takes a middle course. It does not recognize any absolute right of self-defense, but at the same time it gives the assaulted a rather large margin of safety. The defensive act is permissible provided it "does not exceed what is necessary; moreover, in relation to the attack, the guilt of the assailant and the legal values attacked, it must not be considered absolutely improper to inflict so great an evil as intended by the act of self-defense" (Penal Code, § 48, para. 2).

It is evident from this provision that the determining factor is not an evaluation of the objective values of the interest which is attacked and the damage which is caused by the act of self-defense, but rather the *ethical judgment* of the act of self-defense. That legality should not have to yield to illegality is an important consideration; it must not be possible for an aggressor to use force, relying on the victim having no right to use the only method by which he can defend himself. In this evaluation one must therefore consider whether the attack is made maliciously or in good faith, whether the attacker is a mature person, fully responsible for his acts, or a child or insane person, and whether the attack is unprovoked or brought about by the victim himself. Where a conscious and planned breach of the law is concerned, one would only in the exceptional case deny the victim the right to defend himself, even though the assailant might be injured quite seriously. But such examples can be imagined. If a farmer discovers that two men have taken his boat and are now out on his lake fishing illegally, he has the right to shoot warning shots to induce them to stop, but if that does not suffice, he could hardly be allowed to shoot for the purpose of hitting them. Here there is too great a disparity between the conflicting interests.

The same viewpoints must apply to the solution of the disputed question of the significance of a possibility of escape. The fact that the victim can avoid the attack by fleeing does not in itself preclude the right to self-defense. "Fleeing is the opposite of self-defense, and nobody is required to behave cowardly," says Augdahl.[1] But on the other hand, in the adjudication of the act of self-defense we cannot always disregard the possibilities of escape. Here as elsewhere, there must be an evaluation of the concrete conditions compared with the directives which the law has given. The question is whether it was "absolutely improper" for the attacked to choose defense instead of flight (see Rt. 1938, p. 828). Both the nature of the attack and the identity of the victim (his position as an official, for example) will be significant factors.

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[1] Augdahl, *op. cit.*, p. 78.

As experience shows, the opinions on how far one may go to assert one's right vary quite considerably. The man of quiet nature would rather suffer injustice than do injustice; another man stands firmly on his rights. The law has taken these differences into consideration when providing that the act of self-defense is illegal only when it is absolutely improper. It has, as the Penal Commission expressed it, "taken care that no normal person who has truly acted in good faith, that is, who could defend his conduct in his own conscience, can be prosecuted and sentenced" (S.K.M., p. 86).

The language used raises the question whether the impunitive and the lawful coincide, or whether there is a certain border area where an act is perhaps impunitive, but nevertheless unlawful from an objective point of view. If unlawful, it could be met with self-defense and would not automatically be exempted from the duty to pay damages. Such a distinction, however, would hardly coincide with the meaning of the law. If the act is impunitive according to the rules of self-defense, it is thus also lawful, in contrast to the act which is impunitive according to the rules on *exceeding the limit* of self-defense (Penal Code, § 48, para. 4).

IV. Self-defense against official acts

Both according to the words of the law and its legal history, the right of self-defense under § 48 also applies to illegal official acts by public authorities. Here, the act of self-defense will generally take the form of violence toward a civil servant (§ 127) or the prevention of the performance of his duties (§ 326).

Self-defense against official acts creates, however, its own special problems. A factual or legal error by the civil servant cannot be considered in the same manner as a similar error by a private person. If every official act which is based on a misunderstanding of the facts or on an incorrect interpretation of the law could be met with self-defense, this would lead to the dangerous consequence that a person who acted in the belief that such an error existed, would have to be acquitted because of a lack of the necessary intent (see Penal Code, § 42), a situation which could seriously undermine the authority of the official.

A distinction must be made between judicial and administrative decisions.

1. Judicial decisions

A judicial decision—provided it does not suffer from such serious defects that it must be considered a nullity—must be respected until reversed or altered. The very basis of the right to self-defense—that it is a private enforcement of the law in instances where the aggrieved could not be expected to satisfy himself with resorting to ordinary legal remedies—is absent here. A judicial decision is generally enforced by an administrative official. The person to whom the decision applies cannot oppose enforcement with the argument that the decision was incorrect. For example, one who resists the enforcement of a judicial warrant of arrest (Code of Criminal Procedure, § 231, cpr., §§ 228–229), can be punished for violence against the police (Penal Code, § 127), even though it is later decided on appeal that there was insufficient ground for the arrest.

2. Administrative acts

If the error lies in administrative acts, the question becomes more difficult. Most often acts are done without any connection with a foregoing judicial decision; for example, an arrest or a search is made without previous authorization from the court. But a mistake can also be made in the enforcement of a judicial decree; the police may erroneously arrest a person other than the one named in the warrant of arrest, or the officer executing a civil judgment may erroneously seize the objects of a third person.

One group of cases could be easily disposed of, namely, those where the legality of the official acts does not depend upon the existence of certain conditions, but rather upon whether there is reason to believe that they exist. According to Code of Criminal Procedure, § 228, a person who is "reasonably suspected of having committed a punishable act," can be arrested under conditions set out in the section. Even though the arrested person is innocent, the arrest itself is legal when there was reasonable ground for suspicion.

But if an official act is contrary to law, then under a literal interpretation of Penal Code, § 48, self-defense should not be precluded even if the civil serv-

ant acts in good faith because of a factual or legal error. This would be significant only for the question of how far the victim is allowed to go in self-defense. The suspected person should then have the right to oppose by force an arrest or a search made without sufficient legal authority. However, various attempts have been made to limit this rule. Hagerup holds that self-defense is never permissible against a civil servant acting within his formal official capacity,[1] Augdahl discards this limitation, but holds instead that the subjective legality of the official act must be the determining factor. "What the law can require is that the civil servant acts in conformity with his duty. The normally endowed civil servant who, in the conscientious performance of his duties makes a mistake, does not thereby commit any illegal act which can give the aggrieved a right to self-defense."[2] Consequently the enforcement of an illegal order cannot be met with self-defense if the subordinate who carries out the order acts in good faith.

§ 48 was not formulated with any special thought of self-defense against official acts, and one can hardly solve this problem by an analysis of its terms. Anyway, judicial practice has not placed any great weight on the wording of the provision. There is room, however, for considerable difference of opinion if one wants to solve the problem on the basis of policy considerations. And judicial practice has been so vacillating that it is not possible to point to any definite solution as settled law.

V. The act of self-defense affecting third persons

An act of self-defense may harm not only the assailant but a third person as well. For example, I may use a third person's chattel to defend myself, or I may set off a fire alarm in order to call for help against the attacker. Here, the lawfulness of my action in relation to the third party is not determined by § 48, but by the emergency rule in § 47.

A special case of this nature is the setting of trap guns or the use of other mechanically functioning defense methods in places such as hunting cabins or fruit gardens. The use of dangerous watch dogs falls into the same category. Whether such preventive measures are lawful in relation to a trespasser is determined by the principle of § 48. But at the same time, they can be dangerous for anyone who enters the area with no illegal purposes, such as a lost mountain climber seeking protection in the cabin against the storm. Here, the determining factor for the legality of the act will be a consideration of the *reasonableness* of the act. Whether a sufficient warning of the danger has been given, such as a sign that a trap gun has been set out or that the dog is loose, will be an important factor in the decision.

VI. Mistake on the part of the actor

A person may make a mistake about the actual situation. He may wrongly believe that he is being attacked or misjudge the degree of danger. He may also be mistaken as to the effect of the defensive action; he intends merely to render the attacker unconscious, but kills him instead.

It is evident from Penal Code, § 42, that the perpetrator in such cases cannot be punished for an intentional offense if his action was justifiable according to his understanding of the actual situation. If he has shown carelessness in his evaluation of the situation, punishment for negligence can be applied (Penal Code, § 42, para. 2). Thus, if he kills the aggressor in such a situation, he can be punished for negligent homicide (Penal Code, § 239). If he only strikes the supposed aggressor, without causing any serious harm, he commits no criminal offense since the Code has no provision against negligent assault.

The solution is different if he is correct about the actual situation but makes an error as to how far he may go. This is an error of law which is governed by Penal Code, § 57. The fact that the attacked thought he had the right to an act of defense which the law finds "absolutely improper" will hardly be recognized as a ground of impunity.

VII. Exceeding the limits of self-defense

According to § 48, para. 4, one who has exceeded the limits of self-defense is not to be punished "if the excess is due solely to emotional upset or derange-

[1] Hagerup, *Strafferettens almindelige del* [General Principles of Criminal Law], pp. 235–236 (Kristiania, 1911).

[2] Augdahl, *op. cit.*, p. 49.

ment produced by the attack." The nature of the emotion is immaterial: it can be anger as well as fear. Nor does the fact that the attacked person knew that he exceeded the limits preclude impunity (see Rt. 1906, p. 342). As the Penal Code Commission expresses it: It is "offensive that the final result of an illegal attack should be that the attacked person is punished although he has disclosed a mental temper which is dangerous only to those who violate his rights, not to those who themselves keep within the limits of the law and leave him in peace." (S.K.M., p. 88.) The rule gives the attacked another margin in addition to the one given by the law which uses the expression "absolutely improper." But the provision promises only impunity: it does not make the excess legal. This means that the act can be met with self-defense from the original attacker and that, under the Act on the coming into force of the Penal Code, § 25, there exists a basis for an apportionment between the two parties of the damage the act creates. It is doubtful, but of little practical importance, whether § 48, para. 4, can be used in the examples which are discussed in § 48, para. 3 (see above, II, 6).

The rule in § 48, para. 4, applies to cases where the victim inflicts on his attacker a greater suffering than is necessary or proper, but hardly has any application to an excess with respect to time, such as where the victim has hit the attacker so that he falls to the ground, and then, in his excitement, starts to kick the fallen aggressor. Here, when the act was perpetrated, no situation of self-defense existed at all. However, the provision on provocation (§ 228, para. 3) or the provision on decrease in punishment where an act is committed in justifiable anger (§56, No. 1(*b*)) may be applicable.

An excessive act of self-defense which is not due only to emotion or consternation can lead to a decrease in punishment according to the conditions set out in § 56, No. 1 (*a*).

§ 16. Necessity and Negotiorum Gestio

I. The nature of necessity

The rules which apply to necessity in Penal Code, § 47, are in some ways similar to and in other ways different from those which apply to self-defense. Both apply to emergency situations and extend freedom of action beyond the usual limits. But while the rules on self-defense refer to an emergency which is caused by an illegal attack and define the legal position towards the attacker, the rules on necessity refer to every type of emergency situation and regulate the actor's legal position to the outside world in general. While self-defense can be considered a form of enforcement of the law, the act of necessity can be compared to an expropriation where greater interests push minor ones aside. The difference between self-defense and emergency rights is often expressed in the following manner: In the former, legality stands against illegality; in the latter, legality against legality. The difference, of course, brings with it certain legal consequences. The right to save oneself at a third person's expense must be limited more strictly than the right to protect oneself against an aggressor. Moreover, a person must generally pay damages for the harm which he caused by the act of necessity, whereas no such duty exists where self-defense is concerned.

According to some foreign laws the necessity situation is considered a basis for excuse only, which makes the act impunitive but not lawful. Other foreign codes regard an act of necessity lawful in certain circumstances, and in others merely impunitive. Thus, the German Draft Code of 1960 has one provision (§ 39) on "Justifiable necessity" and another (§ 40) on "Excusable necessity." The difference has significance first of all on the questions whether the person affected by the act of necessity has the right to self-defense. The Norwegian law deals expressly only with punishability. But the law presupposes that the act of necessity is as objectively legal as the act of self-defense (see the Act on the coming into force of the Penal Code, § 24).

It has been argued that a special rule applying to necessity situations is unnecessary because necessity rights should follow from the general principle that the legality of an act ought to depend on a weighing of its utility against its dangerousness.[1] This is not tenable. In general, the limits of freedom of

[1] See Torp, in (1897) *Tidsskrift for Rettsvittenskap*, pp. 45–77; Torp, *Den danske Strafferet almindelige Del*, § 23, IV (Copenhagen, 1905).

action are not determined by a concrete weighing of utility against danger, but rather by general rules. The rules which apply to necessity rights form a sharply limited exception. That we are dealing here with special rules is also demonstrated by the fact that damages must be paid. When an act is otherwise legal, even though it creates a certain danger, it ordinarily does not entail the duty to pay damages.

II. The necessity situation

In accordance with § 47, a necessity presupposes "an otherwise inevitable danger." How the danger has been created is of no importance. It can be by an unlawful attack (I borrow someone's boat in order to save myself from the attacker). But it can also apply to acts of nature, sickness, fires, or other situations. A special case exists where a person is coerced into committing an illegal act, *e.g.*, theft; here, he gets out of the situation at the cost of the third person. Many foreign codes have special provisions about this,[1] but under Norwegian law the general rules on necessity govern the case. It makes no difference whether the necessity was self-caused or not. If my house is on fire, I have the right to break into my neighbor's house to get water and fire-extinguishers, even though my own carelessness was the cause of the fire.

The requirement that the danger be "otherwise inevitable" cannot be interpreted strictly. An act of necessity may be warranted even though I could have prevented the danger by myself, if this should require unproportional difficulties or expense. This must be determined according to the same principle which § 47 sets up: the value-relationship between that which is saved and that which is sacrificed. I may also have a choice of using A's property or B's in the rescue. The rule here is that I must use the property of lesser value.

According to the law, the danger must threaten "the person or property of somebody." This means first of all that the necessity act can be performed for the benefit of a third person as well as of the actor himself. This is a natural consequence of the law's viewpoint that the necessity measure is objectively warranted because it saves more than it destroys. On the other hand, in laws which regard the necessity condition as a subjective reason for excuse, impunity is sometimes limited to the case where the danger threatens the actor himself, or someone close to him.

What the rule will be where the third person has prohibited or disapproved of the emergency measure is a moot question. The answer is doubtful. On the one hand, it can be argued that no one should have the right to force assistance on someone who does not want it and which, among other things, imposes upon him the duty to pay damages. On the other hand, it can be argued that an act which saves something of value to society should not be punished, even though the person who directly benefits from the act does not wish it done. A condition for precluding the necessity right in this instance must in any case be that the necessity concerns only the interests over which the individual has the right of disposition. If I take a boat in order to save a drowning person, I cannot be punished for illegal use of the boat, even though the person I save is attempting suicide and protests vehemently against his rescue.

"Person or property" includes all individual legal benefits. However, it does not include public interests. Public officials, such as policemen and health officials, generally have some other basis for those interventions which are necessary for the protection of society's interests, and thus need not use the rules which apply to emergency situations. But interventions for the protection of public interests can also be made by a private person. In order to prevent an act of treason about which he has learned, it may, for example, be necessary for a person to break into a house to reach a telephone, or forcibly to take a bicycle which the owner himself is using. There can hardly be any doubt that § 47 applies analogously in such cases.[2]

III. The necessity measure

The law imposes no limits on the nature of the necessity measure. Most often it will involve an encroachment on another person's property, but it may

[1] See, for instance, German Penal Code, § 52. The German Draft Code of 1960 has omitted this provision, since the general rules on necessity also cover the cases of duress.

[2] See (1947) *Norsk Retstidende*, p. 612, esp. the pronouncement of the lagmannsrett (court of assize), p. 634.

also consist of a physical assault, an imprisonment, or a violation of public interests. As examples of the latter, consider the following: A person is threatened with death unless he engages in enemy war activities; a witness gives false statements to the police in order to prevent the accused, who is despondent, from committing suicide (see Rt. 1949, p. 503).

The prerequisite for the necessity rights is always the existence of a situation which justifies the actor in considering the danger extremely significant in comparison to the damage which could be caused by his act. The law is not concise in its method of expression when it sets up against each other a *danger* and a *damage*. This means that both the degree of danger and the probability of its occurrence should be considered on both sides. Suppose that the threatened goods are worth 10,000 kroner, but the degree of danger is only 25 per cent.; on the other hand, the rescue will certainly create a damage of 1,000 kroner. Here the sums 2,500 and 1,000 kroner must be compared, not 10,000 and 1,000. In most instances, of course, such an exact calculation cannot be made, but an approximate estimation must be used.

The act of rescue can be called socially useful when what is saved is more valuable than what is lost. This, however, is not enough according to the law. The thing saved must be extremely significant in comparison to the damage done by the act. By setting up this requirement, the law shows that strong reasons must exist before such a departure from general rules will be accepted.

It is difficult to determine what is meant by the requirement of extreme significance, even when purely economic values are involved on both sides. It becomes far more difficult where also unmeasurable benefits are concerned; when, *e.g.*, it is necessary to sacrifice economic values in order to prevent a danger to life or health, or on the other hand, to set life or health at stake in order to prevent damage to economic values. Here one must consider the propriety of the act. The Penal Code Commission states that in evaluating whether or not the damage avoided is especially significant in comparison to the damage caused, "the courts will naturally consider whether one should reasonably cause the one in order to prevent the other" (S.K.M., pp. 80–81). It cannot be said that a danger to life or body must in *all* cases be given a preference over economic values. The answer must depend both on the significance of the encroachment and on the position of the acting person. Some occupations, such as that of a policeman or fireman, require a person to face certain dangers. It is not the general rule of emergency rights but the special (written or unwritten) norms applying to each individual occupation which determine the extent of the danger to which a person must expose himself. Military Penal Code, § 26, expressly provides that fear of personal danger cannot be pleaded to justify the omission of an official duty.

It is possible that a definite limit, in addition to the relative one of § 47, should be set up. Skeie (I, p. 151) mentions the case where an immediate blood transfusion must be made in order to save an injured person; the only one who has the same blood-type as the injured refuses to give blood. Can he be overpowered and the blood taken from him? From an objective point of view there is no doubt that saving the injured person's life is extremely significant in comparison to the temporary depletion of the strength of the donor, which is the normal consequence of a blood transfusion. Nevertheless, there will probably be divided opinions on whether or not such a serious encroachment of bodily integrity should be approved, especially if the person in question had reasonable grounds for his refusal, such as the fact that the blood transfusion would have more severe effects than usual because of a recent sickness.

Where life is concerned, there can be no gradation of its value according to age, health, intelligence, obligations of support, or similar factors. Even though many lives could be saved by the sacrifice of one, this would hardly be justifiable. It would conflict with the general attitude toward the inviolability of human life to interfere in this way with the course of events.

The same danger threatens both

Special questions arise where the same danger threatens both the interest which is sacrificed and the one which is saved. If only economic values are involved, this danger must be taken into consideration when the comparison is made. An example of this type is regulated by the maritime rules applying to

general average (Maritime Code, chapter 7), which speaks about damage "which is purposely inflicted on ships or cargo in order to seek safety from a danger which threatens both." Another example involves fires in densely populated neighborhoods where it is necessary to blow up a house in order to prevent the fire from spreading (see the Fire Act of November 19, 1954, § 35).

The question is more difficult when human lives are concerned. We have such an example in Act 5 of Ibsen's *Peer Gynt*, where, after the shipwreck, Peer and his cook both seek refuge on the upturned boat which is able to support only one of them.[1] Neither has any greater rights than the other and neither wishes to give in; but if both hold onto the boat, it will sink and both will drown. As we know, Peer forces the cook to let go. It is difficult to consider Peer's conduct legal, for this would mean that the cook had no right to defend himself. On the other hand, it is not very appealing to punish a person for what he does in a situation such as this. Here it would seem reasonable to extend the necessity condition a bit further as a basis for excuse, rather than as a basis of justification, but there is little authority to support such a solution.

Rt. 1950, p 377: During the evacuation of the northernmost districts of the country in the last moments of World War II, three Norwegian policemen were forced to participate in the execution of a compatriot who was sentenced to death by a Nazi special court. After the war they were prosecuted under Penal Code, §§ 86 (treason) and 233 (murder), but argued in their defense that they had acted in a necessity situation; had they refused to follow the order, they, as well as the sentenced person, would have been shot. The court found that this was most probable, but nevertheless did not find it proper to call their act *lawful*: "And when this is so, the Penal Code will not allow punishment to be dispensed with merely because the accused acted under duress, even where it was of such a serious nature as in the case at bar, since according to the decision of the court of assize it must be deemed clear that the force did not preclude intentional conduct on the part of the accused." The solution would have been different under German law, which regards the state of duress as a basis for excuse and provides for impunity when the act is performed under a threat "entailing an immediate and otherwise not avertable danger to his own or one of his family members' body or life" (Stragesetzbuch, § 52). See the case in *Entscheidungen des Reichsgerichts in Strafsachen*, Vol. 64, p. 30. See also below, § 29, V.

A similar example is one which was not uncommon in former times: A group of shipwrecked sailors manage to survive by the use of lifeboats, but run short of food and water. They save themselves by killing and eating one of their shipmates. The Penal Code Commission accepts this as legal: "When all human logic and reason tells us that the death of not only the victim but of all the others would occur within a few hours if the killing were not done, the harm caused—a few hours shortening of the victim's death struggle—must surely appear immaterial in comparison to the good achieved—the saving of all the rest" (K.M., p. 80, n. 1). This is rather hardboiled justice. In dealing with human lives, merely quantitative evaluations cannot be accepted. From a qualitative point of view, a murder is quite different from an ordinary death. Moreover, there will, as a rule, be a possiblity of rescue; no one knows if or when the rescue ship will appear. And who is to determine which one is to be sacrificed? Someone may voluntarily offer himself. Even though consent generally has no impunitive effect in murder (Penal Code, § 235, para. 2), the situation is different when there is both a necessity situation *and* consent. But aside from this case, the act cannot be considered justified unless, at the very least, a fair method of selection, such as the drawing of lots, is employed. The strong cannot be allowed to save themselves at the expense of the weak.

This question was considered in England in the famous *Mignonette* case in 1884 (*R. v. Dudley and Stephens*; see Turner and Armitage, *Cases on Criminal Law*, pp. 51–55 (Cambridge, 1953)). Three seamen and a mess boy drifted about on the sea after a shipwreck without food or water. Two seamen finally agreed to kill the boy; the third protested. Four days after the killing they were picked up by a ship. It was apparent that none of them would have lived had the boy not been killed. The court found that, no matter how excusable

[1] Such a situation has, by the way, been commented on as far back as Cicero (*De Officiis*, III, XXIII).

the act may have been, it could not be declared legal. The two defendants were sentenced to death, but the penalty was later reduced to six months' imprisonment.

An American case, decided in 1841 (*U.S.* v. *Holmes*), presented the following situation: After a shipwreck, one of the lifeboats drifted about, crowded with survivors, some passengers and some crewmen. Rain and storms caused the boat to take in water through a leak, and there was no way to scoop out the water effectively. At the mate's order, the crew threw overboard the male passengers, fourteen in number. The next morning two men who had hidden themselves were discovered, and were both put overboard. Shortly afterwards the boat was saved. The court stated that such a measure was permissible only if the victims were determined by drawing lots. Moreover, the passengers had the right to be saved before the crew, except the captain and so much of the crew as was necessary to navigate the craft. The result was a conviction of manslaughter under extenuating circumstances, and the sentence of six months' hard labor. A reference to the case and a detailed discussion may be found in Jerome Hall, *General Principles of Criminal Law*, pp. 427 *et seq.* (2nd ed., 1960).

During childbirth, a doctor may be faced with the choice of saving the mother's life or that of the child, or—if he does nothing—of letting them both die. Here there is a well-established judicial attitude that the mother's life must prevail (see S.K.M., p. 212). A highly controversial problem is what grounds can justify the termination of a pregnancy. Most would agree that not only a danger to the mother's life, but also a danger to her health should be recognized as a sufficient reason for a therapeutic abortion. To a certain extent, a similar attitude will apply to other dangers, such as the danger that the child will suffer from a serious and incurable disease or other defects. The judicial attitude towards these issues was uncertain, however, until the question was solved by a special law of November 11, 1960, dealing with the termination of pregnancy under certain circumstances. In other Scandinavian countries, special laws regulating the termination of pregnancy already existed.

IV. The saved and the sacrificed goods belong to the same person

It may happen that the goods which are in danger and those which are sacrificed by the emergency measure belong to the same person. A fire breaks out in one of the buildings on a farm while the owner is away. A neighbor breaks into the main house in order to get water so that the fire can be extinguished; to prevent the fire from spreading to the main house, he takes some wool blankets which he finds, soaks them in water and places them on the roof. A pedestrian is hit by a car and while unconscious is driven to the hospital; in order to save his life, the doctor immediately amputates both legs. No doubt the emergency measure is legal in so far as it is covered by the rule in Penal Code, § 47. But here, one is hardly restricted to the normal limits. § 47 is directed toward a conflict of interests belonging to different persons, while the interests here belong to a single individual. To the extent that the rules on *negotiorum gestio* go further than the emergency rules, they will be decisive. If the action in question is an obviously sensible measure of which one must assume that the owner of the threatened goods would have wished it done, had he been able to make the decision himself, the act will be warranted according to the rules on *negotiorum gestio* even though there is not such a preponderance as § 47 requires.

V. Mistake

As to the legal effects of a factual or legal mistake by the perpetrator, the same rules will apply as in self-defense (see above, § 15, VI). However, there is a greater possibility here than there is in self-defense that a mistake of law regarding the limits of permissible action will lead to impunity because of good faith.

Exceeding the rights of necessity

The law has no rules granting impunity when necessity rights are exceeded, as it does where the rights of self-defense are concerned (penal Code, § 48, para. 4). However, in such cases it is possible to decrease the punishment below the usual minimum, and to a milder type (Penal Code, § 56, No. 1 (*a*)).

§ 24. Mistake of Law

I. Survey

The defendant in a criminal case sometimes wishes to exculpate himself by stating that he acted in good faith, because he did not know that his action violated any law. It may be that he did not even know that any rules of law existed in this area. Or he may have known that rules existed but had been given incorrect information about the contents of the rules, by a lawyer whom he asked for advice, for example. Or perhaps he both knew of and studied the provision, but interpreted it in a way which the court finds erroneous. In all these cases, we speak about *mistake of law*.

The issue of mistake of law arises most often with respect to misdemeanors and legislation outside the Penal Code, less often when more serious crimes, such as assault, murder, defamation and theft are involved. These penal provisions are generally known by all normal adult persons. But a person can undoubtedly make a mistake as to the age limits in the sections on sex offenses, or a businessman, because of his hard-boiled business morals, may not realize that his behavior constitutes a fraud. A person may also make a mistake with respect to a ground of impunity. He may believe that the law gives him greater right to self-defense or use of necessity measures than it actually does, or he overestimates the legal significance of consent of the victim.

Conscientious Offenders

No mistake of law exists where the actor believes that he has a moral or religious obligation to violate the law (such a person is called a conscientious offender). The pacifist who publicly urges the refusal of military service (Rt. 1918, I, p. 465), and the worker who supports an illegal strike (Rt. 1939, p. 602), are perhaps acting in the belief that they are following a higher law. The same may be true on a larger scale in political offenses. In all these cases, the actor knows what the law of the land forbids or requires, and thus no mistake of law exists.

The conscientious offender represents a tragic conflict for the legal system. As far as possible, rules should be formed so that no one is forced to choose between them and his own conscience. As examples of legal attempts to avoid such conflicts, we can mention the rule which allows a person who, on religious grounds, does not want to take an oath, to use an affirmation (on his honor and conscience), and the rule which allows a pacifist to do civilian work instead of military service. But when serious attacks on the interests of society are involved, society finds it necessary to protect itself with punishment, even though the offender honestly believes his action to be morally right. His motive may then have a bearing on the measure of punishment solely.

II. Penal Code, § 57

Mistake of law is treated very differently in different countries,[1] the rule in many jurisdictions is that a mistake of law will not make for impunity at all, or will do so only in very exceptional cases. In other jurisdictions punishability presupposes the mistake of law to have been incurred at least negligently. Some make no distinction as to whether the mistake of law is negligent, but solve the problem according to the *nature* of the mistake. Thus, the earlier German Reichsgericht in practice stressed whether the mistake was of a penal or non-penal nature; the latter type of mistake exculpated, but not the former. In the writings on criminal law, it has often been held that knowledge of punishability or act least of illegality is part of the intent; if such knowledge is lacking no conviction for intentional breach should take place.

Penal Code, § 57, provides: "If a person was ignorant of the illegal nature of an act at the time of its commission, the court may reduce the punishment to less than the minimum provided for such an act, and to a milder form of punishment, provided the court does not decide to acquit him for this reason."

The expression "ignorant of the illegal nature" gives no clear picture of the scope of the provision. One who acts in good faith because of a factual mistake, also errs with respect to the illegal nature of the act, such as where a person takes someone else's property, mistaking it for his own. But Penal Code, § 57, was not meant to apply to cases of factual mistake. It is Penal

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[1] A detailed discussion is found in Thornstedt, *Om rattsvillfarelse* (Stockholm, 1956). See also Andenaes, "Ignorantia Legis in Scandinavian Criminal Law," in *Essays in Criminal Science*, p. 215 *et seq.* (ed. Mueller, 1961).

Code, § 42, which applies to them. We will later consider in greater detail the distinctions between these two provisions (see IV).

The provision speaks only about mistake as to *illegality*, not as to *punishability*. If the actor knows that the act is unlawful, it can never be impunitive merely because he does not know that it is punishable as well. A farmhand may break a contract of employment because he has received a better offer. He knows that it is unlawful to break the contract, but he does not know that it is also punishable (Penal Code, § 409; see Rt. 1921, p. 510; 1924, p. 702). However, when the acts do not appear to violate any interests, the mistake as to punishability and the mistake as to illegality generally coincide. This is the case with respect to many violations of the penal provisions outside the Penal Code. If I do not know of the penal provision, I also do not know that the act is forbidden.

What Penal Code, § 57, directly provides is that a mistake as to illegality *may* lead to a decrease in punishment. The section also permits the court to *refuse* to grant such a decrease. And the paragraph presupposes that the court can *acquit completely* because of the mistake. There are, then, four alternatives from which the judge can choose: he may: (1) acquit completely; (2) reduce the punishment below the general minimum or to a milder form; (3) consider the mistake as an extenuating circumstance within the general framework of the law; (4) attach no significance to the mistake at all.

The law sets up no definite guiding principle for the choice. The natural interpretation of the provision is that the judge is given complete power to decide in the individual case whether or not to decrease or omit the punishment, just as he is given similar powers of decision in other cases (see, for example, Penal Code, §§ 58, 228, para. 3, 250 and 392, para. 2). This interpretation also coincides for the law to provide general rules on the difference between the cases, and that it therefore has left it to the considered discretion of the court to determine when punishment should be decreased or omitted.[1]

However, ever since enactment of the Penal Code, it as been generally understood that there must be a definite principle for this determination.

Hagerup laid down the rule that conviction for an intentional offense presupposes knowledge of the illegality, while conviction for negligence presupposes that the mistake as to illegality can be looked upon as negligent. The reasoning is as follows: Punishment for intentional offenses should react against the conscious criminal mind, and there is no conscious criminal mind when the perpetrator was ignorant of the law on the subject. The punishment for negligence, however, is society's reaction against a lack of care on the part of the actor. And this lack may be due to the fact that the actor has neglected to obtain correct knowledge of the legal rules which apply to his conduct.[2] There are some decisions which adopt this interpretation (see Rt. 1919, p. 312; 1930, p. 1061).

From a practical point of view, however, strong objections can be made against this solution; moreover, it does not coincide with the intention of the legislature (see S.K.M., p. 98). Where general offenses (such as larceny, murder and fraud) are concerned, it would probably not make much difference if knowledge of the illegality was required. This is a knowledge which every normal adult has, and which the court would therefore assume to exist unless very special circumstances demonstrated the contrary. The situation is different when we deal with the numerous demands and prohibitions in the business law, the traffic law, the alcoholic beverage law and the police regulations. Here it will usually be almost impossible to prove that the perpetrator knew about the legal provision. The judge will often have to say: "He *should* have learned the rule, but whether he actually *has* done so, it is impossible to determine." If such an uncertainty should result in an acquittal, the difficulties of proof would lead to acquittals in many cases where the perpetrator actually knew about the penal provision. Such a rule could create a temptation not to keep informed about the prevailing regulations. All this would weaken the effectiveness of the law. Many of these legal provisions, it is true, also apply to negligent violations, and thereby of course to negligent mistakes of law. But merely because the law requires intent (not having found it necessary to react

[1] See: *Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge. II Motiver. Udarbeidet af den ved kgl. Resolution of November 14, 1885, nedsatte Kommission*, p. 98 (Kristiania, 1896); compare the list of printing errors in the same report, p. V.

[2] Hagerup, *Strafferets almindelige del*, pp. 327–328 (Kristiana, 1911).

against negligence in general), this does not mean that it is less important than otherwise to inculcate the knowledge of the legal provision.

Only excusable mistake of law is impunitive

It is now definitely established in practice that, even with respect to intentional offenses, mere negligence with respect to the legal norm is sufficient. Or, as it is often stated, only the *excusable* mistakes of law leads to acquittal. The term "excusable mistake of law" is perhaps a bit misleading; "excusable" does not stand as a contrast to "inexcusable," but to *negligent*. It is only the mistake of law for which the perpetrator cannot be blamed at all which is impunitive. A negligent mistake of law can have significance for the degree of punishment, but not on punishability itself.

The rule also applies where the penal provision contains the expression "illegal," "unlawful" or a similar term. This mode of expression does not mean that knowledge of the illegality is required. What is required, here as always, is knowledge of the actual circumstances which are the basis for the law's characterization, not knowledge of the meaning of the expressions which the law uses (see above, § 22, II, and S.K.M., p. 98).

III. When is a mistake of law excusable?

The question then is: What is required to make a mistake of law excusable? The general rule is undoubtedly that a mistake of law will not be accepted as excusable in the absence of special circumstances. This seems unreasonable at first sight. The number of legal provisions are so overwhelmingly today that no person could have knowledge of more than a fraction of them. How, then, can one hold it against a defendant that he does not have knowledge of a particular provision? To this one can say that no one need know all the rules. There are two requirements: First, knowledge of the general legal rules governing community living which apply to all persons; Secondly, knowledge of the special rules of the trade or occupation in which the individual is engaged. One who wishes to build a house, drive a car, or start a trade must obey the rules which apply to the activity concerned. But a fisherman does not have to know the rules pertaining to industry, and a farmer can live happily without any knowledge of maritime law.

An examination of the cases in this area reveals a certain discrepancy between the judge and the lay judges.[1] We often come upon decisions in country or city courts which acquit a person because of his mistake of law, the lay judges having outvoted the judge, but which are reversed by the Supreme Court (see, for example, Rt. 1959, pp. 105, 796; 1953, p. 459.) The lay judges clearly place themselves in the position of the accused, and find it natural that he did not know about the provision in the law; perhaps they themselves learned about it for the first time in the courtroom. The professional judge thinks more about the necessity of an effective enforcement of the law. Actually, this is but a simple example of the general conflict between professional and lay judges. The layman looks chiefly at the individual case; the lawyer considers the wider implications. In the years from 1954 to 1958, there was only one reported case in which the Supreme Court upheld an acquittal because of an excusable mistake of law. During the same period, eight cases were reported where the lower court acquitted on this ground, but where the decision was reversed by the Supreme Court. In six of the eight cases, the lay judges had outvoted the judge.

The accused's position

Great weight must be given to the position of the accused. Strong demands must be made on the owner or manager of an enterprise. On the other hand, the subordinate must generally be free from liability when he has acted according to his superior's instructions, without having any special reason for suspicion.

The accused's education and mental abilities

One must also take into consideration the accused's education and mental abilities (see Rt. 1926, p. 948). This is so at least with respect to general rules of community living. Where special rules for a profession are involved, it will probably be more difficult to acquit because of lack of intelligence or experience.

[1] Country and city courts in Norway are composed of one professional judge and two lay judges, the laymen having equal votes with the professional judge.

The rule is new

One reason for holding the mistake of law excusable is that the rule is new (see Rt. 1939, p. 430). Here, however, the general situation of the times must be considered. During war, when provisions of a serious nature are constantly being enacted, the excuse that the provision is new carries less weight; the people must be required to keep informed (see Rt. 1940, p. 514).

The actor is a stranger

Another reason for excuse is that the actor is a stranger to the jurisdiction. A foreign tourist cannot be required to acquaint himself with the mysteries of our liquor law, but a foreign trawlfisher can be required to learn our rules on territorial waters and foreigners' rights to fish (see Rt. 1934, p. 727). It can also be excusable for Norwegian citizens to be unfamiliar with regulations in force in a place to which they have recently moved or through which they are travelling.

The meaning of the law has been doubtful

A third reason for excuse is that the meaning of the law has been doubtful. The accused may have relied on an interpretation of the law which was expressed in the draft bill, in earlier practice, or in statements by public authorities. Because of this, he cannot be blamed if the court now adopts another interpretation.

However, the main question is not whether the meaning was more or less legally doubtful, but whether or not the accused acted faithfully according to his understanding of the purpose of the law. A person who has set out to exploit the loopholes in the law cannot expect any charity if he makes a mistake, even though the interpretation was quite doubtful from a judicial point of view.

Rt. 1906, p. 562: It was forbidden to serve liquor in connection with selling and buying. A country merchant who had previously been fined for serving liquor to his customers, conducted himself in such a manner that he did not serve in connection with the customers' purchase, but when they came to settle their monthly accounts; he then took them into a private room next to the store and served them there. One of the judges felt that this conduct was outside the scope of the law. But the majority felt that the law also covered a serving of this nature and upheld the lower's court's finding of guilt. Only one of those voting wanted to reverse because of good faith.

The total judgment of the method of action is of the essence

Not an isolated judgment as to whether the *mistake of law* is excusable, but a *total judgment of the method of action* is of the essence. Only that mistake of law which makes the act itself justifiable will generally be accepted as excluding punishment. Thus, the phrase "excusable mistake of law" does not give a completely accurate picture of what actually happens in practice.

IV. The distinction between § 42 and § 57

At times the distinction between the areas to which Penal Code, §§ 42 and 57, apply is doubtful.[1] If the mistake in the concrete case is accepted as excusable, it makes no difference which of the two sections was applicable; the result must be an acquittal in either case. The question is of importance, however, if negligent mistake exists with reference to a penal provision which requires intent. Here, the mistake will result in impunity if Penal Code, § 42, applies, but not if Penal Code, § 57, applies.

1. Penal Code, § 57, also applies to special rules for limited areas or groups

Penal Code, § 57, applies not only to ignorance of general laws and provisions, but also of special rules for a limited area or a limited group, such as a community, a part of a city, or the University of Oslo.

Rt. 1939, p. 623: The accused fished in an inlet which by royal decree was preserved from fishing. He knew about this preservation law (Act No. 20 of June 25, 1937), but he did not know that the inlet in question had been preserved. The Supreme Court decided that this was a mistake of law under Penal Code, § 57.

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[1] Some modern judicial decisions on this point are referred to in Skeie, *Den norske strafferett*, I, pp. 475–479 (Oslo, 1946). See also Skeie, *Afhandlinger om forskjellige rettsspørgsmål*, pp. 134–136 and 191–193 (Kristiania, 1913).

Territorial limits and community limits. A mistake as to jurisdictional boundaries must be decided under Penal Code, § 57, when the boundary is determinative for the punishability of the act. Example: An English trawler is caught within territorial waters; the skipper excused himself by saying that he kept outside of the territorial waters as they were marked out on his English chart. This is a mistake as to how far the Norwegian prohibition against trawl-fishing extends, and is judged according to Penal Code, § 57. The result would be different if he knew about the boundaries, but made a mistake as to his actual position. That would be a mistake of fact which would be judged acording to Penal Code, § 42 (Rt. 1953, p. 1537; 1954, p. 679).

2. Existence or contents of a judicial or administrative decision

A mistake concerning the existence or contents of a *judicial or administrative decision in an individual case*, such as a restraining order, a divorce decree, or an importation permit, however, is judged according to Penal Code, § 42, as a mistake of fact (Rt. 1950, p. 242). The decision becomes more difficult if the actor knows about the existence and contents of the decision but, because of a mistake of law, errs about its judicial effects. On this point, see below under 3.

3. The distinction between mistake of situation and mistake of norm

It is presupposed both in theory and in practice that not every mistake of law should be judged according to Penal Code, § 57, and this concept finds some support in the legislative history.[1]

A misconception of legal rules, according to this interpretation, may also cause a person to err with respect to "circumstances determining the punishability of the act, or increasing his liability for punishment" (Penal Code, § 42). In judicial practice, this is generally called a mistake of the *situation*, as distinguished from a mistake of the *norm*, which falls under Penal Code, § 57.

Mistakes as to rights and status. Thus, *a mistake of the existence of the right or the legal status which the penal provision seeks to protect*, is judged according to Penal Code, § 42, and not according to Penal Code, § 57, regardless of whether the mistake concerns the actual circumstances or a legal rule. The mistake may concern property rights, contractual rights or family rights. Example 1: A man who has received a deathbed gift from a friend accepts and uses the gift, not knowing that such gifts are invalid. He cannot be punished for larceny, embezzlement or the unlawful use of another man's property Example 2: A woman has been deserted by her husband, and she has not heard from him since. She has been told that the marriage ends automatically when the spouses have not seen each other for seven years. She cannot be punished for bigamy if she remarries when the seven years are over.

Skeie wishes to limit the doctrine to apply only to mistakes about legal rights or status.[2] Hagerup expresses the rule more generally: "Penal Code, § 42, applies to the concrete circumstances which determine the criminal nature of the act, and which are *a condition for the judgment* passed on the act by the law; § 57 refers to this very judgment itself."[3] The line of thought behind this abstract formula is the following: For penal provisions which seek to protect property rights, it is a requirement of punishability that the property actually belongs to someone else. One who commits an error with respect to the property law is not unfamiliar with the commandment "thous shalt not steal," but he errs with respect to "a circumstance determining the punishability of the act." (Penal Code, § 42.) Similarly, a penal provision which seeks to protect the marital relationship presupposes that a marriage exists; one who believes that the marriage has terminated is not ignorant of the prohibition against bigamy, but of a condition determining punishability. The same reasoning applies in other cases.

The distinction lacks a logical basis. This may seem both simple and reasonable at first sight. However, upon closer analysis, one must arrive at the con-

[1] See S.K.M., p. 98, the note, with reference to Getz, *Forelobigt Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge. Første Del med Motiver*, pp. 74–76 (Kristiania, 1887).

[2] Skeie, *Den norske strafferett*, pp. 249, 250, 271 (Oslo, 1946).

[3] Hagerup, *op. cit.*, p. 324.

clusion that the distinction lacks any logical basis. It becomes a question of linguistic formulation whether one should say that a mistake of law concerns a condition for the judgment passed on the act by the law or this judgment itself. Let us discuss the examples mentioned above: Objectively, the law prohibits appropriation of deathbed gifts; it prohibits remarriage as long as the other spouse is alive, even though he has been gone for seven or eight years. Thus, a mistake concerning the property law or the law of domestic relations is also a mistake as to how far the penal norm extends, or, in other words, a mistake about the judgment which the law passes on the act. On the other hand, however, it is not difficult to phrase the rule so that a mistake concerns the conditions for the judgment of the law even in cases where it is agreed that the mistake should be judged under Penal Code, § 57. A man, for example, sells goods in violation of a rationing provision which he does not know about. He is, to rephrase Hagerup's words, not ignorant of the commandment "You shall not sell rationed objects without coupons," but he is ignorant about the condition for application of this commandment, that this particular object is rationed.

When the actor knows about the actual relevant conditions, but believes the act is legal, this is always a mistake with respect to the scope of the penal provision, regardless of whether the mistake pertains directly to the extent of the provision's *descriptive expressions*, or the extent of the *legal concepts* with which it operates. However, the thoughts of the actor will often concern the existence of the right or the legal status without any knowledge of the legal ground on which it builds. A son, for example, hears from his father that their farm has timber rights in a neighbour's woods, but he has no knowledge about the basis of the right. A mistake of this type must be considered a mistake of fact.

An examination of judicial practice shows that the distinction between a "mistake with respect to situation" and a "mistake with respect to norm" is often obscure, and that a reason for deciding such matters one way or another is hardly ever given. And this should come as no surprise: the distinction pretends to be of a fundamental conceptual nature while, as we have seen, there is no logical basis for it.

Policy considerations. It may be asked whether there are any important policy reasons for segregating certain groups of legal mistakes, such as those regarding rights and legal status, for special treatment, despite the difficulties in making the distinction.

From a practical point of view, there may be a difference between an ordinary mistake of law and a mistake about rights and legal status. But in the more serious crimes there is very seldom an issue of good faith due to a general mistake of law. Even though the perpetrator does not know positively that the act is forbidden, he at least knows its character as a violation of interests. Because of a mistake as to legal right or a legal status, however, he may violate an interest which he does not know exists. It may seem unreasonable to convict a person of a serious felony when he is in good faith, even though his good faith can be held against him as negligent.

Secondly, with respect to the penal provisions's effectiveness, it is less necessary to inculcate knowledge of legal rules which have only a peripheral significance for the scope of the provision, than it is to inculcate knowledge about the penal provision itself.

All mistakes of law ought to be encompassed by Penal Code, § 57. In jurisdictions which do not give mistake of law an impunitive effect, or do so only under very strict conditions, unreasonable results can be avoided by separating certain groups of judicial mistakes and by treating them as factual mistakes. A strict adherence to the traditional doctrine that only the excusable mistake of law can be impunitive, would require that such a method of avoidance also be recognized under the Norwegian law.

There is, however, a more natural and more satisfying solution. Both according to its wording and according to the legislature's intentions, Penal Code, § 57, gives the judge the authority to decrease the punishment or acquit completely according to his own opinion in the individual case. By relying on Penal Code, § 57, the judge can go right into the matter and decide whether it is necessary and reasonable to impose punishment despite the mistake of law, instead of seeking the solution in an obscure distinction between "mistake with respect to situation" and "mistake with respect to norm." Such an interpreta-

tion of the law, of course, does not exclude the possibility that court practice can develop more definite rules in typical cases. The formula "excusable mistake of law" provides a satisfactory solution in the great majority of cases where a question about the significance of mistake of law arises, such as cases of violation of provisions for the public order, business regulations and other legislation outside the Penal Code. But it is an untenable generalization to say that the contents of Penal Code, § 57, are exhausted by this. With offenses of a more serious nature, one ought to rely upon the freedom which the law gives the judge, so that he can determine more carefully what significance the mistake of law should have in light of the letter and spirit of the penal provision.

That the question cannot be solved by a completely general formula is confirmed by a scrutiny of the individual penal provisions.

The formulation of some penal provisions clearly indicates that a mistake of law will be deemed impunitive even if it is negligent. The provisions on larceny and other offenses for gain require a purpose of obtaining for oneself or for others an unwarranted gain. A person who is in good faith with respect to his right, lacks this purpose and thus cannot be punished for larceny. But even under the Criminal Code of 1842, which (until an 1889 amendment) did not require a purpose of gain, the courts consistently acquitted for larceny when the perpetrator had acted in good faith.[1] This was so even though he did not believe that he exercised a personal right, but only a public right, such as an alleged right to free seaweed harvesting on another person's property. This practice is well founded. It would seem offensive to convict for larceny when the defendant did not act dishonestly. On the other hand, the Supreme Court has not accepted as impunitive such a mistake as to public right when the accusation concerns the violation of an owner's right to hunt or fish (Penal Code, § 407)[2]

From a practical point of view it could hardly be criticized that the belief of exercising a public right is given an impunitive effect with respect to an accusation of larceny, but not with respect to the violation of hunting or fishing right under Penal Code, § 407.

Another instance where the penal provision clearly presupposes knowledge of e illegality is Penal Code, § 110, which decrees punishment for the judge who acts "against his better judgment." It is not sufficient for a finding of guilt that the judge has negligently committed an error as to legal rules.

§ 30. Liability for Acts Committed under Intoxication

I. The problem

As previously mentioned, intoxication is a substantial cause of criminality. It is therefore important to determine how criminal acts committed while intoxicated will be punished. Alcohol intoxication creates the most important problem, but similar problems also arise from the use of other intoxicants (cocaine, morphine, opium, marijuana, etc.).

Lowering of the consciousness

As long as it merely *lowers* the consciousness and thus weakens moral inhibitions, intoxication will never preclude criminal liability. This applies also to involuntary intoxication. Suppose that an inexperienced young boy at a party is tricked into drinking a strong cocktail in the belief that it is an innocent fruit drink, and that under the influence of the alcohol he becomes guilty of assault or attempted rape. He is liable for his acts. The intoxication will only be taken into account in the measure of punishment, as a possible factor in mitigation.

"Normal" and a typical alcohol-intoxication

Intoxication, however, can also lead to *unconsciousness*. As far as alcohol is concerned, one distinguishes between "normal" and pathological alcohol intoxication. In normal alcohol intoxication, the consciousness is gradually lowered as the amount of alcohol is increased, and the capacity for purposeful movement is at the same time impaired; when the point of complete unconsciousness is reached, the intoxicated person generally has no ability to commit offenses other than those of omission. The picture is different with pathological

[1] Rt. 1871, p. 233; Rt. 1890, p. 45.
[2] Rt. 1907, p. 742; Rt. 1912, p. 810.

intoxication. The mental disturbances here often arise suddenly and after consumption of relatively small quantities of alcohol. The general signs of intoxication, such as an uncertain walk and slurred speech, are lacking, but perception is seriously disturbed. Delusions and hallucinations may also appear. The individual usually does not remember anything that happened while he was intoxicated. Pathological intoxication generally occurs only in those individuals who are predisposed to it (epileptics, neurotics, psychopaths, persons with brain damage); but even persons who otherwise react normally to alcohol may sometimes under the influence of illness, exhaustion or serious mental stress, react abnormally. A person may commit serious crimes, such as rape or murder, while in an unconscious state. It is obvious that not all ideas and sensations cease during pathological intoxication. Perhaps a more accurate picture of the situation is to be found in Swedish forensic psychiatry, which describes it as temporary insantiy.

We must also suppose that there are many gradations between the completely normal and the obviously pathological intoxication.

A Swedish case provides an illustrating example of an offense committed during pathological intoxication.[1]

A twenty-five-year-old man had been with his wife and small son at a Christmas dinner with relatives and had taken a few drinks. He became brutal and unpleasant to his wife on the way home. Weeping, she begged him to desist until after they had come home and put the boy to bed. When they arrived at home, the man grabbed his wife by the throat with one hand and seized a big butcher knife with the other. The wife tore herself free and ran out of the house, screaming for help. Before the neighbors could come to her aid, the man had killed his son with the knife, and had jumped out of the window, inflicting serious injuries on himself.

It was later learned that when the man was about eighteen, he drank a few glasses of wine at a family party and suddenly became rebellious and acted indecently. After that, he abstained from alcohol until the fatal day when he made this one exception. He had then been married for a few years. The marriage was a happy one, the husband enjoyed his home life, and the little boy was the apple of his eye. Afterwards, he became deeply depressed over his conduct, which he could not explain, and he contemplated suicide. On the way home that fatal night an enormous rage had overcome him. "It was as if everything became red in front of my eyes." He could not remember what had happened from that moment on until he jumped out of the window. He hazily recalled the sound of the broken glass and the stinging pains from the glass splinters.

The original provision of the penal law

If the law had no special rule on acts committed during intoxication, the result would be the following:

If the perpetrator become intoxicated for the purpose of committing the punishable act, he would be fully liable if he performed the act in an unconscious state caused by the intoxication (see § 27, II). If he knew, or should have known (on the basis of past experience, for example), that he might commit punishable acts while intoxicated, he would be liable for negligent causation. But if he neither considered, nor should have considered, this possibility, he would be free from liability.

This was largely the situation under Penal Code, § 45, in its original form. But it increased the liability on one point; it provided that a person who becomes unconscious through his own fault should *always* be punished for negligence if, while in this state, he commits an act which is punishable in its negligent form. Thus, liability for negligence would exist regardless of whether or not any actual negligence with respect to the harm caused could be proved in the concrete case.

The reason for Penal Code, § 45

When the law was revised in 1929, it was agreed that the earlier rules were too mild. The first objection was that many serious offenses were not punishable in their negligent form. The law has no punishment for negligent rape or negligent sexual offenses against children, because the negligent commission of

[1] Gösta Rylander and Erik Bendz, *Rättspsykiatri*, p. 67 (Stockholm, 1947).

such acts rarely occurs. As a result, a person who was unconscious because of intoxication and who committed such an offense could not be punished under Penal Code, § 45. Thus, there was very little logic in the rules: a person who committed assaults and malicious destruction of property while intoxicated could be punished, because the law applied to the negligent commission of such offenses, but one who committed the most serious sex offenses could not be punished. The second objection was that impunity benefited not only one who had actually been unconscious, but also one who could create such doubts about his condition that he would have to be acquitted under the principle that doubt must be resolved in favor of the accused. It was further argued that it would have a general educative effect, if a person were to be held fully responsible even for acts committed while intoxicated. But the strongest argument was the assertion that the general sense of justice, or at least the *sound* sense of justice, required full responsibility for intoxicated persons. This sense of justice, which was strongly expressed during the debate, is probably connected with the idea of retribution in its more primitive form, which concentrates on the act and its effects without going into deeper psychological considerations. Fundamental objections against all alcohol consumption undoubtedly influenced the views of certain groups.

Long debates resulted in the formulation of the present Penal Code, § 45: "Unconsciousness due to voluntary intoxication (produced by alcohol or other means) does not exclude punishment." In Penal Code, § 56, No. 2, we obtained at the same time a rule providing that the punishment in such cases can be reduced under especially extenuating circumstances.

The rule constitutes an important exception to the principle of proportionality between guilt and punishment. What the perpetrator can be blamed for is the fact that he has become intoxicated: what he does later, while unconscious, he cannot help. On one occasion he falls peacefully into sleep and thus will incur no punishment; on another occasion he kills a person, and will then be punished under Penal Code, § 233, with a minimum of six years' imprisonment, unless the provisions in Penal Code, § 56, No. 2, on especially extenuating circumstances, come into play. The rule is effective, but harsh, and because of this, it has been attacked by many.

During the debates on the Penal Code of 1902 there was a controversy over the evaluation of acts committed under intoxication, and some persons made demands for stricter rules. By the time the question was taken up by the Penal Code Commission in 1922, there had been some acquittals which had created an uproar. One of the political parties went as far as to put demands for increased punishment of acts committed while intoxicated into its party platform. The Penal Law Commission split into a majority and a minority. The majority proposed the solution which became law, but some within the majority wished to eliminate the possibility of reducing the punishment (Penal Code, § 56, No. 2), and even proposed to impose full liability upon acts committed during involuntary intoxication. The minority, on the other hand, proposed a special provision covering the person who, during unconsciousness because of voluntary intoxication, commits an otherwise punishable act; the punishment should be graduated according to the seriousness of the offense.[1] The final result—full liability under Penal Code, § 45, with a strictly limited recourse to decrease of punishment according to Penal Code, § 56—represents a compromise between the opposing views. The rule in Penal Code, § 45, was discussed by a number of speakers during the meeting of the Norwegian Association of Criminalists in 1935, and all opposed it. The psychiatrist Ragnar Vogt called it a stain on the law because it violated one of the basic rules of ethics: guilt as a basis for punishment.

The question is solved in various ways in foreign countries. In English and American law, the rules seem to lead on the whole to the same result as our Penal Code, § 45, while most countries on the continent treat unconsciousness due to intoxication as a reason for precluding liability, some having special provisions which correspond to the minority proposal of the Penal Law Commission of 1922.

The practical significance of the question

The practical significance of the question tends to be overrated. A study by Ornulf Odegaard of all forensic psychiatric statement which came into the

[1] For a similar rule, see German Penal Code, § 330(*a*).

Commission of Forensic Medicine in the years 1901 and 1926,[1] shows that there were only thirty cases, or about one per year, in which the experts had concluded that the perpetrator was unconscious because of intoxication at the time of commission of the act. The figures were as follows: less serious offenses of violence, threats, assaults, etc.: eleven; thefts: eight; sex offenses: seven; murder and infliction of serious harm: four. The statistics show that even if unconsciousness due to intoxication was often *claimed*, the plea usually did not succeed, even under the earlier system. In some cases, the accused may have been acquitted on the basis of unconsciousness, without a preceding psychiatric examination, but this hardly occurred with the serious offenses.

II. More about § 45

After this survey, we shall now look a little more closely at the questions of interpretation which Penal Code, § 45, raises.

1. The same rule for all types of self-imposed intoxication

The provision applies to all kinds of voluntary intoxication regardless of what intoxicant is used, and how it is consumed (by drinking, by inhalation, or by injection). Nor does the law distinguish between normal and pathological intoxication. It cares only whether the intoxication is voluntary or not. However, a pathological intoxication, more easily than a normal intoxication, may be involuntary because it can occur after the consumption of a smaller quantity.

The problem, however, can sometimes be a difficult one. Let us imagine that the consumption of alcohol by an epileptic causes an epileptic state of fuzziness, and that he commits murder while in this state. It can be held that here the unconsciousness was not due to *intoxication*, but to epilepsy, and that it must therefore lead to an acquittal, regardless of whether or not it was self-imposed. But this is to read more into the word "intoxication" than is reasonable. The most accurate interpretation of the provision is probably that a condition is regarded as voluntary intoxication when it is caused by the use of alcohol or other intoxicants in such quantities that the person can be blamed for having lost control over himself (see below, under 4).

2. When can the unconscious person be punished as an intentional perpetrator?

Thus, unconsciousness due to voluntary intoxication does not preclude liability. But the law requires subjective guilt for punishability: usually intention, sometimes negligence, and sometimes a definite purpose. What influence will unconsciousness have on this requirement?

As we have mentioned before, "unconsciousness," like insanity, does not lead to the end of all activity of the mind. And one can conceive of the possibility of judging the perpetrator on the basis of the ideas which he actually had in his troubled state of mind.

If a person committed murder because of an ungovernable state of anger, but otherwise knew what he was doing, he should then be punished for intentional homicide. If, however, he was so confused that he thought that it was a lion with which he was dealing, or that he was the victim of an assault and that he was merely protecting himself, the result should be an acquittal.

It is difficult, however, to determine what has gone through the "unconscious person's" mind, and there seems to be little reason for basing a decision on the type of the conceptions he entertained. Nor has judicial practice gone into any such examination. Penal Code, § 45, must be interpreted as an acceptance of the proposition that, despite intoxication, the perpetrator should be adjudged *as if he had been sober*. The deciding factor, then, is how a sober man would have been treated in a similar situation. If, for example, the intoxicated person has raped a woman, he will be convicted of intentional rape. A similar act by a normal person would be intentional. As examples from decided cases, we may cite Rt. 1934, p. 1096 (rape) and 1939, p. 20 (indecent acts against minors). If the intoxicated person has taken a stranger's car, driven negligently and killed someone, he can be sentenced for *intentional* car theft (Penal Code, § 260), but only *negligent* homicide. A sober person would also be sentenced in this manner.

But difficulties arise in some cases. The intentional, the negligent and the in-

[1] Ornulf Odegaard, *Trekk av herrsens betydning i rettsmedisinen*, p. 20 *et seq.* (Oslo, 1928).

nocent act are not always easily distinguishable; intention and negligence may depend on factors in the mind of the perpetrator which are not discernible in the actual situation. If I cut someone with a knife, I may have done so for the purpose of homicide, but my intention may have been only to wound, not to kill. Which alternative shall be chosen when the perpetrator was unconscious at the time of act? The comments on the draft Bill state that the mildest solution must be chosen (S.K.I., 1925, p. 91), and this seems to be correct. The unconscious person cannot be convicted of an intentional offense unless the circumstances surrounding the act would clearly have marked it as intentional if it had been committed by a normal person. In the example of the knifing, the perpetrator could generally be punished for causing bodily injury, perhaps with death as its consequence (Penal Code, § 229); compare with (Penal Code, § 232), but not for murder or attempted murder (Penal Code, § 233). Similarly, the unconscious person cannot be punished for negligence either, unless the surrounding circumstances would have marked the act as negligent if it had been committed by a normal person. Thus, the court must disregard those circumstances to which a sober person *perhaps* but not certainly, would have paid attention.

These rules apply to persons who have acted in a state of unconsciousness. How is a person to be judged who is less intoxicated and merely misunderstands the situation by reason of his intoxication. For example, an intoxicated man sees a person advancing toward him with an object in his hand; in his hazy condition he believes that the other intends to attack him, and he strikes the imagined attacker. If the intoxicated person is unconscious, he will have to accept being treated as a normal person, and thus he will be held for intentional assault. If he is not unconscious, the Code gives no authority for departing from the general principle that the defendant must be judged according to his own perception about the actual situation (Penal Code, § 42). If the act, in his view of the situation, would be justified act of self-defense, he can then be punished only for negligence (see Penal Code, § 45). It can be argued, however, that there is so little logic in this that, even as to the intoxicated person who is not unconscious, the mistake caused by the intoxication must be disregarded. This is the view taken by the Supreme Court (Rt. 1961, p. 547). Such an analogized use of the law to the detriment of the accused is of doubtful validity, especially when such a controversial rule as the provision in Penal Code, § 45, is involved.

The perpetrator's own perception of the situation must be used as a basis if, *after the intoxication has ended*, he acts under a mistake caused by the intoxication. He believes, for example, that he has been the victim of an assault, and accuses his supposed assailant. He then cannot be punished under Penal Code, § 168, for false accusation.

3. Penal Provisions Requiring Purpose Cannot Be Used

The comments in the draft Bill to Penal Code, § 45, seem to suggest that the rule cannot be applied to violations of penal provisions which require a definite *purpose* (S.K.I., 1925, p. 91). This is by no means obvious. No such limitation appears in the words of the law, and there is no inherent obstacle to the use of the same principle here as elsewhere. If the surrounding circumstances would characterize the act as purposeful if it had been committed by a sober person, it should be characterized in the same manner when committed by an unconscious person. As it is often stated: if the law can feign intention, it can also feign purpose.

The principle which the draft Bill comments express, however, has been accepted by the courts, and must now be regarded as settled law (Rt. 1933, p. 1180, and 1935, p. 52). If a person who is unconscious because of voluntary intoxication attacks another, and forcibly takes his watch and wallet, he cannot be punished for robbery unless he purposely became intoxicated in order to commit the act, because the law's provision on robbery (Penal Code, § 267) requires the specific purpose of obtaining for oneself or another an unlawful gain. However, the perpetrator can be punished for assault (Penal Code, § 228), for coercion (Penal Code, § 222) and for having unlawfully placed himself in possession of the objects (Penal Code, § 392), since all these provisions require only ordinary intention. And if he later sells the watch or spends the money which was in the wallet, he can be punished for embezzlement committed in a sober condition.

Apart from those provisions which require a definite purpose, cases can also be conceived where the rule in Penal Code, § 45, does not apply. We can imagine that A lies dead-drunk on a beach, where B is drowning. If A had been sober, and neglected to rescue B, he would have been guilty according to the general provision in Penal Code, § 387, about a person's duty "to help according to his ability a person whose life is in obvious and imminent danger." But when he does not actually have the ability to help, it would serve little purpose to invoke the penal provision.

4. What Does Voluntary Mean?

Only an unconsciousness resulting from *voluntary* intoxication does not preclude punishment. Where shall the line be drawn?

Voluntary does not mean the same as intentional, but comes close to negligent. Intoxication is voluntary as soon as the perpetrator can be blamed for becoming intoxicated. Such is the case when he consumes such a large quantity of alcohol that he must know that he might lose full control over himself. How strict one is to be is a question of opinion. It is sufficient that the *intoxication* is voluntary; it makes no difference that the accused had no reason to believe that he would become *unconscious*. The general rule is that intoxication is voluntary, and special circumstances must exist before the contrary will be accepted. One can imagine, for example, that an inexperienced young boy is tricked into drinking champagne in the belief that it is ginger ale. It can also be imagined that a person consumed a small amount of alcohol which would not intoxicate him normally, but which has a special effect because of sickness, fatigue, or other reasons. Here he can be free from liability unless the situation is such that he should have counted on having less resistance than before.

Cooperation, Attempt and Plurality of Offenses

§ 31. General Remarks about Cooperation

Various forms of cooperation

It sometimes happens that many persons cooperate in the commission of an offense. This cooperation may take many forms.

A number of persons may act together in the *execution* of the offense. They may cooperate on an even basis, as where two persons break into a house and carry away the stolen goods together. Or one may be the leader while the other is only a helper, as where one person breaks into the house and perpetrates the theft itself, while the other stands guard outside.

It may also happen that one of them is alone in the actual execution of the offense, but was aided in his preparations, as where one person executes the theft, having been supplied with burglary tools and false keys by the other.

Up to now I have spoken about *physical cooperation* in the preparation or execution of the offense. But cooperation can also be of a *psychic* nature. I talk someone else into committing the offense, I encourage him to execute his plans, or I give him good advice about how to commit the crime. It is also a form of cooperation if I threaten someone into committing an offense.

Cooperation can also exist *after* the commission of the punishable act. I help the thief conceal the stolen goods, or assist the murderer in escaping. The Criminal Code of 1842 included in its chapter on participation a provision about such *subsequent participation* (Chapter 5, § 9). Under our present penal law, these cases are separated from the doctrine of cooperation, and considered independent offenses (see Chapter 13 of the Penal Code on receiving stolen goods and subsequent assistance, and § 132, on assisting the evasion of prosecution). But if the aid is promised in advance, this promise will be treated as a psychic cooperation in the offense.

Offenses in which many participate are often of a dangerous character. This is especially true when the participation is not casual, but rather constitutes an organized criminal activity, such as in a criminal syndicate, or in a revolutionary or traitorous conspiracy. On the other hand, the individual member's subjective guilt may often be less than if he had committed a similar act by himself. Psychological experience generally shows that the individual is capable of asserting greater courage, for both good and evil, when he knows that he has others by his side. This applies especially to weak and dependent per-

sons who, under the influence of a strong will or mass-excitement, may commit acts which they never would have committed alone.

De lege ferenda, two problems arise in the area of cooperation. First, how far should punishability be extended? Should the law confine itself to reacting against the principal, or should it also penalize the less significant participants? Secondly, should all participants be punished to the same extent as the principal, or should the law provide a milder punishment for them, or at least for some of them? A glance at foreign codes shows that the solutions can vary greatly with respect to both substance and form.

§ 32. The Area of Criminal Liability for Cooperation

I. The solution must be found in the individual penal provision

Penal Code, § 58, the only provision on cooperation in the general part, reads as follows:

"Where several persons have cooperated in committing an offense, the punishment may be reduced to less than the minimum provided for the act and to a milder form of punishment if the cooperation was due essentially to dependence on other guilty persons or has been of little significance in comparison to others. Where the penalty otherwise could have been restricted to fines and in the case of misdemeanors, punishment may be entirely remitted."

As we can see, the provision does not reveal *when* cooperation is punishable. It provides only a rule for the measure of punishment in cases where liability itself is clear. The Penal Code, unlike the Criminal Code of 1842, solves the question of liability in the individual provisions of the special part. This is a legislative technique which seems to be used only in Norway.

II. The extent of the penal provision when cooperation is not mentioned

The individual penal provisions can be divided into two main groups: those in which cooperation is explicitly mentioned, and those where it is not. Some penal provisions are in a middle position, where *certain types* of cooperation are mentioned. In a special position we find placed such activities as "misleading or prompting" (see, for example, Penal Code, §§ 219 and 242), or simply "misleading" (Penal Code, § 170). We shall first look at how far the penal provisions extend *where cooperation is not mentioned.*

Whether a penal provision applies only to the person who has actually committed the prohibited act or whether, to a greater or lesser extent, it also applies to the cooperators, will depend on an interpretation of the provision itself. In some cases the act is described in such a limited way that a cooperator will not be affected. When Penal Code, § 385, provides punishment for one who "uses a knife or any other specially dangerous tool during a fight," it does not penalize an outsider who urges one of the participants to use a knife. Similarly, when Penal Code, § 337, directs itself against one who, contrary to law, "changes his own or his children's name," cooperation will fall outside the words of the law. In some cases, the scope of the penal provision is limited because the provision is directed only against persons in *certain positions* (see, for example, Penal Code, Chapters 11, 30, 33 and 42), or *having certain duties* (see for example, Penal Code, §§ 240 and 241). When cooperation is not mentioned in the definition of such offenses, it is clear that an outsider is not covered by the penal provision even though he may have instigated the offense.

In other instances, however, the law is so general in its expression that it includes cooperative acts. Thus, when Penal Code, § 206, speaks about one who "furthers the indecent relations of others," or when Penal Code, § 239 refers to one who "causes the death of another as a result of negligence," liability is not limited to the principal participant. The deciding factor for liability, therefore, is not whether an act can be characterized as a principal act or as mere cooperation, but whether, according to a normal interpretation, the words of the penal provision extend to cooperative actions.

The theory of the indirect perpetrator

It has been held that even though cooperation is not mentioned in the penal provision, a cooperator or at least an instigator must be liable when the actual perpetrator cannot be punished because he was not responsible or acted in good faith. The instigator, it is said, has acted as an indirect perpetrator; he has used the innocent agent as his tool.

De lege ferenda much can be said in favor of such a solution. Even though the law may see fit to exempt the cooperator from punishment when the principal can be reached, it by no means follows that the law should relinquish its penal power with respect to subordinated parties, as it does in those cases where the exemption is extended to cases where the principal is not punishable. An interpretation of the Penal Code, however, can hardly justify the proposition. The provisions on cooperation do not distinguish between instances when there is a punishable principal, and instances when there is not. And the comments to the draft code state that the punishability of the principal actor should not have any bearing on the punishability of the cooperator. Although there may be good reasons for punishing the indirect perpetrator even when cooperation is not mentioned, this will not justify the imposition of criminal liability without authority in the law and contrary to the legislature's intent. Judicial practice has not taken any definite position on the question (see Rt. 1910, p. 901; 1938, p. 21; 1956, p. 738).

III. Penal provisions where cooperation is mentioned

Where the penal provision expressly includes cooperation—and the law does so in dealing with most of the more serious offenses—it not only penalizes the principal, but also all those who have cooperated in one way or another. Whether the cooperation is of a psychic or physical nature, or whether it occurred before or simultaneously with the principal's act, is immaterial. The range of punishment is almost always the same for cooperation as it is for the principal act. Whether the defendant is guilty as a principal or a cooperator is merely a factor to be considered in meting out punishment, and there is no judicial interest in drawing a sharp line between the two. In only a few instances does the law have special penal provisions on cooperation with a different punishment for the principal.

There has been much debate as to whether or not the cooperation must have caused the prohibited result. Much of the controversy is due to the fact that the concept of casual relationship has various meanings. That the cooperation was *essential* for the result (a *conditio sine qua non*), is not required for liability. If we wish to retain the theory that the cooperator's act must be a cause of the prohibited result, it must be pointed out that the only requirement is that the act, in one way or another, has played a part in the chain of events. If a burglar on his way to the scene of the planned burglary bumps into an old friend, and persuades him to stand guard during the burglary, the friend will be liable for cooperation even though the burglary would have taken place without his cooperation. He has been in on the act, and that is enough.

This also applies to the psychic cooperation which consists of "prompting" or giving advice. Proof is not required that the principal would not have committed the act without the cooperation; it is sufficient that his intention was strengthened or that the advice was important in the planning or execution of the act. Even if the advice was bad and the perpetrator would have been better off without it, this is no ground for acquitting the person who gave it. If the advice has influenced the execution of the offense, the adviser was a cooperator. If, however, the suggestions are immediately discarded as useless, there exists only an attempt to cooperate. Here, the advice has played no part in the course of events.

The question as to what constitutes cooperation was widely discussed during the prosecutions after World War II for unlawful executions or other actions resulting in death during enemy occupation. It is supposed that all participants in a firing squad are liable for cooperation in murder without necessity of proof of the significance of the act of each individual. The liability also applies to the person who did not fire a shot, having forgotten in his excitement to release the safety catch on his rifle, and even applies to one who purposely did not shoot (Rt. 1947, p. 742). It also applies to one who participated as a guard, or cooperated in transporting the victims to the place of execution (Rt. 1948, p. 162). Everyone who cooperates in such a joint action is liable for the consequences to the extent that they were intended (see Rt. 1932, p. 224).

Usually the cooperation which exists between the participants is conscious. But it may also happen that aid is given without the principal's knowledge, such as where I stand guard during a burglary on my own initiative, and without the burglar's knowledge. If the guarding was of no actual importance

to the principal, it would seem most natural to regard it only as an attempt to cooperate.

In certain cases there may be doubts as to what is needed for psychic cooperation. The fact that a person indicates by words or deeds that he is not opposed to the commission of the act is insufficient. A positive prompting is generally required. Of course, it is often difficult to distinguish between passive approval and direct prompting (see Rt. 1881, p. 850; 1907, p. 333, and 1926, p. 581). The last decision concerned a woman who, in the presence of her husband, and without his interference, had sold liquor from their joint apartment. The lower court convicted the man for cooperation, stating that his conduct had to be regarded as a consent to the sale. The Supreme Court reversed, on the ground that passivity could not be regarded as punishable cooperation, even though approval or acceptance of the act could be inferred. See also Rt. 1933, p. 620.

Even though a person has a special duty to prevent the punishable act, mere passivity on his part usually cannot be punished as cooperation. If the night watchman fails to act when he hears burglars in the cellar, he cannot be punished for cooperation in the burglary, although he may be held for breach of confidence (Penal Code, § 275). But where a person who has such a special duty is concerned, positive prompting is not required for joint liability; it is sufficient if he indicates to the guilty party that he has nothing against the act. The servant, for example, asks the master whether he should cut some timber on the neighbor's land, and the master answers, "it's all right with me." And to go a bit further, even a superior's failure to step in can be interpreted by a subordinate as consent, and if the superior knows this, his passivity must be regarded as psychic cooperation. A superior police officer, for example, becomes guilty of cooperation if he does not prevent a subordinate from mistreating a person being questioned.[1] Silence or an express agreement from one who has a special duty to prevent the punishable act means that one of the normal obstacles to the offense is eliminated, and thus cannot be regarded in the same way as a similar agreement from an outsider.

Cooperation is also declared a punishable in certain cases where the principal's offense consists of a punishable omission (see, for example, Penal Code, § 172). Cooperation here will usually be of psychic nature (misleading or prompting), but it can also take the form of obstructing the fulfillment of the duty. One who prevents an act of rescue, however, may incur a greater liability. If A and B see a third person drowning and do nothing, they are both guilty of a misdemeanor for their omission under Penal Code, § 387. But if A tries to save the drowning person and B prevents him from doing so, B will not get away with mere liability under Penal Code, § 387; he has caused the death of another and can be punished for murder.

Sometimes an offense requires a certain cooperation from the victim. In usury (Penal Code, § 295), for example, there is a contract between the usurer and his victim. But the victim, of course, cannot be punished for cooperation.

Penal provisions penalizing certain types of cooperators

In the above discussion, we had in mind all those cases in which the penal provision is directed against cooperation generally. Similar principles apply when the penal provision does not mention cooperation in general, but only *certain types of cooperation*, such as "misleading" or "prompting." Here, all those who fall under the legal description of the act are penalized, whether it is natural to call them principals or not.

IV. Evaluation of the system of the Code

A survey of the rules of the Code shows that cooperation is generally punished in all offenses of a more serious nature, while quite a few penal provisions against lesser offenses confine themselves to penalizing the principal. When the act of the perpetrator consists of a breach of a special duty, the law has largely exempted the cooperator from criminal liability. Thus, cooperation in a civil service offense is not punishable unless the cooperator himself is a civil servant (Penal Code, § 125). But certain forms of such cooperation are made special offenses by provisions like Penal Code, § 128, which imposes pun-

[1] See Rt. 1947, p. 69 (73). See also the Danish decision in UfR 1938, p. 964. There a woman was convicted of assault resulting in death, because she had let her husband mistreat her six-year-old illegitimate child in her presence.

ishment upon one who by threats or bribery "seeks to induce a civil servant illegally to perform or omit to perform an official function, or is accessory thereto."

The advantage of having mentioned cooperation in the individual penal provision should have been a careful deliberation in the drafting of each provision regarding the extent and scope of accessorial liability. It cannot be denied, however, that inclusion or exclusion of cooperation in the Code seems rather accidental. Moreover, the description of offenses becomes more complicated when one has to deal with cooperation in the definition of each single offense, instead of determining the punishability of cooperation by provisions in the general part of the Code. As a modern example of the contrary system, we can mention the Danish Penal Code of 1930 which provides in § 23 that "the penalty in respect of an offense shall apply to any person who has contributed to the execution of the wrongful action by instigation, advice or action." The Swedish Code of 1962 (Chap. 23, § 4) has a similar formulation.

V. Cooperation in offenses outside the Penal Code

The principles which apply to the punishability of cooperation in the Penal Code itself also apply to penal provisions in other laws. This cannot be deduced from the Penal Code, § 1, providing that the first part of the Code applies to all offenses, because the Code does not state in its first (general) part to what extent cooperation can be punished. That must be established by an analysis of the special part. But the same principles of interpretation which apply within the Penal Code also apply outside. Where cooperation is expressly mentioned, there is no trouble. Where cooperation is not mentioned, a natural interpretation of the individual penal provision will determine its applicability: whether it applies only to the principal or also to all the participants or to some of them.

VI. Cooperation in offenses involving printed matters

When a punishable act is perpetrated by printed matters—*e.g.*, a newspaper article contains a defamatory statement, a disclosure of military secrets, or an invitation to rebellion—rules other than the general ones apply to liability for cooperation, according to many laws. This was also the case with the Criminal Code of 1842. The Code attempted to make freedom of the press as effective as possible by declaring the editor, the printer and other agents free from liability, if there existed an author who could be held liable (the Belgian *system of substitution*). But if the author could not be held, *e.g.*, where he was unknown, or a minor, or because he resided in a foreign country, the liability passed to the editor, the printer and, if necessary, ultimately to the dealer.

This system was repealed by the Penal Code of 1902. The general rules on cooperation are now fully applied to offenses involving printed matters. If the subjective conditions for punishment exist, everybody who has taken part in the production and distribution of the printed matter will be liable as a cooperator, not only the editor (the publisher), but also the printer, the compositor and the delivery boy (see Rt. 1947, p. 351). It should be added that the law will not impose on technical helpers any duty of investigation with respect to the contents of the writing, such as a duty to investigate whether or not a defamatory statement is true (see Rt. 1930, p. 1383).

In addition to these general rules on liability, however, Penal Code, §§ 431 and 432, provide certain special rules which attempt to increase the publisher's (or editor's) duty of care.

§ 33. Additional Comments on Criminal Liability of the Individual Participant

I. The criminal liability is evaluated independently for each participant

The Criminal Code of 1842, like many foreign Penal Codes, built upon what has been called the principle of the *accessorial character* of liability for cooperation. This means that punishment for cooperation requires a punishable principal act to which the liability is related. If the principal has not even gone so far as a punishable attempt, or if he is free from punishment for some other reason, the cooperator will also be free. The Penal Code of 1902 abandoned this concept. Each of the participants is judged only according to his own connection with the offense in which he cooperated or attempted to cooperate.

Thus, the cooperator may be subject to punishment even though the principal has not attempted to commit a punishable act. According to the Criminal Code of 1842, an unsuccessful attempt at instigation was free from punishment, but under present law it is punished as attempted cooperation. The same applies to attempted cooperation of other types. Suppose that A, who is planning a burglary, obtains false keys and other tools from B. Even though A does not attempt to commit the burglary, B can be punished for attempted cooperation. At first it may seem strange that the cooperator can be punished for attempt in such a case, while the principal goes completely free because he never left the preparatory stage. But the explanation is that the cooperator has already done his part; whether or not the offense he committed no longer depends upon him. The principal, however, has not taken the decisive step; additional actions on his part are required before the offense has materialized.

The question of criminal responsibility is also resolved independently for each of the participants. If one of them is insane, or below the criminal minimum age, he is free from punishment, but this has no effect upon the liability of the others.

The same applies to subjective guilt (*mens rea*). If the principal goes further than the planner or the helper had expected, the latter will not be held liable for the excess. If I aid in a robbery, I will not be held liable for cooperation in homicide should the robber kill his victim. If I participate in a theft, I will not be held liable for grand larceny in the event that one of the other participants is armed without my knowledge (Penal Code, § 258). On the other hand, if the principal does less than the cooperator had expected, the latter will be convicted of only an attempted cooperation, as far as the non-committed acts are concerned.

Moreover, when the law requires a definite *purpose* for punishability, liability depends on whether the purpose exists in the individual participant, unless otherwise provided by the penal provision in question. This does not lead to natural results in all cases. When a person cooperates in another's theft, it would seem to make little difference, as far as his actual culpability is concerned, whether he acts for the purpose of gain or merely for the purpose of damaging the owner of the property. Since the principal has the required purpose, the act has obtained its character as larceny, and it does not seem reasonable that a person who has aided the thief, with knowledge of his purpose, should be liable only under the much milder provision of Penal Code, § 392, for trespass to personal property.

Questions involving other conditions of punishability are also determined in relation to the individual participant. One person may merit impunity because he withdrew from an attempt (Penal Code, § 50), without that impunity applying to the others. The act of one might fall outside the jurisdiction of the Norwegian penal law (Penal Code, § 12), while the acts of the others fall within it. The statute of limitations may benefit one, but not the others.

When there are grounds which make the act objectively legal, such as self-defense, necessity, or consent, they will generally apply to all participants. But this is not always the case. If I, by threats against another's life, force him to give a false report to the police, he may be exempt from punishment because of the necessity situation, while I will naturally be liable for having induced the report. In wartime, an act may be a legal act of war for one of the participants, who is an enemy soldier or civil servant, while it may be criminal for the other, who is a Norwegian citizen. This question was considered many times after World War II in criminal trials against citizens who had given information to the German occupation authorities, resulting in sentences of imprisonment or death for those informed against. As far as the Germans were concerned, the arrests and death sentences were a lawful exercise of official authority; an occupation force has the right to punish attacks against its military security. On the other hand, it was unlawful for a Norwegian citizen to aid the enemy in his suppression of Norwegian resistance. And such an informer became criminally liable not only for treason (Penal Code, § 86), but also for cooperation in the crimes of deprivation of liberty (Penal Code, § 223), and homicide (Penal Code § 233).

II. The measure of punishment for the individual participants

Penal Code, § 58, states the rule for meting out the punishment for the individual participants. The law allows for a reduction of punishment for those

whose "cooperation was due essentially to dependence on other guilty persons or has been of little significance in comparison to others." This method of expression could be taken to signify that it is only the *cooperators* and not the principal who could benefit from the reduction in punishment. But this was not the meaning, nor has the provision been so interpreted. The last part of the provision—the insignificance of the act—cannot well be applied to the principal but the first part, concerning the dependent position of the actor, can (Rt. 1911, p. 32). The classic example here is the thief who takes his young son with him and uses him to creep in and take the goods.

In certain instances punishment may be omitted completely, according to the terms of the last paragraph. This is the case when the conditions for reduction of punishment mentioned in the first part of the provision exist, and the penal provision involved either permits fines as an alternative punishment, or defines only a misdemeanor. In such cases the court is given complete discretion. If it decides to remit the punishment, this does not mean that the act is considered lawful.

While Penal Code, § 58, provides for a punishment milder than usual in cases of cooperation, Military penal Code, § 28, contains a contrary rule: when two or more soldiers have participated in a military offense, the punishment may be increased by up to one-half. Penal Code, § 58, is motivated by considerations of the lesser subjective guilt of the individual participant, while Military Penal Code, § 28, considers the increased danger involved when an offense is committed by more than one. According to Military Penal Code, § 1, the general part of the (civil) Penal Code applies to military offenses in the absence of any provision to the contrary. One cannot say that Military Penal Code, § 28, precludes the use of Penal Code, § 58. The result must therefore be that both can be used; the court may exceed the usual maximum for the leader of the plot, and may go below the usual minimum when dealing with a person who only reluctantly allowed himself to be talked into cooperating.

Within the area of the Penal Code there is usually no such opportunity to increase the punishment beyond the normal maximum. But in determining the amount of punishment to be actually imposed, the fact that the accused has persuaded an immature young boy to be his accomplice will be an aggravating factor.

§ 34. Attempt

I. Completed offense, attempt, preliminary acts

An offense may fall short of completion for many reasons. The attempt may not succeed—the perpetrator shoots at someone but misses. Or he may give up the plan because of repentance, fear of being discovered, or for other reasons. Or he may do his best, but is discovered and stopped. The perpetrator may have made a mistake about the situation: the conditions which would make his act an offense exist only in his mind, not in reality. He may destroy his own property, for example, believing it to be that of a third person.

General penal provisions on attempt belong to a rather late stage of legal development. Older law considered primarily the result of the act and the harm to the victim; if there was no such harm, it was felt that there was no need for a reaction. Neither our old Norwegian laws nor the Norwegian Law of 1687 contained general provisions on attempt, but certain especially dangerous attempts were made punishable by special penal provisions. The existence of general provisions against attempt shows that interest has been directed more toward the conduct and guilt of the perpetrator.

The main rule under our Penal Code is that an attempt to commit a felony is punishable, but less severely than a fully completed offense (Penal Code, §§ 49 and 51). An attempted misdemeanor, however, is not punishable at all (Penal Code, § 49, para. 2). In felonies, the distinction between attempt and completed crime has significance only for the amount of punishment; in misdemeanors, it becomes decisive for punishability itself. The distinction may have significance even for felonies, however, where the question of withdrawal from attempt is involved (Penal Code, § 50).

Not every preparation for an offense is a punishable attempt under our law. It is therefore necessary to distinguish between three stages in the realization of the offensive intent: The *impunitive preliminary act*, the *punishable attempt* and the *completed offense*. Penal Code, § 49, gives a definition of attempt which denotes the limit both upwards toward the fully completed offense and

downwards toward the impunitive preliminary act. It states: "An attempt is an act purposively directed at, but falling short of, completion of the felony."

The doctrine of attempt is an area where there exist rather significant differences between the Scandinavian countries. Denmark goes a long way toward punishment for attempt: preliminary acts are considered punishable attempts, and the law does not say that an attempt is to be punished less severely than a fully completed offense, only that it *may* be. Sweden, on the other hand, has no general rule on punishment for attempt; the attempt can be punished only where the individual penal provision expressly so states. Through legislative amendments during recent years, however, the number of offenses which are punishable even at the stage of attempt has increased substantially, so that the difference is not so great as before. The so-called impossible attempt (see below under V) is generally not punishable under Swedish law.

II. The distinction between attempt and complete offense

The distinction between attempt and completion is in principle easily made. The offense is completed when all the requirements of the individual penal provision are present. How much is needed depends on the definition in the penal provision in question.

For provisions which direct themselves toward the *causation of a harmful result*, the offense is not fully completed until the result has occurred. And it must not be too remote from the act (see above, § 12, V). If it has been caused by other factors, or if it has come about in a completely unpredictable manner, only punishment for attempt can be imposed.

For *danger offenses*, however, nothing more is required than that a danger shall have been caused, which is not too remote from the act.

Where the penal provision *describes the method of action itself*, the answer will depend upon the expressions which the law has used. Larceny (Penal Code, § 257) is completed at the moment when the object is carried away. Usury (Penal Code, § 295) is complete at the moment the offender has "achieved or conditioned" the unproportional return. Rape (Penal Code, § 192) is completed at the moment the indecent relationship is consummated. Doubtful borderline cases can arise in practice, of course, but the principle itself is clear enough: the decision must be made by an interpretation of the individual penal provision. A more detailed discussion, therefore, belongs in the special part of the criminal law, dealing with the different offenses.

Some penal provisions describe the offense in such a way that it is fully completed by an attempt. Penal Code, § 98, for example, is directed against "anybody who attempts to bring about the alteration of Norway's Constitution by illegal means" (see, further, Penal Code, §§ 83, 105, 127, 168). In these cases the distinction between attempt and completed offense does not arise as an issue. Whenever the perpetrator goes beyond merely impunitive preliminary acts, there exists a completed offense (Rt. 1948, p. 531). The question has special significance for the possibility of achieving impunity by withdrawal (see below, § 35).

In offenses of omission there is seldom any question of attempt. As long as it is not too late to act, there exists nothing punishable, and when it is too late, there usually exists a completed offense. Exceptions may exist, however, especially with respect to those penal provisions which require a harmful result. A mother, for example, has decided to kill her newly born baby by depriving it of food and care. The child is then rescued in a state of exhaustion by an outsider. The mother can be punished for attempted murder. Attempt is theoretically possible in the pure omission offenses as well. It may happen, for example, that a person who has a duty to act is forced by a third party to do the act at the last moment.

Where cooperation is punishable, Penal Code, § 49, also applies to attempted cooperation. Even though the cooperator has done everything required of him, he can be punished only for attempt if the offense is not fully completed. For example, I supply a thief with tools and maps of the place in question, but he is caught by the police before breaking in. Whether the term which applies to such a case is *attempted cooperation* or *cooperation in an attempt* is immaterial.

III. The distinction between attempt and preliminary acts

The Danish Penal Code diverts its provision on attempt (§ 21) generally against "acts aiming at promoting or carrying out an offense." Our Penal

Code, like most others, defines punishable attempt more narrowly. The definition contained in § 49 uses the expression "act, purposively directed at, but falling short of, completion of the felony." The term "completion" is here in contrast with preliminary acts. A conspiracy to commit crimes is only a preparatory act under our law.

When purely preliminary acts have not been made punishable, the first reason is probably that they are not a sufficiently reliable expression of a definite criminal mind. The actor may toy with the idea of committing an offense and make his plans for it without having made any definite decision. And even though he has made up his mind, it may be uncertain whether or not the determination will persist when the time of performance arrives. In good as in evil, there is a deep human truth in the words of Peer Gynt: "Ay, think of it—wish it done—*will* it to boot—but *do* it! No, that's past my understanding" [1] It can also be said that purely preliminary acts seldom come to the attention of the police, and that it makes no great difference for the effectiveness of the penal system whether or not punishment is imposed in the rare cases when they become known. Experience shows that even if all preliminary acts are punishable, such as is the case in Denmark, it is only seldom that remote preliminary acts come before the courts.[2]

But where, then is the limit to be drawn? The statutory requirement that the act be directed at completion of the offense could be interpreted to mean that the accused must have begun the very act which the penal provision describes. Thus, attempted larceny would not exist until the perpetrator had commenced to "carry away" the object, and that would at least require that he had placed his hand upon it. Attempted indecent relations (Penal Code, §§ 191–193, and others) would not exist until the perpetrator had commenced an indent act; or attempted bigamy (Penal Code, § 220), until the perpetrator had commenced entering into the new marital relationship, and that would probably mean when the marriage ceremony itself had started. To draw such restricted limits around the concept of attempt would neither be natural nor expedient. And it is agreed, both in theory and in practice, that so much cannot be required.

The decisive question, as Hagerup states it, must be "whether the act, when the offensive activity is considered in connection with and in light of all accompanying circumstances, shows that the perpetrator has now set straight out for an offensive goal." [3] Or to say the same in a slightly different way: the behavior of the perpetrator must show that the time of preparation and contemplation is over, and that he is now proceeding to realize his goal. We shall look a bit more closely at what this means.

The perpetrator must always have *the intention to carry out the offense*. He must have made his decision. Even though objectively he has come fairly near the completion of an offense, no punishable attempt exists if the intention to complete the offense is lacking. One who swings an axe toward the head of his opponent is not guilty of attempted homicide if he intends to change the course of the swing at the last moment so that the other is merely frightened. One who enlists with the enemy for war service cannot be sentenced for attempted aid to the enemy if he knows that he will not be accepted as fit for duty (R.Mbl. 37, p. 60). Whether or not an offensive intention exists is a question of proof and a reasonable doubt must lead to acquittal. The judge's knowledge of the character and history of the accused would be significant for this facet of the decision.

But it is also required that the completion of the offense should, according to the perpetrator's assumptions, occur in a fairly *proximate connection* with the activity in question. Obtaining tools, making agreements with other participants and investigating the scene of the proposed crime are impunitive preliminary acts under Norwegian law—in contrast to Danish law. The promise or offer to commit an offense is generally also merely a preliminary act. Opening a window with the intent to enter and steal must generally be held to be attempted grand larceny. But it is only a preliminary act if the actor's purpose is to make everything clear today and then return to complete the theft tomorrow.

Uncertainty of the time when the result will occur is in itself without significance. Example: A wants to take B's life with poison. He succeeds in plac-

[1] Henrik Ibsen, *Peer Gynt*, Act III, sc. 1.
[2] See Hurwitz, *Den danske kriminalret*, pp. 459–460 (Copenhagen, 1952).
[3] See Hagerup, *Strafferettens almindelige del*, p. 185 (Kristiania, 1911).

ing a couple of capsules of strong poison among B's sleeping pills which are of similar appearance. He knows that B does not often use sleeping pills and that therefore a long time may elapse before the murderous plan succeeds. Here, A has done everything which he deems necessary, and there is no question about preparation for a later offensive act. He can therefore be punished for attempted homicide.

The question of the distinction between attempt and impunitive preparation is not infrequently raised in practice, and I shall mention some legal decisions as illustrations:

Rt. 1939, p. 890: The accused had enticed a five-year-old girl to the house where he lived, but was prevented from taking her into his room because a person who knew him arrived and took the child away. The accused was convicted of attempt to commit an indecent act (Penal Code, § 212, para. 2). The Supreme Court held "that the behavior of the accused goes so far toward completion of the offense that there is no doubt but that in immediate connection with the already effected acts he would have completed the offense had he not been prevented by the intervention of a third party. And our Penal Code, § 49, must be interpreted in such a way that this is sufficient for punishable attempt." See also Rt. 1898, p. 717.

Rt. 1926, p. 716: A man who had bought 147 bottles of wine with the intention of reselling them pleaded guilty to a charge of attempted unlawful sale. The Appellate Division of the Supreme Court reversed the decision, holding that a purchase for the purpose of sale is not, without more, an attempted sale. In itself, it does not go beyond the limits of a non-punishable preliminary act.

Rt. 1880, p. 641: Two prisoners planned to set fire to the prison. They had prepared some cases with ignitable materials, and had equipped them with an igniting mechanism which could be set for a definite time. The cases were to be placed in the sleeping quarters, so that the fire would break out there while the prisoners were at work. The plan was discovered before the cases were completely ready. The two accused were acquitted of attempted arson, on the ground that obtaining materials for an offense could be considered only as a preliminary act.

Unforeseen completion

An act which the perpetrator assumes to be only in the *stage of preparation* may cause the harmful result through an unforeseen development. A woman who wishes to kill her husband obtains a bottle of poison which she intends to mix with his food. Before she can do this he drinks from the bottle, believing it to contain cough drops, and dies. The woman cannot be punished either for attempt or for completed homicide. Subjectively, she had come no further than impunitive preparation; the further development was not encompassed by the intention. However, there may be a question of negligent homicide (Penal Code, § 239).

But it may also happen that the act which the perpetrator assumes to be in the *stage of attempt* is sufficient to bring about the result. Suppose that the woman with the poison wants to kill her husband by giving him a number of small doses in his food, and has commenced to do so. Contrary to her assumption, her husband dies after but a few doses. She must be convicted of completed homicide. Here she has crossed the borderline of crime, and death has resulted from her act. The fact that it took place at a different time than she had counted on makes no legal difference.

IV. Preliminary acts as independent offenses

The determination of the precise point at which the law should step in is a policy question. An act which would be merely an attempt or an impunitive preliminary act under one penal provision is often a completed offense under another penal provision. In such a case it is frequently said that the preparation is made punishable as *delictum sui generis*. The rules concerning forgery of documents constitute a typical example. If fraud is committed with the aid of a false document, the *fraud* is not completed until the victim has been tricked into making a disposition which causes loss or danger of loss (Penal Code, § 270). Fully completed *documentary forgery* already exists, however, at the moment the document is "used," even though the perpetrator has not succeeded in deceiving the other party (Penal Code, § 183). The law, however, goes further. Suppose that the perpetrator has not gotten so far as to use the

document, but is discovered immediately after the forgery. In relation to the provision on the use of false documents, this would merely be an impunitive preparation. But the law has made the falsification itself a separate offense (Penal Code, § 185). And it even goes one step further: one who prepares for the forgery of the document, by obtaining a copy of a genuine stamp for example, is reached by a special penal provision (Penal Code, § 186).

As other examples of preliminary acts which are made independent offenses, we can mention conspiracy to perform certain serious crimes (see, for example, Penal Code, §§ 94, 104, 159), and the procurement of explosives or other objects with which to commit felonies (see, for example, Penal Code, § 161). It is usually especially dangerous preliminary acts which also more or less outwardly bear the characteristics of the offensive purpose, which the law places in a special position in this way.

Once the preliminary act is made a special offense, it is treated as an ordinary offense in every way. There can be an attempted offense, and it becomes necessary to distinguish between impunitive preparation and punishable attempt. Penal Code, § 186, as mentioned, provides punishment for anyone who "in preparation of the forging of a document, fabricates or acquires a false seal, stamp, sign or other objects which appear designed for use in forgery or falsification. . . ." One who tries but fails to obtain such a false stamp can be punished for an attempted violation of that provision. But if he does no more than seek contact with an engraver in order to ascertain his willingness to undertake the fabrication of the false stamp, only impunitive preparation exists.

V. Impossible attempts

A question which has been widely discussed is whether an attempt, in order to be punishable, must have created the danger of a completed violation, or whether the subjective conceptions of the actor are absolutely decisive. This is the problem of the so-called *impossible attempt*. A distinction is made between attempts with impossible methods (such as attempt at murder or criminal abortion with means which are actually quite harmless), and attempt against *impossible objects* (such as attempted theft from an empty pocket, or attempted murder by shooting at a stump which is thought to be a person). Both the method and the object may be impossible; from foreign jurisprudence we have the example of a woman who, erroneously believing that she is pregnant, attempts criminal abortion with a completely ineffective substance.

To a certain extent, it can be said that every unsuccessful attempt has been impossible; if we had complete knowledge of all the factors of causation which play a part, we could predict that the attempt would not succeed. What can be considered to exempt from punishment is only the *absolutely impossible* attempt, that is, the attempt which because of the nature of the method or the object could under no circumstances lead to the result. Legal theory as well as legislatures have endeavoured to set up limitations in this direction in order to preclude from punishability attempts which do not deserve to be taken seriously. The Swedish Penal Code limits punishability to those attempts where "there existed danger of the act leading to the completion of the offense, or where such a danger has been excluded only by purely accidental circumstances."

Ørsted, in contrast to Feuerbach, was a definite follower of the subjective attempt theory. His argument was that the criminal mind has manifested itself in action, whether or not the attempt was possible.[1] The Criminal Code of 1842 took the same viewpoint, and the same applies to the present Code. The expression "purposively directed at completion" in Penal Code, § 49, was meant to manifest that the impossible attempt is also punishable. This is assumed in practice as well.

Rt. 1932, p. 1034: A man had attempted to open up a cash-box by striking it with a roofing-tile. He was sentenced for attempted grand larceny (according to the then prevailing provision in Penal Code, § 258, No. 3), but appealed on the ground that the attempt was impossible. The appeal was dismissed, and the Supreme Court mentioned that according to the legal history of the Code "punishability does not depend on whether the act was really possible but only whether it appeared possible to the accused." Rt. 1947, p. 346: A woman who thought that she was pregnant turned to a "wise woman" who administered

[1] See Orsted, *Eunomia, eller Samling af Afhandlinger henhørende til Moralphilosophien, Statsphilosophien, og den Dansk-Norske Lovkyndighed, Ander Dell*, pp. 149–152 (Copenhagen, 1817).

treatment for abortion. According to the information in the case, she was not actually pregnant. She was convicted of attempted abortion (Penal Code, § 245). "The accused, believing herself pregnant, allowed treatment for abortion to be administered which she knew was for the purpose of killing the foetus, and which could not have had any other purpose. She has thus committed an act purposefully directed at the completion of an offense under Penal Code, § 245, para. 1, and thus, through her act, has unquestionably disclosed her desire to commit this offense." According to the Supreme Court, this was sufficient to make conviction of attempt mandatory. One judge dissented.

The Report of the Penal Law Commission states that one must be aware of "the limiting principle that acts which are in themselves legal and lawful must always be regarded as unpunishable, even though they are committed in order to cause harm, and even if the harm is thereby caused" (S.K.M., p. 93, note 3).

This statement is aimed at those instances where the actor does not cause or count on causing a greater danger than he is entitled to. The Commission itself mentions the case where a doctor performs on a patient in whose immediate death he has a great interest, a dangerous, but fully warranted operation, which he would not have performed had he not hoped that the operation would fail and the patient die. When the operation is medically warranted, the criminal intention will not make the act punishable. The same applies to acts which do not create any proximate danger, such as convincing someone to make a journey by train. It becomes an attempt, however, if the perpetrator believes that he is creating a danger to which it is unlawful to expose the other person. He has, for example, heard someone bragging about having blown up a railroad bridge on the line in question.

Acts which are due to mere superstition

Traditionally, the law is supposed to exclude from punishment for attempt acts which are due to mere superstition, such as the attempt to kill one's neighbor by prayers or curses. Today, it is difficult to imagine such attempts being committed by responsible persons. But as late as 1900, the German Reichsgericht had a case where a woman had given two other women money to kill her husband by calling on the assistance of the devil.[1] The result was an acquittal.

VI. Putative offense

The actor may have known the actual circumstances but wrongfully considered the act to be punishable. He believes, for example, that it is criminal to marry or have sexual relations with his brother's daughter (see Penal Code, §§ 220 and 207). Punishment for attempt cannot be applied here. It can be said that he has exhibited an intention to break the law. But he has not committed an act which any penal provision forbids, nor has he attempted to do so. Thus, there is no authority for the imposition of punishment. Here one often speaks about a *putative* or *imaginary* offense. The expression putative offense is sometimes given the same significance as impossible attempt.[2]

VII. Intention is required for punishment for attempt

One might well imagine punishment being imposed for attempt to commit negligent offenses. For example, a man undertakes blasting operations on his property without taking reasonable precautions to prevent damage to the life or property of his neighbor. Whether the blasting is prevented by the intervention of a third party or occurs without causing damage, we could imagine the imposition of punishment for attempt to commit negligent homicide and negligent destruction of property. It is clear, however, from the definition of attempt (an act purposely directed at completion of the offense) that this is not the position of the law. Where the law wishes to impose punishment for negligence without regard to whether the harmful result occurs, it does not punish the act as an attempt to negligently cause the harm, but it directs itself either against the negligent behavior itself (see for example, Penal Code, § 361), or against the creation of a danger (see, for example, Penal Code, §§ 351 and 352).

Purpose is not required

The expression "purposively directed" might suggest that ordinary intent is not enough and that purpose is required before punishable attempt can exist.

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[1] See, *Entscheidungen des Reichsgerichts in Strafsachen*, p. 321, Vol. 33.
[2] See Hurwitz, *op. cit.*, p. 466.

This, however, has not been considered the object of the law. It is settled practice that nothing more than ordinary intention is required (Rt. 1934, p. 1096). Attempt and completed felony are thus identical on the subjective side; the difference lies on the objective side.

VIII. The punishment for attempt

1. The general rules of Penal Code, § 51

Attempt is punished less severely than the completed offense (Penal Code, § 51). It is not merely a *discretion* which is given to the court; it is a mandatory provision. That means first of all that the maximum punishment which the penal provision sets out for the offense cannot be imposed for an attempt. This has no great practical significance, for very seldom is there any question of passing the maximum sentence, with the possible exception of homicide (Penal Code, § 233). But the provision which prescribes a milder treatment of attempt must also be regarded as a directive as to the *choice of punishment*. Even though pure coincidence prevented the offense from being completed, the punishment imposed should be milder than that which the judge would have found suitable if the harmful result had occurred.

Penal Code, § 51, para. 2, also opens the possibility for reducing the punishment below the usual minimum and to a milder form. This means that even for the most serious offenses punishment for attempt can be reduced to a small fine. Reduction below the minimum can be of great significance if the penal provision has a high minimum penalty, as in homicide, for example.[1] In certain instances, where special considerations come into operation, the law provides that the act is non-punishable if no serious consequences have followed (see Penal Code, § 236, on cooperation in suicide, or that the punishment may be remitted (see Penal Code, § 234, on infant killing).

Penal Code, § 51, para. 2, provides a special rule in the event that the attempt leads to unexpected consequences which are as serious as those which the act set out to create. For example, a person plans to kill his neighbor by an explosion, but by a coincidence it is the neighbor's little daughter who is killed. The maximum punishment for intentional homicide can be imposed here. The possibility of a reduction of the punishment, however, also exists.

Some penal provisions expressly provide that attempt is to be punished in the same manner as the completed offense (see, for example, Penal Code, § 100, para. 2). This is actually the same result as where the offense is described as being completed by an attempt (see, for example, Penal Code, §§ 83 and 105). In other cases it is held that the attempt may be punished in the same way as a completed offense (Penal Code, § 148). Here the court can go all the way up to the maximum, but it also has access to an unlimited reduction of the punishment.

2. Discussion of the rule in Penal Code, § 51

The rule prescribing milder punishment for attempts has been strongly criticized. It is argued that the criminal mind is often exactly the same for the attempt as it is for the completed crime. The fact that the offense has not been completed or that it has failed can of course be an indication that the offender did not have the firm criminal mind or the thoughtfulness and foresight possessed by the really dangerous criminal. But it is no more than an indication. "A plan most cleverly prepared and executed with the greatest possible coldbloodedness foresight and ruthlessness, may fall because of quite unforeseeable and unexpected obstacles, and conversely, a crime most loosely planned and awkwardly and hesitantly accomplished may often achieve its goal."[2] It must therefore, so the argument runs, be sufficient that the law provides a *possibility* to punish attempt milder than the usual offense. This is the rule in § 21 of the Danish Penal Code of 1930 as well as in Swedish and German law. According to this view, our law is considered a throwback to the primitive concept of revenge, which does not look at the criminal mind but rather at the result of the act.

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[1] The general minimum punishment according to Penal Code, § 233, is imprisonment for six years, but the punishment is often substantially less for attempted homicide. See, for example, *Norsk Ex Rt.* 1931, p. 814 (two years and six months); 1949, p. 371 (three years); 1951, p. 1166 (one year as suspended sentence). The difference between attempt and the completed offense is of less importance in other offenses such as larceny. See V. Eyben, *Straffundmaling*, p. 77 and pp. 230–231 (Copenhagen, 1950).

[2] See Torp, *Den danske Straffercts almindelige Del*, p. 547 (Copenhagen, 1905).

It is probably true that the rule prescribing a milder punishment for an attempt is connected historically and psychologically to emotional reactions which even legislatures and judges share (see above, p. 64). But it does not follow that abolition of the rule would be rational. The criticism which has been advanced is unanswerable if we rely upon a principle of moral retribution or on a purely individual preventive viewpoint. But this is not so if we take the general preventive effect of punishment as a starting point. A person who is thinking about committing an offense such as theft or murder is as a rule interested in the result of the act. If he considers the question of punishment at all, it is therefore punishment for the completed offense which he takes into account. Should he know that the punishment is milder where the attempt fails, this will generally have no effect on his contemplations.[1] And it is usually the completed offense which causes the greatest concern among the general public, and the strongest demands for punishment. It is less noticed, and more easily accepted *if* noticed, that the law deals leniently with the offender when no harm has been caused than when his act has had fateful results. For these reasons it is less dangerous to treat the attempt leniently than the completed offense. It may be mentioned in this connection that the courts, in determining the amount of punishment, take the harmful results of the act into account even where those results have no significance for the legal subsumption. Moreover, the rule that negligent offenses are punished only when completed demonstrates that our law attaches importance to the consequences of an act even though they do not correspond to any difference in the guilt of the actor.

3. Attempted misdemeanor is not punishable

Similar considerations may be advanced in favor of the provision in Penal Code, § 49, para. 2, which states that attempted misdemeanors are not punishable. This applies to offenses which are not of a substantial character. When they have not even come to completion, they can be allowed to go unpunished according to the old maxim *de minimis non curat lex*.

Attempted misdemeanors are often made punishable in statutes outside the Penal Code, and sometimes are given the same punishment as the completed offense (see, for example, Liquor Act § 43). This most often applies to penal provisions which have a higher maximum than that which the Penal Code provides for misdemeanors (Penal Code, § 2). Thus, the strange thing is actually not that the attempt is punishable, but that in spite of the possible punishment, the violation is characterized as a misdemeanor (see above, pp. 6–7).

§ 35. Withdrawal from Attempt

I. Termination of criminal liability by withdrawal from attempt

According to Penal Code, § 50, punishability of an attempt disappears when the perpetrator abstains from further activities or prevents the harmful results of the act. In such cases we speak about withdrawal from attempt.

The legal justification for the rule is, first of all, that a person who has withdrawn has thereby shown that he does not have a definite criminal intention. Neither individual preventive nor general preventive considerations militate against leniency toward the repentant offender. But there is another policy reason which comes into play. The promise of impunity may give the perpetrator a positive motive to withdraw. Such effect, however, presupposes that the offender knows about the rule, and this is probably not often the case.

Penal Code, § 50, presupposes that the perpetrator has come as far as a punishable attempt. In other words he has incurred criminal liability, but this liability is wiped out by his subsequent conduct. If he has not gone beyond the preparatory stage, he has not incurred any liability at all. Example: A persuades B to accompnay him on an automobile trip, so that he can kill him. During the trip he changes his mind and gives up the plan. A is impunitive, not because of withdrawal from an attempt, but because he has committed nothing but an impunitive preparatory act.

The impunitive withdrawal, on the other hand, is impossible once the crime is completed. Where the offense is described as an attempt, there can thus be no

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[1] This argument is advanced by Krabbe, *Betragtninger over forbrydelser og straf* [Reflections on crime and punishment], pp. 117–119, 2nd ed. (Copenhagen, 1939). But as Krabbe himself points out (pp. 123–126), the reasoning does not apply to all types of offenses.

impunity by withdrawal. As soon as the actor has gone beyond the limits of impunitive preparation, the offense in such a situation is completed (see above, § 34, II). The rule is different where the law provides that an attempt shall be punished in the same way as the completed offense (see, for example, Penal Code, § 100). Even though the law places the attempt and the completed offense on the same level as far as punishment is concerned, it still retains the principal distinction between the two, so that there may be impunity by withdrawal from the attempt.

Rt. 1924, p. 1149: The accused had taken a suitcase from a railroad station in the belief that it contained liquor, but brought it back when he discovered, much to his dismay, that it contained other things. The theft was completed by the carrying away, and there was thus no question of impunity by withdrawal. See also Rt. 1913, p. 268.

Rt. 1948, p. 531: A person who was under the influence of alcohol got into his car, put the gear shift to neutral, turned on the motor and was about to drive off. He was warned by two observers, and he eventually left the car without driving. He was nevertheless deemed to have violated Motor Vehicle Act, § 17, para. 2. The Supreme Court held that he had gone further than the preparatory stages, and since the law prohibits "driving or attempted driving," the violation was complete and impunity through withdrawal was thereby precluded.

II. The conditions of impunity when the attempt is incomplete

With respect to the more detailed conditions for impunity, the law distinguishes between incomplete and completed attempts. The attempt is incomplete when the perpetrator still has something left to be done before the offense is constituted. He has, for example, opened up the cash register in order to steal, but has not yet taken the money; he has assaulted a woman in order to rape her, but has not yet achieved his goal; he has declared himself willing to confirm a false declaration on oath, but has not yet taken the oath.

To obtain impunity in such cases, the offender must "by his own free will desist from the continuation of the felonious act." A positive act is not required. But the condition for impunity is that he gives up the attempt even though he knows that he could have achieved his goal by continuing. He does not refrain by his own free will if he throws away the burglar's tools, and runs when he sees the police coming, or if he gives up when he realizes that he cannot fulfil the plan with the tools which he has at his disposal. The law does not require that the abstention is due to actual repentance. The effect will be the same if the attempt is abandoned for fear of discovery, or because the perpetrator realizes that the gain will be smaller or the difficulties greater than he had expected. A man who abandons a rape attempt when he discovers that the woman offers serious opposition will nevertheless obtain impunity if he thought he might have been able to attain his purpose despite the opposition.

The fact that the perpetrator realizes that he is discovered does not necessarily preclude impunity. The provision on discovery contained in the last sentence of the section refers only to completed attempts. It is not made very clear by the text, but the legislative history shows that this is the meaning and it is generally accepted. A discovery, however, will often preclude an actor from desisting "by his own free will." If he believes that he could complete the offense and get away without being caught, it could perhaps be said that he desists by his own free will despite the discovery. But it would be otherwise if he fears apprehension in case he completes the offense. This determination is often bound to be uncertain, because the perpetrator himself makes up his mind rapidly and impulsively, without making any well-reasoned calculations of the possibilities. If he becomes panic-stricken and flees because he believes that someone is coming, this cannot be regarded as a voluntary withdrawal.

III. Impunity for completed attempt

The attempt is completed when the perpetrator has done everything which he thought necessary on his part, though the result has not occurred anyway. This can happen when the attempt has failed (the shot missed). But it may also happen that a course of events which has been started simply has not yet ended. The insurance defrander has arranged a fire by placing a burning candle in a box filled with combustible material and has then taken a trip in order to have an alibi. It is precisely in these cases where there is a period of time between the act and the result, that an impunitive withdrawal may take

place. Completed attempt is only possible when the completed offense requires a result which can be distinguished from the offensive conduct itself. With some other offenses, such as incest, perjury and document forgery, the attempt is incomplete until the offense itself is complete.

In case of completed attempt, the fact that the perpetrator abstains from further action when he realizes that the attempt is failing is, of course, not sufficient for impunity. He must positively "prevent the result which could constitute the completed felony."

It is a condition for impunity that he actually prevented the result by his act. If he does not succeed in that, punishment for a completed offense will be imposed. Thus, if the insurance defrauder who has arranged the fire repents and turns back in order to prevent the accident, but finds a smoldering burned-out area, he is liable for the completed offense. The damage may be prevented in other ways—the candle is blown out by the wind, or the plan is discovered and thwarted by a third person. The condition for impunity has not been fulfilled in these cases either, but here, of course, punishment for attempt is imposed with the possibility of unlimited reduction of punishment. The same applies, according to the words of the law, where the attempt was impossible from the outset: A puts into B's food a substance which he believes to be a highly dangerous poison, but which in reality is quite harmless; he repents and warns B before the latter has eaten the food. In this case, Penal Code, § 50, should be used analogously; A should not be put into a worse position than he would have been in if the substance had been poisonous. To a certain extent, foreign laws place a greater weight on the demonstrated good intention, regardless of the result.

It is a further condition for impunity that the perpetrator prevent the consequence "before he knows that the felonious attempt has been discovered." Impunity is precluded if the offensive act is discovered; it is not necessary, however, that the identity of the perpetrator be discovered as long as the act itself, as well as its character as a criminal offense, have been revealed. Example: A person places a case of explosives in front of the door of his enemy's house. The igniting mechanisms is fixed so that the explosion will take place as the door is opened from the inside. The neighbors see him place the case in front of the door, but believe that it is an errand boy delivering goods from the store. Before the explosion occurs, the assassin returns and removes the case. He will obtain impunity according to Penal Code, § 50.

IV. Withdrawal where several persons have participated

If more than one person were engaged in the attempt, the question whether the requirements for impunity exist will be determined individually for each participant. A and B have planned a burglary together; while they are breaking into the house, A repents and withdraws, while B continues. A will be free from punishment, but not B. The same holds true in the case of a completed attempt. A and B have jointly made arrangements to set a house on fire. A returns and prevents the fire.

A completed attempt may also consist of the instigation of an offense. In order for the instigator to be impunitive, he must prevent the offense from being completed. For one who has rendered only preliminary aid to the offensive plan of another, it will be sufficient if he neutralizes his own cooperation, even though he does not succeed in preventing the offense. He has supplied the thief with burglary tools, for example, but retrieves them before they are used.

V. For qualified attempt, only the punishment for attempt terminates

It is the punishment of the *attempt* which terminates by reason of the withdrawal. If the attempt is a completed breach of other penal provisions at the same time (qualified attempt), the punishability of the completed offense does not cease (see Rt. 1938, p. 26). A person who breaks in to steal but leaves without taking anything can be punished for completed breaking and entering (Penal Code, § 147). A man who abandons a rape attempt can be punished for assault (Penal Code, § 228) and the coercion (Penal Code, § 222) which he has already committed.

§ 36. Plurality of Offenses

I. "Realkonkurrens"

It often happens that the defendant is charged with more than one offense, all of which are adjudicated in the same trial. In such cases we speak of *real-*

konkurrens. Usually, crimes of the same or at least of a related type are involved: the accusation, for example, includes rape, robbery and the unlawful sale of liquor. In the former case we speak about *homogeneous*, in the latter case about *heterogeneous realkonkurrens*. Penal Code, §§ 62–63, contain rules on the determining of punishment when a person is convicted of more than one offense. If offenses of the same or closely connected types are committed in a close relationship to one another, the question may occasionally arise as to whether there exists *realkonkurrens*, or *idealkurrens* of several offenses.

Here, we can first distinguish those cases where the law covers a continuous or compound activity, such as where it penalizes one who "by neglect, maltreatment or similar conduct, frequently or gravely violates his duties toward spouse or children" (Penal Code, § 219), or "participates in an association" (Penal Code, § 339), or "carries on an activity" (Penal Code, § 332), or "participates . . . a fight" (Penal Code, § 384). As long as the activity continues, it is but a single offense, even though punishable acts may have been accomplished many times. A fight is a fight, whether it takes only two minutes or continues for the entire night. Here we use the term *collective offenses*.

In practice it is customary to treat several acts as only one offense also in those cases when they are committed in immediate connection to one another. A number of degrading words spoken at the same time will be regarded as only one defamation, many blows as one assault (see Rt. 1912, p. 215), and the carrying away of many objects as one theft.

It is more doubtful whether we can go further and say that a series of punishable acts can be regarded as one *continuing punishable activity*, even though they are not committed in immediate connection with one another. The servant who each day steals cigars from his master (Penal Code, § 262), the cashier who each day takes money from the cash register (Penal Code, § 255), the doctor who each day writes out false prescriptions for morphine (Penal Code, § 189)—are they to be punished for one continuous offense, or for several offenses in *realkonkurrens?* The question has both substantive and procedural significance. Substantially, it will usually be to the accused's advantage if the punishable acts are judged as one offense, since the possible punishment is increased where more than one offense is involved (Penal Code, §§ 62–63). But in some cases it may be to his advantage if the offenses are separated, such as where an addition of the value of the stolen goods would place him under a more severe theft provision, instead of under the milder provision relating to pilfering. The question as to whether the acts of the accused are to be regarded as one continuous offense or as a number of separate offenses may also have significance for determining the date on which the period of limitations begins to run (Penal Code, § 69), and for the issue concerning the applicability of Norwegian law (Penal Code, § 12). Procedurally, the determination has significance on the drafting of the accusation (indictment) (Code of Criminal Procedure, §§ 286, 342), for example, and on the posing of questions to the jury in cases heard in the court of assize (Code of Criminal Procedure, § 343, para. 3).

The practice of considering many punishable acts as one offense was well established under the Criminal Code of 1842. Since the introduction of the new Penal Code it has often been suggested in theoretical writings that such a concurrence can no longer take place.[1] Neither in the Penal Code itself nor in the legislative history, however, is there anything to suggest that any changes on this point were intended, and practice has continued largely on its former path. It has been regarded as one continuous offense where a cafe owner has sold beer illegally over a period of time (Liquor Act, § 47; see Rt. 1940, p. 25), and where a father has had indecent relations with his under-aged daughter many times (Penal Code, §§ 196 and 207; see Rt. 1938, p. 614 and also Rt. 1929, p. 762). If there is a greater time span and a looser relationship between the individual acts, however, they may be regarded as independent offenses, see, for example, Rt. 1923, p. 609 (five unlawful sales of liquor at different times and to four different persons were regarded as independent offenses).

II. "Idealkonkurrens"

Penal Code, § 62, also mentions the case where someone commits more than one offense *by the same act* (*idealkonkurrens*). This can happen because the

[1] See Hagerup, *Strafferettens almindelige del*, pp. 227–228 (Kristiania, 1911). Skeie *Den norske straffeprosess* [Norwegian criminal procedure], pp. 432–433, I (Oslo, 1939).

act is covered by more than one penal provision. One who accomplishes a fraud with the aid of a false document is punished both under Penal Code, § 270, for fraud and under Penal Code § 183, for the use of a false document. The father who rapes his fifteen-year-old daughter, infecting her with syphilis, is punished under Penal Code, § 192 (rape), Penal Code, § 196 (indecent relations with children under sixteen years of age), Penal Code, § 207 (incest) and Penal Code, § 155 (communicating a venereal disease). This is *heterogeneous idealkonkurrens*. But it may happen that the same provision is breached many times by one act. A man throws a bomb and kills a number of people, or he writes defamatory statements about a number of people in a newspaper article. This is *homogeneous idealkonkurrens*.

It is sometimes said that *idealkonkurrens* does not really constitute a concurrence of *offenses*, but a concurrence of penal provisions. The law posits, however, that every violation of the law is an independent offense. That is the terminology both in the Penal Code (§ 62), and the Code of Criminal Procedure (§ 95).

In some cases, the actual distinction between *idealkonkurrens* and *realkonkurrens* becomes very small. When I defame more than one person, it is *idealkonkurrens* if I include them all in a defamatory statement, and *realkonkurrens* if I defame first one and then the other. If I kill a number of people with a bomb or a hand grenade, it is *idealkonkurrens;* if I shoot them down one by one with a pistol, it is *realkonkurrens*; and if I kill them with a volley from a machine gun, the question as to which type exists is a matter of personal taste. If a person gives burglar's tools to another for use in two burglaries which the latter has planned, there exists *realkonkurrens* for the thief and *idealkonkurrens* for the cooperator.

With *idealkonkurrens*, just as with *realkonkurrens*, doubts occasionally arise as to whether we should speak about one offense or several offenses.

1. Homogeneous Idealkonkurrens

This applies first of all to homogeneous *idealkonkurrens*. In the case of personal violations such as murder, assault and defamation, it will always be assumed that there are as many offenses as there are victims. On the other hand, it will not be considered more than one offense if the same person is exposed to more than one violation, such as by a defamatory newspaper article. Violations of property rights, such as theft or destruction of objects which belong to a number of people, are not so certain to be regarded as independent offenses as are violations of personal rights. The offense is no more serious if the objects in question have several owners than if they belong to only one. From the point of view of substantive criminal law, there is thus no reason to regard this situation as one involving several offenses. Procedural reasons, on the other hand, may favor this solution. If the objects all belong to one and the same person, only one offense will be deemed to exist.

2. Heterogeneous Idealkonkurrens

Doubts occasionally arise in connection with heterogeneous *idealkonkurrens* as to whether all the penal provisions which are violated by the act shall apply, or only one of them.

If the provisions aim at different aspects of the punishable act, then they all apply in *idealkonkurrens*. Recognition is thereby given to the act's increased culpability as compared with a breach of only one of the provisions. Such is the case in the examples mentioned above (forgery of documents and fraud, rape and incest, etc.). It makes no difference that the penal provisions have a common ground. Vagrancy Act, §§ 16 and 17, both aim at the person who intentionally or negligently drinks himself into a state of intoxication. But the elements of the offenses are otherwise somewhat different: § 16 requires that the intoxication be obvious, and that the person be seen in this condition in a public place; § 17 does not require any of this, but rather that the guilty person disturbs the general peace and order or the lawful flow of traffic, or annoys or causes danger to others. If the perpetrator fulfills the requirements of both provisions, then both must be applied (Rt. 1929, p. 566).

In other cases, an act which falls under one of two penal provisions necessarily falls under the other one as well. Here, it is the law that only that provision which most fully considers all the aspects of the act is to be used. A

characteristic example is the *compound offense*. Penal Code § 147, imposes punishment for breaking and entering, Penal Code, § 257, for theft, while Penal Code § 258, provides that in determining whether a theft amounts to grand larceny, emphasis shall be placed upon whether it was committed in connection with a breaking and entering. If the accused is convicted of grand larceny under this provision, he cannot at the same time be convicted under Penal Code, §§ 147, and 257. Other examples include violations which are similar in nature, but different in degree. A bodily injury to the person (Penal Code, § 229) is always an assault (Penal Code, § 228), but of course the provisions cannot be used simultaneously. See also Rt. 1925, p. 328.

THE DANISH CRIMINAL CODE

The Danish Criminal Code has been revised more times since the translation in 1958. However, none of the cited provisions have been changed in the substance, unless this is indicated in the text of the report.

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PREFACE

The Danish Committee on Comparative Law thought it useful to have the Danish Criminal Code translated into English. Translations into French and German already exist.

The translation has been made by Miss Else Giersing, sworn interpreter and translator, and Dr. M. Grunhut, M. A. Reader in Criminology, University of Oxford, has been good enough to supervise the translation and give the Committee his valuable advice on the subject.

To enable lawyers of the English speaking countries to acquaint themselves with this modern Criminal legislation and its underlying principles in the Committee has asked Dr. Knud Waaben, professor A. I. in Criminal Law in the University of Copenhagen, to write a short introduction to the Code.

G.E.C. Gads Fond has undertaken to publish the translation; the Committee expresses its heartiest thanks.

N.V. BOEG,
Chairman of the Committee.

INTRODUCTION

I. The Danish Criminal Code of April 15, 1930 entered into force on January 1, 1933. It superseded the Criminal Code of 1866 which had long proved inadequate. Work preparatory to a reform of the Criminal Law began about 1905 with—*inter alia*—the setting up of a Criminal Law Commission. In 1912 the Commission published a report in the form of a first Draft Criminal Code. This draft was examined and criticised by Professor Carl Torp. His own report in the shape of a second draft code appeared in 1917. Finally a new Commission, of which Professor Torp was a member, studied both drafts and published in 1923 a third Draft Criminal Code. Between 1924 and 1930 the Ministry of Justice and Parliament examined the abundant material contained in these three drafts, in the Records of Proceedings of the Danish Association of Criminalists and in other technical publications. It can fairly be claimed, therefore, that a most thorough juridical preparation preceded the new Act of 1930 which was essentially based on the second and third draft codes.

In form, the Code is drawn up on the lines usually followed in continental Criminal Codes. It is divided into a General Part, dealing with the general principles of liability, attempts, complicity, the system of penalties and other measures, etc., and a Special Part, defining particular crimes.

The *Special Part* of the Criminal Code comprises only a selection of all offences punishable in Danish law. The field covered broadly corresponds with the range of offences indictable in English law. Most petty offences are dealt with by other acts—particularly by legislation passed in recent years for the regulation of commerce, road traffic, public health, customs duties, taxation and the like. The Criminal Code is primarily concerned with those types of offence which have been known for time immemorial and which are of such gravity as to make it natural to characterise them as crimes: offences against the State and the public authorities, offences against property, forgery, arson, offences of violence against the person, etc. The individual provisions of Chapters XII–XXIX will show to what extent the provisions of Danish law correspond to the felonies and misdemeanours known in English law. In practice, of course a small group predominates. Of all types of offence, those of Chapter XXVIII of the Criminal Code are of the greatest importance. This Chapter covers all offences against property which are characterized by a willful and unlawful transfer of property: a gain for the perpetrator and a corresponding loss to the victim of the offence. The description of these offences is on the whole much simplified, as compared with the Criminal Code of 1866. For example, no distinction is made between different types of theft, but ss. 285–87 gives the courts a rather great latitude in assessing the gravity of a theft.

Cases concerning violation of the Criminal Code are as a general rule tried by a court of first instance consisting of a professional judge and two lay judges. The defendant or the prosecutor may appeal to one of the two High Courts sitting with three professional judges and three lay judges. Appeal to the Supreme Court as a third instance may take place only by special permission granted by the Minister of Justice. However, the Supreme Court is bound by the fact-finding of the High Court. A more summary trial by the court of first instance, without the co-operation of lay judges, may take place where the accused has made a full confession. A small number of cases concerning grave offences (in particular homicide) are heard by a High Court sitting with a jury.

In so far as the *General Part* of the Code is concerned, particular mention should be made of the penalties and other measures applied to offenders. First, however, some observations seem called for on the principles of criminal liability.

The Criminal Code does not provide exhaustive rules governing the objective and mental elements in criminal liability; in essential points, however, the system in force is defined or implied. Thus, it appears from sect. 1 that the maxim "nulla poena sine lege" is laid down as a fundamental principle in Danish law. Provisions on the plea of necessity etc. are laid down in ss. 13 and 14. Sect. 15 fixes the minimum age of criminal responsibility at 15 years, and ss. 16 and 17, which are discussed in detail below, deal with the legal consequences of mental abnormality.

As it appears from sect. 19, liability to punishment is subject to the existence of a form of "subjective guilt". As in the other Scandinavian countries

and in Germany, the doctrine of "mens rea" is in Danish law defined somewhat differently than in English law. It is assumed that the subjective relation to an "actus reus" will always take the form either of *dolus* (intention), of *culpa* (negligence) or of casus (accidental). In principle, an offence which cannot be described as intentional, nor due to negligence, is not punishable. The so-called absolute liability is little known in Danish law. The question whether a certain legal provision requires intention or only negligence is decided under Sect. 19 of the Criminal Code: as regards the Special Part of the Criminal Code, intention is required, unless negligence is expressly mentioned in the text (e.g., ss. 182, 226, 242); in the special legislation on the contrary negligence is punishable unless the liability is expressly confined to intentional offences.

II. A description of the system of *penalties and other measures* prescribed in the General Part of the Criminal Code would be incomplete without some account of the historical background of the Code itself.

At the end of the nineteenth century penalties based on deprivation of liberty were chiefly relied upon for the prevention of crime. Under the Criminal Code of 1866 these penalties were imposed in various forms, but there was little provision for measures of a reformatory character. The view that it is the deterrent effect of punishment that counts for most in putting down crime was generally accepted. The fight against crime, it was thought, would risk to be lost if society instead of marking its disapproval of the offence by imprisoning the offender were to impose some measure related to the circumstances of the individual case. The personality of the offender generally evoked little interest. With the turn of the century other views began to prevail. They were visible in the adoption by a number of countries of the "suspended sentence". The Danish Criminal Law was amended in this sense in 1905 and the amending act was historically significant in that it made provision for supervision and other care of the offender. The International Association of Criminalists, founded in 1888 by Van Hamel of Holland, Von Liszt of Germany and Prins of Belgium, became a motive force in the field of reform. Torp effectively advocated the adoption in Denmark of the Association's programme, and it was largely due to the authority of his name that in the drafting of the New Code every effort was made to include in it provisions enabling the sanction to be adjusted to the individual offender.

The Criminal Code of 1930 maintained the deprivation of liberty as the primary legal consequence; its application in practice, however, was made on more modern lines inter alia through a simplification of the types of penalty and the introduction of rules for release on parole. At the same time, consideration was given to some categories of offenders for whom special forms of treatment ought to be available: young offenders, mentally abnormal persons, persistent offenders, alcoholics, etc. The considerations underlying this development may briefly be expressed in the following way: The deterrent effect of the penalties involving deprivation of liberty is an essential factor, but its importance should not be overestimated. The fact that punishment is to some extent replaced by other measures or that the classical features of imprisonment are blotted out implies no weakening in the fight against crime. On the contrary, the offender is more likely to abstain from further criminal activities if the measure applied bears some relation to his own personality. A non-penal sanction may well serve both as a deterrent and a means of curing or helping the convicted person, or of adding stability to his character. Furthermore, the requirement that justice must prevail in the criminal field does not mean that all offenders must be treated alike, irrespective of their age, their mental state, their need for social assistance, and so on.

(a) The most important special category is that of the *young offenders*. Acts committed by children under 15 years of age are as mentioned not punishable (sect. 15), but measures of care may be taken on the part of the child welfare authorities. As regards the age group 15–18 years, a charge is brought in relatively few cases. The Public Prosecutor will generally withdraw such a charge, in pursuance of section 30 of the Criminal Code, provided the Authorities responsible for children's welfare exercise supervision over the offender or place him in a special institution. In this respect the Code draws upon an administrative principle of long standing, and it is highly satisfactory that progress in this century has made it possible virtually to abolish the imprisonment of offenders under the age of 18.

Young offenders, between 15 and 21 years of age at the time of their offence, may be committed to a training establishment called youth prison (sect. 41). Here provisions for the Criminal Code have been influenced by the English Borstal system. An effort has been made to adopt the basic characteristics which in England account for the peculiar status of the Borstal system as the alternative to an ordinary prison. The chief and original institution is housed in a former country house called "Sobysogaard". It has excellent facilities for the general educational and vocational training. A second youth prison was established in 1954. There is no institution for girls. In practice, offenders under the age of 17 are rarely sent to a youth prison. The sentence is indeterminate, the term being between one and three years; in the case of recommitment because of non-observance of the conditions for release on licence, the term may be extended to a total of four years (sect. 42).

(b) Sections 16 and 17 of the Criminal Code deal with the important subject of the criminal responsibility of *mentally abnormal persons*. The system applied has in practice proved fully adequate. It permits the courts, to a wider extent than do the Criminal Codes of most other countries, to make an order for special treatment in lieu of punishment. In addition the provisions of the Code have stimulated close co-operation between the legal profession and the psychiatrists and largely averted that conflict between "legal" and "medical" views which arises so easily in this particular sphere.

The principal rule is found in sect. 16, dealing with the most pronounced states of mental abnormality, in particular *insanity* and *pronounced mental deficiency*. It is primarily for the psychiatrist to say whether at the time the offence was committed the condition of the accused was of that nature. It has not been desired, however, that the courts should be bound to exempt the offender from punishment where according to the medical report it is a case, say, of insanity. Under section 16, impunity also depends upon the answer to the question whether the defendent has been "irresponsible" which is a question for lawyers rather than doctors. The term "irresponsible" has not been intended to indicate a clearly defined requirement to the abnormal personality, and the Criminal Code imposes no rigid theoretical construction on the controversial concept of "irresponsibility". The term is used in order to emphasize that the final decision rests with the Court. If the evidence as to "insanity" so warrants, the Court *may* deem the accused to be "responsible" and punish him. This has been done in practice in some cases, in particular where persons who have committed financial frauds have been insane (e.g., suffering from a psychotic depression), but not so affected by the mental disease as to have been unable to carry on their business and in this connection make financial dispositions. In the vast majority of cases, however, the courts hold the accused to be irresponsible, if the psychiatrists have diagnosed a mental disorder which medically amounts to insanity. Persons who are pronounced mentally deficient are always deemed to be irresponsible.

In connection with insanity, sect. 16 also mentions "similar conditions". This addition means that the possibility of exempting an condition is one of "defective development, or impairment or disorders which in medical language are termed psychoses. Certain conditions falling outside this concept, but which have had a quite similar influence on the judgment and power to act of the person concerned, may justify exemption from criminal responsibility. In practice, however, this is of rare occurrence.

An important supplement to sect. 16 is given by the provision of sect. 17 (1). The section refers to persons whose more permanent condition is one of "defective development, or impairment or disturbance of their mental faculties". While sect. 16 is applicable also to abnormal conditions of short duration, provided they were present at the time the offence was committed, sect. 17 requires that the conditions shall be of some duration. Among the conditions covered by sect. 17 (but not by sect. 16) the most important are *ordinary mental deficiency* and *psychopathy*. Here, too, it is for the psychiatrists to find out if such a condition exists. The court has, however, to decide whether the accused may be considered "susceptible of influence through punishment". The question as to whether the mental abnormality shall justify exemption from punishment is thus decided by the court. According to court practice, account may be taken not only of the influence a punishment may have on the offender, but importance may be attributed also to other circumstances. If a psychopath has committed wilful homicide, a heavy prison sentence will often be

preferred for reasons of general prevention. If, conversely, a psychopath has committed a trifling offence, he will be sentenced to a short term of imprisonment because, in such cases, it is considered undesirable to submit the offender to the indeterminate sentence of detention in an institution for psychopaths. On the whole, however, the courts have made extensive use of sect. 17 and thus avoided the application of penalties which would be inappropriate to psychically abnormal persons. In addition to ordinary mental defectives and psychopaths, persons suffering from severe neuroses or from a state of deficiency owing to abuse of alcohol or narcotics may be exempted from punishment under sect. 17, and instead required to undergo some form of treatment likely to meet the purpose.

The measures to be applied to persons covered by sect. 16 or sect. 17 are indicated in sect. 70. In the choice of measures the regard to public safety shall be of primary importance. As a rule the nature of the abnormal condition will justify placement in an institution. However, the court may confine itself to, say, appointing a supervising guardian, or order psychiatric treatment in freedom; and, where an insanity has been completely cured, the court may take no measure. All in all, then, sect. 70 largely permits the courts to adapt the legal effect to the nature of the individual case. The measures dealt with in sect. 70 are indeterminate. Any alteration or cancellation of the measures is decided by the court.

The treatment and detention of insane and mentally deficient offenders fall to the ordinary hospital and public welfare services. In the case of criminal psychopaths, on the other hand, a special form of treatment and detention has been provided in Denmark, in the institution at Herstedvester (near Copenhagen), or in a second institution in Jutland. It is difficult in a few words to characterise the form of treatment that is applied here. The treatment takes account of the psychopathic type of the individual offender, and has largely been in the nature of experiment. Efforts are made to combine general psychiatric therapy and special forms of medical treatment with worktraining, instruction and social care. The end in view is a maturation and stabilisation of the psychopathic personality. An essential feature of this particular treatment is the application of release on parole, so as to maintain the contact between the offender and the officers of the institution.

(c) Against *persistent criminals* two forms of indeterminate detention may be applied: workhouse (sect. 62) and preventive detention (sect. 65). These measures are not penalties in the technical sense of the term, but are alternatives to punishment. They are chiefly intended for persons on whom previous sentences of imprisonment for a definite term have had no corrective effect and who are therefore supposed to be in need of penitentiary treatment through a long period of time. In addition to this consideration, the regard to public safety clearly stands out, especially in the case of preventive detention.

Workhouse is applied to, amongst others, a group of persons who are not particularly dangerous, but who have shown a constant inclination to lead an anti-social life marked by criminality (more particularly acquisitive offences) and in many cases also by habitual drunkenness. The period of detention is not less than one nor more than five years. Most inmates enjoy a fair measure of liberty and occupy their time in workshops or in farming.

Preventive detention is imposed in relatively few cases, on an average one or two a year. According to court practice it is required that the criminal tendencies of the accused should have been clearly ascertained through a number of previous sentences of imprisonment. A considerable number of those detained have pronounced psychopathic symptoms. The minimum period of detention is four years; no maximum is laid down. In practice, the average term of detention has been some seven years.

(d) One of the special groups of offenders who should preferably be submitted to treatment is that of the *alcoholics*. Under sect. 73 of the Criminal Code certain groups of drink addicts may be required to enter an inebriates' home for treatment. A more lenient measure is an order made under section 72 (1) requiring the offender not to drink or buy intoxicating liquor. If he disobeys this order he is liable to be dealt with in accordance with the provisions of section 138 (2) of the Code. A good many inebriates are detained in workhouse. None of these measures has proved fully satisfactory against offenders addicted to drink. During the last ten years, however, the treatment of the alcoholics seems to have been brought into more fruitful paths. It is now recog-

nized that penal policy in this particular field has to some extent been based on a superficial view of the causes of alcoholism and of the prospects of curing it. Habitual drunkenness and the criminality attaching to it should be viewed as part of the social and personal situation of the individual, and the means of treatment should be adapted accordingly. It rarely serves any purpose to institute measures directed against intemperance as an isolated phenomenon. The treatment should consist of a medical, psychological and social therapy. Attempts of this nature have been made in recent years, and the so-called "*antabuse*" treatment has attracted particular attention. Antabuse is a medicine invented by Danish scientists; it is taken in the form of pills which cause sickness if the patient subsequently tastes an intoxicant. The essential thing, however, is not cure in the traditional sense through the taking of the daily pill. The medicine should rather be considered as an aid to a psychological and social cure. The new forms of treatment are applied in freedom or in connection with commitment to prison or other institutions. It has been possible to fit them into the existing system of sanctions, inter alia as a condition for suspended sentence, release on parole, and conditional pardon.

(e) Mention has been made above of a number of measures against special groups of offenders. No measure has, however, contributed so much to reduce imprisonment as the *suspended sentence*, which has not been applied in Denmark for fifty years. About a third of all cases of violations of the Criminal Code result in a suspended sentence. The conditional suspension of punishment is applied in the form that is usual in continental countries: as a suspension of the execution of penalty. In including the imposition of a penalty, this form differs from the suspension of sentence that came into existence in Great Britain and the United States in the course of the 19th century, the most highly developed form of which is now the British probation system. Danish law, however, is not unfamiliar with the ideas underlying probation. Under sect 56 of the Criminal Code the suspended sentence may be subject to various conditions, e.g. supervision. Besides, it will be seen from sect. 56 (2) that importance is attached to pre-sentence social investigations, in order to ensure a careful selection for the suspension of the sentence. Both supervision and pre-sentence investigation are usually carried out by the Danish Welfare Society, a private organization which receives State subsidies. The welfare work is in rapid progress, the staff of full-time social workers being extended and greater importance given to their professional training.

(f) So far, no mention has been made of the types of *penalty*. There are three ordinary penalties: the fine and the two penalties involving deprivation of liberty, viz. simple detention and imprisonment, the latter being the normal penalty in the case of acquisition offences, sexual offences, arson, forgery, and a great number of other offences under the Criminal Code.[1] *Simple detention* is considered a milder form of the penalty involving deprivation of liberty. It is applied to some less grave violations of the Criminal Code (inter alia, certain offences of violence) and also in infringements of special Acts (e.g., motoring in intoxicated condition). The fixed legal minimum duration of simple detention is seven days and, in practice, its duration rarely exceeds two months.

The minimum duration of the *penalty of imprisonment* is 30 days. Sentences for a term of under four months are generally served in the local prison (like sentences of simple detention), long-term sentences in the so-called State prisons. Since the Second World War, the Prison Administration has made great efforts to improve the State prisons and the whole treatment of prisoners. A number of open and semi-open institutions have been established with only little prisonlike atmosphere, with a rather high degree of freedom in the daily life of the prisoners, and an extensive community in instruction, employment and recreation. A large proportion of the sentences of imprisonment of more than four months are served in the open and semi-open institutions, and regard is given to an adequate classification of the offenders by age, previous convictions, etc. At the same time, it has been possible to restrict the use of the old cell prisons from the 19th century. This whole development implies a trend away from the mere deprivation liberty under a strict and schematic adminis-

[1] The death penalty is provided only in respect of a few grave crimes (more particularly treason and murder) committed in time of war or occupation for the advancement of enemy interest and in other aggravating circumstances. These provisions are not included in the Criminal Code, but are found in a special Act of 1952.

trative system towards an individualising treatment of prisoners with the emphasis on instruction and vocational training, psychiatric and psychological treatment and, in particular, social care in connection with release on parole. Of course, the reforms are closely related to or directly inspired by the prison progress of other countries.

III. The Criminal Code is now over 25 years old. This is no great age for a Criminal Code: but these years have been so rich in experience and ideas of penal policy that it is legitimate to ask whether the Code still affords an adequate basis for the practical work. In all essentials, this question can be answered in the affirmative. There is no need today for any entirely new Criminal Code, but the last decade has called for amendments to particular provisions.

The need of reforms has been least in the Special Part of the Code. Only in one field has any major revision been necessary, and this is a field lying outside that of ordinary crime, viz. Chapters XII and XIII of the Criminal Code on offences against the State and the Supreme Authorities of the State. These Chapters have been amended by an Act of June 7, 1952. No radical amendments are likely to be made in any near future to the legal provisions relating to the more ordinary types of offence.

It is primarily the system of penal reaction that has held the interest of Danish criminalists in postwar years. An essential feature of the reform efforts in this field is that they have largely been inspired by collaboration between the Scandinavian countries. Sweden had already before 1939 commenced a gradual revision of its penal legislation. Denmark and Norway followed a similar course when, after 1945, it became possible to think of reforms in these countries. Problems of common interest have been discussed by the meetings, and congresses of the associations of Scandinavian criminalists, and by conferences which since 1948 have been held at regular intervals at the instance of the Scandinavian Ministers of Justice.

In 1950, a permanent *Criminal Law Commission* was charged with considering and making recommendations on a partial reform of the Criminal Code. The President of the Commission is Professor Stephan Hurwitz. Among the tasks that have been entrusted to the Commission are two which should be singled out for special mention.

In 1950 the Commission submitted a Report on the forfeiture of civil rights in consequence of punishment. On the basis of this Report an Act was passed in 1951 amending, inter alia, the text of ss. 78 and 79 of the Criminal Code. Formerly, convicted persons were largely precluded from exercising the rights otherwise belonging to citizens. They might often result in a penalty of imprisonment being, in point of fact, followed by a long-term additional punishment consisting in loss of franchise, of the right to trading licenses, game licenses, etc. The essence of the new Act is that, normally, punishment shall not entail such social disqualification. As will be seen from ss. 78 and 79 of the Criminal Code, this principle has been somewhat modified: on the whole, however, convicted persons are given a more unfavourable position than non-convicted persons only where this may be justified from rational considerations of penal policy.

Furthermore, in 1953, the Criminal Law Commission submitted a Report on suspended sentences. The proposals made by the Commission have not yet resulted in any amendment to the legal provisions. If the general lines of the proposals are followed, the provisions of Chapter VII of the Criminal Code will be somewhat changed: the end in view will be a further development of the application of supervision and similar requirements, and the ultimate result may well be a system very much like the English system of probation.

The trend of penal legislation depends on a variety of factors. In most countries a contrast between two tendencies in penal policy is obvious. Many criminalists are strongly in favour of a more extensive use of social, educational and medical treatment of offenders. Others are more inclined to stress the deterrent effect of punishment, advising caution in the application of measures likely to reduce the severity of the penal reaction. The opinion of the general public is usually strongly in favour of the latter thesis and suspicious of reforms that seem to err in the direction of leniency. In Denmark, too, there may be different opinions as to the measures to be applied: on the whole, however, there has been no difficulty in following a line of policy which increases the possibilities of individual treatment and resocialization, while it avoids sudden departures from the traditional course.

Fortunately, the general trend of crime since 1945 has not placed major obstacles in the way of legislative and administrative progress. The crime rate rose sharply during the war, but since the end of the war the number of offences in proportion to the population has on the whole been declining. Whatever will be the future conditions of penal policy, its further development will follow the trend indicated by the Criminal Code of 1930. New experience will be gained and proposals of reform will be critically examined, inter alia with a view to finding out whether the necessary financial, personal and institutional resources can be provided. International co-operation may also greatly contribute to this development. Our present system includes elements which are clearly the result of national experience, but also elements which are quite as obviously taken from a foreign pattern. In the Danish Criminal Code hereby presented in English translation you will meet with no codification of epoch-making or sensational theories for the prevention of crime and treatment of offenders; this will probably be evident already from these introductory remarks. On the other hand, you may find that the Code contributes to the international literature in this field by showing a system based on the efforts to create a happy combination of tradition, national experiments, and foreign patterns.

KNUD WAABEN.

[The Danish Criminal Code of April 15, 1930, as amended by later Acts]

General Part

CHAPTER I

INTRODUCTORY PROVISIONS

1. Only acts punishable under a statute or acts of entirely similar nature shall be punished. The same rule shall apply to the legal effects referred to in Chapters VIII and IX.

2. Unless otherwise provided, Chapters I to XI of this Act shall apply to all punishable offences.

CHAPTER II

CONDITIONS UNDER WHICH THE CRIMINAL LAW IS GENERALLY APPLIED

3. (1) Where the penal legislation in force at the time of the criminal proceedings in respect of any act differs from that in force at the time of commission of that act, any questions concerning the punishable nature of the act and the penalty to be inflicted shall be decided under the more recent Act: provided that the sentence may not be more severe than under the earlier Act. If the repeal of the Act is due to external conditions irrelevant to the guilt, the act shall be dealt with under the earlier Act.

(2) If in circumstances other than those provided for in the last sentence of subsection (1) an act ceases to be lawfully punishable, any penalty awarded, but not yet served for such act shall be remitted. The convicted person may demand that the question concerning the remission of the penalty be brought, at the instance of the Public Prosecutor, before the court which passed sentence in the first instance. The decision shall be made by court order.

4. (1) The question whether the punishable act shall have legal effects of the nature referred to in sections 30, 56 to 61, 70 to 77, or 79 of this Act shall be decided under the law in force at the time of the criminal proceedings.

(2) Unless otherwise provided, other legal consequences shall take effect only if provided for by the law in force at the time the act is committed.

(3) The provision of sect. 3, subsect. (2), of this Act shall likewise apply to legal effects other than punishment, provided such effects directly arise from the punishable nature of the act.

5. Where an aggravation of the penalty or other legal effects have been prescribed in the case of recidivism, decisions made under previous law shall be taken into account as if they had been made in conformity with the law under which the immediate act is to be dealt with.

6. (1) Under Danish criminal jurisdiction shall come acts committed (i) within the territory of the Danish State; or (ii) on board a Danish ship or plane being outside the territory recognised by international law as belonging

to any State; or (iii) on board a Danish ship or plane being within the territory recognised by international law as belonging to a foreign State, if committed by persons employed on the ship or plane or by passengers travelling on the ship or plane.

(2) The Minister of Justice shall decide to what extent acts committed on board a foreign ship or plane within Danish territory by and against any person employed on it or travelling on it as a passenger shall be brought before the courts.

7. Under Danish criminal jurisdiction shall also come acts committed outside the territory of the Danish State by a Danish national or by a person residing in that territory (i) where the act was committed outside the territory recognized by international law as belonging to any State; provided acts of such nature are subject to a penalty more severe than simple detention; (ii) where the act was committed within the territory of a foreign State, provided it is punishable also under the law in force in that territory.

8. (1) Under Danish criminal jurisdiction shall also come acts committed outside the territory of the Danish State, irrespective of the nationality of the perpetrator (i) where the act violates the independence, safety, Constitution or public authorities of the Danish State, the duties of an official to the State or such interests the legal protection of which depends on a personal connection with the Danish State; or (ii) where the act violates an obligation which the perpetrator is required by law to observe abroad or prejudices the performance of an official duty incumbent on him regarding a Danish ship or plane; or (iii) where an act committed outside the territory recognised by international law as belonging to any State violates a Danish national or a person residing within the territory of the Danish State, provided acts of such nature are subject to a penalty more severe than simple detention.

(2) In the circumstances referred to under paragraph (iii) of subsect. (1) of this section, the Chief Public Prosecutor shall decide whether or not an action shall be brought.

9. Where the punishable nature of an act depends on or is influenced by an actual or intended consequence, the act shall also be deemed to have been committed where the consequence has taken effect or has been intended to take effect.

10. (1) Where prosecution takes place in this country under the foregoing provisions, the decision concerning the penalty or other legal effects of the act shall be made under Danish law.

(2) Provided that, in the circumstances referred to in sect. 7 of this Act, the penalty to be inflicted in respect of an act committed within the territory recognised by international law as belonging to a foreign State shall not be more severe than that provided for by the law in force in that territory.

(3) In the cases referred to in sect. 7 of this Act, no prosecution may be proceeded within this country if the perpetrator has been finally acquitted in the State where the act was committed or if he has served the penalty inflicted or if the penalty has been remitted under the law of that State.

(4) If, otherwise, any person who is to be sentenced for an act in this country has already served his sentence elsewhere, this shall be taken into account by the court in such manner as to reduce the penalty commensurately or to remit it, as the case may be.

11. If a Danish national or a person residing in the Danish State has been punished in a foreign State for an act which under Danish law may entail loss or forfeiture of an office or profession or of any other right, such effect may take place in the course of a public action brought by the order of the Chief Public Prosecutor.

12. The application of the provisions of sections 6 to 8 of this Act shall be subject to the exceptions recognized by international law.

Chapter III

Conditions regarding liability to punishment

13. (1) Acts committed in self-defence are not punishable if they were necessary to resist or avert an imminent or incipient unlawful attack, provided that such acts do not manifestly exceed what is reasonable, having regard to the danger inherent in the attack, the person of the aggressor, or the social importance of the interests endangered by the attack.

(2) Provided that any person who exceeds the limit of lawful self-defence shall not be liable to punishment if his act could in fairness be excused by the fear or excitement brought about by the attack.

(3) Similar rules shall apply to acts necessary to enforce lawful orders in a rightful manner, to carry out a lawful apprehension, or to prevent the escape of a prisoner or a person committed to an institution.

14. An act normally punishable shall not be punished if it was necessary in order to avert impending damage to a person or property and if the offence can only be regarded as of relatively minor importance.

15. Acts committed by children under 15 years of age are not punishable.

16. Acts committed by persons being irresponsible owing to insanity or similar conditions or pronounced mental deficiency are not punishable.

17. (1) If, at the time of committing the punishable act, the more permanent condition of the perpetrator involved defective development, or impairment or disturbance of his mental faculties, including sexual abnormality, of a nature other than that indicated in sect. 16 of this Act, the court shall decide, on the basis of a medical report and all other available evidence, whether he may decide that a penalty invloving the deprivation of liberty inflicted on him

(2) If the court is satisfied that the accused is susceptible to punishment, it may decide that a penalty involving the deprivation of liberty inflicted on him shall be served in an institution or division of an institution intended for such persons. If appropriate, the Prison Commission may alter the decision as to where the penalty of imprisonment shall be served. If, during the term of imprisonment, it becomes evident that a continuation of such imprisonment will be useless or will be likely seriously to aggravate the condition of the convicted, then, at the request of the Director of the Prison Service, the case shall again be brought before the court which passed sentence in the last instance. This court shall decide, on the basis of a medical report, whether the penalty shall continue to be served or not.

(3) If a person in respect of whom preventive measures are taken under sect. 70 of this Act (cf. subsect. (1) of this section) for an offence committed by him has committed another offence, and if he is considered susceptible to punishment for offences of that nature, then, where the latter offence is of minor importance in relation to the offence in respect of which preventive measures are applied, the court may decide that no penalty shall be imposed.

18. Intoxication shall not preclude punishment being awarded, except where the perpetrator has acted while in an unconscious condition.

19. As regards the offences dealt with by this Act, acts which have been committed through negligence on the part of the perpetrator, shall not be punished, except where expressly provided. As regards other offences, the appropriate penal sanction shall apply, even where the offence has been committed through negligence, unless otherwise provided.

20. Where the statutory penalty, or aggravation of a penalty, refers to an intentional offence resulting in an unintentional effect, then that penalty shall take effect only where such consequence may be attributed to the negligence of the perpetrator or if he has failed to avert it to the best of his ability, after becoming aware of the danger.

Chapter IV

Attempt and complicity

21. (1) Acts aiming at promoting or carrying out an offence shall be punished as attempts, when the offence is not accomplished.

(2) The penalty prescribed for the offence may be mitigated in the case of attempts, particularly where the attempt gives evidence of little strength or persistence in the criminal intention.

(3) Unless otherwise provided, attempts shall be punished only where the offence is subject to a penalty more severe than simple detention.

22. Attempts shall not be punished if, spontaneously and not because of extraneous or independent obstacles against either completing the wrongful action or achieving his intention, the perpetrator desists from carrying further his intended act, or prevents its accomplishment or acts in such manner that his intervention would have prevented its accomplishment, even if, without his knowledge, the act had not failed in its purpose or otherwise been averted.

23. (1) The penalty in respect of an offence shall apply to any person who has contributed to the execution of the wrongful action by instigation, advice

or action. The penalty may be mitigated in respect of a person who has intended to give assistance of minor importance only or to strengthen an intention already existing and, again, if the offence has not been accomplished or if an intended assistance has failed.

(2) Similarly, the penalty may be mitigated in respect of a person who has contributed to the breach of a duty in a special relationship in which he himself has no part.

(3) Unless otherwise provided, the penalty for participation in offences that are not subject to a penalty more severe than simple detention shall not take effect if the accomplice had intended to give an assistance of minor importance only or to strengthen an intention already existing or, again, if his own complicity is due to negligence.

24. The accomplice shall not be punished if, under the conditions laid down in sect. 22 of this Act, he prevents the accomplishment of the punishable act or acts in such manner as would have prevented its accomplishment, even if, without his knowledge, the act had not failed in its purpose or otherwise been averted.

Chapter V

Prosecution

25. Unless otherwise provided, punishable acts shall be subject to public prosecution.

26. (1) Private prosecution or requests for public prosecution may be initiated by the injured party. If the latter is a minor, the provisions of sect. 257 of the Administration of Justice Act shall apply.

(2) If the injured party has died or if an act directed against a deceased is punishable, the right to initiate private prosecution or to request public prosecution shall lie with the spouse, the parents, the children or the brothers or sisters of the deceased.

27. A request for public prosecution that excludes any accomplice from prosecution shall be refused, unless the public prosecutor approves of such exclusion. If the request concerns only some of the accused or suspected persons without the exclusion of accomplices, if any, the public prosecutor may extend the prosecution to the latter, unless the interested party, on enquiry, opposes it.

28. If the person on whose request public prosecution has been taken withdraws his request, prior to the pronouncement of sentence or the jury's verdict, the prosecution shall be discontinued, unless the public prosecutor is satisfied that general considerations call for its continuation.

29. (1) The right to initiate private prosecution or to request public prosecution shall be forfeited if the prosecution has not been initiated or the request not submitted before the expiration of three months as from the date on which the interested party received information as to who is the suspected perpetrator. If there are more than one guilty person, the time limit shall be reckoned separately for each. If the time allowed for requesting public prosecution has been exceeded in respect of one of the accused or suspected persons, but not in respect of the others, it shall be for the public prosecutor to decide whether a request for prosecution against those persons shall be accepted. Further, the right to initiate private prosecution or to request public prosecution shall be forfeited at the expiration of three months after the death of the injured party.

(2) If a private prosecution does not result in a final judgment, the time limit shall continue to run, account not being taken of the time during which the proceedings have been carried on.

30. (1) In respect of offences committed by persons between fifteen and eighteen years of age, the public prosecutor may decide that proceedings shall be stayed on condition that the accused person be placed under the care of the child welfare authorities or, in exceptional cases, be entrusted, for a specified period that may continue until such person attains the 21st anniversary of his birthday, to the care of a trustworthy person or institution. Before the public prosecutor decides on the conditions under which the prosecution shall be stayed, a report shall normally be obtained from the child welfare authorities concerned.

(2) The prosecution may be resumed if, while under the supervision referred to above, the person concerned commits another offence or a serious contravention of the regulations to be observed by him.

Chapter VI

Penalties

31. The ordinary penalties shall be imprisonment, simple detention, or fine.

32. Where a penalty involving the deprivation of liberty is of shorter duration than three months, it shall be fixed in days; otherwise in months or years.

33. The penalty of imprisonment shall be inflicted for life or for a specified period covering not less than 30 days, nor more than 16 years.

34. (1) The extent to which the penalty of imprisonment shall be served in solitary confinement or in association shall be laid down by Royal Order: provided that short terms of imprisonment shall normally be served in solitary confinement and long terms of imprisonment in association.

(2) Even where the penalty shall be served in association, the prisoner may be kept in solitary confinement during the first and the last period of his term of imprisonment.

(3) If the penalty shall be served in solitary confinement, the prisoner shall be kept in isolation day and night: provided that, where divine service, classes, lectures, physical exercise and walking exercise in the courtyard are concerned, such exceptions may be made to the isolation as may be warranted by the prisoner's age or condition of health or by other circumstances. Further exceptions may be granted for certain prisoners if special circumstances make this necessary.

(4) Even where the penalty shall be served in association, the prisoner shall be isolated during the night, apart from periods spent outside the grounds of the penal institution, provided his condition of health permits it, and he may be kept isolated during divine service, classes, preparation for lessons and walking exercise in the courtyard as well as during leisure-time and meals.

35. (1) Prisoners shall be required to carry out work imposed on them under the Royal Order issued for this purpose, which Order shall also contain detailed rules governing the earnings of prisoners. Such earnings may be diverted to compensate for any damage or expenses for which the prisoner becomes responsible during his term of imprisonment.

(2) Open-air work outside the grounds of the penal institution may take place under the direction and supervision of the institution.

36. The diet of prisoners shall be in accordance with regulations drawn up by the Minister of Justice. Prisoners shall not be allowed to procure or receive for their diet or for other purposes anything other than that which is permitted by Orders or Regulations.

37. (1) Prisoners whose state of health is impaired by drunkenness may, if owing to their condition the penalty cannot be considered to have the intended effect on them, be transferred by the Prison Commission, on the recommendation of the governing body of the penal institution, to a workhouse, either temporarily or for the remaining term of their penalty (cf. sect. 64 of this Act).

(2) Prisoners whose term of imprisonment amounts to eight years or more may, after the expiration of a period equal to one-half of their term, and provided that this period may not be less than five years, be transferred by the Prison Commission, on the recommendation of the governing body of the institution, to a preventive detention centre (cf. sect. 67 of this Act) for the remaining term of their penalty. As far as life prisoners are concerned, such transfer may take place after the expiration of 16 years.

38. (1) After the expiration of two-thirds of the term of imprisonment, provided that this period may not be less than nine months, the Minister of Justice shall decide, on the recommendation of the governing body of the institution, whether the prisoner shall be released on parole.

(2) Release on parole shall be on condition that this measure is warrantable, having regard to the personal conditions of the prisoner; that appropriate work has been provided for him or that his placement and maintenance have otherwise been adequately secured; and that he declares himself willing to comply with the conditions of such release.

(3) Release on parole may, on the decision of the Minister of Justice, take place earlier than stated in subsect. (1) of this section, where according to the available evidence, including the report on the prisoner submitted by the institution, such release is considered warrantable in the individual case. Release on parole may not take place until the prisoner has served one-half of his term of imprisonment, subject to a minimum of four months.

(4) At his release on parole the person concerned shall normally be placed under supervision by an institution established for that purpose or by a person who is qualified for that task and has accepted it. In any event, such release shall be allowed on condition that the person concerned leads a regular and law-abiding life and that he follows such directions as may be given to him by his supervisor and complies with any other conditions imposed on him.

39. (1) When released on parole, the prisoner shall receive a passport reciting the conditions under which his release is valid and declaring that, if these conditions are not observed, he will be recommitted to serve the unexpired term of his sentence.

(2) The Minister of Justice shall decide whether the released person shall be recommitted to prison. If recommittal takes place, the remaining part of the penalty shall be served as a new penalty which, if after his release he has been sentenced to another penalty of the same kind, shall be added to the latter. If the latter penalty is simple detention, the authority responsible for the execution of sentence shall convert this penalty to imprisonment under the provisions of sect. 90 of this Act.

40. (1) The period of parole ends with the expiration of the remaining term of imprisonment: but in no case before the end of two years.

(2) If, at the expiration of the period of parole, no decision has been made concerning recommitment, the penalty shall be considered to have been served.

41. (1) Where a person between 15 and 21 years of age makes himself liable to imprisonment for an offence which can only be regarded as the result of criminal tendencies, idle inclinations, or association with bad companions, he shall be sentenced to commitment to youth prison, if the court is satisfied that measures of education and instruction for some length of time will meet the purpose.

(2) Such penalty shall be served in an institution or, in respect of women, in a division of an institution, established for the purpose, which either belongs to or is under the supervision of the State.

42. (1) Persons sentenced to commitment to youth prison may be detained in such prison for not more than three years, subject to the provisions of subsect. (4) of this section.

(2) At the expiration of one year after commitment, the Prison Commission shall decide, on the recommendation of the governing body of the prison, whether or not the prisoner shall be released. If the Prison Commission decides that the person concerned shall not be released the question shall be reconsidered at the expiration of the following year.

(3) When the prisoner is released, he shall continue, for a period to be fixed by the Prison Commission, to be under a supervision ordered by the Prison Commission in conformity with sect. 38, subsect. (4), of this Act, and during that period he shall be bound to observe the directions prescribed for him under the said provision.

(4) If he should fail to observe the conditions so prescribed, the Prison Commission shall decide whether or not he shall be recommitted. A person who has been recommitted may, on the decision of the Prison Commission, be detained in youth prison for a period exceeding the term of penalty provided for in subsect. (1) of this section by not more than one year.

(5) If a charge is brought against the parolee for a punishable offence, the Prison Commission shall be consulted as to whether conviction for the offence will result in recommittal. If so, the court may, with the consent of the Public Prosecutor, confine itself to decide the question of guilt.

(6) The period of supervision referred to in subsect. (3) of this section shall not exceed four years as from the date of the first commitment to youth prison: provided that, when after recommitment the prisoner is released again, the supervision may continue for one year as from the date of the later release.

(7) The provision of sect. 40, subsect. (2), of this Act shall apply in like manner to this section.

43. (1) Royal Order shall lay down the extent to which periods spent in youth prison shall be served in solitary confinement or in association.

(2) Particular importance shall be attached to the mental and physical development of the prisoner while serving his penalty, through instruction, physical exercise and the execution of open-air work, as well as to his training in an occupation which will enable him to earn his living after release.

(3) If it appears that a prisoner has a bad influence on the other prisoners or is, in general, unamenable to treatment in association with the latter, he may be transferred to a special division separated from the juvenile prison proper.

44. (1) Unless otherwise provided, the penalty of simple detention shall be imposed for not less than seven days, nor more than two years. The penalty shall be served in solitary confinement, subject to the exceptions and modifications appropriate to the prisoner's age or state of health: provided that, where under sect. 90 of this Act a penalty of simple detention is inflicted for a period exceeding two years, the Minister of Justice may decide that the penalty shall be served, in whole or in part, in association.

(2) Prisoners undergoing detention may not be accommodated with other persons except those also serving sentences of simple detention. Their diet shall not be limited to the ordinary fare in prisons. Within the limits set by the maintenance of proper order in the prison, prisoners shall be entitled to procure what they want for their personal use and for the furnishing of their cell.

(3) Prisoners shall be entitled to find work compatible with the safety and good order of the prison, the earnings from which work shall be paid to the prisoner. In case a prisoner does not find work himself, he shall be required, against remuneration, to carry out such work appropriate to his standard of education and occupation as is considered necessary to keep him reasonably employed.

45. Prisoners may not be employed at work injurious to health, and they shall be insured against the consequences of accidents. Detailed rules for the application of the latter provision, including the payment and administration of benefits may be provided by Royal Order.

46. (1) The period during which a prisoner is in hospital shall be included in the term of his penalty, except when the hospital treatment is attributable to his own conduct during the period of his penalty.

(2) The period during which a prisoner is committed to a special cell as a disciplinary measure or the period until an escaped prisoner has been recommitted shall not be included as part of the penalty itself.

47. (1) The following disciplinary punishments may, under specified rules provided by Royal Order, be applied to prisoners serving a penalty:

(i) Deprivation of privileges granted by Orders or Regulations to prisoners whose conduct is satisfactory, such as the degrading to a lower stage; or

(ii) Restriction of diet for not more than 15 days: provided that, where the prisoner is restricted to bread and water, this punishment may be applied only to persons over 18 years of age and, in respect of prisoners serving a penalty of simple detention, for not more than five days; or

(iii) Exclusion from work for not more than 14 days; or

(iv) Commitment to a special cell for not more than 60 days or, for prisoners serving a penalty of imprisonment, not more than three months.

Further, in respect of prisoners serving a penalty of simple detention:

(v) Deprivation of the privilege of providing for their own food for not more than 30 days, or, in respect of prisoners serving a penalty of imprisonment:

(vi) Deprivation of earnings.

(2) Several disciplinary punishments may be applied at the same time.

(3) The punishment indicated in paragraph (ii) of subsect. (1), of this section may be applied only where, on the basis of a medical report, it is considered to be without detriment to the physical or mental condition of the prisoner.

(4) The prolongation of the term of a penalty involved by commitment to a special cell may not, except with the consent of the Minister of Justice, exceed one-third of the term of the penalty and in no cases one-half of the term.

48. Straight-jacket, handcuffs, commitment to maximum security cell or other safety measures may, to the extent required by the circumstances, be utilised with a view to averting assault, repressing violent resistance or preventing escape. Commitment to maximum security cell for a period exceeding six months shall be ordered only with the consent of the Minister of Justice.

49. Detailed provisions relating to the execution of the sentences of imprisonment, detention in youth prison or simple detention shall be laid down by provided by Royal Order, be applied to prisoners serving a penalty:

50. (1) Fines imposed under this Act shall accrue to the Exchequer.

(2) Fines as a penalty supplementary to other forms of penalty may be imposed in the case of offences committed for the purposes of gain.

51. (1) Where under this Act a fine is imposed or accepted in court, the penalty shall be fixed in the form of day-fines. Their number shall be fixed at not less than one, nor more than 60, having regard to the nature of the offence and the circumstances referred to in sect. 80 of this Act. The amount of the single daily fine or contribution shall be fixed at a sum corresponding to the average daily earnings of the person concerned: provided that, in fixing the amount, account should be taken of the living conditions of the convicted person, including his capital resources, family responsibilities or other circumstances affecting his capacity to pay. The daily fine or contribution shall in no case be fixed at an amount lower than two kroner.

(2) Where a fine shall be imposed in respect of an offence by which the person concerned obtained or intended to obtain a considerable economic profit for himself or others, and where the application of day-fines will result in the penalty being fixed at a substantially lower amount than is deemed reasonable, having regard to the amount of the profit that is or might have been obtained by the offence, the court may award the penalty of a fine other than day-fines.

(3) In fixing other fines, special consideration shall be given, within the limits relative to the nature of the offence and to the circumstances referred to in sect. 80 of this Act, to the offender's capacity to pay. Such fines shall in no case be fixed at an amount lower than four kroner.

(4) The extent to which the provisions concerning day-fines laid down in this Act shall apply to the fixing of fines for infringements of other Acts shall be provided by law. In the case of Acts where the application of day-fines is of minor importance, such provision may be made by Royal Order, after previous consultation between the Minister of Justice and any other Minister concerned.

52. (1) The court may fix a time limit of not more than three months for the payment of a fine.

(2) Payment by instalments may be allowed by the Police.

(3) If a fine is not paid in due time, it shall be recovered by distraint, unless the Police are satisfied that recovery is not possible or that it would seriously prejudice the living conditions of the convicted.

(4) In the absence of special legal provision, a fine shall not be recoverable from the estate of the convicted after his death or from any person other than the convicted.

53. If a fine cannot be recovered, it shall be replaced by a penalty of simple detention or imprisonment.

54. (1) A fine imposed by or accepted before a court is replaceable by a penalty to be served under the provisions relating to simple detention: provided that, if the person concerned in the course of the preceding five years has served a penalty involving the deprivation of liberty more severe than simple detention or if he has served, more than once, an alternative penalty in default of payment of a fine, a penalty of imprisonment may be applied. Simultaneously with fixing the fine, the court shall make a decision concerning the nature of the alternative penalty and its duration. Where the fine has been fixed in the form of a day-fine, it shall, in the calculation of the alternative penalty, be taken into account that one day's simple detention or imprisonment shall be equal to one day-fine: provided that the alternative penalty may in no case be less than two days. If the fine has been fixed otherwise, the alternative penalty shall in no case be less than two days nor more than sixty days: provided that, in special cases, the alternative penalty may be increased to a maximum of nine months.

(2) Where a fine has been added to a penalty involving the deprivation of liberty, the alternative penalty in default of payment of a fine shall be of the same nature as the principal penalty and shall be served, the time of its commencement permitting, in continuation of the latter.

(3) If part of the fine has been paid, the alternative penalty shall be proportionately reduced: provided that part of a day shall be counted as a whole day and that the alternative penalty shall in no case be reduced below the minimum duration referred to above. If part of the alternative penalty has been served and if the convicted offers to pay the remaining part of the fine, account shall be taken, in calculating the latter, only of the whole days during which the alternative penalty has been served.

55. In default of payment of a fine fixed otherwise than provided for in sect. 54 of this Act, a punishment shall be served under the provisions governing the penalty of simple detention:

In respect of a sum amounting to not more than 60 kroner: one day for each 6 kroner;

In respect of the additional amount, not exceeding 400 kroner: one day for each 10 kroner;

In respect of the additional amount, not exceeding 4,000 kroner: one day for each 50 kroner;

In respect of the remaining amount: one day for each 100 kroner;

Provided that the maximum and minimum limits laid down in sect. 54 shall be observed. When calculating the alternative penalty account shall be taken only of that portion of the fine which is equivalent to full days of simple detention.

Chapter VII

SUSPENDED SENTENCES

56. (1) Where the penalty imposed does not exceed a fine, simple detention for two years or imprisonment for one year, the terms of the sentence may provide that its execution shall be suspended in such manner that it shall be remitted at the expiration of a probation period to be fixed by the court, provided that the convicted satisfies the conditions laid down by law and any other conditions prescribed by or in the sentence. The probation period shall be not less than two years nor more than five years, as from the final promulgation of the sentence. During this period or part of it, the convicted shall be subject to supervision, as specified in the sentence, except where this is considered inappropriate in the circumstances.

(2) In cases likely to result in a suspended sentence, a special enquiry should be made for the purpose of providing information on the former career and present circumstances of the accused in home, school and employment, on his physical and mental condition and on any other circumstances likely to be of importance in deciding the case. If possible and desirable, this enquiry shall be made by an institution responsible for the supervision of probationers. If so, this institution shall be informed as soon as possible of the case by the public prosecutor and shall be made cognizant of any relevant information already available as a result of police enquiries. It shall be kept informed of the time of the court sittings during which the case is to be tried and shall be entitled to be represented even in camera.

57. Where the convicted is guilty of a punishable offence in respect of which court proceedings have been instituted against him before the expiration of the probation period, the suspended sentence shall be carried out in such manner that one penalty shall be inflicted in respect of both offences: provided that, if the new offence was committed through negligence or the penalty to be inflicted in respect of that offence does not exceed that of a fine or simple detention, the court may maintain the suspension of the execution of the former penalty or, if warranted by special circumstances, may decide that the execution of a combined penalty in respect of both offences shall be suspended.

58. The penalty shall be served where a condition prescribed in the sentence has not been observed, except in cases where such non-observance is due to circumstances beyond the control of the convicted: provided that, if the convicted so requests, the Public Prosecutor shall bring the case before the court which passed sentence in the first instance or, subject to the consent of the convicted, before the court of first instance in the jurisdiction where he is domiciled or resident. The court shall then decide whether the penalty shall be served or whether the suspension shall be maintained on the original or on modified conditions. There shall be no right of appeal against such decision, except with the permission of the Minister of Justice.

59. If, before the expiration of the probation period, proceedings are instituted against a probationer in respect of an offence committed prior to the pronouncement of the first sentence and resulting in the imposition of an additional penalty under sect. 89 of this Act, the court shall impose on him a combined penalty covering both offences and shall decide, subject to the provisions of sect. 56 of this Act, whether the sentence shall be executed or whether the execution shall be suspended once more. In the latter case, a new probation period shall be fixed.

60. If, after the expiration of the probation period, proceedings are instituted in respect of an offence committed after the suspended sentence as such has been promulgated, but before the probation period has expired, the non-observance of any condition governing the remission of the penalty shall be considered as an aggravating circumstance in fixing the penalty in respect of that offence.

61. (1) If, under the above provisions, the penalty inflicted is not served, it shall be deemed to be remitted and, apart from the case referred to in sect. 60 of this Act, the sentence shall not be counted as a conviction in respect of any future recidivism.

(2) Unless otherwise provided, any legal consequences following the infliction of a penalty shall have effect only where a suspended sentence is later put into execution.

Chapter VIII

Workhouse and Preventive Detention

62. A person may be committed to a workhouse in lieu of imprisonment—

(i) If, after serving two sentences of imprisonment for offences against property or for vagrancy or having been committed to a workhouse, he is found guilty, within three years of his last final release, of one of the offences referred to, provided that such offences committed can only be regarded as being due to idle or irregular habits, except where considerations of public safety require the application of preventive detention under sect. 65 of this Act;

(ii) If, after serving three sentences for begging or having been committed to a workhouse, he is found guilty of begging within two years of his last final release, provided the available evidence marks him out as a professional or habitual offender, except where considerations of public safety require the application of preventive detention under sect. 65 of this Act;

(iii) If, after serving a term of imprisonment in respect of one of the offences referred to in Chapter XXIV or having been committed to a workhouse, he is found guilty of any such offence within three years of his final release, provided his past record shows that he has a tendency to commit offences of that nature, except where considerations of public safety require the application of preventive detention under sect. 65 of this Act;

(iv) If he has committed an offence under the influence of intoxicants, provided he is deemed to be addicted to drinking;

(v) If, having been punished under sect. 256 of this Act, he is found guilty once more of contravening that provision.

63. (1) No person who has been sentenced to workhouse may be released until the expiration of one year as from the date of commitment or be retained in workhouse for a period exceeding five years. If the governing body of the institution considers that he should be released at the expiration of one year, the decision shall be made by the Prison Commission. At the expiration of two years or, in the case of repeated commitment, three years, the Prison Commission shall decide, on the recommendation of the governing body of the institution, whether the convicted shall remain in the workhouse. If so, the question shall be reconsidered and a new decision made at the expiration of each period of one year as from the commitment and until the time limit of five years has expired. Except as provided above, the question of release is not remissible to the Prison Commission.

(2) The Prison Commission shall decide whether release shall take place without conditions or on parole, and shall fix the period of parole at not less than one, nor more than three years. The provisions of sections 38, subsect. (2) and (4), 39, subsect. (1), 40, subsect. (2), and 42, subsect. (5), of this Act shall apply. Decisions concerning recommittal shall be made by the Prison Commission.

(3) The foregoing provisions shall not apply to prisoners transferred to a workhouse under sect. 37, subsect. (1), of this Act.

(4) The provisions of sect. 46 of this Act shall apply in like manner to persons committed to a workhouse.

64. The sentence of commitment to a workhouse shall be served in an institution or division of an institution established for the purpose and belonging to or being under supervision of the State. Persons committed to a workhouse shall be liable to work under rules specified by Royal Order. Open-air work

shall be applied to the maximum extent. The provisions of sect. 35, subsect. (1), of this Act shall apply also to this section. The treatment shall not be more severe than required by the exigencies of discipline and the obligation to work. The governing body of the workhouse may grant leave of absence, to a limited extent, to inmates who have deserved it by good behaviour.

65. (1) Where a person who has served a term of imprisonment for not less than two years in respect of one of the offences referred to in Chapter XXIV or under two sentences, or who has been retained in workhouse for the same period, becomes liable to imprisonment again, and where the available evidence marks him out as a professional or habitual offender, the court may, if it deems it necessary having regard to public safety, sentence him to preventive detention, as an alternative to punishment. (2) Penalties involving the deprivation of liberty and of a nature similar to imprisonment which have been served abroad may, in the circumstances, be recognized as equivalent to imprisonment.

66. (1) Persons sentenced to preventive detention may not be released until after the expiration of four years after committal. At the expiration of four years the Prison Commission shall decide whether release shall take place. Release shall take place on parole under the provisions of sections 38, subsect. (2) and (4), 39, subsect. (1), and 40, subsect. (2), of this Act. The period of parole, which shall be not less than two years, shall be determined by the Prison Commission, which is also responsible for deciding any question of recommitment. The provision of sect. 42, subsect. (5), of this Act shall apply in like manner. In case of non-release, the question may be reconsidered only after the expiration of two years.

(2) Where a person has been detained in preventive detention for twenty years, he shall be released, unless this is considered dangerous by the Prison Commission. In the latter case, the question of his remaining in the preventive detention centre shall be brought before the High Court within the jurisdiction of which that centre is situated. The decision shall be made by court order. If the court decides that he shall remain in the preventive detention centre, the question shall be brought before the court again every five years. Where release is granted after the expiration of twenty years or more, release shall be without conditions.

(3) The above provisions shall not apply to prisoners transferred to preventive detention under sect. 37, subsect. (2), of this Act.

(4) The provisions of sect. 46 of this Act shall apply in like manner to persons subject to preventive detention.

67. The sentence of preventive detention shall be served in a State institution established for the purpose or in a division of such an institution, as far as men are concerned, and, by women, in a workhouse, subject to the provisions of sect. 66 of this Act. As regards the obligation to work, earnings and treatment, the provisions of sect. 64 of this Act shall apply in like manner, with due regard to the greater risk of danger from persons subject to preventive detention. Leaves of absence shall not be permissible.

68. Detailed provisions governing the treatment of persons sentenced to workhouse or preventive detention shall be laid down by Royal Order, which shall also provide for disciplinary measures corresponding to those of sect. 47 of this Act. Sect. 48 of this Act shall apply in like manner to such persons.

69. If a person committed to workhouse or to a preventive detention centre incurs a penalty involving the deprivation of liberty, his stay in the workhouse or the centre shall be temporarily in abeyance for the period while serving his penalty.

Chapter IX

Other Legal Effects of a Punishable Act

70. (1) Where an accused is acquitted under sect. 16 of this Act or where punishment is considered inapplicable under sect. 17 of this Act, while having regard to public safety it is deemed necessary that other measures be applied to him, the court shall decide on the nature of such measures. If public safety is unlikely to be guaranteed by imposing less rigorous measures, such as sureties, directions as to or prohibition against residence in a particular place, orders of the nature dealt with in sect. 72 of this Act, appointment of a supervisor or relegation to a state of minority, the person concerned shall be placed in a mental hospital, an institution for feeble-minded or other curative institu-

tion, an asylum for inebriates or in a special detention centre. Within the limits set by the court, the competent administrative authority shall decide upon any further arrangements that may be required by such measures.

(2) Where the accused is likely to be sentenced to placement in a hospital or an institution, the court may appoint a supervising guardian for him, if possible one of his near relatives, who is qualified for that task and has accepted it. The supervising guardian shall, on the one hand, assist the accused during the proceedings together with the counsel for the defence and, on the other hand, keep himself informed of his condition and see to it that his stay in the hospital or the institution be not extended beyond what is necessary.

(3) At the instance of the Public Prosecutor, of the director of the institution concerned or of the supervising guardian, the court which passed sentence in the first instance may at any time alter the earlier decision made concerning the nature of the measure or may, on the basis of a medical report, cancel it temporarily or absolutely. If a request on the part of the supervising guardian for cancelling or modifying the measures of security is not allowed by the court, the supervising guardian may submit a second request only after the expiration of one year: provided that, if warranted by special circumstances, such a request may be submitted at the expiration of not less than six months.

71. When the perpetrator of a punishable act, after carrying it out but before having sentence passed on him, becomes more seriously affected by the conditions referred to in sect. 16 or sect. 17 of this Act, the court shall decide whether a penalty shall be inflicted or whether the penalty incurred shall be remitted. If deemed necessary, having regard to public safety, the court shall provide in the sentence that measures in conformity with the provisions of sect. 70 of this Act shall be applied in lieu of punishment or until the punishment can be carried out.

72. (1) Where a person is sentenced to a penalty involving the deprivation of liberty in respect of an offence covered by this Act, and if the court is satisfied that the offence has been committed under the influence of intoxicants, the convicted may be ordered by the court not to taste or buy intoxicants, on pain of being dealt with under the provision of sect. 138, subsect. (2), of this Act, for a specified period not exceeding five years as from his final release; a similar order may be made if the person concerned is acquitted under sect. 18 of this Act, where a penalty involving the deprivation of liberty would otherwise have been incurred. If, moreover, the person concerned is regarded as being addicted to intoxicants, such an order shall be made in all cases by the court.

(2) The Police shall as far as possible instruct restaurant keepers, tradesmen and retailers, on pain of liability to sect. 138, subsect. (3), of this Act, not to serve, sell or distribute intoxicants to person convicted under subsect. (1) of this section.

73. Where it appears from a medical report and other available evidence that any person covered by sect. 72, subsect. (1), of this Act or any person liable to punishment under sect. 138, subsect. (1) or (2), of this Act is addicted to intoxicants, it may be provided in the sentence that he shall be placed, after the penalty has been served or in the case of suspended sentence, immediately, in a curative institution for inebriates, if necessary in a public institution or division of an institution established for that particular purpose, until he can be regarded as having been cured. The maximum period of such detention shall be fixed in the sentence at 18 months, or in the case of recidivism at three years. If, prior to the expiration of the specified period, the person concerned is deemed to be cured or if the commitment appears to be ineffective, the Minister of Justice shall, on the recommendation of the governing body of the institution and on the basis of a medical report, decide whether the detention shall be discontinued.

74. Provisions may be made by Royal Order concerning the treatment of the persons detained in an institution under sect. 70 or sect. 73 of this Act concerning, inter alia, their employment at appropriate work.

75. If a person threatens death, fire or other misdeed, and if punishment is precluded or is not considered to afford adequate safety, the court may by a sentence passed after trial initiated by public prosecution, at the request of the person threatened or, if general considerations so require, without such request, order him to comply with the measures which the court finds necessary for obviating the apprehended menace and, if necessary, decide that he shall

be taken into custody; if so, the court shall also decide whether the detention shall take place under the provisions governing arrest or in one of the institutions referred to in ss. 64, 67, 70 or 73 of this Act. The orders made or the measures taken may be rescinded by the Public Prosecutor if he deems it unnecessary to maintain them and if the person threatened agrees, or otherwise by a decision of the court which passed sentence in the first instance. At the request of the convicted, the case shall be brought before the court again, unless the Public Prosecutor is satisfied that the situation is exactly the same and if less than one year has passed after the promulgation of sentence or of a subsequent judicial decision.

76. (1) Where a foreigner, who during the last five years has not been permanently resident within the territory of the Danish State, is sentenced to imprisonment for two years or more, the court shall, except where special circumstances militate against it, order him to be expelled from the Kingdom after he has served his penalty. In other cases, where a foreigner is sentenced to imprisonment, the court may make such order, if appropriate in the circumstances.

(2) Prior to his expulsion, the convicted shall be notified of the criminal liability involved in any unlawful return, and this notification shall be entered in the records of the Police.

77. (1) Unless otherwise expressly provided, the court may decide that the following objects shall be confiscated for the benefit of the Exchequer:

(i) Objects produced in pursuance of a punishable act or which have been used or intended to be used for an intentional offense, provided they belong to any of the persons responsible for the act; or

(ii) Objects supposed to be intended to serve a criminal purpose, where their confiscation is deemed necessary, having regard to public safety; or

(iii) The profit gained by a punishable act, provided no person has a legal claim on it, or an amount deemed to be equivalent to such profit.

(2) The Police shall decide on the use to be made of the objects confiscated under paragraph (ii) of subsect. (1) of this section. In other cases, the objects or money confiscated shall, if any person has suffered damage through the punishable act, and if compensation cannot otherwise be recovered from the guilty person, be applied to meet any claim for compensation, and this claim takes precedence over the claims of the State.

(3) If an association is dissolved by judgment, the capital of the association shall be confiscated for the benefit of the Exchequer, and the State shall take charge of the documents, protocols, etc., of the association.

78. (1) A punishable offense shall not involve the suspension of civil rights, including also the right to carry on a business under an ordinary license or a maritime license.

(2) Provided that the person who has been convicted of a punishable offense may be debarred from carrying on a business requiring a special public authorization or permission, if the offense committed carries with it an obvious risk of abuse of the position or the occupation concerned.

(3) The question whether the offense committed implies an objection to carrying on a business of the nature referred to in subsect. (2) of this section shall, at the request of the person whose application for such authorization or approval has been refused or of any competent authority, be brought by the Public Prosecutor before the municipal court which made the decision or by which the case would have been tried if it had been decided by a municipal court. The question shall be decided by court order. If, according to the decision, the person concerned shall not be allowed to carry on his business, the question may be brought before the court again at the expiration of not less than two years. Authorization or permission may be given by the competent authority, also before the expiration of this time limit.

79. (1) A person carrying on one of the undertakings referred to in sect. 78, subsect. (2), of this Act may, on conviction of a punishable offense, be deprived of the right to continue to carry on the business concerned or to carry it on under certain forms if the offense committed carries with it an obvious risk of abuse of the position. If warranted by special circumstances, the same shall apply to the carrying on of other forms of business. The deprivation of such a right shall be made for a period of not less than one nor more than five years, as from the date of the final sentence, or for the time being; in the latter case, the question as to whether the person concerned shall continue to

be excluded from carrying on the business may, at the expiration of five years, be brought before the court which made the last decision concerning the deprivation of the right, subject to the provisions of sect. 78, subsect. (3), of this Act.

(2) Pending the decision of the case referred to in subsect. (1), first sentence, of this section the court may debar the person concerned from carrying on the business. The court may decide that appeal shall have no suspensive effect.

(3) If warranted by special circumstances, the Minister of Justice may permit the case to be brought before the court before the expiration of the time limit of five years referred to in subsect. (1) of this section.

Chapter X

Determination of the Penalty

80. (1) In determining the penalty, account shall be taken, not only of the gravity and dangerousness of the offense, but also of the previous record of the offender, of his age and of his general conduct before and after the deed, of the persistence of his criminal tendencies and of the motives underlying the act.

(2) The fact that the offense has been committed by several persons in association shall, as a rule, be considered as an aggravating circumstance.

81. (1) The application of provisions concerning an aggravation of the penalty or other legal effects in the case of recidivism shall be dependent on the condition that, before he committed his second offense, the offender has been found guilty, within the territory of the Danish State, or a punishable act committed after he has attained the 18th anniversary of his birthday and is liable, under the Act, to incur the penalty of recidivism for the second offense, or of attempt or complicity in respect of such offense: provided that the age of the offender at the time of committing the punishable act shall not be relevant to the provisions of sect. 65 of this Act.

(2) The court may take into account, for the assumption of recidivism, foreign sentences as sentences pronounced within the territory of the Danish State.

(3) No recividism is to be assumed if, before the commission of the second punishable act, a period of five years has passed after the former sentence has been served, finally remitted or ceased to have effect, or after the convicted has been finally discharged from a workhouse or preventive detention. Where the former penalty is a fine, the said time limit shall be reckoned as from the date of the final sentence or of the acceptance of the fine.

82. If a person is found to have committed one or several offenses by way of profession or habit, then, unless otherwise provided, the punishment may be increased by up to one-half and, in the case of recidivism, be doubled.

83. (1) If any of the offenses referred to in ss. 119, 121, 141, 142, 180, 181, 237, 244 to 247, 252, 260, 261, 266 or 291, subsect. (2), of this Act is committed by a prisoner while serving a sentence or while kept in custody for some other reason, the penalty prescribed in the said provisions may be doubled: provided that the punishment shall in no case be fixed at a penalty lower than simple detention. If the prisoner is serving a term of imprisonment or if he has been committed to a workhouse or a preventive detention centre (cf. sect. 67 of this Act), the penalty to be applied shall not be lower than that of imprisonment, so that, where the penalty provided is only simple detention, that penalty may be replaced by imprisonment for the same period; if so, this penalty may be inflicted for a period shorter than that provided for in sect. 33 of this Act.

(2) The provision of subsect. (1), first sentence, of this section shall apply in like manner if the offenses concerned are committed by a former prisoner against a person employed in the institution concerned or against the institution or its proerty and, again, where a former prisoner is found guilty of any of the offenses referred to in sect. 124 of this Act against a prisoner committed to the institution concerned.

(3) The fact that the deed has been committed by several persons in association shall in all cases be considered as an aggravating circumstance.

(4) If several prisoners have agreed to commit any of the offenses referred to in subsect. (1) of this section, the principals shall, even where the offense is not accomplished, be punished as if it had been accomplished: provided that

the punishment may be reduced under the circumstances referred to in sect. 22 of this Act.

(5) If a person who has been sentenced to imprisonment for life and who has not been pardoned commits another crime in or outside the prison, the nature of the penalty involving the deprivation of liberty that he would have incurred if the penalty previously inflicted on him had not been for life shall be laid down in the sentence. Besides, under specific provisions laid down by Royal Order, he may be sentenced to a penalty corresponding to one or several of the disciplinary punishments provided for in sect. 47 of this Act. The Order may provide that the penalty prescribed in sect. 47, subsect. (1) paragraph (i), of this Act shall be inflicted for an indeterminate period, and that the maximum periods of paragraphs (2) to (4) may be doubled.

84. (1) The punishment prescribed for a punishable act may be reduced in the following circumstances, viz.—

(i) If a person has exceeded the limits of lawful self-defense or of the right to avert damage established by sect. 14 of this Act;

(ii) If, at the time of committing the punishable act, the perpetrator had not attained the age of 18 years and the full penalty, if applied, would be considered unnecessary or harmful because of his youth. The penalty in respect of such persons may not exceed imprisonment for eight years;

(iii) If the perpetrator had acted in excusable ignorance or excusable misinterpretation of legal provisions prohibiting or prescribing a certain act;

(iv) If the act has been committed in a state of excitement brought about by an unlawful attack or by a gross insult on the part of the injured party;

(v) If a person has been induced to commit the deed by virtue of his position of dependence on some other person or in the face of a menace of a substantial injury;

(vi) If, after the accomplishment of the punishable act, the perpetrator has spontaneously averted the danger resulting from the act;

(vii) If, after the accomplishment of the punishable act, the perpetrator has fully restored the damage caused by his act;

(viii) If, otherwise, he has spontaneously made efforts to prevent the accomplishment of the act or to restore the damage caused by it;

(ix) If, by his own will, he has given himself up and made a full confession.

(2) In the circumstances referred to under paragraphs (i) to (vi) of subsect. (1) of this section, the punishment may be remitted in further extenuating circumstances.

85. (1) If an offense has been committed under the influence of excitement, of other temporary lack of mental balance or of other special circumstances which reduce the degree of criminality normally inherent in such acts, to such an extent that the application of the penalty prescribed would be excessively severe, the punishment shall be reduced and may, if the relevant penal sanction provides for a penalty of simple detention only, be remitted. If the lack of mental balance arises from self-inflicted drunkenness, the above provision shall apply only if the accused has not previously been found guilty of a similar punishable act or of a contravention of sect. 138, subsect. (1) or (2), of this Act, and only in further extenuating circumstances.

(2) A suspended sentence may be pronounced in these cases, even where the penalty is higher than that provided for in sect. 56 of this Act.

86. If the offender has been remanded in custody for a reason not attributable to his own conduct during the proceedings, it shall be provided in the sentence that a specified part of the penalty inflicted, or the whole of it, shall be considered as having been served. If the person concerned is sentenced to commitment to a youth prison, a workhouse or a preventive detention centre, the period thus fixed in the sentence shall be deducted from the terms of detention in youth prison or in workhouse or preventive detention provided for in ss. 42, 63 and 66 of this Act.

87. If, under sect. 79 of this Act, a person has been deprived of the rights referred to in that section, the penalty may be reduced or, if it would not have exceeded that of simple detention, be remitted.

88. (1) If, by one or several acts, a person has committed several offences, one penalty shall be fixed for these offences within the statutory range of the punishment prescribed or, if punishments with a different statutory range apply, within the highest maximum. In particularly aggravating circumstances,

the penalty may exceed the most severe penalty prescribed for any of the offences by not more than one-half.

(2) If the offences to be considered in fixing the penalty entail penalties involving the deprivation of liberty of different kinds, a penalty involving the deprivation of liberty of the most severe nature shall be fixed in respect of all of the offences.

(3) If one of the offences is punishable by the deprivation of liberty and another punishable by a fine, the court may, in lieu of a penalty involving the deprivation of liberty to cover both offences, impose a fine in addition to a penalty involving the deprivation of liberty.

(4) If one of the offences is punishable by a day-fine and another by a fine of a different nature, the court shall inflict the penalty of a day-fine in respect of both offences, except where, in the circumstances, it is deemed appropriate to inflict a separate penalty in respect of each offence.

(5) A person who is sentenced to commitment to a workhouse or preventive detention cannot, at the same time, be sentenced to a penalty involving the deprivation of liberty. In case the accused has committed one or several offences in addition to the offence or offences for which he is liable under sect. 62 of this Act to be sentenced to commitment to a workhouse, he may be sentenced to commitment to a workhouse in respect of all the offences committed by him.

89. (1) If a person already sentenced is found guilty of another punishable act committed prior to the promulgation of a sentence, a supplementary penalty shall be inflicted, provided that a sentence, including both offences, awarded at the time of the earlier offence would have rendered him liable to an aggravation of the penalty. If the term of penalty previously inflicted has not expired, the provisions of sect. 88 of this Act shall be applied, if practicable, and the supplementary penalty may in that case be inflicted for a period shorter than those provided for in ss. 33 and 44 of this Act.

(2) If the offence to which the latter sentence relates involves imprisonment, while the former sentence was that of simple detention, the former sentence shall, if not fully served, be converted by the authority responsible for the execution of sentence under the provisions of sect. 90 of this Act.

(3) If the offence that is being tried by the court is punishable by the deprivation of liberty, and the former sentence was one of commitment to a workhouse or preventive detention, the court shall decide whether the former sentence shall be upheld or whether the accused shall be sentenced to imprisonment in respect of both offences. If, in the latter case, the convicted has been detained in a workhouse or in a preventive detention centre, it shall be provided in the sentence that a proportionate part of the term shall be considered to have been served.

(4) If the latter sentence inflicts the penalty of commitment to a workhouse or preventive detention centre, while the former sentence inflicted a penalty involving the deprivation of liberty, the former sentence shall cease to have effect. In case the sentence has been served, in whole or in part, the term served shall be deducted from the terms of commitment to a workhouse or preventive detention centre provided for in ss. 63 and 66 of this Act; if the penalty concerned is one of simple detention, such deduction shall be made under the provisions of sect. 90 of this Act.

90. (1) Where the penalty prescribed for an offence is replaceable by another, two days' imprisonment shall be recognised as equivalent to three days' simple detention.

(2) If the aggravation of a penalty provided by law is impracticable within the limits set for the category of penalties provided, the penalty shall be replaced by a more severe penalty of the next category; provided that, where an increase of the ordinary penalty prescribed for an offence is allowed, simple detention may be awarded for not more than three years and imprisonment for a determinate period up to 20 years.

91. If the penalty prescribed for a punishable act does not exceed simple detention, then, if the convicted has formerly served a term of imprisonment, a penalty of simple detention may be replaced by imprisonment for the same period.

Chapter XI

CESSATION OF THE LEGAL EFFECTS OF A PUNISHABLE ACT

92. Criminal liability shall cease to have effect—

(i) At the death of the offender, cf. sect. 52, subsect. (4), of this Act, or

(ii) If abandoned by the injured party, before the court has retired to consider the case, where the offence has been brought before the court by private prosecution; or

before a request for prosecution has been made, where the offence is subject to public prosecution only at the request of the injured party; or

(iii) As regards contraventions of this Act, in the case of limitation, in accordance with the provisions of ss. 93 and 94 of this Act: provided that criminal liability in respect of the offences dealt with in Chapter XVI and in ss. 296, subsect. (1), paragraphs (ii) and (iii), and subsect. (2), and 297 of this Act shall not be subject to limitation. In the case of other offences to which no statutory limitations apply, the court shall decide whether, provided the conditions of limitation under the said provisions are satisfied, criminal liability shall cease to have effect. Criminal liability for violations of public taxation and duty statutes which aimed at withholding compulsory contributions from the Revenue Authorities shall not be subject to limitation in the absence of special provisions on the subject.

93. (1) The period of limitation shall be—

(i) Two years, where the penalty incurred for the offence would not exceed a fine or simple detention for two years; or

(ii) Five years, where the penalty incurred would be simple detention for more than two years or imprisonment for not more than one year; or

(iii) Ten years, where the penalty incurred would be more severe, but where the maximum penalty prescribed for the deed does not exceed imprisonment for six years.

(2) If any person has committed several offences for which criminal liability under subsect. (1) of this section would be barred by limitation if each offence was tried separately, the limitation shall take effect only if the penalty incurred in respect of all the offences together does not exceed the limits laid down in subsect. (1) of this section.

(3) If, under the provisions of subsect. (1) and (2) of this section, criminal liability for an offence is not barred by limitation, but if a period of ten years has expired after the commission of the offence, the Minister of Justice shall decide whether proceedings shall be instituted.

94. (1) The period of limitation shall run as from the date on which the punishable act has been terminated, or, in the case of an omission, where the obligation to act has ceased: provided that, if the punishable nature of the act depends on a later event, the period of limitation shall not commence to run until the occurrence of that event. The running of the period shall be interrupted during any criminal proceedings in which the person concerned may be a defendant. If the proceedings instituted are suspended for an indeterminate period, the limitation shall continue to run as if no proceedings had been instituted: provided that, if the suspension is due to the fact that the accused evaded prosecution, the duration of the proceedings shall not be included in the caculation of the period of limitation.

(2) If the punishable act has been committed on a Danish vessel outside the territory of the Danish State, the period shall not commence to run until the date when the vessel enters a Danish port or arrives at a place where a Danish consul resides: provided that the commencement of the period shall not be deferred for more than one year.

95. (1) Where criminal liability has ceased to have effect by limitation, the measures dealt with in ss. 30 and 62 to 75 of this Act shall not be applicable, nor may the convicted be deprived of the rights set out in sect. 79 of this Act.

(2) The preventive measures referred to in ss. 62 to 75 of this Act shall not be applicable after the expiration of ten years as from the commission of the act in question.

96. (1) The execution of a sentence of fine, or simple detention, or imprisonment for a period not exceeding one year shall cease to be permissible after five years have expired. After the expiration of ten years no sentence shall be capable of execution, except by the order of the Minister of Justice.

(2) The above time limits shall not include the period during which the execution of a sentence has been suspended under sect. 56 of this Act or has not been capable of commencement due to the serving of a penalty involving the deprivation of liberty or because of commitment to a workhouse, preventive detention centre or curative institution for inebriates.

97. (Repealed by Act, No. 88, dated 15 March 1939).

Special Part

Chapter XII

Offences against the independence and safety of the state

98. (1) Any person who commits an act aimed, by foreign assistance, by the use of force, or by menace of such, at bringing the Danish State or any part of it under foreign rule or at detaching any part of the State shall be liable to imprisonment for any term extending to life imprisonment.

(2) The same penalty shall apply to any person who, for the purpose mentioned in subsect. (1) of this section, organises extensive sabotage, suspension of production or traffic, as well as to any person who, conscious of the purpose of such act, takes part in carrying it out.

99. (1) Any person who commits an act aimed at involving the Danish State or any allied power in war, occupation or other hostilities, such as blockade or any other coercive measure, or who otherwise endeavours to bring about, by foreign assistance, a violation of the independence of the Danish State, shall be liable to imprisonment for any term extending to life imprisonment.

(2) For the purposes of this section and other sections of Chapter XII or XIII of this Act, occupation shall mean foreign occupation of any territory of the Danish State, if and as long as it is inflicted on the country by the use of force or menace of such.

100. (1) Any person who by public statements incites to enemy action against the Danish State or who brings about an evident danger of such action shall be liable to imprisonment for any term not exceeding six years.

(2) Any person who by public statements incites to intervention by any foreign power in the affairs of the Danish State or who brings about an evident danger of such intervention shall be liable to simple detention or to imprisonment for any term not exceeding one year or, in extenuating circumstances, to a fine.

101. Any person who, in the face of impending war, enemy occupation or any other hostilities, commits any act by which preparations are made for aiding the enemy shall be liable to imprisonment for any term not exceeding sixteen years.

102. (1) Any person who, in time of war or enemy occupation, assists the enemy by word or act or, for the promotion of enemy interests, impairs the military efficiency of the Danish State or of any allied power, shall be liable to imprisonment for any term not exceeding sixteen years.

(2) The following acts shall be deemed to be assistance to the enemy:

(i) Recruitment for or service in the armed forces of any military or occupation power of the enemy or in associated military or police forces or in any similar bodies or organisations; or

(ii) exercise of functions as a civil employee in the police or prison administration of any military or occupation power of the enemy, where such functions include participation in the examination or custody of prisoners; or

(iii) information or similar acts bringing about the arrest or risk of arrest or injury by any enemy authority or any associated organisation or person; or

(iv) any propaganda for the benefit of any military or occupation power of the enemy, including activities as publisher, editor or administrative officer of any daily paper, periodical, publishing business or press bureau working for the promotion of enemy interests; or

(v) payment of substantial financial assistance to others with a view to promoting propaganda of the nature indicated in paragraph (iv) of this section or to any party or organisation unduly co-operating with the military or occupation power of the enemy, or promoting the interests of such power.

(3) Where information (cf. subsect. (2), paragraph (iii), of this section) has taken place under such circumstances that the perpetrator has been aware that any person thereby has incurred the risk of imminent danger of losing his life,

suffering grievous harm to person or health, of being deported or of being deprived of his liberty for a long time, or where ss. 245, 246 or 250 of this Act have been contravened with a view to enforcing evidence or a confession or otherwise as part of any maltreatment of prisoners, imprisonment for life may be inflicted.

103. (1) Any person who, in the case of war or occupation or imminent danger of such, fails to fulfill a contract relating to measures taken by the Danish State for that purpose, or who otherwise counteracts such measures, shall be liable to simple detention or to imprisonment for any term not exceeding three years.

(2) If the offence is due to gross negligence, the penalty shall be a fine or simple detention.

104. (1) Any person who, directly or through an intermediary, unduly cooperates for commercial purposes with any military or occupation power of the enemy shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding eight years.

(2) Criminal liability under subsect. (1) of this section may devolve on any person who has had a position of management in the undertaking concerned. Criminal liability may devolve also on other persons employed in the undertaking, if they have shown a particularly offensive behaviour.

(3) In determining whether and, if so, to what extent the cooperation is deemed to be undue in this sense, account shall be taken not only of the importance of the undertaking to the military or occupation power of the enemy, but also of the fact as to whether the person concerned—

(i) had himself taken steps to arrange for the establishment, continuation or extension of any business relations; or

(ii) at his own initiative had undertaken a re-organisation of the undertaking in the interests of the enemy or had made efforts to increase or accelerate its production substantially; or

(iii) had called on the assistance of the enemy in his relations with any Danish public authority with a view to promoting his own interests; or

(iv) had prevented or tried to prevent any Danish public authority from taking full knowledge of the conditions of the undertaking; or

(v) had obtained or tried to obtain any excessive profit or any other privileges not reasonably justified in the undertaking.

105. Any person who, in time of enemy occupation, commits an act aimed at inducing the occupation power or any organisation or person associated with that power to impair the independence of any Danish public authority, or who takes undue advantage of any connection with the occupation power or with any organisation or person associated with that power with a view to obtaining for himself or for others a special privilege, shall be liable to imprisonment for any term not exceeding eight years.

106. Any person who acts against the interests of the State in carrying out a mission entrusted to him to negotiate or settle, on behalf of the State, any matter with any foreign State shall be liable to imprisonment for any term not exceeding sixteen years.

107. (1) Any person who, being in the service of any foreign power or organisation or for the information of persons engaged in such service, inquires into or gives information on matters which, having regard to Danish State or public interests, should be kept secret, shall, whether or not the information is correct, be guilty of espionage and liable to imprisonment for any term not exceeding sixteen years.

(2) If such information is of the nature indicated in sect. 109 of this Act, or if the act is committed in time of war or occupation, the penalty may rise to imprisonment for life.

108. (1) Any person who, by any other act than those covered by sect. 107, enables or assists the Intelligence Service of a foreign State to operate directly or indirectly within the territory of the Danish State shall be liable to imprisonment for any term not exceeding six years.

(2) If such act concerns information on military affairs, or if it is committed in time of war or occupation, the penalty may be increased to imprisonment for any term not exceeding twelve years.

109. (1) Any person who discloses or imparts any information on secret negotiations, deliberations or resolutions of the State in affairs involving the safety of the State or its rights in relation to foreign State, or which have reference to substantial economic interests of public character in relation to foreign

countries, shall be liable to imprisonment for any term not exceeding twelve years.

(2) If any of these acts has been committed through negligence, the penalty shall be simple detention or imprisonment for any term not exceeding three years or, in the case of extenuating circumstances, a fine.

110. (1) Any person who forges, destroys or removes any document or any other instrument that is of importance to the safety of the State or to its rights in relation to foreign States shall be liable to imprisonment for any term not exceeding sixteen years.

(2) If any of these acts has been committed through negligence, the penalty shall be simple detention or imprisonment for any term not exceeding three years or, in extenuating circumstances, a fine.

110a. Any person who, intentionally or through negligence, without being duly authorised to do so,

(I) describes, photographs or otherwise reproduces Danish military works of defence, depots, units, arms, material, etc., which are not accessible to the public, or who copies or publishes such descriptions or reproductions; or

(II) takes photographs from airplanes over any territory of the Danish State or publishes such unlawfully taken photographs; or

(III) publishes provisions relating to the mobilisation of Danish forces or other war preparations,

shall be liable to a fine or simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding three years.

110b. Any person who gives his assistance to any violation of neutrality against the Danish State on the part of any foreign power shall be liable to imprisonment for any term not exceeding eight years.

110c. Any person who, intentionally or through negligence, contravenes any provisions or prohibitions that may have been provided by law for the protection of State defence or neutrality or for the fulfillment of its obligations as a member of the United Nations shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding three years.

110d. If any of the offences dealt with in Chapters XXV, XXVI or XXVII of this Act is committed against a foreign sovereign or the Head of any foreign diplomatic mission, the prescribed penalty may be increased by not more than one-half.

110e. Any person who openly insults any foreign nation, foreign State, its flag or any other recognised symbol of nationality or the flag of the United Nations shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding two years.

110f. The offences referred to in this Chapter shall in all cases be dealt with by public prosecution, to be instituted by the order of the Minister of Justice.

Chapter XIII

Offences against the constitution and the supreme authorities of the State

111. Any person who commits an act aimed, by foreign assistance, by the use of force or menace of such, at changing the Constitution or making it inoperative shall be liable to imprisonment for any term extending to life imprisonment.

112. Any person who commits an act directed against the life of the Sovereign or of the constitutional regent shall be liable to imprisonment for not less than six years.

113. (1) Any person who interferes with the safety or independence of the Diet or otherwise commits any act aimed, by the use of force or menace of such, at extorting any resolution from the Diet or preventing it from freely exercising its activities shall be liable to imprisonment for any term not exceeding sixteen years or, in the case of aggravating circumstances, for life.

(2) The same penalty shall apply to any person who, in like manner, interferes with or exercises coercion against the Sovereign or the constitutional regent or against the Ministers, the Constitutional Court or the Supreme Court.

114. (1) Any person who participates in or grants substantial pecuniary or other substantial support to any corps, group or association which intends, by

the use of force, to influence public affairs to or disturb the public order shall be liable to imprisonment for any term not exceeding six years.

(2) Any person who takes part in any unlawful military organisation or group shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding two years.

115. (1) If any of the offences dealt with in Chapters XXV, XXVI or XVII of this Act, except where the circumstances are covered by sect. 112 or sect. 113 of this Act, is committed against the Sovereign or against the constitutional regent, the penalties prescribed in the above Chapters shall be increased up to twice the prescribed maximum.

(2) If any of the said offences is committed against the Queen, the Queen Dowager or the heir apparent, the penalty may be increased by not more than one-half.

116. (1) Any person who prevents or attempts to prevent any holding of elections to the Diet, to the Assembly of the Faroe Islands or to municipal or any other public councils or authorities, or who corrupts the outcome of any election or renders it impossible to count the votes, shall be liable to imprisonment for any term not exceeding six years.

(2) The same penalty shall apply where such acts are committed in connection with a plebiscite in public affairs, as provided by law.

117. Any person who, in the case of the elections or plebiscites referred to in sect. 116 of this Act,

(i) unlawfully obtains permission, for himself or for others, to take part in the voting; or

(ii) attempts, by unlawful coercion (cf. sect. 260 of this Act) by deprivation of liberty or by taking advantage of a position of superiority, to induce some other person to vote in a particular way or to abstain from voting; or

(iii) causes, by a trick, some other person, against his intention, to abstain from voting or brings it about that such person's vote in rendered invalid or that it has an effect different from that intended; or

(iv) grants, promises or offers any pecuniary advantage with a view to making any person vote in a particular way or abstain from voting; or

(v) accepts, or demands or accepts the promise of any pecuniary advantage against voting in a particular way or against abstaining from voting;

shall be liable to simple detention or to imprisonment for any term not exceeding two years or, in extenuating circumstances, to a fine.

118. (1) Any person who, by the use of force or menace of such or by exploiting any fear of intervention on the part of any foreign power, prevents or attempts to prevent any public authority from freely exercising its activities shall, if the act is committed for the purpose of influencing public affairs or disturbing the public order, be liable to imprisonment for any term not exceeding twelve years.

(2) The same penalty shall apply to any person who, for the purpose indicated in subsect. (1) of this section and by utilising the means indicated in that subsection, gravely impairs freedom of speech or prevents any society or any other association from freely exercising its lawful activities.

(3) The same penalty shall, again, apply to any person who, for the purpose indicated in subsect. (1) of this section and by utilising the means indicated in that subsection, commits the offence dealt with in sect. 193 of this Act or any similar act detrimental to the common good.

118 a. The offences referred to in ss. 111 to 115 and 118 shall in all cases be dealt with by public prosecution, to be instituted by the order of the Minister of Justice.

118 b. (1) Where any person is sentenced to imprisonment for two years or more in respect of any of the offences dealt with in Chapters XII or XIII of this Act, the court may decide that his property and any benefit or income of which he is in receipt shall, in whole or in part, be confiscated for the interest of the Exchequer.

(2) If any person arranges to dispose of his property to another person who is aware of his intention of escaping confiscation, such disposition shall be void.

Chapter XIV

Offences against public authority

119. (1) Any person who, by the exertion of violence or menace of violence, assaults any person required to act by virtue of a public office or function, while executing the office or the function or on occasion of such office or function, or who in like manner attempts to prevent such person from discharging a lawful official function or to force him to discharge an official function, shall be liable to simple detention or imprisonment for any term not exceeding six years or, in extenuating circumstances, to a fine.

(2) The same penalty shall apply to any person who, in circumstances other than those covered by subsect. (1) of this section, threatens any person vested by public authority with jurisdiction or the power to make decisions on any matter involving legal consequences or in enforcing the authority of the Executive in criminal matters with violence, with deprivation of liberty or with allegation of a punishable act or dishonourable conduct, provided such threat is made either in respect of the execution of the office or function or for the purpose of preventing such person from discharging a lawful official function or of forcing him to discharge an official function.

(3) If, otherwise, any person puts obstacles in the way of the persons required to carry out their office or function, he shall be liable to simple detention or to a fine or, in aggravating circumstances, to imprisonment for any term not exceeding six months.

120. The penalties prescribed in sect. 119 of this Act shall, if the acts referred to in that section are carried out by means of any unlawful assembly, apply to those who instigate or direct the assembly and to the participants who fail to comply with any order to disperse, lawfully announced by the public authorities.

121. Any person who falls upon any of the persons referred to in sect. 119 of this Act with insults, abusive language or other offensive words or gestures, while they are executing their office or function or on occasion of such office or function, shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding six months.

122. Any person who grants, promises or offers some other person exercising a public office or function a gift or other privilege in order to cause him to do or fail to do anything by which he would be guilty of a breach of duty shall be liable to imprisonment for any term not exceeding three years or, in the case of extenuating circumstances, to simple detention or to a fine.

123. Where several prisoners serving a penalty involving the deprivation of liberty or being committed to a workhouse or preventive detention centre (*cf.* sect. 67 of this Act) agree to escape together, they shall be liable to imprisonment for not less than six months nor more than three years.

124. (1) Any person who sets free a person who is arrested, imprisoned or detained or any person who prompts or helps such person to escape or harbours the escaped shall be liable to simple detention or to imprisonment for any term not exceeding two years or, in extenuating circumstances, to a fine.

(2) Any person who unlawfully gets in touch with a person who is imprisoned or detained shall be liable to a fine or, in aggravating circumstances, to simple detention or to imprisonment for any term not exceeding three months.

125. (1) Any person who—

(I) with a view to shielding some other person from prosecution for an offence or punishment, harbours him, helps him to escape or passes him off as someone else; or who

(II) destroys, changes or removes objects of importance to a public enquiry or blots out the traces of a crime;

shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

(2) Any person who commits such acts with a view to shielding himself or any one of his near relatives from prosecution or punishment shall not be liable to punishment.

126. (1) Any person who removes or destroys any seal or mark affixed by a public authority shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding six months.

(2) Any person who removes or damages any poster put up by any public authority shall be liable to a fine or to simple detention for any term not exceeding three months.

127. (1) Any person who evades military service or who persuades or helps any conscript to evade his liability for military service, or who incites conscripts or persons belonging to the military forces to disobedience of official orders shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

(2) If any of the acts referred to in subsect. (1) of this section is committed in time of war or of imminent danger of war, the penalty shall be imprisonment for any term not exceeding six years.

128. Any person who within the territory of the Danish State undertakes to recruit for war service with a foreign power shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

129. Any person who, without being empowered to do so, disclosed public information concerning the proceedings of the elections or plebiscites dealt with in sect. 116 of this Act or concerning negotiations of a confidential nature pursued by or in public councils or authorities shall be liable to a fine or to simple detention for any term not exceeding three months or, in aggravating circumstances, to imprisonment for the same term. The same penalty shall apply to any person who, without being empowered to do so, gives public information concerning negotiations carried on by or in any commission or committee set up by the Government, provided that the Government or the Commission or Committee concerned has published its decision that the negotiations shall be confidential.

129a. (1) Any person who publishes versions which he knows to be untrue or false quotations of communications on facts given in court sittings or at meetings of the Diet or of any local or public council or authority shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

(2) The same penalty shall apply to any person who, conscious of the untruthfulness of the accusation, by publicly imputing to the Government or to any other public authority an act which it has not committed, prejudices the interests of the State in relation to foreign countries.

130. Any person who exercises a public power without being entitled to do so shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding two years.

131. Any person who, publicly or for an unlawful purpose, pretends to be invested with a public power or public authorisation to carry on an undertaking or who without public authorization carries on an undertaking for which such authorization is required or continues to carry on an undertaking subject to an authorization of which he has been deprived shall be liable to a fine or to simple detention for any term not exceeding three months or, in aggravating circumstances, to imprisonment for the same term.

132. Any person who, intentionally or through negligence, wears, publicly or for an unlawful purpose, any badge or uniform that is restricted to any Danish or foreign public authority or military persons or that is restricted to any personnel, institution or material designed to give assistance to wounded or sick persons in case of war, or any badge or uniform that bears such resemblance to those referred to above that a mistake is reasonably likely to arise, shall be liable to a fine.

132a. Any person who takes part in the continued activities of an association, after that association has been prohibited, for the time being, by the Government or has been dissolved by judgment shall be liable to simple detention or imprisonment for any term not exceeding one year. Any person who, subsequent to the prohibition or the dissolution, joins such association as a member shall be liable to a fine or to simple detention.

Chapter XV

Offences against public peace and order

133. (1) Any person who instigates an unlawful assembly with intent to exert or to threaten violence to persons or property shall be liable to imprisonment for any term not exceeding three years or to simple detention.

(2) The same penalty shall apply to those who, in the case of an unlawful assembly the purpose of which is evident, act as the ringleaders of the assembly, and any participant who fails to comply with the order to disperse, lawfully announced by the public authorities: provided that, in the case of the latter participants, the penalty may be reduced to a fine.

(3) If, during such unlawful assembly, any of the offences covered by its purpose is committed, the instigators or ringleaders of the unlawful assembly as well as the participants of the offence committed shall be liable to imprisonment for any term not exceeding six years, provided the offence, by its nature is not subject to a more severe penalty.

134. Any participant of an unlawful assembly who, knowing that an order to disperse has been lawfully announced, does not comply with such order shall be liable to a fine or to simple detention for any term not exceeding three months or, in aggravating circumstances, to imprisonment for the same term.

134a. Any participants in brawls or any other grave disturbance of public peace and order shall, if guilty of conspiracy, be liable to simple detention or to imprisonment for any term not exceeding six months.

135. Any person who by groundless alarms, by abuse of danger signals or by similar acts causes a turnout of the police, the fire-brigade or an ambulance shall be liable to a fine or to simple detention for any term not exceeding three months.

136. (1) Any person who, without thereby having incurred a higher penalty, publicly incites others to an offence shall be liable to simple detention or to imprisonment for any term not exceeding four years or, in the case of extenuating circumstances, to a fine.

(2) Any person who, in public, expressly approves of any of the offences dealt with in Chapters XII or XIII of this Act shall be liable to simple detention or to imprisonment for any term not exceeding two years or, in extenuating circumstances, to a fine.

137. (1) Any person who attempts to prevent the holding of any lawful public meeting shall be liable to a fine or to simple detention or, in aggravating circumstances, in particular where the act has been accompanied by violence or threat of violence, to imprisonment for any term not exceeding two years.

(2) The same penalty shall apply to any person who by noisy behaviour or disturbance interferes with the public sittings of Diet, of the Lagting of the Faroe Islands, of municipal or other public councils, divine service or other public church ceremonies or who, in an indecorous manner, disturbs funerals.

138. (1) Any person who, intentionally or through gross negligence, gets drunk shall be liable to a fine or to simple detention if, in that condition, he endangers the person of others or properties of high value. In aggravating circumstances, in particular where considerable damage has been done and in case of recidivism, the penalty may be increased to imprisonment for six months.

(2) Any person who contravenes any order made under sect. 72, subsect. (1), of this Act shall be liable to simple detention or to imprisonment for any term not exceeding four months.

(3) Any person who contravenes any order made under sect. 72, subsect. (2), of this Act shall be liable to a fine.

139. (1) Any person who violates the sanctity of cemeteries or is guilty of indecorous treatment of corpses shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding six months.

(2) The same penalty shall apply to any person who is guilty of indecorous treatment of objects belonging to any church and used for the services of the church.

140. Any person who exposes to ridicule or insults the dogmas or worship of any lawfully existing religious community in this country shall be liable to simple detention or, in extenuating circumstances, to a fine. Prosecution shall take place only by the order of the Chief Public Prosecutor.

141. (1) Any person who, knowing that the commission of any of the offenses against the State or against the supreme authorities of the State dealt with in ss. 98, 99, 102, 106, 109, 110, 111, 112 or 113 of this Act or of an offense endangering the life or welfare of human beings or substantial public property is intended, does not make efforts, to the best of his power, to prevent the offense or its consequences, if necessary by informing the public authorities, shall be liable, provided that the offense is committed or attempted, to

simple detention or to imprisonment for any term not exceeding three years or, in extenuating circumstances, to a fine.

(2) Provided that, if the efforts to prevent the commission of any of the offenses referred to in the foregoing subsection would endanger the life, health or welfare of himself or of his near relatives, the person who fails to make such efforts shall not be punished.

142. Any person who fails, on request, to give assistance to any person wielding public powers with a view to averting an accident or an offense endangering the life, health or welfare of others, when such assistance might be given without danger or sacrifice of any great importance, shall be liable to a fine or to simple detention for any term not exceeding three months.

143. Any person who fails to give evidence likely to prove the innocence of a person charged with or convicted of an offense, when this could be done without endangering the life, health or welfare of himself or of his near relatives or without risking, for himself or for any of his near relatives, prosecution for such offense, shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding one year.

Chapter XVI

Offenses committed while exercising a public office or function

144. Any person who, while exercising a public office or function, unlawfully receives, demands or accepts the promise of a gift or other privilege shall be liable to simple detention or to imprisonment for any term not exceeding six years or, in extenuating circumstances, to a fine.

145. If any person exercising a public office or function demands or accepts, for the purposes of gain, remuneration in respect of an official function or a tax or charge not due shall be liable to imprisonment for any term not exceeding six years. If, for the purposes of gain, he keeps such remuneration which he received in good faith, after he has become aware of the mistake, he shall be liable to imprisonment for any term not exceeding two years.

146. (1) If any person invested with jurisdiction or other public power to make decisions in any matter affecting the legal rights of private persons commits an injustice in deciding or examining the case, he shall be liable to imprisonment for any term not exceeding six years.

(2) If such injustice has impaired the conditions of life of any person, or if such effect has been intended, the penalty shall be imprisonment for not less than three nor more than sixteen years.

147. If any person whose duty it is to enforce the punitive power of the State applies, for that purpose, unlawful means with a view to obtaining a confession or evidence, or if he undertakes any unlawful arrest, imprisonment, search or seizure, he shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding three years.

148. If any person in whom jurisdiction or other public power to decide legal is vested or whose duty it is to enforce the punitive power of the State fails, intentionally or through gross negligence, to observe the procedure provided by law, as regards the examination of the case or the execution of certain judicial acts or in respect of arrest, imprisonment, search, seizure or measures of a similar nature, he shall be liable to a fine or simple detention.

149. If any person responsible for the custody of a prisoner or for the execution of sentences allows an accused person to escape, prevents the execution of sentence or unlawfully occasions a mitigation of the penalty, he shall be liable to simple detention or to imprisonment for any term not exceeding three years or, in extenuating circumstances, to a fine.

150. If any person exercising a public office or function abuses his position to force any other person to do, suffer or omit to do anything, he shall be liable to simple detention or to imprisonment for any term not exceeding three years.

151. Any person who encourages or helps a subordinate in a public office or function to commit a punishable act in pursuance of that office or function shall be liable to the penalty prescribed for such act increased by not more than one-half. The punishment of the superior shall not be affected by the fact that, owing to a mistake or for any other reason, the subordinate is not himself liable to punishment.

152. (1) If any person exercising a public office or function reveals what he has learned in the official course of his duties as a secret or what the law or any other relevant regulation declares to be secret, he shall be liable to a fine or simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding one year. If it is done in order to obtain an unlawful profit for himself or for others or if, in general, he utilises the knowledge thus acquired for the purpose indicated, the penalty may be increased to imprisonment for three years.

(2) The above provisions shall apply in like manner to any person who, after he has resigned from the office in question, commits a punishable act under any of the circumstances indicated in the foregoing subsection in respect of official secrets which have come to his knowledge by virtue of the office concerned.

(3) The provisions of subsections (1) and (2) of this section shall apply in like manner to persons employed in or by telegraph or telephone services recognised by the State.

153. (1) If any person employed by the Postal or Railway Service unlawfully opens, destroys or withholds letters or parcels or assists any other person in committing such acts, he shall be liable to simple detention or to imprisonment for any term not exceeding three years.

(2) The same penalty shall apply to any person employed in the services of the State Telegraph or any other telegraph service recognised by the State, where he destroys, corrupts or embezzles a telegram handed over to the Service for transmission or assists any other person to commit any of these acts.

154. If any person, while executing a public office or function, has been guilty of false accusation, an offence relating to evidence, physical assault, deprivation of liberty, embezzlement or breach of trust, the penalty prescribed for the particular offence may be increased by not more than one-half.

155. If, in general, any person exercising a public office or function abuses his position to violate the rights of any private person or of any public authority, he shall be liable to a fine or to simple detention. Where he commits such abuse in order to obtain an unlawful privilege for himself or for others, a penalty of imprisonment for any term not exceeding two years may be inflicted.

156. If any person exercising a public office or function refuses or fails to fulfil any duty involved by the office or the function or to comply with any lawful official order, he shall be liable to a fine or to simple detention. The foregoing provision shall not apply to functions the exercise of which is based on public elections.

157. The penalty provided for in sect. 156 of this Act shall apply if any person exercising a public office or function is guilty of a serious or often repeated breach of duty or carelessness in carrying out the office or the function or in the observance of the duties inherent in the office or the function. The provisions of sect. 156, second sentence, of this Act shall apply in like manner to this section.

CHAPTER XVII

FALSE EVIDENCE AND FALSE ACCUSATION

158. (1) Any person who gives false evidence before a court or before any other public authority which has the right to administer the oath shall be liable to imprisonment for not less than three months nor more than four years.

(2) If the false evidence is given on oath or under an oath taken on a previous occasion, the penalty may be increased to imprisonment for eight years. Such declaration as by law replaces an oath shall be recognized as equivalent to an oath.

(3) If the false evidence relates only to facts irrelevant to the matter to be elucidated, the penalty may be reduced to simple detention or to a fine.

159. (1) Any person who gives false evidence when a defendant in public criminal procedure or while being examined in cases where he would not be legally required to give evidence shall not be liable to punishment.

(2) If false evidence is given in the course of an examination before any of the public authorities mentioned in sect. 158 of this Act in cases where the person examined was entitled to refuse to give evidence, the penalty may be reduced or, in extenuating circumstances, where the evidence had not been given on oath, be remitted.

160. If any person is guilty of gross negligence by giving incorrect evidence in circumstances that would otherwise make him liable to punishment under

sect. 158 or sect. 159, subsect. (2), of this Act, he shall be liable to a fine or to simple detention.

161. Any person who, in any circumstance other than that provided for in sect. 158 of this Act, gives false evidence before any public authority or for the information of such authority, while offering to take his oath, on his word of honour or in a similar solemn way, where such formality is prescribed or allowed, shall be liable to a fine or simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding two years.

162. (1) Any person who otherwise makes an incorrect statement before any public authority or for the information of such authority concerning matters on which he is bound to give evidence shall be liable to a fine or to simple detention for any term not exceeding six months or to imprisonment for any term not exceeding four months.

(2) The provisions of sect. 159, subsect. (1), of this Act shall apply in like manner to this section.

163. The penalty prescribed in sect. 162 of this Act shall apply to any person who, otherwise, with regard to any matter affecting the public rights of individuals, makes an incorrect written declaration or gives evidence, in writing, of matters of which he has no knowledge.

164. (1) Any person who by false accusation, false denunciation to or false evidence before a court or a public authority or by any other means attempts to cause any innocent person to be charged with or convicted of a punishable act shall be liable, in case such act is not subject to a penalty higher than simple detention for three months, to simple detention or to imprisonment for any term not exceeding three years, in other cases to imprisonment for any term not exceeding six years.

(2) The provisions of subsect. (1) of this section shall apply in like manner to any person who, by corruption or suppression of evidence or by the establishment of false evidence attempts to cause some other person to be charged with or convicted of a punishable act.

(3) Where the offense has impaired the conditions of life of any person or where such effect has been intended, the penalty shall be imprisonment for not less than two nor more than sixteen years.

(4) At the request of the injured party the sentence may prescribe that, with the aid of a public authority, one or several public papers shall publish the sentence, together with as much of the reasoning on which it is based as is deemed necessary by the court.

165. Any person who informs a public authority of a punishable act that has not been committed, or any person who lodges false complaints with the Sovereign, the Diet, a court or a public authority shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding one year.

Chapter XVIII

Offenses in respect of money

166. (1) Any person who counterfeits or debases money with a view to putting it into circulation as legal tender or who, for the same purpose, procures, to himself or to others, money that is counterfeited or debased, shall be liable to imprisonment for any term not exceeding twelve years.

(2) In case the forgery consists in reducing the value of legal tender, the penalty shall be imprisonment for any term not exceeding four years.

167. The putting into circulation of counterfeit or debased money shall be punishable by the same penalties as apply to counterfeiting or forgery: provided that, if the person putting the money into circulation had received it in good faith, the penalty may be reduced to simple detention or to a fine.

168. Any person who puts into circulation money that he suspects of being counterfeit or debased shall be liable to simple detention or to imprisonment for any term not exceeding three years: provided that, if the person putting the money into circulation has received it in good faith, the penalty may be reduced to a fine or, in extenuating circumstances be remitted.

169. Any person who fabricates, imports or puts into circulation objects which, by their form and appearance, bear a striking outward likeness to money or to any security intended for general circulation shall be liable to a fine.

170. Any person who unlawfully fabricates, imports or puts into circulation bills payable to bearer purporting to be used as legal tender in a smaller or wider circulation, or which may be expected to be used in such manner, shall be liable to a fine or to simple detention for any term not exceeding three months. This provision shall not apply to foreign banknotes.

Chapter XIX

Offenses in respect of evidence

171. (1) Any person who, with intent to deceive in any matter involving legal consequences, makes use of a false document shall be guilty of forgery of documents.

(2) By document is understood a written statement bearing the name of the author and purporting to serve as evidence or which is used as evidence of any right, obligation or exemption from any obligation.

(3) A document is false if it does not emanate from the author indicated by it or if anything has been added to or altered in it by anyone other than the author.

172. (1) The penalty applicable to forgery of documents shall be imprisonment which, where the document professes to contain the decision of any public authority or where it is a public bond, a cheque, a bill of exchange or other document intended for general circulation or a testamentary provision, may be extended to eight years.

(2) If the document, by its nature, or if the forgery or the inherent intention is of minor importance, or if the offender has not intended to prejudice any other person, for example where the sole inherent intention has been to obtain satisfaction for any lawful claim or to avert an unlawful claim, the penalty shall be a fine or simple detention or imprisonment for any term not exceeding one year.

173. Any person who, with intent to deceive in any matter involving legal consequences, makes use of a document carrying an authentic signature, where, nevertheless, by deceit, the signature has been obtained on a different document or on a document having a wording other than that intended by the signatory, shall be liable to the pealty prescribed in sect. 172 of this Act.

174. Any person who in any matter involving legal consequences makes use of an authentic document as relating to a person other than the one to whom it actually relates, or in any other way contrary to the purpose intended by the document, shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding six months.

175. (1) Any person who, with intent to deceive in any matter involving legal consequences, in a public document or book or in a private document or book which, by law or in pursuance of a special obligation, he is required to issue or keep, or in a medical, dental, midwife's or veterinary surgeon's report makes an incorrect statement on any matter of which the statement shall serve as evidence, shall be liable to simple detention or to imprisonment for any term not exceeding three years or, in extenuating circumstances, to a fine.

(2) The same penalty shall apply to any person who in any matter involving legal consequences makes use of such document as representing the truth.

176. (1) Any person who, with intent to deceive in commerce, makes use of articles which unlawfully have been provided with an official trade-mark or any other mark intended to guarantee the authenticity, the nature, the quality or the quantity of the article shall be liable to imprisonment for any term not exceeding three years or, in extenuating circumstances, to simple detention.

(2) Any person who in like manner makes use of articles unlawfully provided with a private trade-mark or other mark or description intended to assert a fact relating to the article and being of importance to commerce shall be liable to imprisonmeent for any term not exceeding one year or to simple detention or, in extenuating circumstances, to a fine.

(3) Any person who in the same manner makes use of articles on which any lawfully affixed trade-mark or other mark or description has been corrupted or removed shall be liable to the penalty prescribed in the last foregoing subsection.

177. (1) Any person who makes use of counterfeit or forged stamped paper, stamps or other marks used for the payment of public taxes, rates or revenue duties as well as postage stamps shall be liable to imprisonment for any term

not exceeding eight years. A proportionately less severe penalty shall apply to any person who makes use of paper or stamps already used and on which the mark indicating the previous use has been removed.

(2) The provision of sect. 169 of this Act shall apply in like manner to stamps, postage stamps and similar means of discharge.

178. Any person who, with intent to deprive any other person of his right, destroys, removes or makes ineffective, in whole or in part, any evidence capable of being used as such in any matter involving legal consequences shall be liable to imprisonment for any term not exceeding two years or, in extenuating circumstances, to simple detention.

179. Any person who, with intent to deceive, in respect of the boundaries of a piece of land or in respect of territorial rights or rights relating to water-courses or areas covered by water, puts up a false boundary-stone or other mark of delimination, or moves, removes, alters or destroys such indication, shall be liable to imprisonment for any term not exceeding three years. If this is done in order to maintain a lawful claim or to avert an unlawful claim, the penalty shall be a fine or simple detention.

Chapter XX

Offences causing danger to the public

180. Any person who sets fire to his own property or to the property of others under such circumstances as must make him realise that the lives of other persons are thereby exposed to imminent danger, or if it is done for the purpose of effecting extensive damage to the property of others or to incite sedition, looting or other similar disturbance of public order, shall be liable to imprisonment for not less than four years.

181. (1) If, otherwise, any person causes fire to be started on the property of others, he shall be liable to imprisonment for not less than six months nor more than twelve years.

(2) The same penalty shall apply to any person who, with intent to defraud any fire insurance company, to violate the rights of mortgagees or for a similar unlawful purpose, causes fire to be started on his own property or on the property of some other person, with the consent of the latter.

(3) If the object set on fire is of minor importance or if the perpetrator is assumed not to have considered the possibility that any major damage was capable of being caused by the fire, the penalty may be reduced to the minimum degree of imprisonment.

182. Any person who through negligence causes fire to be started on the property of others or to the prejudice of the pecuniary interests of others shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding two years.

183. (1) Any person who, to the prejudice of the person or property of others, causes explosion, spreading of noxious gases, floods, shipwreck, railway or other traffic accident shall be liable to imprisonment for not less than six months nor more than twelve years.

(2) If such act has been committed under the circumstances indicated in sect. 180 of this Act, the penalty shall be imprisonment for not less than four years.

(3) If the act has been committed through negligence, the penalty shall be a fine or simple detention or imprisonment for any term not exceeding two years.

184. (1) Any person who, without being liable to punishment under sect. 183 of this Act, impairs the safe operation of railways, ships or planes, motor vehicles or similar means of communication, or safe traffic on public highways, shall be liable to imprisonment for any term not exceeding six years or, in extenuating circumstances, to simple detention.

(2) If the act has been committed through negligence, the penalty shall be a fine or simple detention.

185. Any person who, though he could do so without particular danger or sacrifice to himself or to others, fails to the best of his power, by notification made in due time or in any other way appropriate in the circumstances, to avert a fire, explosion, spreading of noxious gases, floods, damage to ships, railway accidents or similar accidents involving danger to human lives, shall be liable to a fine or to simple detention for any term not exceeding six months.

186. (1) Any person who endangers the life or health of others by bringing about a general shortage of drinking water or by adding injurious substances to reservoirs, water-mains or water-courses shall be liable to imprisonment for any term not exceeding ten years.

(2) If such act has been committed through negligence, the penalty shall be a fine or simple detention or, in aggravating circumstances, imprisonment for any term not exceeding one year.

187. (1) Any person—

(I) who adds poison or other substances to products intended for sale or general use so as to endanger the health of others when the product is used for the purpose for which it is designed; or

(II) who, when such products have been tainted to such extent as to make their consumption or use as designed injurious to health, subjects them to a process likely to conceal their tainted condition; or

(III) who, while concealing his interference therewith, offers for sale or otherwise tries to spread products which have been treated as mentioned in paragraphs (I) or (II) of this subsection;

shall be liable to imprisonment for any term not exceeding ten years.

(2) If such act has been committed through negligence, the penalty shall be a fine or simple detention or, in aggravating circumstances, imprisonment for any term not exceeding one year.

188. (1) Any person who, without being liable to punishment under sect. 187, subsect. (1), paragraph (III), of this Act, offers for sale or otherwise tries to circulate, while concealing the injurious nature of the substance,

(I) food stuffs or stimulants being injurious to health because of corruption, or of defective preparation, mode of conservation or for similar reasons; or

(II) articles for use endangering the health of others when used in the customary way;

shall be liable to imprisonment for any term not exceeding six years or, in extenuating circumstances, to simple detention or a fine.

(2) If such act has been committed through negligence, the penalty shall be simple detention or a fine.

189. (1) Any person who offers for sale or otherwise tries to circulate as drugs or preventive remedies against diseases products which he knows to be unsuitable for the purpose indicated and, if used for that purpose, to be likely to endanger the life or health of others shall be liable to imprisonment for any term not exceeding six years.

(2) If such act has been committed through negligence, the penalty shall be simple detention or a fine.

190. If, under conditions corresponding to those indicated in ss. 186 to 189 of this Act, only the life or health of domestic animals is endangered, a proportionately milder punishment within the statutory range of punishment shall be inflicted.

191. Any person who unlawfully sells drugs or poison or who sells such articles on conditions other than those prescribed by law or in pursuance of a law shall be liable to a fine.

192. (1) Any person who, by contravention of the provisions laid down by law or in pursuance of a law for preventing or combating a contagious disease, brings about the danger that such a disease will reach or spread among the public shall be liable to simple detention or to imprisonment for any term not exceeding three years.

(2) If the disease is of such nature that, under the law, it shall be liable to or at the time of the commission of the act is in fact under public treatment or against the introduction of which in the Realm special measures have been taken, the penalty shall be imprisonment for any term not exceeding six years.

(3) Any person who in such manner brings about a danger that a contagious disease will reach or spread among domestic animals or cultivated or other profitable plants shall be liable to simple detention or to imprisonment for any term not exceeding two years or, in extenuating circumstances, to a fine.

(4) If such contravention has been committed through negligence, the penalty shall be a fine or simple detention or, in aggravating circumstances, imprisonment for any term not exceeding six months.

Chapter XXI

Various acts causing public damage

193. (1) Any person who, in an unlawful manner, causes major disturbances in the operation of public means of communication, of the public mail service, of

publicly used telegraph or telephone services or of installations for the public supply of water, gas, electricity or heat shall be liable to simple detention or to imprisonment for any term not exceeding three years or, in extenuating circumstances, to a fine.

(2) If such act has been committed through negligence, the penalty shall be a fine or simple detention for any term not exceeding six months.

194. Any person who removes, ruins or damages public monuments or other objects of public utility or ornament or belonging to public collections or subject to public conservation shall be liable to simple detention or to imprisonment for any term not exceeding three years or, in the case of extenuating circumstances, to a fine.

195. Any person who offers for sale foodstuffs which he knows to be falsely constituted or adulterated without their special nature being indicated unambiguously on the article itself or its label or its packing (as well as on the invoice, in case such a document had been made out) shall be liable to a fine or simple detention for any term not exceeding three months. If the contravention is committed in the exercise of a trade, the offender may, in case of recidivism, be deprived of the right to carry on such trade, for a specified period or for ever. This consequence of the sentence may be annulled by Royal Order.

196. (Repealed by Act, No. 256, dated 27 May 1950).

Chapter XXII

Begging and commercialised vice

197. (1) Any person who, in spite of Police warnings, is guilty of begging, or who, having formerly been convicted of or having received a warning before a court for begging, vagrancy, a sexual offence, an act of violence or an offence against property or, having received a warning or an order by the Police under ss. 198 or 199 of this Act, is guilty of begging, or who employs other persons for begging or permits any person belonging to his household and being under eighteen years of age to engage in begging, shall be liable to imprisonment for any term not exceeding six months.

(2) If the act has been committed through distress and not from habit, the penalty shall be simple detention or may, in other extenuating circumstances, be remitted.

198. (1) Where, in consequence of habitual idleness due to his own fault, a person capable of working becomes a public charge, neglects his family responsibilities in respect of any person who, for that reason, falls into distress, or does not pay the contributions due to be paid by him to wife or child, he shall be given a warning by the Police and, if possible, work shall be found for him.

(2) If, within a period of twelve months as from such intervention by the Police, he is guilty once more of any of the defaults mentioned in subsect. (1) of this section, in consequence of idleness due to his own fault, he shall be guilty of vagrancy and liable to imprisonment for any term not exceeding one year.

199. (1) If a person indulges in idleness under such circumstances that there is reason to suppose that he does not make an effort to earn his living in a lawful manner, the Police shall order him to find a lawful occupation within a reasonable time and shall, if possible, find such occupation for him. If he does not comply with the order, he shall be guilty of vagrancy and liable to the penalty prescribed in sect. 198 of this Act.

(2) Gambling, prostitution or living on the earnings of prostitution shall not be considered as lawful occupations.

200. (1) Where any person has been convicted under ss. 198 or 199 of this Act, the Police may, within a period of five years as from this final release, order him to appear on specified dates to give information as to his place of domicile or residence, and to account for the manner in which he earns his livelihood.

(2) Any contravention of such order shall be punished with imprisonment for any term not exceeding four months or, in particularly extenuating circumstances, with a fine.

201. Any person who, having been expelled from the country under sect. 76 of this Act, returns without permission shall be liable to imprisonment for any term not exceeding six months or, in the case of recidivism, for any term not exceeding one year.

202. Any person who, on a commercial basis, takes advantage of the ignorance, folly or inexperience of others with a view to inducing them to engage in specu-

lation shall be liable to simple detention or to imprisonment for any term not exceeding one year.

203. (1) Any person who makes his living by gambling or betting of a similar nature not permitted under special regulations, or by promoting such gambling, shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding one year.

(2) The court shall decide whether the profit gained shall be confiscated or repaid.

204. (1) Any person who, in a public place, provides accommodation or makes arrangements for non-authorized gambling activities shall be liable to a fine or to simple detention for any term not exceeding three months. In case of recidivism, the penalty may be increased to a higher degree of simple detention or to imprisonment for six months.

(2) Equivalent to a public place shall be deemed the premises of an association, where any person whatsoever or any person belonging to a particular social class is, as a general rule, eligible for membership of that association, or if non-authorised gambling is one of the purposes of such association, or if a special subscription is paid for participation in the gambling.

(3) Any person who takes part in non-authorised gambling in a public place shall be liable to a fine.

205. (Repealed by Act, No. 123, dated 13 March 1943).

206. Any person who, for professional purposes, makes use of false pretences or of other fradulent methods to induce anyone to emigrate shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding one year.

207. If any person contravenes the provisions of ss. 202 to 206 of this Act in the exercise of his trade, he may, in case of recidivism, be deprived of the right to carry on such trade, for a specified period or for ever. This consequence of the sentence may be annulled by Royal Order.

Chapter XXIII

Offences against family relationships

208. (1) Any married person who purports to contract a marriage shall be liable to imprisonment for any term not exceeding three years, if the second spouse was then ignorant of the existing marriage, to imprisonment for any term not exceeding six years.

(2) If the act has been committed through gross negligence, the penalty shall be simple detention or imprisonment for any term not exceeding one year.

(3) Any unmarried person who purports to contract marriage with any married person shall be liable to simple detention or to imprisonment for any term not exceeding one year.

(4) Where the purported marriage is not voidable, the penalty in respect of the married person may always be reduced to simple detention, and the unmarried person may be acquitted.

209. (1) Any person who purports to contract a marriage which, owing to the consanguinity of the parties or owing to their relationship by marriage, is voidable shall be liable to simple detention or to imprisonment for any term not exceeding two years.

(2) In case the marriage is not voided, the penalty may, in the case of other extenuating circumstances, be remitted.

210. (1) Any person who has sexual intercourse with any relative in lineal descent shall be guilty of incest and liable to imprisonment for not less than six months nor more than six years, and any person who has sexual intercourse with any relative in lineal ascent or with brother or sister shall also be guilty of incest and liable to imprisonment for any term not exceeding two years. If the sexual intercourse has taken place with a lineal descendent under eighteen years of age, the penalty shall be imprisonment for not less than one nor more than ten years.

(2) The lineal descendant under eighteen years of age shall not be punished. In the case of sexual intercourse between brothers and sisters, any person who has not attained sixteen years of age may be acquitted.

211. (1) Sexual intercourse between persons related by marriage shall, where their intermarriageability is unconditionally prohibited, be punished with simple detention. In cases were exception to the prohibition can be granted, the penalty is a fine.

(2) The provision of sect. 210, subsect. (2), of this Act shall apply in like manner to this section.

212. If, in the case of consanguinity or relation by marriage dealt with in ss. 210 and 211 of this Act, sexual relations other than sexual intercourse have taken place, the penalty to be inflicted shall be proportionately reduced.

213. (1) Any person who, by neglect or degrading treatment, insults his sponse, his child or any of his dependants under eighteen years of age or any person to whom he is related by blood or marriage in lineal ascent, or who, by evading his duties to maintain or contribute to the maintenance of any such persons, exposes them to distress shall be liable to imprisonment for any term not exceeding two years or, in extenuating circumstances, to simple detention.

(2) Prosecution may be waived at the request of the injured person.

214. (1) Any person who, by incorrect or incomplete notification to the public authority responsible for the registration of births, corrupts the evidence of the family status of any person shall be liable to simple detention or, in extenuating circumstances, to a fine.

(2) The penalty may be remitted where an illegitimate child of a married woman is notified, with the consent of the husband, as a legitimate child.

215. Any person who withdraws some other person under eighteen years of age from the authority or care of his parents or other authorized person, or assists him to evade such authority or care, shall be punishable under the provisions of sect. 261 of this Act.

Chapter XXIV

Sexual offences

216. Any person who enforces sexual intercourse with a woman by violence, by depriving her of her liberty or by inspiring her with fear concerning the life, health or welfare of herself or of her nearest relatives shall be guilty of rape and liable to imprisonment for not less than one nor more than sixteen years or, in particular aggravating circumstances, for life. If the woman has previously had sexual intercourse of a more lasting kind with the perpetrator, the penalty shall be imprisonment for any term not exceeding eight years.

217. (1) Any person who, out of marriage, has sexual intercourse with a woman who is insane or low-grade mental defective shall be liable to imprisonment for not less than three months nor more than eight years If the woman has previously, while in a normal condition, had sexual intercourse of a more lasting kind with the perpetrator, the penalty may be reduced to the minimum degree of imprisonment.

(2) The same penalty shall apply to any person who, out of marriage, has sexual intercourse with a woman whose condition is such as to make her incapable of offering resistance to the act or of understanding its significance. If, for that purpose, the perpetrator has himself reduced her to such condition, he shall be liable to the penalty prescribed in sect. 216 of this Act.

(3) Any person who, out of marriage, has sexual intercourse with a woman who, having been admitted to a general or mental hospital or an institution for the feebleminded, is subject to the care of any one of these institutions, shall be liable to imprisonment for any term not exceeding one year.

218. Any person who, in circumstances other than those dealt with in sect. 216 or sect. 217, subsect. (1) or (2), of this Act, has sexual intercourse with a woman under menace of violence, of deprivation of liberty or of accusing her of a punishable act or dishonourable conduct, shall be liable to imprisonment for any term of not exceeding six years.

219. Any person employed in or being a supervisor at any prison, poor-house, Children's Home, mental hospital, institution for the feebleminded or any similar institution who has sexual intercourse with an inmate of any such institution shall be liable to imprisonment for any term not exceeding four years.

220. Any person who, by grave abuse of the subordinate position of economic dependence of a woman, has sexual intercourse out of marriage with her shall be liable to imprisonment for any term not exceeding one year or, where she is under 21 years of age, to imprisonment for any term not exceeding three years.

221. Any person who by trickery has sexual intercourse with any woman who wrongly believes that she is united to him in marriage or mistakes the perpetrator for some other person shall be liable to imprisonment for any term not exceeding six years.

222. (1) Any person who has sexual intercourse with any child under fifteen years of age shall be liable to imprisonment for any term not exceeding six years.

(2) If the child is under twelve years af age, or if the perpetrator has enforced the sexual intercourse in a manner other than those mentioned in sect. 216 of this Act, or by intimidation, the penalty may be increased to imprisonment for any term not exceeding twelve years.

223. (1) Any person who has sexual intercourse with a person under eighteen years of age who is his adopted child or foster-child or who has been entrusted to him for instruction or education shall be liable to imprisonment for any term not exceeding four years.

(2) The same penalty shall apply to any person who, by gravely abusing superior age or experience, induces any person under eighteen years af age to sexual intercourse.

224. If, in the circumstances indicated in ss. 216 to 223 of this Act, sexual relations other than sexual intercourse have taken place, the penalty of imprisonment to be inflicted shall be proportionately reduced.

225. (1) Any person who commits acts of sexual immorality with any person of the same sex in circumstances corresponding to those indicated in ss. 216 to 220 or 222 of this Act shall be liable to imprisonment for any term not exceeding six years.

(2) Any person who commits an act of sexual immorality with a person of the same sex under eighteen years of age shall be liable to imprisonment for any term not exceeding four years; provided that, where the persons concerned are of approximately the same age and development, punishment may be dispensed with.

(3) Any person who, by abusing superior age or experience, induces a person of the same sex and under 21 years of age to commit sexual immorality with him shall be liable to imprisonment for any term not exceeding three years.

226. If, in the circumstances provided for in the foregoing, the punishable nature of the act depends on any abnormal mental or physical condition of the injured person or on the age of that person, the perpetrator has acted without knowledge of such condition or age of the person concerned, or if, in the circumstances dealt with in sect. 217, subsect. (3), of this Act, he has acted without knowing that the person concerned has been admitted to and was subject to the care of any of the institutions indicated in that section and if, for that reason, the act is not imputable to him as intentional, the penalty to be inflicted, if he has acted negligently, shall be proportionately reduced.

227. The punishment to be inflicted under ss. 216 to 224 or 226 of this Act may be remitted if the persons between whom the illicit sexual relations have taken place have since married each other.

228. (1) Any person who, for the purpose of gain, induces some other person to indulge in sexual immorality with others or prevents any person who carries on sexual immorality as a profession from giving it up, or who keeps a brothel, shall be guilty of procuring and liable to imprisonment for any term not exceeding four years.

(2) The same penalty shall apply to any person who incites or helps a person under eighteen years of age to carry on sexual immorality as a profession, or to any person who helps some other person to leave the Kingdom in order that the latter shall carry on sexual immorality as a profession abroad or shall be used for such immorality, where that person is under 21 years of age or is at the time ignorant of the purpose.

229. (1) Any person who promotes sexual immorality as a profession by acting as an intermediary or who derives profit from the activities of any person carrying on sexual immorality as a profession, shall be liable to imprisonment for any term not exceeding three years.

(2) Any man who allows himself to be maintained, in whole or in part, by a woman who makes her living by prostitution shall be liable to imprisonment for any term not exceeding four years.

(3) Any man who, in spite of the warnings of the Police, lives with a woman who makes her living by prostitution shall be liable to imprisonment for any term not exceeding one year.

(4) The same penalties prescribed in subsect. (2) or (3) of this section shall not apply to male persons under eighteen years of age whom the women are under a legal obligation to support.

230. Any person who accepts payment for committing sexual immorality with a person of the same sex shall be liable to imprisonment for any term not exceeding two years.

231. If any person prosecuted under the provisions of ss. 228, 229 or 230 of this Act has previously been convicted of any of the offences dealt with in these provisions or of vagrancy, or if he has been sentenced to imprisonment in respect of an offence against property, the penalty may be increased by not more than one-half.

232. Any person who by obscene behaviour violates public decency or gives public offence shall be liable to imprisonment for any term not exceeding four years or, in extenuating circumstances, to simple detention or a fine.

233. Any person who incites or invites other persons to prostitution or exhibits immoral habits in such manner as to violate public decency or to give public offence or to inconvenience neighbours shall be liable to simple detention or to imprisonment for any term not exceeding one year or, in extenuating circumstances, to a fine.

234. (1) Any person who—

(I) offers or hands over to any person under eighteen years of age obscene publications, pictures or objects; or who

(II) publishes or circulates or, for such purpose, produces or imports obscene publications, pictures or objects; or who

(III) arranges for any public lecture, performance or exhibition of an obscene nature;

shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding six months.

(2) If any of the acts mentioned in subsect. (1) of this section is committed for commercial purposes, a fine may be imposed only in particularly extenuating circumstances.

(3) Any person who, for the purposes of gain, publishes or circulates or, for such purpose, produces or imports publications or pictures which, without being actually obscene, must be assumed to be solely intended for a commercial exploration of sensuality shall be liable to a fine or to simple detention for any term not exceeding one year.

235. (1) Any person who, in an offensive manner, advertises or offers for sale contraceptive articles or substances shall be liable to a fine. The same penalty shall be imposed on any person who, without a positive request, sends out advertisements of such articles or substances to persons who are not specifically authorized to offer them for sale.

(2) (Repealed by Act. No. 177, dated 23 June 1956).

236. (1) Where any person is convicted under ss. 216, 217, subsect. (1) or (3), 218, 222 or 223, subsect. (2) 224 (cf. any of the provisions indicated), 225, subsect. (1) (cf. ss. 216, 217, subsect. (1) or (3), 218 or 222), 225, subsect. (2) or (3), 226 (cf. any of the provisions indicated) or 232 of this Act, he may be ordered by the court not to appear in public parks or gardens, on commons, in the neighbourhood of schools, recreation-grounds, Children's Homes, mental hospitals or institutions for the feeble-minded, or in particular woods or at particular bathing establishments or seaside resorts.

(2) Besides, any person who is convicted under the sections referred to in subsect. (1) of this section or under ss. 228 or 229 of this Act may be forbidden by the court to allow children under eighteen years of age to live in their house or, without the permission of the Police, to stay themselves with persons who live together with children under the said age: provided that such order shall not apply to children who are dependants of the convicted person.

(3) At the expiration of three years after his final release, the convicted may demand that the question of continuing the operation or otherwise of any of the orders made under subsect. (1) or (2) of this section shall be brought before the court which passed sentence in the first instance and the decision of the court shall be made by court order. If an application for rescinding the order is rejected, a new application may be submitted only after three years have expired.

(4) Any contravention of the orders made under subsect. (1) or (2) of this section shall be punished with simple detention or with imprisonment for any term not exceeding four months.

Chapter XXV

Offenses of violence against the person

237. Any person who kills some other person shall be guilty of homicide and liable to imprisonment for any term ranging from five years to life.

238. (1) If a mother kills her child in the course of or immediately after childbirth, and if she is shown to have acted while in distress, from fear of disgrace or while suffering from consequent weakness, confusion or panic caused by the childbirth, she shall be liable to imprisonment for any term not exceeding four years.

(2) If the crime has only been attempted without injury to the child, the penalty may be remitted.

239. Any person who kills some other person at the explicit request of the latter shall be liable to imprisonment for any term not exceeding three years or to simple detention for not less than sixty days.

240. Any person who assists some other person in committing suicide shall be liable to a fine or to simple detention. If such an act of assistance is committed for reasons of personal interest, the penalty shall be imprisonment for any term not exceeding three years.

241. Any person who negligently causes the death of some other person shall be liable to simple detention or to a fine or, in aggravating circumstances, to imprisonment for any term not exceeding four years.

242. (Repealed by Act, No. 161, dated 18 May 1937.)

243. Any person who imports, produces or offers for sale, as a complete set or separately, articles purporting to be intended for sexual hygiene but the principal purpose of which is shown to be inducing abortion shall be liable to a fine or to simple detention for any term not exceeding three months or, in aggravating circumstances, to imprisonment for the same term. This provision shall not apply to the purchase, for therapeutic purposes, of instruments and other similar objects on behalf of medical practitioners or hospitals.

244. (1) Any person who commits violence against or otherwise attacks the person of others shall be guilty of committing an act of violence and liable to a fine or to simple detention.

(2) If the victim is a pregnant women or if, owing to the nature of the instruments or means used or the circumstances under which it has been committed, the assault was of a particularly dangerous character, the penalty may be aggravated to imprisonment for two years. The same shall apply if the violence exerted was in any other way exceptionally brutal.

(3) If the act of violence has resulted in damage to the person or health of the injured party, the penalty shall be simple detention or imprisonment for any term not exceeding two years or, in particularly extenuating circumstances, to a fine. In the case of cruelty, the penalty shall be simple detention or imprisonment for any term not exceeding two years. If the act has resulted in death or grievous bodily harm, the penalty may be increased to imprisonment for six years.

(4) Any person who, without provocation, commits violence against some other person or otherwise attacks him shall be guilty of assault and battery and shall be liable to imprisonment for any term not exceeding two years. If the act of violence is of a less serious nature, or in extenuating circumstances, the penalty may be reduced to simple detention; if the act of violence is of minor importance or where they are particularly extenuating circumstances, a fine may be imposed. Where the act of violence has entailed such consequences or has been of such character as to be covered by the provisions of subsect. (2) or (3) of this section, the penalty may be increased to imprisonment for six years.

(5) In the circumstances dealt with in subsect. (1) of this section public prosecution shall take place only where required by considerations of public policy.

245. (1) Any person who injures the person or health of others shall be guilty of inflicting bodily harm and liable to simple detention or to imprisonment for any term not exceeding three years or, in particularly extenuating circumstances, to a fine.

(2) In the circumstances indicated in sect. 244, subsect. (2) or (4), of this Act, or where the bodily harm has been associated with cruelty or has resulted in death or grievous bodily harm, the penalty shall be imprisonment for any term not exceeding eight years.

246. Any person who injures some other person in such manner that the latter loses or suffers a substantial impairment of his vision, hearing, speech or power of procreation, or becomes unfit, for ever or for a long, indefinite time, to discharge his professional duties or to attend the pursuits of daily life, or who

inflicts on his person or health any other injury of similar consequence, shall be guilty of inflicting grievous bodily harm and liable to imprisonment for not less than one nor more than twelve years.

247. If any person convicted under sect. 244 or sect. 245 of this Act has previously been sentenced to a penalty involving the deprivation of liberty for intentional assault or for any offense associated with intentional violence, the penalty may be increased to not more than one-half.

248. (1) Where the injured party has given his consent to the assault, the penalty may be reduced and, if covered by sect. 244, subsect. (1), of this Act, the act is not punishable.

(2) Where blows have been inflicted in a brawl or where the person attacked has returned such blows, the penalty may be reduced or, in the circumstances dealt with in sect. 244, subsect. (1), of this Act, be remitted.

249. (1) Any person who negligently inflicts serious harm on the person or health of others of a nature not falling within the provisions of sect. 246 of this Act shall be liable to a fine or to simple detention. Prosecution shall take place ony at the request of the injured party, unless considerations of public policy call for prosecution.

(2) Any person who negligently inflicts harm on others of the nature described in sect. 246 of this Act shall be liable to simple detention or to a fine or, in aggravating circumstances, to imprisonment for any term not exceeding four years.

250. Any person who reduces some other person to a helpless condition or abandons, in such condition, any person entrusted to his care shall be liable to imprisonment for a term which, where the act results in death or grievous bodily harm and in other aggravating circumstances, be increased to eight years.

251. Any woman who, at the time of her childbirth, exposes her child to serious danger in an unwarrantable manner shall be liable to simple detention for not less than sixty days or to imprisonment for not more than one year. The penalty may be reduced or remitted if the child survives without having suffered any injury.

252. Any persons who, for the purposes of gain, by gross recklessness or in similar inconsiderate manner, exposes the life or health of others to impending danger shall be liable to simple detention or to imprisonment for any term not exceeding four years.

253. Any person who, though he could do so without particular danger or sacrifice to himself or others, fails

(I) to the best of his power to help any person who is in evident danger of his life, or

(II) to take such action as is required by the circumstances to rescue any person who seems to be lifeless, or as is ordered for the care of persons who have been victims of any shipwreck or any other similar accident;

shall be liable to a fine or to simple detention for any term not exceeding three months.

254. Any person who, intentionally or through negligence, leaves dangerous weapons or explosives in the hands of a child under fifteen years of age or of an insane, feebleminded or intoxicated person shall be liable to a fine or to simple detention for any term not exceeding three months.

255. (1) A man who fails to give any woman whom he has got with child out of wedlock such assistance as may be necessary for her childbirth and if, for that reason, she is reduced to distress, shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding one year.

(2) If any person who is aware that the childbirth of any woman belonging to his household is approaching fails to give her the assistance necessary for that occasion, he shall be liable to a fine or to simple detention for any term not exceeding three months.

256. (1) Any person who by sexual intercourse or other sexual relations exposes any other person to infection by venereal disease if he has been or ought to have been aware of the danger of infection, shall be liable to imprisonment for any term not exceeding four years or to simple detention.

(2) If the person exposed to the infection is the spouse of the guilty person, prosecution shall take place only at the request of the former.

257. (1) Any person who places a child infected with syphilis at nurse with a woman other than its mother shall, if he has been or ought to have been aware of the danger of infection, be liable to simple detention or to imprisonment for any term not exceeding three years or, in extenuating circumstances, to a fine.

(2) The same penalty shall apply to any woman who, despite her knowledge or suspicion that she suffers or has suffered from syphilis, accepts or keeps the child of some other woman at nurse.

258. Any person who, despite his knowledge or suspicion that a child is infected with a contagious venereal disease, entrusts it to the care of any other person who has not been informed in advance of the disease or of its contagious nature, or under conditions exposing other children to infection, shall be liable to simple detention or to imprisonment for any term not exceeding two years or, in extenuating circumstances, to a fine.

259. Any person who, in circumstances other than those covered by the foregoing provisions, through gross negligence exposes any other person to the imminent danger of being infected with venereal disease shall be liable to a fine or to simple detention.

Chapter XXVI

Offences against personal liberty

260. Any person who—

(I) by violence or under the threat of violence, of substantial damage to property, of the deprivation of liberty or of a false accusation of having committed a punishable act or dishonourable conduct or of revealing matters appertaining to someone's private affairs, forces any other person to do, suffer or omit to do anything; or who

(II) under threat of denouncing or revealing a punishable act or of making true accusations of dishonourable conduct, forces any other person to do, suffer or omit to do anything, provided such coercion is not deemed to be duly justified by virtue of the circumstances to which the threat relates;

shall be guilty of unlawful coercion and liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

261. (1) Any person who deprives any other person of liberty shall be liable to imprisonment for any term not exceeding four years or, in extenuating circumstances, to simple detention.

(2) If the deprivation of liberty has been effected for the purposes of gain or if it has been of long duration or if it consisted in any person being unlawfully kept in custody as insane or feebleminded or being enlisted for foreign military service or being taken into captivity or any other state of dependence in any foreign country, the penalty shall be imprisonment for not less than one nor more than twelve years.

262. (1) Any person who, through gross negligence, brings about a deprivation of liberty of the nature referred to in sect. 261, subsect. (2), of this Act shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding one year.

(2) Prosecution may be waived at the request of the injured person.

Chapter XXVII

Offences against personal honour and certain individual rights

263. (1) Any person who violates the peace or privacy of others—

(I) by opening letters or otherwise appropriating any closed communication addressed to others or withholding such communication from others; or

(II) by obtaining access without a proper reason to the places where other persons keep their personal things; or

(III) by publicly communicating the strictly private affairs of others; or

(IV) by publicly communicating other matters appertaining to the private affairs of others which they can reasonably expect not to be disclosed publicly;

shall be liable to a fine or to simple detention for any term not exceeding six months.

(2) The same penalty shall apply to any person who exercises or has exercised a public office or function or who, by virtue of an official authorisation or approval, carries on or has carried on any occupation, as well as any assistant of such persons, where he reveals secrets appertaining to the private affairs of others or which have come to his knowledge in the execution of his work, except where he has been under an obligation to speak or has acted in lawful protection of obvious public interest or of the personal interests of himself or others.

264. (1) Any person who violates the peace of the home by forcing his way into any house, room or ship belonging to others or into any other place that is not open to the general public shall be liable to a fine or to simple detention for any term not exceeding six months.

(2) The same penalty shall apply to any person who refuses, on request, to leave the land or premises of others.

(3) If the trespass has caused substantial disturbance of peaceful enjoyment by the occupiers or if it has been committed by an armed person or by several persons in association or has been accompanied by violence against any person or with threat of such, or if the offender has previously been sentenced to a penalty involving the deprivation of liberty in respect of any offence associated with intentional violence against any person or property, the penalty may be increased to a longer term of detention or to imprisonment for one year.

264 a. Any person who obtains access to any house or room, including public or private offices, shops, factories, etc., belonging to others with a view to appropriating documents, commercial books, etc., or to ascertaining their contents, shall be liable to imprisonment for any term not exceeding one year or, in extenuating circumstances, to simple detention. If the trespass was of the nature of housebreaking or if it was planned by an organisation or if it was accompanied by violence against any person, the penalty may be increased to imprisonment for any term not exceeding four years.

265. Any person who violates the peace of some other person improperly by intruding on him, pursuing him with letters or inconveniencing him in any other similar way, despite warnings by the Police, shall be liable to a fine or to simple detention for any term not exceeding six months.

266. Any person who, in a manner likely to inspire some other person with serious fears concerning the life, health or welfare of himself or of others, threatens to commit a punishable act shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

266 a. Any person who, in circumstances other than those covered by ss. 136 or 266 of this Act, makes public statements aimed at provoking acts of violence or destruction shall be liable to simple detention or to imprisonment for any term not exceeding one year or, in extenuating circumstances, to a fine.

266 b. Any person who, by circulating false rumours or accusations, persecutes or incites hatred against any group of the Danish population because of its creed, race or nationality shall be liable to simple detention or, in extenuating circumstances, to a fine. If such rumours or accusations have been made in a printed document or in any other way likely to give them a wider circulation, the punishment shall be simple detention or, in aggravating circumstances, imprisonment for any term not exceeding one year.

266 c. Any person who, subsequent to the decision of a case, continues to make such frequent and baseless allegations against the same person as to amount to a virtual persecution shall be liable, if the information is likely to prejudice the person concerned in public opinion, to a fine or to simple detention for any term not exceeding one year.

267. (1) Any person who violates the personal honour of another by offensive words or acts or by making or spreading accusations of an act likely to disparage him in the esteem of his fellow countrymen shall be liable to a fine or to simple detention for any term not exceeding one year.

(2) If the offense has been made against any of the persons mentioned in sect. 119, subsect. (2), of this Act, in connection with the execution of their office or function, in circumstances other than those covered by the provisions of sect. 121 of this Act, this shall be taken into account as an aggravating circumstance in fixing the penalty and, in such case, the punishment may be increased to imprisonment for any term not exceeding six months.

(3) In fixing the penalty it shall be considered as an aggravating circumstance if the insult was made in a printed document or in any other way likely to give it a wider circulation, or in such places or at such times as greatly to aggravate the offensive character of the act.

267a. If any person in the manner indicated in sect. 267, subsect. (3), of this Act has made a statement containing an untrue allegation against another person for acts which, if true, would make the latter unworthy to hold public office, he shall not be heard with the argument that, for the determination of his guilt or for the assessment of the penalty, standards, as they are generally accepted in society, should not apply.

268. If an allegation has been maliciously made or disseminated, or if the author has had no reasonable ground to regard it as true, he shall be guilty of slander and liable to simple detention or to imprisonment for any term not exceeding two years. If the allegation has not been made or disseminated publicly, the punishment may, in extenuating circumstances, be reduced to a fine.

269. (1) An allegation shall not be punishable if its truth has been established or if the author of the allegation in good faith has been under the obligation to speak or has acted in justified protection of obvious public interest or of the personal interests of himself or others.

(2) Punishment may be remitted where evidence is produced affording grounds for regarding the allegation as true.

270. (1) Where the form in which the allegation is made is unduly offensive, the penalty prescribed in sect. 267, subsect. (1), of this Act may be inflicted, even where the allegation is true; the same shall apply if the author had no reasonable grounds for making the insult.

(2) If the injured party demands punishment only under this section, the offender shall not be allowed to prove the truth of the accusation, unless this is clearly justified by considerations of public policy.

271. (1) In the case of an allegation of a punishable act, the person who made the allegation shall not be allowed to prove the commission of such act if the accused has already been finally acquitted of it at home or abroad.

(2) Proofs of a punishable act of which the person, against whom the allegation was made, has been convicted, shall not exempt the author of the allegation from punishment if, having regard to the nature of the offense, the time it was committed and other circumstances, the person convicted of it had a reasonable claim on not having the offense revealed.

272. The penalty prescribed in sect. 267 of this Act may be remitted if the act has been provoked by improper behaviour on the part of the injured person or if the latter is guilty of retaliation.

273. (1) If a defamatory allegation is unjustified, a statement to that effect shall, at the request of the injured party, be included in the sentence.

(2) Any person who is found guilty of any defamatory allegation may, at the request of the injured party, be ordered to pay a sum fixed by the court to meet the cost of publishing, in one or several public papers, of either the full report of the sentence itself or of this together with the court's reasoning.

274. (1) Any person who makes or spreads defamatory utterances against a deceased shall be liable to a fine or, in the case of slander, to simple detention.

(2) Defamatory utterances made against any person twenty years after his death shall be liable to prosecution only for the conditions laid down in sect. 268 of this Act.

275. The offenses mentioned in this Chapter shall, with the exception of those dealth with in ss. 264 a, 266 or 266 a or b, of this Act, be liable to private prosecution. In the circumstances referred to in ss. 263, subsect. (2), 264, subsect. (3), or 265 of this Act or where any person who exercises or, at the time in question, exercised a public office or function is charged with an act that may entail or might have entailed resignation of the office or function, the injured party may require public prosecution. The same shall apply where an accusation is made in an anonymous letter or in a letter signed by a false or fictitious name.

275a. Cases in which a charge is preferred in pursuance of the provisions of ss. 267 or 268 of this Act shall be tried without delay.

Chapter XXVIII

Acquisitive offenses

276. Any person who, without the consent of the owner, carries away any movable object belonging to some other person for the purpose of obtaining for himself or for others an unlawful gain by its appropriation shall be guilty of theft. For the purposes of this and the following sections, any quantity of energy that is produced, conserved or utilized for the production of light, heat, power or motion or for any other economic purpose shall be recognized as equivalent to a movable object.

277. Any person who, for the purpose of obtaining for himself or for others an unlawful gain, appropriates any movable object belonging to some other

person which is not in the custody of any person or which has come into the hands of the perpetrator through a carelessness on the part of the owner or in any similar accidental way shall be guilty of misappropriation of objects found.

278. Any person who, for the purpose of obtaining for himself or for others an unlawful gain:

(i) Appropriates any movable object belonging to any other person and which is in his custody, in circumstances other than those covered by sect. 277 of this Act; or

(ii) Refuses to acknowledge receipt of a pecuniary or any other loan, or of a service for which a remuneration shall be paid; or

(iii) Unlawfully spends money that has been entrusted to him, even if he was not under the obligation to keep it separate from his own funds;

shall be guilty of embezzlement.

279. Any person who, for the purpose of obtaining for himself or for others an unlawful gain, by bringing about, confirming or exploiting a mistake, induces any person to do or omit to do an act which involves the loss of property for the deceived person or for others affected by the act or the omission, shall be guilty of fraud.

280. Any person who, for the purpose of obtaining for himself or for others an unlawful gain, involves some other person in a loss of property:

(i) By abusing an authority conferred on him to act with power of attorney on behalf of the latter; or

(ii) By acting against the interests of the person concerned in respect of property held in trust by him on behalf of that person; shall, provided the case is not covered by ss. 276 to 279 of this Act, be guilty of breach of trust.

281. Any person who—

(i) for the purpose of obtaining for himself or for others an unlawful gain, threatens some other person with violence, substantial damage to goods or deprivation of liberty, with making a false accusation of a punishable act or dishonorable conduct or with revealing matters appertaining to his private life; or who

(ii) threatens some other person with denouncing or revealing a punishable action, or with making true accusations of dishonourable conduct for the purpose of obtaining for himself or for others a gain which was not justified by the action which was the occasion of the menace or threat:

shall, provided the case is not covered by sect. 228 of this Act, be guilty of extortion.

282. Any person who takes advantage of the distress, naïvetē, or inexperience of some other person or of the state of dependence of that person in relation to himself in order to obtain or stipultate in a contract any payment that is out of all proportion to the return, and any person who, having been aware of the nature of the contract at the time of acquiring an interest arising out of such contract, enforces his claim or assigns it to some other person, shall be guilty of usury.

283. (1) Any person who, for the purpose of obtaining for himself or for others an unlawful gain,

(i) sells, pawns, mortgages or in any other way disposes of property belonging to him, but on which a third party has acquired a right with which the act is incompatible; or

(ii) subsequent to the institution of bankruptcy proceedings against him or to the commencement of negotiations to agree on a composition, undertakes acts aimed at withdrawing from creditors the property and interests in the estate; or who

(iii) by false pretences, concealment, abuse of contractual forms, substantial gifts, excessive consumption, sales at cut prices, payments of or deposit of guarantee for debts not due or in any other similar manner withdraws his property or interests from his creditors or from anyone of them;

shall be guilty of misappropriation of funds.

(2) If acts of the nature indicated under paragraph (iii) of subsect. (1) of this section have been undertaken for the benefit of a creditor, the latter shall be liable to punishment only if, at the time when he foresaw the imminence of bankruptcy or the suspension of payments by the debtor, he induced the debtor to grant him such facilities.

284. Any person who accepts or obtains for himself or for others a share in profits acquired by stealing, unlawful detention of objects found, embezzlement, fraud, breach of trust, extortion, misappropriation of funds or robbery, and any person who, by hiding the articles thus acquired, by assisting in selling them or in any other similar manner helps to ensure for the benefit of another person the profits of any of these offences, shall be guilty of receiving.

285. (1) The offences referred to in ss. 276, 278 to 281 or 283 of this Act as well as receiving in connection with such offenses or with robbery shall be punished with imprisonment for any term not exceeding two years or, in the case of recidivism, three years. In the circumstances dealt with in sect. 283, subsect. (2), of this Act, the penalty in respect of the debtor as well as of the creditor who had benefited may be reduced to simple detention.

(2) Misappropriation of objects found and receiving in connection with such offenses shall be punished with a fine or simple detention or imprisonment for any term not exceeding two years.

(3) Usury shall be punished with simple detention or with imprisonment for any term not exceeding two years.

286. (1) If a theft is of an especially aggravated nature, for example, because of the manner in which it was committed, or because it was committed by several persons in association, or because the perpetrator was armed with any weapon or any other dangerous implement, or because of the high value of the object stolen, or the conditions under which they were kept, or where a large number of thefts was committed, the penalty may be increased to imprisonment for six years.

(2) The penalty for embezzlement, fraud, breach of trust, or misappropriation of funds may, where the offence is of an especially aggravated nature or where a large number of such offences was committed be increased to imprisonment up to eight years.

(3) The penalty for extortion, usury or receiving may, under similar circumstances, be increased to imprisonment for six years.

287. (1) If any of the offences dealt with in sect. 276 or ss. 278 to 284 of this Act is of very small importance because of the circumstances under which the punishable act was committed, of the small value of the objects appropriated or of the loss of property sustained or for any other reason, the penalty may be reduced to simple detention or to a fine or, in further extenuating circumstances, be remitted.

(2) In the case of unlawful detention of objects found or in the case of receiving in respect of such objects, the penalty may be remitted under extenuating circumstances.

288. (1) Any person who, for the purpose of obtaining for himself or for others an unlawful gain, by violence or threat of immediate application of such,

(I) takes or extorts from any other person a movable object belonging to the latter; or

(II) hides in a safe place any stolen object; or who

(III) forces some other person to commit any act or make any omission involving that person or any other person for whom he is acting in a loss of property;

shall be guilty of robbery and liable to imprisonment for not less than six months nor more than ten years.

(2) If the robbery has been carried out in particularly dangerous circumstances, the penalty may be increased to imprisonment up to sixteen years.

289. (Repealed by Act. No. 120, of 17 May 1956).

290. (1) Any misappropriation of funds that has not violated any right especially protected shall be prosecuted only at the request of the injured party, or if a subsequent distraint has failed to satisfy a creditor, if bankruptcy proceedings have been instituted, if negotiations to agree on a composition have been commenced, or if a petition in bankruptcy has been refused owing to the insufficiency of the assets of the estate.

(2) In the case of stealing, unlawful detention of objects found, embezzlement, fraud or receiving committed against any near relative of the offender, and in the circumstances dealt with in sect. 287 of this Act, prosecution may be waived at the request of the injured party.

Chapter XXIX

Other offenses against property

291. (1) Any person who destroys, damages or removes objects belonging to others shall be liable to a fine, or to simple detention or to imprisonment for any term not exceeding one year.

(2) In the case of very serious damage or where the perpetrator has previously been convicted under this section or in pursuance of ss. 180, 181, 183, subsect. (1) or (2), 184, subsect. (1), 193 or 194 of this Act, the penalty may be increased to imprisonment up to four years.

(3) Where the damage has been done through gross negligence in the circumstances referred to in subsect. (2) of this section, the penalty shall be a fine or simple detention or imprisonment for any term not exceeding six months.

292. (1) Any person who destroys, damages or removes his property, thereby rendering it no longer available to satisfy his creditors or anyone of them shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding one year.

(2) The provisions of sect. 290, subsect. (1), of this Act shall apply in like manner to this section.

293. (1) Any person who unlawfully uses an object belonging to some other person so as to involve the latter in any loss or considerable inconvenience shall be liable to a fine or to simple detention. In aggravating circumstances, in particular where the object is of considerable value, the penalty may be increased to imprisonment up to two years.

(2) Any person who puts obstacles in the way of any other person exercising his right of disposing of or retaining an object shall be liable to a fine or to simple detention or, in aggravating circumstances, to imprisonment for any term not exceeding six months.

294. Any person who unlawfully takes the law into his own hands shall be liable to a fine.

295. Any person who, contrary to the rights of individuals or of public authorities, executes works of embankment or erects or builds permanent installations in fresh waters or in territorial waters shall be liable to a fine or to simple detention for any term not exceeding three months.

296. (1) Any person who, in circumstances other than those covered by sect. 279 of this Act,

(I) spreads false intelligence likely to affect the prices of commodities, valuable securities or any other similar interests; or

(II) makes incorrect or misleading statements concerning the economic conditions of joint-stock companies, co-operative societies or similar undertakings through channels of public communications, in reports, in statements of accounts or in declarations to the general meeting or any proper official of a company, in notifications to the Registrar of commercial undertakings or to the Registrar of joint-stock companies or in any invitation to the establishment of such companies or to the subscription of shares; or who

(III) contravenes the provisions governing joint-stock companies or any other limited liability companies in regard to the issue of share certificates, certificates of co-operative guarantee or scrip certificates, the application of profit, the payment of dividend, or the repayment of deposits;

shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years.

(2) Where any of the acts referred to in paragraphs (II) or (III) of subsect. (1) of this section has been committed through gross negligence, the punishment shall be a fine or, in aggravating circumstances, simple detention.

297. Any person who, in circumstances other than those referred to in sect. 296 of this act, knowingly makes incorrect statements in documents, business letters, circular letters or notifications concerning the economic position of the company managed or represented by him shall be liable to a fine.

298. Any person who, in circumstances other than those covered by sect. 297 of this Act,

(I) by false pretences relating to his capacity to pay obtains, for himself or for others, loans or credit resulting in a loss of property to others; who

(II) by spending a prepaid remuneration renders himself incapable of fulfilling his obligation; who

(III) departs without paying for accommodation, food, transport or any other service the receipt of which has clearly been subject to the condition that payment should be made before the departure; or who

(IV) obtains admission by trickery, without paying the fixed price, to any performance, exhibition or meeting, or to conveyance by any public means of communication or to the use of any other public establishment;

shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding six months.

299. Any person who, in circumstances other than those covered by the provisions of sect. 280 of this Act,

(I) in his capacity as trustee of any property of another person involves, by neglect of duty, the latter in a substantial loss of property that is not made good prior to the promulgation of sentence in the first instance; or who

(II) in his capacity as trustee of any property of another person accepts, claims or accepts the promise of a third party, for the benefit of himself or of others, a pecuniary advantage the receipt of which is concealed from the person whose interests he is protecting, as well as any person who grants, promises or offers such advantage;

shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding six months.

300. Any person who,

(I) at a time when he is aware or ought to be aware of his inability to satisfy his creditors seriously aggravates his economic circumstances by incurring new debt, or pays or deposits guarantees for substantial debts that have fallen due; who

(II) involves his creditors in a substantial loss by extravagant habits, by gambling, by hazardous enterprises that are out of proportion to his economic circumstances, by grave mismanagement of his affairs or by any other careless conduct; or who

(III) in his capacity as debtor or authorised agent makes incorrect statements or is guilty of grave carelessness in submitting the declarations necessary for the commencement of negotiations to agree on a composition;

shall be liable to imprisonment for any term not exceeding one year or, in extenuating circumstances, to a fine.

(2) Prosecution shall take place only on the conditions laid down in sect. 290, subsect. (1), of this Act.

301. Any person wo, intentionally or negligently, fails to fulfil the duty of filing a petition in bankruptcy in respect of himself or of any company of which he is the responsible manager, shall be liable to a fine or to simple detention for any term not exceeding three months.

302. Any person who fails to keep such commercial books as he is under an obligation to keep by law, or is guilty of grave irregularities in the keeping of such books or in such filing of the books or of their vouchers as is prescribed by law, shall be liable to a fine or to simple detention.

303. Any person who is guilty of gross negligence in acquiring by purchase or in receiving in any other similar manner objects acquired through an offence against property shall be liable to a fine or to simple detention. In the case of recidivism or if the offender has been previously convicted of an offence against property, the penalty may be increased to imprisonment up to six months.

304. (1) Any person who, where rights of property are amenable to decision by voting, obtains for himself or for others an improper permission or authority to paticipate in such procedure or to give more votes than he is entitled to, or acts in a manner which unduly influences the vote, shall be liable to a fine or to simple detention for any term not exceeding one year.

(2) The same penalty shall apply to any person who, in the case of any voting in a bankruptcy estate or an unencumbered estate or in the course of any negotiations to agree on a composition, influences by false pretences the casting of votes, or who grants, promises or offers, accepts, claims or accepts the promise of a pecuniary advantage for voting in a particular way or for abstaining from voting.

305. The offences dealt with in ss. 291, subsect. (1) or (3), 293, subsect. (1), 298 or 299 of this Act shall be prosecuted only at the request of the injured party; provided that the offence dealt with in sect. 293, subsect. (1), of this Act shall also be amenable to prosecution in the absence of such request, if required by considerations of public policy. The offences dealt with in ss. 293, subsect. (2), and 294 of this Act shall be liable to private prosecution.

Appendix C

The Norwegian Penal Code With an Introduction by Professor Dr.jur. Johs. Andenaes

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NORWEGIAN PENAL CODE
of 1902 as amended 1961

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FOREWORD

There is unanimous agreement among comparative criminal lawyers that the modern era of criminal law began with the promulgation of the Norwegian Penal Code of May 22, 1902.[1] No doubt existed, therefore, that the Norwegian Penal Code was to be among the first in the American Series of Foreign Penal Codes. Since an unselfish willingness to help is a rather predominant Norwegian characteristic, it was no difficult task to secure the very best and most competent Norwegian cooperation. Mr. Harald Schjoldager, a graduate of the Faculty of Law of the University of Oslo, as well as an American LL.M. (Yale) devoted himself to the task of translating with the thrust of a Viking ship under full sail. Mr. Finn Backer, likewise a graduate of the University of Oslo and an alumnus of New York University, Chief of Division in the Royal Ministry of Justice, stood at the helm and safely guided the translation around difficult cliffs. But it was the distinguished Norwegian criminalist Prof. Dr. jur. Johs. Andenaes, former teacher of Messrs. Schjoldager and Backer, and our Norwegian Advisory Committee member, who provided the sails for the journey. Without his kind advice and his remarkable *Introduction* this volume would not have become a reality. His various previous publications in English have already introduced Prof. Andenaes' erudite scholarship to American criminalists. I am, therefore, particularly proud that Prof. Andenaes has made his services available to our Project.

To all three Norwegian friends and colleagues I want to offer my sincere gratitude for a splendid scholarly performance. My gratitude is also due to the Royal Norwegian Ministry of Justice for placing Mr. Backer's services at our disposal. And I am no less grateful to our secretaries and volunteer assistants who have labored beyond and without material compensation.

The editor-in-chief of the series has used his editorial discretion only in a few instances for the preservation of unity of style within the whole series, both as to terminology and as to technical matter, *e.g.*, the mode of indicating the latest amendment anywhere within a given section by placing the date of such amendment in square brackets at the end of the whole section.

G. O. W. M.

PREFACE

In the process of translating a penal code, one is constantly confronted with the difficult task of choosing between exactitude and linguistic beauty. This translation seeks a compromise between the two demands.

Some parts of the code, especially the chapters on maritime offenses, had already been available in English, as translated by the Ministry for Foreign Affairs. This has facilitated the work. The translation into English of the Danish Penal Code has also been of considerable help.

Professor Johs. Andenaes of the University of Oslo has given me valuable assistance and advice, for which I am most grateful to him. Chief of Division Finn Backer, of the Legal Department of the Ministry of Justice, has kindly

[1] See especially Ancel, "The Collection of European Penal Codes and the Study of Comparative Law" (Schwartz transl.), 106 U.Pa.L.Rev. 334, 337 (1958).

checked every section and rewritten a great number of them. He has verified the legal terminology as well as the English style, and his extensive work has greatly improved the translation, for which I am deeply indebted to him and to the Ministry of Justice.

HARALD SCHJOLDAGER.

Oslo, Norway.
March 1, 1961.

INTRODUCTION

More than most other comprehensive legislative works, the Norwegian Penal Code of 1902, in force since January 1905, is the result of one man's efforts. The draft of 1896 which, with only few alterations, became the basis for the code, was produced by a large committee. But the dominant force in the committee's work was its chairman, Bernhard Getz (1850-1901), one of the most renowned names in Norwegian jurisprudence. Originally he was a professor at the University of Kristiania (now Oslo), but in 1890, when the new Code of Criminal Procedure of 1887 came into force, he became the first Attorney-General. A comparison of Getz's preliminary draft, the proposal of the committee, and the final code, shows only few and minor revisions.

Getz, as well as his somewhat younger friend and colleague, Professor Francis Hagerup (later Prime Minister and diplomat), was an active member of the International Association for Criminology (*Internationale Kriminalistische Vereinigung*), the most brilliant member of which was Franz v. Liszt. It may be said that the Penal Code of 1902 was the first important practical result of the reform ideas represented by the I.K.V. Getz's preliminary draft of 1887 was translated with comments into German and reviewed in detail by v. Liszt himself in the Norwegian legal periodical *Tidsskrift for Retsvidenskab*, in 1889. The code earned international reputation and was, at the time of the enactment, regarded as the most modern penal code in Europe.

The code did not, however, represent any radical reform program. It did not, as Ferri's Italian draft of 1921, or the new Swedish draft of 1957, attack the traditional concepts of punishment, guilt and criminal responsibility. One of the most characteristic features of the code is said to be the way it has combined new ideas and traditional concepts. The code is also widely based on comparative legal studies.

AMENDMENTS TO THE PENAL CODE

Since the penal code's enactment in 1902, substantial parts of it have been amended. The most important amendments will be mentioned in the following.[1]

The work of revision was initiated in 1922 by the appointment of the Commission on Revision of the Penal Code. The first result of the Commission's work was the amendment of 1927, concerning the provisions on felonies against public morals (Chapter 19). At that time, the common feeling was that the number of sexual offenses was steadily increasing and that this was due partly to the mild penalties imposed by the courts. The amendment established high minimum punishments for serious sexual offenses. Experience has proved this to be a mistake. The high minimum punishments have sometimes caused unreasonable sentences which necessarily called for the exercise of the pardoning power. In other instances unjustified acquittals by the jury have resulted, or *nolle prosequis* have been entered. The provisions about sexual offenses are once again being revised and, probably, the court's discretionary power to determine the measure of punishment will be restored.

In 1929 the Commission's work resulted in amendments of the provisions concerning criminal responsibility, measures pertaining to recidivists and mentally abnormal offenders, the application of suspended sentence and some other provisions.

A new Commission on Revision of the Penal Code was established in 1934 and continued the work. On the basis of its proposals, the provisions concerning offenses against personal honor (Chapter 23) were amended in 1939, and the provisions concerning offenses against property (Chapters 24–29, 31 and 40

[1] A German translation of the code in its original form is given in the *Sammlung ausserdeutscher Strafgesetzbücher*, No. 20. The code is also available in a French translation, III Ancel, *Les Codes Penaux Europeens 1281* (1958).

and some other single provisions) in 1951. Due to the threatening international situation, the provisions about treason and felonies against the state (Chapters 8 and 9) were temporarily amended in 1950, as a part of the national defense effort.

The Commission of 1934 was reorganized in 1947 and later given the status of a permanent advisory board to the Ministry of Justice (The Penal Code Council) with the task of continuing the work of partial revision. The provisions about loss of civil rights were amended in 1953, the provisions about suspended sentence in 1955, and the provisions about felonies and misdemeanors by press in 1958. At the same time new rules about wire-tapping and illicit eavesdropping on conversations and meetings were enacted (section 145a), and some of the provisions in Chapter 2, concerning the forms of punishment, were amended or repealed. A proposal of 1953 about new provisions concerning homosexuality and certain other sexual offenses did not, however, result in new legislation. The Council's proposal of 1956 about new provisions concerning legitimate abortion resulted in a special Act of November 1960, amending section 245 of the code. Among other problems on the Council's agenda may be mentioned the provisions regarding sexual crimes and measures against recidivists and mentally abnormal offenders (sections 39–39b).

A foreign reader may perhaps get the impression that these extensive revisions are an expression of general discontent with the code. This is not at all the case. The work of revision originates from the belief that with the passage of time even a good code must be reconsidered in light of new experiences, public sentiment and developments in legal thinking.

OTHER STATUTES CONCERNING PENAL MATTERS

When the Norwegian Penal Code of 1902 was enacted, it was one of a series of laws aimed at fighting criminality in its various forms. Therefore, by studying only the penal code without reference to the other provisions regulating penal matters, the reader may gain an incorrect impression of the state of the law.

In this connection the Act of 1896 about neglected children, now replaced by the Child Welfare Act of 1953, is of paramount importance. The Act of 1896 enunciated for the first time the Scandinavian alternative to juvenile courts: a system of local administrative agencies entrusted with the care of neglected or delinquent children whose sole consideration should be the best interests of the child. The Child Welfare Boards have authority to act until the child is eighteen years of age. The penal code declares that an offender is liable to punishment when he has reached his fourteenth year of age (section 46), and the prosecution is fully entitled to initiate proceedings before the ordinary courts. But when the offender is under eighteen years of age, the prosecution will generally waive its right to prosecute, and leave it to the Child Welfare Board to decide what measures should be taken.

The Act of June 1, 1928, concerning corrective treatment of juvenile offenders, inspired to some extent by the English Borstal institution, is based on the idea of treatment rather than punishment. This Act is aimed at offenders under twenty-three years of age and permits the court to place such an offender in a reform school instead of sentencing him to imprisonment. The court must find that the offender needs "educational influence in a reform school in order to abstain from further felonies, and that such treatment will be appropriate." The duration of the treatment is decided by the central prison administration, but except under special circumstances, may not be extended over more than two years. The law does not regard commitment to a reform school as a punishment. Rather, it is considered an educational measure similar to those employed with delinquents under eighteen years of age.

The Code of Criminal Procedure of 1887 should also be mentioned. This code established an efficient prosecution headed by the Attorney-General and permanently appointed state attorneys within each district. The Attorney-General is a non-political official in a very strong position. He is subject to instructions of the King, but not subordinate to any Ministry. The prosecution has a general and discretionary power to waive prosecution if it finds special reasons therefor. When the offense in question is a felony, the state attorney needs the approval of the Attorney-General.

The power to waive prosecution (*nolle-pros*) is extensively used, especially with respect to young offenders and when otherwise specially extenuating circumstances are present. Occasionally it has been used also in connection with types of felonies which generally are of a very serious nature: for example, in a case where an old man had killed his insane daughter out of mercy. On the whole, a waiver of prosecution is made conditional upon good behavior during a specified probation period. A conditional waiver of prosecution, therefore, largely resembles a suspended sentence.

It should also be mentioned that the Code of Criminal Procedure contains provisions which ensure a defendant's right to assistance of counsel at the expense of the state. In all cases where the defendant is charged with a felony he is entitled to have a counsel, unless he has made a complete confession and the case is therefore subject to summary proceedings. In misdemeanor cases the court may appoint counsel for the defendant, at the expense of the state if special circumstances make it necessary. The Prison Act of 1958 has replaced the previous Prison Act of 1903. This law invests the central prison and administration with a far-reaching power to release convicts on probation. Independent of these rules, the King in Council may pardon any convict, completely or partly.

THE SYSTEM OF THE CODE

The code is divided into three parts. The first part is the General Part, containing provisions about the scope of Norwegian penal law, about penal and correctional measures, self-defense and defense of others and of property, *mens rea* and responsibility. Unless otherwise stated, these provisions are applicable also to the penal provisions of other laws (see section 1). The second part of the code deals with felonies, the third part with misdemeanors. The division felonies-misdemeanors is followed also in other laws (see section 2). This is mainly of procedural significance, but it also has some substantive importance. According to section 49, for example, an attempted misdemeanor is not punishable.

All the major penal provisions about felonies are to be found in the second part of the code, for instance, homicide, larceny, forgery and sexual offenses. The third part, concerning misdemeanors is not so comprehensive. The misdemeanors included in this part of the penal code are of far lesser practical importance than those of other laws, for instance, the law of 1900 about vagrancy, begging and drunkenness, or the local police regulations.

RESPONSIBILITY AND MENS REA

Following the amendment of the provisions about responsibility in 1929, the code is based on a clearly biological system. A person who has acted while *insane* or *unconscious* may not be punished. Insanity under the law also includes severe imbecility. The medical diagnosis alone is decisive. If the accused person was insane at the time of the offense, he must be acquitted without any investigation of the relationship between the illness and the criminal act. From the viewpoint of the code, there is always a possibility that such a relationship is present. If the offender is dangerous because of his illness, the community must be protected by means other than punishment. The courts also adhere to the principle that the defendant shall receive the benefit of the doubt about his state of mind, according to the general principle *in dubio pro reo*. The statements of psychiatric expert witnesses are in principle only advisory, but, in fact, the biological system makes their statements conclusive on the question of responsibility. In this connection it should be mentioned that Norwegian law does not regard expert witnesses as ordinary party witnesses but as court appointed witnesses. (This does not prevent a defense counsel from calling private experts as witnesses, but actually this rarely happens.) The statements of the expert witnesses are subject to control by a national public Commission for Legal Medicine. This system secures a fairly high degree of conformity in terminology and in the practice of forensic psychiatry. A somewhat controversial exception to the general rules is found in section 45 which provides that unconsciousness due to voluntary intoxication does not exclude punishment. The provision is based on considerations of deterrence but is also undoubtedly related to the general antipathy to the consumption of alcohol so frequently reflected in Norwegian law, for example, in the complicated

restrictions on the sale of alcohol and in the provisions (probably the strictest in the world) about driving under the influence of alcohol.

Only acts committed *intentionally* or by *negligence* are punishable. The principal rule is that intent is necessary (section 40). Frequently a special purpose is also required, particularly the purpose of obtaining an unlawful gain for oneself or another. The so-called strict or absolute criminal liability is practically unknown in Norwegian law, and the same applies to liability of corporations and other legal entities, though a few scattered provisions of this kind can be found in penal legislation outside the code, but they are rarely resorted to. The code contains no definition of the terms intent and negligence. It is clear, however, that an act is committed intentionally if the offender had the *purpose* of bringing about the harm or if he thought of it as the *most probable* result of the act. It is disputed whether intent may be present also outside these limits (*dolus eventualis*). The intent must include all aspects of the factual description contained in the provision which is to be applied. If the defendant intentionally has injured another person, who dies as a result, he may not be punished for intentional homicide (section 233). But the code contains special provisions about bodily assault causing death (sections 228, 229 and 231). Here it is sufficient that the offender has been in a position to foresee the possibility of death as a result of his act (see section 43).

According to section 57, the court may reduce the punishment or even acquit the defendant because of his error of law. According to precedent, it is generally understood that the court not only may, but is *obliged* to acquit the offender if he cannot be blamed for the error as a result of negligence. It should be added that the courts apply very strict standards in such cases, especially when the provisions in question relate to the trade of the offender.

COMPLICITY

The rules of the code concerning complicity deserve a short explanation. The General Part contains only a single provision on complicity, section 58. This section specifies only the *stipulation of punishment* in cases where several persons have committed an offense in concert. Whether complicity is *punishable* is expressly stated in the particular section describing the offense. In most sections concerning felonies and numerous sections concerning misdemeanors, complicity is mentioned explicitly. In these cases principals and accessories are equally liable to punishment, but according to section 58 the punishment can be mitigated, and in some cases even omitted for those whose cooperation "is due essentially to dependence on other guilty persons or has been of little significance in comparison to others." When complicity is not mentioned in a section, only those directly covered by the description of the punishable act are liable to punishment.

The advantage of the code's system is that every section considers how the liability should be distributed among the persons involved. But one must admit that as a result the wording of many sections has become rather complicated.

The court must decide separately for every participant whether the conditions for liability are present. The accessory may thus be liable to punishment even if the principal is acquitted by reason of insanity, because he is outside Norwegian jurisdiction, or the like.

PUNISHMENT AND SECURITY MEASURES

The penal code does not provide for capital punishment. The last Norwegian death sentence for a crime other than treason was executed in 1876. The Military Penal Code of 1902, however, has retained capital punishment for acts of treason committed during time of war, or national emergency. These provisions, which become somewhat extended in connection with the 1950 revision of the provisions regarding treason, are to some degree applicable also to civilians.

Indefinite punishments are unknown to the code. The judge must always stipulate a fixed punishment. Imprisonment may be imposed for a specific period of time from twenty-one days up to fifteen years, or in certain cases up to twenty years (section 17). Some of the most serious felonies are punishable by imprisonment for life. According to the new Prison Act of 1958, the convict may be released on probation after having served twelve years of a life term.

The reader should keep these general rules in mind when going through the various provisions. If, for example, the code provides for "imprisonment up to three years" for a certain felony, this means imprisonment from twenty-one days up to three years. If the punishment is imprisonment for at least one year, this means imprisonment from one to fifteen years (or sometimes twenty years). When evaluating a specific penal provision, the rules of Chapter 5, concerning suspended sentence and circumstances permitting higher or lower maximum and minimum punishments, should be kept in mind.

Misdemeanors are in fact mostly punished by fines, even if the alternative of imprisonment is generally permissible. An interesting feature of the code is that the provisions for fines never contain maxima or minima. The provisions originally contained in the code (section 27) concerning such limitations were repealed in 1946, because such minima and maxima for fines are regarded as contrary to the idea expressed in section 27: that the fine shall be proportional to the economic situation of the convict. The sentence shall also stipulate a term of imprisonment which will be enforced in case the fine is not paid (section 28).

Some penal provisions permit fines and imprisonments to be applied concurrently. Where there is no special provision, the judge must choose. But an unsuspended fine may always be imposed in addition to a suspended sentence of imprisonment (section 52, no. 4).

Norway was one of the first countries in Europe to establish the use of the suspended sentence. This was done by a special statute in 1894. The rules are now found in the penal code (sections 52–54, which have been amended several times, most recently in 1955). By this amendment, the previous restrictions on the courts' discretionary power to decide on suspension were repealed. Thus, it is now permissible to pronounce a suspended sentence for all kinds of felonies and without regard to the past of the offender. The extensive use of suspended sentence is today one of the most characteristic features of Norwegian penal practice. In 1956 more than half (52 per cent) of all sentences of imprisonment were suspended. Of previously unpunished offenders 78 per cent got suspended sentences. In addition, it may be noted that extensive use is made of the right to waive prosecution. It is only natural that people have become somewhat concerned about the possibility that we may have gone too far in leniency, especially since the crime rate has been rising substantially during the last years.

When suspended sentences were introduced they were in the continental form, according to which the fulfilment of a certain punishment is suspended, conditioned on good behavior. In 1955, patterned after the Anglo-American system, the alternative of suspending the imposition of punishment was established. For the time being, this form is rarely used. The alternatives may be combined with supervision of the offender, and during the last years great efforts have been made to improve the probation service. But there is still a long way to go before the English level, which in this case serves as the nearest ideal, may be reached.

Besides the punishments, the code (in sections 39–39b) provides for special offenders, nor the preventive detention which section 39a prescribes for recidivists. Neither the security measures which section 39 prescribes for abnormal offenders, nor the preventive detentien which section 39a prescribes for recidivvists, are to be regarded as punishments. Such measures are as a rule applied in addition to punishment. This is the double-track system. Security measures, however, may be imposed alone, and if the offender was not criminally responsible when he committed the offense, only such measures may be imposed. The double-track system represents a deliberate concession to the concepts of retribution present in the community; it was assumed that public opinion would demand punishment for an offender who had committed a serious felony unless he was not criminally responsible. Since deprivation of liberty is always felt as a punishment, even where punishment is not the purpose, it is highly questionable whether this reasoning is valid. The rules about security measures and preventive detention are presently under revision and it is probable that the question concerning the double-track or the single-track system will be reconsidered.

Security measures are of greater significance than preventive detention. Most recidivists, although subject to the rules regarding preventive detention, are

also covered by the rules regarding security measures, and the latter provide far more flexible methods of treatment. Of those subjected to security measures, persons with "under-developed or permanently impaired mental capacity" form the most important category. This concept includes not only intellectual defects but also serious emotional deficiencies and volitional deficiencies (psychopathies). Security measures do not necessarily entail confinement: the convict may also be placed under supervision, maintaining his freedom or semi-freedom. The prison authorities may change the measures to be applied according to experiences during the period of treatment. The court will stipulate a maximum period, in most cases five years, but this may be prolonged if necessary. Security measures are terminated when no longer necessary.

The provisions of the code about punishment and security measures establish a wide range from which the court may choose the sanction appropriate in the individual case.

Johs. Andenaes.

Norwegian Penal Code of May 22, 1902, as of March 1, 1961

Part I—General Provisions

introductory provisions

Section 1

The first part of this code applies to all offenses, unless otherwise provided.

Section 2

The offenses treated in the second part of this code are felonies, as are offenses treated in other laws, to the extent that they are punishable by imprisonment exceeding three months, jailing exceeding six months or dismissal from public office as the principal penalty, unless otherwise provided.

The offenses treated in the third part of this code are misdemeanors, as are those treated in other laws, to the extent that they are not defined as felonies according to the above provision.

Section 3

If the penal law has been amended in the interval between the commission of an act and the trial, the penal provisions in force at the time of commission are applicable, unless otherwise provided.

The penal provisions in force at the time of decision in a particular case apply when they are more favorable to the accused than the penal provisions in force at the time of the commission of the act. Provisions which come into force after the adjudication, however, shall not apply in case the decision is appealed or rehearing requested.

Duly initiated legal proceedings or execution of punishment shall not be affected by subsequent laws restricting the time limit for prosecution or execution or making prosecution dependent upon the request of the victim or restricting it to private action.

The time limiting the victim's initiation of legal action, or request for prosecution shall in no case be computed until the law determining it has come into force.

Section 4

Wherever this code mentions the word act, it also includes the omission to act, unless otherwise expressly provided or evident from the context.

Section 5

Wherever this code uses the expression a person's next of kin, it includes his spouse, ascendants and descendants, siblings and equally related in-laws, foster-parents and foster-children, and an affianced person. Should a marriage be dissolved, the above rules apply to events prior to the dissolution.

The spouses of the in-laws are to be regarded as in-laws.

Section 6

The term movable objects as used in this code includes any power made or stored for the production of light, heat or motion.

Section 7

1. The term public place as used in this code means any place designated for general use or so used by the public.
2. An act is considered committed in public when it is committed by printed publication or in the presence of a substantial number of persons or in such a way that it could have been easily observed from a public place and was observed by anybody present at such a place or close to it.

Section 8

Whatever this law prescribes for time of war shall also apply when the armed forces or any part thereof have been alerted for war service.

Section 9

By serious injury to body or health this code means injury whereby somebody loses, or suffers substantial impairment of sight, hearing, speech or reproduction, becomes disabled, seriously disfigured, or unable to continue his work, or suffers critical or protracted illness or mental disease.
It is also considered a serious injury when, in the case of an offense committed against a pregnant woman, the fetus is damaged or destroyed as a consequence of the act.

Section 10

Printed matter means writing, representation, etc., which is reproduced by printing or other chemical or mechanical means.
Publication means also posting, placing, etc., in a public place.

Section 11

One month means one calendar month; one day means twenty-four hours.

Chapter 1

Applicability of the Norwegian Penal Law

Section 12

The Norwegian penal law is applicable, unless otherwise provided or agreed upon by a treaty with a foreign state, to acts committed:
1. in the realm, including on a Norwegian vessel on the high seas and on a Norwegian aircraft in areas outside the jurisdiction of any state.
2. on a Norwegian vessel or aircraft wherever it is, by a member of its crew or others travelling on the craft.
3. abroad by a Norwegian national or any other person domiciled in Norway when the act
(a) is covered in chapters 8, 9, 10, 11, 12, 14, 17, 18, 20, 23, 24, 25, 26 or 33 or sections 135, 141, 142, 144, 169, 191–195, 199, 204, (*cf.* 202), 205–209, 223–225, 228–235, 242–245, 291, 292, 294 no. 2, 318, 326–328, 330 last para., 338, 367–370, 380, 381 or 423 of this law, or
(b) is a felony or misdemeanor against the Norwegian state or a Norwegian authority, or
(c) is subject to punishment also according to the laws of the country in which it has been committed.
4. abroad by a foreigner, when the act
(a) is one treated in sections 83, 88, 89, 90, 91a, 93, 94, 98–104, 110–132, 148, 149, 152, paras. 1 and 2, 153, paras. 1 to 4, 154, 159, 160, 161, 169, 174–178, 182–185, 187, 189, 190, 191–195, 202, 217, 220, 221, 223–225, 229, 231–235, 243, 244, 256, 258, 267–269, 276, 292, 324, 325, 328, 415 or 423 of this law or the Defense Secrets Law, sections 1, 2, 3, or 5 or

(b) is a felony punishable also according to the laws of the country in which it has been committed, and the guilty person is domiciled in the realm or is staying here.

In cases where the punishability of the act depends on or is influenced by an actual or intended effect,the act is considered to have been committed also where the effect has occurred or is intended to occur. [5–11–1951]

Section 13

In the instances mentioned in section 12, No. 4, legal proceedings can be initiated only by the decision of the King.

In the instances mentioned in section 12, No. 4 (b) legal proceedings cannot be initiated, unless the perpetrator actually can be punished according to the laws of the country in which the act has been committed. Nor can more severe punishment be inflicted than provided for by the laws of that country.

In every case where somebody has been punished, abroad, and in this country is convicted of the same offense, the punishment already served shall, if possible, be deducted from his sentence.

Section 14

The application of the above described rules is circumscribed by generally acknowledged exceptions of international law.

CHAPTER 2

PENAL AND CORRECTIONAL MEASURES [2–22–1929]

Section 15

Ordinary punishments are: imprisonment, jailing and fines.

Under special circumstances a person may be deprived of certain rights as mentioned in section 29.

A person may be sentenced to loss of rights in addition to, or instead of, other punishment. Deprivation of rights may not be substituted for other punishment where the law specifies confinement for at least one year as punishment for an act. [5–22–1953]

Section 16

The following supplementary punishments may be combined with the punishments mentioned in section 15:

1. Deprivation of rights as stated in sections 30 and 31.
2. Banishment from specified places (section 33).
3. *Repealed.* [3–10–1939]
4. Confiscation of specific objects (section 34). [5–22–1953]

Section 17

Imprisonment may be imposed

1. for a period of twenty-one days to fifteen years or, in the cases mentioned in section 62, up to twenty years;
2. for life.

The term imprisonment as used in this code means imprisonment for a limited period of time, unless the contrary is expressly stated.

Anybody sentenced to imprisonment may be released on probation in accordance with the provisions of a special law (section 26).

Section 18

Repealed. [12–12–1958]

Section 19

Repealed. [12–12–1958]

Section 20

Should a person sentenced to, or serving, a term of imprisonment for life commit an offense, he may be disciplined according to one or more of the provisions of the Prison Act.

If the offense is a felony, the perpetrator may also be sentenced to solitary confinement up to six years. The punishments mentioned in the first para. of this section may be imposed in addition to solitary confinement.

The provisions in section 16 apply also in the cases mentioned in this section.

Section 21

If a person serving a jail sentence should be sentenced to imprisonment, he would generally serve the latter sentence first and the former afterwards.

Section 22

A jail sentence may be imposed for a period of from twenty-one days to twenty years. Two days of jailing correspond to one day of imprisonment.

Section 23

At a convict's request, or with his consent, a jail sentence may be converted to imprisonment.

Section 24

Where imprisonment is specified as the only form of confinement, a corresponding jail sentence may be pronounced, provided special circumstances seem to indicate that the offense did not originate from a depraved mind.

Section 25

Confinement up to four months is stipulated in days. Confinement over four months is stipulated in months and years.

Section 26

The more specific rules, necessary for the enforcement of the above provisions, as well as for the arrangement and administration of prisons and for the treatment of prisoners, are provided in a separate law.

Section 27

When the convict is sentenced to a fine, consideration shall be given not only to the offense he has committed, but also specifically to his economic position and the amount he can afford to pay.

The fine shall be paid to the State Treasury. [7–19–1946]

Section 28

In accordance with detailed provisions prescribed by the King, an imposed fine may be paid in instalments or accumulated in state or community service. The prosecution may order the employer of a convict to withhold from his wages and pay to the police an amount sufficient to cover the fine. If a deduction from the wages for taxes or alimony has already been decreed, such commitments have priority over deductions for fines. Absent the convict's consent, not more than one-third of the wages may be deducted to cover fines. If the employer fails to withhold wages as ordered by the prosecution, he is liable for the deductible amount. In this case, as well as when the employer fails to pay to the police the retained amount, payment may be enforced through levy of execution.

If the fine is not paid or accumulated, it shall be levied by execution, unless the convict's earnings or economic position are found to be severely diminished thereby.

In case the fine is not paid in any of the above mentioned ways, the sentence shall provide a prison term from one day to three months, or in the cases mentioned insection 63, up to four and one-half months.

If the convict has paid part of the fine and the rest is to be converted to imprisonment, the latter is reduced proportionately. Part of a day counts as a full day. If the fine is converted to imprisonment which is served in part and the convict offers to pay the balance of the fine, only the full days served shall count. [6–6–1930]

Section 29

When regarded necessary for the public good, anybody found guilty of an offense may be sentenced to:

1. Loss of public office for which the convict, because of the offense, has proved himself unfit or unworthy.

2. Loss for a definite period of up to five years, or forever, of the right to hold office or to pursue a certain occupation for which the convict, because of his offense, has proved to be unfit, or which he might misuse, or for which a high degree of public confidence is required. A person forbidden to practice a certain occupation may not engage in it on behalf of someone else. The convict may be required to surrender documents or other objects which have served as certificate or proof of such right. [5–22–1953]

Section 30

The sentence may deprive the convict, for a definite period or for all time, of the right to serve in the armed forces when his offense indicates that his service would be contrary to the interests of national defense.

A person deprived of the right to serve in the armed forces may, by a decision of the Magistrate's Court, regain such right before the expiration of the stipulated period, provided there is no longer any reason to exclude him from service. The convict or the prosecution may request such decision. The convict must make his request to the prosecution which prepares the case for the court. If the request is denied, it may not be repeated for two years. [5–22–1953]

Section 31

Anybody convicted of any of the offenses mentioned in chapters 8, 9 or 10, may, when general considerations demand it, be deprived of the right to vote in public plebiscites and elections for a period of up to ten years. [5–22–1953]

Section 32

A deprivation of right becomes effective on the day the sentence becomes final.

The time during which a convict serves, or avoids serving, a prison term included in the sentence, does not count as part of the period for which he is deprived of a right. [5–22–1953]

Section 33

If the nature of an offense or its motivation indicates that the presence of the convict at a designated place is connected with special danger to persons or property, the sentence may forbid him to live or appear at that place or within a specified distance therefrom.

When the prohibition no longer seems necessary, it may be terminated by the King or someone authorized by him, with or without conditions, for a limited or unlimited time.

Section 34

Objects created through an offense, or employed in an intentional felony, may be confiscated by the sentence when they belong to the convict.

Section 35

Objects which are by their nature destined for use as implements in committing an offense, may be confiscated by court order in the public interest, regardless of who owns them and whether or not anyone is, or can be, prosecuted. The same applies to burglars' tools and explosives owned or kept by anyone who has repeatedly been sentenced to imprisonment for theft, receipt of stolen goods, or robbery, either in Norway or abroad, unless it is proven that the tools or explosives are to be used for a legal purpose. [5–11–1951]

Section 36

The profit resulting from an offense, or an amount equal to the profit may, by court order, be seized from the guilty person or the person in whose behalf he was acting, whether or not anybody is, or can be, prosecuted.

If a punishable activity is carried on habitually, the amount subject to confiscation may be determined according to the probable profit of the entire activity.

Section 37

Confiscated funds accrue to the State Treasury, unless otherwise stated.

If the victim of an offense is unable to obtain damages from the offender, the confiscated objects shall, as far as possible, be used to cover the damage claim.

Section 38

A printed matter of felonious character may be confiscated by court order regardless of whether anybody is punished for the publication, or even if the author cannot be punished because of circumstances mentioned in section 249 No. 3 or other conditions which bar punishment.

The decision shall indicate the parts of the publication which occasion the confiscation. Upon enforcement of the decision, the remaining part of the publication shall, if possible, be taken out and returned to the person concerned, at his request and his own cost.

Confiscation may also include plates and molds prepared for printing; at the request of the party concerned and at his own cost, arrangement shall be made for dismantling the printing type instead of confiscating it.

The above provisions do not apply to copies which are inaccessible to the public or which are not intended for further distribution from their present location. [12-12-1958]

Section 39

1. If an otherwise punishable act is committed in a state of insanity or unconsciousness, or if an offense is committed during unconsciousness due to voluntary intoxication (section 45) or during temporarily reduced consciousness or by someone with underdeveloped or permanently impaired mental capacity, and there is danger that the perpetrator because of his condition will repeat such an act, the court may decide that, for purposes of safety, the prosecution shall

(a) assign or forbid him a certain place of residence,

(b) place him under the supervision of the police or a specially appointed probation officer and order him to report to the police or the probation officer at designated intervals,

(c) forbid him to consume alcoholic beverages,

(d) place him in reliable, private care,

(e) place him in a mental hospital, sanatorium, nursing home, or workhouse, where possible, in accordance with general provisions promulgated by the King.

(f) keep him in custody. [2-22-1929]

2. If such condition involves danger of acts of the kind covered by sections 148, 149, 152 para. 2, 153 paras. 1 to 3, 154, 155, 159, 160, 161, 191, 192, 193, 195, 196, 197, 198, 200, 201, 202, 203, 204, 206, 212, 217, 224, 225, 227, 230, 231, 233, 245 para. 1, 258, 266, 267, 268 or 298, the court must decide to apply such security measures as are mentioned above. [5-11-1951]

3. These measures are terminated when they are no longer regarded as necessary, but may be resumed if there should be reason to do so. The security measures listed under (a)-(d) may be employed concurrently.

The court shall determine the maximum period for which security measures may be imposed without its further consent.

4. If the court has not decided otherwise, the prosecution may choose between the above-mentioned security measures.

The decision to terminate, resume or alter a security measure is made by the ministry. Before a decision about security measures or their termination is made, the opinion of a medical specialist must ordinarily be obtained. The same procedure should be followed at regular intervals during the period in which security measures are in force.

5. If security measures, as mentioned in No. 1 above, are imposed, the ministry may decide to forgo all or part of the punishment to which a transgressor might be sentenced.

6. If the perpetrator is placed in a mental hospital and the court has not in advance decided that security measures are to be employed, the prosecution

shall be notified before discharge. Discharge shall not take place until there has been opportunity to obtain the decision of the court on the imposition of further measures in accordance with this section. The offender may not be kept in the hospital waiting for such decision for more than three months after the director of the hospital has notified the prosecution that he will be certified as recovered.

7. If the perpetrator is not a Norwegian citizen, the ministry may decide to deport him instead of subjecting him to security measures according to this section, unless otherwise agreed by treaty with a foreign state.

Section 39a

1. If the defendant is guilty of several attempted or completed felonies punishable according to sections 148, 149, 152, para. 2, 153, paras. 1–3, 154, 159, 160, 161, 174, 178, *cf.* 174, 191, 192, 193, 195, 196, 197, 198, 200, 201, 202, 203, 204, 206, 207, 212, 217, 224, 225, 227, 230, 231, 233, 245, para. 1, 258, 266, 267, 268 or 292, and the court has reason to assume that he will again commit a felony of the kind named above, the court shall decide that he is to be kept in preventive detention after he has served all or part of his sentence, so long as this is necessary.

The court shall determine the maximum period for which preventive detention may be imposed without its further consent. [5–11–1951]

2. If the defendant is a person with underdeveloped or impaired mental capacity, the court may decide to employ security measures in accordance with section 39 instead of punishment and preventive detention in accordance with this section. Such decision may also be made by the ministry.

3. The ministry may decide to transfer the convict from prison to preventive detention when he has served at least one-third of the term to which he was sentenced.

4. The ministry may release the convict on probation when the punishment to which he is sentenced has been fully served, or when the punishment served and preventive detention together equal at least the prison term to which he was sentenced. As a condition for the release the ministry may assign or forbid him a certain place of residence, order him to report at regular intervals to the police or an appointed probation officer, forbid him to consume alcoholic beverages, and order him, within his financial capacity, to pay the victim compensation for economic loss and suffering.

If during the five years following his release on probation the convict has not committed any intentional felony and has acted in accordance with the conditions set, the release becomes final.

5. If the stipulated punishment has been served in part, it is regarded as completed as of the time the convict is released from preventive detention, unless he is again confined.

6. If the convict is not a Norwegian citizen the ministry may decide to deport him when the punishment to which he is sentenced is served, unless otherwise agreed upon by treaty with a foreign state. [2–22–1929]

Section 39b

1. The prosecution may proceed according to section 39 without demanding punishment, provided the right to prosecute has not expired. In such a case proceedings may be brought regardless of whether the conditions mentioned in section 87 of the Code of Criminal Procedure are present. Request for prosecution by the victim is not required. Such proceedings must always be brought in the City or County Court, and must be treated according to the rules in the Code of Criminal Procedure.

2. In a criminal case, if no decision is made about security measures according to sections 39 or 39a, the prosecution may, where there are special reasons, bring the question before the court within one year after sentence has been served. The provisions in the last sentence of No. 1, above, apply in such cases.

3. When the court provides that security measures shall be imposed, or when a court denies a request for such measures, the decision shall be in the form of a judgment.

In cases before the Court of Appeals, security measures may not be imposed unless the jury, by more than six votes, has affirmed that the conditions listed in section 39, Nos. 1 and 2, or section 39a No. 1, are present.

4. When a person is released on probation from a jail, sanatorium or nursing home, and the question of recommitment arises, the prosecution may have

him arrested and, on specific instructions from the Magistrate's Court, keep him in custody until the matter is decided.

5. Detailed rules about the security measures mentioned in sections 39 and 39a, and about the questions to be presented to the jury as provided in No. 3, above, may be issued by the King. [2–22–1929]

Chapter 3

Conditions determining punishability

Section 40

The penal provisions of this code do not apply to an act committed unintentionally unless it is explicitly provided or unmistakably implied that a negligent act is also punishable.

A misdemeanor consisting of omission to act is also punishable when committed by negligence, unless the contrary is explicitly provided or unmistakably implied.

Section 41

In cases where a superior cannot be punished for a misdemeanor committed by somebody in his service, the subordinate can always be held responsible, even if the penal provision, according to its wording alone, is directed against the superior.

Section 42

To a person who has committed an act in ignorance of circumstances determining the punishability of the act or increasing his liability for punishment, these circumstances are not attributable.

Where the ignorance can be ascribed to negligence, the punishment provided for a negligent act is applied, if negligence is punishable.

Error regarding the value of an object or the estimated amount of damages caused will be taken into account only when punishability depends thereon.

Section 43

Where the law provides that an unintentional consequence of a punishable act entails increased punishment, the more severe punishment applies only where the offender could have foreseen the possibility of such a consequence, or where, in spite of his ability to do so, he has failed to prevent such a consequence after having been made aware of the danger.

Section 44

An act is not punishable if committed while the perpetrator was insane or unconscious. [2–22–1929]

Section 45

Unconsciousness due to voluntary intoxication (produced by alcohol or other means) does not exclude punishment. [2–22–1929]

Section 46

Nobody may be punished for an act committed before he has completed his fourteenth year.

Section 47

Nobody may be punished for an act committed to save the person or property of another from an otherwise inevitable danger, where the circumstances justified him in regarding this danger as extremely significant in relation to the damage his act might cause.

Section 48

Nobody may be punished for an act committed in self-defense.

Self-defense exists when an otherwise punishable act is committed for the prevention of, or in defense against, an unlawful attack, as long as the act does not exceed what is necessary; moreover, in relation to the attack, the guilt of the assailant, and the legal values attacked, it must not be considered absolutely improper to inflict so great an evil as intended by the act of self-defense.

The above rule concerning the prevention of unlawful attack applies also to

acts performed for the purpose of lawful arrest or for the prevention of a prisoner's escape from prison or custody.

Anybody who has exceeded the limits of self-defense is nevertheless not to be punished if the excess is due solely to emotional upset or derangement produced by the attack.

Chapter 4

ATTEMPT

Section 49

An attempt to commit a felony is punishable. An attempt is an act purposively directed at, but failing short of, completion of the felony.

An attempt to commit a misdemeanor is not punishable.

Section 50

An attempted felony is not considered punishable if the offender, before he knows that the felonious attempt has been discovered, by his own free will desists from the continuation of the felonious act before the attempt has been completed, or prevents the result which would constitute the completed felony.

Section 51

The attempt is subject to milder punishment than the completed felony; the punishment may be reduced to less than the minimum provided for such an offense or to a milder type of punishment.

The maximum punishment provided for a completed felony may be applied if the attempt has led to such a result as would justify that punishment if it had been purposely achieved.

Chapter 5

GROUNDS FOR MITIGATING OR AGGRAVATING PUNISHMENT

Section 52

1. Upon conviction of an offense, the court may provide in its judgment that the execution of the punishment shall be suspended, unless the concern for general law-abidance or for restraining the convict from further offenses requires execution of the punishment.

The court may also defer pronouncing sentence, if this is deemed to serve the purpose best.

If a substantial part of the sentence is considered served by time spent in custody, the court may decide to suspend enforcement of the remaining punishment.

2. If the convict has been kept in confinement in the course of five years preceding the offense, the court may decide upon suspension only under special circumstances.

The same applies when the convict is sentenced to be kept in confinement for more than one year, or the law provides a minimum punishment of more than one year's imprisonment for the felonies of which the convict is found guilty.

3. When the court decides upon suspension, it shall, in the judgment, stipulate a probation period of two years from the pronouncement of the final judgment. In special cases, a probation period up to five years may be stipulated.

4. When the execution of a prison or jail term is suspended, the court may in addition to the confinement impose fines, the payment of which is not suspended. This applies even where fines are not otherwise specified as punishment for violation of the law.

5. The court shall, as a condition for suspension, order the convict to pay compensation for economic loss and suffering to which the victim is entitled and which he has claimed, and which the court finds to be within the convict's ability to pay.

6. The court may also set the following conditions for suspension:

(a) that the convict seek employment or training for a trade,

(b) that he completely abstain from alcoholic beverages or other intoxicating or narcotic preparations,

(c) that he stay at a sanatorium or undergo other cure prescribed by a doctor or temperance commission, to counteract abuse of alcohol or other intoxicating or narcotic preparations,

(d) that he pay support which is or will become due during the probation period,

(e) that during the probation period he stay away from or remain at a designated place.

When there is reason for it, the court may also impose other conditions.

7. If the court considers it best for the support and welfare of the convict, it shall be specified in the judgment that he shall be under the supervision of an approved welfare organization during all or part of the probation period. The court may also decide that supervision shall be carried on by a person appointed by the (trial) court or the Magistrate's Court. In such a case the convict shall, if possible, be under the general supervision of the welfare organization.

The person exercising such supervision shall see to it that the legal regulations and the specific conditions are maintained, and shall furthermore counsel the convict and try to help him toward work or education and toward an ordered way of life.

The King issues specific rules concerning supervision.

8. A sentence specifying deprivation of a right becomes effective even where the execution of other punishments is suspended, cf. section 32.

The suspension does not extend to other supplementary punishments or to non-punitive confiscation. [6–3–1955]

Section 53

1. Should the convict, during the probation period, be found guilty of an offense committed before the sentence was pronounced, the court decides for both acts whether he shall be sentenced to punishment and whether the sentence shall be executed, or if the sentence shall be suspended (cf. section 52). The provisions of section 64 (cf. sections 62 and 63) apply similarly.

If a suspended sentence is imposed, the court specifies a new probation period which runs from the pronouncement of the final judgment in the new case.

2. If the convict commits an offense during the probation period and action is started or adjudication of the case is requested in the Magistrate's Court within six months after the expiration of the probation period, the court may

(a) specify a combined unconditional punishment for both offenses,

(b) pronounce a separate sentence for the new act, or

(c) pronounce a new suspended sentence for both acts in accordance with the rules of section 52, where there are special reasons for it.

3. During the probation period the Magistrate's Court may decide by a ruling that a convict shall be under supervision, and may provide new conditions on the basis of the convict's behavior. The court may also extend the probation period, but for not more than a total of five years.

The supervision may be terminated by the Magistrate's Court when it is no longer found necessary. The same applies to conditions which may have been imposed.

Decisions mentioned here may also be made by another court which has jurisdiction of the case according to No. 1 or 2.

4. If the convict fails to fulfil the conditions provided for suspension, avoids supervision, disregards orders given by the supervisor, or indulges in drinking, idleness or other improper habits, the Magistrate's Court may during the probation period decide that the punishment shall be executed.

If punishment is not previously specified, it may be provided now, in which case it is to be executed. Decisions mentioned here are made as judgments by the Magistrate's Court upon request of the prosecution.

5. If a case is settled out of court by the offender's acceptance of a fine suggested by the prosecution, the settlement may provide for suspension of payment in accordance with the rules of sections 52 and 53. [6–3–1955]

Section 54

When a suspended sentence is read to or served on the convict, he shall be acquainted with the meaning of a suspended sentence and with the consequences of not complying with the conditions. The judge should also give the convict such warning and admonition as his age and general circumstances might require. For this purpose the convict may be summoned to a special session of the court.

If the convict is placed under supervision, the judge shall explain to him the significance of the supervision and his duty to comply with the instructions provided under the supervision. [6–3–1955]

Section 55

For offenses committed by a person under eighteen years of age, confinement for life may not be used and punishment of the kind specified may be reduced below the minimum provided for the act.

If the convict is under eighteen years of age at the time of sentencing, the court may refrain from imposing punishment and, instead, provide in the sentence for the Child Welfare Board to take action in accordance with the Child Welfare Law. [6–3–1955]

Section 56

1. The court may reduce the punishment below the minimum provided for the offense and commute it to a milder form of punishment:

(a) when the act is committed in order to save the life or property of a person, but the limits for the right, as stated in sections 47 and 48, are exceeded;

(b) when the act is committed in justifiable anger, under compulsion or imminent danger or during temporary strong reduction of consciousness not due to voluntary intoxication.

2. When the act is committed in a state of unconsciousness due to voluntary intoxication (section 45), the punishment may, under extremely extenuating circumstances, be reduced to less than the minimum provided, unless the convict had become intoxicated for the purpose of committing the act. [2–22–1929]

Section 57

If a person was ignorant of the illegal nature of an act at the time of its commission, the court may reduce the punishment to less than the minimum provided for such an act, and to a milder form of punishment, provided the court does not decide to acquit him for this reason.

Section 58

Where several persons have cooperated in committing an offense, the punishment may be reduced to less than the minimum provided for the act and to a milder form of punishment if the cooperation was due essentially to dependence on other guilty persons or has been of little significance in comparison to others. Where the penalty otherwise could have been restricted to fines, and in the case of misdemeanors, punishment may be entirely remitted.

Section 59

The provisions of the foregoing section apply also to a person who, before he knew he was suspected, has as far as possible and substantially prevented the harmful consequences of the act, or has restored the damage done by it, or has reported himself and made a full confession.

Section 60

If the convict has been kept in custody pending trial, not imposed by reason of his conduct during the pendency of trial, the sentence should provide for the deduction of such period from the punishment ultimately imposed, so that the latter may even be considered as completely served.

Section 61

Provisions concerning increased punishment in case of recidivism are applicable only to persons who have completed their eighteenth year at the time of the commission of the earlier offense and who have committed the new offense after the punishment for the previously committed offense has been served partially or completely. Unless otherwise provided, there is no increase of punishment where the new offense, if a felony, is committed more than six years, and if a misdemeanor, more than two years, after the punishment for the previous offense has been served completely.

The court may allow previous punishments imposed in other countries to serve as a basis for increased punishment in the same manner as punishments imposed in this country.

Section 62

If anybody has, by one or several acts, committed more than one felony or misdemeanor which should have resulted in prison or jail sentences, a common

sentence of confinement is provided which must be more severe than the highest minimum penalty provided for any of the single felonies or misdemeanors and must in no case exceed by more than one-half the maximum set for any one of them. Where any of the single offenses would have resulted in imprisonment, the common punishment generally provides for a prison sentence.

If any of the felonies or misdemeanors should have resulted in imprisonment, the same supplementary punishments as would apply in case of a prison sentence are imposed also in case of a jail sentence.

Under special circumstances, the court may provide a separate prison sentence, which is to be served for one or more of the offenses, and impose a suspended sentence for the others in accordance with sections 52 to 53. [6-30-1955]

Section 63

If anybody has, by one or more acts, committed several felonies or misdemeanors punishable by fine, a common fine is provided which must be more severe than that imposable for any of the single felonies or misdemeanors.

Where some of the felonies or misdemeanors are punishable by any kind of confinement and others by fine, the court may consider those felonies or misdemeanors for which fines are provided as aggravating circumstances instead of pronouncing sentence on the separate acts.

Section 64

If anybody already sentenced to punishment is found guilty of a felony or misdemeanor committed before sentence, the rules in sections 62 and 63 are applied as far as possible, for determining the punishment.

In this case the convict may be sentenced to confinement for less than twenty-one days.

If a prison term is to be served in lieu of fines for several convictions, that part of the prison sentence which exceeds what could have been imposed in one sentence is dismissed if the punishable acts are committed before sentence has been pronounced for any of them.

Section 65

Repealed. [2-22-1929]

Chapter 6

Cessation of punishability

Section 66

The right to initiate criminal proceedings or to pronounce a penal sentence ceases:

1. with the death of the offender;
2. after certain time limits, according to the following rules.

Section 67

The period of limitation required for offenses with maximum legal punishment of

life imprisonment is twenty-five years;
imprisonment for a limited time exceeding ten years, twenty years;
imprisonment up to ten years, fifteen years;
imprisonment up to five years, ten years;
imprisonment up to two years, five years;
imprisonment up to six months, two years.

For offenses for which the severest punishment is jailing, the period of limitation is half that provided for imprisonment.

The limitation period for other offenses is one year.

Section 68

Expiration of the time limit does not prevent initiation of proceedings for confiscation in accordance with sections 35 and 36, or for removal from public office, or for declaring an accusation null and void in accordance with section 251, para. 1, and section 253. [3-10-1939]

Section 69

The period of limitation begins to run on the day the punishable activity stops or the punishable condition ceases.

When the punishability of an act is dependent on or influenced by the harm in which it results, the period of limitation may in no case begin prior to the creation of the harm.

If, as a result of the offense, a person is unjustly deprived of freedom either by judgment or otherwise, the period of limitation runs from the day the victim has regained his freedom or died.

If an offense of the kind treated in Chapters 30 and 42 is committed abroad, or if an offense is committed on board a Norwegian ship, the period of limitation does not begin before the day the ship has come to a Norwegian port or to a place with a Norwegian consul, but its commencement may in no case be postponed for more than one year.

Section 70

The running of the period of limitation is interrupted by any legal proceeding in which the perpetrator is described as the accused.

If the proceedings are terminated or suspended for an indefinite period, the running of the period of limitation is resumed from that time.

If proceedings cannot be initiated or continued before a claim advanced in another case is settled, the period of limitation does not run so long as this case continues without interruption.

Section 71

After the death of the convict, punishment may not be executed; his death has no influence, however, on confiscation of objects or profits of the offense (sections 34–36) provided for in the sentence, or on a decision to publish the sentence.

Section 72

The power to execute the following punishments ceases after these time limits:

for life imprisonment—after thirty years;

for imprisonment for a specified time exceeding ten years—after twenty years;

for imprisonment up to five years—after fifteen years;

for imprisonment up to one year—after ten years;

for imprisonment up to three months—after five years;

for jailing—after one-half of the period specified for imprisonment, but not before a period equal to the sentence, and in no case before five years;

for fines over twenty kroner—after five years;

for fines up to twenty kroner—after two years.

If execution cannot begin because another term is being served in this country or abroad or has been suspended according to section 52, the period of limitation does not run during this time.

Section 73

The period of limitation begins to run from the day the sentence becomes final, but in no case before the beginning of the period in which criminal proceedings must be initiated according to section 69.

The period of limitation ceases to run when execution of punishment begins or when the convict is arrested to insure execution.

If the convict is released or has escaped before the execution of the punishment has commenced, or if the punishment is discontinued, a new period of limitation begins, the duration of which is computed according to the punishment which remains to be served.

If a release on probation is revoked, the period of limitation begins from the time of revocation.

Section 74

The running of the period of limitation is similarly interrupted when anybody who is sentenced to imprisonment for more than six months is found guilty of a felony committed after the sentence and for which he is sentenced to imprisonment for more than two years in this country or abroad.

However, a new period of limitation begins to run from the commission of the last felony (section 69).

Section 75

Repealed. [5–22–1955]

Section 76

Repealed. [5–22–1955]

CHAPTER 7

THE PROSECUTION

Section 77

Unless otherwise provided, offenses shall be subject to public prosecution.

Section 78

In those cases where only the victim may institute legal action, or where public prosecution cannot be instituted without his request, the guardian or one of the parents, or, if the parents are deceased, one of the grandparents of the victim acts in his behalf if he is under eighteen years of age. However, a prosecution may not be instituted against the expressly stated desire of the victim who is over sixteen years of age for assault or an insult to his honor. If the victim has completed his sixteenth year, he may also request public prosecution personally.

If the victim is mentally ill, his guardian, his spouse, his parents, or his children of age, or, in case there are neither parents nor children of age, his grandparents, may act in his behalf.

If the victim is deceased, his spouse, his ascendants or descendants, his siblings as well as his heirs may institute or request prosecution.

In case of harm to property or economic rights, a person is considered a victim if, according to a previous agreement, he has paid or is obliged to pay compensation for damages. [5–11–1951]

Section 79

If there is nobody who under section 78 is entitled to request public prosecution, or if the offense is committed by anybody who under section 78 would have been entitled to request public prosecution, such a request may be made by the provincial governor.

Section 80

Complaints in cases not subject to public prosecution and requests for public action in cases where this is a condition for public prosecution, must be brought within six months after the person entitled to do so receives information about the offense and its perpetrator.

For those whose rights are based on sections 78 and 79, the time limit does not begin until their right is established.

Section 81

Request for public prosecution may be restricted to the instigator or the instigators of the decision to commit the felony.

Otherwise, in order to be effective, the request must not exclude any accomplice from prosecution; without special procedures, prosecution may be extended to accomplices not expressly exempted in the request.

Section 82

The request may not be withdrawn after charges are brought.

If the perpetrator has committed the offense against any of his next-of-kin, as well as in the cases mentioned in sections 209, 210 and 409–412, the request may be effectively withdrawn at a later stage.

If a request for public action is withdrawn, it may not be advanced again.

PART II—FELONIES

CHAPTER 9

FELONIES AGAINST NORWAY'S CONSTITUTION AND HEAD OF STATE

Section 98

Anybody who attempts to bring about the alteration of Norway's Constitution by illegal means, or is accessory thereto, shall be punished by jailing or

imprisonment for not less than five years. If the act is committed by use of arms or by exploitation of the fear of intervention by a foreign power, imprisonment for life may be imposed.

Fines may be imposed in addition to confinement. [12–15–1950]

Section 99

Anybody who by force, threats or other illegal means prevents the free exercise of authority by the King, the Regent, the King's Council, the Parliament or any of its divisions, the Supreme Court or the Court of Impeachment, or is accessory thereto, shall be punished by jailing or imprisonment for not less than five years.

Section 98, second and third sentence, is similarly applicable. [12–15–1950]

Section 99a

Anybody who by use of arms or by exploitation of the fear of intervention by a foreign power, hampers the public authorities in their activities, or seriously hinders civil servants, the press, associations or institutions, or otherwise endangers important public interests, or is accessory thereto, shall be punished by jailing or imprisonment from five years to life.

Fines may be imposed in addition to confinement. [12–15–1950]

Section 100

Anybody who brings about the death of the King or the Regent, or is accessory thereto, shall be punished by imprisonment for life.

An attempt is punished in the same way.

Section 101

Anybody who commits violence or other bodily injury against the King or the Regent, or is accessory thereto, shall be punished by imprisonment for not less than two years. If serious injury to body or health is caused, or attempted, imprisonment for life may be imposed.

Anybody who commits an offense against the honor of the King or the Regent, shall be punished by jailing or imprisonment up to five years.

Section 102

If any felony mentioned in chapters 19, 20, 21, 22 or 23, is committed against any member of the royal family, the punishment may be increased to double the penalty provided therefor, and life-imprisonment is imposed if the general punishment is as high as eight years imprisonment.

Section 103

Prosecution of offenses against honor, as provided in sections 101 and 102, shall take place only by order of the King, or with his consent.

Section 104

Anybody committing acts mentioned in section 94 shall be punished by jailing or imprisonment up to ten years, if they intended the commission of a felony covered in sections 98, 99 or 99a, but by imprisonment from one to twelve years, if they intended the commission of a felony covered in section 100 or in the Military Penal Code, section 81a (cf. this code, sections 98 and 99). [12–15–1950]

Section 104a

Anybody who establishes or participates in a private organization of military character or supports such organization, shall be punished by imprisonment up to two years. If the organization or its members maintains supplies of arms or explosives, or if there are other aggravating circumstances, the punishment shall be imprisonment up to six years.

Chapter 13

Felonies against the general order and peace

Section 135

Anybody who endangers the general peace by publicly insulting or provoking hatred of the Constitution or any public authority, or publicly inflaming one group of the population against another, or is accessory thereto, shall be punished by fines or jailing or imprisonment up to one year.

Section 136

Anybody who brings about the occurrence of a riot with the intent to use violence against person or property, or to threaten therewith, or is accessory to bringing about such a riot, or who, during a riot where such intent has been revealed, acts as a leader, shall be punished by imprisonment up to three years.

If, during a riot, such felony against person or property as intended thereby, or as revealed by the participants as intended, is committed, or if any felony against public authority is committed, the above-mentioned persons as well as those participating in the commission of the felony shall be punished by imprisonment from two months to five years, but by up to one and one-half the punishment provided for such felony if a more severe punishment results therefrom.

Section 137

Anybody who is present, or is accessory to another's presence, in such riot as mentioned in section 136, after the authorities have ordered the rioters to leave peacefully, shall be punished by imprisonment up to three months, but up to two years if a felony against the public authorities or if such a felony against person or property as intended by the riot, or as revealed by the participants therein to be intended, is committed while he is present.

Section 138

Anybody who causes, or is accessory to causing, the unlawful prevention or interruption of a public function, a public religious meeting, an ecclesiastical act, public instruction or teaching in the schools, an auction, or a public meeting called for a common purpose, shall be punished by fines or by imprisonment up to six months.

Section 139

Anybody who omits, by timely report to the proper authorities or otherwise, to try to prevent a mutiny, war-time treason, espionage or a plot with the purpose of desertion punishable according to military law, or a felony defined in the Law on Defense Secrets, sections 1, 2, 3 or 4, or a felony mentioned in this code, sections 83, 84, 86, 87 No. 2, 90, 91, 92, 93, 94, 98, 99, 99a, 100, 104a, 148, 149, 150, 152, 153, 154, 159, 169, 192, 195, 217, 223 second para., 225, 231, 233, 234, 243, 267, 268 or 269, or the results of any such felony although he had received reliable information that the felony was impending or was being committed at such time as the felony or its consequences could have been prevented, shall be punished by fines, jailing or imprisonment up to one year.

He shall, however, not be punished, if the felony is not completed nor a punishable attempt made, or if it could not be prevented without exposing himself, his next-of-kin or an innocent person to prosecution or danger to life, health or welfare.

A superior who has omitted to prevent a felony committed in his service, although he was able to do so, shall be punished similarly, but the punishment shall not exceed the maximum penalty provided for such felony. [12-15-1950]

Section 140

Anybody who publicly urges or prompts the commission of an offense, or glorifies an offense, or offers to commit or to assist in the commission of an offense, or who is accessory to such urging, prompting, glorification or offer, shall be punished by fines, jailing or imprisonment up to eight years, but in no case with confinement exceeding two-thirds of the maximum provided for the offense.

Punishable acts here include acts which it is punishable to urge or prompt,

Section 141

Anybody who by false inducements or other underhanded conduct deceives another into emigrating from this country, or is accessory thereto, shall be punished by fines or imprisonment up to one year.

Section 142

Anybody who, by word or deed, publicly insults or in an offensive or injurious way shows disdain for a religious creed permitted in this country, or for the dogma or worship of any religious community lawfully existing here, or is accessory thereto, shall be punished by fines, jailing or imprisonment up to six months. [3–24–1934]

Section 143

Anybody who mistreats a corpse or unlawfully takes possession of a corpse in another's custody, or exhumes or removes a corpse without authorization, or is accessory thereto, shall be punished by imprisonment up to two years. Under extremely extenuating circumstances, fines may be imposed.

Anybody who removes a corpse or takes an object from a corpse, a grave or a memorial, with the intent of obtaining by such appropriation unlawful gain for himself or another, or is accessory thereto, shall be punished according to the provisions of Chapter 24, regardless of whether the corpse or the object belongs to someone.

Section 144

Clergymen, lawyers, defense counsel in criminal cases, physicians, pharmacists and midwives, as well as their employees and helpers, who illegally reveal secrets confided to them or their employers in the course of duty, shall be punished by fines or imprisonment up to six months.

Public prosecution is initiated only upon request of the victim or when required in the public interest.

Section 145

Anybody who unlawfully opens a letter or any other closed document, or breaks into another's locked depository, or is accessory thereto, shall be punished by fines or imprisonment up to six months.

If injury is caused through unauthorized knowledge acquired thereby, or the felony is committed for the purpose of unlawful gain, imprisonment up to two years may be imposed. Public prosecution may not be initiated without the request of the victim.

Section 145a

Fines or imprisonment up to six months may be imposed on anybody who

1. With the aid of a concealed monitoring apparatus, listens to a telephone conversation or other conversation between other people or to negotiations in a closed meeting in which he himself does not participate, or

2. with the aid of a recording apparatus or other technical means, secretly records conversations as mentioned above, or of negotiations in closed meetings in which he does not himself participate or to which he has gained admission by false pretenses or by sneaking in, or

3. introduces a monitoring or recording apparatus for the purposes named.

Complicity is punished in the same way.

Public prosecution is initiated when it is required in the public interest. [12–12–1958]

Section 146

Anybody who unlawfully causes, or is accessory to causing, the failure of a written message to be delivered or to come on time to the person addressed, by destruction, concealment or retention, shall be punished by fines or imprisonment up to one year.

If injury is caused by the felony, or the offender has acted with the intent of unlawful gain for himself or another, imprisonment up to three years may be imposed.

Public prosecution may not be initiated without the request of the victim.

Section 147

Anybody who unlawfully breaks into or assists another in breaking into a house, vessel, railroad car, automobile or aircraft or into any room in same or into a closed courtyard or similar storeroom or place of residence, by damag-

ing an object designed for protection against intruders, or by means of a picklock, false key or key unlawfully taken from the possessor, is considered guilty of punishable burglary.

Anybody who is guilty of burglary or is accessory thereto, shall be punished by imprisonment up to one year. If the felony is committed by an armed person, or by several in cooperation, imprisonment up to two years may be imposed; if the felony is committed with the intent to prepare the way for another felony, imprisonment up to four years may be imposed.

Anybody who by violent or threatening conduct seeks to force his own or another's unlawful admission to, or presence in, such place, or who unlawfully sneaks into an inhabited house or room which usually is kept closed at night, with the intention of being locked in, or who by means of disguise or a pretended or misused public capacity or order, or by use of a document which is falsified or pertains to somebody else, obtains for himself or another, unlawful admission to or presence in an inhabited house or room, or is accessory thereto, shall be punished similarly. [5–11–1951]

Chapter 14

FELONIES AGAINST PUBLIC SAFETY

Section 148

Anybody who causes, or is accessory to causing, fire, collapse, explosion, flood, marine casualty, railroad or aircraft accident, which may easily result in loss of human lives or extensive destruction of another's property, shall be punished by imprisonment from two years to life, but not less than five years if as a result of the felony somebody is killed or seriously injured in body or health.

An attempt may be punished in the same way as a completed felony. [5–11–1951]

Section 149

Imprisonment for at least one year shall be imposed as punishment upon anyone who tries to hinder the prevention or combating of such an accident as treated in section 148, when it occurs or when he knows it is threatening, by destruction, damage or removal of equipment or in another way, or who is accessory thereto.

Section 150

Anybody who brings about, or is accessory to bringing about, such danger as mentioned in section 148, by omitting to perform a special duty incumbent on him, by unlawfully destroying, removing or damaging an object or guiding signal, by giving or setting a false signal, by placing an obstruction in a seaway, by impairing the safe operation of a railroad driven by a locomotive or other mechanical power, shall be punished by imprisonment up to six years. If an accident such as mentioned in section 148 is caused thereby, imprisonment up to twelve years may be imposed.

Anybody who has committed one of the above-mentioned acts by negligence, or in ignorance of the danger, shall be punished by fines or by imprisonment up to one year.

Anybody who causes a person to escape, or to be removed unlawfully, from an institution or another place where the public authorities have put him, shall be punished by fines or imprisonment up to three months.

Chapter 35

MISDEMEANORS AGAINST GENERAL PEACE AND ORDER

Section 347

Any superior who intentionally omits to prevent the commission of any misdemeanor in his service, to the extent he was able to do so, shall be punished by fines.

Section 348

Anybody who violates the provisions concerning peace and order on holidays, shall be punished by fines.

Section 349

Anybody who causes, or is accessory to causing, fear among a substantial number of persons, their gathering, or turnout of the police, the fire service or the armed forces, by groundless cries for help, misuse of distress signals or similar conduct, shall be punished by fines or imprisonment up to three months.

The same punishment shall apply to anybody who, against his better conscience or without reasonable grounds for believing a rumor to be true, publicly spreads or is accessory to spreading a false rumor which is likely to cause general bitterness or fear or endanger public peace and order.

Section 350

Anybody who, by fighting, shouting, offensive behavior or other improper conduct, disturbs public peace and order, or lawful traffic, or is accessory thereto, shall be punished by fines or imprisonment up to two months.

Anybody who, by shouting, noise or in some other way, disturbs the night-rest of the neighborhood without just cause, or who causes the neighborhood fear or disturbance by such conduct in a place where he remains without authority and in spite of a request to leave, or who is accessory thereto, shall be punished in the same way.

The acts mentioned in the second para. shall be subject to public prosecution only upon request of the victim.

Section 351

Fines or imprisonment up to three months may be imposed as punishment upon anybody who

1. by careless driving, riding, sledding or sailing, or
2. by careless depositing of objects, or
3. by throwing stones or placing obstacles or traps, or
4. by omitting to properly fence in or to cover a well or an excavation, or
5. by omitting to maintain a building, road, bridge or handrail, or
6. by omitting to carry out compulsory safety measures, or
7. by omitting to mend or report damage which he himself has caused,

or by other similar conduct, causes danger for the traffic in a public place, or is accessory thereto.

Anybody who, in such manner as mentioned above, causes danger to the traffic in a place which is the lawful entrance to a farm, house or apartment, or to the traffic in a courtyard, garden or similar place to which several people have common access, shall be punished by fines.

Section 352

Anybody who, in the manufacture, use, storage or handling of explosives, firearms, machines, steam boilers, electric wires, or similar objects, is guilty of careless conduct which is likely to endanger the life or health of others, or who is accessory thereto, shall be punished by fines or imprisonment up to three months.

Anybody who by careless handling of fire or inflammable materials causes danger of fire, or is accessory thereto, or who violates the provisions contained in the law or issued in accordance with the law for the prevention of fires or explosions or similar accidents, shall be punished in the same way.

Section 353

Anybody who appears in a place to which access is forbidden by the public authorities, or who is accessory thereto, shall be punished by fines.

Section 354

Fines or imprisonment up to four months may be imposed as punishment upon anybody who causes danger

1. by neglecting his duty to watch an insane person, or by omitting to report to the police the disappearance of an insane person in his custody or care,
2. by unlawfully exciting, teasing or frightening animals, or by complicity thereto,

3. by unlawfully keeping dangerous animals or omitting to render dangerous animals in his possession harmless in a proper manner, or

4. by omitting to report to the police and otherwise to do all in his power to prevent an accident in case a dangerous animal has escaped from him.

If a dog attacks a person or causes considerable nuisance by noise or in some other manner, the owner of the dog shall be punished by fines, unless it must be assumed that he cannot be blamed therefor. If the dog, after having attacked somebody, still goes loose, despite complaints to the owner, or if considerable nuisance continues despite such complaints, the dog may be killed or requested to be killed by arrangement with the police.

Public prosecution of cases treated in the previous para. shall be initiated only on request of the victim.

Section 355

Anybody who unlawfully sneaks into or, despite prohibition, forces his way into a house, vessel, railroad car, motor vehicle or aircraft or a room in any of these, or any other closed place, or who unlawfully remains therein despite requests to withdraw, or who is accessory thereto, shall be punished by fines or imprisonment up to three months.

Anybody who unjustifiably stays in a place which is in the possession of another and remains there despite a request to withdraw, shall be punished by fines.

Public prosecution shall be initiated only on request of the victim, or when required in the public interest. [5-11-1951]

Section 356

Anybody who without request from the proper person, manufactures or disposes of a key to a lock belonging to somebody else, or who manufactures or gives a picklock to another person who has no lawful use for it, or who is accessory thereto, shall be punished by fines.

If he has acted on the supposition that an offense was intended, imprisonment up to six months may be imposed.

CHAPTER 36

MISDEMEANORS AGAINST PUBLIC HEALTH

Section 357

Anybody who violates the regulations given by law or in accordance with law in Norway, for the prevention or combating of contagious diseases, or for the protection of public health, shall be punished by fines or imprisonment up to three months.

Section 358

Punishment by fines or imprisonment up to six months may be imposed upon anybody who, without calling attention to the danger of contagion,

1. places in care a child whom he knows or presumes to be suffering from a contagious syphilitic disease, or who hires somebody to nurse such a child, or

2. enters service in another's house with the knowledge or presumption that he suffers from a contagious syphilitic disease, or continues in such employment, or receives a strange child to nurse,

or is accessory thereto.

Anybody who hires or continues to employ a person whom he knows or presumes to be suffering from a contagious syphilitic disease, to nurse a child, or who is accessory thereto, shall be punished in the same way.

Section 359

Punishment by fines or imprisonment up to four months may be imposed upon anybody who with intent or through negligence offers for sale,

1. as foodstuffs for people or animals or as luxuries, objects injurious to health because of adulteration, immaturity, spoilage, defective preparation, mode of conservation or other reasons, or

2. garments, fabrics, wall-paper, toys, utensils or other tools designed for preparing or preserving foodstuffs, or similar objects containing substances which make them injurious to health.

Appendix D

THE PENAL CODE OF SWEDEN

[Effective January 1, 1965]

Translated by Thorsten Sellin, University of Pennsylvania

Introduction by Ivar Strahl, University of Uppsala

MINISTRY OF JUSTICE, STOCKHOLM 1965

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Preface

A thorough reform of the Swedish penal law has been in preparation for more than half a century. Its purpose has been to replace the penal code of 1864 and other acts related thereto. In the meanwhile the old code has been progressively modernized by partial reforms, and now the results of all such labors have cumulated in the enactment of a new penal code. Adopted in 1962, this code took effect on January 1, 1965, exactly one hundred years after the previous code came into force.

Even though the new code does not contain a complete revision of Swedish penal law, the modifications introduced constitute altogether a substantial reform. As to specific crimes, it is mainly the provisions concerning crimes against persons that now appear in a completely revised form. Modifications in the system of sanctions have been made more extensively. The new code reflects the social outlook of our times and prevalent views of problems of penal law. It expresses in a comprehensive manner the trends and evaluations which have appeared in the legislation of more recent years.

Considering international developments in the field of penal law, the Swedish Government has thought that jurists and interested persons in other lands might find it useful to have an English translation of the code and a substantial introductory analysis of its content. The introduction has been written by Professor Ivar Strahl of the University of Uppsala, who has taken an active part in the drafting of the legislation. The translation is the work of Professor Thorsten Sellin of the University of Pennsylvania, who wishes to acknowledge the assistance of Mr. Gillis Erenius, Judge Referee of the Svea Court of Appeals, Stockholm, in the translation of the first twenty-one chapters of the Code and a final review of the complete typescript. For the cooperation these gentlemen have given in the production of this publication, the Government hereby expresses its gratitude.

Stockholm, January 1965

Herman Kling,
Minister of Justice.

Introduction

(By Ivar Strahl, Professor of Criminal Law, University of Uppsala)

The penal code, presented here in an English translation, was proclaimed in 1962 and went into effect January 1, 1965. It has replaced the code of 1864 which took effect January 1, 1865, and has been in force for exactly a century. The Swedish title of the new code (*brottsbalk*) literally means "Part on Crime", because in Sweden's general code of laws, which contains the most important of the provisions affecting citizens, the new penal code is only one "part". This general code dates from 1734 but has been revised from time to time. Besides changing some of its provisions, entire "parts" have been replaced by new parts with new content; the marriage law, the inheritance law, and the law of procedure, for instance, which have been adopted during the present century. The part dealing with the law of crimes now joins the others. The idea is to give the old general code of laws new content step by step and, when all parts have been reformulated, to declare that a new general code has replaced that of 1734.

This manner of proceeding is characteristic of Swedish legislation. It has been followed in the preparation of the new penal code. Work to produce such a code began early in the present century, but it was found difficult to draft it in one piece and therefore it was decided to revise the 1864 law gradually. Consequently the text of the new penal code is not entirely new. Large sections of the law of 1864 were revised in 1942 and 1948; the revisions, slightly amended, are found in the new penal code.

The labor of preparing the draft of the new code was entrusted to two committees. One, chaired by the former president judge of the Svea District Court of Appeals and later Lord High Chamberlain, Birger Ekeberg, was given the task of drafting the definitions of crimes and general provisions relevant to crime. The other, chaired by Karl Schlyter, president judge of the District Court of Appeals of Skåne and Blekinge, was to draft the provisions concerning sanctions.[1]

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[1] An English translation of this committee's proposal, together with an orienting presentation of its main features, is found in Thorsten Sellin's pamphlet, *The Protective Code. A Swedish Proposal,* 56 pp., Stockholm: Department of Justice, 1957.

Each committee presented a draft and these were then combined by the Department of Justice into a coordinated text.

Besides the efforts designed to bring a new penal code into being, a lively reform activity during the present century has brought about changes in the law of 1864 and in collateral legislation containing penal provisions. Reforms affecting sanctions have been particularly prominent. When the new penal code was proclaimed, Swedish criminal law had already become widely different from the law in force a century earlier. The new code is in a large degree the consolidation, in a systematically formulated legal text, of reforms previously realized.

EARLIER REFORMS

A few of these earlier reforms should be mentioned and in this connection references will be made to the Sections of the penal code which contain provisions corresponding to the novelties introduced by those reforms.[1]

As originally adopted, the code of 1864 was typical of the European penal codes of the middle of the last century. It was based on concepts then generally accepted. Each crime was to be carefully defined in the law and the punishment of that crime stated. The offender should, practically without exception, suffer the penalty attached to the crime by law. The law determined the punishment by fixing a minimum and a maximum, i.e., a penal latitude, within which the court, in each case, had to set a definite quantity of punishment after evaluating the seriousness of the crime. Lesser crimes were punishable by fine and more serious crimes by deprivation of liberty, imposed by courts for specific periods of time or, for very serious crimes, for life. Death sentences occurred but were seldom executed. No one who committed a crime before he was 15 years of age could be sentenced to punishment, because he was not considered responsible. Nor could the insane or the feebleminded be so sentenced; they, too, were held irresponsible. If they needed treatment, public mental health authorities were to provide it.

Changes in this system began to be made at the beginning of this century. In connection with the creation of a special public system of child care, separately administered, there was introduced a sanction involving commitment to an institution for training and treatment: it could be imposed by the court on persons between 15 and 18 years of age and its length was not fixed in the sentence but was decided, within certain limits, as the treatment progressed; the need for treatment would determine the length of time that liberty was denied. The new penal code contains nothing corresponding to this sanction.

In 1906, conditional sentences and parole were introduced. To begin with, the execution of a sentence was conditionally suspended. Later reforms permitted different ways of administering the sentence which in many cases became, in fact, probation. Chapters 27 and 28, respectively, deal with conditional sentence and probation.

In 1921, capital punishment was abolished after a long period during which no death sentence had been executed.

In 1927, courts were granted the prerogative, given certain prerequisites, of sentencing criminals who were considered dangerous to imprisonment for an indeterminate maximum term: the minimum term was stated in the sentence. Chapter 30 contains a corresponding provision.

In 1931, the so-called day-fine system was introduced; its meaning will be described later. Chapter 25 deals with such fines and other fines. The requirement that those unable to pay an imposed fine should serve a prison term was practically abandoned in 1937.

In 1935, a form of imprisonment was adopted for youths between 18 and 21 years of age, who needed treatment and training. The length of the term was not to be decided by the court but during the process of treatment, within certain limits. The English Borstal system served as a model for this sanction, the counterpart of which is dealt with in Chapter 29.

Provisions were adopted—the most important of them in 1944—which made it possible for a prosecutor to remit prosecution in certain cases even though he had adequate evidence.

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[1] A description of these reform activities appears in Thorsten Sellin's *Recent Penal Legislation in Sweden*, 70 pp., Stockholm: Penal Code Commission, 1947. This pamphlet also contains an English translation of the Act of 1945 concerning the execution of imprisonment, now superseded by an act of 1964 in the main of the same content.

A reform was made in 1945 in the system of administering imprisonment and other sanctions deprivative of liberty. The cellular system was abolished and treatment in open institutions introduced as a normal form of imprisonment. By open institutions is meant institutions lacking surrounding walls, grill work or other security measures. About a third of the prison inmates are at present in open institutions. There has been no intention of abolishing closed institutions, but the Correctional Administration is making efforts to enlarge the use of open institutions. The serving of longer prison terms is begun in closed institutions, the prisoner being transferred later, if possible, to an open institution. One who misbehaves in an open institution is returned to a closed one. Regardless of the type of institution, the law has specified that the execution of the sanction shall aim at the inmate's re-adaptation to society. Aside from disciplinary measures, no measures may be taken which inflict suffering on prisoners in addition to the mere loss of liberty, which is considered to be afflictive enough. Considering the usually terse and severely factual Swedish style of legal draftsmanship an unusual statement is found in the text of the code, namely that prisoners shall be treated with consideration for their human dignity.

THE PHILOSOPHY OF THE NEW PENAL CODE

There is no statement in the new code of the philosophy on which it is based, but it is clear from its provisions and from views expressed during its drafting that it is founded on the idea that prevention and not retaliation is its aim. In Chapter 1, Section 7, this is apparent from the stipulation that in the choice of sanction in the individual case the court shall, without ignoring the need for general deterrence, keep in mind that the sanction should serve to foster the offender's adaptation to society, i.e., aim at individual prevention. However, the code is less marked by theories and principles than are certain other European codes. Its initiators have not sought guidance from the different schools of thought which have arisen within European penal jurisprudence but have been guided by common sense, practical experience and regard for the need of humaneness. The orientation closest to that of the new code is the movement usually called that of social defense.

The code is based on a firm principle in one respect, namely that punishment may not be imposed without legal authorization: *nullum crimen sine lege*. It is not explicitly stated in the code, however, but for certain reasons in its promulgation statute. The provision in Chapter 1, Section 1, is not meant to give expression to the principle; it only defines what the law considers a crime. The principle will most likely be inserted in the new Swedish Constitution now in preparation. However, the principle is not so strictly construed in Sweden that, regardless of circumstances, courts could be absolutely required to apply it in marginal cases quite like those definitely covered by a penal provision.

THE ORGANIZATION OF THE CODE

The organization of the penal code differs somewhat from the customary one. The drafters have assumed that the law should give information on what is punishable, not only to jurists but also to the general public. The public is most interested in the definition of the individual crimes and therefore it was thought that these definitions should be placed at the beginning of the code. Consequently, after two introductory chapters there follow, as in a catalogue, chapter after chapter containing definitions of crimes. First come the offenses of greatest interest to the public; the catalogue begins with crimes against life and health. There follow chapters on, among others, libel and slander, crimes against morals, theft, fraud, embezzlement, and malicious mischief. Not until the last part of the catalogue do we find crimes such as rebellion and treason. Crimes by public servants and members of the armed forces have also been placed at the end of the catalogue.

General provisions concerning crimes are found in Chapters 23 and 24, following the catalogue of crimes. In Chapter 23 provisions are found which extend the area of punishability beyond that given by the definitions of the crimes, namely provisions defining punishable attempts or punishable preparation of crime and participation in crime. In the next chapter, on the contrary, there are provisions that actually restrict the punishable area in comparison with what the crime catalogue covers. Impunity, for instance, is granted for acts committed in self

defense and in certain other situations of such nature that the act should be considered noncriminal even though it fits into the definition of crime.

Beginning with Chapter 25, there are provisions governing punishments and other sanctions. Later, in Chapter 33, we find provisions that exempt from punishment or other sanction a person who committed the act before he was 15 years of age, and provisions placing restrictions on sanctions when the offender is mentally ill or suffers from some other mental abnormality. In Chapter 34 there are provisions governing certain cases when someone has committed multiple crimes. Then come chapters on the statute of limitation on prosecution for crime and administration of sanction, and confiscation. Two chapters dealing with organizational matters close the code.

SUBJECTS NOT IN THE PENAL CODE

To try to give details here about the specific crimes and general provisions concerning crime would carry us too far afield. It is worth mentioning, however, that the penal code lacks definitions of certain concepts which are very significant for determining the criminal nature of an act, namely intent (dolus) and carelessness (culpa). According to Chapter 1, Section 2, the definitions of crimes in the code are to be understood to mean that unless it is definitely stated that carelessness suffices to make an act punishable, intent is always required. The reason for omitting a definition of carelessness or of carelessly causing an effect is that it was thought difficult or impossible to give a definition that could furnish real guidance in borderline cases. Carelessness does comprise, however, both recklessness and negligence. Intent has not been defined because when the penal code was drafted the committee was not quite sure how it could be done. Therefore it was preferred to let judicial decisions gradually shape the concept of intent.

Courts have, as a matter of fact, partly as a result of decisions subsequent to the drafting of the penal code, arrived at a definition of intent that is probably rather generally accepted by now. According to this definition three kinds of intent can be distinguished. It is enough to describe these three kinds, having in mind cases where intentionally causing an effect is a requirement for punishability.

First of all, intent may be said to be direct, if the effect is what the actor wants to produce by his act. For instance, he is so insensed by the person he kills that he desires his death and hence kills him. In that case he has caused the death by direct intent. Such intent exists also when the effect—the death—is looked upon by the actor as a transitional link to what he wants to gain. For instance, he kills his aunt in order to inherit from her. For certain crimes, namely those in which the penal code expressly so states, direct intent is required for punishability, usually indicated by the words "in order to," as for instance in Chapter 9, Section 9, first paragraph, or in Chapter 17, Section 1.

The second kind of intent is the so-called indirect intent. It is present when the actor is sure that the effect will occur although it is not the effect he wanted produced by his act nor is it a transitional link to the effect he wanted to gain. Example: In order to collect on an insurance policy on the life of an airplane passenger, a person causes the wreck of the plane. If he is certain that other passengers on board will be killed, he indirectly intends their death.

Finally, the third kind of intent, eventual intent so called, exists in cases where the actor has neither direct nor indirect intent but realizes that the effect is possible and circumstances are such that one can be sure that he would have acted as he did even if he had been certain that the effect would materialize. Example: A person fleeing in a car sees a policeman facing him in the middle of the road but instead of stopping increases his speed and runs over and kills the officer. If the fleeing person did not want to kill the policeman but realized that there was a risk that this might happen and if, furthermore, the circumstances were such that one would be sure that he would have acted the same way even though he had known that the policeman would be killed, he has killed him with eventual intent.

When the definition of crime does not indicate otherwise, the requirement of intent is established whichever kind is present. The statements just made about intent to produce an effect are also applicable to circumstances of the crime. These must also be included in the scope of intent, when intent is required to make an act punishable.

The legislator has refrained from introducing provisions in certain other respects also. Chapter 24, for instance, deals with such grounds as self defense, for instance, that rule out criminality. One might expect to find among such

provisions one that would make clear that under certain circumstances the consent of the person against whom the crime is directed would lead to the conclusion that the act is no crime. Although consent undoubtedly has this effect to some extent according to Swedish law, the legislator has not felt capable of defining its scope well enough to venture to introduce any provision regarding it. He has likewise avoided provisions stating the extent to which the causing of an effect by omission is to be considered punishable, in accord with a description of a crime that literally would require that the effect be produced by an act. There is no doubt that omission in such cases is punishable to some extent.

GENERAL COMMENTS ON PUNISHMENTS AND OTHER SANCTIONS

In Chapter 1, Section 3, there is a list of the sanctions that can be imposed in accord with the penal code. They are divided into punishments and other sanctions. The punishments are fines, imprisonment, suspension or discharge of a public servant from office, and military arrest or disciplinary fine for servicemen (Ch. 32). A feature of the punishments is that they are attached to the specific offenses in the law; in each Section containing the definition of a crime, such and such a punishment shall be imposed for the crime. The court is always given the latitude of fixing the punishment within a minimum and a maximum. However, instead of the punishment so stated in the catalogue of crimes, i.e., in Chapters 3–22, the court may choose another sanction if the prerequisites for its use are met. This is the import of the provision in Chapter 1, Section 4, first paragraph. The idea is that in principle all sanctions are to be on an equal footing even though, for practical reasons, punishments are specified for each crime.

While the preparatory work on the penal code was progressing there was a lively discussion on whether it would be reasonable to avoid calling some of the sanctions in the penal code punishments. The committee which proposed the part of the draft code dealing with sanctions did not adopt the term punishment in its draft. This aroused strong opposition. Among those who submitted reports on the draft the vast majority felt that the traditional term of punishment should above all be retained to designate fines and imprisonment.

In this connection we should perhaps note that the word sanction is not quite an apposite translation of the word used in the text of the code. A literal translation of the Swedish term is "consequence." Thus Chapter 1, Section 3, speaks in part of punishments and in part of other consequences.

THE SPECIAL SANCTIONS

The provisions with reference to sanctions begin with Chapter 25. We should note that in accord with Chapter 33, Section 1, no sanction may be imposed for an act committed by someone under 15 years of age.

Chapter 25 contains the provisions concerning fines. Except for drunkenness and disorderly conduct (Ch. 16, Secs. 15–16) all fines are to be fixed in day-fines. This means that the court (Ch. 25, Sec. 2) sentences to a fixed number of units, called day-fines, at least one and at most 120, and at the same time sets the size of each day-fine in an amount of money not less than 2 and not more than 500 kronor. The total amount to be paid as fine is arrived at by multiplying the number of day-fines by the amount of each day-fine. If, for instance, the offender has been sentenced to pay 20 day-fines of 10 kronor, he must pay 200 kronor. The idea of this system is that the number of day-fines is to be determined in relation to the gravity of the crime in accord with the customary way of meting out punishment, while the size of the day-fine is to be commensurate with the offender's capacity to pay. In this manner one achieves both a sentence which expresses the court's evaluation of the gravity of the crime and also adapts the punishment to the offender's economic status. The term day-fine is due to an idea that the size of that fine would be the amount the offender, by exercising great frugality, can forego per day. An exact calculation of this amount is often difficult, of course. The calculation is generally made in a rather routine manner in practice, but the result is fairly well adapted to the offender's ability to pay.

Even other statutes than the penal code that provide for fines are as a rule to be so applied that the fines are assessed in day-fines, following the rules already mentioned. This appears from Chapter 25, Section 1, second paragraph. Two exceptions are made there, however. Fines shall be assessed directly in kronor

if the statutory maximum fine is 500 kronor or less and also if the law defines a special basis for computing the fine. The second exception is found especially in a separate statute fixing punishment for incorrect declaration of taxes.

Section 7 of Chapter 25 refers to a special statute dealing with the recovery of fines. This Section also notes that unpaid fines may be converted into imprisonment, but this procedure is rarely used and occurs really only when the reason for non-payment is obstinacy or negligence on the part of the offender. The fines that are never paid represent a very small proportion of those assessed.

Provisions governing imprisonment are found in Chapter 26. Before the new penal code appeared there were two kinds of punishment by imprisonment in Sweden, one called imprisonment and the other penal servitude. Gradually, the differences in the manner of administering them had been practically eliminated, however. The Act of 1945 on the execution of imprisonment, already mentioned, stated that both should be so administered that the prisoner's adaptation to society was fostered. This principle did not permit essential differences in the treatment of those sentenced to simple imprisonment and those sentenced to penal servitude. The prisoners of both classes had to work and this work was to be of a kind that would promote their resocialization. The new act of 1964 differs very little from the previous act.

According to Chapter 26, Section 1, imprisonment is imposed for a specific period of time or for life. In the former case the minimum is fixed at one month and the maximum at ten years. However, if a specified crime in the catalogue is punishable by imprisonment, the minimum and maximum times for the sentence applicable to that crime are stated. When Chapter 8, Section 1, provides, for instance, that theft is to be punished by imprisonment for at most two years, this means that the court shall sentence to a term of a given length of at least one month and no longer than two years.

A person sentenced to a fixed term of imprisonment will, in most cases, not have to serve the entire term in prison. If his sentence is for six months or longer, he must be paroled (Ch. 26, Sec. 7) when he has served five-sixths of the term. This is a mandatory rule, and the release occurs no matter how the prisoner has behaved in the institution. The idea behind the rule is that by conditionally releasing these prisoners some time before the expiration of their terms they can be placed under supervision and subject to the threat that they can be returned to the institution to serve the balance of their sentence unless they behave themselves well during parole. After-care armed with this means of bringing pressure to bear on the parolee has been regarded as the more advisable the poorer the inmate's prognosis is. But, as Chapter 26, Section 6, indicates, a well adjusted prisoner may be paroled before he has served five-sixths of his term, namely after two-thirds but not before four months of the term has passed. This means, then, that a prisoner with a sentence of six months may be paroled after four and must be paroled after five months; if he has a sentence of one year, he may be paroled after eight months and must be paroled after ten, etc. Sections 9—24 of Chapter 26 give more detailed instructions regarding parole.

Life imprisonment is provided for only the most serious crimes. It is customary to parole a prisoner under life sentence by way of pardon, when he has served ten to fifteen years.

Chapter 27 provides for a conditional sentence. No punishment is ever stated in such a sentence, according to the new penal code. The probationary period is two years. There is no supervision, and this sanction is designed for only those whose prognosis is excellent.

Chapter 28 deals with probation. Before the adoption of the new penal code probation was a form of conditional sentence, but the new code clearly distinguishes between conditional sentence and probation. Probation is not conceived to be a conditional suspension of the imposition of a sentence. However, if during the probation term the probationer does not observe the rules of conduct imposed on him, the probation order may be revoked and another sanction imposed (Ch. 28, Secs. 8–10). The probation term is three years long (Ch. 28, Sec. 4). The probationer is placed under supervision, and the court can issue directives concerning this way of life during the probation period (Ch. 28, Secs. 5—6).

Local boards, called supervision boards, with a judge or other jurist as chairman, have been set up for the supervision of probationers and parolees (Ch. 37, Secs. 1–2; Ch. 28, Sec. 6; and Ch. 26, Sec. 12). There also exists an

organization of State servants—protective supervisors—who are to assist in the supervision of both probationers and parolees. One of the tasks of the protective supervisor is to carry out or assist in investigations of the accused in order to provide the court with information needed for the proper choice of sanction. The court or the supervision board selects a probation or parole officer for each person to be supervised. He is either a suitable private citizen or a protective supervisor or assistant protective supervisor. The protective supervisor in the district assists and exercises control over such officer and his charge, if the officer is a private citizen.

In connection with both conditional sentence and probation, the court can prescribe at what times and in what manner the offender shall meet the obligation to pay damages incurred by his crime (Ch. 27, Sec. 5; Ch. 28, Sec. 6; cf. Ch. 26, Sec. 15). Customary rules are followed in determining whether or not the offender is obliged to pay damages and in what amount, but if the court, following such rules, does sentence the offender to pay damages, it can, according to the Sections mentioned, direct, for instance, that payments be made in weekly or monthly installments in given amounts during the probation(ary) term. For one conditionally sentenced, such a directive operates as a condition for enjoying a respite, and for the probationer as an obligation which like other conditions prescribed in the probation order he must meet, if he does not wish to risk a revocation of the order and a substituted sanction.

According to Chapter 27, Section 2, and Chapter 28, Section 2, a court can add day-fines for the crime, when a conditional sentence or a sentence to probation is passed, even if the offense is not expressly made punishable by fine. This possibility has been provided to enable the court to sharpen the reaction to the offense, when there is a good reason for it.

In a sentence to probation, but not in a conditional sentence, the court can also (Ch. 28, Sec. 3), if found advisable, order the probationer committed to an institution for a period of not less than one and not more than two months. The actual time is not fixed by the court but by the supervision board later during the confinement period. This device, like the authorization to impose fines, is a means which permits the court to react more severely to the offense. It is also meant to give the court a means, if necessary, to interrupt the criminal activity of the sentenced offender, preventing him from continuing to commit crimes after having been sentenced, as sometimes happens. It may also be necessary to remove a probationer from a sodden milieu or extricate him from alcoholism. The commitment is to a correctional institution but to one of a special kind set up for the purpose. The institutions are small and open. There the inmate will be under observation and treatment which may be of value for his later treatment, since this institutional phase is to be regarded as the initial one of probation. It is not intended that this form of deprivation of liberty will be common. The court is to use it only when it is considered essential for the rehabilitation of the offender or when it may be expected to have positive value in encouraging public law obedience.

The possibility of ordering such a commitment to an institution is a novelty in the penal code and the extent to which the courts will adopt it remains somewhat uncertain. It is regarded as being particularly applicable to rather young offenders being sentenced to probation, but the code does not permit its use in the case of defendants under eighteen years of age. As will be seen from later comments, the commitment of such juveniles to a correctional institution should be an exceptional event.

Youths who are 18 but not yet 21 years of age at time of sentence may be sentenced to youth imprisonment (Ch. 29, Sec. 1). In exceptional cases, such a sentence may also be imposed on a youth under 18 or on one who is 21 but not yet 23 years of age. The length of the term is left indeterminate in the sentence. The execution of the sanction begins in a correctional institution and is later transformed into treatment on parole. There are special institutions serving this class of inmates; some are closed and some open and some have both open and closed sections. Their program emphasizes education and vocational training. Inmates may not be held longer than three years within walls and the entire treatment period, including parole, may not exceed five years (Ch. 29, Secs. 2 and 4). Usually the youth has spent a year or a little less before his first release on parole; he may be returned to the institution if he does not behave himself.

A central board decides on the inmate's release on parole on conditions about like those imposed on parolees from sentences to imprisonment (Ch. 29, Sec. 5

and Ch. 37, Sec. 4). The local supervision boards, mentioned earlier, are primarily responsible for the supervision.

Youths may on occasion be sentenced to ordinary imprisonment, but the use of this sanction in such cases is greatly circumscribed (Ch. 26, Sec. 4). Very strong reasons must exist before some one under 18 at the time of sentence may be so dealt with, and if the defendant is 18 but under 21, ordinary imprisonment can be used only for the purpose of general prevention or when no other sanction is equally suitable.

Youths under 18 years of age and, under certain circumstances, those between 18 and 21 may be surrendered by the court to public child welfare organs for treatment in one of their institutions. The sense of this procedure and those referred to earlier is that youths deprived of liberty because of crime are generally in need of education and training. With that aim in mind, youths under 18 are as a rule better served by the child welfare agencies than by the Correctional Administration. Even when they are dealt with in correctional institutions, it is felt that the length of time should neither be fixed in the sentence nor determined in relation to the gravity of the offense, as is largely the case when ordinary imprisonment is imposed. It is thought wiser to leave the time indeterminate, within certain limits, in the sentence so that it can be adjusted to the need of treatment revealed as that treatment progresses. But, it has not been thought possible to forbid the use of ordinary imprisonment for youths under 21 or even under 18 years. There are instances when a young offender needs no education or training by a pulic agency but must be deprived of his liberty for purposes of general prevention. A fairly common case in practice is grossly reckless operation of a motor vehicle, perhaps under the influence of alcohol. There are cases, when for other reasons, such as the heinousness of the offense, the possibility of imposing a sentence to imprisonment should be left open.

In Chapter 30, there are provisions enabling the court to sentence dangerous offenders to indeterminate internment. The prerequisites are found in Section 1 of the Chapter. Section 3 provides that the court shall fix a minimum term for the confinement in the institution. The maximum term is not decided, except that, as Section 8 notes, the confinement for longer than a certain time in excess of the minimum requires a court decision but not necessarily by the sentencing court. Supervision follows a release from internment and the parolee can be re-incarcerated if his conduct is not satisfactory (Ch. 30, Secs. 12 and 13). A central board decides on release and re-incarceration (Ch. 30, Sec. 6 and Ch. 37, Sec. 4). The local supervision boards already mentioned are primarily responsible for supervision, as in the case of other parolees (Ch. 30, Sec. 10).

According to Chapter 31 the court may, under certain circumstances, surrender the offender for care as provided in social welfare statutes, i.e., to the public agencies for child welfare, care of alcoholics or the mentally ill. Such surrender is collectively referred to as surrender for special care.

Child Care.—This care, according to the Child Welfare Act, is so organized that it is primarily in the hands of local boards, whose members are elected by the communal administrations, who in return are elected by the voters of the communes. Each child welfare board is, by and large, charged with the task of seeing that children and youth within its jurisdiction may grow up under favorable conditions and receive suitable nurture. The work of such boards is not limited to asocial young people; it includes needed assistance to those having shown no asocial tendencies. The boards are not courts, for there are no juvenile courts in Sweden or the other Scandinavian countries. There is no requirement that a jurist be a member of a board, but the Act recommends it if a suitable candidate is available. Furthermore, a board may engage a jurist as secretary or expert. The boards are much less than courts bound in their work by legal formalities. There is no prosecutor who presents a case against any one before a board. When a board makes a decision that infringes upon some one the decision may be appealed to State authorities of a courtlike character, and decisions that more seriously infringe upon some one's liberty cannot be executed until they have been approved by a State authority. These authorities also exercise control in other ways over the work of the boards and lend them assistance.

One of the functions of the boards is to take measures against children and youths who act in an asocial manner and therefore are in need of corrective measures. The measures may consist of advice and warnings, probation, placement in a foster home and commitment to an institution for education and

training. A criminal act by the younster is neither a prerequisite, nor a sufficient reason for taking a measure. The decisive element is instead the recognized need for remedial action. It is, of course, obvious that the need is often demonstrated by the youngster's criminal act. Remedial measures may be taken by the board if the person has not reached his 18th birthday, but under certain conditions they may be applied to older youths not yet 21 years of age.

It should be clear from what has just been said that public child care is entirely divorced from the system of prosecution and court action and from the authorities executing the sentences of courts. However, judicial authorities may allow child welfare boards to take action in criminal matters.

The pertinent provision is found in Chapter 31, Section 1. The case in point is one where some one of an age to which the Child Welfare Act applies is prosecuted in court and found guilty. The above Section offers the court the possibility in such case to surrender the defendant to the child welfare board of the district for appropriate disposition in accord with the Child Welfare Act. Such surrender is considered as a sanction by the penal code. The court must establish that the prerequisites for care under the Act exist, both with respect to age and other conditions, and that the child welfare board's opinion has been sought. In practice no surrender would occur unless the board had expressed its willingness to take the required measures. What further measures are taken depends on the board, for the court has no jurisdiction over its actions. If it should happen, however, that the measures which the board said that it would take cannot be taken, the case (Ch. 38, Sec. 2) can be re-opened by the court, and if that occurs it can impose another sanction for the crime.

Section 1 of Chapter 31 also covers the case in which the accused has already been taken in charge by the child welfare authorities and placed in one of its institutions. If so, the administration of the institution rather than the child welfare board shall be asked for its opinion.

Section 1 thus treats of what a court can do if the prosecution of a young offender has been started. According to another statute than the penal code, the prosecutor is allowed to forego prosecuting some one under 18 years of age. If the crime is not insignificant, the prosecutor must consult the child welfare board before deciding to prosecute or not prosecute. It happens very often that the prosecutor drops the prosecution and lets the child welfare board take over, before the judge has had any opportunity to surrender the case to a board. In many instances this is no doubt what the judge would have done ultimately.

In certain cases there is a special reason for starting prosecution even though all concerned are agreed that the young offender should be dealt with under the provisions of the Child Welfare Act. Chapter 31, Section 1, second paragraph, permits the court to impose a fine for the offense although the offender is being surrendered to a child welfare board (or the administration of an institution) for handling. A child welfare board cannot impose fines, since it is not a court.

Of course, there may be other reasons for starting prosecution even in cases where the prosecutor has grounds for assuming that the court will end by turning the juvenile over to a child welfare board. One reason may be that the offense is so serious that it should not escape prosecution; another that the juvenile belongs to a gang, whose other members are to be prosecuted. In some cases, the authorities may think it a good idea to show the juvenile that his offense is considered so serious that he must be brought before the court.

The above provisions signify altogether that there is no fixed border between the administration of criminal justice and care in accord with the Child Welfare Act, so far as age is concerned. The distinction depends on what the authorities regard as the most suitable disposition in the individual case.

Care of Alcoholics.—In Sweden there exists a public agency, organized in the main like public child welfare and based on a special statute, the Temperance Act. Local temperance boards are elected by the communal administrations, and among their tasks these boards are to take measures against those who abuse alcoholic beverages. These measures consist, among others, of advice and warnings, probation and commitment to an institution for alcoholics. Such commitment requires a decision by a State authority. If the alcoholic does not apply for such commitment voluntarily, a petition to that effect by the temperance board is generally required.

A court may, under Chapter 31, Section 2, hand over to the temperance board the task of acting under the Temperance Act, if the measures available are deemed applicable, but the opinion of the board must first be sought by the court.

Transfer of a case for care under the Temperance Act is also regarded as a sanction by the penal code.

Mental Health Care.—A third form of special care mentioned in Chapter 31, Section 3, is mental health care including the care of the feebleminded. Such care is not entrusted to local boards. According to the Mental Health Act commitment to a mental hospital can occur on the basis of a report by a registered physician that such care is needed. Control in various ways exists to prevent the retention of some one in a hospital without adequate reasons.

Somewhat like the provisions of Chapter 31, Sections 1 and 2, the third Section empowers the court to surrender a convicted defendant for care under the Mental Health Act, which means his being sent to a State mental hospital. First, however, a medical examination in accord with the Act must have demonstrated that there is need for such action.

If psychiatric care is found to be needed but without hospitalization, the court, under the authority of Section 4 of Chapter 31, may order that such care be provided. There are physicians at the mental hospitals who provide such care for out-patients.

An order made by authority of Sections 3 or 4 of Chapter 31 is counted as a sanction by the penal code. This means that in accord with this code even the mentally ill are sentenced to what the law calls a sanction for the crime.

The Applicability of Sanctions to the Mentally Abnormal and to the Young.—The provisions in Chapter 33, Section 2, show that even other sanctions than surrender for mental care, in or outside a hospital, may be applied to the mentally ill. The provisions do not state that the mentally ill or those equated with them are to be exempt from all punishments and other sanctions. They only place restrictions on the use of sanctions in such cases. Certain sanctions are forbidden, others permitted, and when no permissible sanction is applicable the mentally ill defendant is not sanctionable.

The Section just mentioned applies to one who has committed the crime under the influence of mental disease, feebleмindedness or other mental abnormality of so profound a character that it must be considered equivalent to mental disease. This last formulation has in mind the psychopaths, in particular, but only those who suffer from a strongly marked psychopathy. It should be noted that neither in this connection nor elsewhere does the penal code speak of irresponsibility. There is no statement that the offender may lack the ability to comprehend that he has committed a wrong or the ability to act in accord with the law. It is the view of Swedish legislators that such provisions do not point to any realities, the existence of which could be established, one way or another. The legislator has preferred to tie the relevant provisions of the penal code to criteria which really can be established. A diagnosis can establish the existence of a mental illness. Intelligence tests can demonstrate the presence of feebleмindedness. The difficulties are greater when the third category—those equated with the mentally ill—are involved and one has to be satisfied, alas, with evaluations which often are uncertain.

If a person belongs to any of the categories mentioned in Chapter 33, Section 2, he can be subjected only to certain sanctions. Imprisonment, youth imprisonment, internment, conditional sentence, suspension or discharge from public office and military arrest and disciplinary fines cannot be employed. The most commonly used sanction is surrender for commitment to a mental hospital, but surrender for open psychiatric care may also occur or care in accord with the Child Welfare Act or the Temperance Act. Probation might be ordered, because it may in certain cases be a means for providing suitable treatment. Even a sentence to fines may be used. Fines are often considered a suitable sanction for ordinance violations even when the offender is mentally ill, feebleминded or otherwise mentally abnormal. In more serious offenses a fine would be regarded as a proper sanction only in exceptional cases. During the period of the drafting of the code, the example was given of a person suffering from a pathological mania to hound a given individual with defamatory statements. In such a case, fines could be both an effective and humane way of causing him to desist.

The court shall declare the defendant free from sanction, however, if none of the permissible sanctions should be used (Ch. 33, Sec. 2, third par.).

The system of provisions applicable to the mentally ill, the feebleминded and similar persons is a novelty in the penal code. The change is in reality not very great, because in the future, as heretofore, the great majority of those belonging to these categories will undoubtedly be brought to court and committed for mental

hospital care. From a theoretical point of view, however, the new system represents a radical modification of earlier law.

The legislator has abandoned the idea that there are two classes of people, the responsible and the irresponsible, and that the second class should be exempt from the administration of criminal justice. He has instead, with practical and humanitarian viewpoints in mind, given thought to whether each and every one of the sanctions available through the penal code ought to be applicable to those mentally ill, feebleminded or otherwise serious abnormal mentally. In so doing he has found good reason for eliminating certain sanctions and allowing others. Given this point of departure it would have been logical to let the prohibition against the use of some sanctions apply even to the offender who has become mentally ill after the crime. However, this has not been thought possible. It might conduce to a risk of simulation or aggravation. For the same reason, Section 3 of Chapter 31 prescribes a restricted use of the possibility of ordering a surrender for care in a mental hospital in cases where the crime was not committed under the influence of mental illness, feeblemindedness or mental abnormality of equal serious nature.

The reasoning which has determined the formulation of the system of rules concerning mental cases has been followed also in deciding what importance an offender's youth should have for imposing a sanction on him. The legislator has abandoned the idea of fixing an age limit below which a young person would be regarded as irresponsible and above which he would be responsible. He has instead, animated by practical and humanitarian considerations, examined each sanction with a view to its possible suitability for a given age group. A fixed minimum age for bringing an offender into a court is found in the rule (Ch. 33, Sec. 1) that no sanction may be imposed on any one for a crime committed before he was 15 years of age, but otherwise different age limits have been set for the use of different sanctions. Repeating to some degree what has already been said, these age limits will be described here altogether.

Fines and conditional sentence, as well as surrender for special care, may be used with no other limitation than the 15-year age rule, which also applies to internment, although in practice this sanction is hardly likely to come into question for those very young, since they cannot have met other prerequisites for internment.

Probation is to be used only in exceptional cases unless the offender is at least 18 years old at the time of sentence (Ch. 28, Sec. 1). For those who are younger, care under the Child Welfare Act is preferred, as a rule.

Imprisonment may be imposed on one under 18 years of age only in very rare cases, and the code favors a restrictive use of imprisonment even for the youth of 18 but not yet 21 years of age (Ch. 26, Sec. 4).

Youth imprisonment is primarily designed for those who are 18 but not yet 21 at the time of sentence, but in exceptional cases it may be used for some one under 18 and for one of 21 but not yet 23 years of age when sentenced (Ch. 29, Sec. 1).

The system is complemented by the age limits for the application of the Child Welfare Act, which is fully applicable to those under 18. To those older but not yet 21, it is applicable only under certain circumstances.

Multiple Crimes.—When, as sometimes happens, a person is to be sentenced for several crimes at the same time, whether these crimes were committed by one act or several acts, only one sanction shall, as a rule, be imposed for all the crimes together (Ch. 1, Sec. 6). This applies even if the crimes are not interrelated. For instance, a person prosecuted for two thefts and drunkenness is consequently to be sentenced, as a rule, to only one punishment for these crimes or to another sanction, too, such as probation. In that case, however, another latitude applies to the punishment than if only one crime were involved. In the example given, the only punishment possible is imprisonment, because theft carries no other sanction. The maximum sentence for theft would be two years (Ch. 8, Sec. 1). The punishment for drunkenness is a fine of at most 500 kronor (Ch. 16, Sec. 15). According to Chapter 26, Section 2, the maximum for a collective sanction is to be computed according to two rules. One states that the maximum for the individual crimes are to be summed. This rule would result in two years plus two years plus 40 days, i.e., the number of days into which the fine of 500 kronor could be converted if not paid. According to the second rule, a limiting one, the highest maximum for any one of the crimes may not be exceeded by more than two years. In the example given, the maximum collective sanction then becomes four years. The minimum for any sentence to imprisonment is one month. Within these limits the court must impose a fixed term for the two thefts and the drunkenness, collectively.

In cases where a collective fine may be imposed because each of the crimes is punishable by fine (which is not the case with theft), similar provisions in Chapter 25, Section 5, provide the possibility of sentencing to a larger fine than the maximum established for a single offense.

Chapter 34 governs cases in which someone has already been sentenced to a punishment or other sanction and later is to be sentenced for a crime he committed earlier or later but before he has completely undergone the sanction first imposed.

Remission of Prosecution or Sanction.—We have already mentioned that public prosecutors have the power to forego prosecution of a person who committed his crime before the age of 18. This is an exception from a general rule in Swedish law, namely that the prosecutor is duty bound to prosecute when adequate evidence against some one exists. One may deduce from what has been said earlier that the exception is primarily to be understood as a link in the system of rules which fix the minimum age limit for the administration of criminal justice. This limit has not been made unchangeable. After an examination of circumstances in an individual case falling within the 15–17 year group, inclusive, the authorities must decide if some form of child care is preferable. It is not necessary for the public child welfare authorities to intervene. Many a time, the solicitude of the parents is considered adequate.

There are certain other exceptions from the general rule that prosecution must follow if there is sufficient evidence. Thus, prosecutors may forego prosecution when it is obvious that it would only result in a fine. Furthermore, the State's highest prosecutor has the power to decide that no prosecution be started. This power is to be used in exceptional cases when a prosecution would be looked upon as shocking. As examples one might mention the case of someone accused of assault following strong provocation or some one who has committed a theft, soon regrets it, returns the property and tells the police about it, or someone who committed an offense in the excusable belief that his act was not criminal.

The provisions governing the power of the prosecutor to forego prosecution are not found in the penal code. Before the power can be exercised, it is generally held that investigation of the crime has established the fact that the one benefitting from such remission did, in fact, commit the offense.

There is a provision in the penal code (Chapter 33, Section 4) permitting a court in rare cases to impose a punishment below the minimum in the punishment scale or even to remit a sanction for the crime.

From this review it appears that the new Swedish Penal Code offers great possibilities for individualizing the law's reaction to an offender's crime by taking into account his personal nature and circumstances.

In certain cases, the public prosecution may forego prosecution or the court may decide not to impose a sanction. Given certain conditions, the court may use as mild a sanction as a conditional sentence, i.e., stop at something which in reality is hardly more than a warning.

It is also possible for the court, if certain prerequisites exist, to surrender the lawbreaker for care in accord with the Child Welfare Act, the Temperance Act, or the Mental Health Act. Such care may, indeed, mean such a great restriction of the culprit's liberty that it can be regarded as an appreciable reaction to his offense, but it should be noted that such care requires that the need for it exists and that if that need is established, the same kind of care could have been furnished without the cooperation of the court and in the absence of any criminal conduct.

If the court finds that a fine should be imposed for a crime that is not trivial, the monetary value of the fines is generally, by means of the day-fine system, adjusted to the culprit's capacity to pay.

If a court considers it purposeful to leave the offender in freedom but under supervision and measures connected therewith, it has, within certain limits, the possibility to arrange such treatment in freedom by a sentence to probation. The conditions that can be imposed on the probationer in the sentence may vary greatly depending on the requirements of the individual case and such conditions may be changed during the probation period if necessary.

A far-reaching individualization can also result if the court sentences to a sanction depriving the culprit of his liberty. These sanctons have been reduced in number in the new Code compared with the older one, and therefore the court often has no choice from among several prison sanctions. But, this has not reduced the possibility of individualization. One has preferred to let it occur

at the institutional level, guided by the greater knowledge of the offender at that stage. For instance, it is then that the decision is made that the sentence be served in an open or a closed institution. Even the length of the institutional period depends in many cases on decisions taken during it. This applies also to fixed terms of imprisonment for if that term is not too short, the institutional period can be abbreviated by parole which is decided after taking into consideration what is then known about the prisoner. Furthermore, it is noteworthy that if parole is granted or if the sanction is a Borstal commitment or internment, the institutional period is followed by one during which the parolee is regularly to be subject to a treatment which in principle is like that organized under a sentence to probation, with a possibility of recommitting the parolee to the institution in case of violation. Thus, we note that one sentenced to have his freedom curtailed is under continuous observation while in an institution and often long afterwards, and that there exist wide possibilities for having recourse to measures prompted by that observation.

PART ONE—GENERAL PROVISIONS

Chapter 1

Of Crimes and Sanctions

Sec. 1. Crime is an act for which a punishment as stated below is provided by this Code or by other codes or laws.

Sec. 2. Unless otherwise stated, an act described in this Code shall be regarded as a crime only if it is committed intentionally.

If the act has been committed during self-induced intoxication or if the actor had otherwise himself brought about the temporary loss of the use of his senses, this shall not cause the act to be considered non-criminal.

Sec. 3. A sanction for crime in this code means: the common punishments of fine and imprisonment—the punishments of suspension or dismissal of a person exercising a function carrying official responsibility, and disciplinary punishments for members of the armed services; as well as conditional sentence, probation, youth imprisonment, internment, and surrender for special care.

Sec. 4. The use of punishments is regulated, in general, by the statutory provisions governing the individual crimes. Other sanctions may, according to what is provided for their use, nevertheless be applied albeit they are not mentioned in those provisions.

Imprisonment, suspension, and dismissal are to be regarded as heavier sanctions than a fine and disciplinary punishments.

Sec. 5. Unless otherwise provided several sanctions for the same crime may not be imposed.

Suspension or dismissal are imposed collaterally with the sanction to which it is found that the accused should be sentenced.

Sec. 6. Unless otherwise provided, a joint sanction for the crimes shall be imposed when some one is to be sentenced for several crimes.

If there are special reasons for it, a person may be sentenced for one or more crimes to pay a fine together with a sanction for additional criminality, or to imprisonment together with conditional sentence or probation for the rest of his criminality.

Sec. 7. In the choice of sanctions, the court, with an eye to what is required to maintain general law obedience, shall keep particularly in mind that the sanction shall serve to foster the sentenced offender's adaptation to society.

Sec. 8. Aside from a sanction and in accord with appropriate statutory provisions, a crime can incur forfeiture of property or some other special consequence defined by law and may also incur liability for the payment of damages.

Chapter 2

Of the Applicability of Swedish Law

Sec. 1. A person, who has committed a crime within this Realm, shall be tried according to Swedish law and in a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm.

Sec. 2. If a crime has been committed outside the Realm by a Swedish citizen or by an alien domiciled in Sweden, he shall be tried according to Swedish law and in a Swedish court.

If some other alien, while being outside the Realm, has committed a criminal act which was punishable under the law in force at the place of the crime, he shall be tried according to Swedish law and in a Swedish court, if, after having committed the crime, he has become a Swedish citizen or has acquired domicile in this Realm or if he is a Danish, Finnish, Icelandic, or Norwegian citizen and is found here, and similarly too if he is found in the Realm and the crime is punishable according to Swedish law by imprisonment for more than six months.

Sec. 3. Even in a case other than those mentioned in Section 2, an alien, who has committed a crime outside the Realm, shall be tried according to Swedish law and in a Swedish court.

1. if he committed the crime on board a Swedish vessel or airplane or if he was a commanding officer or belonged to the crew of such carrier and committed the crime while in that capacity;

2. if he committed the crime in an area where a detachment of military forces was found but, unless he was a serviceman, only if the detachment was there for other than training purposes;

3. if the crime was committed against Sweden, a Swedish citizen or a Swedish group, institution or organization or against an alien domiciled in Sweden; or

4. if the crime violated international law.

Sec. 4. A crime is deemed to have been committed where the criminal act occurred and also where the crime was completed or, in case of attempts, where the intended crime would have been completed.

Sec. 5. Prosecution for a crime committed within the Realm on a foreign vessel or airplane by an alien, who was a commanding officer or belonged to the crew of or otherwise accompanied the carrier, against such alien or a foreign interest shall not be instituted without an order from the King or from someone authorized by the King to give such order.

Prosecution for a crime committed outside the Realm may be instituted only pursuant to an order as stated in the first paragraph. Nevertheless, prosecution may be instituted without such order if the crime was committed on a Swedish vessel or airplane or, while on duty, by the commanding officer or some member of the crew of such carrier or by a serviceman in an area where a detachment of the armed services was found or by a Swedish, Danish, Finnish, Icelandic or Norwegian citizen against a Swedish interest.

Sec. 6. No one may, without an order from the King or from some one authorized by the King to give such order, be prosecuted for an act for which he has been subjected to punishment or other sanction outside the Realm. If prosecution is instituted in this Realm, the fixing of the sanction shall be done with due consideration for what he has suffered outside the Realm, and he may according to circumstances be sentenced to a lesser punishment than the one set by law for the act or be completely absolved of punishment.

Sec. 7. Aside from the provisions of this chapter regarding the applicability of Swedish law and the jurisdiction of Swedish courts, attention shall be paid to the limitations resulting from generally recognized principles of international law or, in accord with special statutory provisions, from agreements with foreign powers.

Sec. 8. Separate statutory provisions govern extradition for crime.

Conditions stipulated in connection with extradition from a foreign state to Sweden shall be complied with in this Realm.

Chapter 16

Of Crimes Against Public Order

Sec. 1. If a crowd of people disturbs public order by demonstrating an intention to use group violence in opposition to a public authority or otherwise to compel or obstruct a given measure and does not disperse when ordered to do so by the authority, instigators and leaders shall be sentenced to imprisonment for at most four years and other participants in the crowd's business to pay a fine or to imprisonment for at most two years for *riot*.

If the crowd disperses on order of the authority, instigators and leaders shall be sentenced for riot to pay a fine or to imprisonment for at most two years.

Sec. 2. If a crowd, with intent referred to in Sec. 1., has proceeded to use group violence on person or property, whether a public authority was present or not, sentences for *violent riot* shall be imposed; on instigators and leaders to imprisonment for at most ten years and on participants in the crowd's business to pay a fine or to imprisonment for at most four years.

Sec. 3. If a member of a crowd that disturbs public order neglects to obey a command aimed at maintaining order, or if he intrudes on an area that is protected or has been closed off against intrusion, he shall, if no riot is occurring, be sentenced for *disobeying police order* to pay a fine or to imprisonment for at most six months.

Sec. 4. If a person by act of violence, loud noise or other like means disturbs or tries to interfere with a public religious service, other public devotional exercise, wedding, funeral or like ceremony, a court session or other state or local official function, or a public gathering for deliberation, instruction or hearing a lecture, he shall be sentenced for *disturbing a function or public meeting* to pay a fine or to imprisonment for at most six months.

Sec. 5. A person, who orally, before a crowd or congregation of people, or in a publication distributed or issued for distribution, or in other message to the public, urges or otherwise attempts to entice people to commit a criminal act, evade a civic duty or disobey public authority, shall be sentenced for *inciting rebellion* to pay a fine or to imprisonment for at most six months.

If the crime is considered grave because the offender tried to induce the commission of a serious crime or for other reasons, imprisonment for at most four years shall be imposed.

Sec. 6. If a person publicly spreads a false rumor or other untrue assertion apt to arouse a danger to public subsistence or to public order or security, he shall be sentenced for *spreading socially harmful rumor* to pay a fine or to imprisonment for at most two years.

Sec. 7. If a person publicly insults the Swedish flag or coat of arms or other majestic symbol of the Realm, he shall be sentenced for *insulting a symbol of the Realm* to pay a fine or to imprisonment for at most six months.

Sec. 8. If a person publicly threatens, slanders or vilifies an ethnic group having a certain origin or religious creed, he shall be sentenced for *agitation against ethnic group* to imprisonment for at most two years or, if the crime is petty, to pay a fine.

Sec. 9. If a person publicly vilifies matters held sacred by the Church of Sweden or other religious denomination active in this Realm, he shall be sentenced for *breach of religious peace* to pay a fine or to imprisonment for at most six months.

Sec. 10. If a person, without authorization, moves, or if he injures or infamously treats the corpse or ashes of the dead, opens a grave or otherwise inflicts damage on or abuses a coffin, urn, grave or other resting place of the dead or a tombstone, he shall be sentenced for *crime against the peace of the tomb* to pay a fine or to imprisonment for at most six months.

Sec. 11. If a person offends morality and decency by written or pictorial representation or by offering for sale, exhibiting or otherwise spreading a writing or picture, he shall be sentenced for *offending morality and decency* to pay a fine or to imprisonment for at most six months.

The statement just made shall also apply, if a person in a public place or otherwise publicly, offends morality and decency by speech or action.

Sec. 12. A person, who distributes among children or youth a writing or picture which due to its content can coarsen or otherwise involve serious risk for the moral nurture of the young, shall be sentenced for *leading youth astray* to pay a fine or to imprisonment for at most six months.

Sec. 13. If a person, by physical maltreatment, overworking, neglect or in other ways exposes an animal to undue suffering, he shall be sentenced for *cruelty to animal* to pay a fine or to imprisonment for at most two years.

Sec. 14. If a person organizes for the public a game of chance about money or monetary values, or permits such play on premises he has opened to the public, he shall be sentenced for *gambling* to pay a fine or to imprisonment for at most six months. If a person participates in such play, which has been arranged for the public or else occurs on premises to which the public is admitted, he shall be sentenced for gambling to pay a fine.

Sec. 15. A person, who, in a public place, indoors, or outdoors, appears so intoxicated by alcoholic beverages that it is evident from his gestures and speech, shall be sentenced for *drunkenness* to pay a fine of at most five hundred kronor.

The fine just mentioned shall also be imposed if the intoxication has been caused by something other than alcoholic beverages.

Sec. 16. A person, who, in a case other than those previously mentioned in this Chapter, by loud noisiness in a public place or otherwise publicly behaves in a manner apt to arouse public indignation shall be sentenced for *disorderly conduct* to pay a fine of at most five hundred kronor.

Chapter 23

Of Attempt, Preparation, Conspiracy and Complicity

Sec. 1. If some one has begun to commit a given crime without its arriving at completion, he shall, in cases where specific provisions have been made governing this, be sentenced for attempt to commit the crime, if there had been a danger that the act would lead to the completion of the crime or such danger had been precluded only because of accidental circumstances.

Punishment for attempt shall be fixed at most at what applies to a completed crime and not at less than imprisonment, if the lowest punishment for the completed crime is imprisonment for two years or more.

Sec. 2. A person who, with the intention of committing or promoting a crime, presents or receives money or something else as prepayment or payment for the crime or who procures, constructs, gives, receives, keeps, conveys or engages in any other such activity with poison, explosive, weapon, picklock, falsification tool or other such auxiliary means, shall, in cases where specific provisions have been made governing this, be sentenced for preparation of the crime, unless he is punishable for completed crime or attempt.

In specially designated cases punishment for conspiracy shall also be imposed. By conspiracy is meant that some one decides on the act in concert with another, or also that some one seeks to incite another or agrees to or offers to commit it.

Punishment for preparation or conspiracy shall be fixed lower than the highest and may be fixed below the lowest limit applicable to a completed crime. No greater punishment than imprisonment for two years may be imposed, unless imprisonment for eight or more years may be imposed for the completed crime. If there was slight danger of the crime's being completed, no punishment shall be given.

Sec. 3. Punishment for attempt, preparation or conspiracy to commit a crime shall not be imposed on one who voluntarily, by discontinuing the execution of the crime or otherwise, has prevented the competion of the crime. Even though the crime was completed, a person who has unlawfully had to do with auxiliary means may not be punished for that reason if he has voluntarily prevented the criminal use of the means.

Sec. 4. Punishment provided in this Code for an act shall be inflicted not only on the one who committed the act but also on any one who furthered it by advice or deed. A person who is not regarded as the actor shall, if he induced another to commit the act, be punished for instigation of the crime or else for being an accessory to the crime.

Each accomplice shall be judged according to the intent or the carelessness attributable to him. Punishment fixed by law for the act of a manager, debtor, or other person in a special position shall also befall a person who together with him was an accomplice in the act.

The provisions of this paragraph do not apply if the law provides otherwise in special cases.

Sec. 5. If some one has been induced to be an accessory to a crime by coercion, deceit or misuse of his youth, lack of comprehension or dependent status or has been an accessory only to a small degree, his punishment may be fixed below that otherwise established for the crime; in trifling cases no punishment shall be imposed. The same applies when it is a question of imposing the punishment for a person in a special position on some other accomplice.

Sec. 6. If a person omits in time to report or otherwise reveal a crime that is occurring, when it can be done without danger to himself or any one of his next of kin, he shall in the cases where this has been covered by special provisions be sentenced for failure to reveal the crime as provided for a person who has been an accessory to the crime only to a smaller degree; however, in no case may a heavier punishment than imprisonment for two years be imposed. In the cases covered by special provisions punishment for failure to reveal a crime as just stated shall also be imposed on one who has not but should have realized that crime was being committed.

If, when it can be done without danger to themselves or their next of kin and without reporting to some authority, parents or other preceptors or guardians, in cases other than those mentioned in the first paragraph, fail to prevent one who is in their care or under their control from committing a crime, punishment for failure to prevent the crime shall be imposed as provided in the first paragraph.

Failure to reveal or prevent a crime is not punishable unless the act being committed has progressed so far that punishment can follow.

Sec. 7. Punishment provided in this Code in a case where some one by crime achieves for himself a gain or appropriates something shall also be imposed when some one intentionally provides a gain for or appropriates something for another.

Chapter 24

Of Self-Defense and Other Acts of Necessity

Sec. 1. An act committed by a person in self-defense is not punishable.

A person acts in self-defense, who seeks

to avert an actual or imminent criminal attack on person or property;

to compel one, who by force or threat of force or in other ways obstructs the recapture of property when caught in the act;

to prevent some one from unlawfully forcing his way into a room, house, yard or vessel; or

to remove from a room, house, yard or vessel some one who has unlawfully forced, his way in, or, else, if it is dwelling, refuses to leave when ordered to do so.

and all this so long as the act is not obviously unjustifiable considering the nature of the aggression and the importance of its object.

Sec. 2. If a policeman, who is to execute an official duty is met with or is attacked by force or threat of force, he may for the accomplishment of his task use such force as can be regarded as justifiable in view of the circumstances. The same applies to a sentry or other serviceman or civilian defense personnel during civilian defense preparations, who performs a police task or serves on guard duty or for maintaining order.

If a prisoner or one who is jailed, taken into custody or otherwise deprived of liberty escapes or, by force or threat of force offers resistance or if he otherwise offers resistance to some one who has him in charge and responsible for making him behave, such force as is justifiable in view of the circumstances may be used to prevent the escape or maintain order. If some one who is to be jailed, taken into custody or otherwise deprived of his liberty tries to avoid or impede the one who has to perform the task, force may also be used as just mentioned. The same applies, if in cases referred to in this paragraph, resistance is offered by some one other than previously mentioned.

If some one has the right according to this section to use force, each person who comes to his assistance shall have the same right.

Sec. 3. In case of mutiny or during combat, as well as on occasions when a crime against military discipline imports a special danger, a serviceman may vis-a-vis a subordinate, who shows disobedience, use the force necessary for maintaining military discipline.

In a case referred to here, the provisions of Section 2, third paragraph, shall apply correspondingly.

Sec. 4. A person, who in a case other than one referred to previously in this Chapter acts out of necessity in order to avert danger to life or health, save valuable property or for other reasons, shall also be free from punishment if the act must be considered justifiable in view of the nature of the danger, the harm caused another and the circumstances in general.

Sec. 5. If, in a case referred to in Sections 1–4, some one has used greater force or caused more serious harm than is permissible in each case, he shall nevertheless not be punished, so long as the circumstances were such that he could hardly have stopped to think.

If the act is found to be criminal, a lesser punishment than that fixed for the crime may be imposed.

Sec. 6. An act committed by some one by order of the person to whom he owes obedience shall not lead to punishment for him, if he had to obey the order in view of the nature of the condition of obedience, the character of the act and the circumstances in general.

PART THREE—OF SANCTIONS

Chapter 25

Of Fines, etc.

Sec. 1. Fines are imposed in day fines.

However, if a certain maximum sum of not more than five hundred kronor is specified for a fine or if its amount is to be determined according to a special basis of computation (standardized fine), the fine is imposed directly in money.

Sec. 2. Day-fines are imposed to a number of at least one and at most one hundred and twenty.

A day-fine is fixed in money in an amount of at least two and at most five hundred kronor, depending on what is deemed reasonable in view of the defendant's income, wealth, obligations to dependents, and other economic circumstances. If the offense is petty, the amount of the day-fine may be adjusted accordingly.

Sec. 3. Unless the law states otherwise, the smallest sanction by fine is ten kronor.

Sec. 4. Fines may be used as a collective punishment for several crimes, if fines can follow on each of the crimes.

A collective punishment by fines does not apply to crimes for which the law has provided standardized fines or fines which may not be converted into imprisonment.

Sec. 5. Fines as collective punishment for several crimes are imposed in day-fines if the law provides such fines for any one of the crimes.

As a collective punishment day-fines may be imposed to a number of one hundred and eighty and a fine directly in money to an amount of one thousand kronor.

If a specified minimum fine is provided for any one of the crimes, a lesser fine may not be imposed.

Sec. 6. Unless otherwise prescribed, fines go to the Crown.

If fines are imposed as collective punishment for several crimes and the fine for any one of the crimes is to go elsewhere than to the Crown or be used for a special purpose, the apportionment of the fines shall be ordered depending on circumstances.

Sec. 7. Special provisions govern the recovery of fines.

Unless otherwise provided, unpaid fines shall be converted into imprisonment for at least ten and at most ninety days in conformity with special provisions applying thereto.

Sec. 8. The provisions of Sec. 6, first paragraph, and of Sec. 7 shall correspondingly apply with respect to a monetary penalty which, by decision of a court or other authority, has been imposed on some one in a particular case. With respect to other monetary penalties, the provisions of this Chapter pertaining to fines shall apply.

Chapter 26

Of Imprisonment

Sec. 1. According to what is provided for the crime, imprisonment is imposed for a fixed term of not more than ten years, or for life. A fixed term of imprisonment may not be shorter than one month.

Separate legal provisions govern the use of imprisonment as punishment into which fines have been converted.

Sec. 2. Imprisonment may be used as a collective punishment for several crimes if imprisonment can follow on any one of the crimes.

Imprisonment for a fixed term may be set longer than the longest of the maximum terms that can follow on the crimes, but it may not exceed this by more than two years nor surpass the maximum terms added together; in that connection, punishment by fine is considered as corresponding to the imprisonment which would result from the conversion of the fines.

Imprisonment shorter than the longest of the minimum terms may not be imposed.

Sec. 3. If some one has been sentenced to a sanction for a crime defined in this Code and punishable by imprisonment and he, after the sentence has acquired legal force, again commits a crime defined in the Code and punishable by imprisonment for at most six months, imprisonment for at most two years may be imposed for the new crime. If the new crime is punishable by imprisonment for more

than six months but at most two years, imprisonment for at most four years may be imposed for the new crime.

Neither a crime which some one has committed before his eighteenth birthday, nor a sentence to a fine or a disciplinary punishment may be made the basis for the augmentation mentioned in the first paragraph.

A foreign sentence may be given the same effect as a Swedish one.

Sec. 4. A person under eighteen years of age may not be sentenced to imprisonment except for very strong reasons.

Imprisonment may be imposed on one over eighteen but not yet twenty-one years of age only when the deprivation of liberty is particularly called for in deference to public law-obedience or else when imprisonment is found more appropriate than another sanction.

Life imprisonment may not be imposed for a crime some one committed before reaching eighteen years of age.

Sec. 5. A person sentenced to imprisonment shall, for the execution of the punishment, be committed to a correctional institution. This is the subject of separate legislation.

Sec. 6. A person serving imprisonment for a fixed term may, if it can be assumed that it will further his adaptation in society, be paroled when two-thirds of his term, but at least four months, have been served (discretionary parole).

When a matter of discretionary parole is being investigated, special note shall be taken of the prisoner's conduct during his stay in the institution and his mental attitude at the time the question of his parole arises, his readiness to make compensation for the damage caused by his crime, and the circumstances in which he would find himself upon release.

Sec. 7. A person serving imprisonment for a fixed term of not less than six months shall be paroled when he has served five-sixths of his term (mandatory parole).

Sec. 8. If several sentences to imprisonment are being served concurrently, the combined prison terms shall be taken into consideration in applying Sections 6 and 7. In that connection, punishment into which fines have been converted shall also be regarded as imprisonment.

If, in accord with governing provisions, the period of imprisonment has been extended due to disciplinary punishment, such extension shall not be counted in computing the time for parole, nor may release on parole occur before the conclusion of such punishment.

The period during which the punishment shall be regarded as being administered as a result of a court order referred to in Chapter 33, Section 3, is also counted as time served.

Sec. 9. Questions of discretionary parole are investigated by the supervision board within whose district the correctional institution is located.

The decision concerning mandatory parole is made by the director of the correctional institution.

Sec. 10. A parole period corresponding to the balance of the term at the time of release, but at least one year in length, shall be set in the decision granting parole.

Sec. 11. The parolee shall be under supervision during the parole period.

If at the time of release or later it is found that supervision is not needed, it may be decided that no supervision shall take place. As long as the parole period lasts, the parolee may be placed under supervision, when reasons dictate it. Decisions here referred to are made by the supervision board.

Sec. 12. A supervision board is in charge of the supervision. The board appoints a parole officer.

If some one other than the protective supervisor attached to the supervision board has been appointed parole officer, the supervision shall be under the guidance of such supervisor.

Sec. 13. The parolee shall keep the parole officer informed of his residence and employment, appear before him when summoned, and otherwise maintain contact with him in conformity with his instructions.

Sec. 14. During his parole period, the parolee shall lead an orderly and law-abiding life, avoid harmful company, try to support himself according to his ability, and otherwise observe what is required of him by this Code or by directives or instructions issued by its authority. If he has been enjoined to make compensation for damage caused by his crime, he shall meet this obligation to the best of his ability.

Sec. 15. When it is deemed appropriate for promoting the parolee's adaptation in society, special directives, valid for a given period of time or until further notice, shall be issued with respect to what he has to observe during the parole period. Such directve may have reference to place of residence or lodging, use of leisure time, disposal of wages or other resources, all this for a specified period of at most one year at a time; training, employment, or ban on the use of alcoholic beverages. Other analogous directives may also be issued.

When deemed required, the parolee may be directed to submit to medical care, treatment for alcoholism or other care or treatment in or outside a hospital or other similar establishment.

If the parolee has been enjoined to make compensation for damage caused by his crime, directives may be issued governing the time and manner of meeting this obligation.

Sec. 16. Directives in accord with Section 15 shall be issued by the supervision board.

If so indicated by the parolee's progress and other personal circumstances, the supervision board may change a directive issued and also issue a new directive.

Sec. 17. Instructions concerning the carrying out of a directive referred to in Section 15 may be given by the parole officer, who may also allow temporary relief and make a promptly required adjustment.

Sec. 18. If the parolee does not comply with what is required of him by this Code or by directives or instructions issued by its authority, the supervision board, aside from ordering supervision or issuing a directive in accord with Secton 15, may, depending on the circumstances:

1. Decide that the parolee be given a warning;

2. Extend the parole period by at most one year beyond the time fixed at the time of release;

3. Order him, under threat of a monetary penalty, to comply with a directive issued.

Sec. 19. If it can be assumed that a parolee, who has ignored his obligations, will not let himself be corrected by a measure referred to in Section 18, the supervision board may declare the conditionally granted liberty forfeited.

Sec. 20. A decision concerning a measure referred to in Section 18 or 19 may be made even after the expiration of the parole period, if the question has been under consideration by the supervision board prior thereto. No other measure there mentioned may be decided upon after the expiration of the parole period, unless that period is prolonged in accord with Section 18.

Sec. 21. Concerning the forfeiture of conditionally granted liberty and concerning certain other measures, when the person sentenced to imprisonment is found to have committed another crime, provisions are found in Chapter 34.

Sec. 22. If a question arises of declaring a conditionally granted liberty forfeited or of taking a measure referred to in Section 18, the supervision board may, if circumstances indicate it, order that the parolee be appropriately detained while awaiting further order.

A person thus detained may not be held longer than a week. However, if strong reasons dictate it, a new order for his detention for at most an additional week may be issued. He may not be retained in detention after the expiration of the parole period.

Sec. 23. If a conditionally granted liberty is declared forfeited the balance of the prison term shall be regarded as a new term with respect to re-parole. If the parolee is not at the same time sentenced to imprisonment for a fixed term, discretionary parole may, however, be granted even though the time mentioned in Section 6 has not ended.

Sec. 24. If a conditionally granted liberty can no longer be declared forfeited, the punishment shall be considered fully served when the parole period expires.

Chapter 27

Of Conditional Sentence

Sec. 1. A conditional sentence may be given for a crime punishable by imprisonment, if, with particular consideration of the defendant's character and other personal circumstances, there are firm reasons for assuming that supervision or some other more far-reaching measure is not needed to restrain him from further criminality.

A conditional sentence may not be given if, because of the gravity of the crime or for other reason, an obstacle exists with respect to public law-obedience. A conditional sentence may not be used for a crime by a serviceman, unless it is

deemed feasible without danger to military discipline and order within the military forces.

Sec. 2. Whether or not fines are provided by law for the crime, at most one hundred and twenty day fines may be imposed in addition to the conditional sentence, if this is deemed appropriate for the correction of the defendant or out of consideration for public law obedience.

Sec. 3. A person who receives a conditional sentence shall undergo a probationary period of two years.

The probationary period begins the day the decision of the court in respect to the sanction for the crime, either by declaration of satisfaction with the decision or otherwise, has acquired legal force against the offender.

Sec. 4. During the probationary period the offender shall lead an orderly and law abiding life, avoid harmful company, and seek to support himself according to his ability.

Sec. 5. If the offender has been enjoined to make compensation for damage caused by his crime, he shall do what he is able to do to meet this obligation. The court may direct that, during the probationary period, he shall seek to meet his obligation to pay damages or a part thereof at times and in a manner indicated in the sentence.

When reasons dictate it, a directive referred to in the first paragraph may be changed or revoked on application by the prosecutor or by the offender.

Sec. 6. If the offender does not comply with what is required of him by the conditional sentence, the court may, if the prosecutor proceeds in the matter before the expiration of the probationary period, depending on circumstances:

1. Decide that the offender be given a warning;

2. Issue a directive according to Section 5 or change a directive previously issued;

3. Extend the probationary period to three years;

4. Vacate the conditional sentence and fix another sanction for the crime.

Unless the probationary period is extended, a measure described in 1 and 2 of the first paragraph may not be taken after the expiration of the probationary period.

If the conditional sentence is vacated, fair consideration shall be given, in deciding on the sanction, to the fine which in accord with Section 2 was imposed in addition to the conditional sentence.

Sec. 7. Concerning the vacating of a conditional sentence and concerning certain other measures, when the offender is found to have committed another crime, provisions are found in Chapter 34.

Chapter 28

Of Probation

Sec. 1. If it is deemed necessary that the defendant be placed under supervision and no more far-reaching sanction than probation is needed, a sentence to probation may be imposed for a crime punishable by imprisonment.

A person under eighteen years of age may not be sentenced to probation unless this sanction is deemed more appropriate than care in accord with the Child Welfare Act.

If the mildest punishment provided for the crime is imprisonment for one year or longer, a sentence to probation may be imposed only if strong reasons dictate it.

Sec. 2. Whether or not fines are provided by law for the crime, at most one hundred and twenty day-fines may be imposed in addition to probation, if this is deemed appropriate for the correction of the defendant or out of consideration for public law-obedience.

Sec. 3. If the defendant is eighteen years of age or older, the court may, if it is deemed necessary for his correction or for some other reason, order that the probation shall include treatment in an institution. Such treatment shall continue for at least one and at most two months depending on decisions made as it progresses. In other respects, the treatment is governed by special legislation.

If the probationer has not reached his twenty-third year of age, the court may decide that the order mentioned in the first paragraph shall take effect even though the sentence to probation has not acquired legal force.

Sec. 4. Probation shall last three years.

The probation term begins the day the decision of the court in respect to the sanction for the crime either by declaration of satisfaction with the decision or otherwise, has acquired legal force against the probationer.

If the court has rendered a decision mentioned in Section 3, second paragraph, the probation term shall begin the day of the sentence.

Sec. 5. The probationer shall remain under supervision during his probation term.

When supervision is no longer deemed needed, it shall be ordered terminated. As long as the probation term lasts, the probationer may be placed under supervision anew, if reasons dictate it. A decision here referred to is rendered by the supervision board.

Sec. 6. Provisions of Chapter 26, Sections 12–17, shall correspondingly apply to a person sentenced to probation. A probation officer may also be assigned and directives based on Chapter 26, Section 15, issued by the court when sentencing to probation.

Sec. 7. If the probationer does not comply with what is required of him in consequence of the sentence to probation, the supervision board may, aside from ordering placement under supervision or the issuing of a directive in accord with Chapter 26, Section 15, depending on circumstances:

1. Decide that the probationer be given a warning;
2. Extend the probation term to at most five years;
3. Order him, under threat of a monetary penalty, to comply with a directive issued.

A measure referred to in this Section may not be taken by a supervision board after the expiration of the probation term.

Sec. 8. If the probationer has ignored his obligations and it can be assumed that he will not let himself be corrected by a measure which the supervision board may take, the board shall ask the prosecutor to raise with the court the question of revoking the probation or of treatment referred to in Section 3.

The proceeding just mentioned shall be instituted before the expiration of the probation term.

Sec. 9. If probation is revoked, the court shall import another sanction for the crime. In so doing, fair consideration shall be given to what the probationer has suffered in consequence of the sentence to probation as well as to fines imposed in addition to probation in accord with Section 2; and the court may impose imprisonment for a shorter time than that provided for the crime.

If adequate reasons for the revocation of probation are not present, the court may instead take a measure referred to in Section 7 or, if the probationer is eighteen years of age or older, order that he undergo treatment in accord with Section 3. If the question of such treatment is raised, a decision to revoke probation or to take a measure referred to in Section 7 may be made instead. No other measure than one there mentioned may be ordered when the probation term has expired, unless the term is extended in accord with Section 7.

Sec. 10. Concerning the revocation of probation and concerning certain other measures, when the probationer is found to have committed another crime, provisions are found in Chapter 34.

Sec. 11. If a question arises concerning the revocation of probation or concerning treatment in accord with Section 3 or a measure referred to in Section 7, the supervision board or the court before which a proceeding has been instituted in accord with Section 8 may, if circumstances dictate it, order the probationer appropriately detained while awaiting further order.

A probationer thus detained may not be held longer than a week. However, if strong reasons dictate it, a new order for his detention for at most an additional week may be issued. He may not be held in detention after the expiration of the probation term.

Chapter 29

Of Youth Imprisonment

Sec. 1. A sentence to youth imprisonment may, for a crime punishable by imprisonment, be imposed on a person who is eighteen but not yet twenty-one years of age, if the nurture and training which youth imprisonment is meant to give are deemed appropriate in view of the youth's personal development, conduct and other circumstances.

A person who is not yet eighteen or who is twenty-one but not yet twenty-three years of age may be sentenced to youth imprisonment, if such sanction is deemed obviously more appropriate than another sanction.

The court may order a sentence to youth imprisonment executed even though it has not acquired legal force.

Sec. 2. The treatment of one sentenced to youth imprisonment takes place within or outside an institution and may last for at most five years, of which at most three in an institution.

Sec. 3. The treatment shall begin in an institution.

The institutional care shall be given in a youth institution or, if special reasons dictate it, in some other correctional institution.

Special legislation governs institutional care.

Sec. 4. The treatment shall continue outside the institution when institutional care has lasted as long as needed in view of the aim of the treatment. Unless special reasons dictate it, the youth may not be transferred to care outside the institution before a year has passed since his commitment to the institution.

Sec. 5. The decision on transfer to care outside the institution is rendered by the youth imprisonment board, which may, however, charge the supervision board in the district in which the institution is located with fixing more precisely the date of the transfer.

If the supervision board finds that the youth should be transferred to care outside the institution or if he himself applies for such transfer, the board shall refer the matter, together with its own views thereon, to the youth imprisonment board for investigation.

Sec. 6. The youth shall be under supervision during treatment outside the institution.

Sec. 7. With respect to care outside the institution, the provisions of Chapter 26, Sections 12–17, shall have corresponding application. A parole officer may also be assigned and directives in accord with Chapter 26, Section 15, issued by the youth imprisonment board when it orders care outside the institution.

Sec. 8. If a youth under care outside the institution does not comply with what is required of him by this Code or in accord with directives or instructions issued by its authority, the supervision board, aside from issuing a directive in accord with Chapter 26, Section 15, may, depending on circumstances, decide that he be given a warning, as well as requiring him, under threat of a monetary penalty, to observe a directive issued.

Sec. 9. If a youth under care outside the institution obstinately refuses to meet his obligations or if it is found that because of his conduct or for other reasons institutional care is needed to prevent him from committing crime, the youth imprisonment board may order his re-commitment to the institution.

A re-committed youth shall be again transferred to care outside the institution, when the aim of his treatment is best achieved thereby.

Sec. 10. Concerning re-commitment to an institution and concerning certain other measures, when the youth is found to have committed another crime, provisions are found in Chapter 34.

Sec. 11. If a question arises of recommitting a youth to an institution or of taking a measure referred to in Section 8, the supervision board or the youth imprisonment board may, if circumstances dictate it, order him appropriately detained while awaiting further order.

A youth thus detained may not be held longer than a week. However, if strong reasons dictate it, a new order for his detention for at most an additional week may be issued. He may not be held in detention after the expiration of the imposed sanction.

Sec. 12. If the need to continue supervision over a youth under care outside the institution no longer exists, the youth imprisonment board shall order the imposed sanction terminated. Unless special reasons dictate it, however, such order may not be issued until the care outside the institution has lasted two uninterrupted years.

If no order mentioned in the first paragraph is issued, the sanction terminates at the expiration of the maximum length of time the treatment can be given.

Chapter 30

Of Internment

Sec. 1. A sentence to internment may be imposed if the crime or, when several crimes have been committed any one of them is punishable by imprisonment for two years or longer and, in view of the defendant's criminality, mental condition, conduct and other circumstances, a long-lasting deprivation of liberty, without duration fixed in advance, is deemed needed to prevent further serious criminality on his part.

Sec. 2. The treatment of a person sentenced to internment takes place within and outside an institution and shall begin in an institution.

Sec. 3. When internment is imposed, the court, in considering the nature of the crime and other circumstances, shall fix a given minimum time of at least one and at most twelve years for custodial institutional care.

Sec. 4. The institutional care shall take place in an internment institution or, if special reasons dictate it, in some other correctional institution.

Special legislation governs the institutional care.

Sec. 5. After the expiration of the minimum term, the treatment shall continue outside the institution, when institutional care is no longer deemed needed to restrain the internee from further criminality.

Sec. 6. The decision on transfer to care outside the institution is rendered by the internment board, which, however, may charge the supervision board in the district in which the institution is located with fixing more precisely the date of the transfer.

Before the expiration of the minimum term and at least every six months thereafter, the supervision board shall consider the question of transfer to care outside the institution.

If the supervision board finds that the internee should be transferred to care outside the institution or if he himself applies for such transfer, the board shall refer the matter, together with its own views thereon, to the internment board for investigation.

Sec. 7. If the internee is in permanent need of care in a mental hospital, the the internment board may, when the minimum term has expired, order the termination of the internment for the purpose of his admission to such hospital.

Sec. 8. Without the consent of the court, care in the institution may not exceed the minimum term by more than three years altogether, or five years altogether, if the minimum term is three years or longer.

The consent referred to in the first paragraph shall be given if it is deemed necessary to prevent further serious criminality on the part of the internee. The consent shall apply to an extension by three years; the term can be further extended, three years at a time, by a new consent.

The proceeding concerning extension is instituted by the attorney general when proposed by the internment board. If such proceeding is instituted the internee may be held in the institution until the court's decision has acquired legal force.

Sec. 9. The internee shall be under supervision during treatment outside the institution.

Sec. 10. With respect to the care outside the institution, the provisions of Chapter 26, Sections 12–17, shall have corresponding application. A parole officer may also be assigned and directives in accord with Chapter 26, Section 15, issued by the internment board when it orders care outside the institution.

Sec. 11. If an internee under care outside the institution does not comply with what is required of him by this Code or in accord with directives or instructions issued by its authority, the supervision board, aside from issuing a directive in accord with Chapter 26, Section 15, may, depending on circumstances, decide that he be given a warning, as well as requiring him, under threat of a monetary penalty, to observe a directive issued.

Sec. 12. If an internee under care outside the institution obstinately refuses to meet his obligations or if it is found that because of his conduct or for other reasons institutional care is needed to prevent him from committing crime, the internment board may order his re-commitment to the institution.

A re-committed internee shall again be transferred to care outside the institution when institutional care is no longer deemed necessary.

Sec. 13. Concerning re-commitment to an institution and concerning certain other measures, when the internee is found to have committed another crime, provisions are found in Chapter 34.

Sec. 14. If a question arises of recommitting an internee to an institution or of taking a measure referred to in Section 11, the supervision board or the internment board may, if circumstances dictate it, order him appropriately detained while awaiting further order.

An internee thus detained may not be held longer than a week. However, if strong reasons dictate it, a new order for his detention for at most an additional week may be issued. He may not be held in detention after the expiration of the imposed sanction.

Sec. 15. If there is no longer a need to continue supervision over an internee under care outside the institution, the internment board shall order the imposed sanction terminated. Unless special reasons dictate it, such an order may not be given before three years have passed since the internee was last transferred to care outside the institution.

If the internee has been under supervision during an uninterrupted period of three years, the board shall consider the possibility of terminating the sanction; if the supervision has lasted five years, the sanction shall be terminated.

Chapter 31

Of Surrender for Special Care

Sec. 1. If a person who has committed a criminal act can be subject to *care in accord with the Child Welfare Act*, the court may, after hearing the child welfare board, or, in case a pupil in a youth welfare school is involved, the school administration, leave to the board or the administration to arrange for requisite care.

If deemed needed for the correction of the offender or out of consideration for public law-obedience, at most one hundred and twenty day fines may be imposed in addition to the surrender for care in accord with the Child Welfare Act, whether the law provides fines for the crime or not.

Sec. 2. If a person who has committed a criminal act can be subject to *care in accord with the Temperance Act* by supervision or compulsory commitment to a treatment institution, the court may, after hearing the temperance board or, in case an inmate of such an institution is involved, the institutional administration, leave to the board or the administration to arrange for requisite care.

If a more severe punishment than imprisonment for six months is provided for the crime, surrender for care according to the Temperance Act may take place only if special reasons dictate it.

Sec. 3. If a person who has committed a criminal act has been declared, in a report of his mental examination, to be in need of care in a mental hospital, the court may, if it finds the need for such care established, order his surrender for *care in accord with the Mental Health Act*. If the act was not committed under the influence of mental disease, feeblemindedness or other mental abnormality of such profound nature that it must be considered equivalent to mental disease, such order may, however, be made only if special reasons dictate it.

Sec. 4. If some one who has committed a criminal act is in need of psychiatric care or supervision and no order based on Section 3 is made, the court may order him surrendered for *open psychiatric care* if, for special reasons, no more far-reaching measure is deemed required.

Chapter 32

Of Punishments of Public Servants and of Disciplinary Punishments of Servicemen

Sec. 1. Suspension involves the loss of a given office for a specific period and is accompanied, during the period the offender is by his sentence deprived of the exercise of his functions, by the loss of the rights and privileges pertaining to the office, unless otherwise provided with respect to some particular right or privilege.

Sec. 2. The period of suspension is fixed at not less than one month and no more than one year, whether the sanction applies to one or to several crimes.

Suspension may be used as collective sanction for several crimes, if each and all of them can incur suspension.

Sec. 3. Suspension may not be enforced while the offender is an inmate undergoing a sanction in a correctional institution or a military jail.

Sec. 4. Dismissal from a given office involves the loss of the office and of the rights and privileges pertaining thereto, unless otherwise provided with respect to some particular right or privilege.

Sec. 5. Dismissal may be used as collective punishment for several crimes for which public servants are punishable, if dismissal can follow upon any one of the crimes.

Sec. 6. Disciplinary punishments for servicemen are arrest and disciplinary fine.

Arrest shall be imposed for at least three and at most thirty days. The sentence is served in a military jail.

A disciplinary fine consists of a deduction from wages or a corresponding cash payment in accord with special legal provisions and is imposed for at least one and at most twenty days.

Sec. 7. Concerning disciplinary punishment as collective punishment for several crimes and, when a crime by a serviceman is involved, concerning sentence to disciplinary punishment instead of to fines and to fines instead of to disciplinary punishment, provisions are found in a special statute, which also contains provisions on the administration of disciplinary punishments.

If a person who is not a serviceman has become punishable for being an accessory to a crime subject to disciplinary punishment, the determination of the sanction shall be made as if day fines instead of disciplinary punishment were provided.

Chapter 33

Of Reduction and Exclusion of Sanctions

Sec. 1. No one may be sentenced to a sanction for a crime he committed before he reached fifteen years of age.

Sec. 2. For a crime which some one has committed under the influence of mental disease, feebleмindedness or other mental abnormality of such profound nature that it must be considered equivalent to mental disease, no other sanction may be applied than surrender for special care or, in cases specified in the second paragraph, fine or probation.

Fines may be imposed if they are found answering the purpose of deterring the defendant from further criminality. Probation may be imposed if in view of the circumstances such sanction is considered more appropriate than special care; in such case treatment provided for in Chapter 28, Section 3, may not be prescribed.

The defendant shall be free of sanctions if it is found that a sanction mentioned in this Section should not be imposed.

Sec. 3. If some one is sentenced to imprisonment for a fixed term, fines, suspension or disciplinary punishment in a case for which he has been detained in jail, it may be decided, if deemed reasonable in view of the circumstances, that the sentence shall be considered as having been wholly or partly served by such detention of the defendant.

If some one, who has begun to undergo youth imprisonment, internment or, subsequent to a sentence to probation, treatment provided by Chapter 28, Section 3, is instead sentenced to a punishment mentioned in the first paragraph, it may be decided, if deemed reasonable in view of the circumstances, that the sentence shall be considered as having been wholly or partly served by such institutional care or treatment.

A decision on a matter referred to in this Section may be changed by a higher court when considering an appeal of the sanction imposed, even though the decision was not appealed.

Sec. 4. If some one has committed a crime before reaching the age of eighteen, a milder punishment than that provided for the crime may be imposed, depending on circumstances. If special reasons dictate it, a milder punishment may also be imposed for crime which some one committed under the influence of mental abnormality.

If very strong reasons dictate it and no obvious obstacle exists with reference to public law-obedience, a milder punishment than that provided for the crime may be imposed in other cases as well.

A sanction may be completely dispensed with, if because of special circumstances it is found obvious that no sanction for the crime is necessary.

Chapter 34

Certain Provisions Concerning Concurrence of Crimes and Change of Sanction

Sec. 1. If a person who has been sentenced for crime to imprisonment, conditional sentence, probation, youth imprisonment or internment is found to have committed another crime prior to the sentence, or if he commits a new crime subsequent to the sentence but before the sanction has been fully served or otherwise terminated, the court may, depending on circumstances and taking note of what Sections 2–9 prescribe in certain cases:

1. Order that the sanction imposed earlier shall apply also to the second crime;

2. Impose a separate sanction for that crime, or,

3. If the earlier sentence has acquired legal force, vacate the sanction imposed and impose a different kind of sanction for the crimes.

Sec. 2. If the offender is serving life imprisonment, only an order in accord with Section 1(1) may be made.

Sec. 3. If the prior sentence is to imprisonment for a fixed term, an order in accord with Section 1(1) may be made only if it is obvious that, so far as the sanction is concerned, the new crime, compared with the earlier one, is of no importance worth mentioning, or else that strong reasons dictate it.

If in applying Section 1(2) punishment is imposed for crime committed before the execution of the earlier sentence has begun, possible care should be taken in determining the punishment that the combined punishments do not exceed what could have been imposed for the two crimes in accord with Chapter 26, Section 2, and in so doing a milder punishment than that provided for the crime may be imposed.

The vacating of imprisonment in conformity with Section 1(3) may occur only if sentence is pronounced before the prison term has been fully served.

Sec. 4. If Section 1 (1) or (2) is applied with respect to some one paroled from imprisonment, the conditionally granted liberty may be declared forfeited; if a fixed term of imprisonment is imposed in conformity with Section 1(2), such declaration shall be made, unless special reasons oppose it.

If forfeiture in accord with the first paragraph is not ordered, the court may decide on a measure referred to in Chapter 26, Section 18.

Forfeiture or a measure just mentioned may not be decided unless the question concerning it is raised in a case in which the parolee has been committed to jail or been informed of the prosecution before the expiration of the parole term.

Sec. 5. If the sanction previously imposed is a conditional sentence, an order based on Section 1(1) may have reference only to a crime committed before the beginning of the probationary period.

If Section 1 (1) or (2) is applied, the court may decide on a measure mentioned in Chapter 27, Section 6 (1–3), but only if the question concerning it is raised in a case in which the offender has been committed to jail or been informed of the prosecution before the expiration of the probationary period.

The vacating of a conditional sentence in conformity with Section 1(3) may not take place unless the question concerning it is raised in a case in which the offender has been committed to jail or been informed of the prosecution within a year from the expiration of the probationary period.

Sec. 6. If the sanction previously imposed is probation, the court may, in applying Section 1 (1) or (2), decide on a measure or treatment referred to in Chapter 28, Section 9.

If in applying Section 1(3) imprisonment is imposed, the provisions of Chapter 28, Section 9, shall govern the determination of the punishment.

A decision in accord with the first paragraph or a decision revoking probation may not be taken unless the question concerning it is raised in a case in which the offender has been committed to jail or been informed of the prosecution before the expiration of the probationary period.

Sec. 7. If the sanction previously imposed is youth imprisonment, an order according to Section 1(1) may be made in disregard of what Chapter 29, Section 1, states concerning the age of the defendant.

If the offender is under care in an institution, the provision of Section 1(2) may not be applied.

The vacating of youth imprisonment in conformity with Section 1 (3) may occur only if sentence is passed before the sanction is terminated. If, in applying Section 1 (3), a sentence to imprisonment is imposed, fair consideration shall be given, when determining the punishment, to what the offender has suffered on account of the earlier sentence, and in that connection imprisonment may be imposed for a shorter time than indicated in Chapter 26, Section 2.

Sec. 8. If Section 1 (1) or (2) is applied to one sentenced to youth imprisonment, the court may extend the maximum term of such imprisonment to six years, in which case treatment in an institution may take place for at most four years.

If in accord with Section 1 (1) the order is made that youth imprisonment shall apply to another crime as well, the court may decide that the youth shall be re-committed to an institution. If the crime was committed after the execution of the sentence to youth imprisonment had begun, the court may also direct that one who is under care in an institution or is being re-committeed may not be transferred to care outside the institution before six months have elapsed from the date of the court's decision or the re-commitment, so long as the maximum period for care in the institution does not expire earlier.

A decision referred to in this Section may not be made unless the question concerning it is raised in a case in which the offender has been committed to jail or been informed of the prosecution before the sanction has terminated.

Sec. 9. If the sanction previously imposed is internment and the internee is under care outside the institution, the court, when applying Section 1 (1), may decide that he shall be re-committed to the institution. If such decision is made or if Section 1 (1) is applied in the case of one under care in an institution, the court shall, unless special reasons oppose it, fix a minimum term for the institutional care in progress. In such case the minimum time fixed shall be at least six months.

If the offender is under care in an institution, the provision of Section 1 (2) may not be applied.

The vacating of internment in conformity with Section 1 (3) may occur only if sentence is passed before the sanction has terminated. If imprisonment is imposed, the provisions of Section 7, third paragraph, shall have corresponding application.

Sec. 10. If on the basis of Section 1 (1) a sentence which has acquired legal force has directed that imprisonment, conditional sentence, probation youth imprisonment or internment imposed in an earlier case shall cover further crime, and if the earlier sentence is changed by a higher court by a judgment which acquires legal force, the question of sanction for said crime shall, upon notification by the prosecutor, be reconsidered by the court. The same shall apply when a punishment has been decided on the basis of Section 3., second paragraph, and the punishment imposed earlier is changed.

If, when a sentence to imprisonment for a fixed term is to be executed, it is found that the offender committed the crime before the execution of such punishment, imposed on him for another crime, has begun, and if it does not appear from the sentences that the other punishment has been taken into consideration, the court, once the sentences have acquired legal force, shall, upon notification by the prosecutor and on the basis of Section 3, second paragraph, fix the punishment the offender shall suffer as a result of the sentence which is to be executed last.

Sec. 11. If the execution of a sentence to life imprisonment is to take place concurrently with a sentence to a fine, punishment to which a fine has been converted, imprisonment for a fixed term, conditional sentence, probation, youth imprisonment, internment or disciplinary punishment, the life sentence shall supplant the other sanction.

Sec. 12. If the execution of a sentence to youth imprisonment is to take place concurrently with a sentence to a fine, punishment to which a fine has been converted, imprisonment for at most one year, conditional sentence, probation or disciplinary punishment, the sentence to youth imprisonment shall supplant the other sanction, if the youth is to be under care in an institution while serving his sentence.

If the execution of a sentence to youth imprisonment is to occur concurrently with a sentence to imprisonment for a fixed term of more than one year, the prosecutor shall, when the sentences have acquired legal force, notify the court. Depending on circumstances, the court may declare that one of the sanctions shall supplant the other or may vacate the sentence to youth imprisonment and impose a sentence to imprisonment for the crime or crimes involved. If the court sentences to imprisonment, Section 7, third paragraph, shall apply.

Sec. 13. If the execution of a sentence to internment is to occur concurrently with a sentence to a fine, punishment in to which a fine has been converted, imprisonment for a fixed term, conditional sentence, probation, youth imprisonment or disciplinary punishment, the internment shall supplant the other sanction, if the offender is to be under care in an institution while serving his sentence.

If, in view of the nature of the additional crime, which the internment is thus to cover, a new minimum term for the institutional care is deemed needed, the court may fix such term upon application by the prosecutor.

Sec. 14. If some one has been sentenced to suspension from a given office and, before sentence or later before the execution of the sentence has begun, he is found to have committed another crime, for which he shall be suspended from the same office, the court may, depending on circumstances:

1. Declare that the sentence to suspension already imposed shall cover the other crime as well, or

2. Sentence to suspension for such crime separately, in which case the combined time of the punishment may not exceed one year.

Sec. 15. Provisions of Section 10 shall correspondingly apply in a matter of suspension; however, instead of Section 3, second paragraph, the provisions of Section 14 (2) shall govern.

Sec. 16. If some one has been sentenced to dismissal from a given office and it is found that before the sentence acquired legal force he had committed another crime for which he should have been sentenced to suspension or dismissal from the same office, the court shall declare that the sentence to dismissal shall cover the other crime as well.

Sec. 17. Fine or disciplinary punishment may not be imposed for a crime defined in Chapter 20, Sections 1–4, when a sentence of suspension or dismissal is imposed for another crime and such punishment is deemed sufficient.

Chapter 35

Of Limitations on Sanctions

Sec. 1. No sanction may be imposed unless the suspect has been committed to jail or informed of his prosecution for the crime within:

1. Two years, if the crime is punishable by no more severe punishment than imprisonment for one year;

2. Five years, if the most severe punishment is imprisonment for more than one but not longer than two years;

3. Ten years, if the most severe punishment is imprisonment for more than two but no longer than eight years;

4. Fifteen years, if the most severe punishment is imprisonment for a fixed term of more than eight years;

5. Twenty-five years, if the crime is punishable by life imprisonment.

If an act includes several crimes, a sanction may be imposed for all the crimes, regardless of what has just been stated, so long as a sanction can be imposed for any one of them.

Sec. 2. A sanction may not be imposed for a crime defined in Chapter 20, Sections 1–4, unless the suspect has been committed to jail or been informed of his prosecution for the crime within five years or, if the crime is punishable as mentioned in Section 1 (3) above, within the time there stated.

Sec. 3. If a person committed to jail is released without having been informed of his prosecution for the crime or if the case against him is dismissed or filed after he has been so informed, the commitment or information shall be considered as never having occurred, if a question of the possibility of imposing a sanction is raised.

Sec. 4. The times specified in Sections 1 and 2 shall be counted from the date the crime was committed. If the appearance of a given consequence of the act is a prerequisite for the imposition of a sanction, the time shall be counted from the date such consequence appeared.

In cases referred to in Chapter 7, Section 2, the time shall be counted from the date the sentence of annulment of the marriage acquired legal force, and in the case referred to in Chapter 11, Section 5, from the date the decision concerning the alienation of property was given or else the earliest date prosecution could be instituted.

Sec. 5. If some one has committed a crime referred to in Section 1 (3, 4, or 5) and has within the period there stated again committed a crime punishable by imprisonment for more than two years, the times mentioned in Section 1 for the imposition of sanction with respect to both crimes shall be counted from the latter. What has just been said shall have corresponding application if the

criminal commits further crime punishable by more than two years' imprisonment.

Sec. 6. In no case may a sanction be imposed when thirty or, if the crime is not punishable by imprisonment for more than two years, when fifteen years have elapsed from the date mentioned in Section 4.

Sec. 7. Fines imposed are null and void when three years have elapsed from the date the sentence acquired legal force, if before such time no application for the conversion of the fines has been brought to the notice of the offender. Special provisions exist concerning the nullification of fines when such notification has been made and of imprisonment into which fines have been converted.

If the offender dies, imposed fines are nullified. If the sentence acquired legal force during the offender's lifetime and if in satisfaction of the fines chattel property has been distrained or placed in public custody, the fines shall, however, be payable out of such property.

What has been said now about fines, applies equally to a monetary penalty ordered paid.

Sec. 8. A sentence to imprisonment is null and void if its execution has not begun before the period stated below has elapsed since the sentence acquired legal force:

1. Five years, if less than six months' imprisonment had been imposed;
2. Ten years, if imprisonment had been imposed for six months or longer but not more than two years;
3. Fifteen years, if imprisonment for over two but not over eight years had been imposed;
4. Twenty years, if imprisonment for a fixed term longer than eight years had been imposed;
5. Thirty years, if life imprisonment had been imposed.

Sec. 9. If the serving of a sentence to imprisonment for a fixed term is interrupted, the provisions in Section 8 shall correspondingly apply with respect to the continuation of the serving of the sentence; in such case the time shall be computed with consideration of what remains of the punishment imposed. The time shall be counted from the date the interruption occurred or, when parole has been granted but declared revoked, from the date the declaration acquired legal force.

Sec. 10. Unless the execution of the sentence has already begun, a sentence to youth imprisonment is null and void when five years have elapsed, and a sentence to internment when fifteen years have elapsed since the sentence acquired legal force.

If the serving of a sentence to youth imprisonment or internment is interrupted while the offender is under care in an institution, or if a decision to re-commit him to the institution is taken while he is under care outside the institution, the provision of the first paragraph shall correspondingly apply with regard to the continuation of the serving of the sentence; in such case, the time shall be counted from the date of the interruption or the date the re-commitment order acquired legal force.

Sec. 11. Special legislation governs the nullification of disciplinary punishments.

Chapter 36

Of Forfeiture of Property and of Other Special Legal Effects of Crime

Sec. 1. A bribe, as well as any tender or compensation similar thing meant to promote a crime, the giving or receiving of which is a crime according to this Code, shall be declared forfeited to the Crown unless this is obviously unreasonable; if the property consisted of other than money and is no longer available, its value may be declared forfeited instead. What has just been said shall not apply, however, against a person who in good faith has acquired such property or a special claim thereto.

If, through a crime defined in this Code, some one has otherwise received a gain in excess of the loss to an individual, he may, according to what is deemed reasonable, be required to pay the Crown an amount corresponding thereto.

Sec. 2. That which has been used as an instrument in the commission of a crime defined in this Code or has been the product of such crime may, if the

owner or some one acting for him has intentionally committed the act or been an accessory thereto, be declared partly or wholly forfeited to the Crown, if this is called for in order to prevent crime or for other special reasons and is not obviously unreasonable; if the property is no longer available, its value may be declared forfeited instead. The same shall apply with regard to instruments, with which some one has had such dealings as constitute criminal preparation according to this Code.

What has been stated in the first paragraph shall not apply against a person who in good faith has acquired the property or a special claim thereto.

Sec. 3. Even though a case described in Section 2 is not in question, a picklock, counterfeit coin or other object, which, because of its special nature and other circumstances, raises an apprehension that it may come to be criminally employed, may be declared forfeited.

Sec. 4. If a vessel or airplane, subject to lien or mortgage is declared forfeited, the court may declare that the lien on the forfeited property shall cease. If in some other instance some one's claim on a property declared forfeited should stand despite the declaration, the court shall make a reservation to that effect.

Sec. 5. Instead of forfeiture, the court may prescribe a measure in order to prevent misusage.

Sec. 6. Provisions in law or statute with regard to a special legal effect of some one's being sentenced to punishment shall apply also when some other sanction mentioned in Chapter 1, Section 3, is imposed.

In applying the first paragraph, conditional sentence, probation, youth imprisonment and internment, and also, unless the sentence otherwise states, surrender for special care shall be considered equivalent to imprisonment. In that connection, internment and, if so ordered, probation, youth imprisonment and surrender for special care shall be considered as corresponding to imprisonment for at least six months.

Sec. 7. If sentencing some one to a sanction is prerequisite to the forfeiture of property or other special legal effect, which can follow upon crime, the court may, if the sanction for the crime is remitted, order, in so far as circumstances dictate it, that such legal effect shall ensue.

Sec. 8. If a crime has been committed by some one who has not reached fifteen years of age or who has acted under the influence of mental disease, feebleminded-ness or other mental abnormality of such profound nature that it must be considered as equivalent to mental disease, the court may order forfeiture of property or other special legal effect that can follow upon the crime only if and to the extent this can be regarded as reasonable in view of his mentality, the nature of the act, and other circumstances.

Sec. 9. If a sanction can no longer be imposed because of the death of the criminal or for other cause, the provisions of Section 1–5 can be applied only if, in a proceeding pertaining thereto, a summons has been served within ten years from the time the crime was committed. In such case the prosecutor may institute proceedings only if deemed required from a public point of view.

In a case just mentioned, the provisions of Chapter 35, Section 3, shall have corresponding application.

Sec. 10. A decision concerning forfeiture or other measure in accord with Sections 1–5 is null and void to the extent that its execution has not occurred within ten years from the date the decision acquired legal force.

Chapter 37

Of Boards

Sec. 1. The area of a supervision board's activity shall cover the district of one or more public courts of first instance. However, special supervision boards may be appointed to deal with matters concerning persons sentenced to imprisonment, youth imprisonment or internment. The area of a supervision board's activity is determined by the King.

A supervision board consists of five members, unless the King decrees that a given board shall have more members. Substitute members are appointed to a number determined by the King. The chairman and two members constitute a quorum. In urgent cases as well as in matters of less importance the chairman alone may act on behalf of the board. Such action shall be reported at the next meeting of the board.

The King may order that a supervision board shall work in sections. Applicable parts of the law governing the board shall apply to such section.

Sec. 2. The King appoints the chairman of the supervision board and a substitute who, in the absence of the chairman, serves in his stead. The chairman shall be learned in the law and have judicial experience; his substitute shall be learned in the law.

Other members and their substitutes are appointed by the county administration in the county within which the supervision board has its chief area of activity. They should have experience involving youth care or employment agencies or else in public functions.

The chairman, other members and substitutes are appointed for terms of five years. If a member or substitute leaves before the expiration of his term, a new member or substitute is appointed to serve for the balance of the term.

Sec. 3. In accord with provisions below there shall be a special board, the board of corrections, for dealing with matters concerning parole. This board shall consist of one member, who occupies or has occupied a judicial office and who shall be chairman of the board, and four additional members. Substitutes are appointed to a number determined by the King. The King appoints the chairman, other members and substitutes. In the absence of the chairman, his function shall be exercised by a member or substitute designated by the King and qualified for appointment as chairman.

The chairman, other members and substitutes are appointed for terms of five years. If a member or substitute leaves before the expiration of his term, a new member or substitute is appointed to serve for the balance of the term.

Sec. 4. The youth imprisonment board and the internment board shall each consist of a member, who occupies or has occupied a judicial office and who shall be chairman of the board, and one member who is a psychiatrist, both of them with special substitutes who have the qualifications required of the respective members, and three additional members together with substitutes to a number determined by the King. The King appoints the chairman, other members and substitutes. In the absence of the chairman, his function shall be exercised by a member or substitute designated by the King and qualified for appointment as chairman.

In urgent cases as well as in matters of less importance, the chairman alone may act on behalf of the board. Such action shall be reported at the next meeting of the board.

The chairman, other members and substitutes are appointed for terms of five years. If a member or substitute leaves before the expiration of his term, a new member or substitute is appointed to serve for the balance of the term.

Sec. 5. A member or substitute of a supervision board, the board of corrections, the youth imprisonment board and the internment board shall have taken a judge's oath. The same grounds for disqualification that apply to a judge shall apply to a member or substitute, but the provisions of Chapter 4, Section 13 (7) of the Code of Procedure shall not be applicable to a member or substitute of a supervision board.

With respect to decisions by a board referred to in the first paragraph, applicable parts of the provisions governing voting in criminal cases in a superior court shall be observed.

Sec. 6. In a matter dealt with by a supervision board and relating to some question other than the termination of supervision or a directive issued, the offender shall receive an opportunity to express himself if this can conveniently be done and hearing him would not be unprofitable. If the offender demands to be heard orally in a matter before the board, he shall be given the opportunity.

In a matter before the board of correction, the youth imprisonment board and the internment board an opportunity should be given the offender to express himself or be orally heard if this can be assumed to be useful and can be conveniently arranged.

Sec. 7. A person sentenced to imprisonment may request the board of correction to review a decision by a supervision board in a matter of parole.

If a parolee is not satisfied with the supervision board's decision relative to placement under supervision in accord with Chapter 26, Section 11, a directive in accord with Chapter 26, Section 15, or a measure in accord with Chapter

26, Section 18, 19, or 22, he may request the board of correction to review the decision.

Sec. 8. A person sentenced to probation may appeal to the circuit court of appeals against a supervision board's decision relative to placement under supervision in accord with Chapter 28, Section 5, a measure in accord with Chapter 28, Section 7 or 11, or a directive referred to in Chapter 26, Section 15. The time for appeal is counted from the date he was informed of the decision.

Sec. 9. If a person sentenced to youth imprisonment or internment is not satisfied with the decision of the supervision board in accord with Chapter 29, Section 8 or 11 or Chapter 30, Section 11 or 14, or relative to a directive referred to in Chapter 26, Section 15, he may request the youth imprisonment board or the internment board to review the decision.

Sec. 10. A supervision board's decision mentioned in Sections 7–9 shall be instantly obeyed unless otherwise provided.

Sec. 11. No appeal may be taken against a decision made by a supervision board in accord with this Code except in cases mentioned in Sections 7–9; by a circuit court of appeals in accord with Section 8 or by the board of correction, the youth imprisonment board or the internment board.

Chapter 38

Procedural Provisions, etc.

Sec. 1. A person sentenced to conditional sentence or to probation may, before the time for appeal has expired, make a declaration that he is satisfied with the judgment as to the sanction imposed. Such declaration shall also cover fines imposed on the basis of Chapter 27, Section 2, or Chapter 28, Section 2, and includes treatment mentioned in Chapter 28, Section 3. The declaration shall be made in the manner prescribed by the King.

A declaration once made in the prescribed manner is not retractable. If the offender has appealed the sentence, his appeal shall be considered withdrawn by the declaration so far as the sanction for the crime is concerned.

Special provisions exist relating to the declaration of satisfaction in conneciton with a sentence to imprisonment, youth imprisonment or internment.

Sec. 2. If a court has surrendered some one for care in accord with the Child Welfare Act or the Temperance Act but it is found, upon investigation prescribed, that the prerequisites indicated by law for such care, or for care of the kind the child welfare board or the temperance board declared themselves, in a report to the court, prepared to arrange, are absent, the court which first adjudicated the case may, upon application by the prosecutor, vacate the order for surrender for special care and impose another sanction for the crime.

Sec. 3. A question concerning a measure in accord with Chapter 27, Section 5, second paragraph, or Section 6, is dealt with by the court which first adjudicated the case in which conditional sentence was passed.

A proceeding based on Chapter 28, Section 8, shall be instituted in the public court of first instance, within whose district the supervision board which is in charge of the supervision of the offender is active.

A proceeding based on Chapter 30, Section 8, is instituted in the court which first adjudicated the case in which internment was imposed.

Cases referred to in this Section may also be brought before a court presently adjudicating a criminal charge against the offender, or before the court in the locality where the offender is mostly staying, if, in view of the investigation as well as costs and other circumstances, the court deems it appropriate.

Sec. 4. Notification based on Chapter 34, Section 10, 12 or 15 is addressed to the first court in any one of the cases.

Application based on Chapter 34, Section 13, is made to the court which first adjudicated the case in which internment was imposed.

Sec. 5. A proceeding to which reference is made in Chapter 27, Section 6, Chapter 28, Section 8, or Chapter 30, Section 8, shall be considered instituted, when the offender was informed of the opening of the case.

Sec. 6. With respect to the composition of the court when it has to decide a question referred to in Section 2 or in Chapter 27, Section 6, Chapter 28, Section 9, Chapter 30, Section 8, or Chapter 34, Section 10, second paragraph 12 or 13 or 15, insofar as the application of Section 10, second paragraph, is concerned, the general provisions of the Code of Procedure shall apply with reference to the

competency of a court in criminal trials. The same shall apply with respect to the vacating of sanction in accord with Chapter 34, Section 1 (3), the forfeiture of conditionally granted liberty in accord with Chapter 34, Section 4, and recommitment to an institution or other measure in accord with Chapter 34, Section 8 or 9.

A question concerning any other measure in accord with Chapter 34, Section 4, a measure in accord with Chapter 34, Section 5, and a measure or treatment in accord with Chapter 34, Section 6, may not be decided by a district court without lay judges or a city court with but one judge learned in the law.

In deciding upon a question in accord with Chapter 27, Section 5, second paragraph or Chapter 28, Section 11, a district court may decide without lay judges and a city court with one judge learned in the law.

Sec. 7. If a question of sentencing to internment arises, the court shall, unless deemed unnecessary for some special reason, request an opinion from the internment board as to whether or not such a measure should be taken.

Before the court, in accord with Chapter 34, Section 1, decides on a measure concerning some one sentenced to youth imprisonment or internment, an opinion shall, if found needed, be secured from the youth imprisonment board or the internment board. What has now been said shall have corresponding application in cases referred to in Chapter 34, Section 12.

Sec. 8. In a proceeding concerning a measure in accord with Section 2 or Chapter 27, Section 5, second paragraph, or Section 6; Chapter 28, Section 9, Chapter 30, Section 8, or Chapter 34, Section 10, second paragraph, Section 12 or 13 or 15, in so far as the application of Section 10, second paragraph, is concerned, the court of first instance shall give the offender an opportunity to express himself. If he requests to be heard orally, he shall be given the opportunity. The court's adjudication of the matter is by decision.

A measure in accord with Chapter 28, Section 11, may be decided without giving the offender an opportunity to express himself.

Sec. 9. The court's decision on a measure in accord with Chapter 27, Section 5, second paragraph, Chapter 28, Section 11, or Chapter 34, Section 10, second paragraph, Section 12 or 13 or 15, in so far as the application of Section 10, second paragraph, is concerned, is to be instantly obeyed, unless otherwise decided. The same applies to decisions based on Chapter 27, Section 6, Chapter 28, Section 9, or Chapter 34, Section 4, 5, 6 or 8 with reference to directives, monetary penalties, probationary period or length of youth imprisonment.

If a decision in accord with Chapter 28, Section 9, second paragraph, or Chapter 34, Section 6, intends that someone not yet twenty-three years of age is to undergo treatment established by Chapter 28, Section 3, the court may order the decision to be executed even though it has not acquired legal force. Such order may also be given with respect to a decision in accord with Chapter 34, Section 8, concerning re-commitment to an institution of one undergoing youth imprisonment.

Sec. 10. A warning decided upon by a court or a supervision board shall be promptly delivered to the offender in person. If the warning cannot be delivered in connection with the decision, another court or supervision board may be requested to deliver it.

Sec. 11. A monetary penalty imposed by authority of Chapter 26, Section 18, Chapter 28, Section 7 or 9, Chapter, 29, Section 8, Chapter 30, Section 11, or Chapter 34, Section 4 or 6, may be enforced only if the prosecutor, upon application by the supervision board, institutes a proceeding in point before the sanction imposed has been fully executed or otherwise terminated. Such proceeding shall be considered instituted when the offender has been informed of the application for enforcement of the monetary penalty.

Sec. 12. It is the duty of police authorities to assist the court, the supervision board, the board of correction, the youth imprisonment board and the internment board in assuring the offender's appearance at a proceeding or in a matter dealt with in accord with this Code or in his detention in accord with Chapter 26, Section 22, Chapter 28, Section 11, Chapter 29, Section 11, or Chapter 30, Section 14.

Sec. 13. More detailed directives required for the application of the provisions of Chapters 25–38 are issued by the King.

Appendix E

Dansk Komité for sammenlignende retsforskning

DANISH AND NORWEGIAN LAW

(A General Survey Edited by The Danish Committee on Comparative Law)

G·E·C GAD, COPENHAGEN, 1963

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PREFACE

The Danish Committee on Comparative Law has found it useful to have a general survey of Danish and Norwegian law published in the English language thereby making it accessible to the public at large. The Committee has been fortunate enough to secure the cooperation of a great number of distinguished experts in Norway and Denmark:

from Norway: professor, dr. Johannes Andenaes, professor, dr. Carl Jacob Arnholm, professor, dr. Sjur Braekhus, professor, dr. Torstein Eckhoff, assistant professor Carsten Smith, all in the University of Oslo, and Mrs. Elizabeth Schweigaard Selmer, chief of division, ministry of Justice;

from Denmark: assistant professor K. Ehlers, professor, dr. W. E. v. Eyben, Folketingets ombudsmand, professor, dr. Stephan Hurwitz, professor, dr. Stig Iuul, former assistant professor N. Kjaergaard, professor, dr. Anders Vinding Kruse and professor, dr. Allan Philip, all in the University of Copenhagen.

Only a minor part of the contributions has been written in English; the rest of the work has been translated by Mr. Poul Boeg, Miss Else Giersing, both sworn interpreters and translators, and Miss Hedevig Ring, M.A.

The publication of this compilation has been generously supported by Rask-Ørsted Fondet, Copenhagen: the Committee expresses its heartiest thanks.

For further study of Danish and Norwegian Law attention is drawn to Scandinavian Legal Bibliography edited by professor, dr. Ake Malmstrøm. Uppsala, November 1961.

For the compilation and the editing of the present book the undersigned chairman of the Danish Committee is responsible.

Copenhagen, December 1962

N. V. Boeg

CHAPTER IX

Criminal Law

1. The criminal laws of Denmark and Norway have both a national *character* of their own. The evolution from the earliest written sources of law in the 12th and 13th centuries has generally followed a steady course. In its nucleus

this law has been of Germanic type. Roman law has had but a limited and indirect influence on the earlier stages of the development of law. A more important impact was exercised by cannon law and mosaic law during the Middle Ages and up to the 17th century.

In recent times, Scandinavian criminal law, like the other branches of law, has of course participated in the evolution of the general cultural currents. In the field of criminal law the influences deriving therefrom have particularly been related to German science in the 18th and 19th centuries. There has been no question, however, of any general acceptance of a particular foreign penal legislation or doctrine.

The considerable changes to which the Danish and Norwegian criminal law has been subject in our century, and the reform work that is still in progress, have to a very great extent been based on an international, primarily inter-Sandinavian, collaboration. In spite of the important common features which as a result of these criminalistic tendencies across the frontiers now characterise many recent criminal laws, as is the case with the Danish and the Norwegian penal legislation, the legislation of both countries presents, however, several important characteristics. As such willingness to accept the new ideas of a progressive penal policy may be mentioned.

2. Danish and Norwegian criminal law has escaped being dominated by any one-sided, stringent and consistent *penal theory*. The criminal law system, as laid down in the legislation and as practised by the courts and by the public prosecution, contains repressive or retributory elements as well as considerations of general and individual prevention. It may be said, however, that the latter considerations, which make the influence on and the treatment of the individual offender according to his peculiar nature the principal aim of penal policy, have gained ever increasing ground in recent legislation.

3. In both countries the most important penal provisions are codified in a general Criminal Code: the Norwegian Criminal Code of 22 May 1902 and the Danish Criminal Code of 15 April 1930. Great weight is attached to keeping the penal legislation up to date. At the present time, indeed, *Criminal Law Commissions* have been formed in both countries for the purpose of preparing such amendments as have been found desirable in the light of new experience and new views of penal policy. In Norway, where—with some interruptions—this revisonary work has been in progress ever since 1922, the result has been a gradual revision of large parts of the Criminal Code of 1902.

In addition to the general Criminal Codes, a number of Acts contain special provisions, particularly dealing with offences of a less grave nature. As a rule, the general provisions of the Criminal Code also apply to punishable violations of the special legislation.

4. As far as *graduation of offences* is concerned, the system differs as between the two countries. The Norwegian Criminal Code makes a distinction between "felonies" and "misdeameanors". The distinction has chiefly procedural but also some penal consequences; thus, attempts at misdeameanor are not punishable. The Danish Criminal Code has no such division. In point of fact, however, general usage confines the term of "felony" to offences of a certain gravity. And the Criminal Code also contains a number of special provisions for offences of a less serious type or of no great degree of criminality, so that, inter alia, liability for attempt and complicity is precluded or restricted; further that provision is made for a shorter period of limitation, and that the possibility of applying more radical measures involving deprivation of liberty outside the actual penal system is precluded. There is therefore no great difference.

5. Criminal liability is in principle confined to acts which at the time of the deed were criminalized by an explicit legal provision or in conformity with such provision, and the penalty cannot be more severe than prescribed by the law in force at the time the act was committed (*nullum crimen sine lege, nulla poena sine lege*). Application of penalty on the basis purely of common law is thus out of question. The application of this principle, however, differs somewhat as between the two countries. The Norwegian Constitution of 1814 provides: "No person may be convicted except in conformity with a law", a fact which, however, has not bound the courts to any strict construction of terms where evidently a more liberal construction better meets the intention of the legislator. The Danish Constitution contains no corresponding provision, and the Danish Criminal Code of 1930, like the earlier Danish penal legislation, has in sect. 1 maintained an opportunity for *analogic* application of penal provisions to acts which "must be treated as quite similar" to the act de-

scribed in the Code. This provision, which does not authorize every analogy, but only the so-called strict or complete legal analogy is in practice applied as a rare exception only and then so narrowly that it goes no further than what might be justified as a reasonable construction of the particular legal provision. It is thus only on paper that the Danish Criminal Code may be cited in support of a conception relinquishing the legal guarantees implied by the explicit pre-fixation of the content of the criminal act as a condition for criminal liability. For reasons of principle, the provision of analogy should be abolished next time the Criminal Code is to be revised, which will involve no change in the actual legal position. Characteristic of the reluctance as to a wider application of analogy is the fact that, when after the cessation of the German occupation in 1945 it became necessary to instigate a judicial purge against traitors whose offences during the occupation did not all come clearly under the terms of the penal provisions, it was not found desirable to deal with the acts through an analogical application of the Criminal Code, it being preferred to provide an indisputable issue through a new Act. The fact that, on the other hand, it proved necessary to a certain extent to give the Act retrospective application was felt deeply regrettable, but was all the same deemed justified, considering that during the occupation Parliament had been precluded from freely exercising its legislative activities. In principle, the desirability of avoiding any retrospective penal legislation was maintained. And this view has been one of the chief arguments for enacting, in time of peace, a new up-to-date treason legislation dealing with the possibility of any future war and occupation, as was done by an Act dated 7 June 1952.

6. In accordance with the maxim *nullum crimen sine lege*, efforts have been made in Danish and Norwegian penal legislation to make the *descriptions in the Code of the individual punishable offences* as exact as possible. The casuistic legal formulation of earlier law is everywhere replaced by generally formulated type provisions. As regards certain penal provisions, more particularly within the special legislation, it has, however, not been possible to entirely avoid using rather vague descriptions of the acts to which the penal provision applies, e.g., when the Price Act prohibits "unfair" prices or business terms, or when the rules governing blackmail cover threats which are not "duly" motivated. The application of such "judicial standards" in criminal law has lately been subject to much discussion.

7. As to the *subjective conditions of liability*, it is a principle laid down practically without exception in the criminal laws of both countries that liability cannot be imposed without *individual guilt* on the part of the offender. The requirement of guilt (*imputatio*) implies an *intentional* or, at least, a *negligent* act on the part of the perpetrator, and that no effect of the act that is not covered by that subjective guilt may justify punishment or aggravated punishment. As regards the offences criminalized in the Criminal Code itself, only intentional acts are as a rule liable to punishment, in the event of negligence such liability is only assumed if it is expressly prescribed in the relevant special provision of the Criminal Code. In the case of violations of the special legislation, the situation is different. In Danish law, negligence is covered by the criminal liability, unless otherwise provided in the Act concerned. Under Norwegian law, the question is decided through a construction of the particular special Act.

8. The requirement of intention does not quite cover what in Anglo-Saxon law is denoted as *mens rea*. Decisive are certain psychological criteria specified in theory. It is a controversial question to what extent these criteria should be laid down as reflecting the perpetrator's will or his conception. In practice, a combination of the relevant theories developed particularly in German doctrine has been accepted. Accordingly, there is intention not only in regard to what the perpetrator intended, but also in regard to what he deemed a necessary or most likely result. Also the so-called *dolus eventualis* is recognized as a form of intention, but is very rarely used as basis of court decisions on the question of guilt.

9. As a result of the requirement of individual guilt, criminal liability of *corporations* is generally precluded. In more recent theory, however, the desirability and justification of making provisions for imposing a fine on joint-stock companies and other corporations on Anglo-Saxon lines have gained ground, and a few special Acts have now provisions for such liability.

10. The question of *knowledge of the rules of law* has in theory and legislation been kept separate from the question of subjective guilt. As a general rule criminal liability is to be imposed irrespective of the fact that the offender

pleads ignorance or misapprehension of the penal provision (*ignorantia juris semper nocet*). This does not apply, however, if the misapprehension was "excusable", i.e., if the offender is not to blame. Under sect. 57 of the Norwegian Criminal Code, as it has been constructed in practice, the offender is exempt from punishment in such cases. Under sect. 84 of the Danish Criminal Code, impunity does not follow as a matter of course, but the courts have power to reduce the penalty or remit it altogether.

11. The subjective conditions of criminal liability are supplemented by provisions on exemption from liability in the event of lack of imputability. These provisions relate, on the other hand, to the age limit governing criminal liability and, on the other, to the significance of psychic abnormality in the offender.

12. As first regards the *age limit*, the minimum age of criminal liability is in Danish law 15, in Norwegian law 14. Any criminal prosecution of a child who at the time the act was committed was under that age is precluded. On the other hand, The National Assistance Act provides that children who commit criminal acts may be placed under the care of the child welfare authorities, e.g. even in such a manner that the child is removed the home and committed to the care of a child welfare institution.

Juvenile delinquents between 15 (14) and 18 years of age *may* be prosecuted, but this is very rarely done. In the vast majority of cases the charge is withdrawn subject to the condition that the young person even of that age be committed to care by the child welfare authorities. Apart from the very few cases of prosecution, the actual minimum age of criminal liability proper is thus 18.

The care replacing conviction and execution of sentence may, if necessary, be extended till the person concerned attains 21 years of age. The child welfare authorities have at their disposal a number of educational homes, some of which having a closed section for particularly maladjusted young persons. The conditions under which resocialisation and training take place in these homes hardly differ very much from the conditions obtaining in the youth prison referred to below, where the commitment formally has the character of "punishment". At present, efforts are being made to co-ordinate the treatment of the young offenders who are now distributed between the child care institutions and the institutions of the prison administration.

13. The rules governing the *psychic abnormality* of the offender are framed rather differently in the two countries. We shall first look at the rules of the Danish Code (see, in particular, ss. 16–18 and 70).

14. According to these rules, persons who were *insane* at the time the act was committed are generally exempt from criminal liability. The Danish Criminal Code, however, does not apply a purely medical criterion so that the psychiatric diagnosis of insanity automatically involves impunity. It is left to the discretion of the court whether the supposed mental disease viewed in relation to the offence committed should unconditionally preclude criminal liability. In borderline cases, special regard may be had to the question of whether, in spite of his insanity, the offender has been able to act rationally and whether he is susceptible of being influenced through ordinary punishment. No fixed doctrine, like the British *MacNaghten* Rules can be said to exist in these borderline cases. In practice the proceedings are as a rule stayed or the court holds the offender irresponsible in presence of medical proof of insanity. In that respect, as a rule, a report from the *Forensic Medical* Council on the basis of preceding observation in hospital is required. The physicians concerned are generally not called as witnesses in court.

15. The same significance as "insanity" in its proper sense is statutorily accorded to "*conditions recognized as similar to insanity*", i.e. conditions of psychic abnormality which, though not coming under the types of disease characterized by psychiatric science as insanity (psychosis), must nevertheless be supposed to have influenced the ability of motivation in the same pathological way as a psychotic condition. Certain neuroses and passing mental anomalies resulting in so-called abnormal isolated reactions may be mentioned. In practice, the said provision of irresponsibility is but little applied.

16. Offenders who are pronounced mentally deficient will always be declared irresponsible. On the other hand, intelligence defects of a less pronounced nature placing the offender at a subnormal intelligence level, without his being characterized as mentally deficient, do not normally exempt him from criminal liability. This is due to the fact that there exist no special welfare services for

such a category of persons, the so-called mentally retarded, while there are highly developed welfare services for mental defectives, including residential care.

17. Of particular interest are the provisions of the Danish Criminal Code on the treatment of the psychically abnormal persons who without being mentally ill, nor mentally deficient, present serious charactereological anomalies, the so-called *psychopathic personalities* or persons suffering from character insufficiency. As far as this group is concerned, the Criminal Code provides for a differentiated treatment. Firstly it has to be decided whether or not they are found "susceptible of influence through punishment". If punishment is regarded as *unsuitable*, which, inter alia, may appear from the fact that punishment has been applied several times in vain, the offender shall be exempted from criminal liability; this can only be decided after a thourough medical examination of his whole personality. The offender may instead be sentenced to detention or other forms of non-punitive treatment under rules which will be discussed below. If, conversely, the offender is found to be *susceptible of influence through punishment* despite his psychopathic disposition, he may be sentenced to ordinary punishment, including ordinary imprisonment, or he may be sentenced to a term of imprisonment to be served under medical supervision in a special institution for psychopathic criminals, the so-called psychopathic prison, but otherwise being in the nature of an ordinary penalty involving deprivation of liberty. This latter form of deprivation of liberty is, however, but little applied. It must be recognized that the criterion of "susceptibility of influence through punishment" is rather vague and hardly, taken isolated, is made the basis of decisions. There is instead a clear tendency to make a general evaluation, taking into consideration the offences committed, the personality of the offender and the reaction and treatment possibilities that may be applied and in this way to choose the sanction which, having regard to all the circumstances at hand, is the most adequate in each particular case.

18. It should finally be noted that, as a rule, *intoxication*, even in its highest degrees, does not preclude application of punishment. Only in the event of complete unconsciousness, or where the intoxication has been of a pathological character, is it to a certain extent possible to exempt the offender from punishment.

19. In Norwegian law, the rules governing the psychic abnormality are more simple. Following a legislative amendment in 1929, a purely medical criterion is applied: if the act was committed in a condition of insanity (psychosis) or unconsciousness, the offender is unconditionally exempt from punishment, without the question of any connection between the abnormal condition and the act being examined; on the other hand, security measures may be applied, if necessary. Equivalent to insanity is pronounced mental deficiency, the level normally being an I.Q. of around 50. No other abnormal conditions may involve impunity, if they have not precluded the necessary intention, but they may be taken into account in meting out punishment and may give rise to application of security measures (see below par. 32). Self-inflicted intoxication does not preclude punishment, even if it has resulted in complete unconsciousness, except in cases where the statutory provisions require a special intention, e.g., in the case of theft, the intention to obtain, for oneself or for others, an unlawful gain.

20. As regards the *objective conditions* of criminal liability, it is of course first of all required that the committed act and its relevant effects may be subsumed under the acts covered by the particular legal provision. With positive acts are, as a general rule, classed *omissions* which according to a natural construction of the relevant penal clause may be regarded as covered by it. In addition, the omission qua omission is in some cases criminalized without being regarded as causal in relation to the consequence that should have been averted. Thus, a penalty (relatively mild) is prescribed for omission to come to the rescue of any person who is in evident danger of his life, where the help may be offered without any particular danger to himself or others.

21. In the case of liability for the effects of a certain act, it is in objective respect required, not only that the act is *causal* in relation to the effect, but also that the effect is an "*adequate*" consequence of the act; this implies that it must not have been caused as a result of developments being quite outside what normally may be anticipated, or on which it would be unreasonable to base any criminal liability.

22. In addition to the general conditions laid down as to the accordance of the act with the criminalized element of the deed and as to the causal and adequate relation of the consequences to the act, another objective condition governing the liability is laid down, that is, that the act is *contrary* to law. This implies the general reservation applying to the construction of any law, that acts which, properly speaking, accord with the description of the punishable offence may nevertheless be lawful or permissible; this may be the case because the law must be supposed to have taken account of the general conceptions prevailing in society or there may exist special, objective grounds for impunity, such as self-defence, *jus necessitatis*, consent or *negtiorum gestio*.

23. A few observations shall be made only concerning the rules governing *self-defence* (sect. 13 of the Danish, sect. 48 of the Norwegian Criminal Code) and *jus necessitatis* (sect. 14 of the Danish, sect. 47 of the Norwegian Code); these rules are characteristic of Danish and Norwegian law on account of their relativity. Thus, self-defence in the face of unlawful attacks must be kept within the limits resulting from the fact that the averting act must never go beyond the necessary; further it must not exceed what is reasonable, having regard to the danger inherent in the attack, the person of the aggressor, and the social importance of the interests endangered by the attack. Within these limits it is on the other hand not unconditionally required that the injury inflicted on the aggressor in order to avert the unlawful attack shall be less than the injury threatening the person attacked. Whereas, in the case of exercise of *jus necessitatis*, which in contradistinction to self-defence does not presuppose that the emergency was caused through any unlawful attack, it is always required that the interests that are sacrificed shall be "of relatively minor importance" (the Norwegian Code has a somewhat different wording). It is not assumed that the provision of jus necessitatis of the Criminal Code in any case admits of sacrifice of human lives. The possibility of an extra-legal jus necessitatis is, however, recognized in Danish law, and it is also possible, on subjective grounds, to acquit any person who has acted in the face of a quite exceptional emergency where normal motivation must be regarded as precluded and where the conditions of pronouncing punishable "guilt" therefore fail.

24. In connection with the objective basis of liability, mention should be made also of the rules governing punishment of attempts and complicity.

The Codes of both countries have general penal clauses for *attempt* (sect. 21 (Denmark), sect. 51 (Norway)). Under Danish law, the same maximum penalty may be inflicted for attempt as for an accomplished offence, whereas the Norwegian Code always prescribes a milder penalty for attempts. Under both Codes the penalty for attempt *may* be reduced to the minimum penalty prescribed in the Code itself and not only to the minimum penalty prescribed for the offence concerned, i.e., to a small fine. Attempts are in practice generally liable to a considerably milder penalty than an accomplished offence.

As regards the delimitation of the concept of attempt, the rules differ. The Norwegian Code requires that the offender has commenced to carry out the offence (sect. 49). The corresponding provision of the Danish Code (sect. 21), on the other hand, applies to any act "aiming at promoting or carrying out an offence". Thus even remote preparatory acts, e.g., procurement of arms or housebreaking tools in view of particular offences, may without any statutory limitation be liable to punishment as attempts. In this respect, Danish law goes further than most other national laws, which usually confine the criminality to cases where an act more directly connected with the carrying out of the offence has been committed. In practice, however, the difference between Danish and foreign law in this field is hardly very great. It is very rare that charge is made in respect of more remote preparatory acts, and a substantial limitation is implied by the demand of proof being made in regard to the offender's intention to commit the offence to which the act should have reference.

25. Sect. 23 of the Danish Code contains a general provision governing criminal liability for *complicity*. Accordingly, the penal provisions of the Code apply not only to the direct offender, but to any person who by instigation, advice or action has contributed to the offence, thus physical as well as mental accomplices. In point of fact, the Norwegian Code holds the same view; instead of having a general provision governing complicity, it is here covered by the individual penal clauses. In the event of minor offences, no mention is sometimes made of complicity and in that case the penal sanction applies only to the person who has carried out the very act described.

Unlike British-American law, no special rules have been laid down about *conspiracy*. The mere collusion about an offence will normally not give rise to criminal liability. The liability for complicity is not, as was the case in earlier theory, understood as a liability derived from or being accessory to the liability of the offender, but as an independent liability determined by the importance of the complicity and the subjective conditions of the accomplice. The penalty for complicity may rise to the maximum of the penalties concerned, but may be facultatively reduced, subject, however, to specified conditions.

26. The *system of penal sanctions* first covers penalties proper. They may consist in *fines* or *penalties involving deprivation of liberty*. The *death penalty* is not applied to civil offences in time of peace. The last execution for such offence took place in Norway in 1876, in Denmark in 1892, and the formal abolition of capital punishment was made in Norway by the Criminal Code of 1902, in Denmark by the Criminal Code of 1930. The abolition was not accompanied by any increase in the number of murders. In the Military Criminal Code, both countries have maintained the possibility to apply the death penalty in time of war. Through statutory amendments of recent years (Norway, 1950; Denmark, 1952) motivated by international political tension and the necessity of an effective fight against fifth-column activities, the authority to apply the death penalty in respect of grave treasonable offences committed in time of war or warlike conditions has been extended, applying also to civil persons. At the time of the judicial purge following the cessation of the German occupation in 1945, capital punishment was applied also to some of the most hardened killers and terrorists in German service.

27. Where not otherwise provided by law, *fines* may be imposed without any legally fixed maximum. In Denmark, but not in Norway, the so-called *day-fine system* is applied in the case of violations of the Criminal Code in contradistinction to infringements of the special legislation. Under this system the fine is fixed proportionate to the guilt as a multiple (from 1 to 60) of an amount corresponding more or less to the average daily earnings of the offender. The system has not obtained the same recognition in Denmark as in Sweden and Finland, where it was first practised. It is applied in a very small proportion of the total number of cases involving imposition of fines.

28. The principal form of the penalty involving deprivation of liberty is *imprisonment*. The minimum term of that type of penalty is 30, in Norway 21 days, the maximum 16, in Norway 20 years or for life. In the case of a number of less serious offences, provision has in Denmark been made for the application of a milder form of deprivation of liberty called "*simple detention*", which may be inflicted for terms ranging from seven days to two years. Offenders committed to simple detention may provide for their own diet, and the detention is in the nature of a *custodia honesta* rather than of any actual penalty of imprisonment. It is to a certain, not very large extent applied to offenders of a non-criminal type. A somewhat related institute in Norway is virtually never applied. It may be asked whether there is any ground for maintaining this special type of refined imprisonment, having regard to the reforms of recent years concerning the ordinary penalty of imprisonment.

As far as the penalty of imprisonment is concerned, the purpose of resocialization has gradualy assumed a more and more prominent place. A number of open and half-open institutions have been set up, still partly in the nature of an experiment, and great progress has been made in regard to classification and differentiation of the prisoners. Release on parole plays an important role as part of the prison system. It may take place on the expiration of two-thirds of the term, subject to a minimum of four months.

29. In meting out punishment in the individual case, the courts shall normally keep within the *range of penalties* provided for the particular offence in the special part of the Criminal Code. The ranges of penalty, however, are as a rule rather wide, and recent Danish legislation shows an increasing tendency to omit the determination of minimum levels, apart from what follows from the general statutory minimum of the type of penalty prescribed (for imprisonment, as already mentioned, 30, in Norway 21 days). Even where a particular higher minimum is prescribed, this may be departed from in a number of cases in pursuance of the general statutory *grounds for reducing the penalty* (Denmark, ss. 84–85; Norway, ss. 55–59). In this connection, special regard may, inter alia, be had to the young age of the offender; to a position of dependence that has affected the commission of the punishable act; to provocation, prevention or restoration of the damage caused by the offence; to great excitement or other temporary lack of mental balance at the time the act was

committed. In the event of particularly extenuating circumstances, the punishment may be altogether remitted.

Maximum sanctions relating to the criminal liability, on the other hand, are maintained (apart from fines outside the day-fine system). In the event of several offences having been committed, the criminal liability is under Danish law generally kept within the normal maximum of the range of penalties or, where several ranges come into consideration, within the maximum of the most severe range. Norwegian law provides for a certain increase of the usual maximum. There is no question of any absolute accumulation of the penalties incurred in respect of each of the offences committed.

30. As special types of prison there exist in Denmark the *psychopathic prison* referred to above and the so-called *youth prison*, corresponding more or less to the British Borstal institutions. The latter prison admits young convicted male offenders, in particular between the ages of 18 and 21, with whom the child welfare authorities are unable to cope but who still give hope of social readjustment under the influence of long-standing educative and training measures. The sentence is indeterminate within a minimum of one and a maximum of three years.

The corresponding institution in Norway is termed *work school;* commitment to such institution shall under the Code not be regarded as a penalty.

31. There exist special forms of treatment for older persistent offenders who are not segregated for treatment by psychic deviations. Such offenders may in Denmark be committed either to *workhouse* or to *preventive detention*. In both cases the deprivation of liberty is for an indeterminate period, and both penal substitutes are in the Code, due in particular to their indeterminate nature, kept outside the actual concept of punishment, without admitting of any clear distinction from long-term imprisonment.

Sentence to workhouse (sect. 62 of the Criminal Code) is applied to habitual offenders of relatively little dangerousness to society. The term is from one to five years. The time of release is decided by a special board, *the Prison Board*. Quite a number of recidivists (50 to 100 a year) are sentenced to workhouse. Preventive detention (sect. 65 of the Code), which is designed for recidivists of a more dangerous type, is much more rarely applied. The minimum term of detention is here four years, and the term may be extended to 20 years or more. In recent years, very few persons have been sentenced to preventive detention, and it must be considered doubtful if there is sufficient ground for maintaining a special treatment of that nature. The particularly dangerous types will, as a rule, be physically abnormal and should be referred to psychiatric treatment and, as far as the remaining clientele is concerned, which consists of persons who do not differ substantially from ordinary prisoners, preventive detention is sometimes a disproportionately severe punishment, more particularly because of the mental strain due to the indeterminate nature of the penalty.

32. As regards the reaction to mentally abnormal offenders, the rules differ as between the two countries.

As already mentioned measures of detention are in Denmark applied by the courts under sect. 70 of the Criminal Code, when the offender on account of his psychic abnormality is acquitted of ordinary punishment or penal substitute. The insane will, as a rule, be sentenced to commitment to a mental hospital; the mental defectives will be placed under the special care provided for such persons; and the psychopaths who are considered unamenable to punishment will be committed to an institution for psychopathic criminals. In less severe cases there may, however, be questions of applying non-institutional treatment or supervision. These measures are applied with no indication of any definite minimum or maximum terms. The length of the term will, in principle, depend on the need of society for security, taking the mental condition of the offender into consideration. Cessation of the measures is decided by court order on the basis of a medical report.

In Norway, security measures (sect. 39 of the Criminal Code) may be applied even where the offender is responsible within the meaning of the Criminal Code if his "mental faculties are insufficiently developed or permanently impaired" and such condition is liable to result in recidivism. "Defective development or permanent impairment of the mental faculties" covers intelligence defects as well as emotional and character defects (psychopathies). The sentence will provide for a maximum term, as a rule five years, subject to extension, as needed, without any maximum limit. Characteristic of the statutory system is that the Code provides for a number of security measures to be ap-

plied by the administration, ranging from mild measures, such as supervision or prohibition against residence in a particular place, to deprivation of liberty in institution and, as an extreme measure imprisonment. If the court has set no limits, the prison administration has the choice between the different measures and may change over from one to the other, as the treatment is progressing. The intention has been to enable the administration to choose the measure protecting society against the danger represented by the convicted with as little suffering to the latter as possible. This extensive power of the administrative authorities may give rise to certain scruples of principle; the general opinion is, however, that the system has worked well.

33. The *sexually abnormal* offenders constitute a special group. In both countries, provision has been made for *castration* of such persons. A Danish Act of 11 May 1935 empowers the courts to order compulsory castration in the case of very grave sexual offences. This authority for compulsory castration has, however, never been applied, and members of the legal and medical profession are now generally agreed that it should on no account be applied and that the statutory provision should be repealed. In Norway, no provision has been made for compulsory castration. Voluntary castration, on the other hand, is subject to the consent of the convicted applied both in Denmark and Norway in a number of cases where such measure may without any risk permit of release of an offender who would otherwise be subject to detention as dangerous to the public security. The experience gained in that respect is favourable, and such application of castration (very limited in practice) presents therefore itself as a humane measure. In principle, however, the recognition of castration as part of the penal sanctions is still subject to discussion.

34. Finally, a number of special measures are applicable in the treatment of *alcoholic offenders*. There may be question of combining punishment with order of abstinence or placing in a curative institution for inebriates. In recent years, non-institutional treatment with special curative means ("*antabuse*" treatment) coupled with psychotherapy has been tried and orders of such treatment have been included as conditions in suspended sentences.

35. As will be seen from the foregoing, the system of penal sanctions is in both countries *dualistic* in the sense that the Code makes a distinction between punitive and non-punitive reactions. In Norway, the system is dualistic also in another sense, i.e. the special measures applied to psychically abnormal and habitual offenders (security measures and detention) are generally imposed in addition to punishment. Provision has been made, however, for the penalty thus inflicted to be largely remitted when the special measures are applied. In Denmark, on the other hand, the system is *monistic* in that respect, i.e., the special treatment (commitment to workhouse, preventive detention, psychopathic detention, etc.) replaces punishment, without it being provided in the sentence what type of penalty would have been inflicted in the case of ordinary punishment. This system works fully satisfactory in practice and there has hardly been any question of impairment of the object of the general prevention. On the contrary the special forms of detention, though not characterized as punishment, have, if anything, a more deterrent effect than ordinary punishment for a specified term.

36. Mention has been made of a number of the special measures of the penal system that are applied to special categories of offenders. Of a more general nature is the possibility to suspend the execution of a penalty through pronouncement of a conditional sentence suspending the execution of the penalty or a conditional sentence suspending the determination of the penalty.

The conditional sentence *suspending the execution of the penalty* was introduced in Norway in 1894, in Denmark in 1905. On Continental lines the courts were empowered to suspend the execution of sentence in case of minor offences, if so warranted by the circumstances of the individual case. The emphasis was originally only on the implied remission of the penalty incurred; already the Danish Code of 1905, however, made provision for combining the suspended sentence with constructive measures in the form of supervision or other specified moral care. The Code thus headed the development on the European Continent towards approaching the suspended sentences to the probation system of Anglo-Saxon law.

An Act passed in 1961, amending the provisions of Chapter VII in the Criminal Code on suspended sentences, introduced in Danish law, in addition to the previous form, a conditional sentence *suspending the determination of penalty*. Accordingly, the courts have to a certain extent the option between the two alternatives of suspended sentences, provided that, under the terms of the

amendment, the punishment is meted out in a suspended sentence only where this is considered more expedient than suspending the determination of the penalty altogether.

In practice, the suspended sentence is mostly applied to juvenile delinquents and to first offenders whose criminality is of a more occasional nature. The suspended sentence provides for a probation period subject, as a rule, to a maximum of three years. In special circumstances, however, a period of probation of up to five years may be prescribed. As a condition for suspending the execution of the sentence the courts may decide that the convicted shall be placed under supervision during the whole probation period or part of it. Moreover, the courts may prescribe other conditions, as they think fit, including in particular those enumerated in the Code, such as order of abstinence, anti-alcoholic treatment, restrictions on disposal of income and property, payment of compensation, and orders relating to work and to place of residence. The conditions prescribed in the sentence are subject to subsequent modification or suspension by court order.

In the event of non-observance by the convicted of the conditions, the court may modify them and extend the probation period within the prescribed maximum or sentence the offender to punishment or other sanction in respect of the offence or, if the penalty has been prescribed in the suspended sentence, order the execution of that penalty or part of it in connection with a new suspended sentence. If the convicted commits another offence during the probation period and if, before the expiration of that period, he is prosecuted for the offence, the court inflicts an unconditional penalty or other sanction in respect of that offence and of the offence previously prosecuted. If warranted by the circumstances, the court may instead inflict an unconditional penalty only in respect of the new offence, possibly in connection with a change of the conditions previously prescribed, or the court may pass a new conditional sentence relating to both offences. It might be noted that a very great percentage of all cases concerning violation of the Criminal Code results in a suspended sentence and it is quite possible that the introduction in Denmark of the new form of sentence suspending the determination of the penalty will tend to increase the number of suspended sentences.

The Norwegian provisions governing suspended sentences have been subject to similar amendments.

37. In line with the efforts of resocialization underlying the application of suspended sentences and probation, both countries have recently enacted new provisions designed to facilitate the social resettlement of the convicted, including even those who have served a more or less severe penalty, by limiting the extensive and inappropriate provisions of previous law governing *loss of civil rights as a result of punishment.*

The view underlying the former provisions on loss of rights, more particularly so in Denmark, was that offences of a certain type or penalties of a certain severity entail public dishonour to the convicted. When he had served his sentence, he was thus excluded, automatically or in pursuance of special statement in the sentence, from a great many rights or facilities, belonging automatically to the non-convicted person, such as the franchise, the military service, the right to obtain appointment in public service and to carry out public functions, the right to carry on a trade or business requiring a special licence, the right to drive a motor vehicle, to draw public benefits (old age and disability pensions) that are not in the nature of poor relief, etc. This meant that the released offender, who made efforts to lead a blameless life, time and again came up against obstacles reflecting the fundamental distrust of him on the part of society. At the same time, the whole registration machinery that was of necessity involved in such a system of forfeiture of rights would inevitably spread knowledge of his offence and the serving of his sentence to wider circles wherever he came to live. If the resocialization shall be successful, however, society must give the convicted a fair chance after he has served his sentence, and this was excluded under the system thus described.

An Act passed in 1951, amending ss. 78 and 79 of the Danish Criminal Code, introduced, on the recommendation of the *Criminal Law Commission*, a new system which, as far as possible, combines the regard to resocialization with the justified demand of society for protection against particularly indicated risks on the part of convicted persons. As a general rule, punishment no longer entails any loss of civil rights, including in particular the right to carry on a trade or business. Where a trade or business is of such nature as to require public authorisation, it may in each individual case, however, be decided by

court order that a convicted person shall be debarred from carrying on such trade or business if the offence committed carries with it an obvious risk of abuse of the position or occupation concerned. Subject to the same condition, it may be decided that a convicted person shall cease to carry on a trade or business requiring authorisation or any other business in which he has proved to present a particular risk of abuse. These rules, which to our knowledge are unknown in any foreign law, shift the central point, concerning the loss of rights, from the criterion of honour to the more rational one of dangerousness. In other words, an adequate connection is established btween the offence and its consequences to the future occupation of the person concerned. In practice, the new rules largely facilitate resocialization.

In Norway, similar rules were enacted in 1953; in that country, however, somewhat less drastic measures have been adopted in the abolition of loss of rights.

CHAPTER X

Criminal Proceedings

1. The Danish rules of procedure and court organisation are laid down in the *Administration of Justice Act dated 1 April 1916* with subsequent amendments and additions. In Norway, the rules are distributed between the *Criminal Proceedings Act*, 1887, and the *Courts of Law Act*, 1915. Before going into the characteristics of the rules of procedure, an outline must be given of the organisation of the courts of law, which is broadly the same in both countries.

2. The ordinary courts are the lower courts, the High Courts, and the Supreme Court.

Preparatory judicial acts during inquiry and preliminary investigation take place before a *lower court*. As judicial court of first instance, the lower courts are further competent to deal with the vast majority of criminal cases. The judicial authority of first instance is assigned to the *High Courts* only in the graver cases and in a few other cases specified in the Act; even such cases may generally be tried by a lower court with the consent of the accused if he has made a full confession, the truth of which is corroborated by other available evidence.

While, thus, the High Courts only deal with criminal cases in first instance to a very limited extent, they act largely as a *court of appeal* since an appeal may normally be made to the competent high court from any decision by a lower court. Where the appeal relates to the hearing of the case, application of legal provisions or meeting out of punishment, it is, however, in Norway brought not before the High Court, but directly before the Supreme Court.

The *Supreme Court* never acts as a court of first instance but only as a court of appeal. The trial by the Supreme Court cannot include the assessment of evidence in regard to the guilt of the accused but is in all essentials confined to the legal problems of the case and the meeting out of punishment.

3. As regards the *composition of the courts*, it should be noted that, in the lower court, the criminal cases are heard by one legal judge and, apart from police prosecutions and cases where a full confession has been made, two lay judges. In the High Courts of Denmark three legal judges and three lay judges hear cases of appeal. In the graver cases, more particularly cases of homicide, in which the High Court acts as a court of first instance, the legal element consists of three High Court judges sitting with a jury being composed of twelve jurors, who decide the question of guilt between them and thereafter, together with the legal judges as one body determine the penalty. In the consideration of the sentence the total votes of the three legal judges have the same weight as those of the twelve jurors. In Norway, the relative influence of the legal judges and the lay judges is somewhat different.

4. Unlike the inquisitorial system of former rules of procedure, the existing rules are *pronouncedly accusatory*. The main characteristics of this modern prosecution system are:

(1) No proceedings may be taken without a charge being brought by a body outside the courts; (2) the accusation is made by a special prosecution; (3) the accused is recognized as a party to the proceedings with a number of positive capacities also at the preparatory stages of the proceedings; (4) the accused is under no obligation to submit to examination or to co-operate actively in any way to the elucidation of the case; (5) a counsel for the defense is to a large extent appointed at the public expense to safeguard the interests of the accused; (6) the criminal procedure is in principle subject to full public-

ity; (7) production of evidence takes in principle place directly before the competent court; (8) apart from cases where a full confession has been made, lay judges take part in the trial of all criminal cases proper.

In the sequel, some of these main characteristics will be illustrated in greater detail in regard to aspects where Danish and Norwegian law of legal procedure may present a particular interest. In such respect, particular attention is called to the rules governing *charge and withdrawal of charge*, the rules of *publicity* and the rules associated with the *assessment of evidence*.

5. As already mentioned, *prosecution of offenses* takes place through the public prosecution. In Norway, but not in Denmark, the injured person has a general subsidiary right to take proceedings. In certain petty cases it is the injured person himself who has to bring his claim before the court.—The structure of the public prosecution is hierarchic. At the head of it is the *Public Prosecutor*, who has under him a certain number of *assistant public prosecutors;* they generally decide whether a charge shall be made in criminal cases proper and carry out the office of public prosecution at the High Courts. The assistant public prosecutors are, in turn, superior to the *chief constables* and their assistants, who act as the representatives of the public prosecution at the preliminary stages of the case and often perform the office of public prosecution during trial before a lower court.

6. The determination as to whether criminal proceedings shall be brought before the courts is in Danish and Norwegian law subject to the so-called "*principle of relative prosecution*" (or "principle of opportunism"), which provides for a rather wide authority on the part of the public prosecution to withdraw the charge even where the evidence affords sufficient ground for taking proceedings.

In petty, i.e. police, cases the competent *chief constable* may normally withdraw the charge on his own accord, or he may omit prosecution against the accused's agreeing to pay a fine.

In the event of criminal cases proper which are prosecuted by the *assistant public prosecutor*, the general rule is of course to proceed with the case if, in the opinion of the public prosecution, the evidence of the guilt of the accused is sufficiently strong. From that rule, however, important exceptions are made. First, the assistant public prosecutors have a special statutory authority to withdraw the charge against offenders under 18 years of age, subject to the condition that they be placed under the care of the child welfare authorities; as mentioned above in the review of the criminal law virtually all criminal cases against young persons are dealt with in this way. Also in the case of adult offenders, it is, however, possible to stay proceedings, if this may be done without prejudice to any public interest. A case of euthanasia was e.g. decided in that way. The formal rules differ somewhat as between the two countries. In Norway, staying of proceedings shall in every case be submitted to the Public Prosecutor; whereas, in Denmark, the assistant public prosecutors may stay the proceedings on their own accord if the gravity of the offense is relatively small, e.g. petty acquisitive offenses, offenses of violence and against public decency of a minor gravity.

It may of course be questioned if so extensive rules governing staying of proceedings in Danish and Norwegian law are advisable. There is, however, consensus of opinion among experts that the system works satisfactorily, that there has been no abuse, and that indeed there is hardly any practical possibility of abuse in view of the control to which the decisions of the Public Prosecutor are subject by the consideration of the cases through the individual levels of public prosecution.

By and large, the staying of proceedings works as an adequate valve to the machinery of justice, permitting a number of petty and atypical cases to be kept outside prosecution. The general view is that the existing practice makes for promoting humane considerations without prejudice to the general prevention.

7. The court sittings in a criminal case are as a general rule *public*, not only during the trial of the case, but also at the preliminary stages from the moment when the investigation is focused on a particular person as accused. In a number of cases specified in the Act, the courts may, however, exclude the public. This may be done if warranted by special considerations of procedure, more particularly in view of the elucidation of the case; further where certain social considerations quite outside the case so require because public trial might prejudice the relations of the State with foreign powers or violate public decency, or where special individual considerations make themselves felt. The case may thus be heard *in camera* if the accused is under 18 years of age,

but this is not the only case. Danish law provides for a case to be heard in camera where "special circumstances afford ground for assuming that public trial would unnecessarily insult any person". This rule is primarily designed to protect the injured persons and witnesses; it shall, however, "not be quite excluded" to decide to hear the case in camera in order to avoid the infliction of "disproportionately great suffering" to the accused or his nearest relatives. The fact that not only the regard to third parties, but also to the accused, may justify hearing the case in camera, is clearly expressed in Norwegian law, which as an alternative reason states that "regards to the sanctity of private life so require" and that "the accused himself so requests for reasons found adequate by the court".

8. As a rule, the proceedings of court sittings may be freely *reported*. Public report (press reportage) may, however, in certain cases be prohibited by the court. First, this may be done for the sake of clearing up the case and for protection of special public interests. Next, however, prohibition of press report may be ordered also to protect individual interests. Under Danish law, for example, the court may, as an exception, decide that public report shall be wholly or partly omitted where this would unnecessarily insult any person who is not charged in the case or would inflict disproportionately great suffering on the accused or his relatives. The Norwegian law contains similar provisions. In addition, Danish law provides for special restrictions in the right to pictorial reportage. It is thus forbidden without special permission to make drawings or take photographs in the court room, and the court has a general authority to entirely forbid public report in pictures of a court sitting at any stage of the case. The law also protects the correctness of the reportage by various provisions. The general rule is that "public report of court proceedings shall be objective and loyal." The provisions is not covered by any legal sanction, and its significance is therefore chiefly of a moral-pedagogic character. It is nevertheless not entirely without legal significance since in border cases it may justify considering a report contrary to law with resulting liability under civil law. Besides, criminal liability is separately provided for in regard to highly incorrect and wilfully untrue reports of court sittings.

9. As regards comments on pending criminal cases beyond the mere report of court proceedings, the Danish Administration of Justice Act contains a provisions reminiscent of the liability laid down in British law for *contempt of court*. Under that provision any person may be liable to punishment who "pending the final sentence in a criminal case makes statements calculated to improperly influence the judges, lay assessors or jurors in regard to the decision of the case." This prohibition of improper influence on the court is supplemented by a provision under which "no person who in an official capacity is concerned with a criminal case may out of court express any opinion to the public on the question of guilt pending the decision of the case".

These penal provisions governing improper court reports, communications and comments have been very little applied in practice, though the treatment by the press of lawsuits has often given rise to criticism. The efforts for reforms in that field have in recent years been concentrated on achieving satisfactory results through the voluntary co-operation of leading press organizations in remedying objectionable practices in press reportage; in that respect, certain agreements have been made, in Denmark as well as in Norway, between representatives of the press and of the bodies of criminal procedure about the lines to be followed in comments on criminal cases.

10. The *assessment of evidence* is free. Circumstantial evidence is fully recognized as a proof according to a free appreciation of the court. All factual elements relevant to the decision must be proved on the part of the public prosecution without support in legal rules of presumption. The principle of *in dubio pro reo* in regard to the decision of the question of guilt is fully accepted.

11. In principle, there exists no restriction on the nature of the acceptable *pieces of evidence*. As exceptions from that fundamental rule, however, it should be noted that the law admits certain *grounds for exclusion of witnesses;* thus clergymen cannot be examined as to what has been confided them in their capacity of spiritual advisers, nor counsels for the defense in criminal cases as to what has been confided them in such capacity; the law also admits certain *grounds for exemption of witnesses;* a witness may thus refuse to answer questions, if the reply would expose the witness to loss of general esteem or welfare.Under Norwegian law, the same applies to cases where the evidence would expose any of the nearest relatives of the witness to such consequences.

In addition, it is to a certain extent forbidden to read out documents in evidence of statements already made. More particularly extrajudicial evidence relating to the previous conduct of the accused is forbidden.

12. It is a controversial question whether evidence given by the accused or by witnesses to the *police* prior to court proceedings may or should be used during such proceedings as part of the production of evidence. In practice, the general rule is that the person concerned is confronted with such evidence if during the examination he gives different evidence; by and large there is a tendency to attach a certain, not quite insignificant weight of evidence to policemen's reports.

13. Information on the *previous career of the accused*, including his previous convictions, if any, is not to the same extent as in British administration of justice kept outside the material with which the court, including the jurors, become acquainted before the questions of guilt is decided. The Danish Minister of Justice has, however, instructed the representatives of the public prosecution to co-operate in avoiding superfluous documentation and documentation being unnecessarily injurious to the accused in regard to previous sentences. No request should therefore be made during court proceedings for documentation of the previous career unless it is of direct relevance to the particular case before the court. As to acquittals in previous cases and cases closed without any charge being made, documentation should not be requested unless the documents are deemed to be of crucial importance to the decision of the particular case before the court; this may be the case especially if they relate to similar offenses as the one now prosecuted, and if the accused now claims acquittal on subjective grounds.—The opportunity to produce evidence of previous convictions, etc., should be viewed in connection with the fact that Danish and Norwegian administration of justice does not provide for any separation of the decision of the question of guilt (conviction) from the determination of the penalty or other legal consequences (sentence), apart from the few cases tried by a jury. When it has reached the stage of judgment, the case is decided collectively in regard both to guilt and sanction.

14. The *production of evidence* in connection with the court proceedings is commenced by an examination of the accused, whose attention shall be called to the fact that he is under no obligation to answer. This should, however, be considered as a matter of pure form, since in practice the accused almost never wishes to be extempted from examination. In Denmark, the examination is undertaken in the first place by the public prosecutor. Then the counsel for the defense may put questions to the accused. The court is also entitled to do so. In Norway, the accused shall in principle be examined by the judge, but when the latter has finished, he normally leaves it to the counsels for the prosecution and for the defense to ask further questions. The examination is very informal and, more particularly, is not subject to the rules applying to the British cross-examination. The use of captious questions is expressly forbidden. The evidence of the accused is not given on oath and under penalty for false evidence.

The examination of the accused is followed by the further production of evidence. It is generally confined to production of the evidence included in the list of evidence of the parties. Also unannounced evidence may be produced; in that case, however, the court proceedings must be postponed, if necessary, in order that the opposite party may protect his interests.

The law provides for the production of evidence first on the part of the counsel for the prosecution and, next, of the counsel for the defense. In practice, however, this rule is frequently departed from so as to distribute the production of evidence as between the parties in the order considered expedient in each particular case.

15. As regards the *examination of witnesses*, this is generally carried out by the party producing the witness. Following the examination by the party, the so-called "general examination", the opposite party may put questions to the witness (cross-examination), after which the former party may put the questions to the witness to which the cross-examination has given rise (re-examination). The examination is hereby normally finished, but the court may permit further questions to be asked by the parties. In practice, the stages of the examination described above are not kept strictly separate, nor is the rule providing that the re-examination must not go outside the field of the cross-examination strictly observed.—The evidence is given under penalty of the law. The witnesses are generally not put on oath in Denmark, while in Norway it is the general rule, though often departed from.

It should be noted that the law expressly provides that production of evidence designed to weaken the trustworthiness of a witness may take place only in such manner and to such extent as is permitted by the court, and should always be refused where the evidence in view is not considered of substantial importance. It is hereby established that there has been no intention of admitting the application of the examination methods employed in British cross-examination.

As regards more general rules governing examination of witnesses, it should be noted that hearsay evidence is not precluded, but it must always be made clear whether the evidence of the witness is based on his own observation. Suggestive questions should as far as possible be avoided, while captious questions are quite inadmissable. The court shall also see to it that no irrelevant questions are asked, i.e. questions that do not contribute to clearing up the case. The general rule is that the examination must not be carried out in an improper manner or in a manner that is not calculated to elicit the truth.

The rules governing examination, both in themselves and by the manner in which they are practiced, are as a whole characterized by lack of formality, which is striking, more particularly as compared with British administration of justice. Where the latter has developed a comprehensive and complex system of legal rules, Danish and Norwegian laws leave practically everything to the free judgement of the court. This affords general satisfaction and in practice no need for any more formal regulation of the production of evidence on the British lines has made itself felt.

16. The law of criminal procedure is on the whole designed to provide the best possible conditions for trying the criminal cases on a sound basis. Many of the rules laid down with that general aim in view are primarily designed to guarantee the accused against errors of justice. Whereas in that respect no efforts have been made in Danish or Norwegian law to provide guarantees through the development of a fixed, formal system of evidence, the countries have otherwise gone far in the provision of security. Here, mention shall only be made of a system peculiar to the Danish law of legal procedure that admits of challenging sentences on the basis of a criticism of the assessment of evidence.

This special system was introduced in 1939 through the establishment of the "*Special Court of Appeal*". This is a court outside the ordinary court organization, being competent, on the one hand, to hear certain complaints against judges and, on the other, to decide on *reconsideration of criminal cases* in which the assessment of evidence is not capable of challenge through the ordinary channels by appeal to a court of higher instance within the general court system. In cases of reconsideration the special Court of Appeal is composed of three regular legal judges, one from each of the three levels of court: the Supreme Court, the High Courts and the inferior courts, and of two additional legal judges, one of whom being a university lecturer with expert knowledge of criminal cases, the other a practicing lawyer. All the judges of the special Court of Appeal are appointed for a term of ten years.

This composition of the Court of Appeal is supposed to provide the best guarantees for a competent and impartial examination of applications for reconsideration, as it eliminates the regards to prestige that might be an obstacle to a justified reconsideration if the judges who had pronounced the sentence or their colleagues alone should decide the question.

The reconsideration of a case may be decided by the Court of Appeal not only where new relevant evidence has come to hand, but also where this is not the case if, otherwise, "there are special circumstances indicating that the available evidence has not been properly assessed " (sect. 977 of the Administration of Justice Act.) This provision is based on the fact that, as mentioned before the assessment of evidence is not subject to examination by the Supreme Court. It has therefore been found desirable to provide an exceptional opportunity to set aside the assessment of evidence by the High Courts, which can otherwise not be challenged. The provision concerned is an ex tuto provision which preferably should not have to be applied and which, indeed, has been applied very rarely in practice during the years since 1939. The provision is, however, of preventive importance as against any tendencies on the part of the courts to weaken the requirements of evidence in criminal cases; it provides an additional legal protection to the individual citizen against erroneous decisions; and it is a significant manifestation of the care with which Nordic administration of criminal law tries to provide the best possible guarantees against erroneous convictions.

SCANDINAVIAN CRIMINAL CODES—QUESTIONS NOS. 1–20

Appendix F

THE SWEDISH CODE OF JUDICIAL PROCEDURE

(Translated and with an Introduction by Anders Bruzelius, *City Court Judge, Lund, Sweden*)

By Ruth Bader Ginsburg, *Associate Professor of Law, Rutgers, The State University*

FRED B. ROTHMAN & CO. SOUTH HACKENSACK, N.J.

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CHAPTER 51

REGULAR APPEALS IN CRIMINAL CASES

Section 1

A party desiring to take a regular appeal from a lower court judgment in a criminal action shall submit an appeal petition to the lower court within three weeks of the pronouncement of the judgement.

Section 2

If a party has appealed from a lower court judgment pursuant to section 1, the adverse party, although he did not observe the provisions of the said section, may also appeal from the judgment; to do so, however, he must submit an appeal petition to the lower court within one week of the expiration of the time to appeal pursuant to section 1.

If the first appeal is withdrawn or otherwise terminated prior to adjudication on the merits, the latter appeal also terminates.

Section 3

If it is found that an appeal is not brought in the prescribed form or in due time, the appeal shall be dismissed by the lower court.

Section 4

In the appeal petition the appellant shall specify:

1. the judgment appealed from;

2. the grounds for the appeal, stating the respect in which the appellant considers the fact findings and legal conclusions of the lower court to be erroneous; and

3. the particular part of the judgment attacked and the change in the judgment demanded by the appellant.

In the petition, the appellant shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. The original or a certified copy of any document not previously presented shall be annexed to the petition. If the appellant desires that the court of appeals hear the testimony of a witness or an expert, or view the locus in quo, he shall so state in the petition, indicating the reasons therefor. The appellant shall also state in the petition whether he desires the injured person or the defendant to appear in person at the main hearing in the court of appeals. (SFS 1963:149)

When the defendant is under arrest or in detention, this information shall be stated in the appeal petition.

The petition shall be signed by the appellant or his attorney in his own hand.

Section 5

If the appeal is not dismissed, upon expiration of the time stated in section 2, the lower court shall transmit without delay to the court of appeals the appeal petition with the papers annexed thereto and the case file.

If the defendant is in detention, or if the petition contains a demand requiring immediate consideration, such as a request for the detention of the defendant, or for a measure referred to in chapters 25 to 28, or for the termination of such a measure, the transmission shall occur immediately upon receipt of the petition; however, until the time stated in section 2 has expired, a copy of the petition shall be held accessible at the lower court. (SFS 1947:616)

Section 6

If an impediment other than the kind referred to in section 3 precludes consideration of the appeal on the merits, the appeal may be dismissed forthwith by the court of appeals.

Section 7

If the peition fails to comply with the regulations in section 4, or is otherwise incomplete, the court of appeals shall direct the appellant to cure the defect.

If the appellant fails to comply with the directive, the appeal shall be dismissed if the petition is defective in failing to present a distinct demand for a change in the judgment or to state clearly the grounds of the appeal, or if the defect is otherwise so fundamental in character as to render the petition unserviceable as a basis for the proceedings in the court of appeals.

Section 8

In order to commence preparation of the case on appeal, the petition with the papers annexed thereto shall be served upon the appellee with a notice directing him to file a written answer.

If the lower court has denied a request for a measure stated in chapters 26 to 28, or ordered the termination of such a measure, the court of appeals may immediately grant the measure to remain effective until otherwise ordered. If the lower court has granted such a measure, the court of appeals may immediately direct that no further step be taken to execute the lower court order. As to detention and travel prohibition, the court of appeals may also change the lower court order without giving the adverse party an opportunity to be heard.

Section 9

The answer shall respond to the appellant's grounds for his appeal and specify the circumstances upon which the appellee desires to rely.

In the answer the appellee shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. The original or a certified copy of any document not previously presented shall be annexed to the answer. If the appellee desires that the court of appeals hear the testimony of a witness or an expert, or view the locus in quo, he shall so state in his answer indicating his reasons therefor. The appellee shall also state in his answer whether he desires the injured person or the defendant to appear in person at the main hearing in the court of appeal. (SFS 1963:149)

The answer shall be signed personally by the appellee or his attorney or, when the defendant is the appellee, by his defense counsel.

Section 10

The answer with the papers annexed thereto shall be served upon the appellant.

If it is found necessary for the preparation of the case, the court of appeals may direct a further exchange of writings. The court may also issue detailed regulations as to the exchange of writings and even particularize the issues upon which the parties shall express themselves. However, a party may be directed to file more than one writing only for special cause.

Section 11

If the court of appeals finds it necessary to obtain expert opinions, documents, or objects for view or inspection, or to take proof outside the main hearing or any other preparatory measure, it shall issue an order thereon without delay.

A party who desires that one of the measures referred to above be taken shall apply therefor to the court of appeals as soon as possible.

In a public prosecution, if it is found that the preliminary investigation should be expanded or, if no investigation was made, that such an investigation should take place, the court of appeals may direct the prosecutor accordingly.

Section 12

If examination of a party or a third person is found necessary for the preparation of the case, the court of appeals shall direct such examination in the manner it finds appropriate. As to the appearance in court of a defendant who is under arrest or in detention, the court of appeals shall issue the appropriate directive to provide for his presence.

Section 13

As soon as the preparation of the case has been concluded, the court of appeals shall fix a date for the main hearing. A main hearing may be fixed for the disposition of a procedural issue, or of a portion of the controversy that may be decided separately, although in other respects the preparation of the case has not been completed.

If the defendant is in detention, the main hearing shall be held within four weeks of the expiration of the time stated in section 2, unless a longer post-

ponement is necessary owing to a measure referred to in section 11 or to another circumstance. If the defendant was detained after the expiration of the time stated in section 2, the period shall be computed from the day of his detention.

Section 14

Notice to attend the main hearing shall be given to the parties.

A private appellant shall be directed to appear on pain that otherwise he forfeits his appeal. Moreover, if he is to appear in person, the court of appeals shall direct him to do so on penalty of fine. If a private appellee is obliged to appear in person, or if his presence is otherwise found to be of importance for the disposition or investigation of the case, he shall be directed to appear on penalty of fine; if the defendant is the appellee, and there is cause to believe that he would not comply with such direction, the court of appeals may direct that he be brought before it in custody. When a conditional fine is not directed and the appellee is not to be brought to the court in custody, the appellee shall be reminded that the case may be heard and decided notwithstanding his absence. As to the appearance of a defendant who is under arrest or in detention, the court of appeals shall issue the appropriate directive to provide for his presence.

In a public prosecution, if the injured person is to be examined as part of the prosecutor's case, he shall be directed to appear in person at the main hearing on penalty of fine.

The court of appeals shall also decide whether a witness or an expert shall be notified to appear at the main hearing. The parties shall be given notice of any direction issued for the attendance of a witness or an expert. As to notices to witnesses or experts to appear at the main hearing, the provisions in chapters 36 and 40 shall apply.

Section 15

As to main hearings in other respects, the provisions in chapter 1, section 15, paragraph 1 and in chapter 46, sections 1 to 5, 7, 9, 11, 13, and 16, shall correspondingly apply; however, with respect to notices to appear at postponed main hearings and directions for the parties, the provisions in section 14 of this chapter shall apply. (SFS 1956:587)

When a case is scheduled for a continued or new main hearing, the court of appeals may direct the measures found appropriate to facilitate conclusion of the case at that hearing. As to such measures, the provisions in sections 10 to 12 of this chapter shall apply.

Section 16

At the main hearing the lower court judgment shall be read to the extent necessary, and the appellant shall state both the part of the judgment appealed from and his demand for a change in the judgment. The appellee shall be given an opportunity to respond to the demand.

Subsequently, the prosecutor, or the injured person, if he is the sole appellant on the prosecution's side, shall present the position of the prosecution to the extent required for the trial at the appellate level. If the defendant has appealed, however, and the court of appeals finds it more suitable, the defendant may present his position first, followed by the prosecutor or the injured person. Each party shall be given an opportunity to respond to the allegations of his adversary. When the hearing is held despite the absence of the appellee, to the extent necessary, his position shall be presented from the documents by the court.

During the examination of the injured person or of the defendant, the written record of his prior statements made before the lower court, a prosecutor, or a police authority may be read only if his oral testimony departs from his earlier statement, or if he fails to testify.

Section 17

After the opening statements of the parties, the evidence shall be presented. The evidence presented in the lower court, to the extent that it is of importance for the appeal, shall be presented by the court of appeals in the state in which it appears in the protocol and other documents; however, when the

court of appeals finds it more suitable and the parties consent thereto, the evidence from the proceedings below may be presented by the parties.

Absent special cause for a different order of presentation, the evidence to be brought forward from protocol and other documents filed with the lower court should be presented before evidence concerning the same circumstance is taken directly by the court of appeals. When there are several evidentiary items concerning the same circumstance, they should be presented in sequence without interruption.

Section 18

After the evidence has been presented, the parties may state what they regard as necessary for the summation of their positions.

Section 19

If a private appellant fails to appear at a main hearing, his appeal shall be dismissed.

If a private appellee directed to appear on penalty of fine fails to appear, the court of appeals, in lieu of directing him to appear under the sanction of a new conditional fine, may direct that he be brought before it in custody either immediately or on the date to which the session has been adjourned.

If a private party directed to appear in person on penalty of fine appears by attorney only, the court of appeals, in lieu of directing him to appear under the sanction of a new conditional fine, may direct that he be brought before it in custody either immediately or on the date to which the session has been adjourned.

In a public prosecution, if an injured person who is to be examined in support of the prosecution fails to appear in person, the rule in the third paragraph shall apply.

However, if a party has been directed to appear on penalty of fine, or if a party is to be brought before the court in custody and it is found that the order for bringing him to court cannot be executed, the appeal may be heard and decided on the merits notwithstanding the fact that the party has appeared by attorney only or has failed to appear.

Section 20

When the court of appeals, pursuant to section 19, has dismissed the appeal, the appellant may make an application to the court for reinstatement of the case.

The application for reinstatement shall be made in writing within two weeks of the issurance of the dismissal order. If the appellant again fails to appear, his right to reinstatement of the case shall be forfeited.

Section 21

The court of appeals may dispose of an appeal on the merits without a main hearing if the prosecutor appeals only for the benefit of the defendant, or if an appeal brought by the defendant is supported by the adverse party.

If the lower court has acquitted the defendant or has dispensed with all sanctions for the offense, or has found the defendant free from criminal sanctions owing to his mental abnormality, or has sentenced him to ordinary or conditional fines,[1] and if there is no cause to sentence the defendant to a punishment more severe than those stated above or to impose a sanction of a different kind than those stated above, the case may be heard and decided on the merits without a main hearing; however, if the appeal also concerns a matter other than criminal liability, decision of the appeal without a main hearing is not permitted, unless the civil aspect of the appeal may be heard and decided on the merits without a main hearing pursuant to chapter 50, section 21. (SFS 1964:166)

For the determination of questions not related to the substance of the appeal, a main hearing is not required.

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[1] As to the Swedish criminal sanctions, see note after ch. 29, sec. 2.

Section 22

If the court of appeals has ordered that a case shall be decided on the merits without a main hearing, and it is not obvious at the time of the order that the parties have already concluded their presentations, an opportunity to do so shall be given to them. (SFS 1954:432)

Notwithstanding any previous order, the court of appeals may direct that a main hearing shall be held.

Section 23

If testimony of a witness or an expert was heard at the main hearing in the lower court with respect to a particular circumstance, or if a view concerning a certain fact was held during the main hearing in the lower court, and the evaluation of such evidence is decisive of the outcome on appeal, the relevant part of the lower court judgment may not be changed by the court of appeals, except for the benefit of the defendant, unless the appellate court hears or views the evidence anew, or extraordinary reasons justify the conclusion that the value of the evidence is other than that attached to it by the lower court.

Section 24

An appeal may be withdrawn at any time prior to the pronouncement of the judgment or final order of the court of appeals. A prosecutor who appealed to the court of appeals against the defendant may amend his appeal to benefit the defendant.

An appellant may not amend his claim on appeal to include a criminal act other than the one specified in the appeal petition.

Section 25

In an appeal lodged by the defendant, or by the prosecutor for the benefit of the defendant, the court of appeals may not sentence the defendant to a criminal sanction more severe than the one imposed by the lower court. If the defendant was sentenced by the lower court to imprisonment, the court of appeals may order suspension of sentence, probation, youth imprisonment, internment, or surrender for special care; in addition to suspension of sentence, probation, or surrender for care under the Child Welfare Law, the court of appeals may impose a fine. When the lower court has ordered a sanction of the kind referred to above, the court of appeals may impose a different sanction.[1] (SFS 1964:166)

Section 26

If a grave procedural error of the kind referred to in chapter 59, section 1, 1. to 4. occurred in the lower court, the court of appeals shall vacate the lower court judgment even if not requested to do so.

If a grave procedural error of another kind occurred in the lower court, for cause, the court of appeals may vacate the judgment even if not requested to do so.

The judgment may be vacated in whole or only in part. If the procedural error also affects a part of the judgment from which no appeal has been taken, the court of appeals shall determine, based upon the particular circumstances, whether that part shall be vacated.

Section 27

If the issue of the disqualification of a judge in the lower court is raised in conjunction with an appeal from the judgment, and the complaint is well-founded, the court of appeals shall vacate the lower court judgment to the extent appealed from.

Section 28

If the court of appeals finds a procedural error other than those referred to in section 26 or 27 to have occurred, the appellate court may vacate the lower court judgment only if the error can be assumed to have affected the outcome

[1] As to the Swedish criminal sanctions, see note after ch. 29, sec. 2.

of the case, and correction of the error cannot be accomplished in the appellate court without substantial inconvenience.

Section 29

If the court of appeals vacates a lower court judgment, and the decision on appeal is not based on lack of competence in the court below or another ground indicating that the lower court should not have entertained the case on the merits, the court of appeals shall remand the case to the lower court for the required further processing.

The authority of the court of appeals, when it finds that the court below lacked competence, to refer the case to another lower court is described in chapter 19, section 11.

Section 30

After a judgment or final order of a court of appeals has become conclusive, the file received from the lower court and a copy of the judgment or order on appeal shall be transmitted to the lower court.

Section 31

When the appeal from the lower court judgment concerns only matters other than criminal liability, the case shall be disposed of in the court of appeals as a civil case.

Chapter 52

Limited appeals

Section 1

A person desiring to take a limited appeal from a lower court order shall submit a limited appeal petition to the lower court within two weeks of the pronouncement of the challenged order; however, as to an order rendered in the course of the proceedings, but not at a hearing session, the period for appeal shall be computed from service of the order from the complainant. No time limit shall apply to an appeal from an order requiring a person to be placed or kept in detention or an order on an issue of the kind referred to in chapter 49, section 6.

The obligation to give a formal notice of exception to orders of the kind referred to in chapter 49, section 3 or section 4, paragraph 2, 3, or 7, is prescribed in the said chapter.

Section 2

If it is found that a limited appeal if not brought in the prescribed form and in due time, the appeal shall be dismissed by the lower court.

Section 3

In the limited appeal petition the complainant shall specify:

1. the order appealed from;
2. the grounds for the limited appeal and
3. the change in order demanded by the complainant.

In the petition, the complainant shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. The original or a certified copy of any document not previously presented shall be annexed to the petition. (SFS 1963:149)

The petition shall be signed by the complainant or his attorney in his own hand.

Section 4

If the appeal is not dismissed, the lower court shall transmit without delay to the court of appeals the limited appeal petition with the papers annexed thereto, and an original or certified copy of the file to the extent related to the challenged matter.

Section 5

If an impediment other than the kind referred to in section 2 precludes consideration of the appeal on the merits, the appeal may be dismissed forthwith by the court of appeals.

Section 6

If the petition fails to comply with the regulations in section 3 or is otherwise incomplete, the court of appeals shall direct the complainant to cure the defect.

If the complainant fails to comply with the directive, the limited appeal shall be dismissed if the petition is defective in failing to present a distinct demand for a change in the order or to state clearly the grounds of appeal, or if the defect is otherwise so fundamental in character as to render the petition unserviceable as a basis for the proceedings in the court of appeals.

Section 7

If it is found that the adverse party should be given an opportunity to respond, the petition with the papers annexed thereto shall be served upon him with a notice directing him to file a written answer.

Unless an opportunity to respond has been given to the adverse party, the lower court order may not be changed to his detriment.

If the lower court, in a civil case, has denied a request for provisional attachment, injunction against dissipation or any other security measure, or for an interlocutory decree, or has ordered the termination of such a measure, or in a criminal case has denied a request for a measure stated in chapters 2 to 28, or has ordered the termination of such a measure, the court of appeals may immediately grant the measure to remain effective until otherwise ordered. If the lower court has granted such a measure, or has directed that execution of an order may occur forthwith, the court of appeals may immediately direct that no further step be taken to implement the measure or to execute the order. As to detention or travel prohibition, the appellate court may also change the lower court order without giving the adverse party an opportunity to answer.

Section 8

The answer shall respond to the complainant's grounds for his appeal and specify the circumstances upon which the respondent desires to rely.

The respondent shall specify the evidence upon which he desires to rely, and indicate what he intends to prove by each specified item. The original or a certified copy of any document not previously presented shall be annexed to the answer. (SFS 1963:149)

The answer shall be signed personally by the respondent or his attorney or, in a criminal case in which the defendant is the respondent, by his defense counsel.

Section 9

After an answer is filed, if the court of appeals finds that a further exchange of writings is necessary, it may so direct. The court may also issue detailed regulations as to the exchange of writings and even particularize the issues upon which the parties shall express themselves. However, a party may be directed to file more than one writing only for special cause.

Section 10

If examination of a party or a third person is found necessary for the investigation, the court of appeals shall direct such examination in the manner it finds appropriate. As to the appearance in court of a defendant who is under arrest or in detention, the court of appeals shall issue the appropriate directive to provide for his presence.

Section 11

After the required measures have been taken, the appeal shall be decided by the court of appeals as soon as possible.

Section 12

A limited appeal may be withdrawn at any time prior to the pronouncement of the final order by the court of appeals.

Section 13

After the final order of the court of appeals has become conclusive, the file received from the lower court and a copy of the order on appeal shall be transmitted to the lower court.

Chapter 53

Actions commenced in court of appeals

Section 1

In a civil action instituted in a court of appeals as a court of first instance, the provisions of chapters 42 to 44 concerning proceedings in the lower courts shall correspondingly apply.

Section 2

In a criminal case instituted in a court of appeals as a court of first instance, the provisions in chapters 45 to 47 concerning proceedings in the lower courts shall correspondingly apply; however, in such a case, the following diverging provisions shall govern:

1. The court of appeals may not authorize the prosecutor to issue a summons.

2. For the preparation of the action, the court of appeals may direct the defendant in the summons to file a written answer with the court. The answer with the papers annexed thereto shall be served upon the prosecutor. When a further exchange of writings is found necessary for the preparation of the action, the court of appeals may so direct. The court may also issue detailed regulations as to the exchange of writings and even particularize the issues upon which the parties shall express themselves.

3. In lieu of the one week period prescribed in chapter 45, section 14, chapter 46, section 11 and chapter 47, section 22, for holding the main hearing in cases in which the defendant is under arrest or in detention, a period of two weeks shall apply.

4. If there is no cause to sentence the defendant to punishment more severe than fine, the court of appeals may decide the case on the merits without a main hearing; as to such a decision, the provisions in chapter 51, section 22, shall govern. (SFS 1964:166)

Part 6

Proceedings in the Supreme Court

Chapter 54

Appeals from judgments and orders of the courts of appeals

Section 1

Appeal from a court of appeals judgment shall be sought by a review petition.

A party against whom a default judgment was entered may not appeal from the judgment; his right to a reopening of the case following the entry of such a judgment is prescribed in chapter 44, section 9, and chapter 53, section 1.

In an action amenable to out of court settlement, if a party has undertaken not to appeal from the judgment after the controversy arose, the undertaking shall be given effect; however, a commitment prior to the entry of judgment shall not be effective unless a reciprocal undertaking was made by the adverse party.

Section 2

Appeal from a court of appeals final order shall be sought by limited appeal. However, when an order dismissing a specified part of a case without reaching the merits is issued in conjunction with a judgment, review of the order shall be sought by a review petition.

A party entitled to apply for reinstatement of a case terminated by a final order may not appeal from the order.

Section 3

The provisions in chapter 49, sections 3 to 5, 7 and 11, concerning appeals from lower court orders shall correspondingly apply to appeals from orders, other than final orders, of the courts of appeals on issues referred to in the said sections and raised in, or appealed to, the appellate courts.

Section 4

As to orders of the courts of appeals other than those referred to in the preceding sections, the provisions in chapter 49, section 8, shall govern.

Section 5

As to an order of the court of appeals denying a request for detention or travel prohibition, or releasing a detained person, or terminating a travel prohibition, an appeal may be brought only in conjunction with an appeal from a judgment or final order of the appellate court.

Section 6

A court of appeals order remanding a case to the lower court is not reviewable; however, as an exception to this proscription, if the disposition by the court of appeals embraces decision of a question that bears directly upon the ultimate outcome of the action, an immediate appeal may be sought.

Section 7

A ruling of a court of appeals that the lower court is competent to entertain a case is not reviewable, unless the challenge to the competence of the lower court is based upon a ground that the higher courts on appeal are required to notice on their own motion.

Section 8

A court of appeals order concerning the disqualification of a judge in the lower court, or with respect to the lower court disposition of an issue of the kind referred to in chapter 49, section 4, paragraph 1, 7, or section 6, is not subject to review.

Section 9

An appeal from a court of appeals judgment or final order in a case or non-contentious proceeding initiated at a lower court may not be considered by the Supreme Court to a further extent than prescribed in section 10, unless that Court has granted the party review dispensation.

However, in a case invoving a public prosecution, this rule does not apply to an appeal brought by the Chief State Prosecutor, the Attorney General, or the Parliamentary Civil or Military Ombudsman. (SFS 1947:616)

Section 10

Review dispensation may be granted only if:

1. for uniform interpretation of statutes or uniform law application it is of extraordinary importance that the Supreme Court decide the case, or the petitioner shows that for other reasons the disposition of the case should have extraordinary importance beyond the particular situation involved in the litigation; or

2. cause exists for a change in the determination of the court of appeals or, on other grounds, in view of the circumstances in the case, cause exists for review by the Supreme Court.

If review dispensation is not granted, the appellate court judgment or final order shall remain conclusive; a reminder to this effect shall be included in Supreme Court order.

Section 11

In determining whether or not review dispensation shall be granted for an appeal from a judgment, the Supreme Court shall also examine any order in the case which dismissed a specified part thereof without considering the merits,

and which is appealed from in conjunction with the appeal from the judgment.

When review dispensation is granted, the dispensation shall relate to the judgment or final order in its entirety, if the party appeals therefrom, as well as to any order appealed from in conjunction with the appeal from the judgment or final order.

Section 12

As to claims for, or payable in money, review dispensation pursuant to section 10, 2. may not be granted to a party if the sum he has lost in the court of appeals plainly does not amount to one thousand five hundred crowns. In computing the value of the party's loss, neither litigation costs, nor interest accruing after the commencement of the action may be taken into consideration.

As to criminal liability, review dispensation pursuant to section 10, 2. may not be granted to an injured party, unless his charge is based upon an offense punishable by imprisonment for more than one year or by dismissal from office. Such dispensation may be granted to a defendant or to any person related to him as specified in chapter 21, section 1, only when the prosecution is based upon an offense, punishable as stated above, or upon any other offense if the defendant was sentenced to a sanction other than a fine, or to not less than sixty day-fines, or to ordinary fines or finally imposed conditional fines of not less than one thousand five hundred crowns, or when a defendant already sentenced to internment was subjected to a new minimum term for institutional care, or when the provision in chapter 34, section 8, paragraph 2, 2. of the Penal Code was applied.[1] (SFS 1964:166)

Section 13

As to an appeal from an order of a court of appeals, other than a final order, in a case or non-contentious judicial proceeding initiated in a lower court, the provisions in sections 9 to 12 shall correspondingly apply, unless review dispensation has been granted for an appeal from the judgment or final order of the court of appeals, and the dispensation, in accordance with section 11, paragraph 2, also encompasses the ancillary order; however, as to an appeal from an order concerning litigation costs, no review dispensation pursuant to section 10, 2. may be granted.

Section 14

When the court of appeals issues an order which, pursuant to section 5, 6, 7 or 8, is not subject to review on appeal to the Supreme Court, the court of appeals shall so state in the order.

If an appeal from a court of appeals judgment or order cannot be entertained by the Supreme Court unless the Court grants review dispensation to a party, the court of appeals shall so state in its appeal instruction. The court of appeals shall also specify in the appeal instruction the grounds upon which review dispensation may be granted; it shall determine the applicable grounds with reference to the outcome of the case in the court of appeals. If different grounds apply to different parts of the judgment or order, the court of appeals shall instruct the party of the contents of section 11, paragraph 2.

Section 15

A party who considers an instruction issued by the court of appeals pursuant to section 14 to be erroneous may request review of the instruction in conjunction with an appeal from the judgment or order. if the challenge to the instruction raises the question whether, in light of the circumstances presented, the provisions in section 12 preclude review dispensation under section 10, 2., the question shall be decided in conjunction with the determination whether to grant review dispensation. New evidence may not be urged in the petition to the Supreme Court with respect to the monetary value of the party's loss in the court of appeals.

Questions referred to in the preceding paragraph may not be raised in the Supreme Court except as there stated. In all other respects, the directions of the court of appeals as to the form of appeal must be followed.

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[1] As to the Swedish criminal sanctions, see note after ch. 29, sec. 2.

Section 16

Review of a court of appeals order dismissing a formal notice of exception to, an application for reopening or reinstatement of, or a regular or limited appeal from the judgment or order of the court of appeals may be sought by limited appeal. Under no other circumstances may the Supreme Court review the question whether such notice was given or application made, or appeal taken in the prescribed form and in due time.

Section 17

A person desiring to appeal from a court of appeals judgment or order shall deposit with the appellate court an appeal fee of one hundred fifty crowns, and an equally high sum as security for the costs that the Supreme Court may award to the adverse party. In a case in which several persons have a joint claim or defense, deposit of the said sums by one of them is effective for all of them. Although there are several parties adverse to the appelant, he is not obliged to deposit more than the two amounts stated above.

The Crown, and, in a criminal case, both the prosecutor and a defendant who is in detention are exempt from the obligation to make the deposits referred to above. Any other defendant who appeals from a conviction is exempt from depositing an appeal fee. A deposit as security for costs is not required when there is no private adverse party. (SFS 1947:616)

Section 18

A person desiring to appeal who deposits the sum prescribed as security for the adverse party's costs, but who is unable to post the appeal fee owing to poverty, may nonetheless pursue his appeal if he establishes by the affidavit of a competent authority that his assets are insufficient to cover the additional one hundred fifty crowns or that, after the payment of the appeal fee, he would lack adequate means to subsist. If he cannot pay even the sum that is to be deposited as security for costs, he may nonetheless pursue his appeal if he establishes by affidavit as stated above that his assets are insufficient to cover a deposit of one hundred fifty crowns or that after the payment of that sum he woud lack adequate means to subsist.

Further regulations concerning the authorities that may issue such affidavits and the contents of the affidavits are issued by the King.

Section 19

If a party's demand for change in the judgment or order of the court of appeals is granted in whole or in principal part, the Supreme Court shall further direct that the party may receive back the deposited appeal fee. If such a direction is not issued, the fee shall go to the Crown.

If a party has deposited an appeal fee when the circumstances were such that he was not obligate to make the deposit, the Supreme Court, in conjunction with its disposition of the appeal, shall direct that he may reclaim the fee.

In its judgment or final order the Supreme Court shall direct whether and to what extent the sum deposited by a party as security for costs may be withdrawn by him or by his adversary.

Chapter 55

Regular appeals to the supreme court

Section 1

A party desiring to take a regular appeal from a court of appeals judgment shall submit a review petition to the appellate court within four weeks of the pronouncement of the judgment.

Section 2

Within the period stated in section 1, the appellant shall deposit with the court of appeals the prescribed appeal fee, and the stipulated sum as security for costs is deposited, the appellant shall file an affidavit of poverty of the

kind referred to in chapter 54, section 18, prior to the expiration of the period referred to above.

If the appellant has timely filed an affidavit of a competent authority concerning the appellant's poverty, but the content of the affidavit does not conform to that specified in the said section, the court of appeals shall direct the appellant to file an affidavit of the kind specified with the consequence that if a proper affidavit is not furnished to the appellate court when it re-examines the question whether the appeal has been properly pursued, the appeal will be dismissed. A deposit of the sum for which the waiver by affidavit had been sought is also effective to cure the defect.

Section 3

If it is found that an appeal is not brought in the prescribed form or in due time, the appeal shall be dismissed by the court of appeals.

Section 4

In the review petition the appellant shall specify:

1. the judgment appealed from;

2. the grounds for the appeal, stating the respect in which the appellant considers the fact findings and legal conclusions of the court of appeals to be erroneous; and

3. the particular part of the judgment attacked and the change in the judgment demanded by the appellant.

If the appellant requests review dispensation pursuant to chapter 54, section 10, 1., he should specify in the petition the circumstances he relies upon in support thereof.

In the petition, the appellant shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. In a civil case, if evidence is specified which was not presented below, the appellant shall state why such evidence was not offered at an earlier stage. The original or a certified copy of any document not previously presented shall be annexed to the petition. The appellant shall also state in the petition whether he desires the adverse party or, in a criminal case, the injured person or the defendant to appear in person at the main hearing in the Supreme Court. (SFS 1963:149)

In criminal cases, if the defendant is under arrest or in detention, this information shall be stated in the petition.

The petition shall be signed by the party or his attorney in his own hand.

Section 5

If the appeal is not dismissed, upon expiration of the time stated in section 1, the court of appeals shall transmit without delay to the Supreme Court the review petition with the papers annexed thereto and the case files of the lower court and the appellate court.

The transmission shall occur immediately on receipt of the petition in criminal cases, if the defendant is in detention, or in any case in which the petition contains a demand requiring immediate consideration, such as a request in civil cases for provisional attachment or injunction against dissipation, or for the termination of such a measure, or for an order that execution may occur forthwith, or a request in criminal cases for the detention of the defendant, or for a measure stated in chapters 25 to 28, or for the termination of such a measure. (SFS 1947:616)

Section 6

If an impediment other than the kind referred to in section 3 precludes consideration of the appeal upon the merits, the appeal may be dismissed forthwith by the Supreme Court.

Section 7

If the review petition fails to comply with the regulations in section 4 or is otherwise incomplete, the Supreme Court shall direct the appellant to cure the defect.

If the appellant fails to comply with the directive, the appeal shall be dismissed if the petition is defective in failing to present a distinct demand for a change in the judgment or to state clearly the grounds of the appeal, or if the defect is otherwise so fundamental in character as to render the petition unserviceable as a basis for the proceedings in the Supreme Court.

Section 8

In order to commence preparation of the case, the petition with the papers annexed thereto shall be served upon the appellee with a notice directing him to file a written answer.

If the court of appeals in a civil case has denied a request for provisional attachment, injunction against dissipation or any other security measure, or for an interlocutory decree, or has ordered the termination of such a measure, or in a criminal case has denied a request for a measure stated in chapters 26 to 28, or has ordered the termination of such a measure, the Supreme Court may immediately grant the measure to remain effective until otherwise ordered. If the court of appeals has granted such a measure, or has directed that execution of a judgment may occur forthwith, or has confirmed a lower court order granting such a measure or authorizing immediate execution of a judgment, the Supreme Court may immediately direct that no further step be taken to implement the measure or to execute the order. As to detention or travel prohibition, the Supreme Court may also change the order of the court of appeals without giving the adverse party an opportunity to be heard.

Section 9

Unless in a civil case the appellant's demand for a change in the judgment is consented to, the answer shall respond to the appellant's grounds for his appeal and specify the circumstances upon which the appellee desires to rely.

In the answer the appellee shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. In a civil case, if evidence is specified which was not presented below, the appellee shall state why such evidence was not offered at an earlier stage. The original or a certified copy of any document not previously presented shall be annexed to the answer. The appellee shall also state in the answer whether he desires the adverse party, or, in criminal cases, the injured person or the defendant to appear in person at the main hearing in the Supreme Court. (SFS 1963: 149)

The answer shall be signed personally by the appellee or his attorney or, in criminal cases when the defendant is the appellee, by his defense counsel.

Section 10

The answer with the papers annexed thereto shall be served upon the appellant.

If it is found necessary for the preparation of the case, the Supreme Court may direct a further exchange of writings. The court may also issue detailed regulations as to the exchange of writings and even particularize the issues upon which the parties shall express themselves. However, a party may be directed to file more than one writing only for special cause.

Section 11

If review dispensation is required, after the conclusion of the exchange of writings, the Supreme Court shall determine whether such dispensation shall be granted. For cause, the matter of dispensation may be disposed of, although an exchange of writings has not occurred. Prior to the grant of review dispensation, the issues stated in section 8, paragraph 2, may not be considered.

Section 12

The Supreme Court may dispose of an appeal on the merits without a main hearing if the action was initiated in a court of appeals or, in civil cases, if the appeal petition is consented to or, in criminal cases, if an appeal by the prosecutor is brought only for the benefit of the defendant or an appeal by the defendant is supported by the adverse party.

For the determination of a question not related to the substance of the appeal, a main hearing is not required.

When an appeal, or a certain issue arising therein, is to be decided by the Supreme Court en banc, the en banc determination may take place without a main hearing.

Section 13

In civil cases a party may not assert in the Supreme Court in support of his position a circumstance or evidence not previously presented, unless he makes it appear probable that he was unable to claim the circumstance or evidence at a court below or that on other grounds he had a valid excuse for failing to do so. A set-off defense initially asserted in the Supreme Court may be dismissed unless it can be tried in the proceeding there without inconvenience.

Section 14

If testimony of a witness or an expert, or of a party under truth affirmation was heard at the main hearing in a court below with respect to a particular circumstance, or if a view concerning a certain fact was held during the main hearing in a court below, and the evaluation of such evidence is decisive of the outcome in the Supreme Court, the relevant part of the court of appeals judgment may not be changed by the Supreme Court, except for the benefit of the defendant in a criminal case, unless the court of appeals, even if the evidence was not taken at a main hearing in that court, has changed the relevant portion of the lower court judgment, or extraordinary reasons justify the conclusion that the value of the evidence is other than that attached to it by the appellate court.

Section 15

As to the proceedings in the Supreme Court in other respects, in civil cases, chapter 50, sections 11 to 20, 22, 24, and 25, paragraphs 1 and 2, and in criminal cases, chapter 51, sections 11 to 20, 22, 24, 25, and 31, shall correspondingly apply.

The provisions concerning the vacation and remand of lower court judgments by the courts of appeals, with respect to civil cases, chapter 50, sections 26 to 29, and with respect to criminal cases, chapter 51, sections 26 to 29, shall correspondingly apply to vacation and remand of the judgment below by the Supreme Court.

Section 16

After the Supreme Court has entered a judgment or final order, the files received from the court of appeals and copies of the judgment or order of the Supreme Court shall be returned, the court of appeals file to the appellate court and the lower court file to that court.

Chapter 56

Limited Appeal

Section 1

A person desiring to take a limited appeal from a court of appeals order shall submit a limited appeal petition to the appellate court within four weeks of the pronouncement of the challenged order; however, as to an order rendered in the course of the proceedings, but not at a hearing session, the period for appeal shall be computed from the date of the service of the order upon the complainant. No time limit shall apply to an appeal from an order requiring a person to be placed or kept in detention.

The obligation to give a formal notice of exception to orders of the kind referred to in chapter 49, section 3, or section 4, paragraph 1, 1., 2., 3., or 7., is prescribed in chapter 54, section 3.

Section 2

Within the period stated in section 1, the complainant shall deposit with the court of appeals the prescribed appeal fee, and the stipulated sum as security for the adverse party's costs; if neither sum or only the sum stipulated as se-

curity for costs is deposited, the appellant shall file an affidavit of poverty of the kind referred to in chapter 54, section 18, prior to the expiration of the period referred to above.

If the complainant has timely filed an affidavit of a competent authority concerning the complainant's poverty, but the content of the affidavit does not conform to that specified in the said section, the court of appeals shall direct the complainant to file an affidavit of the kind specified with the consequence that if a proper affidavit is not available to the appellate court when it re-examines the question whether the appeal has been properly pursued, the appeal been sought is also effective to cure the defect.

Section 3

If it is found that a limited appeal is not brought in the prescribed form or in due time, the appeal shall be dismissed by the court of appeals.

Section 4

In the limited appeal petition the complainant shall specify:

1. the order appealed from;
2. the grounds for the limited appeal;
3. the change in the order demanded by the complainant.

If the complainant requests review dispensation pursuant to chapter 54, section 10, 1., he should specify in the petition the circumstances he relied upon in support thereof.

In the petition, the complainant shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. The original or a certified copy of any document not previously presented shall be annexed to the petition. (SFS 1963:149)

The petition shall be signed by the complainant or his attorney in his own hand.

Section 5

If the appeal is not dismissed, the court of appeals shall transmit without delay to the Supreme Court the limited appeal petition with the papers annexed thereto, and the files of the lower and appellate courts or certified copies thereof, to the extent related to the challanged matter.

Section 6

If an impediment other than the kind referred to in section 3 precludes consideration of the appeal upon the merits, the appeal may be dismissed forthwith by the Supreme Court.

Section 7

If the limited appeal petition fails to comply with the regulations in section 4 or is otherwise incomplete, the Supreme Court shall direct the complainant to cure the defect.

If the complainant fails to comply with the directive, the limited appeal shall be dismissed if the petition is defective in failing to present a distinct demand for a change in the order or to state clearly the grounds of appeal, or if the defect is otherwise so fundamental in character as to render the petition unserviceable as a basis for the proceedings in the Supreme Court.

Section 8

If it is found that the adverse party should be given an opportunity to respond, the petition with the papers annexed thereto shall be served upon him with a notice directing him to file a written answer.

Section 9

The answer shall respond to the complainant's grounds for his appeal and specify the circumstances upon which the respondent desires to rely.

The respondent shall specify the evidence upon which he desires to rely and indicate what he intends to prove by each specified item. The original or a cer-

tified copy of any document not previously presented shall be annexed to the answer. (SFS 1963:149)

The answer shall be signed personally by the respondent or his attorney or, in criminal cases, when the defendant is the respondent, by his defense counsel.

Section 10

After an answer is filed, if the Supreme Court finds that a further exchange of writings is necessary, it may so direct. The Court may also issue detailed regulations as to the exchange of writings and even particularize the issues upon which the parties shall express themselves. However, a party may be directed to file more than one writing only for special cause.

Section 11

If review dispensation is required, and the adverse party has been given an opportunity to respond, the Supreme Court shall determine, after the conclusion of the exchange of writings, whether such dispensation shall be granted. For cause, the matter of dispensation may be disposed of, although an exchange of writings has not occurred.

Section 12

As to the proceedings in the Supreme Court in other respects, the provisions in chapter 52, sections 10 to 12, shall correspondingly apply.

Section 13

After the Supreme Court has entered a final order, the files received from the court of appeals and copies of the order of the Supreme Court shall be returned, the court of appeals file to the appellate court and the lower court file to that court.

Section 14

The provisions in this chapter shall correspondingly apply to limited appeals from decisions in accordance with chapter 8, section 8; in such appeals, however, the following diverging provisions shall govern: (SFS 1963:149).

1. A person desiring to appeal shall file a limited appeal petition with the Supreme Court within four weeks of service of the decision upon him. The provisions in section 2 do not apply.

2. Unless special reasons indicate otherwise, the complainant and, when the appeal is brought by the Attorney General, the adverse party as well, shall be orally examined before the Supreme Court.

3. The organ of the Association of Advocates that rendered the decision appealed from shall be given an opportunity to file a written answer and, when a party is orally examined, to express its position on the matters raised in the examination. (SFS 1963:149)

Chapter 57

ACTIONS COMMENCED IN THE SUPREME COURT

Section 1

As to an action that is to be instituted in the Supreme Court as a court of first instance, the provisions in chapter 53 shall correspondingly apply.

Part 7

EXTRAORDINARY REMEDIES

Chapter 58

RELIEF FOR SUBSTANTIVE DEFECTS AND RESTORATION OF EXPIRED TIME

Section 1

After a judgment in a civil case has become conclusive, relief for a substantive defect in the judgment (*resning*) may be granted for the benefit of any of the parties:

1. if a member of the court, a civil servant employed at the court, an attorney, or a legal representative rendered himself liable for criminal conduct with respect to the litigation, and such conduct can be assumed to have affected the outcome;

2. if a document presented as proof was forged, or if a party examined under truth affirmation, or a witness, an expert, or an interpreter gave false testimony, and the document or testimony can be assumed to have affected the outcome;

3. if a circumstance or evidence that was not presented previously is asserted, and presentation of the matter asserted probably would have led to a different outcome; or

4. if the application of law forming the basis of the judgment is obviously inconsistent with the governing legislative provision.

Relief for a substantive defect may not be granted on the basis stated in 3., unless the party makes it appear probable that he was unable to claim the circumstance or evidence in the court that pronounced the judgment or on appeal therefrom, or that on other grounds he had a valid excuse for failing to do so.

Section 2

After a judgment in a criminal case has become conclusive, relief for a substantive defect may be granted for the benefit of the defendant:

1. if a member of the court, a civil servant employed at the court, the prosecutor, an attorney, a legal representative, or a defense counsel rendered himself liable for criminal conduct with respect to the case, and such conduct can be assumed to have affected the outcome;

2. if a document presented as proof was forged, or a witness, an expert, or an interpreter gave false testimony, and the document or testimony can be assumed to have affected the outcome;

3. if a circumstance or evidence that was not presented previously is asserted, and presentation of the matter asserted probably would have led to the defendant's acquittal or to application of a sentencing provision milder than that applied; relief may also be granted if, in view of the new matter and other circumstances, extraordinary cause warrants a new trial on the question whether the defendant committed the crime for which he was convicted;

4. if the application of law forming the basis of the judgment is obviously inconsistent with the governing legislative provision.

Section 3

After a judgment in a criminal case has become conclusive, relief for a substantive defect may be granted to the detriment of the defendant:

1. if a condition of the kind referred to in section 2, 1. or 2., existed, and the condition can be assumed to have contributed to the defendant's acquittal, or to application of a sentencing provision fundamentally milder than the one that should have been applied; or

2. if the offense is punishable by imprisonment for a term exceeding one year, and a circumstance or evidence that was not presented previously is asserted, and presentation of the matter asserted probably would have led to conviction of the defendant or to application of a sentencing provision fundamentally more severe than the one applied. (SFS 1964:166)

Relief for a substantive defect may not be granted on the basis stated in 2., unless the party makes it appear probable that he was unable to claim the circumstance or evidence in the court that pronounced the judgment or on appeal therefrom, or that on other grounds he had a valid excuse for failing to do so.

Section 4

A person desiring to apply for relief for a substantive defect shall file a written application therefor with the Supreme Court.

Applications in civil cases based upon a situation of the kind referred to in section 1, paragraph 1, 1., 2., or 3., and applications in criminal cases to the detriment of the defendant, shall be submitted within one year of the time when the situation justifying the application became known to the applicant; if the application is based upon the criminal activity of another person, the period may be computed from the time when the judgment in question became

conclusive. In civil cases, relief based on a situation of the kind referred to in section 1, paragraph 1, 4., shall be sought within six months of the time when the judgment became conclusive.

Section 5

In the application for relief for a substantive defect the applicant shall specify:

1. the challenged judgment;
2. the legal basis of, and supporting reasons for, the application; and
3. the evidence upon which the applicant desires to rely, and what he intends to prove by each specified item.

If the application is based upon matters stated in section 1, paragraph 1, 3., or section 3, paragraph 1, 2., the applicant shall state why the circumstance or evidence was not presented in the proceedings.

The application shall be signed by the applicant or his attorney in his own hand.

The original or a certified copy of any document asserted by the applicant shall be annexed to the application.

Section 6

If an application for relief for a substantive defect is not dismissed, the application, with the papers annexed thereto, shall be served upon the adverse party with a notice directing him to file a written answer. If the application is found to be without merit, however, it may be dismissed forthwith.

The provisions in chapter 56, sections 9, 10, and 12, concerning limited appeals to the Supreme Court shall correspondingly apply to applications for relief for substantive defects.

For cause, the Supreme Court may direct that, until otherwise ordered, no further step may be taken to execute the judgment.

Section 7

If an application for relief for a substantive defect is granted, the Supreme Court shall direct that the case be taken up anew by the court in which it was last pending; however, when such relief is granted in a civil case, or in a criminal case for the benefit of the defendant and the matter is found to be plain, the Supreme Court may change the judgment immediately.

If the applicant fails to appear at the hearing for readjudication of the action, the proceedings shall be dismissed; if the adverse party fails to appear, the action may nonetheless be retried and determined. The notices to appear served on the parties shall contain a reminder of the consequences of failure to appear. However, the provisions of this paragraph are not applicable to prosecutors.

Section 8

If an application for relief for a substantive defect is dismissed or denied, the Supreme Court may order the applicant to compensate the adverse party or if the prosecutor is the adversary, the Crown for costs incurred in the extraordinary remedy proceeding; if the relief was sought by the prosecutor, the costs may be paid out of public funds. If the application is granted, the issue of costs shall be determined in conjunction with the disposition of case after its reinstatement.

Section 9

If a judgment in a criminal case also encompasses a matter other than criminal liability, relief for a substantive defect as to that part of the case shall be governed by the provisions for relief in civil cases; however, as an exception to this rule, if relief is granted on the question of criminal liability, relief may also be granted at the same time on any other aspect of the case.

Section 10

The provisions in sections 1 to 9 concerning judgments shall correspondingly apply to court orders.

Section 11

If the time has expired for an appeal from a judgment or an order, or for an application for reopening or reinstatement, and the person who failed to act within the period specified by statute was prevented from doing so by a circumstance that constitues legal excuse, upon an application made by him, the expired time may be restored, provided that the legal excuse was such that the person could not notify the court thereof prior to the expiration of the specified period.

Section 12

A person who desires to apply for the restoration of expired time shall file a written application therefor with the Supreme Court within three weeks of the termination of the legal excuse and, at the latest, within one year of the expiration of the time period.

As to such applications, the provisions in sections 5, 6, and 8 shall correspondingly apply.

CHAPTER 59

RELIEF FOR GRAVE PROCEDURAL ERRORS

Section 1

A judgment that has become conclusive shall be vacated for grave procedural errors on the limited appeal petition of the person whose legal right the judgment concerns:

1. if the action was adjudicated on the merits, although a procedural hindrance existed that a higher court is obliged to notice on appeal on its own motion;

2. if the court was improperly constituted;

3. if the judgment was directed against someone who was not properly summoned and did not appear in the proceedings, or if the substantive rights of a person who was not a party to the action are adversely affected by the judgment;

4. if the judgment is so vague or incomplete that the determination on the merits cannot be ascertained therefrom; or

5. if another grave procedural error occurred in the course of the proceeding that can be assumed to have affected the outcome of the action.

Section 2

A person desiring to take a limited appeal for relief from a grave procedural error shall file a limited appeal petition with the court to which an appeal from the judgment should have been brought or, if the judgment was not reviewable, with the Supreme Court.

If based on a circumstance of the kind referred to in section 1, 1., 2., or 5., the limited appeal shall be brought within six months after the judgement became conclusive and, if based on a circumstance of the kind referred to in section 1, 3., within six months of the time when the complainant learned of the judgment. If the complainant knew of the judgment before it became conclusive, the time shall be computed from the day when the judgment became conclusive.

Section 3

As to limited appeals for relief from grave procedural errors, and further appeals from court of appeals orders on such matters, the provisions in chapters 52, 54 and 56 shall correspondingly apply; however, conerning limited appeals for such relief that are to be brought directly to the Supreme Court, the provisions for deposit of an appeal fee and a sum as security for costs, and for review dispensation shall not govern.

For cause, the court may direct that, until otherwise ordered, no further step be taken to execute the judgment in question.

If the judgment is vacated, except when the decision is grounded upon the court's lack of competence or upon another basis for concluding that the court should not have entertained the case on the merits, the vacation order shall direct that new proceedings occur in the court that rendered the judgment from which relief was granted.

Section 4

As to compensation for expenses, the provisions on litigation costs shall apply.

The provisions in sections 1 to 3 concerning judgments shall correspondingly apply to court orders.

Section 5

An order of summary punishment by fine consented to by the suspect shall be set aside upon a limited appeal:

1. if the consent cannot be considered a valid voluntary declaration of intent by the suspect;

2. if an error occurred during the processing of the matter of such character that the order should be considered invalid; or

3. if the order is otherwise inconsistent with the governing legislative provision. (SFS 1959:257)

If an order for summary punishment by fine is set aside, a more severe punishment for the same criminal act may not thereafter be imposed. (SFS 1959:257)

Section 6

A person who desires to attack an order of summary punishment by fine shall file a petition with the lower court that had competence to entertain a prosecution for the offense. (SFS 1966:249)

The petition shall be filed within one year after a step was taken against the suspect to execute the order. As to such petitions, the provisions in chapter 52, sections 2, 3 and 5 to 12 shall correspondingly apply. Any provision relating to a court of appeals, however, shall apply to the lower court. (SFS 1966:249)

SCANDINAVIAN CRIMINAL CODES—QUESTIONS NOS. 1–20

Appendix G

FINES PROPORTIONAL TO THE INCOME OF THE OFFENDER IN THE NORDIC COUNTRIES

The Criminal Codes of all the Nordic Countries (Denmark,[1] Finland,[2] Norway,[3] and Sweden)[4] have provisions on fines which make it mandatory that the financial circumstances of the accused be considered before the final amount of a fine is decided. The alternative to paying a fine is to serve time in jail. In practice, the time to be served is always decided first and then the amount to be paid per day is decided after an evaluation of the total financial circumstances of the offender. The express purpose of these provisions is to make fines equally severe for everybody, just as the term of imprisonment is the same for everybody regardless of his financial situation.

Fine settled by the day apply only to fines for violations of the criminal (penal) codes, and are not applied widely for other infractions of the statutory laws, partly because they are both cumbersome and expensive to administer. For instance, violations of the traffic laws, such as parking violations and minor cases of speeding, are punished by small fines of the same amount for everybody.

SINGAPORE

1. The Penal Code of Singapore consists of 24 chapters, most of which deal with separate groups of offenses such as offenses against the State, offenses against the public tranquility, etc. Sentences are prescribed as each offense is

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[1] As to the Swedish criminal sanctions, see note after ch. 29, sec. 2. *The Danish Criminal Code.* Secs. 50–54. Copenhagen, G.E.C. Gad, 1958.

[2] Finnish Strafflag No. 39 of December 19, 1889, as amended. Secs. 4–5. *in Finlands Lag.* Helsingfors, Finlands Juristforbund, 1969, p. 1014. *See also* Jaakko Uotila, *editor. The Financial Legal System.* Helsinki, Union of Finnish Lawyers Publishing Company Ltd., 1966, p. 243.

[3] *The Norwegian Penal Code.* Secs. 27–28. So. Hackensack, N.J., Rothman, 1961.

[4] *The Penal Code of Sweden.* Chapter 25. Stockholm, The Ministry of Justice, 1965.

described. The Code makes no distinction between felonies and misdemeanors. However, minor offenses are dealt with by the Minor Offenses Act first promulgated in 1906.

2. The Code does not leave blank numbers for future sections. However, sections inserted by amending legislation have been numbered 1A, 1B, 1C, and so on according to the number of the preceding section.

3. While the Singapore Penal Code nowhere lists the different kinds of culpability involved, an analysis of the various sections shows that ten different kinds are involved. These are:

(1) intentionally;
(2) knowingly;
(3) voluntarily;
(4) negligently;
(5) fraudulently;
(6) dishonestly;
(7) corruptly;
(8) wantonly;
(9) malignantly;
(10) maliciously.

Where the particular requirement for culpability is not specified in the offense, intent is required.

It should be noted that apart from liability for the actual commission of an offense, liability for abetment is also included.

4. Causation is defined only in connection with "voluntarily," as below:

Section 39.—A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

5. Singapore has an insanity defense to criminal charges:

Section 84.—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

It will be noted that "unsoundness of mind" is not defined or qualified, or is the term "incapable" explained.

According to the Singapore Criminal Procedure Code, a person raising insanity as a defense will have the fact of such unsoundness of mind investigated. The person may be remanded for a period not exceeding one month, to be detained for observation in a mental hospital. During that period, the medical superintendent (a medical officer in charge of mental hospital), will keep him under observation and before the expiry of the period will certify to the court his opinion as to the state of mind of the person; he may also ask for a further remand up to two months.

If the medical superintendent certifies that the person is of unsound mind and incapable of making his defense, the inquiry or trial is to be postponed. If the offense charged is a bailable one, the court may at its discretion release him on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and that he will appear before the court when required. If the offense is not a bailable one it is at the discretion of the Minister of Justice to order the accused to be confined in a mental hospital or other suitable place.

If the person is of unsound mind, therefore, the trial cannot be held, and must be postponed until such time as he is capable of making a defense. However, if the accused is found to be of sound mind at the time of the inquiry, but raises the defense of unsound mind at the time when the act was committed, he can be sent for trial.

If a person is acquitted upon the ground of mental disorder, the finding must state specifically whether he committed the act or not. When the finding states that the accused person committed the act, the Minister may order him to be confined in a mental hospital, prison or other suitable place of safe custody.

6. The cases in which intoxication may constitute a defense to a criminal charge are stated as below:

Section 85.—(1) Save as provided in this section and in section 86, intoxication shall not constitute a defense to any criminal charge. (2) Intoxication

shall be a defense to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

j)b) The person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.

Section 86.—(1) Where the defense under section 85 is established, then in a case falling under paragraph (a) of subsection (2) thereof the accused person shall be acquitted, and in a case falling under paragraph (b) the provisions of section 84 of this Code and of sections 304 and 305 of the Criminal Procedure Code shall apply.

(2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(3) For the purposes of this and the preceding section "intoxication" shall be deemed to include a state produced by narcotics or drugs.

Sections 304 and 305 of the Criminal Procedure Code, cited in the above paragraph, are those provisions described under item 5 of the questionnaire, regarding the finding when the person is acquitted on the ground of mental disorder. That is to say, in the case of intoxication also, such a finding must state whether he committed the act or not (Section 304), and whenever the finding states that he committed the alleged act, the Minister may order his confinement in a mental hospital, prison or other suitable place (Section 305).

7. Regarding the right of private defense, the Penal Code states, in its Section 96, that "nothing is an offence which is done in the exercise of the right of private defence." Section 97 deals with both self-defense and the defense of others.

Section 97.—Every person has a right, subject to the restrictions contained in section 99, to defend—

(a) his own body, and the body of any other person, against any offence affecting the human body;

(b) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.

Section 98 maintains the right of private defense against the act of a person of unsound mind, or an intoxicated person, or any other, for whom it would not be an offense. Section 99 restricts the right of private defense as not existing against an act which does not reasonably cause apprehension of death or grievous hurt, by a public servant acting in good faith under color of his office, or done under his direction, or in cases where there is time to have recourse to the protection of public authorities. It is also laid down that the right does not in any case extend to the inflicting of more harm than is necessary for the purpose of defense.

Section 100 gives descriptions of offenses which may occasion the right of private defense to extend to the voluntary causing of death or of any other harm to the assailant. Section 101 states when such a right may extend only to causing any harm other than death. Sections 102 through 106 contain provisions on the defense of the body and the defense of property.

The Code thus covers the same ground covered by the U.S. Draft Code in its sections on self-defense, defense of others, use of force in defense of premises and property, and limits on the use of force. The Singapore Code has no provisions on the use of force by persons with parental, custodial or similar responsibilities.

8. The Singapore Penal Code classifies offenses into various categories: offenses against the State; offenses relating to the armed forces; offenses against the public tranquility, and so on. This is not a classification for purposes of sentencing, but by nature or subject-matter only.

9. Offenders are liable to one of five punishments:

(1) death;

(2) imprisonment;

(3) forfeiture of property;

(4) fine;

(5) caning.

The Criminal Procedure Code has provisions for requiring security for keeping the peace. This is in cases where a person accused of certain crimes, e.g. rioting, assault, assembling armed men, has been convicted of the offense, and the court is of the opinion that it is necessary to require him to execute a bond for keeping the peace. This may be in lieu of a sentence, or in addition to the sentence. If the person is, at that time, sentenced to or is undergoing a sentence of imprisonment, the period for which the security is required is to begin on the expiration of that sentence. Also, when a person who has been convicted of an offense punishable with imprisonment for a term of two years or upwards is convicted of any other offense punishable likewise, he may be subject to the supervision of the police for a period of not more than two years, beginning immediately after the expiration of the sentence passed on him for the last offense. Police supervision involves notifying changes of residence and absences from residence of more than forty-eight hours, and reporting to the police at regular intervals.

Regarding the suspension of imposition of sentences, the Criminal Procedure Code provides as follows:

Section 203.—Sentence of death shall not be pronounced on or recorded against a person convicted of an offense if it appears to the court that at the time when the offence was committed he was under the age of eighteen years but instead of that the court shall sentence him to be detained during the President's pleasure, and, if so sentenced, he shall be liable to be detained in such place and under such conditions as the President directs, and while so detained shall be deemed to be in legal custody.

Section 204.—(1) Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before whom a woman is so convicted thinks fit, the question whether or not the woman is pregnant shall, before sentence is passed on her, be determined by the court.

(2) If the woman is found to be pregnant, a sentence of imprisonment for life shall be passed on her.

(3) If the woman is found not to be pregnant, she may appeal under the Supreme Court of Judicature Act to the Court of Criminal Appeal against such finding, and that Court, if satisfied that for any reason the finding should be set aside, shall squash the sentence passed on her, and instead of it pass on her a sentence of imprisonment for life.

As for suspension of execution of sentence, there is the following provision:

Section 227.—(1) When any person has been sentenced to punishment for an offence, the President, acting in accordance with the provisions of section 8 of the Republic of Singapore Independence Act, 1965, may at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the President for the suspension or remission of a sentence, the President may require the presiding Judge of the court before or by which the conviction was had to state his opinion as to whether the application should be granted or refused and the judge shall state his opinion accordingly.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the President, not fulfilled the President may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.

The whole question of probation is covered by the Probation of Offenders Act of Singapore. Section 5 of this Act reads thus:

Section 5.—(1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years. . . .

Probation is thus a form of suspension of sentence.

A person released under probation is thus under the supervision of probation officers.

Determinate sentences of imprisonment are provided for.

Comparing sentences provided in the Singapore Penal Code for those offenses termed "Contempts of the Lawful Authority of Public Servants" with those in the U.S. Draft Code for offenses termed "Criminal Contempt and Related Offenses," it would seem that Singapore imposes heavier penalties for the same type of offense.

Criminal contempt under the U.S. Code is treated as a Class B misdemeanor, except that the defendant may be sentenced to a term of imprisonment of no more than six months, and may be sentenced to pay a fine in any amount deemed just, if the criminal contempt is disobedience of or resistance to a court's lawful temporary restraining order, or preliminary or final injunction, or other final order other than for the payment of money. Under the Singapore Code, disobedience in the form of non-attendance according to an order from a public servant carries a penalty of up to six months' imprisonment, fine of up to one thousand dollars, or both. Omission to produce a document when legally bound to do so is punishable with the same penalties, as is omission to furnish notice or information to a public servant when legally bound to do so. The furnishing of false information is punishable with imprisonment for a term which may extend to two years, or fine, or both. Other offenses of the same nature, e.g. refusing oath when required to take it, refusing to answer a public servant authorized to question, refusing to sign a statement when required to do so by a legally competent public servant, etc., carry penalties ranging from imprisonment of up to three years, fine of up to one thousand dollars, or both.

There are no mandatory minimum prison sentences under the Singapore Penal Code.

There is no provision in the Singapore Code requiring judges to give reasons in writing for sentences imposed.

Sentences are subject to review on appeal by a higher court. The appellate court may raise as well as lower the sentence.

The government may appeal a sentence as can the defendant.

Section 251 of the Criminal Procedure Code states that no judgment, sentence or order is to be reversed or set aside unless it is shown to the satisfaction of the High Court that the judgment, acquittal, sentence or order was either wrong in law or against the weight of the evidence, or in the case of a sentence, manifestly excessive or inadequate in the circumstances of the case.

On the question of multiple offenses, it is provided as follows, by Section 17 of the Criminal Procedure Code:

When a person is convicted at one trial of any two or more distinct offences the court may sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict, such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court directs or to run concurrently if the court so directs, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of one single offence, to send the offender before a higher court:

Provided that if the case is tried by a District Court or Magistrate's Court the aggregate punishment shall not exceed twice the amount of punishment which such Court in the exercise of its ordinary jurisdiction is competent to inflict.

Regarding the collection of fines, the Criminal Procedure Code states:

Section 214.—Where any fine is imposed under the authority of any law for the time being in force then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply:—

(a) where no sum is expressed to which the fine may extend, the amount to which the offender is liable is unlimited but shall not be excessive;

(b) in every case of an offence in which the offender is sentenced to pay a fine the court passing the sentence may at any time before the fine has been paid in full at its discretion, do all or any of the following things:—

(i) allow time for the payment of the fine and grant extensions of the time so allowed;

(ii) direct payment of the fine to be made by installments;

Provided that before allowing time for payment of a fine or directing payment of a fine to be made by instalments the court may require the offender to execute a bond with or without sureties conditioned upon payment of the fine or of the instalments as the case may be on the day or days directed and in the event of the fine or any instalment not being paid as ordered the whole of the fine remaining unpaid shall become due and payable and the court may issue a warrant for the arrest of the offender;

(iii) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;

(iv) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under commutation of a sentence;

(v) direct that such person be searched, and that any money found on him when so searched or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of such fine, the surplus, if any, being returned to him:

Provided that such money shall not be so applied if the court is satisfied that the money does not belong to the person on whom it was found.

Provision is also made for the term the offender may be imprisoned in default of payment of a fine, according to the gravity of the offense.

10. Mistake of fact is a defense under the Penal Code of Singapore, under the following circumstances:

Section 76.—Nothing is an offence which is done by a person who is, or who, by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be bound by law to do it.

Section 79.—Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

Mistake of law can be a defense only in the following circumstances:

Section 78.—Nothing which is done in pursuance of, or which is warranted by the judgment or order of a court of justice, if done while the judgment or order remains in force, is an offence, notwithstanding the court may have had no jurisdiction to pass the judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.

The U.S. Draft Code in its Section 303 lays down the general principle that mistake of facts which would constitute an affirmative defense is not a defense, except as expressly provided otherwise. Singapore law, on the other hand, specifically states the two cases in which such a defense would be admissible. The Singapore Code's Section 79 is similar to the Draft Code's Section 304 in that they both admit of mistakes which would negate the culpability. The Singapore Code only admits mistake of fact, however, while the U.S. Code states "mistaken about a matter of fact or law." Mistake of law under the Singapore Code is possible only in acts done pursuant to a judgment or order of a court of justice. The U.S. Code admits mistake of law if it negates the kind of culpability required for commission of the offense. It also allows the defense of mistake of law under a larger area of circumstances than the Singapore Code does.

12. On the question of extraterritorial jurisdiction, the Singapore Penal Code states merely as below:

Section 3.—Any person liable by law to be tried for an offence committed beyond the limits of Singapore, shall be dealt with according to the provisions of this Code for any act committed beyond Singapore, in the same manner as if such act had been committed within Singapore.

13. Criminal conspiracy is handled first by defining the offense of criminal conspiracy, and then prescribing the punishment therefor.

Section 120A.—When two or more persons agree to do, or cause to be done—

(a) an illegal act; or

(b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Section 120B.—(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death or imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months, or with fine, or with both.

16. The following two sections are the only ones in the Singapore Penal Code on the collection of men, arms, or ammunition, with the intention of waging war against the Government, i.e. para-military activities:

Section 122.—Whoever collects men, arms, or ammunition or otherwise prepares to wage war, with the intention of either waging or being prepared to wage war against the Government, shall be punished with imprisonment for life or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Section 123.—Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

17. The only offense pertaining to the taking of drugs is described in the following:

Section 328.—Whoever administers to, or causes to be taken by, any person, any poison or any stupefying, intoxicating or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of a offence, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

It will be noted that this pertains only to the administration of drugs, and does not deal with possession or trafficking. It also does not attempt to identify the poisons or drugs.

Illegal abortion is an offense under the Singapore Penal Code, i.e. abortion other than according to the provisions of the Abortion Act of 1969. Sections 312 through 318 provide for offenses relating to illegal abortions.

Gambling is dealt with outside the Penal Code, by means of the Betting Act of 1960 and the Common Gaming Houses Act of 1961. These acts make illegal betting-houses, betting in public places, bookmaking, common gaming houses, public gaming, and public lotteries.

Obscenity is dealt with in the following three sections:

Section 292.—Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces, or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure, or any other obscene object whatsoever; or

(b) imports, exports, or conveys, any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed, or publicly exhibited, or in any manner put into circulation; or

(c) takes part in or receives profits from, any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited, or in any manner put into circulation; or

(d) advertises, or makes known by any means whatsoever, that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person:

(e) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment for a term which may extend to three months, or with fine, or with both.

Exception: This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes, or any representation sculptured, engraved, painted or otherwise represented on or in

any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Section 293.—Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.

Section 294.—Whoever, to the annoyance of others—

(a) does any obscene act in any public place: or

(b) sings, recites or utters any obscene song, ballad or words in or near any public place,

shall be punished with imprisonment for a term which may extend to three months, or with fine, or with both.

In Singapore, offenses involving explosive substances are dealt with under the Explosive Substances Act and the Corrosive and Explosive Substances and Offensive Weapons Act. The first act penalizes the unlawful and malicious causing of an explosion likely to endanger life or cause serious injury to property, by means of an explosive substance, with fine, imprisonment up to ten years, caning, or any two of these punishments. Attempts and conspiracy to do so, and the possession of any explosive substance with such intent, is punishable with the same penalties. Making or possessing explosives under suspicious circumstances carries a penalty of fine, up to seven years imprisonment, caning, or any two of these penalties.

The second act penalizes unlawful possession of a corrosive or explosive substance for the purpose of causing hurt, using such a substance to cause hurt, and carrying offensive weapons without lawful authority or lawful purpose, with penalties for the first type of offense of imprisonment up to ten years and caning, for the second type imprisonment for life and caning, for the third type imprisonment up to three years and caning.

Firearms and ammunition are governed by the Arms and Explosives Ordinance and the Firearms and Ammunition (Unlawful Possession) Act. Unlawful possession, i.e. contrary to the provisions of the Arms and Explosives Ordinance, is punishable with up to ten years' imprisonment, fine up to ten thousand dollars, or both.

The emphasis in Singapore law is thus on unlawful possession, next on unlawful use of explosive substances. The wording of the law is rather broad in scope, unlike the specific nature of the offenses in the U.S. Draft Code, e.g. supplying firearms, etc. to a prohibited person, possessing explosives and destructive devices in federal government buildings, etc. Penalties are within an approximate range, with the exception that under Singapore law, the unlawful and malicious use of explosives to cause an explosion likely to cause hurt is punishable with imprisonment or fine or caning, regardless of whether any hurt has actually been caused or not.

19. Singapore provides for capital punishment. Death is the punishment for offenses against the State such as waging war against the government (with life imprisonment being the alternative), and offenses against the President's person (plus fine). Capital punishment is also prescribed for murder, and for attempts at murder made by a person under sentence of life imprisonment, if hurt is caused. Separate proceedings are not held to determine sentence in a capital case.

20. On the matter of multiple prosecutions and trials, the Singapore Criminal Procedure Code provides as below regarding previous acquittals and convictions:

Section 229.—(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 165 or for which he might have been convicted under section 166 or 167.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection (1) of section 163.

(3) A person convicted of any offence constituted by any act causing consequences which together with that act constituted a different offence from that

of which he was convicted may be afterwards tried for that different offence if the consequences had not happened or were not known to the court to have happened at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may notwithstanding the acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

A separate section provides for prosecution of multiple related offenses:

Section 163.—(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of those offences.

(3) If several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined or for any offence constituted by any one or more of such acts.

In general, these three sections of the Singapore Code cover the same ground as do Sections 703, 704 and 705 of the U.S. Draft Code. Section 3 of the Singapore Code provides that all offences under any other law are to be tried according to the same provisions as apply to offenses under the Penal Code.

Section 2 states that every person shall be liable to punishment under this Code *and not otherwise* for every act of omission contrary to the provisions thereof. Sheridan's comment is that this is in practice interpreted to mean criminal liability under the Code, and not otherwise, in respect of acts against the Code.[1] The Code has no provision for cases when former prosecution is invalid or fraudulently procured, other than that implied by the words "by a court of competent jurisdiction" in Section 229 above.

Somalia

The Somali Criminal Code was approved by Legislative Decree No. 5 of December 16, 1962, and entered into force on April 3, 1964. Although based on the Italian Penal Code, the Somali Code was, in the process of its preparation, subject to the influence of Islamic and Somali customary law in order to fit the needs of the Somali nation, which was under Italian and British administration prior to achieving independence in 1960.

Two unofficial scholarly sources on the text of the Somali Penal Code were used in the preparation of this report. They were published with comments and annotations in 1967[2] and 1971,[3] respectively. References to articles always refer to the 1967 edition.

QUESTION 1

The Somali Criminal Code is divided into three books: Book I, Offenses in general; Book II, Crimes in particular; and Book III, Contraventions in particular. The books are divided into parts, which in turn are subdivided into chapters, sections and articles.

The classification of offenses defined as crimes and contraventions is based on the nature of the right or interest which has been injured or threatened by the criminal act.

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[1] L. A. Sheridan, *The British Commonwealth: The Development of its Laws and Constitutions*, Vol. 9, London: Stevens & Sons, 1961, p. 193.

[2] Angeloni, Renato, *Codice Penale Somato—The Somali Penal Code*, [Italian and English Text] (Milano: Giuffre Editore, 1967), pp. 1–331.

[3] Ganzglass, Martin R., *The Penal Code of the Somali Democratic Republic* (New Brunswick: Rutgers University Press, 1971), pp. XVII–XXI and 1–644.

QUESTION 2

The Code contains 3 books, 25 parts, 46 chapters, 14 sections, and 565 articles. The numbering system runs consecutively from article 1 to article 565. The Code does not leave any blank numbers for future statutes.

QUESTION 3

In regard to culpability, the Somali Criminal Code requires objective and subjective elements for the existence of an offense. The subjective, also known as mental, or psychological, elements, consist of (a) knowingly, (b) intentionally, (c) preterintentionally, and (d) negligently committing or omitting an act (Articles 23 and 24).

A crime is committed (a) with criminal intent when the result is foreseen and desired, (b) preterintentionally, or beyond intent, when the result is more serious than that desired by the offender, and (c) with negligence, or against the intent of the offender, when the event is not desired and is due to imprudence, lack of skill, or non-observance of laws and regulations (Articles 24, 434, 441 and 513).

In regard to contraventions, that is, simple offenses, the offender has only to act (a) knowingly, and (b) wilfully, whether the act is done with criminal intent or by negligence (Article 23).

The distinction between crimes and contraventions is based on the different nature of the punishment prescribed by the code (Article 15). The state of mind of the offender is used to determine the guilt of innocence, the degree of guilt and the sentence (Articles 23 and 24).

Persons under the age of fourteen are not criminally liable based on the assumption that they are not capable of understanding or of having volition. Persons under the age of eighteen years are liable if the prosecutor proves that they had the capacity of understanding and volition. Should this be the case, then punishment must be reduced (Articles 59 and 60).

Acts committed through accident or force majeure, that is, acts of God, are not punishable (Article 26). The same rule applies when irresistible physical compulsion has been applied on the offender (Article 27).

QUESTION 4

In regard to causal connection, the Code requires that the harmful and dangerous event must be a consequence of the offender's act or omission. Failure to prevent the occurrence of an event is considered equivalent to causing it if there is a legal duty to prevent that event from occurring (Article 20).

The Code distinguishes between (a) preexisting causes, those that exist before the event occurs; (b) simultaneous causes, those which occur at the same time as the event; and (c) supervening causes, those that occur after the event. The concurrence of preexisting, simultaneous and supervening causes does not exclude the causal relationship. The chain of causality will, however, be broken in the case of supervening causes if such causes would have caused the event by themselves (Articles 13–21).

QUESTION 5

In cases of total mental deficiency, the Somali Criminal Code states that persons who, at the time of committing a criminal act, were infirm, so as to preclude the capacity of understanding and volition, shall not be liable. According to judicial practice the courts require proof by medical expert opinion, in which case the accused is sent to a mental hospital for observation and examination before any sentence is passed (Article 50).

Deaf and dumb persons who lack the capacity of understanding and volition due to their infirmity are not criminally liable (Article 58).

QUESTION 6

Chronic intoxication from alcohol or narcotic drugs is considered a stage of total mental deficiency and is treated like insanity, which precludes criminal liability (Article 57).

Partial mental deficiency involving diminished capacity of understanding and volition does not preclude liability, but punishment is reduced (Article 51).

This rule is also applicable to cases involving chronic intoxication from alcohol and narcotic drugs and to deaf and dumb persons (Articles 57 and 58).

In cases involving total mental deficiency, total chronic intoxication from alcohol or narcotic drugs as well as total incapacity of deaf and dumb persons, the accused persons are acquitted, but they are automatically presumed to be dangerous to society. Consequently, security measures are imposed upon them by the court and they are committed to a lunatic asylum for treatment.

The period of mandatory commitment to a lunatic asylum is limited to (1) c not less than two years provided that the maximum penalty prescribed by law is greater than two but less than ten years; (2) not less than five years where the term of imprisonment prescribed by law is not less than ten years; and (3) not less than ten years where the law provides punishment with death or imprisonment for life.

In cases involving contraventions, or crimes committed with negligence, or those which carry a fine or imprisonment for less than two years, the accused cannot be committed to a lunatic asylum and must be released. The police authority will be notified of the judgment of acquittal (Article 176).

Voluntary or culpable drunkenness does not lessen liability, because it is held that the offender was of proper mind when he commenced drinking (Article 54). If drunkenness is not total, punishment is reduced (Article 53). Punishment must be increased when an offense is committed in a state of drunkenness by a habitual drunkard, that is, a person who is addicted to alcohol (Article 55). The rules which govern the cases provided for by articles 53 and 54 also apply when the offender is under the influence of narcotic drugs (Article 56).

In cases involving habitual drunkards or drug addicts sentenced to imprisonment for committing a crime, if no other security measures of detention are required the judge also has to commit the offender to a nursing home for a period of not less than six months. If the imposed sentence carries a term of less than three years of imprisonment the judge may place the offender only under police surveillance (Article 175).

Commitment to a hospital or a nursing home is generally ordered in addition to imprisonment, and is executed after the sentence has been served or was extinguished (Article 170). In cases of habitual drunkards and drug addicts, the judge may order the execution of such commitment before the beginning or the end of the sentence restrictive of liberty (Article 174).

Persons convicted for a crime committed with intent and sentenced to a reduced punishment by reason of mental infirmity, of chronic intoxication from alcohol or narcotic drugs, or by reason of being deaf and dumb, are committed to a nursing home or a hospital for not less than one year, if the minimum punishment prescribed by law is imprisonment for not less than five years. This security measure must be ordered by the judge for a period of not less than three years if the punishment prescribed by law for a crime carries death, imprisonment for life, or imprisonment for a period of not less than ten years (Article 173).

QUESTION 7

Self-defense is known in the Somali Penal Code as private defense. It is based on the necessity to defend one's own or another person's rights against the actual danger of unlawful injury. If the defense is proportionate to the injury, the act committed is not punishable (Article 34).

Acts committed in the exercise of a right or in the performance of a duty imposed by law or by a lawful order of a public officer are not considered offenses. The existence of a lawful order will be determined by the judge. The officer giving an unlawful order is liable for the offense. The person who carries out such an order is also liable, unless he makes a justifiable mistake in believing that he was acting under a lawful order. If he was not allowed to question the correctness of the order, he is not liable (Article 33).

A public officer is not punishable if, in the performance of his duties, he employs or orders the use of arms or physical force. The use of arms or force must, however, be justifiable by an absolute necessity of repelling violence, overcoming resistance to the authorities, or avoiding the escape of a person lawfully arrested or detained. These rules also apply to private persons who are lawfully requested by a public officer to render assistance in such cases (Article 35).

In cases of a state of necessity, it is required that the offender (1) was compelled to save himself or another person from an actual danger of serious bodily injury, (2) did not cause the danger himself and could not avoid it, (3) committed an act that was proportionate to the danger involved, and (4) was not legally bound to expose himself to such danger. These rules also apply if the state of necessity is caused by the threat of others (Article 36).

If, within the terms of the exercise of a right or the performance of a duty (Article 33), of private defense (Article 34), of lawful use of arms or physical force (Article 35), or of a state of necessity (Article 36), the limits of the action permitted have been exceeded by negligence, and the acts constitute a crime committed with negligence, the excess (committed with negligence) is punishable as an offense committed with negligence (Article 37).

Abuses of correctional or disciplinary measures, committed by persons with parental, custodial, or similar responsibilities, are considered offenses and are punished with imprisonment up to six months, when the acts result in the danger of mental or physical illness. When the acts result in injury, the penalty is reduced to one third. Should the act result in death, imprisonment will range from three to eight years (Articles 431 and 440).

In cases other than those referred to in the preceding article, ill-treatment of children under the age of fourteen, of members of the family, and of other persons, committed by parents and persons with custodial or similar responsibilities, is punished with imprisonment from one to five years. If the result is a serious or very serious injury, the penalty is imprisonment from two to eight years. Resulting death carries a penalty of imprisonment from ten to fifteen years (Articles 432, 440, 441).

In cases of homicide or injury caused by a parent in the exercise of his paternal authority, the punishment of death is reduced to imprisonment from ten to fifteen years, and the punishment of imprisonment is reduced from one third to one half (Articles 442 and 96).

The parent who strikes a child in the exercise of his paternal authority, without causing physical or mental illness, commits an assault, but he is not punishable. This rule does, however, not apply when the act, by law, forms the constitutive element or an aggravating circumstance of another offense (Articles 442 and 439).

QUESTION 8

The Somali Criminal Code deviates from the traditional tripartite classification of offenses and distinguishes only two categories: (a) crimes, and (b) contraventions, or simple offenses. This classification is based on the juridical objectiveness of the offense, that is, on the nature of the good, possession, right or interest which has been injured by the criminal act.

The juridical objectiveness in regard to crimes is concerned with (1) social interests protected by the State, such as the personality of the State, the activity of administrative and judicial agencies, the society as a whole, moral values of the society, and (2) individual interests, such as those relating to persons and to property.

The classification of contraventional offenses is concerned mainly with social interests such as public order, public safety, prevention of certain classes of offenses, public morality, and public health.

The distinction between crimes and contraventions is based on the different nature of the punishments prescribed by the Code (Article 15).

QUESTION 9

Principal punishments are imposed by the judge upon conviction at the end of the trial. As a result of the conviction, accessory penalties, imposed by the judge, follow automatically (Article 93).

In the process of application and modification of punishments, the judge has general discretionary powers within the limits of the law. He is, however, required to state the grounds for using such discretion. When increasing or decreasing the terms of a sentence, the judge is bound to observe the limits established for each kind of punishment. Whenever a sentence of imprisonment is not greater than one year and the offender has not been previously convicted for committing a crime with intent, the judge can convert the penalty of imprisonment into an equivalent fine (Article 109).

The execution of a sentence can be ordered suspended by the judge when (a) the offender is not a recidivist, (b) there is reason to believe that the convicted person will show good conduct in the future, (c) the term of imprisonment imposed by the judge is not more than six months and/or a fine, and (d) the fine is convertible into imprisonment for the same period. This suspension of the punishment of a convicted person is, however, conditioned by the fact that (a) within five years from the date of the sentence, the offender does not commit a crime or contravention of the same nature and (b) the offender fulfills all civil obligations imposed by the court. Under all of these conditions the punishment will be extinguished after five years (Article 150). Otherwise the suspended sentences will be revoked automatically (Article 127 of the Criminal Procedure Code).[1]

In the exercise of his discretionary powers, for the purpose of the punishment, the judge is bound to take into account the following, as stated in Article 110.

Article 110: Gravity of the Offense: Evaluation for the Purpose of Punishment

(1) the gravity of the offense, as inferred from:

(a) the nature, character, means, object, time, place, and any other circumstances of the act;

(b) the gravity of the injury or of the danger caused to the party injured by the offense;

(c) the intensity of the criminal intent, or the degree of culpa; and

(2) the offender's criminal capacity, as inferred from:

(a) the motives to commit delinquency and the character of the offender;

(b) the criminal record of the offender and, in general, the conduct and life of the offender prior to the offense;

(c) the conduct at the time of, or subsequent to, the offense;

(d) the individual, domestic, and social conditions of life of the offender.

The Somali Criminal Code provides for determinate sentences and the judge cannot exceed the limits of punishment set by law (Article 109).

Based on the personality of the offender, recidivists (Articles 61, 62, 63), habitual offenders (Articles 64, 65, 66) and professional offenders (Article 67) are singled out by the Code for the purpose of extended term prison sentences. In cases involving recidivists, the punishment can be increased to one sixth, one third, or two thirds, depending on the specific conditions of the offenses (Article 124). Recidivists and persons declared as habitual or professional offenders can also be subject to administrative security measures (Article 70).

A group of crimes representing authorized sentences is reflected by the following text of the Somali Penal Code concerning crimes against morals, alcohol in particular.

Article 411: Supply or Sale of Alcoholic Beverages

(1) Whoever sells or otherwise supplies to a Somali citizen [4 P.C.] or to a muslim [1 Const.] of a foreign nationality any alcoholic beverage [417 P.C.] shall be punished with imprisonment [96 P.C.] up to three months or with fine [97 P.C.] up to Sh. So. 1,000.

(2) Where any alcoholic beverage [417 P.C.] is sold or supplied to a person under the age of 14 years or to a person who is afflicted with mental disease or is in a condition of mental deficiency owing to any other infirmity, the punishment shall be increased [118 P.C.].

Article 412: Consumption of Alcoholic Beverages

(1) In cases other than those referred to in the preceding article, a Somali citizen [4 P.C.] or a muslim [1 Const.] of a foreign nationality, who acquires for his consumption or the consumption of another Somali citizen or a muslim of a foreign nationality or consumes in any form whatsoever any alcoholic beverages [417 P.C.] shall be punished with imprisonment [96 P.C.], up to four months or with fine [97 P.C.] up to Sh. So. 1,000.

(2) Where the act is committed in a public place or a place open to the public, the punishment shall be increased [118 P.C.].

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[1] *Bollettino Ufficiale della Repubblica Somala*, No. 11, Supp. No. 2, November 1, 1965 (Mogadiscio: Government Printer) (Criminal Procedure Code), pp. 74–75.

Article 413: Drunkenness

(1) Whoever, in a public place or a place open to the public, is in a state of manifest drunkenness [53, 54 P.C.], shall be punished with imprisonment [46 P.C.] up to six months or with fine [97 P.C.] up to Sh. So. 2,000.

(2) The punishment shall be imprisonment [96 P.C.] from three to six months where the act is committed by a person who has previously been convicted of a crime against human life or safety committed not with "culpa" [434–444, 447–450 P.C.].

(3) The punishment shall be increased [118 P.C.], where the drunkenness is habitual [55 P.C.].

Article 414: Causing a State of Drunkenness in Other Persons

Whoever, other than in the cases referred to in article 411, in a public place or a place open to the public, causes the drunkenness [413 P.C.] of other persons by supplying alcoholic beverages [417 P.C.], shall be punished with imprisonment [96 P.C.] up to six months or with fine [97 P.C.] up to Sh. So. 2,000.

Article 415: Supply of Alcoholic Beverages to a Person in a State of Manifest Drunkenness

(1) Whoever, other than in the cases referred to in articles 411 and 414, supplies alcoholic beverages [417 P.C.] to a person in a state of manifest drunkenness [413 P.C.] shall be punished with imprisonment [96 P.C.] up to one year.

(2) Where the offender is the keeper of a public establishment for the sale of food or beverage, conviction shall entail suspension of the license [107 P.C.] or permit for running the establishment.

Article 416: Unlawful Manufacture of or Trade in Liquors or Substances Intended for the Preparation of Same

(1) Whoever, without observing the provisions of the law or the orders of the authorities, manufactures, introduces into of the territory of the State [4 Const., 4 P.C.], holds for the purpose of sale, or sells, liquors or other alcoholic beverages [46 P.C.], shall be punished with imprisonment [97 P.C.] up to one year or with fine [97 P.C.] from Sh. So. 500 to 5,000.

(2) The same punishment shall be imposed on any person who, without observing the provisions of the law or the order of the authorities, manufactures or introduces into the territory of the State [4 Const., 4 P.C.] substances intended for the preparation of liquors [417 P.C.].

Article 417: Definition

For purposes of penal law [411–416 P.C.] "alcoholic beverage" means any alcoholic beverage of a strength exceeding 3 per centum of proof spirit.

The Somali Criminal Code provides for mandatory minimum prison sentences (Articles 96, 97, 98, 109).

Release on parole, called conditional release, will be granted by the court if (a) a person sentenced for life has served twenty-five years, or (b) a person sentenced to imprisonment has served one-half of the term, and (c) a recidivist sentenced to imprisonment has served three-fourths of the punishment, provided that he has shown good behavior (Article 151).

No publicity to a conviction is provided for by the Somali Penal Code.

The category of misdemeanants appears to correspond to the categories of habitual contraveners, habitual offenders, and professional offenders or contraveners. The judge can declare an offender a habitual contravener if (a) he has been sentenced to imprisonment for three contraventions and (b) he receives a sentence for another contravention (Article 66). Likewise, the judge may declare a person a habitual offender if (a) he has committed two crimes with intent and (b) he is again convicted for a crime with intent (Article 65). If a habitual offender is convicted for another offense he shall be declared to be a professional offender or contravener (Article 67). An offender must be declared a habitual offender by law if (a) he has been sentenced, for three intentional crimes of the same kind, to an aggregate term of imprisonment not exceeding five years, provided that the crimes were committed within a period of ten years and (b) he is convicted for another intentional crime of the same kind within ten years after the last crime (Article 64).

Reasons in writing must be given for sentences imposed by the judge. A judgment is null and void if no grounds are given or if they are contradictory (Article 121 of the Criminal Procedure Code[1]).

Criminal sentences are subject to review and appeal by a higher court. The Court of Appeal may decide on the merits of the appeal and can either affirm or modify the decision appealed against, which indicates that it can raise as well as lower the sentence (Articles 228 & 229 of the Criminal Procedure Code[2]).

The government and the accused may appeal (a) against conviction or acquittal, (b) against an order that proceedings be terminated, and (c) against measures concerning personal liberty. The accused and the injured party can appeal a judgment in respect to civil damages (Article 227 of the Criminal Procedure Code[3]).

The standards for sentencing in review are contained in Articles 230–244 of the Criminal Procedure Code (see attachment to this report).[4]

Concurrent and consecutive terms of imprisonment, and the computation of terms, are controlled by the following provisions of the Somali Penal Code (Articles 44–46, 126–135).

Article 44: More than One Breach of One or Various Provisions of Law by One or More Acts

Whoever, by a single act or omission, violates various provisions of law, or commits more than one breach of the same provision of law, shall be punished, for the various offences provided for by law. In such a case, the punishments imposed in the same judgment shall be added together, subject to the maximum limits fixed by law [126–139 P.C.].

Article 45: Continuing Offence

Whoever, by more than one act or omission done with the same criminal intent, commits, at the same time or at different times, more than one breach of the same provision of law, of the same or of different gravity, shall be guilty of continuing offence. In such a case the punishment shall be that imposed in respect of the most serious of the breaches committed, increased up to threefold.

Article 46: Complex Offence

(1) The provisions of the two preceding articles [44, 45, P.C.] shall not apply when the law considers as constituent elements, or as aggravating circumstances of a single offence, acts which by themselves would constitute an offence.

(2) Whenever the law, in fixing the punishment for a complex offence, refers to the punishments prescribed in respect of the separate offences which constitute it, the maximum limits fixed by articles 133 and 134 shall not be exceeded.

Article 126: Conviction for More Than One Offence by a Single Judgment

Where, by a single judgment, an offender is convicted of more than one offence, the provisions of the following articles shall apply.

Article 127: Concurrence of Offences Punishable with Imprisonment for Life and Offences Punishable with Imprisonment

(1) Imprisonment for life [95 P.C.] shall be imposed with separate confinement during daytime for a term of not less than one year and not more than five years, where the offender is guilty of more than one crime, each of which is punishable with imprisonment for life.

(2) Where an offender is convicted of a crime punishable with imprisonment for life [95 P.C.] and one or more crimes punishable with imprisonment [96 P.C.], the punishment of imprisonment for life shall be imposed, with separate confinement during daytime for a term of not less than six months and not more than four years.

Article 128: Concurrence of Offences Punishable With Imprisonment or Pecuniary Punishments of the Same Kind

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[1] *Bollettino Ufficiale della Republica Somala*, No. 11, Supp. No. 2, November 1, 1963 (Mogadiscio: Government Printer) (Criminal Procedure Code), p. 71.
[2] *Ibid.*, pp. 125–126.
[3] *Ibid.*, p. 124.
[4] *Ibid.*, pp. 126–133.

(1) Where more than one offence is punishable with imprisonment [96, 98 P.C.], a single punishment shall be imposed for a term equivalent to the total duration of the punishment which would have been imposed for the separate offences.

(2) Where there is a concurrence of more than one crime, each of which is punishable with imprisonment [96 P.C.] for not less than twenty four years, imprisonment for life [95 P.C.] shall be imposed.

(3) Pecuniary punishments [91(2) P.C.] of the same kind shall all be imposed in full.

Article 129: Concurrence of Offences Punishable With Imprisonment of Different Kinds

(1) Where more than one offence is punishable with imprisonment of a different kind [96, 98 P.C.], each punishment shall be imposed separately and in full.

(2) Imprisonment for contravention [98 P.C.] shall be executed last.

Article 130: Concurrence of Offences Punishable With Pecuniary Punishment of Different Kinds

(1) Where more than one offence is punishable with pecuniary punishments [91(2) P.C.] of different kinds, each punishment shall be imposed separately and in full.

(2) Where the pecuniary punishment [91(2) P.C.] imposed is not paid in full, the sum paid shall, for the purposes of conversion [115 P.C.], be deducted from the amount of the fine.

Article 131: Punishments Considered as a Single Punishment or as Separate Punishments

(1) Except as otherwise provided by law, the punishments of the same kind which are imposed, in accordance with article 128 shall be considered a single punishment for all legal purposes.

(2) Punishments of different kinds which are imposed in accordance with articles 129 and 130 shall likewise be considered, for all legal purposes, a single punishment of the most serious kind. They shall, however, be regarded as different punishments for the purposes of their execution, the application of security measures [161 P.C.] and for any other purpose prescribed by law.

(3) Where a pecuniary punishment [91(2) P.C.] is imposed together with another punishment of a different kind, the punishments shall be considered as separate for all legal purposes.

Article 132: Determination of Accessory Penalties

In order to determine the accessory penalties [92 P.C.] and all other penal consequences of a conviction, regard shall be had to the separate offences in respect of which an offender is convicted, and to the principal punishment [90 P.C.] which would have been imposed in respect of each of them if there had not been a concurrence of offences.

Article 133: Limits of Increase of Principal Punishments

(1) Where there is a concurrence of offences referred to in article 128, the punishment to be imposed under that article shall not be more than five times the amount of the most serious of the joint punishments, and shall not for any reason exceed:

(a) thirty years, in case of imprisonment for crimes [96 P.C.];

(b) six years, in case of imprisonment for contraventions [98 P.C.];

(c) 150,000 Sh. So., in case of fine for crimes [97 P.C.], and 30,000 Sh. So., in case of fine of contravention [97 P.C.], and 400,000 in case of fine per crimes or 80,000 Sh. So. in case of fine for contraventions, where the judge avails himself of the power specified in the third paragraph of article 97 and the second paragraph of article 99.

(2) Where there is a concurrence of offences under the terms of article 129, the duration of the punishments to be imposed under that article shall not exceed thirty years. The portion of punishment in excess of such limit shall in every case be deducted from imprisonment for contraventions [98 P.C.].

(3) Where pecuniary punishments [91(2) P.C.] are converted into imprisonment [91(1) P.C.], owing to the insolvency of the offender, the total duration of such punishment shall not exceed four years in the case of imprisonment for crimes [96 P.C.] and three years in the case of imprisonment for contraventions [98 P.C.].

Article 134: Limits of Increase of Accessory Penalties

The maximum duration of the temporary accessory penalties shall not exceed, altogether, the following limits:

(a) ten years, in cases of interdiction from public offices [101 P.C.] or from a profession or craft [103 P.C.];

(b) five years, in cases of suspension, from the exercise of a profession or craft [107 P.C.].

Article 135: Punishments Imposed by Different Sentences

The provisions of the preceding articles shall also apply where, after a conviction, the same person has to be tried for another offence committed before or after the said conviction, or where more than one sentence have to be carried out against the same person.

The Somali Criminal Code has minimum and maximum limits set for fines. In cases involving crimes motivated by gain, an additional fine specified by law may be imposed by the court. The judge may increase a fine up to three times the amount prescribed by law if it appears to him that the imposed fine is inefficient by reason of the financial situation of the offender (Article 97).

A similar minimum and maximum limit is set for contraventions. The judge may increase the prescribed fine up to three times the amount whenever it appears to be ineffective because of the financial position of the contravener (Article 99).

The maximum limit for crimes and contraventions does not apply to cases for which the law prescribes a fine in proportion to the injury (Article 100).

If a fine imposed for a crime or for a contravention cannot be collected due to insolvency, the punishment shall be converted into imprisonment for not more than three years or two years respectively. Subsequent payment of the fine, reduced by the number of days served, will extinguish the punishment (Article 113).

In regard to the equivalence between fine and detentive punishment, the Criminal Code establishes a fixed amount, which is a "day fine" of 25 Somali Shillings (Sh. So.), established for conversion purposes (Article 112).

QUESTION 10

A mistake of fact as to the act constituting the offense precludes punishment. This rule does not apply if the mistake is a result of negligence and if the fact constitutes a crime committed with negligence.

Mistake of law other than the criminal law excludes liability to punishments (Article 28). This rule also applies if the mistake of fact is caused by deceit committed by another person (Article 29).

QUESTION 11

The Somali Penal Code does not contain provisions on the differentiation between crime and jurisdiction.

QUESTION 12

In regard to offenses committed abroad, the Somali Penal Code provides for their punishment without exception, when they are committed by nationals or foreigners, and when they involve (a) crimes against the personality of the State involving external and internal security, political rights, and foreign states and their heads and representatives (Articles 184–239); (b) crimes of counterfeiting the seal of the State or using such counterfeited seal (Article 360); (c) crimes of counterfeiting legal tender (Article 348); (d) crimes committed by public officers through abuse of power or violation of duties (Articles 240–262); and finally (e) any other offenses provided for by law or international conventions (Article 7).

In addition, the Somali Criminal Code provides for offenses committed abroad punishable under certain conditions. These provisions require that they involve (a) a crime which is also an offense in the country of commission, (b) that a complaint is made by the injured party when required by law, (c) that the accused is found in the territory of the State when the complaint is made or when the penal proceedings are instituted, (d) extradition has not been granted or agreed to, and (e) prosecution has been authorized when needed (Article 8).

Except for the cases specified in the above article 7, crimes committed abroad cannot be prosecuted again in Somali territory when the offender has been acquitted abroad or when he has been convicted and has served his sentence there (Article 9).

QUESTION 13

The Somali Criminal Code distinguishes between conspiracy by agreement (Article 232) and conspiracy by association (Article 233). In both cases, conspiracy must be based on a plan to commit crimes against the external security of the State (Articles 184–216) and against the internal security of the State (Articles 217–225).

Conspiracy by agreement is committed by two or more persons and is punished with imprisonment from one to six years. For promoters, punishment shall be increased up to one third. In all cases it is, however, limited to less than one half of the penalty prescribed for the consummated crime involved (Articles 232 and 118).

Conspiracy by association must involve three or more persons associated for the purpose of committing the illegal act. Those who promote, constitute, organize or direct the association are punished with imprisonment from five to twelve years. The sole act of participation in the association is punishable with imprisonment from two to eight years. When the association aims at two or more crimes, punishment must be increased by one third (Articles 233 and 118).

Exemption from punishment is granted in conspiracy cases to those promoters who have dissolved the agreement or the association prior to arrest or prior to the institution of criminal proceedings. Exemption is also granted to those participants who have withdrawn from the agreement or association under the same conditions (Article 235).

Should the act of conspiracy be considered by the judge "of slight importance," he can reduce the penalty (Article 238).

Foreigners sentenced to imprisonment for conspiracy shall be expelled after serving the sentence (Article 239).

QUESTION 14

The Somali Penal Code provides for felony murder in the case of preterintentional homicide, that is, homicide beyond intent, when death is caused in the process of committing assault and injury. Punishment ranges from ten to fifteen years (Articles 441, 439, & 440).

In all other cases of preterintentional death caused as a consequence of another crime committed with intent by law, the provisions governing death caused by negligence are applicable and punishment shall be increased but shall not exceed the aggregate of twelve years (Articles 447 and 445).

QUESTION 15

Since Somalia is not a federal state the problem of concurrent or exclusive jurisdiction does nor arise.

QUESTION 16

Para-Military activities are not sanctioned by a special text of the Code.

QUESTION 17

The Somali Penal Code contains several offenses without victims. The consent of the injured party is controlled by the general principle of the following text of Article 32:

Whoever injures or places in jeopardy a right, with the consent of the person who can legitimately dispose of it, shall not be liable to punishment.

There are, however, several exceptions provided for by other provisions, as indicated in the following cases.

QUESTION 17–A—DRUGS

Whoever services another person, with his consent, narcotics which deprive him of his consciousness or will, shall be punished with imprisonment from one to six months or with a fine, provided that the act results in danger to the

victim. If this is done by a physician for scientific or curative purposes the offense is not considered a contravention (Article 563). If the result is death or injury, the act is considered death caused by negligence or injury caused by negligence (Articles 445 and 446).

Supplying poisonous or harmful substances to a minor under fourteen, with or without prescription, even by a person authorized to sell or trade in pharmaceutical products, is punishable with a fine (Article 565).

QUESTION 17–B ABORTION

Causing abortion, even with the consent of the victim, is considered a crime and is punished with imprisonment from one to five years. The same punishment is imposed on the victim (article 419).

Instigating to abortion by administering the appropriate means is punished with imprisonment from six months to two years (Article 420).

Death caused in cases of abortion with consent is punished with imprisonment from ten to fifteen years. When injury results, the same type of punishment ranges from three to eight years (Article 421).

Where abortion with consent is committed for reasons of honor of the victim or of a near relative, punishment shall be reduced by one half to two thirds (Article 422).

QUESTION 17–C—GAMBLING

Gambling is considered a contravention. Holding or facilitating the conduct of games of chance in a public place or a place open to the public, as well as in private clubs of any kind, attracts imprisonment from three months to one year and a fine (Article 553).

Punishment shall be doubled when the act is committed in a public establishment where there are heavy stakes in the game and where persons under fourteen participate (Article 554).

Persons participating in the game in public places or private clubs who are apprehended while taking part in the game are punished with imprisonment up to six months or with a fine. The punishment will be increased when the offense is detected by surprise inspection in a gambling house or in a public establishment where the game is played for high stakes (Article 555).

QUESTION 17–D—PROSTITUTION

The practice of prostitution in any form is considered as one of the crimes against morals and decency, and is punished with imprisonment from two months to five years and with a fine. If committed by a married woman the penalty is increased (Article 405).

QUESTION 17–E—HOMOSEXUALITY

Homosexuality as carnal intercourse with a person of the same sex is punished with imprisonment from three months to three years, provided that the act does not constitute a more serious crime (Article 409). The offense may also attract the imposition of an additional security measure consisting of police surveillance (Articles 410, 161 and 172).

QUESTION 17–F—OBSCENITY

The manufacture, possession, import, export, or putting into circulation of any obscene publication or object for commercial purposes, or distribution, or public exhibition, is punished with imprisonment from three months to three years and with a fine. The same penalty applies to secret trading, distribution and exhibition of such articles. Persons assisting by means of publicity are subject to the same punishment. Giving public theatrical or cinematographic performances or other public performances with an obscene character aggravate the above punishment (Article 403).

QUESTION 18

The unlawful manufacturing, possession, trade and transport of explosive materials and substances is considered a contravention against public safety and is punished with imprisonment up to six months and with a fine (Article

530). This subject is governed by the Public Order Law No. 21 of August 26, 1963. Therefore, this special law takes precedence over the general provisions of the Criminal Code (Articles 13 and 14).[1]

Failure to keep arms in custody, even by licensed persons, also constitutes a contravention and punished with fine up to 1,000 Somali Shillings when (a) delivered to minors under the age of fourteen, to incapable or inexperienced persons, (b) neglected to be kept in a safe place, and (c) carried loaded in public places (Article 539).

Failure by the holder to declare explosive materials is also punished with imprisonment up to four months or with a fine. Any person who has knowledge about such materials and fails to declare them is liable to a fine (Article 531).

The punishments shall be increased if the unlawful manufacturing or failure to declare was committed by persons barred from obtaining a license, or where such license was refused or withdrawn (Article 532).

QUESTION 19

Capital punishment is one of the principal penalties of the Somali Penal Code (Articles 90 & 94). It is limited in its application to twenty offenses involving the following categories: (a) serious crimes against the personality of the Somali State such as high treason (Article 184), bearing arms against the State (Article 185), favoring the enemy in time of war (Article 190), serious destruction or sabotage of military works (Article 196), suppression, falsification or purloining of papers or documents concerning the security of the State which seriously affects military preparation and operations (Article 198), procuring information regarding the security of the State which seriously affects the military preparation or operations (Article 199), political and military espionage in the interest of a state at war with Somalia, where the act seriously affects military preparation and operations (Article 200), espionage concerning information the disclosure of which has been prohibited, where the act has seriously affected military preparation and operations (Article 201), disclosure of State secrets for purposes of political or military espionage, where the act is committed in time or war or has seriously affected military preparation and operations (Article 204), disclosure of information the divulgation of which has been prohibited, where the act is committed for purposes of political or military espionage in time of war or has seriously affected military preparation and operations (Article 205), utilization of State secrets, such as scientific invention or discoveries of new industrial devices, where the act is committed in the interest of a state at war with Somalia, or where it seriously affected military preparation or operations (Article 206), armed insurrection against the powers of the State (Article 221), devastation, pillage and slaughter for political purposes (Article 222), civil war (Article 223), unlawfully taking and exercising political powers or military command in time of war, where the act has seriously affected the outcome of military operations (Article 224); (b) serious crimes against human life such as massacre (Article 329), causing an epidemic by diffusing noxious germs resulting in death (Article 334), pollution of water and food resulting in death (Article 335), murder (Article 434) except infanticide for reasons of honor (Articles 435 and 443), and, finally, death caused to a consenting person, when committed against a minor under the age of eighteen, against an insane person, and if consent has been obtained by violence, threat, suggestion, or fraud (Article 436).

No separate proceedings are provided for determining the sentence in capital cases nor are separate hearings authorized for that purpose by the Somali Criminal Code.

QUESTION 20

In the case of joinder of offenses, that is, if one person is charged with more than one offense and if the same offense was committed by more than one person, the competent court may, upon request of the prosecution, the defense, or on its own motion, order that the offense be tried separately for reasons of convenience (Article 6 of the Criminal Procedure Code).[2]

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[1] Ganzglass, Martin R., *The Penal Code of the Somali Democratic Republic* (New Brunswick: Rutgers University Press, 1971), p. 610.

[2] *Bollettino Ufficiale della Repubblica Somala*, No. 11, Supp. No. 2, November 6, 1965 (Mogadiscio: Government Printer), p. 10.

Prosecution is barred by a former prosecution which resulted in a final conviction or acquittal, or in a lawful order not to prosecute the case, provided that the charges involve the same person and the same facts, even if those facts can be regarded as constituting a different offense, except in the following cases.

(a) The accused can be charged again if the act constitutes a different and more serious crime than that for which he has already been found guilty and if this was not known to the court (Article 13 of the Criminal Procedure Code.)[1]

(b) Even if orders to close the case, which are by law equivalent to a judgment, have become irrevocable, penal action can be instituted again if the orders were based on death reported by error, on the lack of private complaint, or on lack of authorization to prosecute, which are subsequently granted (Article 77 of the Criminal Procedure Code).[2]

[Attachment]

SECTION II—HEARING OF THE APPEAL

Article 230

Procedure of Court of First Instance to apply to Court of Appeal. Preliminaries to Hearing of Appeal

1. Insofar as applicable, the provisions relating to the hearing of a case in a Court of first instance shall be followed in the hearing of an appeal.

2. When an appeal has to be heard, the President of a Court of Appeal shall:

(a) fix the date of the hearing;

(b) order the appearance:

(i) of the accused who appeals, and

(ii) of an accused who has not appealed, if the appeal has been made by the Attorney General or is made with regard to one of the cases provided for in Article 217;

(c) appoint Counsel for the accused in the cases provided for in sub-paragraph b) of paragraph 2 of Article 14 of the Law on the Organization of the Judiciary, when the accused is without Counsel. The Court shall arrange to inform the accused and his Counsel of such appointment;

(d) order that the injured party be summoned to appear before the Court, if the injured party or the accused has appealed against the judgment concerning civil damages;

(e) order that the Attorney General be duly notified.

3. The date of the hearing shall be notified to the accused and brought to the notice of this Counsel and of the Attorney General at least 15 days before the hearing.

4. Insofar as applicable, the provisions of paragraph 5 of Article 80 and of Article 89 shall be observed.

Article 231

Hearing of the Appeal

1. After the opening of the hearing of the appeal, first the appellant shall explain the grounds for his appeal, then the other party shall be given the opportunity to reply. Both parties may make comments and observations, raising objections and presenting requests and petitions which they deem pertinent, and expressing their views on the points of fact and law, which in the opinion the Courts should accept. The right to reply shall be exercised only with the consent of the Court. If an appeal has been made in the same case by both the accused and the Attorney General, the appeal of the accused shall be heard last.

Insofar as applicable, the provisions of Article 119 shall apply.

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[1] *Bollettino, Ufficiale della Repubblica Somala*, No. 11, Supp. No. 2, November 6, 1965 (Mogadiscio: Government Printer), pp. 14–15.

[2] *Ibid.*, p. 48.

2. If the appeal is against a conviction or an acquittal and the Court does not consider itself able to reach a decision upon the available evidence, the Court may, even on its own motion, order:

(a) the re-hearing before it, in whole or in part, of the trial;

(b) the examination of witnesses heard in the trial of first instance, who may testify even with respect to matters not previously considered;

(c) the taking of new evidence;

(d) the re-hearing of expert witnesses.

3. If the appeal is against an order that the proceedings be terminated and the Court of Appeal considers that there are valid grounds for the appeal, the Court of Appeal shall set aside the impugned order and shall either try the case itself, in accordance with the provisions of Book Two of this Code, or remand the case for trial to the Court which passed the impugned order.

CHAPTER III—APPEALS TO THE SUPREME COURT

Article 232

Matters against which Appeal may be made to the Supreme Court

1. In addition to cases established by special provision, and subject to the provisions of Chapter 1 of this Part, an appeal may be lodged with the Supreme Court:

(a) by the parties specified in paragraph 2 of Article 227 against any acts and decisions referred to therein when handed down by a Court of second instance;

(b) by the accused or by the Attorney General against any other decision handed down in an appellate proceedings, or against any other decision concerning which appeal to the Court of Appeal is not permissible.

2. An appeal shall be admissible only on the following questions of law:

(a) lack of jurisdiction or incompetence of the lower Court;

(b) violation or erroneous application of legal provisions;

(c) nullity of the judgment or the proceedings;

(d) omission, insufficiency or contradiction in the grounds on which the judgment is based, relating to a material point raised by either party or by the Court on its own motion.

Article 233

Decision by the Supreme Court

1. The Supreme Court, depending on the particular case, shall decide in one of the following ways:

(a) if the appeal is against a judgment, it shall, after a hearing in open Court, in accordance with Article 234:

(i) reject the appeal and make any necessary corrections in any errors of law in the grounds given and errors in the provisions of law referred to in the judgment, provided that such errors did not influence the dispositive part of the judgment;

(ii) set aside the judgment appealed against and remand the case to the competent court;

(iii) set aside the judgment appealed against without remanding the case to any other Court in those cases in which a sentence of conviction could not have been passed or in which no criminal proceedings could have been started or continued;

(iv) set aside in whole or in part the judgment appealed against; where no additional evidence is required, decide on the merits and where additional evidence is required, remand the case to the Court that pronounced the judgment appealed against;

(b) if an appeal is against an order issued during the trial that the proceedings be terminated, the Court shall, after a hearing in open Court, in accordance with Article 234:

(i) reject the appeal;

(ii) set aside the order appealed against, and insofar as applicable, observe the provisions of the preceding sub-paragraph;

(c) in every other case, it shall proceed in the manner laid down in the preceding sub-paragraph, reaching its decision in chambers, in accordance with paragraph 2 of Article 225.

2. Judgments of the Supreme Court shall be drawn up in writing by the President of the Court or by another member of the Bench.

3. The provisions of paragraphs 2 and 3 of Article 229 shall apply, insofar as applicable.

Article 234

Hearing of the Appeal in Open Court

When the appeal is to be heard in open Court, the provisions of Article 230 and of paragraph 1 of Article 231 shall be observed, insofar as applicable.

Article 235

Appeal against Decisions given by a Court re-hearing a case remanded by the Supreme Court

1. The Court to which a case has been remanded for re-hearing shall comply with the findings of the Supreme Court with respect to all questions decided by it.

2. When a Court re-hears a case remanded to it by the Supreme Court, an appeal may be lodged against the new judgment only with respect to those parts which have not already been decided by the Supreme Court. But an appeal may also be lodged when the Court which re-hears the case fails to comply with the provisions of the preceding paragraph.

Article 236

No Appeal to lie against Decision of the Supreme Court

No appeal shall lie against any decision of the Supreme Court with regard to criminal matters.

CHAPTER IV—REVISION

Article 237

Cases Subject to Revision

When a conviction has become final, and even when the punishment has been served or has become extinct, revision may be allowed in favour of the convicted person at any time with regard to those cases coming within the provisions of Article 238.

Article 238

Instances in which a Case is subject to Revision

1. Revision may be sought:

(a) if after the conviction new facts or new evidence have occurred or been discovered, which either separately or in connection with facts or evidence already considered at the trial, clearly establish that the offense was not committed or that it was not the accused who committed it;

(b) if it is shown that the conviction was the result of some false act or document or the result of another act which the law considers an offense, provided that a final conviction has been pronounced as a result of such false acts or document or such other offense;

(c) if the findings on which the conviction is based are incompatible with those of another final penal conviction.

2. Every petition for re-trial shall be based on facts or evidence which, if established, demonstrate that:

(a) an offense was not committed, or that, if it was committed, it was not the accused who committed it, or

(b) there was no evidence whatsoever that an offense was committed or that, if it was committed, it was not the accused who committed it.

Otherwise the petition shall not be admissible.

Article 239

Persons who may seek Revision and Petition for Revision

1. Revision may be sought by:
(a) the convicted person;
(b) the Attorney General;
(c) the «descendants», «ascendants», or the spouse of the convicted person if the convicted person has died.
2. A petition for revision may be submitted in person or through a special representative and shall be presented, together with supporting documentation, to the Registrar of the Supreme Court.

Article 240

Preliminary Proceedings

1. The President of the Supreme Court, having received the petition and relevant documents, shall convene the Court in chambers, and decide as a preliminary matter whether the application for revision is admissible.
2. If the requisites for filing a petition are lacking or if the petition appears obviously unfounded, the Court shall declare the petition inadmissible. If the Court does consider the application to be admissible, it shall proceed in accordance with Article 241.

Article 241

Hearing in Open Court

1. If the Supreme Court allows the petition, the proceedings shall take place in open Court, in the manner provided in Article 234.
2. The Supreme Court:
(a) if it finds that the facts and evidence show that the petition is well-founded, shall set aside the conviction;
(b) if it finds that further investigations are necessary, shall provisionally set aside the conviction and refer the case to the competent Court which shall try the case in the normal way;
(c) in any other case, shall reject the petition.

Article 242

Procedure when Conviction is set aside

The Supreme Court, when it sets aside a conviction without remanding to a lower Court, or a Court to which a case has been remanded, when either Court gives judgment of acquittal, shall also order the restitution of the fines or damages paid as a consequence of the conviction.

Article 243

Damages

1. A convicted person who has been acquitted as a result of a revision proceedings may submit an application to the Supreme Court for the payment of damages by the State.
2. The Supreme Court shall decide in chambers on whether damages should be granted and on the amount. The Court shall take into account the material and moral damages suffered by the convicted person as a consequence of the judgment set aside.
3. The State may recover costs, within the limits of the law, from any person who with criminal intent caused the wrongful conviction.

Article 244

Appeal against Judgment in a Remanded Proceedings

1. The Attorney General may appeal against a judgment of acquittal given by a Court to which a case has been remanded.

2. There shall be no appeal against a judgment of conviction by the Court referred to in paragraph 1.

3. In all cases, a petition for another revision proceedings may be made if the application is based on different facts and evidence.

THAILAND

1. The Thai Penal Code consists of three books. Book I is on General Provisions; Book II on Specific Offenses; Book III on Petty Offenses. Sentences are dealt with as each offense is described.

2. The Code does not leave blank numbers for future sections. When amended, if such amendations necessitate additional sections, the Thai practice is to use *bis*, *tres*, *quattuor*, etc., after the number of the preceding section.

3. The Code establishes two kinds of criminal culpability:

Section 59.—A person shall be criminally liable only when he commits an act intentionally, except in the case where he is made liable by provisions of law for an act done by negligence, or except in the case where he is specifically made liable for an act done unintentionally.

To do an act intentionally is to do an act consciously, and at the same time the doer desired or could have foreseen the effect of such doing.

If the doer does not know the fact constituting an offense, it cannot be deemed that he desired or could have foreseen the effect of such doing.

To do an act by negligence is to commit an offense unintentionally but without exercising such care as might be expected from a person under such conditions and circumstances, and the doer could exercise such care but did not do so sufficiently.

5. The Thai Penal Code provides for an insanity defense to criminal charges. It states as below:

Section 65.—Whenever any person commits an offense at the time of not being able to appreciate the nature of illegality of his act or not being able to control himself on account of defective mind, mental disease or mental infirmity, such person shall not be punished for such offense.

But, if the offender is partially able to appreciate the nature of illegality of his act, or is partially able to control himself, he shall be punished for such offense, but the Court may inflict less punishment to any extent than that provided by the law for such offense.

Section 48 provides for hospitalization of a person raising insanity as a defense, whether or not he is found to be unpunishable. It states:

Section 48.—If the Court is of opinion that the liberation of any person having a defective mind, mental disease, or mental infirmity who is not punishable, or whose punishment is reduced according to Section 65 will not be safe for the public, the Court may give order to send him to be put under restraint in a hospital. This order may, however, be revoked at any time by the Court.

No information is available on the procedural aspects of the insanity defense, i.e. how the insanity is proved. The defendant, found not guilty by reason of insanity, is not automatically committed, as shown by Section 48 above.

6. Intoxication is dealt with below:

Section 66.—Intoxication on account of taking liquor or any other intoxicant may not be raised as an excuse under Section 65, except where such intoxication is caused without the knowledge or against the will of the offender, and he has committed the offense at the time of not being able to appreciate the nature or illegality of his act or not being able to control himself, he shall then be exempted from the punishment for such offense. But, if he is partially able to appreciate the nature or illegality of his act, or is partially able to control himself, the Court may inflict less punishment to any extent than that provided by the law for such offense.

Section 49 provides for both alcoholic and drug intoxication to be taken into consideration in suspending the determination of infliction of punishment provided he will not take the drink or harmful habit-forming drug within a period of two years.

7. On self-defense and the use of force, Sections 67, 68, 69, and 72 state:

Section 67.—A person shall not be punished for committing any offense on account of necessity:

(1) when such person is under compulsion or under the influence of a force such that he cannot avoid or resist; or

(2) when such person acts in order to avoid the infliction upon himself or any other person of an imminent and irreparable danger which could not be otherwise avoided and which he did not cause to exist through his own fault;

provided that no more is done than is reasonably necessary under the circumstances.

Section 68.—Whenever any person is bound to commit any act for the defense of his own right or right of any other person against a danger occurring from act of violence which violates the law, and such danger is an imminent one, such act, if reasonable committed under the circumstances, is a lawful defense, and he shall not be guilty.

Section 69.—In the case provided in Sections 67 and 68, if the act committed is in excess of what is reasonable under the circumstances or in excess of what is necessary, or in excess of what is necessary for the defense, the Court may inflict less punishment to any extent than that provided by the law for such offense. But, if the act occurs out of excitement, fright or fear, the Court may not inflict any punishment at all.

Section 72.—Whenever any person commits any offense at the time of grave, injust and sudden provocation against the provoker, the Court may inflict upon such person less punishment to any extent than that provided by the law for such offense.

The Thai Code in its Section 68, like the U.S. Draft Code, permits the use of force to protect oneself from harm or danger which is imminent; also justified is an act committed through necessity. Even excessive force, according to Section 69, is excusable if provoked by excitement, fright or fear. The rules are far from being as detailed as those provided by the U.S. Draft.

8. Under the Thai Code, offenses are classified into only two categories: offenses, and petty offenses. The classification is for the purpose of sentencing, since a petty offense is defined in Section 102 as being one punishable with imprisonment of not exceeding one month or with fine of not exceeding one thousand *baht*, or with both imprisonment and fine as aforesaid together. Also, according to Sections 104, 105, 106, petty offenses are punishable, even though not committed intentionally, but attempts to commit a petty offense are not punishable, neither are supporters to a petty offense.

9. Under the U.S. Code, authorized sentences consist of imprisonment and fine, apart from civil penalties authorized by law. The Thai Code provides for a wider range of options, ranging from death, through imprisonment, confinement, and fine, to forfeiture of property. Five measures of safety are also imposable: relegation, prohibition from entering a specific area; execution of a bond with security for keeping the peace; restraint in a hospital; and prohibition from carrying on certain occupations.

Section 56 provides for suspension of imposition of sentence as well as for suspension of execution of sentence. The section reads thus:

Section 56.—Whenever the punishment to be inflicted in the case by the Court on any person committing an offense punishable with imprisonment does not exceed two years, if it does not appear that he has undergone the punishment of imprisonment previously, or it appears that he has undergone the punishment of imprisonment previously, but is the punishment for an offense committed by negligence or for a petty offense, the Court may, when taking into consideration the age, past record, behaviour, intelligence, education and training, health, condition of the mind, habit, occupation and environment of the offender or the nature of the offense, or other extenuating circumstances, pass judgment, if it thinks fit, that he is guilty, but the determination of the punishment is to be suspended, or the punishment is determined, but the infliction of the punishment is to be suspended, and he shall be released with or without conditions for controlling his behaviour so as to give him an opportunity to reform himself within a period of time to be determined by the Court, but it shall not exceed five years as from the day on which the Court passes judgment.

Regarding the conditions for controlling the behaviour of the offender, the Court may determine one or more conditions as follows:

(1) To report himself to the official specified by the Court from time to time so that the official may make inquiries, give advice, assistance or admonition on the behaviour and the carrying on of occupation as he thinks fit;

(2) To be trained or to carry on occupation substantially;

(3) To refrain from going into society or from any behaviour which may lead to the commission of the same offense again.

Regarding any conditions determined by the Court according to the foregoing paragraph, if, afterwards, it appears to the Court from the submission of the offender, his legal representative or guardian, the Public Prosecutor or the official that the circumstances relating to the control of the behaviour of the offender have changed, the Court may, if it thinks fit, modify or revoke any of the conditions, or it may determine in addition any of the conditions mentioned in the foregoing paragraph which is not yet determined.

The provision in the above section regarding conditions for controlling the behavior of the offender might be regarded as probation, i.e. it is a form of suspension of sentence. There are no provisions for supervision other than the requirement in (1) above for periodic reports to a specified official.

The Thai Criminal Procedure Code provides for suspension of execution of imprisonment:

Section 246.—Execution of imprisonment may be suspended until the cause of suspension has ceased, in the following cases:

(1) When the accused is insane;

(2) When it is feared that the life of the accused will be endangered by imprisonment;

(3) If the accused is pregnant for seven months or over;

(4) If the accused has given birth to a child and a period of one month has not yet elapsed.

Section 247.—In the case where the accused has been sentenced to death, the sentence shall not be executed until the provisions of this Code governing pardon have been complied with.

If a woman sentenced to death is found to be with child, execution of the sentence shall be suspended until after her delivery.

The execution shall take place at such time and place as the authorities think fit.

Section 248.—If a person sentenced to death becomes insane before being executed, the execution shall be suspended until such person has recovered. Pending the suspension, the Court may apply Section 46 paragraph 2 of the Penal Code.

If the insane person recovers after one year from the date when the judgment became final, the punishment of death shall be commuted to imprisonment for life.

Determinate sentences of imprisonment are imposed.

According to Section 41, any person who has been sentenced to relegation, or has been sentenced to imprisonment of not less than six months for not less than twice, for certain specified offences and, within ten years from the day of having passed the relegation or the punishment commits any of the specified offences again, may be regarded as a habitual criminal, and may be sentenced to relegation.

Prison sentences for a group of crimes, e.g. internal security (called national security under the U.S. Draft Code) compare as follows: Under the Thai Code (Sections 113-118) death is the penalty for using violence or threatening to use violence to overthrow or change the Constitution, to overthrow the legislative power, executive power, or the judicial power of the Constitution, or nullify it, or to separate the Kingdom or seize the power of administration in any part thereof, any of which is termed insurrection.

The next category, punishable with imprisonment of three to fifteen years, is the collection of forces or arms, or other preparations or conspiracy to commit insurrection, or any offence which part of a plot to commit, or instigating people to commit, or any act to assist in keeping secret any intention to commit, such offence.

Up to ten years imprisonment is prescribed for the instigation of any members of the armed forces or police force to desert or not to perform his duties, or to commit mutiny, if committed for the purpose of undermining the discipline and efficiency of the armed forces or police force. Without this purpose in mind, the offence carries a penalty of up to five years imprisonment only. Words or writing used to bring about a change in the laws of the country or the government by the use of force or violence (if not an act within the intention of the Constitution or an act made for expression of an honest opinion or criticism), or used to raise unrest and disaffection in a manner likely to cause

disturbance, or to make people transgress the laws of the country, is punishable with imprisonment not exceeding seven years.

On comparing the above offences and penalties with the section in the U.S. Draft Code on armed insurrection, it has engaging in such insurrection classed as a Class B felony, while leading it is a Class A felony, and advocating it a Class C felony. Paramilitary activities constitute either a Class B or a Class C felony. Causing insubordination in the armed forces constitutes a Class B or a Class C felony. Advocating armed insurrection is a Class C felony.

Sentences under both the Codes are thus quite comparable, with the exception of the Thai Code penalty for armed insurrection, which is death, while under the U.S. Draft Code, leading such an insurrection is a Class A felony, but merely engaging in it will constitute only a Class B felony.

Mandatory minimum prison sentences are prescribed in some, not all, offences.

There is no equivalent to proposed Section 3007 in the U.S. Draft Code for organizations convicted of an offence.

Giving publicity to a conviction is not used as a sanction or sentence under the Thai Code.

The only equivalent would be the habitual criminal provision mentioned above, Section 41, but these are all serious crimes, not misdemeanors.

The Thai Criminal Procedure Code provides:

Section 183.—A judgment, order or dissenting opinion shall be made in writing and signed by the judges who sat in the case. Any such judge disagreeing with the judgment or order may give a dissenting opinion which shall be attached to the file.

Section 186.—A judgment or order shall contain at least the following essentials:

(1) the name of the Court and the date;
(2) the names of the parties in the case;
(3) the offence;
(4) the charge and the statement of defense.
(5) the facts as found in the trial;
(6) the grounds for decision both on questions of fact and of law;
(7) the provisions of law applying to the case;
(8) the decision dismissing the charge or convicting the accused;
(9) the decision of the Court as to the exhibits, or as to the civil claim.

Judgments relating to petty offences need not contain the essentials as provided in sub-sections 4, 5, and 6.

Sentences are subject to review on appeal to a higher court. The appeal court may enhance the punishment. Any party may appeal a sentence.

Two sections of the Penal Code treat multiple offences:

Section 90.—Whenever one and the same act is an offence violating several provisions of the law, the provision prescribing the severest punishment shall apply to inflict the punishment upon the offender.

Section 91.—When the Court is to pass judgment inflicting punishment upon any person, it appears that he has committed several distinct offences, the Court may inflict upon such person the punishment prescribed for the severest offence only, provided that, in no case, the aggregate term of imprisonment, unless it be imprisonment for life, shall exceed twenty years.

Regarding the collection of fines, the Thai Penal Code provides as below:

Section 29.—If a person inflicted with the punishment of fine fails to pay the fine within thirty days as from the day on which the judgment is passed, his property shall be seized to pay for the fine, or else he shall be confined in lieu of fine. But, if the Court has reasonable cause to suspect that he is likely to evade the payment of the fine, the Court may order him to find security, or it may order him to be confined in lieu of fine for the time being.

10. Mistake of law is no defense in Thai law. Mistake of fact is provided for in Section 62, which states:

Section 62.—Whenever any fact, if really existing, will cause the doing of any act not to be an offence or the doer not to be punishable, or to receive less punishment, or even though such fact does not really exist, but the doer understands mistakenly that it really exists, the doer, in such cases, shall not be guilty, or shall be exempted from the punishment, or shall receive less punishment, as the case may be.

If the ignorance of fact according to the third paragraph of Section 59, or the mistake as to the existence of fact according to the first paragraph occurs

through the offender's negligence, he shall be liable for committing the offence by negligence in the case where the law specfically provides that the doer shall be criminally liable for the act though committed by negligence.

A person shall receive heavier punishment on account of any fact only when he must have known of such fact.

12. Section 8 of the Thai Penal Code has to do with offences committed outside the country. According to this section, if the offender is a Thai, there must be a request for punishment by the government of the country where the offence occurred or by the injured person: if the offender is an alien, the Thai government or a Thai must be injured, and there must be a request for punishment by the injured person. Also, the offence committed has to be one of a specified list, e.g. offences endangering public safety.

13. Section 209 and 210 deal with criminal conspiracy:

Section 209.—Whoever is a member of a body of persons the proceedings of which are secret and the aim of which is unlawful, is said to be a member of a secret society, and shall be punished with imprisonment not exceeding seven years and fine not exceeding fourteen thousand *baht*.

If the offender be the chief, manager or office-bearer in that body of persons, he shall be punished with imprisonment not exceeding ten years and fine not exceeding twenty thousand *baht*.

Section 210.—Whenever five persons upwards conspire to commit any offence provided in this Book II and punishable with maximum imprisonment of one year upwards, every such person is said to be a member of a criminal association, and shall be punished with imprisonment not exceeding five years or fine not exceeding ten housand *baht*, or both.

If it be a conspiracy to commit an offence punishable with death or imprisonment for life or imprisonment from ten years upwards, the offender shall be punished with imprisonment of two years to ten years and fine of four thousand *baht* to twenty thousand *baht*.

Sections 211 and 212 contain further provisions regarding those attending meetings of a secret society or criminal association, and those aiding such a body. Section 213 makes everyone present at the commission of the offence, or anyone present at any meeting where the commission of such offence was decided upon liable to the punishment for such offence.

14. The only provision similar to what is termed a "felony-murder" would be Section 289, which states *inter alia* that whoever commits murder on any other person for the purpose of preparing or facilitating the commission of any other offence shall be punished with death.

16. Section 114 deals with para-military activities, stating:

Whoever collects forces or arms, or otherwise makes preparations or conspires to commit insurrection, or commits any offence which is part of the plot to commit insurrection, or instigates the people to commit insurrection, or does any act to assist in keeping secret any intention to commit such offence shall be punished with imprisonment of three years to fifteen years.

17. Crimes relating to drugs are dealt with by the Dangerous Drugs Act, and not within the Penal Code itself.

Abortion is dealt with in Sections 301 through 305 of the Penal Code, as below:

Section 301.—Any woman who causes abortion for herself, or allows any other person to procure abortion for her shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand *baht*, or both.

Section 302.—Whoever procures abortion for any women with her consent shall be punished with imprisonment not exceeding five years or fine not exceeding ten thousand *baht*, or both.

If such act causes other grievous bodily harm to the woman, the offender shall be punished with imprisonment not exceeding seven years or fine not exceeding fourteen thousand *baht*, or both.

If such act causes death to the woman, the offender shall be punished with imprisonment not exceeding ten years and fine not exceeding twenty thousand *baht*.

Section 303.—Whoever procures abortion for any woman without her consent shall be punished with imprisonment not exceeding seven years or fine not exceeding fourteen thousand *baht*, or both.

If such act causes other grievous bodily harm to the woman, the offender shall be punished with imprisonment of one year to ten years and fine of two thousand *baht* to twenty thousand *baht*.

If such act causes death to the woman, the offender shall be punished with imprisonment of five years to twenty years and fine of ten thousand *baht* to forty thousand *baht*.

Section 304.—Whoever attempts to commit the offence according to Section 301 or 302, first paragraph, shall not be punished.

Section 305.—If the offence mentioned in Section 301 and Section 302 be committed by a medical practitioner, and (1) it is necessary for the sake of the women's health or (2) the woman is pregnant of account of the offence mentioned in Section 276, Section 277, Section 282, Section 283, or Section 284 [the offences mentioned in these sections are those of rape, intercourse with a girl not over thirteen years of age, etc.] having been committed the offender is not guilty.

Prostitution: While prostitution itself is not an offence under the Code, Section 286 makes any man over sixteen years of age subsisting on the earnings of a prostitute punishable with imprisonment not exceeding three years or fine not exceeding six thousand *baht* or both.

Obscenity:

Section 287.—Whoever—

(1) for the purpose of trade or by trade, for public distribution or exhibition, makes, produces, possesses, brings or causes to be brought into the Kingdom, sends or causes to be sent out of the Kingdom, takes away or causes to be taken away, or circulates by any means whatever, any document, drawing, print, painting, printed matter, picture, poster, symbol, photograph, cinematograph film or any other thing which is obscene;

(2) carries on trade, or takes part or participates in the trade concerning the aforesaid obscene material or thing, or distributes or exhibits to the public, or hires out such material or thing;

(3) in order to assist in the circulation or trading of the aforesaid obscene material or thing, propagates or spreads the news by any means whatever that there is a person committing the act which is an offence according to this Section or propagates or spreads the news that the aforesaid obscene material or thing may be obtained from which person or by what means shall be punished with imprisonment not exceeding six months or fine not exceeding one thousand *baht*, or both.

18. The Thai Penal Code does not deal specifically with firearms and explosives. Section 114 (described under Question 9 above) makes illegal the collection of arms for the purpose of committing insurrection.

19. Capital punishment is provided for a number of offences:

Section 107: Causing death to the King, or attempts to cause death.

Section 108: Act of violence against the King or His liberty (death or imprisonment for life).

Section 109: causing death to the Queen, Heir-apparent, or Regent; also attempts.

Section 110: Act of violence against the Queen or Her liberty, against the Heir-apparent or His liberty, or against the Regent or his liberty if such act is likely to endanger life (death of imprisonment for life).

Section 113: Violence or the threat of violence used to overthrow or change the Consitution and other such offences against the internal security of the state (death or imprisonment for life)

Section 119: Act with intent to subject the country or any part of it to the sovereignty of a foreign State, or to deteriorate the independence of the State (death or imprisonment for life)

Section 121: A Thai bearing arms in battle against the country, or participating as an enemy of the country (death or imprisonment for life)

Section 132: Causing death, or attempts to cause death, to the Sovereign, Queen or Consort, Heir-apparent, Head of a friendly foreign state, or a foreign Representative accredited to the Court of Thailand (death or imprisonment for life).

Section 288: Murder (death, imprisonment for life, or imprisonment for fifteen to twenty years)

Section 289: Murder of an ascendant [an official excising his duties, persons assisting an official, of any person by pre-meditation, any person by employing torture or acts of cruelty; for the purpose of facilitating or preparing the commission of any other offence; or for the purpose of securing the benefit obtained through any other offence, or for concealing or escaping punishment for any other offence committed by him.

20. Section 24 of the Thai Criminal Procedure Code states:

When several offences are connected for any reason such as:

(1) if it appears that several offences have been committed by the same offender, or that several offenders are connected in the commission of one or more offences, whether as principals, accessories or receivers of stolen property;

(2) if it appears that several offences have been committed with the same aim, or that the several offenders have previously conspired;

(3) if it appears that an offence has been committed with the intent to cause an offender to escape punishment in respect of another offence which the latter has committed, then every criminal prosecution may be insituted in, or all the offenders may be charged before, the Court which is competent to try and adjudicate the case in respect of the offence for which a higher maximum punishment is provided.

If the connected offences are punishable with the same maximum punishment, the Court which is competent to try and adjudicate the cases shall be the Court before which criminal prosecution of any of the said offences has been instituted first.

Section 160 of the same Code provides:

Any number of distinct offences may be joined in the same charge, but they shall be separated and stated in consecutive order.

Each of such offences may be treated as distinct from other offences in the charge. If the Court thinks fit, it may direct that any one or several of such distinct offences be tried separately. Such order may be made either before or during trial.

Under Section 10 of the Penal Code, whoever does any act outside the Kingdom which is an offence under various sections (relating to counterfeiting and alternation, or relating to robbery or gang-robbery on the high seas) offences endangering public safety, relating to documents, relating to sexuality, against life, against body, etc.) shall not be punished in the Kingdom for the doing of such act again, if:

(1) there is a final judgment of any foreign Court acquitting him; or

(2) there be a judgment of any foreign Court convicting him, and he has already completed the punishment.

Criminal Code of Turkey

QUESTION 1

The present Turkish Penal Code was put into effect on July 1, 1926, as Law No. 765,[1] and has been amended several times up to September 28, 1971. It consists of three books: the First Book (Articles 1–124) contains the basic principles of criminal law common to all crimes; the Second Book (Articles 125–525) contains provisions concerning felonies; and the Third Book (Articles 525–592) deals with misdemeanors.

In the Turkish criminal system of codification, provisions related to sentencing are not under a special chapter, but are part of the First Book of the Penal Code or are added to the articles of the Code.

QUESTION 2

Consecutive numbering is used in the Turkish system of codification. Amendments or additions to any law are done on the same consecutive numbering, by modifying the paragraphs or by adding new articles or paragraphs to the existing articles.

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[1] *T.C. Resmî Gazete* (Turkish Official Gazette), No. 320 of 3/13/26.

Sources of the English texts used throughout this report are:

(a) G.O.W. Mueller, Ed-in-Chief, *The Turkish Code of Criminal Procedure* ("The American Series of Foreign Penal Codes," Vol. 5; South Hackensack, N.J.: Fred B. Rothman & Co., 1965). [In the text of this report, this is referred to as "TCCP", the Turkish Code of Criminal Procedure].

(b) G.O.W. Mueller, Ed-in-Chief, *The Turkish Criminal Code* ("The American Series of Foreign Penal Codes," Vol. 9; South Hackensack, N.J.: Fred B. Rothman & Co., 1965). [In the text of this report, this is referred to as "TPC", Turkish Penal Code].

QUESTION 3

Turkish criminal law follows the classical school concept of moral responsibility of the criminal. To be guilty of a crime a man must have criminal intent and criminal capacity. Article 45 of the Turkish Penal Code provides:

In felonies absence of criminal intent precludes punishment.

There is an exception for those cases where the law prescribes a punishment for consequences of the perpetrator's acts or omissions.

In misdemeanors, everyone is responsible for his act or omission in the absence of criminal intent.

Beside the four different kinds of culpability which the new Federal Code wants to establish, there is another kind of Turkish criminal law. This is inexperience in one's profession or trade. Article 455, Para. 1, of the Turkish Penal Code states:

Whoever causes the death of a person through negligence or carelessness or inexperience in his profession or trade or inobedience to regulations, orders or instructions shall be punished by imprisonment for two to five years and by a heavy fine of 250 to 2,500 [Turkish] liras.

Book I, Part 4 of the Turkish Penal Code prescribes criminal capacity and the matters which negate or reduce that capacity. In Article 46, Para. 1, mental disorder has a nullifying effect on criminal responsibility, and in Article 47, it has a diminishing effect.

Article 46, Para. 1:

Anybody afflicted with mental disease which causes a complete loss of consciousness or of freedom of action, at the time of commission of the act, shall not be punished.

Article 47:

The punishment to be imposed upon a person who, at the time of commission of the act, was afflicted with mental disease which diminished his consciousness or his freedom of action in a considerable degree, shall be reduced in the following manner:

(1) the punishment of death shall be reduced to heavy imprisonment of not less than fifteen years:

(2) life imprisonment shall be reduced to heavy imprisonment of ten to fifteen years;

(3) permanent disqualification to hold public office shall be reduced to temporary disqualification to hold public office.

Other punishments shall be reduced by one-third to one-half.

The provisions of Articles 46 and 47 also apply to temporary reasons causing complete or partial loss of consciousness or freedom of action. But acts committed under the influence of voluntary intoxication or under the influence of narcotics taken voluntarily are excluded from the provisions recognizing incapacity (TPC, Article 48).

QUESTION 4

Rules and principles governing the causal connection between the defendant's act and the result are not defined and specified in the Turkish Criminal Code, despite their existence as basic principles in Turkish law. And in most of the provisions describing felonies, there is no statement requiring the necessity to indicate the causal connection. The judge shall determine the causal relation as a fundamental motive for his decision.

QUESTION 5

There is insanity defense to criminal charges under Turkish law, and the insane defendant may not be found guilty. The test of mental responsibility under Turkish Penal Code seems to be similar to the test proposed by the American Law Institute. When the criminal is found not responsible for his criminal act, due to mental disease or defect, this does not mean his immediate freedom. He must be accorded medical treatment. The second and following paragraphs of Article 46 handle the procedural aspects of the insanity defense:

During the preparatory investigation, the decision subjecting such person (afflicted with mental disease) to custody and medical treatment must be ren-

dered by the decision of the Justice of the Peace, during the preliminary investigation by the decision of the investigating judge, and during the final investigation by the decision of the competent court.

The custody and medical treatment continues until such person is cured. But a defendant accused of a crime entailing heavy imprisonment shall not be released prior to one year.

The person thus placed in custody and subjected to medical treatment shall be released by the competent court upon a hospital board report of the institution where the patient was kept in custody and for treatment, indicating that it is medically understood that the patient has recovered.

This report shall include a decision as to whether, in view of considerations of social safety, and considering the nature of the disease and the defendant's alleged crime, the person shall be subject to medical control and an examination, and if so, shall state the time and intervals for periodic examinations.

It is the delegation of the prosecuting attorney to insure that this medical control and examination is provided at the specified time, at the place of the defendant's residence, and if not there available, then at the nearest hospital which has competent specialists. If during this medical control and treatment the disease appears to recur, the person shall be placed in custody and subjected to medical treatment by decision of the judge or the court.

QUESTION 6

As it was said before, in Turkish law voluntary intoxication by alcohol or by drugs is not a defense to the criminal charge. But provisions of Articles 46 and 47 shall apply to anybody who, during the commission of a crime, was in a state of incapacity for extraneous reasons, such as involuntary intoxication by alcohol or by drugs. The treatment of this kind of intoxication is done according to the provisions of Article 46 of the Turkish Penal Code.

According to Articles 404 and 573 of the Turkish Penal Code, narcotic addicts and alcoholics shall be kept and treated in a hospital until it is medically ascertained that they have recovered. If such persons are in an area where there is no hospital for that kind of treatment, they shall be sent to a place where one exists.

QUESTION 7

The Turkish criminal system shows some criteria for the determination of the guilt of the accused person. These criteria, which are mentioned in Article 49 of the Turkish Penal Code, are the legitimate defense of self or of others, the necessity to react against danger, and the execution of a legal order. These situations are not specified but they are put as basic principles which mitigate or eliminate guilt.

Article 49:

No punishment shall be imposed if the perpetrator acted:

(1) in order to execute the provisions of a statute or an order given by a responsible authority, execution of which is the perpetrator's duty;

(2) in immediate necessity to repel an unjust assault against his own or another's person or chastity;

(3) in necessity, if there was no other way of protection, so as to protect himself or another person against a grave and certain danger not knowingly caused by himself.

In the case indicated in sub-paragraph 1, if the order issued is contrary to law, the punishment for the felony resulting from the violation of the law, shall be suffered by the person who has issued the order.

Article 461 of the Turkish Penal Code provides additional situations which have nullifying or mitigating effects on punishment, as follows. Whoever kills, causes bodily pain, injures the health, or causes mental disorder of another person, due to a necessary action, shall not be punished. Action may be taken in defense of one's property against plunderers or perpetrators during looting, plundering, highway robbery, and kidnapping. Action may also be taken against persons who climb, by means of ladder, into one's house or any kind of building and it's outhouses, or make a hole in the walls, or break the doors, or set fire to such buildings, provided that such offenses are committed during the night or, if committed during the day, against buildings which are in solitary locations, and provided that there is a reasonable danger or a serious fear for

the personal security of those residing in such buildings. If the defender goes to extremes in his defense in the case prescribed above, his punishment shall be reduced by one-third to one-half.

QUESTION 8

In the Turkish Penal Code, crimes are classified as either felonies or misdemeanors. Nobody may be punished for an act which is not expressly defined by law as a crime, and no one can be subjected to a punishment not prescribed by law. (*Nulla poena sine lege, nullem crimen sine lege*). (TPC, Article 1). Individual offenses are defined and their penalties are prescribed in each article of the Code.

QUESTION 9

There are sections in the Turkish Penal Code which provide for suspension of execution of sentences. It is up to the discretion of the judge, after considering the past conduct and the moral attitude of the convicted and whether the good effect of the suspension will stop him from committing a felony in the future, to suspend the execution of the sentence. He may suspend the sentence if the defendant does not have previous convictions and if the sentence to be suspended is not for an imprisonment of more than six months.

Criminal institutions such as probation and parole do not exist in the Turkish Penal Code, due to the lack of qualified personnel and funds. However, there is a system of conditional release, which resembles parole. Prisoners who have served a special period of time required by law with good conduct may request their conditional release. All of the services are done by police officers instead of parole officers. The decision to grant the conditional release is given by the court instead of the parole board.

The Turkish Penal Code provides for determinate sentences of imprisonment, while provisions for extended term prison-sentence for dangerous special offenders are not mentioned.

Chapter 16 of the proposed Federal Code, "Offenses Involving Danger to the Person," corresponds to Part 9 of the Second Book of the Turkish Penal Code, which is entitled "Felonies Against Individuals." According to the Code, a person who intentionally murders another shall be punished by heavy imprisonment for twenty-four to thirty years (TPC, Article 448). In the proposed Federal Code the same crime is classified under Class A Felony, and its authorized term of imprisonment is not more than 30 years. In the Turkish Code the minimum term of imprisonment is unconditionally set and limited by law, while in the proposed Federal Code the minimum term of imprisonment is attached to some requirements.

The Turkish Penal Code states that if the homicide is committed against the wife, husband, brother, sister, adopted parents, adopted child, step-mother, step-father, step-son or -daughter, father-in-law, mother-in-law, son-in-law, daughter-in-law; or if the defendant has intentionally killed a government official during or due to the performance of his duty; or if he has murdered by means of poisoning, the defendant shall be punished by heavy imprisonment for life (TPC Article 449).

The offender shall suffer death if he has committed the murder against an ascendant or descendant; against a member of the Grand National Assembly; against more than one person; with premeditation; under a brutal feeling or with torture; through fire, flood and shipwreck; in order to prepare, facilitate or commit a separate crime, even if it cannot be consummated; in order to get the fruits of a crime, to conceal the preparation made for that purpose, or in the heat of anger resulting from failure to achieve the goal of a crime; in order to conceal a crime or to destroy the evidence and traces thereof; to enable himself or someone else to run away from punishment; or with the motive of vendetta (TPC, Article 450).

In the Turkish Penal Code, there is no provision requiring an organization convicted of an offense to give notice or appropriate publicity to the conviction, nor is there a provision for giving publicity to a conviction of a person, such as forcing persons convicted of drunken driving to use a special plate or sign.

Articles 81–88 of the Turkish Penal Code, concerning recidivism, talk about persistent criminals and find the solution in increasing the punishment. However, those provisions are not equivalent to the provisions mentioned in the proposed Federal Penal Code.

Article 81:

If a person commits a new crime within ten years of serving a sentence of more than five years, or after such a sentence is set aside, and within five years in case of other punishments, the punishment to be imposed for the new offense shall be increased by not more than one sixth.

If the new crime is of the same kind as the crime causing the previous conviction, the punishment shall be increased by one sixth to one third.

If the punishment of a second crime is increased because of recidivism, the increase may not exceed, in any event, the maximum punishment authorized for the previous crime.

If a fine or banishment has been imposed for either the former or the subsequent crimes, and a different type of punishment is imposed for the other, the rules about rates prescribed in Articles 19 and 40 shall be applied in determining the amount of addition to be made for recidivism.

Article 82:

If a person previously sentenced to heavy life imprisonment commits one or more felonies and the later felony or felonies are punishable by temporary heavy imprisonment, the period of the night and day solitary confinement shall be increased by one eighth of the total temporary imprisonment; and if they are punishable by imprisonment, the solitary confinement period shall be increased by one tenth of the total temporary imprisonment.

However, the additional solitary confinement period may not exceed three years in heavy imprisonment, and two years in imprisonment.

Where a convict who had previously been sentenced to heavy life imprisonment, is again so sentenced for his later felony, he shall be punished by death.

Article 83: Repealed [10–1–1936].

Article 84:

The duration of imprisonment to be served in accordance with Article 19, in lieu of heavy fine to be imposed in a case of recidivism, may not be more than five years.

Article 85:

If anybody who is sentenced twice or more to punishments restricting liberty for more than three months each time due to crimes he had committed, commits, within the periods specified in Article 81, another crime of the same kind punishable by a punishment restricting liberty, the punishment to which he will be sentenced, if less than thirty months, shall be increased by one half and in other cases by one third; provided that the periods for imprisonment and heavy imprisonment may not be more than thirty years.

Article 86:

Apart from the felonies to which the same Article of the law is applicable and which are included in the same Chapter of the Code, all the felonies specified below shall be considered to be of the same kind:

(1) felonies committed against the security of the state;

(2) felonies committed by government officials by violation of their duties respecting their office or by misusing their authorities;

(3) felonies involving religious or political liberty and misconduct by religious officials during performance of their duties;

(4) felonies committed against judges and government officials in connection with the performance of their duties and in violation of the State administration and public order;

(5) the felonies of false accusation, malicious prosecution, perjury, false swearing and misconduct of lawyers and solicitors;

(6) felonies committed against public welfare;

(7) felonies covered in Part 8;

(8) felonies in Chapters I and II of the Part respecting felonies against persons;

(9) all felonies specified in the Articles respecting larceny, robbery, procurement of benefits by threatening to disclose a secret, fraud, breach of confidence, purchasing and concealing items used in or which are products of a fenoly and fraudulent bankruptcy, and [some felonies committed against persons having official titles, stealing Government properties and other felonies against public confidence].

Article 87:

The following convictions shall not be taken as the basis for application of the foregoing provisions of recidivism:

(1) conviction of a misdemeanor in the case of the commission of a felony or vice versa;

(2) felonies committed by imprudence or carelessness or inexperience in a profession or a trade or disobedience to orders or regulations, after commission of other felonies; and vice versa;

(3) convictions of purely military felonies;

(4) sentences rendered by a foreign court, excepting those rendered for offenses [for counterfeiting of money, public bonds and valuable seals, and crimes related to narcotics].

According to Article 260 of the Turkish Code of Criminal Procedure,[1] the judge has to give reasons in writing for sentences imposed. Sentences rendered by criminal courts may be appealed. Sentences restricting liberty for fifteen or more years and death sentences are reviewed by the Court of Appeal on its own motion, without being subject to request, charges, or expenses. If the judgment is reversed, the Court of Appeal forwards the file to the originating court or to another nearby court having the same jurisdiction for review of its own decision and for a new judgment. However, in the following situations the Court of Appeal gives a final decision on the merits of the case in place of the originating court: if a decision for an acquittal or for the cessation of the investigation is necessary without further clarification of the facts; if the Court of Appeal concurs with the assertion of the Chief Public Prosecutor for the application of the minimum degree of punishment prescribed by law; and if the law has been erroneously applied (TCCP, Article 322). The right to appeal a judicial decision is open either to the Public Prosecutor or the accused. The Public Prosecutor may also appeal on behalf of the accused person (TCCP, Article 289).

With several exceptions, the cumulative system is accepted for the application of punishments for multiple offenses. The exceptions are:

(a) If a person, after a judgment, is convicted of another crime committed therebefore or thereafter, and if the person is sentenced to life imprisonment more than once, he shall be punished by death.

(b) If a person is sentenced to identical kinds of temporary punishments restricting liberty, the total of the punishments shall be applied. And if a person is sentenced to at least two heavy imprisonments of not less than twenty-four years each, life imprisonment shall be applied. In case of sentences to fines of the same kind, the person shall be subject to the total of the fines.

(c) If one of the punishments is life imprisonment and the other temporary punishment restricting liberty, life imprisonment shall be the punishment to be applied.

(d) If a person is sentenced to various kinds of temporary punishments restricting liberty, they shall be applied separately and completely. The punishments shall be executed in the following order: heavy imprisonment, imprisonment, light imprisonment, and banishment (TPC, Articles 68–74).

(e) The maximum punishments of the same category restricting liberty to which a defendant may be subject shall not exceed thirty-six years of heavy imprisonment, twenty-five years of imprisonment, ten years of light imprisonment, or fifteen years of banishment. The total of punishments of different categories restricting liberty may not exceed thirty years (TPC, Article 77).

(f) Whoever violates several provisions of the law by a single act shall be punished under the provisions of the article involving the most severe punishment (TPC, Article 79).

(g) During the trial of a case if a court perceives a connection between various cases before it, it may order them to be consolidated for purposes of joint investigation and decision (TCCP, Article 230). The Court of Appeal reviews the file as a whole, and if the judgment is reversed, this decision affects the consolidated file.

Under the Penal Code there are two types of punishment involving the imposing of fines: the heavy fine, which ranges from 10 to 25,000 Turkish liras;

[1] Law No. 1412 of 4/4/29, *T.C. Resmi Gazete* (Turkish Official Gazette), No. 1172 of 4/20/29.

and the light fine, which consists of 3 to 1,000 Turkish liras, to be paid to the Treasury. There is no maximum limit for a fine based on proportion (TPC, Articles 19–24). For example, in the case of bribery, in addition to the principal punishment to be given to the bribee, a heavy fine of five times the amount of the money he has received or five times the value of the benefits promised shall also be imposed as fine (TPC, Article 225).

Fines are collected by the Treasury in accordance with the provisions of the Law on Enforcement of Punishments.[1] Because of the financial situation of the convicted, the court may order the payment to be made at intervals not exceeding the period of two years. In case of impossibility of payment, the convicted may be forced to work in a public service or in a job related to the municipality for a period not exceeding one year. If the payment is not made due to bad intention or as a result of negligence, up to one year of imprisonment shall be imposed.

According to Article 5 of the Law on Enforcement of Punishments, in order to determine the amount of a fine the court shall take into consideration the job, the profession, the financial situation and the resources of the defendant. Age and health also have their effect on determination of fines.

QUESTION 10

Ignorance or mistake of law is not a defense under the Turkish Penal System (TPC, Article 44). Mistake of law may only be a defense where knowledge of the law is an element of the offense.

Mistake of persons and facts is a defense in Turkish law. If a person commits a felony against a person other than he intended, as a result of a mistake or defect, the matters of aggravation arising from the situation of the injured party shall not be imputed to the perpetrator. Such cases may be dealt with as if the felony had been committed against the person intended, but the perpetrator shall benefit from any matter of mitigation applicable to the felony (TPC, Article 52).

If a man thinks he is shooting an animal, but in reality he kills a man, he is not guilty of intentional murder but of manslaughter with recklessness and carelessness (TPC, Article 455).

QUESTION 11

There is differentiation between crime and jurisdiction in Turkish law. This differentiation is among different types of courts having different jurisdictions. Turkey has a non-federal governmental system. Therefore, conflicts of jurisdiction between the federal and state courts do not exist.

QUESTION 12

The system of territoriality is a basic rule in Turkish Penal law. Whoever commits a crime in Turkey shall be punished in accordance with the Turkish law. A Turkish citizen, even if he is sentenced in a foreign country for a crime committed in Turkey, shall be retried in Turkey. A foreigner shall be tried in Turkey upon the request of the Minister of Justice.

In some cases mentioned in Articles 3–8 of the Turkish Penal Code, the systems of individuality and universality have been applied. For example, a Turkish citizen or a foreigner who commits a felony against the security of the State, or counterfeits the Turkish money, the bonds and valuable seals, or commits a felony against Turkey and Turkish citizens, shall be directly prosecuted and retried in Turkey upon the request of the Minister of Justice, even if the perpetrator was previously convicted in foreign countries. Whoever commits a felony during and in connection with the performance of an office or mission on behalf of Turkey in foreign countries shall be prosecuted and tried in Turkey.

QUESTION 13

The Turkish Penal Code defines conspiracy as "forming a society with five or more persons with the purpose of committing felonies." Each participant shall be punished by heavy imprisonment for not more than five years exclusively for forming such a society.

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[1] Law No. 647 of 1965, *T.C. Resmî Gazete* (Turkish Official Gazette), No. 12050 of 7/16/65.

If the participants of this society wander on mountains, countryside or highways, or two or more of them carry arms on them or conceal arms at secure places, the punishment shall be heavy imprisonment for three to ten years.

Instigators and leaders of the society shall be punished, in the events described in the first paragraph of this section, with heavy imprisonment for three to eight years, and, for the events described in the second paragraph, for five to twelve years.

Whoever knowingly and willfully assists the participants of this type of society, through harboring the same, through procuring food, arms and ammunition, or in other manners, shall be imprisoned for not more than one year. The punishment shall be reduced by one half to two-thirds, if one who is assisting is a close relative (TPC, Articles 313-314).

QUESTION 14

The "felony-murder" rule does not have direct application in Turkish law. The Penal Code contains several provisions on participation in felonies and the degree of culpability of the participants. Of several persons participating in a felony, each one shall be subject to the punishment prescribed for that act (TPC, Article 64). In a case when a homicide has been committed by more than one person and if the killer cannot be identified, each of the participants shall be punished by one-third to one-half of the punishment prescribed for the offense committed. However, this provision is not applicable to persons who are known to have committed the act jointly.

QUESTION 15

Turkey has a centralized governmental system and one Penal Code which applies to the entire country.

QUESTION 16

Para-Military activities are defined in the Turkish Penal Code as "recruiting soldiers against any other country without the approval of the Turkish Government", and "enlisting or arming Turkish citizens within Turkey, to be engaged in the services of, or in favor of a foreigner (TPC, Articles 128 and 129).

QUESTION 17—A—DRUGS

Drugs in the Turkish Penal Code are divided into two groups for the purpose of criminal sanctions. Heroin, hashish, cocaine and morphine are in the first group, and all other narcotics are in the second group. The following articles of the Turkish Penal Code apply to drugs.

Article 403:

(1) Whoever manufactures, imports or exports narcotics or attempts to perpetrate such offenses without possession a license or contrary to the purpose of a license, shall be punished by heavy imprisonment for not less than ten years and in addition, by banishment for three to five years which will be executed in a county capital outside the production areas where there is a police organization and where he will be kept under police supervision during the period of banishment; and by a heavy fine of 10 liras for every gram of narcotic or fraction thereof. However, the fine so imposed shall not be less than 1,000 liras;

(2) if the narcotic indicated in the foregoing paragraph is either heroin, hashish, cocaine or morphine, the perpetrator shall be punished by life imprisonment;

(3) whoever sells, puts on sale, purchases, or keeps in his possession or in another place narcotics, or transfers or receives free of charge or ships or transports such items, or mediates in the sale, purchase, transfer or procurement in any way of such items, in Turkey, without a license, or contrary to a license, shall be punished by heavy imprisonment for not less than five years, and in addition by banishment for two to five years which will be executed in a county capital outside the production areas where there is a police organization and where he will be kept under police supervision during the period of banishment, and by a heavy fine of 10 liras for every gram of narcotic or fraction thereof. However, the fine so imposed shall not be less than 500 liras.

(4) where the offenses specified in the foregoing paragraph involve either heroin, cocaine, morphine or hashish, heavy imprisonment to be imposed shall not be less than ten years, nor the heavy fine less than 1,000 liras, nor the banishment for less than three years;

(5) whoever organizes societies with the purpose of committing the offenses prescribed in the foregoing paragraphs, or governs or participates in such societies, shall suffer heavy imprisonment for not less than five years.

Conspiracy of two or more persons to commit such offenses is considered organizing a society.

In case of a commission of the crime by those organizing or governing or participating in a society, the punishments prescribed in paragraphs 1, 3 and 4 shall be doubled. Under conditions described in the second paragraph the perpetrators shall be sentenced to death;

(6) where the crimes defined in paragraphs 1, 3 and 4 are committed jointly by two or more persons having no agreement or connection with persons who have made such crimes a profession, trade, or a means of making a living, the punishment for the perpetrators shall be increased by one half. Under the conditions indicated in paragraph 2 the punishment shall be death;

(7) whoever uses a minor or a person who has no criminal liability, in committing the offenses defined in paragraphs 1, 3 and 4, shall suffer the punishment prescribed for the principal increased by one sixth; and in the case of paragraph 2, the punishment shall be death.

In case an offender is sentenced to death according to paragraph 1, 2, 5, 6 or 7, or where this punishment is commuted to a lesser punishment, a decision for the confiscation of all personal and real properties of the offender shall also be rendered.

Article 404:

(1) Whoever facilitates the use of narcotics through summoning one or more persons by way of providing a special place or in other ways, and whoever gives such substances to minors or to overtly insane persons or to an addict, shall suffer the punishments prescribed in paragraphs 3 and 4 of Article 403 increased by one sixth;

(2) whoever uses narcotics or keeps them in his possession with the purpose of using them, shall be punished by imprisonment for three to five years and by a heavy fine of 100 to 1,000 liras.

Recidivists, apart from being imprisoned and fines, shall be banished for not less than one year, which will be executed in a county capital outside the production areas where there is a police organization and where he will be kept under police supervision during the banishment period.

Narcotic addicts shall be kept and treated in a hospital until it is medically ascertained that they have recovered. In locations where there is no hospital such persons will be sent to a place where there is a hospital.

A decision to keep and treat in a hospital a person who is medically ascertained to be addicted to narcotics may be rendered by the court of competent jurisdiction at every stage of the investigation. Persons addicted to narcotics shall also be put under police supervision for a period of six months to one year.

(3) whoever has participated in a crime defined in Article 403 or in this Article, and informs the competent authorities of the crime, the accomplices and the places where they keep and manufacture the narcotics, before official authorities are informed thereof, and thus facilitates their apprehension, shall be exempt from punishment involving his offense.

For a person having served or aided in the disclosure of the crime or in the apprehension of the criminals, after official authorities are informed of such crimes, capital punishment may be commuted to heavy imprisonment for not less than fifteen years and life imprisonment to heavy imprisonment for not less than ten years and other punishments may be reduced by one half.

Article 405:

Whoever purchases the substances specified in Article 403 with a false prescription, shall be imprisoned for not less than a year and a heavy fine of 100 to 1,000 liras shall be imposed.

Article 406:

(1) If the offenses defined in Article 403 are committed either by a physician, or a veterinarian, or a pharmacist, or a dentist, or a drugstore owner or the manager, or a civilian or military sanitation officer, or a midwife, or a

nurse; heavy life imprisonment prescribed in that Article shall be changed to the punishment of death and the punishments of temporary heavy imprisonment, heavy fine and banishment shall be increased by one third to one half. The perpetrator shall also be disqualified for life from holding his office or exercising his profession:

(2) If the offenses defined in Article 403 and paragraph 1 of Article 404 are committed in any kind of transportation means or in public places by the owners or employees thereof or by government officers or employees through misusing their office or authority, heavy life imprisonment prescribed in the aforesaid Article or paragraph shall be changed to the punishment of death, and temporary heavy imprisonment, heavy fine and banishment shall be doubled. The perpetrator shall also be disqualified for life from holding his office or from exercising his trade or profession.

Article 407:

Where the offenses defined in the foregoing Articles result in an injury to the health of a person such as getting sick, injured or bruised, the punishments, with the exception of death and heavy life imprisonment, shall be increased by one third to one half. If the offense has resulted in an injury to the health of more than one person, said punishment shall not be less than doubled.

In case the offense has resulted in a person's death the offender shall be sentenced to death.

Article 408:

All properties existing in a place opened to facilitate the use of the substances indicated in Article 403 shall be confiscated and half the price of these properties shall be given to those having served in the disclosure of the crime.

QUESTION 17–B—ABORTION

Abortion is a crime in Turkey, and it is classified under "felonies against the integrity and the health of the race." The following articles apply to abortion.

Article 468:

Whoever procures miscarriage of a woman's child without her consent, shall be imprisoned for seven to twelve years.

A person procuring miscarriage with the woman's consent shall be confined for two to five years.

The woman giving consent for an abortion shall suffer the same punishment.

The provision of the first paragraph of this Article shall be applied in the following instances:

(1) where the woman is below the age of fourteen, or does not possess, in any manner, mental capacity.

(2) if her consent is obtained by the use of violence, threat, suggestion or fraud.

Where the act specified in the first paragraph has caused the woman's death, the punishment is heavy imprisonment for fifteen to twenty years; the punishment shall be heavy imprisonment from ten to fifteen years if such act has caused her only bodily injury.

If the act specified in the second paragraph has caused the woman's death, the offender shall be confined for five to twelve years, and if it caused her bodily injury, the punishment shall be confinement for three to eight years.

Article 469:

Any woman who wilfully causes an abortion on herself, shall be imprisoned for one to four years.

Any person who induces a pregnant woman to procure an abortion by obtaining the means of abortion, exclusive of participation in the crime mentioned in the foregoing paragraph, shall be imprisoned for six months to two years.

Article 470:

Whoever obtains a means of abortion for a woman who is thought to be pregnant or performs such acts on this woman so as to serve the same purpose and, as a result of these, causes death or bodily injury to the woman, shall be punished according to Articles 452 and 456.

If the woman has consented to the performance of the act, the punishment shall be reduced by one third.

Article 472:

If the offenses defined in this Chapter are committed in order to preserve the pride and reputation of one's own self or relative, the punishment shall be reduced by one half to two thirds; . . .

Where the one committing the offense defined in paragraphs 1, 2, 3, 5 and 6 of Article 468, in paragraph 2 of Article 469, [and] in Article 470 . . . is a person engaged in a medical profession, the punishment prescribed for the respective offense shall be increased by not less than one third.

QUESTION 17-C—GAMBLING

Gambling is an offense included in Chapter 1 of the Third Book of the Turkish Penal Code, which deals with misdemeanors related to public morals. The pertinent articles follow.

Article 567:

Whoever manages gambling in public places or in locations open to the public, or procures a place for gambling, shall suffer light imprisonment for one to six months and a light fine of 250 to 500 liras. Repeators shall suffer light imprisonment for two months to one year and a light fine of 500 to 1,000 liras.

All articles and devices of gambling existing at the place of gambling, and all properties and money which are exposed, shall be seized and confiscated.

Where the perpetrator has made a habit of such acts, or where he has acted as the croupier [house], he shall suffer double the foregoing punishments and shall be disqualified from performing his trade or profession for not more than three months.

Article 568:

Whoever, not having participated in the misdemeanour specified in the foregoing article, gambles in public places or places open to the public, shall be punished by light imprisonment for not more than one month and by a light fine of 500 to 100 liras. In case of repetition, the light imprisonment shall be for ten days to two months and the light fine shall be from 100 to 200 liras.

Article 569:

All games of chance played or managed *lucri causa* are gambling, according to the Turkish Criminal Code.

Article 570:

Those places, even if proper to private assemblages, where a fee is received for the use of gaming devices, or where games are customarily played or where any people desiring to play games are allowed to enter, are places open to the public in the sense used in relation to the misdemeanors specified in the foregoing Articles.

QUESTION 17-D—PROSTITUTION

Prostitution is not directly dealt with in the Turkish Penal Code. Provisions concerning prostitution are under the sub-title "Instigation to Prostitution," as follows.

Article 435:

Whoever entices and instigates a minor, who has not completed the age of fifteen, to prostitution and facilitates the ways thereof, shall be imprisoned for not less than two years and ordered to pay a heavy fine of 100 to 500 liras.

If the act of enticement is perpetrated by one of the ascendants, sisters or brothers, the adopter, the natural or appointed guardian, the teacher or tutor or the servants of the minor, or by another person authorized to supervise the minor, the perpetrator shall be imprisoned for not less than three years.

Where the act of enticement is perpetrated against a person who has completed the age of fifteen but not yet completed the age of twenty-one, the perpetrator shall be punished by imprisonment for six months to two years and by a heavy fine of 50 to 200 liras.

Where the act of enticement is perpetrated by one of the persons indicated in the second paragraph of this Article or by the husband, the perpetrator

shall be imprisoned for not less than two years, and ordered to pay a heavy fine of 100 to 500 liras.

Where a girl or woman who has completed the age of twenty-one is enticed into prostitution by her husband, ascendant, ascendant by affinity, brother or sister, the perpetrator shall be punished by imprisonment for six months to two years.

Article 436:

Whoever, with the purpose of prostitution, seduces, provides or sends from one place to another for another person, a virgin girl or a woman who has not completed the age of twenty-one, even by obtaining her consent, or a virgin girl or a woman over twenty-one years of age by using force, violence, threat or applying influence or fraud, shall be imprisoned for one year to three years and ordered to pay a heavy fine of 50 to 500 liras.

Where the above mentioned wrongs are committed against a virgin girl or a woman who has not completed the age of twenty-one, by using force, violence, or threat or by applying influence, or where such wrongs are committed by the victim's brother or sister, ascendant, ascendant by affinity, husband, natural or appointed guardian, teacher, tutor, servant or supervisor, the offender shall be imprisoned for two to five years.

Whoever commits the preparatory actions of the offenses embraced in this Chapter, shall be punished by one sixth of the punishment prescribed for the main offense.

QUESTION 17–E—OBSCENITY

Obscenity is a felony against public decency because of its tendency to corrupt public morals.

Article 426:

Whoever exhibits obscene books, newspapers, pamphlets, magazines, documents, articles, advertisements, pictures, illustrations, photographs, movie films or other items; or who puts on stage or show these things in theaters, cinemas or other public places, or who knowingly distributes or sells or suffers them, or the phonograph records of the same nature, to be distributed or sold, or who in order to make profit or to distribute or exhibit such items, draws, illustrates, carves, manufactures, prints, or reproduces such items, or records them on phonograph records, or imports, exports or transports them from one locality to another in Turkey, or suffers the foregoing activities to be performed, or who performs any transaction respecting any of the foregoing objects, or performs any transaction to facilitate the trade thereof, or who, in any manner, makes publicly known the ways of procuring, directly or indirectly, these documents or items, shall be imprisoned for one month to two years and shall be sentenced to pay a heavy fine of 15 to 500 liras.

Article 427:

The provisions of the foregoing Article are applicable also to the writers of obscene books, articles, documents or advertisements and to those who have assumed administrative responsibility for newspapers or magazines containing such writings or pictures.

The documents and objects mentioned in the foregoing and in this Article, shall be confiscated and destroyed.

Article 428:

Whoever openly sings obscene songs, plays such phonograph records, or sells newspapers, pamphlets and other documents by way of pronouncing words which are against public decency or injurious to a person's or a group of persons' honor and dignity, shall be imprisoned for one to six months and shall be sentenced to pay a heavy fine of 30 to 50 liras.

Turkish law is silent on homosexual activity between consenting adults, as long as they are not engaged in sexual intercourse in public (TPC, Article 419).

QUESTION 18

Whoever, without obtaining permission from appropriate authority, manufactures dynamite, bombs, or similar destructive killing devices, gun powder and other combustible chemicals; or imports such items into Turkey or acts as in-

termediary for such importation; or carries, sends, or knowingly mediates for the carriage from one place to another of such items shall be punished by imprisonment of three to five years and by a heavy fine of 1,000 to 10,000 Turkish liras. Whoever organizes societies with the purpose of committing the abovementioned offenses, or whoever governs or participates in such societies shall be punished by imprisonment from seven to fifteen years. And, whoever carries, keeps, sells, or puts up for sale, or purchases such items without permission shall suffer imprisonment from one to two years and a fine of 500 to 2,000 Turkish liras (TPC, Article 264).

The preceding article (264) is the version as amended on 9/28/71. The old article also covered "weapons prohibited by law" and the ammunition for such weapons. Since Article 265, which was not amended or repealed, gives the definition of prohibited, or forbidden, weapons, this writer is under the impression that the part related to such weapons has been left out of this amended article by mistake.

Article 265 of the Turkish Penal Code states:

For the purpose of the provisions of this Code, "forbidden weapons" embraces the following:

(1) all kinds and models of old or new types rifles, light or heavy machine guns or bayonets or swords or spears or other kinds of war weapons, once used or still being used by the Armed Forces, or taken from the enemy or assigned to the military personnel or police force.

(2) pistols, regardless of their calibre, make or model, with barrels longer than fifteen centimeters including the chamber;

(3) all types of cutting tools with single or double blades which are pointed and twenty-five centimeters long exclusive of the handle.

Knives or tools appropriate for the performance of a profession or trade or which are household utensils, carried or used for this purpose, are not considered forbidden weapons.

Whoever carries weapons not forbidden by law, within cities and towns, without a license obtained from the proper authority, shall be punished by light imprisonment of fifteen days to three months, or a light fine of 30 to 500 Turkish liras (TPC, Article 549).

If a person makes, invents, transports, prepares, imports, conceals, or carries arms, ammunition, knives, bombs or similar destructive, combustible, or fatal instruments in order that a group of conspirators may accomplish its purpose, he shall be punished by one to twenty-four years of imprisonment (TPC, Article 150).

Weapons considered by the Turkish Penal Code as matters of aggravation are: firearms; explosives; all sorts of cutting, perforating or bruising tools used for defense or assault; burning, corroding, or wounding chemicals; all kinds of poisons; and choking and blinding gases (TPC, Article 189).

If a felony is committed by a group of persons and if one of the persons is armed, the felony is considered as being committed by arms (TPC, Article 190).

QUESTION 19

There is no jury system in Turkey. Capital punishment is recognized by law under the following circumstances:

(a) If the act committed is intended to put the entire or a part of the territory of Turkey under the sovereignty of a foreign State or to decrease the independence or to disrupt the union of the State or to separate a part of its territory from the Administration of Turkey (TPC, Article 125).

(b) If a Turkish citizen commands or conducts the forces of a foreign State, when that State is in war against Turkey (TPC, Article 126).

(c) In case of political and military spying when the act is committed in time of war or has jeopardized war preparation or war power and capability or military operations of Turkey (TPC, Articles 136 and 137).

(d) If a person conducts and administers societies having the goal to establish domination of a social class over other social classes, or exterminating a certain social class, or overthrowing any of the established basic economic or social orders of the country (TPC, Article 141).

(e) When someone attempts by force to alter, modify, or abolish, in whole or in part, the Constitution of the Turkish Republic, or attempts to overthrow the Grand National Assembly organized by the constitution or to prevent the

Grand National Assembly from accomplishing its mission (TPC, Article 146).

(f) In cases when someone, by force, overthrows or prevents the performance of the duties of the Council of Ministers or incites others to commit these felonies.

(g) In cases where someone incites a revolt against the Government or incites Turkish people to kill one another (TPC, Article 149).

(h) When, without an official status conferred by the Government or without a valid reason, a person undertakes the command of a military unit; of Navy; of a war vessel, fort, harbor, or city; or disobeys, without a valid reason, a Government order to relinquish command, and continues to assume command (TPC, Article 152).

(i) When the President of Turkey is assassinated (TPC, Article 156).

(j) In some cases for narcotic offenses (see answer to question #17).

(k) For the felony of rape when the victim dies.

(l) If homicide is committed as described in Article #450 of the Turkish Penal Code (see answer to question #9).

(m) In case of kidnapping for political and social reasons, when the perpetrator attains his goal (TPC, Article 499).

Any offense involving capital punishment is under the jurisdiction of the Aggravated Felony Courts which have three-judge benches consisting of a chief justice and two associate justices. There is no special and separate proceeding to determine sentence in capital cases. Only sentences restricting liberty for fifteen or more years and death sentences are reviewed by the Court of Appeal on its own motion (TCCP, Article 305).

QUESTION 20

Whoever, while perpetrating a crime, commits with the same conduct another act punishable by law, shall be punished in accordance with the provisions related to multiplicity of crimes, if such acts or crimes are not, by provision of the law, elements of the main crime, or if they do not constitute grounds of aggravation of the main crime (TPC, Article 78). For example, threat is a crime by itself (TPC, Article 191), but it is one of the elements of the crime of plundering and looting (TPC, Article 495).

When the defendant is subject to punishment for a crime unrelated to one for which he has been previously convicted and punished or will be punished, the prosecution may be discontinued. The investigating judge may suspend the prosecution temporarily upon the request of the Public Prosecutor who initiated the proceedings. Any suspended prosecution may be renewed only if the statute of limitations has not run out during the suspension period (TTCP, Article 149).

Prosecution done in a foreign country by a Turk or a foreigner for a crime against or related to the security of the Turkish Government is not a bar to a subsequent prosecution in Turkey. Such perpetrators, even if previously convicted in foreign countries, are subject to prosecution and to retrial in Turkey upon the request of the Minister of Justice (TPC, Article 4).

U.S.S.R.

Soviet criminal law consists of the fundamental principles of criminal legislation of the U.S.S.R. and the union republics, which determine the general principles of criminal legislation and are binding upon the union republics, federal laws which define crimes against the state and military secrets, as well as some other crimes detrimental to the interests of the Soviet Union and, finally, the criminal codes of the union republics.

The present study, therefore, is based on the now-prevailing Fundamental Principles of Criminal Legislation of the U.S.S.R. and the Union Republics of December 25, 1958, as amended (hereinafter referred to as Principles) [1] and the Criminal Code of the RSFSR of October 27, 1960, as amended.[2] The crimi-

[1] *Text published in Osnovy zakonodatel'stva Soiuza SSR i soiuznykh respublik* (Fundamental Principles of Legislation of the U.S.S.R. and the Union Republics). Moscow, 1971, p. 245 ff.

[2] *Kommentarii k ugolovnomu Kodeksu RSFSR* (Commentary on the Criminal Code of the RSFSR—hereinafter referred to as *Kommentarii*). Moscow, 1971.

nal codes of the other union republics incorporate the provisions of the Principles and are patterned on the Criminal Code of the RSFSR.

QUESTION 1

The Criminal Code of the RSFSR is divided into two parts, the General Part and the Special Part, as follows:

General Part

Chapter 1. General Provisions.
Chapter 2. Limits on the Operation of the Criminal Code.
Chapter 3. Crime.
Chapter 4. Punishment.
Chapter 5. Assignment of Punishment and Relief from Punishment.
Chapter 6. Compulsory Medical and Educational Measures.

Special Part

Chapter 1. Crimes against the State.
Chapter 2. Crimes against Socialist Property.
Chapter 3. Crimes against Life, Health, Freedom, and Dignity of the Person.
Chapter 4. Crimes against Political and Labor Rights of Citizens.
Chapter 5. Crimes against Personal Property of Citizens.
Chapter 6. Economic Crimes.
Chapter 7. Official Crimes.
Chapter 8. Crimes against the Administration of Justice.
Chapter 9. Crimes against the System of Administration.
Chapter 10. Crimes against Public Security, Public Order and the Health of the Population.
Chapter 11. Crimes Constituting Relics of Local Customs.
Chapter 12. Military Crimes.
Appendix. List of Property not Subject to Confiscation by the Court Judgment.

Provisions dealing with sentences are incorporated in the General Part of the Code as Chapter 4. Punishment, and Chapter 5. Assignment of Punishment and Relief from Punishment. They are discussed in detail under Question 9.

QUESTION 2

In addition to the division into parts and chapters, the Code is divided into sections numbered consecutively from 1 to 269. No blank numbers are left for future enactments. If a new section is added, it is incorporated into the appropriate chapter of the Code and assigned the same number as the immediately preceding related section. For instance: Section 53. Conditional early release from punishment and replacement of punishment by milder punishment. Section 53_1. Non-applicability of conditional early release from punishment and replacement of punishment by milder punishment. Section 77. * * * Section 77^1. * * *

QUESTION 5

The basic conditions of criminal liability, as defined in Section 3 of the Principles, are as follows:

a. commission of a socially dangerous act (or omission to act) which is considered a crime by criminal law;

b. the crime must be committed either intentionally or negligently;

c. criminal punishment may be imposed only by a court judgment.

The definition of a crime is contained in Section 7 of the Principles which reads as follows:

Sec. 7. The concept of a crime. A socially dangerous act (an act or omission to act) provided for by criminal law which infringes upon the Soviet social order or system of government, the socialist system of economy, socialist property, the person, political, labor, property or other rights of citizens, as well as any other socially dangerous act provided for by criminal law, shall be a crime.

An act or omission to act shall not be a crime, in spite of the fact that it formally contains elements of any act provided for by criminal law if, by reason of its significance, it does not constitute a social danger.

According to the currently prevailing interpretation in the Soviet Union, the above definition of crime, which has been incorporated in the criminal codes of all the union republics:[1]

* * * is theoretically correct since it establishes the determining characteristics of a crime according to Soviet criminal law. These characteristics are the social danger of an act and its criminal illegality.

The social danger of an act is a characteristic (inner feature) of a crime disclosing its social essence and fixed in the law, and, consequently, having legal significance. By nature this characteristic is objective and unchangeable. Its presence or absence does not depend on the will of the legislator or the will of an organ applying the law.

This does not contradict the fact that the inclusion of a concrete act in the list of crimes depends on the legislator and the evaluation of a committed act as socially dangerous—on the organ applying the law.

Another authoritative Soviet source states that:[2]

Social danger of a crime consists in that it causes real harm to socialist social relations or, in some cases, creates the danger of causing such harm.

The question whether an act is socially dangerous is decided by the investigating authorities or by the court according to the circumstances under which the act was committed, the place or time of its commission, and finally, to a considerable decree, the personality of the perpetrator.[3] This applies specially in a decision of whether to recognize an act as insignificant and thus not socially dangerous. In such instances, the decision is made on the basis of the factual circumstances of the case (the nature of the act itself, the circumstances of its commission and the conditions under which it was committed, the harmful consequences, the insignificance of the damage caused, and other things).[4]

According to Section 3 of the Principles, a crime may be committed only by a guilty person, *i.e.*, a person who intentionally or negligently commits a socially dangerous act provided for by the law.

The prevailing Soviet criminal law recognizes two forms of guilt—intent (Sec. 8, Principles) and negligence (Sec. 9, Principles).

Section 8 reads as follows:

Sec. 8. Intentional commission of a crime. A crime shall be regarded as committed intentionally when the person who commits it is conscious of the socially dangerous character of his act or omission to act, foresees its socially dangerous consequences, and desires those consequences or knowingly allows them to occur.

Thus this Section distinguishes between direct intent (*dolus directus*) and indirect intent (*dolus indirectus, dolus eventualis*).

In regard to direct intent Soviet legal writers discern three qualifying elements: (1) consciousness of the social danger of the act which is predetermined by the purely subjective qualities of the perpetrator such as experience, education, etc., (2) foreseeing the socially dangerous consequences, and (3) desiring the predetermined consequence to occur. This element characterizes the will of the perpetrator.

Elements (1) and (2) are the same for indirect intent as for direct intent, but element (3) requires that the consequences be consciously allowed (not desired) to occur. Consequently, in the case of indirect intent, the will (attitude) of the perpetrator is passive, not active as in direct intent.[5]

Negligence is dealt with in Section 9 of the Principles which reads as follows:

Sec. 9. Commission of a crime through negligence. A crime shall be considered committed through negligence if the person who commits it foresees the possibility of the occurrence of socially dangerous consequences of his act or omission to act but recklessly (*lekkomyslenne*) counts on their being prevented, or does not foresee the possibility of the occurrence of such consequences although he should and could have foreseen them.

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[1] *Kurs sovetskogo ugolovnogo prava. Chast' obshchaia* (A Course in Soviet Criminal Law. General Part). Leningrad University Press, 1968. v. 1, p. 158.
[2] *Kommentarii*, p. 17.
[3] *Supra* note 1 at 161–162.
[4] *Supra* note 2 at 19.
[5] *Supra* note 1 *at* 412 ff.

There are two forms of negligence. The first is defined as recklessness (*luxuria*), *i.e.*, when the person foresees the socially dangerous consequences of his act but recklessly (light-mindedly) expects that they will not occur. The second is defined as carelessness, *i.e.*, when the person does not foresee the socially dangerous consequences though he should and could have foreseen them.

The characteristic feature of recklessness as a form of guilt is that the attitude of the perpetrator is directed only to the probable consequences of his act.

The difference between recklessness and intent is based on the element of volition. In the case of the former the perpetrator foresees only the probability of the occurrence of the consequences, while in the case of intent, he desires (direct intent) or allows (indirect intent) them to occur.[1]

Carelessness, as defined in Section 9 of the Principles, is characterized by the absence, on the part of the perpetrator, of foresight of the occurrence of socially dangerous consequences and his duty to foresee them as well as the subjective possibility to foresee them. These aspect distinguish carelessness from other forms of guilt.

The duty to foresee represents an objective aspect based on legal premises such as the duties of an employee or the perpetrator's experience and the possibility of foreseeing which is the subjective aspect of criminal carelessness, depending on the personal traits of the perpetrator, his age, education, maturity, and the like.[2]

QUESTION 4

Neither the Principles nor the criminal codes of the constituent republics contain provisions which define, as the Draft Codes does, the causal relationship between conduct and result. Therefore, the answer to this question should be sought in legal writing and in the judicial practice of the U.S.S.R. Supreme Court and the supreme courts of the constituent republics.

According to a Soviet authority on criminal law:[3]

* * * the essence of causal connection in criminal law consists in establishing the borderline which separates a relationship between conduct and result necessary and sufficient for the justification (on the objective side) of criminal responsibility, from a relationship which does not play such a role.

The first theory of a causal connection formulated by Soviet legal scholars was the theory of *conditio sine qua non* which maintained that any condition necessary for an event to occur is the cause of the event. This theory, based on the equality of all conditions, excludes the possibility of any differentiation of conditions. It was strongly criticized as being practically useless because of its demand for unlimited responsibility.[4] A majority of legal scholars think that each condition is the cause of the result but not each cause may be recognized as "juridically" valid, i.e., not just any causal connection may justify criminal responsibility.

Another theory formulated by Soviet writers is the theory of necessary cause based on the premise that the difference between necessity and accidentality as objective categories appears to be the basis of the solution of the question of causality in law. A further necessary result is the manifestation of the regularity of development of a given phenomenon. On the other hand, an accidental result does not regularly ensue from the phenomenon, although it is stipulated by the cause. Hence the question of responsibility for the result may be positively solved only when the result was the necessary regular result of the person's conduct.[5]

The theory of "necessary result" was also challenged mainly because it contradicted the Marxist-Leninist philosophy establishing the relativity of concepts of necessity and accidentality. Another argument against it is that the question of whether the relationship between conduct and result is necessary or accidental is of no significance for criminal law. As the accidental non-

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[1] *Supra* note 1 (p. 2925) at 424 ff.

[2] *Sovetskoe ugolovno pravo. Obshchaia chast'* (Soviet Criminal Law. General Part). Moscow, 1969, p. 175.

[3] *Kurs sovetskogo ugolovnogo prava. Obshchaia chast'* (A Course on Soviet Criminal Law. General Part). Leningrad University Press, 1968, v. 1, p. 340. This textbook was prepared by a group of legal scholars of Leningrad University under the editorship of N. Belaev and M. D. Sharogorodskii.

[4] *Id.*, note 58.

[5] *Id.*, p. 343.

occurrence of the result excludes responsibility, likewise the responsibility for an accidental result should not be excluded.[1]

The concept of causal connection conforming with Leninist-Marxist philosophy is discussed by Prof. M. D. Durmanov.[2] According to him the problem of the presence or lack of a causal connection between the conduct (or lack of conduct) of a person and the harmful results which followed arises in all cases when the presence of harmful results constitutes an element characterizing the objective aspect of a crime. The establishment of the presence of a causal connection between a socially dangerous act (or omission to act) and the socially dangerous results which followed is important in instances when the law defines the occurrence of the specified harmful results as an objective element of the crime.

In discussing the problem of the results of a concrete socially dangerous act it should be established whether or not the result was caused, in objective reality, by this particular act.

The causal connection exists when harmful results are engendered objectively, although even independently of the perpetrator's will, by his particular action committed in the given, sometimes unique, circumstances.

A prerequisite of the causal connection is that the conduct must precede the harmful result. A simple sequence of events in time does not establish a causal connection if the result was not brought about by this particular conduct. There is no causal connection if only external cohesion, simple sequence, or coexistence of circumstances exist.

In cases where the criminal responsibility is connected with a violation of the rules which caused specified consequences, it is necessary to establish the rules which were violated, and whether the consequences were the result of this violation of these particular rules.

Method and/or means used for causing harmful results are important only if the law specifically connects criminal responsibility with the particular method or means.

In order to establish a causal connection between the lack of conduct and the result it is necessary to establish if:

(1) the perpetrator had the duty to perform the particular act,

(2) if he had the opportunity to perform the required act,

(3) if the omission to act caused or did not avert the consequences indicated by the appropriate section of the law.

If the act (or omission to act) which caused harmful results was performed by two or more persons who are not participants in crime, it is necessary to establish whether the act of each of them caused the results and the results were the consequence of failure to perform the act which each of these persons had the duty to perform.

Finally, the U.S.S.R. Supreme Court requires that direct, immediate, or close connection between conduct and result be established.[3]

QUESTION 5

According to Soviet legal doctrine insanity always constitutes a defense to criminal charges.

This rule is formulated in Section 11 of the Principles and incorporated as Section 11 into the Criminal Code of the RSFSR and pertinent sections of the criminal codes of all the other constituent republics.

Section 11 of the Principles reads as follows:[4]

A person shall not be subject to criminal responsibility who, at the time of committing a socially dangerous act, is in a state of nonimputability, that is, cannot realize the significance of his actions or control them because of a chronic mental illness, temporary mental derangement, mental deficiency, or other conditions of illness. Compulsory measures of a medical character may be applied to such a person by order of the court.

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[1] *Supra*, note 3 (p. 2926) at 347.

[2] *Sovetskoe ugolovnoe pravo. Obshchaia chast'* (Soviet Criminal Law. General Part). Moscow, 1969. p. 145 ff.

[3] *Supra*, note 1 (p. 2925), p. 351.

[4] Translation based on H. Berman *and* J. W. Spindler, *Soviet Criminal Law and Procedure. The RSFSR Codes*. Cambridge, Mass., 1966. p. 11.

Also, a person shall not be subject to punishment who commits a crime while in a state of imputability, but before the rendering of judgment by the court, contracts a mental illness which deprives him of the possibility of realizing the significance of his actions or of controlling them. Compulsory measures of a medical character may be applied to such person by order of the court, but upon recovery he may be subject to punishment.

The provisions of this section distinguish two groups of aspects on which the concept of nonimputability is based, namely, medical (biological, as some authors prefer) and juridical (psychological, according to some authors).[1]

Medical aspects are contained in a list of mental illnesses which include chronic mental illness, temporary mental derangement, mental deficiency (*slaboumie*), or other conditions of illness. The term "other conditions of illness" includes mental disturbances which may justify nonimputability only if they appear in acute forms, like some forms of psychosis, infectious diseases which cause mental derangement, mental states connected with deafness, and others.[2] Generally speaking, only such mental disturbances as are caused by illness may justify nonimputability. Emotional disturbances do not exclude criminal responsibility. They may be taken into account as extenuating circumstances.[3]

The juridical aspects of nonimputability characterize such a degree of disease as deprives a person of his ability to recognize the social significance of, or to consciously control, his conduct, and excludes criminal responsibility.[4]

The provisions of Section 11, paragraph 1 distinguish two juridical aspects, namely intellectual, *i.e.*, inability to recognize the significance of actions (impairment of reasoning ability), and volitional, *i.e.*, inability to control one's conduct. The latter implies that a person is more or less able to recognize the significance and social danger of his conduct but, because of the impairment of his will power, is unable to control his conduct.[5]

Section 11, paragraph 2 establishes rules for the treatment of persons who became mentally ill after committing a crime, but before the judgment was rendered.

Although these provisions mention only mental illness, judicial interpretation established that it had in mind both curable (temporary) and incurable (chronic, progressive) mental diseases.

In case of the former the court suspends court proceedings (even in its investigative phase) until the accused (or suspect) is declared cured and competent to stand trial, and decides on the compulsory measures of a medical character to be applied.

In case of the latter the court declares the accused (or suspect) nonimputable and decides on the necessity of applying, and the kind of compulsory measures to be applied, of a medical character.

The state of nonimputability eliminates the guilt of the accused which is the prerequisite of criminal responsibility. Therefore, under Soviet codes, once a person is found to be insane, proceedings are discontinued and he thus is accorded medical rather than penological treatment.

Compulsory measures of a medical character consist of commitment to a general psychiatric hospital or to a special psychiatric hospital.[6] To the latter must be committed a person who, by reason of his mental condition and the character of the socially dangerous act he has committed, is in need of hospitalization and compulsory treatment. Such a person must be kept under strict supervision.[7]

The final decision on the nonimputability and application of compulsory medical treatment of the defendant rests exclusively with the court. It must be, however, based on an expert examination which is mandatory when doubts arise with regard to the mental state of the defendant.[8] An expert examination may be initiated during the obligatory preliminary investigation by the investigators of the procuracy, of agencies of the Ministry of Internal Affairs, as

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[1] *Sovetskoe ugolovnoe pravo. Obshchaia chast'* (Soviet Criminal Law, General Part), Moscow, 1969, p. 119; *Kommentarii*, p. 30.
[2] *Sovetskoe ugolovnoe pravo*, p. 121.
[3] *Kommentarii*, p. 30.
[4] *Supra*, note 2 (p. 2923), at 122.
[5] *Id.*, p. 123.
[6] RSFSR Criminal Code, Section 58.
[7] *Id.*, Section 59.
[8] RSFSR Code of Criminal Procedure (hereinafter referred to as CCP), Section 79 (2).

well as of agencies of state security,[1] and finally by the court.[2] Referral of the defendant for examination by experts, appointed by an official in charge of the case, may take place only if there exist sufficient data that he committed a crime regarding which the criminal case has been initiated and the investigation is being conducted.[3]

Upon completion of the preliminary investigation the case is referred to the court if grounds for the application of compulsory medical treatment exist. The court must decide whether a crime has been committed and, if so, whether the defendant committed the crime, and whether he committed the act in a state of nonimputability and, finally, whether and what compulsory measure of a medical character is applicable.[4]

According to Section 22 of the Principles of Criminal Procedure of the Soviet Union and the Union Republics, as amended by the Decree of the Presidium of the Supreme Council of the U.S.S.R. of February 3, 1972,[5] the presence of the defense counsel is obligatory during the preliminary investigation and at the judicial examination from the moment of presentation of the accusation.

QUESTION 6

Section 12 of the Criminal Code states that a person who commits a crime in a state of intoxication shall not be freed from criminal responsibility.

The following interpretation of this provision has been commonly accepted by commentators and judicial practice:[6]

1. The term "state of intoxication" means intoxication caused by introducing into one's system both alcohol and narcotics.

2. Ordinary (*obychnoe*) intoxication (drunkenness), regardless of its intensity and the degree of loss, by a person, of the ability to control himself and guide his conduct, may not be considered in the light of nonimputability. It may be considered, at the discretion of the court, an aggravating circumstance.

3. Section 12 does not apply to (1) the mentally ill who committed a crime while in a state of intoxication if their mental illness excludes the imputability even if such illness is attributable to the abuse of alcohol, and (b) to pathological intoxication, i.e., a short-lasting, rare acute psychosis occurring suddenly in connection with the consumption of even a small amount of alcohol. Such persons are subject to compulsory medical treatment under Sections 11, 58–61 of the RSFSR Criminal Code (see Question 5).

4. In the case of drug addicts who committed a crime in a state of narcotic psychosis (morphine delirium, cocaine psychosis) such crime may be considered nonimputable.[7]

According to Section 62 of the RSFSR Criminal Code, alcoholics and drug addicts who are convicted of a crime may be subject to compulsory medical treatment in addition to the punishment for the crime committed.

Persons sentenced to deprivation of liberty undergo the compulsory medical treatment while serving the punishment and, if it is necessary to extend the treatment after release from prison, in a medical institution with a special therapeutic and work regimen. Those sentenced to measures of punishment other than deprivation of liberty are placed for compulsory medical teatment in medical institutions with a special therapeutic and work regimen.

Confinement in a medical institution is ordered by the court upon the petition of a social organization, comrade's court, public health agency, and upon the court's initiative. Termination of the compulsory medical treatment is ordered by the court on the basis of the opinion of the medical institution providing the treatment.

With regard to a person misusing alcoholic beverages or narcotic drugs, thereby putting his family in a difficult material situation, the court, in addition to applying a punishment other than deprivation of liberty for the crimes committed by him, may declare him partially incapable of entering into legal transactions. The decision in this respect is issued upon the request of the

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[1] RSFSR Code of Criminal Procedure, Section 117.
[2] *Id.*, Section 125.
[3] *Id.*, Section 404.
[4] *Id.*, Sections 403–413.
[5] *Vedomosti Verkhovnogo Soveta SSSR*, No. 6, 1972, text 51.
[6] *Kommentarii*, p. 32.
[7] *Sovetskoe ugolovnoe pravo. Obshchaia chast'* (Soviet Criminal Law. General Part). Moscow, 1969, p. 128.

members of his family, a labor union, or other social organization, the procurator, a guardianship and curatorship agency, or a medical institution. A curatorship is established for the person concerned on the basis of this decision.

QUESTION 7

The Soviet criminal codes do not contain, as does the Draft Federal Criminal Code, detailed provisions dealing separately with self-defense, the defense of others, or the defense of property. The subject is dealt with in general provisions under the heading "Necessary Defense."

Necessary defense is defined in Section 13 of the Principles as follows:

Sec. 13. Necessary defense. An act which, although containing the features of an act provided for by criminal law, shall not constitute a crime if it is committed in a state of necessary defense involving the protection of the interests of the Soviet state, social interests, the person or the rights of the defender, or of another person against a socially dangerous attack by causing harm to the attacker, provided that the limits of necessary defense are not exceeded.

The limits of necessary defense shall be considered exceeded if there is an obvious discrepancy between the defense and the character and danger of the attack.

This definition differs radically from that contained in the Basic Principles of Criminal Law of 1924 which merely stated that "measures of social defense [*i.e.*, punishments] shall not be applied to persons who commit an act provided for by criminal law, in necessary defense."

The provisions of Section 13 were drafted on the premise that defense against a socially dangerous attack by harming the attacker, is one of the means of combating crime.[1] This was confirmed by the U.S.S.R. Supreme Court which, in addition, stated that necessary defense is an indefeasible right of a citizen.[2] According to other commentators "the repulsion of an attack may and should be considered only a moral duty of Soviet citizens if the attack threatens the interests of the state, social interests, or the interests of other people." [3]

According to the prevailing interpretation, the provisions of Section 13 of the Principles clearly define the requirements whose fulfillment justifies necessary defense. They are divided into two groups: requirements pertaining to the attack and requirements pertaining to the defensive action taken by the defender.[4]

The attack, in the first place, must be socially dangerous, *i.e.*, the actions of the attacker must be intended to cause real harm to the social or lawful interests of individuals. Most often, the socially dangerous attack is effected by action, but in some cases failure to act may justify necessary defense.

Necessary defense is permissible not only against criminal acts but also against other dangerous conduct of individuals. For instance, it is permissible against acts committed by insane persons or minors whose actions, although dangerous in an objective sense, are not qualified as crimes.[5]

The right to necessary defense arises only if the attack is socially dangerous in an objective sense.[6]

The attack, in the second place, must be actual, *i.e.*, the attacker must have started to cause harm to the interests protected by law, or constitute a direct and real threat that harm will be caused, exists, or is imminent.[7]

The state of necessary defense exists as long as the attack has not been completed, *i.e.*, still remains actual.[8] It should be pointed out that the U.S.S.R. Supreme Court, in its ruling of December 4, 1969, established that "the state of necessary defense cannot be considered to have been removed when the act

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[1] *Kurs sovetskogo ugolovnogo prava* (Course in Soviet Criminal Law). v. 1. Moscow, 1968. p. 465.

[2] Resolution of the Plenum of the U.S.S.R. Supreme Court, No. 11 of December 4, 1969. *Sbornik postanovlenii Plenuma Verkhovnogo Suda SSSR* (Collection of Resolutions of the Plenum of the USSR Supreme Court). Moscow, 1970. p. 326.

[3] *Supra* note 1 at p. 467.

[4] *Sovetskoe ugolovnoe pravo. Obshchaia chast'* (Soviet Criminal Law. General Part). Moscow, 1969. p. 192.

[5] *Id.* at 193.

[6] *Id.*

[7] *Id.* at 194.

[8] *Id.*

of self-defense directly followed the already completed attack, but because of the circumstances of the case, the moment of its completion was not clear to the defender."[1]

Soviet theory and judicial practice also deal with the concept of imaginary defense. Imaginary defense implies a mistake of fact and in such cases, provisions of the Criminal Code dealing with responsibility for criminal acts committed in error apply. According to the interpretation of the U.S.S.R. Supreme Court, "imaginary defense excludes criminal responsibility only when all circumstances of the incident gave the person who employed the means of defense reason to assume that a real attack was taking place and he did not realize that his assumption was erroneous."[2] If, however, a man who caused the harm in a state of imaginary defense did not realize, but in view of the circumstances should and could have realized, that the socially dangerous act was not taking place, his action should be considered a crime committed through negligence.[3]

Requirements pertaining to the action of the defender constituting necessary defense are: (1) the defense must be undertaken in order to protect the interests of the Soviet state (*i.e.*, the Constitution, external security, socialist property, socialist order, etc.), social interests (*i.e.*, the functioning of social organizations, social property, social order, etc.) and, finally, the person, rights and legal interests of the defender or another person; (2) defense is effected by causing harm to the attacker or his property; (3) the defensive actions must not exceed the limits of necessity.

For the last requirement, it should be pointed out that according to the interpretation of the provisions of Section 13 of the Principles established by legal scholars and judicial practice, "necessary defense implies active counteraction against the attack . . . and cannot be reduced to simple resistance to the attack or, in particular, to pushing the attacker away."[4] Hence, it is maintained that the determination of the limits of the necessity of defense should be made for each individual concrete case. For instance, it would be erroneous to establish a rule beforehand prohibiting the use of firearms against a person attacking with a knife.[5] Likewise, the reasonableness of the means and method of defense, or the extent of harm caused to the attacker, depend on the circumstances of the case. Therefore, in order to determine the legality of the defense, the following objective factors should be considered: the importance of the defended interest, the dangerousness of the attack and its intensity, the age and number of the attackers, the nature and method of attack, its imminence and suddenness, the real possibility of causing harm, the place, the circumstances, and the like.[6]

The defender has the right to choose the method of defense which, under the given circumstances, is the most effective and admissible.

Finally, the U.S.S.R. Court also stressed that because of the mental excitement brought about by the suddenness of the attack, the defender may not be able to select a commensurate means of defense, thus causing more serious consequences for which he cannot be held responsible.[7]

According to Section 13, the limits of necessary defense are exceeded if the defense is clearly disproportionate to the character and danger of the attack. The causing of harm in a case of exceeding the limits of defense constitutes a crime and the defender is brought to trial.

The criminal codes of the union republics provide for two instances of exceeding the limits of necessary defense as independent offenses. These are homicide (Sec. 105, RSFSR Criminal Code) and serious or less serious bodily harm (Sec. 111, RSFSR CRiminal Code). Other instances of excessive necessary defense are punishable under the relevant provisions of the Criminal Code dealing with offenses against persons or property. In such cases, however, excessive necessary defense should be treated as an extenuating circumstance (Sec. 33, Principles).

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[1] *Biulleten' Verkhovnogo Suda SSSR* (Bulletin of the Supreme Court of the U.S.S.R.), hereinafter referred to as Bulletin, No. 1, 1970, p. 19.
[2] *Id.*
[3] *Kommentarii*, p. 35.
[4] *Bulletin*, No. 4, 1967, p. 18.
[5] *Sovetskoe ugolovnoe pravo, Obshchaia chast'* (Soviet Criminal Law, General Part), Moscow, 1969, p. 197.
[6] *Id.*
[7] *Supra* note 2, at 326.

The question of whether the defense is clearly disproportionate is left to the decision of the court which should be based on the concrete circumstances of the case.

QUESTION 8

In the Soviet Union the traditional division of criminal offenses, for the purpose of sentencing, does not exist. Any act provided for by the Criminal Code is considered a crime punishable by penalties imposed by the courts.

However, it should be pointed out that the less important breaches of the law which are known in other legal systems as petty offenses and form a part of the criminal codes, in the Soviet Union belong to the sphere of administrative law and are dealt with in an administrative procedure. Administrative offenses are defined in laws, decrees, and regulations enacted by a legislative authority or by a government agency authorized by law. Penalties for these offenses are warnings, fines, corrective labor, and, in a few instances, preventive detention, or arrest, and do not entail a criminal record.

QUESTION 9

The Soviet criminal codes recognize three groups of penalties, namely (1) basic; (2) supplementary; and (3) mixed, *i.e.*, which may be imposed either as basis or as supplementary penalties.[1]

Basic penalties are deprivation of liberty, correctional labor without deprivation of liberty, and social censure.

Supplementary penalties, *i.e.*, those which may be applied in addition to another penalty, are confiscation of property and deprivation of military or special rank (applicable only to servicemen, members of state security, the militia, and the like).

Exile, banishment, deprivation of the right to occupy certain offices or engage in a certain activity, a fine, dismissal from office, imposition of duty to make amends for harm caused may be imposed either as basic or as supplementary penalties.

Sentence to deprivation of liberty, exile, banishment or correctional labor without deprivation of liberty is always for a specified term within the limits prescribed for a given kind of punishment and for a given offense.

The minimum and maximum terms are:

(1) for deprivation of liberty for from 3 months to 10 years the maximum limit is extended to 15 years in case of especially dangerous crimes or in case of an especially dangerous recidivist;

(2) for exile and banishment (both as a basic or supplementary penalty) for from 2 to 5 years.

(3) for correctional labor without deprivation of liberty for from one month up to one year.

In deserving instances justified by exceptional circumstances or by the personality of the defendant the court may assign a penalty lower than the minimum provided for the given crime or resort to another milder kind of penalty.[2]

The purpose of social censure as an independent penalty is to chastise the defendant by public expression by the court of the censure of his conduct and to bring it to public notice through the press or other means.[3]

According to the Principles (Sec. 32) the court determines the penalty within the limits provided for by law for the given crime in strict agreement with the provisions of the Principles and the criminal codes of the union republics. In imposing sentence the court must take into consideration the character and degree of social danger of the committed crime, personal traits of the accused, and mitigating and aggravating circumstances (Secs. 33 and 34, respectively). The court judgment must be "legal and reasoned" and in writing.[4]

The Soviet system provides for joint sentence rather than concurrent or consecutive sentences.

When multiple sentences of imprisonment are imposed on the defendant at the same time the court determines a final joint punishment by absorbing the less severe punishment in the severer one or by fully or partially cumulating

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[1] RSFSR Criminal Code, Secs. 21 and 22.
[2] RSFSR Criminal Code, Sec. 43.
[3] *Id.*, Sec. 33.
[4] RSFSR Code of Criminal Procedure, Sec. 301.

the punishment within the limits provided for the severer punishment. The same rule applies if it is established, after the judgment is rendered in a case, that the convicted person is guilty of yet another crime committed by him before the sentence has been imposed in the first case. In such case the sentence fully or partially served under the first judgment shall be counted in the term of punishment.[1]

According to the Principles of Criminal Procedure of the U.S.S.R. and Union Republics of December 25, 1958 (hereinafter referred to as the Principles of CP) the sentence may be appealed by the defendant (his counsel or legal representative) and by a victim by way of cassational appeal. The prosecutor must lodge a cassational protest against any illegal or unsubstantiated sentence (Sec. 44).

The review by way of cassational appeal (protest) consists in examining the legality of the sentence and its substantiation in the light of supplementary material presented by the interested party. However, the higher court is not bound by the arguments of the cassational appeal or protest and considers the case as a whole with respect to all the persons concerned. The higher court decision may (1) leave the judgment unchanged, (2) vacate the judgment and refer the case for new investigation or a new judicial consideration, (3) vacate the judgment and terminate the case, or (4) change the judgment (Sec. 45).

In case of a cassational appeal on behalf of the defendant the court may not increase the punishment imposed by the court of first instance, or apply the law for a less serious crime. Increased punishment may be imposed or the law for a more serious crime may be applied only if the prosecutor has protested the sentence or the victim has submitted an appeal (Sec. 46).

The judgment of acquittal may be vacated by way of cassation only on the protest of a prosecutor or on appeal of a victim or of a person acquitted (Sec. 47).

Suspension of the execution of a sentence and probation are dealt with in the Soviet criminal codes under the heading conditional conviction.[2]

In case of a conditional conviction the court assigns the penalty, suspends its execution, and determines the duration of the probation period.

The application of a conditional conviction must be justified by the circumstances of the case, the personality of the defendant, and the conviction on the part of the court that the serving of the sentence by the defendant would be inappropriate.[3]

Conditional conviction may be applied only when the penalty of deprivation of liberty or correctional labor is assigned.

The probation period shall be set for a duration of from 1 to 5 years. However, upon the recommendation of the organization or person under whose supervision the person concerned has been placed, the court may reduce the probation period set by the judgment after the expiration of not less than half of such term.

The Soviet probation system does not have special probation officers. Their functions are exercised by social organizations of collectives of workers or of collective farm workers upon their petition, which must be approved by the court or, in the absence of such petition, by a social organization or a person appointed by the court with their consent. General control of the conduct of the person concerned belongs to the court which rendered the judgment.

Revocation of probation is ordered if the person concerned commits a new crime of the same kind or of equal gravity.

In the Soviet Union the equivalent of parole is conditional release from punishment.

Eligibility requirements for such release are:

(1) exemplary conduct and honorable attitude of the prisoner toward labor;

(2) a. actual serving of not less than half of the assigned term.

b. actual serving of not less than two thirds of the assigned term by prisoners serving a sentence of at least 3 years of imprisonment, or by persons with a previous unexpunged criminal record who were sentenced for another intentional crime and, finally, by prisoners who committed an intentional crime while serving the sentence.

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[1] The Principles, Sec. 35.

[2] The Principles, Sec. 38; RSFSR Criminal Code, Sec. 43.

[3] According to commentators, conditional conviction is applied to persons who have committed less serious crimes.

Especially dangerous recidivists and person who have committed especially dangerous crimes against the state and other serious crimes, as well as those who have violated conditional early releases are not eligible for conditional release.

Revocation of conditional early release is mandatory if the person concerned is convicted of a new intentional crime committed during the remainder of the term of punishment.

Conditional early release is granted by the court upon a joint recommendation of a prison administration and a supervisory board of the executive committee of the local council of deputies of working people. The court may designate a collective of workers to supervise the conduct of the person concerned during the probation period.

It should be stressed that the submission of a recommendation for conditional early release is only the right of the recommending agencies, not their duty.[1]

A fine may be imposed in certain instances and within the limits prescribed by the appropriate provisions of the Criminal Code. The amount of the fine depends on the seriousness of the crime as well as on the financial circumstances of the defendant. If it is impossible to exact a fine it may be replaced by correctional labor without deprivation of liberty with 10 rubles of the fine to count as one month of correctional labor but not more than one year.[2] In case of hardship the payment of a fine may be deferred or arranged in installments for a period of up to 6 months.[3]

QUESTION 10

The Principles and criminal codes of the union republics do not contain provisions similar to Sections 303, 304 and 609 of the Draft Code.

However, Soviet theory and judicial practice recognize both mistake of law and mistake of fact.

Mistake of law may be based, on the one hand, on the belief that a certain conduct is socially dangerous and erroneously believed to be a crime (imaginary crime). Such mistake excludes criminal responsibility. On the other hand, the mistake of law may also be based on the erroneous belief of the perpetrator that his action is not socially dangerous and therefore not criminal. Lack of consciousness of the social danger of an action excludes the possibility of establishing the intent. If, however, it is established that the perpetrator could realize the social danger of his actions he may be held responsible for criminal negligence.[4]

Mistake of fact concerning factual circumstances constituting elements of a crime refers to (1) object of the criminal conduct; (2) objective side of an act (action or omission to act); and (3) development of a causal connection between conduct and socially dangerous consequences.

In all these instances the determination by the court that the mistake really took place may free the defendant from punishment for a lesser crime.[5]

QUESTION 11

This question is not applicable to the Soviet Union.

QUESTION 12

I. *Pertinent Provisions*

In the Soviet Union, the personality principle and the universality principle (universal repression principle) are the main principles upon which the applicability of Soviet criminal law[6] to crimes committed outside the boundaries of

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[1] *Sovetskoe Ugolovnoe Pravo. Obshchaia Chast'* (Soviet Criminal Law, General Part). Moscow, 1969. p. 355.

[2] The Principles, Sec. 27; RSFSR Criminal Code, Sec. 30.

[3] RSFSR Code of Criminal Procedure. Sec. 361, par. 2.

[4] *Ugolovnoe pravo. Chast' obshchaia* (Criminal Law. General Part). Moscow, 1966. p. 263

[5] *Ibid.*, p. 186–187.

[6] Soviet criminal legislation consists of the Fundamental Principles of Criminal Legislation which defines the principles and general provisions of criminal law, federal (*obshchesoiuznye*) criminal laws defining crimes against the state, military crimes, and if necessary, other crimes against the interests of the Soviet Union, and the criminal codes of the union republics.

the Soviet Union is based. The former makes criminal law applicable to Soviet citizens and stateless persons, the latter, to aliens. The relevant provisions are contained in Section 5 of the Fundamental Principles of Criminal Legislation of the USSR and Union Republics (*Ganovy ugolovnogo zakonodatel'stya Soiuza SSR i soiuznykh respublik*) which reads as follows:[1]

See. 5. Applicability of the Criminal Laws of the USSR and the Union Republics to Acts Committed Outside the Boundaries of the USSR.

Citizens of the USSR who commit crimes abroad shall be subject to criminal responsibility according to the laws in force in a union republic on the territory of which criminal proceedings are instituted against them or they are arraigned before the court.

Persons without citizenship who are situated in the USSR and who have committed a crime outside the boundaries of the USSR shall be responsible on the same basis.

If the persons specified in the preceding paragraphs have been punished abroad for the crimes committed by them, the court may accordingly mitigate the punishment or completely relieve the guilty person from serving the punishment.

Aliens who have committed crimes outside the boundaries of the USSR shall be subject to responsibility according to the Soviet criminal laws in instances provided for by international agreements.

These provisions have been incorporated into the criminal codes of all the union republics. For the purpose of this report, the relevant section of the Criminal Code of the Russian Soviet Federative Socialist Republic of 1960 is quoted below:[2]

Art. 5. Operation of the present Code with respect to acts committed outside boundaries of USSR. Citizens of the USSR who commit crimes abroad shall be subject to responsibility in accordance with the present Code if criminal proceedings are instituted against them or they are brought to trial on the territory of the RSFSR.

Persons without citizenship who are situated in the RSFSR and who have committed crimes beyond the boundaries of the USSR shall bear responsibility on the same basis.

If the persons specified in paragraphs one and two of the present article have undergone punishment abroad for the crimes committed by them, a court may accordingly mitigate the assigned punishment or may completely relieve the guilty person from serving the punishment.

For crimes committed by them outside the boundaries of the USSR, foreigners shall be subject to responsibility in accordance with Soviet criminal laws in instances provided for by international agreements.

II. *Comments and Interpretation*

A. Soviet citizens and stateless persons.[3]

One of the leading authorities on criminal law, N. D. Durmanov, points out that a Soviet citizen and a stateless person:[4]

* * * is subject to criminal responsibility before the Soviet court according to Soviet criminal law irrespective of the place where he committed an act considered a punishable crime by Soviet law.

Section 5, paragraph 1 of the Fundamental Principles has in mind, of course, acts considered crimes by Soviet law. It is of no importance whether these acts are considered crimes by the state where they were committed.

B. Aliens.

According to the interpretation of Section 5, paragraph 4, of the Fundamental Principles prevailing in the Soviet Union, Soviet criminal law has no external application except when international treaties provide for the punishment

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[1] *Osnovy sakonodatel'stva Soiuza SSR i soiuznykh respublik* (Fundamental Principles of the Legislation of the USSR and the Union Republics). Moscow, 1971. p. 247–S.

[2] Harold J. Berman, *Soviet Criminal Law and Procedure, the RSFSR Codes. Introduction and Analysis.* Cambridge, Mass., 1966. p. 5.

[3] According to Sec. 8 of the Law on Citizenship of the USSR of August 19, 1938, a person who permanently or temporarily resides in the USSR and has no proof of citizenship of any other foreign country is deemed to be a stateless person.

[4] V.D. Men'shagin, N.D. Durnsnov *and* A. G. Kriger, *editors. Sovetskoe ugolovnoe pravo. Obshchaia chast'* (Soviet Criminal Law, General Part). Moscow, 1969. p. 55.

of aliens for crimes committed abroad.[1] Such a view is expressed by M. I. Kovalev who states:[2]

Aliens who commit crimes outside the boundaries of the USSR are subject to criminal responsibility only in the cases provided for by international agreements.

However, it should be pointed out that the provisions of Section 5, paragraph 4, do not make an alien immune from prosecution in the Soviet Union for other acts committed abroad which are punishable under Soviet criminal laws but not punishable under foreign law.

According to the Soviet doctrine formulated in one of the commentaries:[3]

. . . a crime is deemed to be committed on the territory of the USSR if the criminal result occurs within the boundaries of the USSR. Therefore, aliens who commit an act whose criminal result occurs within the boundaries of the USSR may bear criminal responsibility under the Criminal Code of the RSFSR if the criminal result occurs in the territory of the RSFSR or under the criminal codes of the other union republics if the criminal result occurs in their territory.

This doctrine is, in the first place, applicable to crimes against the Soviet Union. An authority on Soviet criminal law states:[4]

An act which was begun outside the boundaries of the USSR but completed (the result has occurred or should have occurred) on our territory, is considered [an act] directed against the USSR and committed on the territory of the USSR. Thus, for instance, the planting of a delayed action bomb intended to go off on our territory should be considered a crime against the USSR.

Confirmation of this doctrine may be found in the decision of the Military Division of the Supreme Court of the USSR of May 19, 1960, which convicted Francis G. Powers, a pilot of the U-2 place, of espionage for which preparations had been made outside the boundaries of the USSR.[5] Powers was tried and convicted of espionage on the basis of Section 2 of the Law on Crimes Against the State of December 25, 1958, which reads as follows:[6]

Sec. 2. Espionage.

The transfer or stealing or obtainment for the purpose of transfer to a foreign state, a foreign organization or its intelligence service, of information constituting a state or military secret, as well as the transfer or obtainment on assignment from a foreign intelligence service of any other information to be used to the detriment of the USSR, if the espionage is committed by an alien or a stateless person, shall be punished by deprivation of liberty for from 7 to 15 years with confiscation of property and with or without exile for a term of 2 to 5 years, or by death with confiscation of property.

Other crimes against the state are treason, terrorist acts, diversion, sabotage, anti-Soviet agitation and propaganda, smuggling, currency violations, disclosure of state secrets, and others.

The Law of December 25, 1958, makes these federal crimes but since its provisions were incorporated in the criminal codes of the union republics, they are also republican offenses.

Attached is the Appendix: *Law in Eastern Europe, a series of publications issued by the Documentation Office for East European Law*, University of Leyden.

QUESTION 13

According to Soviet doctrine criminal conspiracy is one of the forms of complicity and is defined as criminal association.[7]

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[1] Soviet sources mention for instance: making or passing counterfeit money or securities (Sec. 87 of the RSFSR Criminal Code), illegally engaging in hunting seals and beavers (Sec. 164), making or supplying narcotics or other virulent or poisonous substances (Sec. 224), growing opium poppies and Indian hemp (Sec. 225), etc.

[2] M. I. Kovalov and others, *editors, Nauchnyi kommentarii k ugolovnomu kodeksy RSFSR*. Sverdlovsk, 1964. p. 9. A similar view is contained in Prof. B. S. Nikiforov, *editor, Nauchnyi kommentarii ugolovanogo kodeksa RSFSR* (Scholarly Commeneary to the Criminal Code of the RSFSR). Moscow, 1964. p. 11.

[3] *Id.*

[4] I.I. Solodkin *in Kurs sovetskogo ugolovnogo prava. Chast' obshchaia* (A Course in Soviet Criminal Law, General Part). Moscow, 1968. p. 129.

[5] *Trial of the U-2. Exclusive authorized Account of the Court Proceedings of the Case of Francis Gary Powers.* Chicago, Translation World Publishers. 1960.

[6] 2 *Sbornik zakonov SSR, 1938-1967* (Collection of Laws of the USSR, 1938-1967). Moscow, 1968. p. 451.

[7] *Sovetskoe ugolovnoe pravo. Chast' obshchaia.* Moscow, 1969, p. 234 ff.

Criminal association is not merely an agreement of several persons to commit a crime in concert. It must be a cohesive organization established for the purpose of carrying on criminal activities.

However, only the organization of and participation in a criminal association for the purpose of committing certain crimes explicitly specified in the Criminal Code are punishable as the crime itself. These crimes constitute crimes against the state and include conspiracy for the purpose of seizing power, which is a form of treason (Sec. 64, Criminal Code of the RSFSR), organizational activity for the purpose of establishing an anti-Soviet organization and participation in such an organization (Sec. 72), banditry (Sec. 77), and the organization of criminal groups in institutions of confinement for the purpose of terrorizing the inmates (Sec. 771). The mere fact of the organization of and participation in criminal associations for the purpose of committing other crimes (such as speculation, counterfeiting money, theft of socialist property, and the life) does not constitute an offense and will be taken into account as an aggravating circumstance if a crime has actually been committed.

Section 17 of the Principles contains an exclusive list of the parties to complicity (conspiracies). They are the performer, who actually carried out the crime; the organizer, i.e., the person who directed the preparation and actual commission of the crime; the instigator who intentially caused another person to decide to commit the crime; the accomplice, i.e., a person who cooperated in the commission of the crime by advice, instruction, supplying means or removing obstacles; as well as any person who before the act promised to harbor the criminal or to conceal the instruments and means of committing the crime and the objects obtained through the crime.

QUESTION 14

The Soviet criminal codes do not contain provisions similar to the provisions of paragraph 1601 of the Draft Code.

It should be pointed out that the U.S.S.R. Supreme Court, in its decision of June 14, 1960, stated that "in case of intentional homicide committed by a group of persons, not only the persons whose actions directly caused the death [of the victim] should be considered the perpetrators, but also those who, by their actions directed towards the achieving of the indicated aim, intentionally participated in the process of committing the crime." [1]

A similar interpretation is contained in a provision of the RSFSR Criminal Code which states that although a participant did not inflict the blows which caused the victim's death, nevertheless his actions consisted of direct intentional participation in the process of killing the victim and, therefore, he should be considered a co-perpetrator of the given crime.[2]

Of course in case of a homicide committed by two or more persons the court should consider the role and degree of participation of each participant.[3]

QUESTION 15

Although the Soviet Union is a federal state, there are no separate federal and state courts in the lower levels of the judicial hierarchy. The only court that has federal jurisdiction is the Supreme Court of the U.S.S.R. which, in addition to appellate jurisdiction, also has original jurisdiction in civil and criminal cases of special significance provided by law,[4] and criminal cases against Soviet dignitaries and high officials.[5] Special provisions concerning cases of special importance are contained in the Law on Military Tribunals of December 25, 1958.[6] According to this Law one of the functions of military tri-

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[1] *Sbornik postanovlenii Plenuma Verkhovnogo Suda SSR* (Collection of Decisions of the Supreme Court of the U.S.S.R.), 1924–1970, p. 445.

[2] *Biulleten' Verkhovnogo Suda RSFSR* (Bulletin of the Supreme Court of the RSFSR), No. 4, 1961, p. 7.

[3] *Komentarii*, p. 263.

[4] Section 11 (a), Law on the Supreme Court of the U.S.S.R. of February 12, 1957. *Sbornik zakonov SSSR* (Collection of Law of the U.S.S.R.), 1938–1967, Moscow, 1968, v. 2, p. 514–515.

[5] *Organizatsiia suda i prokuratury v SSR* (Organization of Court and Procuracy in the U.S.S.R.), Moscow, 1961, p. 172.

[6] *Supra* note 4 at 520 ff.

bunals is to combat crimes against the security of the U.S.S.R. Section 16 provides that the Military Collegium of the Supreme Court of the U.S.S.R. shall have original jurisdiction over all criminal cases (regardless of whether against the military or civilians) of special significance.

Although ordinarily the offenses defined in paragraphs 1801 through 1804 of the Draft fall under the jurisdiction of the courts of the union republics, they may be tried by the Military Collegium of the Supreme Court of the U.S.S.R. if they are deemed to be of special significance.

QUESTION 16

Soviet criminal laws do not have a section similar to Section 1104 of the Draft Code dealing with para-military activities. Such activities may constitute the crimes defined in Sections 72 and 73 of the RSFSR Criminal Code which read as follows:

Sec. 72. An organizational activity directed toward the preparation or commission of an especially dangerous crime against the state or toward formation of an organization which has as its purpose the commission of such a crime, as well as participation in an anti-Soviet organization, shall be punished in accordance with Sections 64–71 of the present Code.[1]

Sec. 73. By virtue of the international solidarity of working peoples, especially dangerous crimes committed against another working people's state shall be punished in accordance with Sections 64–72 of the present Code.

Other provisions of the Criminal Code which may be applied to para-military activities are Section 79 dealing with the organization of mass disorders accompanied by pogroms, acts of destruction, arson and other similar actions such as armed resistance, etc., as well as Section 190$_3$ which deals with the organization of and active participation in group activities which violate the public order. The latter are actions of a lesser degree or illegality than the former.

The organization of mass disorders consists of taking steps to assemble a crowd, to incite it to commit crimes, etc.,[2] and the organization of group activities consist in preparing plans, and in the formation of a group of people for the purpose o carrying out illegal activities.[3]

According to a Soviet commentator, group activity means a joint and simultaneous action of two or more persons.[4]

QUESTION 17

Drugs

The Ministry of Health of the U.S.S.R. and its subordinate agencies have overall control of narcotic drugs. It approves the Soviet State *Pharmacopeia* which contains a list of narcotics and potent drugs which may be prescribed and prohibits the use of certain drugs for medical purposes and orders their removal from the *Pharmacopeia*. Further, it approves the rules and procedures for the storing, registering, and dispensing of toxic and potent drugs by pharmacies, pharmaceutical depositories and plants, analytical laboratories, scientific research institutions, and medical schools.

The penal provisions relating to violations of laws and regulations relating to drugs are contained in the criminal codes of all the constituent republics. They provide punishment for the following:

(1) a. making, supplying, keeping, and acquiring for the purpose of supplying narcotics and other virulent or poisonous substances which are not narcotics, without the required permit (Sec. 224, pars. 1 and 2, RSFSR Criminal Code):[5]

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[1] Especially dangerous crimes against the state are treason, espionage, terrorist acts, sabotage and the like and are punishable by deprivation of liberty for from 5 to 15 year, or by death.

[2] *Kommentarii k ugolovnomu kodeksu RSFSR* (Commentary on the Criminal Code of the RSFSR), Moscow, 1971, p. 180.

[3] *Id.*, p. 405.

[4] *Id.*

[5] "Making" means producing by any method and in any quantity, "supplying," disposing of a drug to another person by sale, gift, transfer, lease, and the like, "keeping" for the purpose of supplying means temporary possession with intent to dispose of to another person, and "acquiring for the purpose of supplying," obtaining by any means in order to further dispose thereof (*Komentarii*, p. 473–474).

b. violations of the rules established for producing, keeping, issuing, registering, transporting or dispatching narcotics and other poisonous drugs which are not narcotics (Sec. 224, par. 3, RSFSR Criminal Code);

(2) cultivating opium poppies, Indian, South Manchurian and South Chuisk hemp without the required permit (Sec. 225, RSFSR Criminal Code);

(3) smuggling narcotics, virulent and poisonous substances which constitutes a crime against the state (Sec. 78, RSFSR Criminal Code);

(4) keeping dens for the use of narcotics (Sec. 226, RSFSR Criminal Code);

(5) influencing minors to use narcotics (Sec. 210, RSFSR Criminal Code);

(6) use of narcotics. This is penalized only in the Kirghiz, Azerbaijan, Armenian, and Turkmen republics;

(7) theft of opium, penalized in the Kirghiz SSSR.

Gambling and Prostitution

In the Soviet Union gamblers and prostitutes are considered parasites[1] and if they willfully refuse to comply with a decision of the proper authority ordering them to work and stop their parasitic existence, they may be subject to criminal responsibility under the provisions of Section 209, of the RSFSR Criminal Code which reads as follows:

Sec. 209,. The willfull refusal, by a person leading an antisocial life, to comply with the decision of an executive committee of the district (city) council of the deputies of working people concerning the taking up of employment and stopping his parasitic existence, shall be punished by deprivation of liberty for a term not exceeding one year or correctional labor for the same term.

The same sactions committed by persons previously convicted on the basis of the first paragraph of this section shall be punished by deprivation of liberty for a term not exceeding two years.

The prosecution under Section 209, may be instituted only if a gambler or a prostitute was directed to an assigned employment and failed to report for work or, after reporting, was absent from work or left it without reason. Such actions are considered to be wilful and to justify prosecution.[2]

Promoting and facilitating gambling and prostitution are penalized under Section 226, RSFSR Criminal Code, which reads as follows:

Sec. 226. The operation of houses of prostitution and pandering for material gain as well as the operation of dens for the use of narcotics or for gambling shall be punished by deprivation of liberty for a term not exceeding 5 years, with or without exile, with or without confiscation of property, or with banishment for the same period, with or without confiscation of property.

According to the established interpretation, operating a house of prostitution means permitting a place to be used regularly for carrying on sexual relations by a man and a woman or a man and another man. Pandering includes soliciting a person to patronize a prostitute, procuring a prostitute for a patron, providing a meeting place and the like.[3]

Causing a minor to engage in gambling or prostitution is dealt with in Section 210 of the RSFSR Criminal Code. It can be accomplished by active behavior (suggestions, persuasion, threats, promises, deceit), psychological influence, or coercion.[4]

Homosexual Activities

According to Section 121 of the RSFSR Criminal Code, homosexual activities (*i.e.*, sexual relations of a man with another man) regardless of whether between consenting or non-consenting adults, constitutes a crime and is punishable by deprivation of liberty for up to 5 years. The harsher penalty of deprivation of liberty is provided if physical force was used, if it was committed with a minor, or advantage was taken of a dependency relationship.[5]

Obscenity

Section 228 of the RSFSR Criminal Code provides penalties for the manufacture, dissemination, or advertising of pornographic writings, printed publi-

[1] A parasite is any able-bodied adult who for a prolonged period of time is not employed in a socially useful job and supports himself by engaging in activities which are prohibited by law or are in conflict with socialist morality. Gambling and prostitution belong to the latter category. (*Kommentarii*, p. 447)

[2] *Id.*, p. 448.

[3] *Id.*, p. 475.

[4] *Id.*, p. 448.

[5] *Id.*, p. 285.

cations, pornographic pictures or other obscene material, as well as dealing in or keeping for the purpose of selling or disseminating this material. This provision was included in the Criminal Code in accordance with the Geneva Convention of October 12, 1923, on the Suppression of Circulation of and Trading in Pornographic Materials.[1]

QUESTION 18

The acquisition and possession of firearms in the Soviet Union is strictly restricted and limited and requires a special license which may be granted by the proper authority (state security) if and when the public interest so requires and public order is not endangered thereby.

According to the basic law[2] concerning this matter which was enacted in 1924 and, notwithstanding some changes caused by the renaming of the agencies involved, still remains in force, the firearms and explosives which may be acquired and possessed by a licensed person are:

(1) explosives and detonating substances for blasting;

(2) certain types of revolvers and pistols which are not designed for exclusive use by the armed forces:

(3) hunting guns, including automatic ones: smoothbore, rifled-percussion, flintlocks, matchlocks and those with a recoiling barrel (carbine type); rifled guns with sliding, dropping or rising locks which cannot use rifle cartridges but can use revolver cartridges; double-barreled and multi-barreled guns for small shot and bullets, cartridges for guns listed in this paragraph;

(4) hunting gunpowder.

Penalties for violations of the gun control laws are provided in the criminal codes of the union republics. The relevant sections of the RSFSR Criminal Code read as follows:

Sec. 217. Violation of the rules for keeping, utilizing, registering or transporting explosive, radioactive materials and fireworks, as well as illegally sending such materials by mail or carrier, if such actions could result in grave consequences, shall be punished by deprivation of liberty for up to one year or correctional labor for the same term, or a fine of up to 100 rubles.

The same actions resulting in grave consequences shall be punished by deprivation of liberty for up to 7 years.

Sec. 218. par 1. The carrying, keeping, manufacturing, or marketing of firearms (except smoothbore hunting firearms),[3] munitions, or explosives without a proper license shall be punished by deprivation of liberty for up to 2 years, correctional labor for up to one year, or a fine of up to 100 rubles.

Sec. 218. (1) The stealing of firearms (except smoothbore hunting firearms), ammunition or explosive shall be punished by deprivation of liberty for up to 7 years.

If such act is committed repeatedly or by a group of persons acting in conspiracy, or by a person who was given firearms, ammunition or explosives for official use or to keep in custody, they shall be punished by deprivation of liberty for up to 10 years.

The stealing of firearms (except smoothbore firearms), ammunition, or explosives committed either by robbery or by an especially dangerous habitual criminal, shall be punished by deprivation of liberty for from 6 to 15 years.

Sec. 219. Carelessly keeping a firearm and thereby creating conditions for the use of such weapon by another person, resulting in grave consequences, shall be punished by deprivation of liberty for a term not to exceed one year or by correctional labor for the same term.

A Decree of the Presidium of the Supreme Soviet of the RSFSR of October 14, 1963,[4] makes punishable by a fine imposed in an administrative proceeding

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[1] *Kommentarii k ugolovnomu Kodeksu RSFSR* (Commentary on the Criminal Code of the RSFSR), p. 478.

[2] Decree of TSIK and SNK SSSR (The Central Executive Committee and the Council of People's Commissars of the U.S.S.R.) of December 12, 1924 (U.S.S.R. Law Collection 1924, No. 29, item 256).

[3] Hunting smoothbore weapons and ammunition are available at special licensed and controlled stores to private individuals who possess hunting licenses. Failure to report the acquisition within 5 days to the *militsia* is punishable by an administrative fine. (RSFSR Decree of December 20, 1944)

[4] *Vedomosti Verkhovnogo Soveta RSFSR* No. 41, 1963, text 719.

various acts involving firearms which are not serious enough to be punishable (in a judicial proceeding) according to the Criminal Code. The Decree includes such acts as the use of firearms by persons who possess a firearms permit in populated areas, the lending or sale of smoothbore hunting firearms to persons who have no hunting permit, etc.

QUESTION 19

Section 22 of the Fundamental Principles provided the death penalty for crimes against the state as defined in the Law on Criminal Responsibility for Crimes against the State of December 25, 1958,[1] as amended (hereinafter referred to as the 1958 Law), for intentional homicide under aggravating circumstances as specified in federal and union republic criminal laws establishing criminal responsibility for intentional homicide, as well as for some other especially grave crimes specified in special U.S.S.R. laws. The death penalty, considered by the Soviet legislator to be an exceptional penal measure, is not mandatory and the law always provides the alternative of imprisonment.

Crimes punishable by death according to the 1958 Law and/or, the RSFSR Criminal Code are as follows:

Crimes	Section of the 1958 law	Section of the RSFSR Code
Treason (applies only to Soviet citizens)*	1	64
Espionage (applies only to aliens and stateless persons)	2	65
Terrorist acts against the Soviet State or a social figure or representative of authority	3	66
Terrorist acts against representatives of a foreign state.	4	67.
Sabotage	5	68.
Organizational activity directed against the commission of especially dangerous crimes against the state and participation in an anti-Soviet organization.	9	72.
Especially dangerous crimes against the state committed against another working people's state.	10	73.
Banditry	14	77.
Making or passing counterfeit money or securities.	24, par. 2	87, par. 2.
Violation of regulations concerning currency transactions.	25, par. 2	88, par. 2.
Misappropriation of state or social property on an especially large scale.		93¹.
Intentional homicide under aggravating circumstances.		102.
Rape committed by a group of persons, or by an especially dangerous recidivist, or resulting in especially serious consequences, or the rape of minor.		103, par. 3.
Taking a bribe under especially aggravating circumstances.		173, par. 3.
Assault upon the life of a policeman or a people's guard.		191, par. 2.
Resisting a superior or forcing him to violate his official duties in conjunction with the intentional homicide of a superior (military crime).		240(c).
Evasion of call-up by mobilization and evasion of further calls in wartime.		
Actions disrupting the functioning of corrective labor institutions.	14¹	77¹.

* Includes: going over to the side of the enemy, espionage, transmission of state or military secrets to a foreign state, flight abroad or refusal to return from abroad to the U.S.S.R., rendering assistance to a foreign power in carrying on hostile activities against the U.S.S.R., as well as conspiracy for the purpose of seizing power.

[1] 2 *Sbornik zakonov SSR* (Collection of U.S.S.R. Laws), 1938–1967. Moscow, 1968. p. 450 ff.

In addition, the Law on Military Crimes of December 25, 1958,[1] as well as the RSFSR Criminal Code, provides the death penalty for certain military crimes such as insubordination, forcible actions against a superior, desertion and willful abandonment of a unit, evasion of military service by self-maiming or any other method, abandonment of a sinking ship or a battlefield, voluntary surrender to the enemy, pillage and other crimes committed in wartime or in a combat situation.

The provisions of this Law apply to persons in active military service, to personnel of state security agencies, and other persons specified in the legislation of the U.S.S.R. Complicity in military crimes by persons other than those mentioned above entails responsibility according to relevant sections of the Law.

Section 22, paragraph 2 of the Principles excludes the possibility of the application of the death penalty to persons under eighteen, as well as to women who were pregnant at the moment of the commission of the crime or at the pronouncing of the sentence or at the moment of its execution.

According to Soviet legal authorities, in such cases an alternative penalty is imposed instead of the death penalty.[2]

Soviet criminal procedure does not provide for separate hearings to determine the sentence in a capital case. The sentence is determined according to the rules contained in the Code of Criminal Procedure applicable to all criminal cases (*see* Question 9, Sentencing).

Capital punishment is considered to be an exceptional measure and in this connection the Supreme Court of the U.S.S.R., in its Guiding Explanation Concerning Court Judgments of July 30, 1969, stated:

In deciding the question of the application of the extreme penal measure, *i.e.*, the death penalty, courts should take into consideration that such penal measure may be applied in cases provided by law only if its imposition is inevitable because of the existence of particular circumstances which aggravate the responsibility and if the person who committed the crime is especially dangerous to society. The circumstances which were used as a basis for imposition of the death penalty should be indicated in the court judgment.[3]

A similar opinion was expressed earlier by the Supreme Court of the RSFSR which, in a decision of November 4, 1964, stated:

In applying the exceptional measure of punishment, *i.e.*, the death penalty, courts should investigate and consider with particular care all the circumstances of the case and indicate in the sentence substantiated reasons for its decision.[4]

The answer to the question of when the imposition of the death penalty is mandatory is given by a Western writer on Soviet criminal law who states that "once . . . the existence of one or more aggravating circumstances has been established, the court is no longer at liberty to disregard them (barring the circumstance mentioned by point 1 of Art. 39 [of the RSFSR Criminal Code])."[5]

An exclusive list of aggravating circumstances is contained in Section 34 of the Fundamental Principles and Section 39 of the RSFSR Criminal Code (for details *see* Question 9, Sentencing).

QUESTION 20

There are two main characteristic features of the Soviet criminal law system. The first is that all-union (federal) criminal laws become, explicitly or implicitly, republican criminal laws.[6] The second is that, according to the Soviet judicial system, each constituent republic has its own hierarchy of courts with a supreme court at the top. The only federal courts are the Supreme

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[1] *Id.*, p. 458 ff.

[2] Kommentarii.

[3] *Sbornik postanovlenii Plenuma Verkhovnogo Suda SSR* (Collection of Decisions of the Supreme Court of the U.S.S.R.), 1924–1970. Moscow, 1970. p. 523.

[4] *Voprosy ugolovnogo prava i protsessa v praktike Verkhovnykh Sudov SSR i RSFSR* (Problems of Criminal Law and Criminal Procedure in the Practice of the Supreme Courts of the U.S.S.R. and RSFSR), 1938–1969. 2nd ed. Moscow, 1971. p. 81.

[5] F. J. Feldbrugge, *Soviet Criminal Law, General Part*. Leyden, 1964. 6. 204.

[6] RSFSR Criminal Code, Sec. 2.

Court of the U.S.S.R. and military tribunals set up within the military districts which do not coincide with the territories of the constituent republics.

Consequently, republican courts are competent to try any case under their jurisdiction.

The penalties for multiple related offenses are dealt with in Section 40, Assignment of Punishment where Several Crimes have been committed, and Section 41, Assignment of Punishment under Several Judgments, of the RSFSR Criminal Code. The provisions of these sections were discussed in the answer to Question 9.

Rules for multiple prosecution and trials are contained in the republican codes of criminal procedure.

The pertinent provisions of the RSFSR Code of Criminal Procedure read as follows: [1]

Article 26. Joinder and disjoinder of criminal cases. There may be joined in one proceeding only cases in which several persons are accused of complicity in committing one or several crimes, or cases in which one person is accused of commission of several crimes or of concealment of such crimes or failure to report them when not promised in advance.

The disjoinder of a case shall be permitted only in necessary instances, if it will not affect the thoroughness, completeness, and objectivity of the analysis and resolution of a case.

Joinder and disjoinder of cases shall be carried out by decree of a person conducting an inquiry, investigator, or procurator, or by ruling or decree of a court.

Article 42. Determination of Jurisdiction in combining criminal cases. When one person or a group of persons is accused of committing several crimes, the cases concerning which are within the jurisdiction of courts of different kinds, a case embracing all the crimes shall be considered by the highest of such courts.

If a case in which one person or a group of persons is accused of committing several crimes is within the jurisdiction of a military tribunal with respect to at least one person or one crime, a case embracing all the persons and crimes shall be considered by the military tribunal in conformity with Article 12 of the Statute on Military Tribunals.

A case which on these or any other grounds is within the jurisdiction simultaneously of several courts of the same kind shall be considered by the court of the district where the preliminary investigation or inquiry in the case is completed.

Article 232. Returning case for supplementary investigation. A court in administrative session shall refer a case for supplementary investigation in the event of:

(1) an insufficiency in the conduct of the inquiry or preliminary investigation.

(2) the substantial violation of criminal procedure law in the conduct of the inquiry or preliminary investigation:

(3) the existence of grounds for the presenting to the accused another accusation connected with the one previously presented, or for changing the accusation to a graver one or one differing substantially in factual circumstances from the accusation contained in the conclusion to indict.

(4) the existence of grounds for instituting criminal proceedings against other persons in a given case when it is impossible to separate the materials of the case concerning them:

(5) incorrect joinder or disjoinder of a case.

A case shall be referred to the procurator for supplementary investigation. In this connection the court shall be obliged to indicate in its ruling upon what grounds the case is returned and what circumstances must be elucidated supplementarily.

When referring a case for supplementary investigation, a court shall be obliged to resolve the question of a measure of restraint with respect to the accused.

Article 396. Disjoinder of case concerning minor into separate proceeding. If a minor has participated in the commission of a crime together with adults,

[1] Translation taken from H. J. Berman and J. W. Spindler, *Soviet Law and Procedure. The RSFSR Codes*, Harvard University Press, Cambridge, Mass., 1966.

the case concerning him must, when possible, be disjoined into a separate proceeding at the stage of the preliminary investigation.

In the event that disjoinder into a separate proceeding concerning the minor may create substantial obstacles to the thorough, complete, and objective analysis of the circumstances of the case, the rules of the present chapter shall be applicable to a minor prosecuted as an accused in the same case with adults.

SOUTH VIETNAM

This report is based on the provisions of the Draft Criminal Code and the Draft Criminal Procedure Code of the Republic of Vietnam, presently under consideration and expected to be promulgated in the near future.

1. The Criminal Code is in four parts. Part I, entitled Generalities, includes the provisions on penalties and defenses. Part II deals with crimes against national security, public administration, and public order. Part III covers crimes against person and property, and Part IV deals with petty offenses.

2. The articles in the Code are numbered straight through, from 1 to 492, with no blank numbers left for future legislation. In the past, South Vietnamese practice has been to insert new sub-sections or sub-articles under the article amended.

3. The various articles in the Code make explicit only two kinds of culpability: for acts done intentionally, and acts done negligently. Strict liability is therefore implied where neither requirements is specified, except where any of the listed defenses is applicable. "Intention" is called for, for example, in Article 116, relating to being an accessory to stolen property, and Article 208, on destruction of documents or objects under seal. "Negligence" is called for in Articles 206 and 207, *inter alia*, these articles relating to custodians of seals, judicial judgments, and documents, etc., under seal.

4. South Vietnam has an insanity defense to criminal charges, expressed in Article 76:

It shall not constitute an offense if in the commission of a crime the offender is insane.

No charge can be made against such an offender, therefore the question does not arise whether the insane defendant may be found guilty.

Article 54, however, provides that persons who commit a misdemeanor or a crime shall be excused or dismissed from prosecution if insane, but that he shall be required to stay in a particular hospital or convalescent center until completely treated, upon order of the criminal court. The same article provides that the procedure for retaining and releasing such persons is prescribed in the Criminal Code of Procedure.

Articles 141 through 153 of the Draft Criminal Procedure Code deal with Expert Appraisal. This includes examination of offenders by a medical expert. Selection is made from a list made by the court annually. Persons not on the list may also be chosen, but the reasons for this must be stated. After examination of the offender, a written report is made and given orally before the court, if necessary. (If several experts have been named, each will make a report.)

Article 55 of the Criminal Code states:

An alcoholic, an opium addict, or anyone mentally ill who commits a crime or delict shall, in addition to the principal penalty imposed, be required to stay in a hospital or convalescent center until such time as he is completely treated, if the court decides that such person may be a serious danger to public security and orders him to be retained.

If the principal penalty in the above paragraph is a detention, the person shall serve his sentence in a separate hospital until he has recovered.

The maximum period for his stay in a hospital is five years, but that period may be reduced according to procedures provided in the Criminal Procedure Code if his release is not prejudicial to himself or to public security and order.

5. The defendant who is intoxicated has no defense against criminal liability, under this Code. However, Article 55, quoted above, covers alcoholics and opium addicts in providing for treatment after sentencing, i.e. they are handled differently upon sentencing. Thus if the sentence is a prison sentence, it will be served in a hospital.

6. On self-defense and use of force, etc., the Criminal Code has the following four Articles:

Article 72.—Acts performed on behalf of the law and by order of the legal authorities shall not constitute an offense.

If the legal administrative official gives an unlawful order, the judge shall examine the criminal responsibility of the person who carried it out. This examination shall be in accordance with the particular case and without consideration of the penalties imposed against the person who gave such order.

Article 73.—Any action forcedly taken by a person to legitimately defend himself or another person from an immediate danger shall not be an offense, provided that such action does not exceed that which is necessary for such defense.

Article 74.—The following shall be considered as legitimate defense:

1. When an action is taken at night-time to repel anyone who gains entry by breaking through fences, walls or doors of an occupied house unless the occupant thereof knows there will be no danger to himself or other persons.

2. When the action is in self-defense, or in defense of others, against a burglar or robber using violence.

Article 75.—It shall not constitute a crime if during the commission thereof the person is under pressure which he is unable to resist.

It shall not constitute an offense if a person takes emergency action to safeguard himself or others against a danger which would definitely have occurred had such preventive action not been taken provided, however, that such action does not cause damage greater than would have resulted from the prevented danger.

It will be seen that no provision is made for the use of force by persons with parental, custodial or similar responsibilities. Otherwise, the same general ground is covered: execution of public duty, self-defense, defense of others, and use of force in defense of premises and property. The Vietnamese Code considers "any action" or "acts" or "emergency action" justifiable, with far less restriction and definition than is found in the U.S. Draft Code. Article 72 is equivalent to the U.S. Section 602 regarding execution of public duty. The U.S. Code extends the protection to persons directed by a public servant to assist him, unless the action is plainly unlawful. The Vietnamese Code leaves it up to the judge to consider on its own merits each such case of obeying an unlawful order.

Sections 603 and 604, covering self-defense and the defense of others, have Article 73 as their counterpart. Again, where the U.S. Code spells out what danger would justify the use of force upon another person, i.e. danger of imminent unlawful bodily injury, sexual assault, etc., the Vietnamese Code merely says "immediate danger." No provision is made in the Vietnamese Code for use of force by persons with parental or similar responsibilities. The use of force in defense of premises and property is limited and cannot expose the trespasser to substantial danger of serious bodily injury. Under the Vietnamese Code, action taken at night to repel a trespasser who has broken in, is justifiable unless it is known there will be no danger to the occupant or others. The same principle is enunciated in both Codes: that a person is not justified in using more force than is necessary and appropriate under the circumstances. Just as the U.S. Code explicitly states the circumstances in which deadly force is justified, the Vietnamese Code too, in its Articles 84 and 85, states as below:

Article 84.—A person shall be excused from penalty for any immediate reaction to a provocation, violation or threat against his body, property or honor, even if such reaction is not commensurate with the provocation.

Article 85.—A person shall be excused from penalty for any action taken during the daytime against anyone who breaks entry through fences, walls, gates or doors of any house or room which is occupied.

7. Crimes are classified for purposes of sentencing, into three categories as below:

Article 17.—According to the seriousness of the penalty provided, criminal offenses can be divided into three categories: petty offense, misdemeanor, and crime, or felony.

An offense for which the criminal law prescribed a police penalty is called a petty offense. If the criminal law provides a light penalty, it is called a misde-

meanor. If the criminal law specifies a heavy penalty, it is called a crime, or felony.

S. Article 21 lists the penalties. For crimes, or felonies, they are death, hard labor for life, deportation, time-limited hard labor, solitary confinement and confinement. For misdemeanors, the penalities are imprisonment and fine. For petty offenses, the penalties are detention and fine.

Article 25 provides that time-limited hard labor is to be not less than five and not more than twenty years. Confinement is to be not less than five nor more than ten years. Deportation is permanent exile to a separate place in Vietnamese territory, to be determined by law. Solitary confinement is to be for not less than five and not more than twenty years.

Imprisonment in misdemeanor cases is for not less than eleven days and not more than five years. The minimum amount of fine is 601 piastres, the maximum to be determined by law according to the offense. Detention for petty offenses is to be not less than one and not more than ten days, while the fine is to be not less than 20 piastres and not more than 600. The Code also provides for auxiliary penalties, which can be an automatic consequence of some principal penalties as provided for in the Code. Complementary penalties may also be pronounced by the judge if deemed necessary.

The Vietnamese Criminal Code not only provides a comprehensive list of penalties, it also provides for penalties and fines against properties, damages, security measures, forfeiture of liberties as a security measure, restriction of freedom, and security measures on property.

Suspension of sentence is provided for by Article 611 of the Criminal Procedure Code:

In pronouncing an imprisonment or a fine, the court can, by issuing order stating the reasons therefor, authorize a suspended sentence if the convict has never been sentenced to imprisonment for criminal offense or a misdemeanor.

The Criminal Code has provisions for sentences of a form of probation:

Article 56.—Minors of the age of 13 [or over] who commit a crime can be required to stay, until they attain the age of 21, at the house of a trustworthy person, at a benevolent association, an educational headquarters, a vocational training center, or a juvenile protection center.

However, they may be released by the court which originally imposed their sentence, if the foregoing person or centers report that those minors have improved.

Article 57.—Hoodlums, vagrants, beggars, etc., after having served their sentence, shall automatically be required to stay for a period of three years in a re-education center or a vocational orientation center for three years at the most.

However, they may be released by the court which originally imposed their sentence if the director of the re-education or vocational training center reports that they have improved.

The Criminal Code provides for determinate sentences of imprisonment.

The Code contains special provisions for recidivists, somewhat similar to the U.S. provisions for dangerous special offenders.

Article 96.—Anyone who formerly received a punishment involving imprisonment and loss of civil rights and who has thereafter committed a second crime for which confinement is prescribed, shall be sentenced to limited hard labor.

If the second crime results in a sentence to solitary confinement, he shall receive the maximum penalty prescribed for solitary confinement, and such maximum can be doubled.

If the second crime results in deportation, he shall receive a penalty of life at hard labor.

One who had previously been sentenced for life at hard labor and who thereafter commits a second crime for which the penalty is the same, shall be sentenced to death.

Article 97.—Anyone who has been sentenced to more than one year of imprisonment and who, within five years after expiration of that sentence or after the penalty has been prescribed by time, commits another misdemeanor or crime which results in a sentence of imprisonment, shall be sentenced to the maximum degree of the stipulated penalty and that degree can be doubled.

Further, he may be subject to a prohibition of residence for from five to ten years.

Article 98.—The increase of penalty in the foregoing article shall also apply to any offender who was formerly sentenced to more than one year of imprisonment for a misdemeanor and who repeats the same offense within the same five-year period, or who commits a felony the penalty for which is imprisonment.

Anyone who was formerly sentenced to up to one year of imprisonment for a misdemeanor and who repeats the same offense within the same five-year period, shall be sentenced to an imprisonment penalty of double the penalty imposed for the previous offense, but such new penalty shall not exceed double the maximum penalty.

Sentences for crimes against national security under the two codes may be compared. In the U.S. Code, wartime participation in, or facilitation of, military activity of the enemy is a Class A felony. In the Vietnamese Code, colluding with another country in time of war or assisting in its hostile activities, according to Articles 108 and 111, is treason and punishable with death. Engaging in armed insurrection under the Code is a Class B felony, leading it is a Class A felony, and advocating it is a Class C felony. Under the Vietnamese Code, using weapons to struggle against Vietnam, without further distinction, is punishable with death. Inducing others to do so is also punishable with death. Sabotage in the U.S. Code is either a Class A or a Class B felony; in the Vietnamese Code intentionally destroying or damaging any ship, aircraft, material, supplies, etc., which can be used in the national defense is punishable with death. Espionage, a Class A or Class B felony under the U.S. Code, carries the death penalty under the Vietnamese one.

Other crimes in this category, such as maintaining liaison with an enemy country without authorization, negligent disclosure of a national defense secret, etc., are punishable with limited hard labor.

There are mandatory minimum prison sentences under the Vietnamese Draft Criminal Code.

The equivalent to proposed §3003 (Persistent Misdemeanant) would be Article 98, already cited above, providing that anyone sentenced previously to up to one year's imprisonment for a misdemeanor, and who repeats it within a five year period, will be liable to double the penalty imposed for the first offense, but not more than double the maximum.

Judges are not required to give written reasons for sentences imposed.

Regarding the review of sentences on appeal to a higher court, Article 439 of the Criminal Procedure Codes states as below:

If the appeal is made by the public prosecutor, the court of appeal can either approve the judgment of the court of first instance or reject all or part of such judgment, favorably or unfavorably to the defendant.

If only the defendant or his representative makes the appeal, the judgment of the appeal court cannot increase the penalty or prejudice the appellant.

If only the plaintiff makes the appeal, the judgment cannot be made in an unfavorable way to the plaintiff.

The plaintiff cannot submit new requests to the court of appeal. However, he can ask for an increase of the payment of damages which have increased since the date the judgment of first instance is pronounced.

The Vietnamese Draft Criminal Code provides for cumulation of offenses in the following articles:

Article 105.—A person who has committed several felonies and/or misdemeanors which are prosecuted at the same time or separately but no offense has been conclusively judged by the court shall be considered as coming within the meaning of cumulation.

Article 106.—In the above cases of cumulation of offenses, the offender shall only have to be subject to the most serious one.

However, he shall be subject to all auxiliary and complementary penalties, security measures, reimbursements, and payment for damages.

The Criminal Code's Article 141 is similar to the U.S. Draft Code's §3301 (2), reading as follows:

Article 141.—In situations stated in Articles 136 through 140, the offender shall always be fined an amount not exceeding double the amount to be reimbursed or paid as damages, but not less than 2,000$.

Articles 136 through 140 deal with embezzlement or removal of money, bonds or properties received by a publicly elected official, public servant, military

personnel, etc., received by him for preservation because of his position, and the fine stipulated in Article 141 is in addition to the penalty prescribed in each section.

Article 591 of the Criminal Procedure Code provides for imprisonment for debt if fines are not paid. Article 592 gives the periods for such imprisonment, which are based on the amounts payable. Persons under 18 and over 65 are exempted from such imprisonment by Article 593, while persons over 55 at the time of sentencing will have the period reduced to one half. One half will also be reduced from the period of imprisonment, according to Article 594, if documents can be furnished certifying insolvency.

10. There are no provisions either for mistake of law or for mistake of fact.

12. The Draft Criminal Code contains the following provisions regarding extraterritorial jurisdiction:

Article 10.—Vietnamese citizens who commit crimes outside the territory of Viet-Nam and which crimes are subject to Vietnamese criminal laws, can be prosecuted and judged in Viet-Nam.

If a misdemeanor is committed, the offender shall only by prosecuted and tried in Viet-Nam when such offense is also punished by the law of the country where the offense is committed.

If it is not a crime or a misdeameanor as in Article 12 hereinunder, no prosecution can be made before the offender returns to Viet-Nam.

Crimes or misdemeanors committed outside the national territory can only be prosecuted upon request of the public prosecutor. Prior to the prosecution there must be a bill of complaint by the victim or an official denunciation by the foreign authorities to the Vietnamese authorities.

This law shall also apply to persons who have acquired Vietnamese citizenship after the commission of their crimes.

Article 11.—If, outside the territory of Viet-Nam, any Vietnamese or foreigner commits a violation of national security, forgery of documents, national seals, or currency and banknotes in circulation, he can be prosecuted and tried in Viet-Nam, whether primary culprit or accomplice.

Article 12.—Anyone, whether culprit of accomplice, can be prosecuted and tried in accordance with the provisions of Article 10 who commits at any place whatsoever robbery, terrorism, forgery of foreign exchange or bills, sale of slaves, recruitment of persons for purpose of debauching, or does business in stimulants or obscene publications.

Article 13.—Public servants, government officials working abroad who commit a felony or misdemeanor while carrying out their responsibilities or in the accomplishment of a mission can be prosecuted and tried in Viet-Nam.

Article 10 would make every crime punishable under the Code still prosecutable in Vietnam although committed outside Vietnamese territory, provided that there is a bill of complaint or an official denunciation by foreign authorities. Articles 11, 12 and 13 name specific types of crimes committed abroad which are *per se* prosecutable. The Vietnamese Code covers crimes committed by Vietnamese nationals, but does not include cases of crimes against such nationals committed abroad. No provision is made for crimes by or against nationals outside the jurisdiction of any nation.

Conspiracy is dealt with only insofar as it is aimed at specific crimes, such as overthrowing or changing the government, or at inducement of people to rise up against the government. Article 121 provides as below:

A conspiracy aimed at commission of the foregoing crime shall be punished by sentence to solitary confinement if no preparation had been made for execution of the crime.

If preparations have been made, the penalty shall be deportation.

A conspiracy exists when the intent to act is discussed and approved by one or more persons.

Article 123 makes persons guilty of conspiracy aimed at causing civil war by distribution of weapons, urging them to take up arms against one another, or by destruction, murder or looting, liable to the death penalty.

14. With regard to felony-murder, Article 329 provides as below:

Sentence of death shall be imposed upon any criminal who:

1. Commits murder prior to, during or after the commission of another crime.

WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

VOLUME III.—MISCELLANEOUS MEMORANDA AND GUIDELINES FOR CONFORMING TITLE 18, PARTS II–V, AND OTHER TITLES OF THE UNITED STATES CODE TO THE PROPOSALS FOR A NEW FEDERAL CRIMINAL CODE

COMMENT BY PROF. JOHANNES ANDENAES COMPARING STUDY DRAFT OF PROPOSED NEW FEDERAL CRIMINAL CODE TO EUROPEAN PENAL CODES

(Prof. Johannes Andenaes, University of Oslo, Oslo, Norway, August 31, 1970)

INTRODUCTION

The present Study Draft must be welcomed as a remarkable effort to make Federal criminal law coherent, rational and intelligible. The Commission has had the advantage of being able to build on the epoch-making work embodied in the Model Penal Code and some newer State Codes. Through these Codes and the present Study Draft, American draftsmanship in criminal law has reached a level far higher than previously. From a technical point of view the Study Draft compares well with modern Criminal Codes of the Continental breed. On many points, of course, different legal traditions and different social mores have resulted in different solutions, both in substance and in form. Sometimes, especially in the General Part, the draft is more detailed and explicit than most European Codes. The draftsmen have boldly chosen the statutory solution of questions which most European legislators have found it more cautious to leave to the courts and legal scholarship, for instance the definition of different types of culpability. The Draft deals with the general questions of criminal law more fully than any existing Code known to the author. This method has its obvious risks, since it is very difficult to forsee how well general provisions will cover the enormous variety of life situations, but the lack of a uniform tradition in the various Federal and State courts probably calls more strongly for a statutory solution than would be the case in most European states.

The systematization of criminal law in a comprehensive Code will facilitate international comparison and discussion. For foreign students of American criminal law the Study Draft will in the future be a primary source. The distinguishing between definition of offense and scope of Federal jurisdiction represents from a technical point of view a decisive step forward.

The following comments will primarily deal with points about which the author has doubts as to the solution chosen in the Study Draft. Some points are of a trivial and technical nature, others concern fundamentals. It goes without saying that it is a dangerous enterprise for a foreign scholar to comment on a national Code: lack of familiarity with the background may easily lead to misunderstanding or mistaken conclusions, the more so since the Working Papers have not been at my disposal. In the short time available for study of the draft it has of course been impossible to form an opinion on all matters. The shortness of time has led me to limit my remarks to the General Provisions and The Sentencing System, leaving out all questions of definitions of specific offenses.

I. THE ORGANIZATION OF THE CODE

The Code is divided into three parts: Part A. General Provisions; Part B. Specific Offenses; and Part C. The Sentencing System.

This organization differs from most European Codes, which place the provisions on penalties and principles of sentencing in the General Part. From a logical point of view this can be said to be most adequate. The provisions on sentencing are general provisions in so far as they apply to all offenses. It is, for example, technically somewhat unsatisfactory for the provisions on the various offenses in Part B to define the offenses as belonging to certain classes of felonies or misdemeanors, when the whole scheme of classification is not presented until section 3002 in Part C. Nevertheless I feel that much is to be said in favour of the organization of the draft. There is a fundamental difference between the provisions on jurisdiction and liability in Part A and the provisions on sentencing in

Part C. Part A and Part B belong together in so far as they define the conditions of criminal liability, whereas the provisions in Part C become operative only where liability exists. It would, of course, be easy to let Part B and Part C change places.

It strikes me as somewhat surprising that the provisions on criminal attempt are placed in Part B, Specific Offenses. All European Codes known to the author deal with criminal attempt in the General Part. As I see it, it is artificial to look upon criminal attempt as a specific offense. The conviction should not be for criminal attempt, but for attempt of murder, attempt of larceny, and so on. The definition of criminal attempt represents an extension of the definitions of the specific offenses. Since there is a general definition of attempt, the provisions on specific offenses can be formulated with an eye only in the consummated offense.

I am inclined to think the whole of Chapter 10 would belong more naturally in Part A. To start the Part on "Specific Offenses" with a chapter on "Offenses of General Applicability" sounds almost to be a self contradiction.

II. General Provisions

A. voluntary conduct

In section 301(1) voluntary conduct is declared to be a necessary prerequisite of an offense, and voluntary conduct is defined as including "an act, an omission, or possession." [1]

Such declarations of principle are usually lacking in European Codes. And in legal literature on criminal law the concepts "act" and "omission" are considered to cover all kinds of punishable conduct.

I raise the question whether "voluntary conduct" is required in cases of self induced intoxication where the person violates a penal provision which is satisfied by recklessness, section 502(2). It is understood that such provisions are applicable even in cases where the person has been quite out of his mind because of the intoxication, and if this is correct, section 502(2) is hardly compatible with section 301(1) without giving "voluntary" a meaning so wide that it does not really signify anything. The Norwegian Criminal Code has the following provision as section 45: "Unconsciousness due to voluntary intoxication (produced by alcohol or other means) does not exclude punishment." Unconsciousness and voluntary conduct seem to be contradictory concepts. If drunkenness is excluded as an excuse, this seems to be an exception to the geenral principle of voluntary conduct.

Moreover, I tend to think that analytically it is not correct to list possession as a category separate from acts and omissions. To be punishable, the possession must be due to the culpable act of acquiring possession or the culpable omission of getting rid of it.

Consequently I should prefer to omit the somewhat textbook-like definition in section 301(1).

B. omissions

Section 301, subsection (2) provides that a person who omits to perform an act does not commit an offense "unless a statute provides that the omission is an offense or otherwise provides that he has a duty to perform the act." [2]

The first alternative, where the statute itself specifically makes the omission an offense, does not raise special difficulties. The second alternative is, I take it, meant to solve problems as to whether an omission can amount to violation of a penal statute which, on the face of it, seems to be directed against criminal actions, for instance homicide, burglary or perjury.

It seems to me that there must be a slip in the text. The Comment says that the subsection restates present Federal law: a person is not liable for an omission unless he has a duty to act. The proposed provision itself says something different: That a statute must provide that the person has a duy to perform the act. This can hardly be intended. More often the duty will arise out of administrative regulations (for example the duties of railway personnel), of a contractual relationship (the nursemaid must see to it that the child does not hurt itself) or of the creation of a dangerous situation (he who has made a fire has to extinguish it

[1] In the Final Report, the word "voluntary" was deleted.
[2] In the Final Report this clause reads "unless he has a legal duty to perform the act".

before leaving). Whether the duty has a statutory basis or not seems immaterial.

The criminal liability for omissions is not specifically regulated in most European Codes. The Italian Code of 1930 has a provision in article 40, subsection (2) which comes close to the provision of the Study Draft: "Not to prevent an event which one has a legal obligation to prevent, is equivalent to causing it." The Greek Code of 1950 has a similar provision in article 15. The question has been thoroughly discussed during the preparations of a new German Code. By the Second Criminal Law Reform Act of 4 July 1969[3] the following provision was inserted in the Criminal Code as section 13: "Anybody who fails to avert the harm specified by a penal law, is only punishable under this Code, if it was his legal obligation to avert the harm, and if the omission is tantamount to perpetration by commission."

The intent of the last words in the German provision is that not every omission in breach of duty incurs liability as a perpetrator, but only an omission which could reasonably be equalized with the normal perpetration through an act. This restriction seems to be well founded. It does not seem justified that every legal duty, for example every contractual obligation to avert a harm, should lead to criminal responsibility for causing the harm in case of breach of the contract. Suppose X comes across a man with a broken leg in the woods in wintertime, far away from people, and accepts an amount of money to go to the nearest village for help. Later X changes his mind and continues his trip, letting the injured man freeze to death. This is certainly reprehensible conduct, and many European Codes have specific provisions against the omission of bringing assistance to a person in danger of death, but can nonfulfilment of a promise make a man a murderer?

On the other hand it is doubtful whether a legal duty, existing independently of the penal provision, should always be a prerequisite to criminal liability. There are cases in which a moral obligation arising out of a personal relationship should not be denied protection by criminal law.[4] Of course, if a court declares a man guilty on the basis of an omission, this implies that he has violated a legal duty. But it can be asked: Is there criminal responsibility because there is legal duty, or is there legal duty because there is responsibility. If the reference to a legal duty as a prerequisite for punishability shall have a tangible meaning, it must be that there shall exist such a duty independent of the penal provision in question.

To conclude: the proposed provision, even if the term "statutory duty" is replaced by "legal duty," seems to go both too far and not far enough to give an adequate solution of the complex problem of criminal omissions, and that this is a field where it would be wiser to abstain from a statutory solution.[5]

It is noted that under section 401(1)(b) on complicity a person is considered an accomplice if, with intent that an offense be committed, "having a legal duty to prevent its commission, he fails to make proper effort to do so." The requirement of intent in this case will exclude the harsh results to which the provision would otherwise have led. It is not to be seen from the comment whether any difference is contemplated between (statutory) "duty" in section 301(2) and "legal duty" in section 401(1).

C. KINDS OF CULPABILITY

Section 302(1) defines the different kinds of culpability: intentionally, knowingly, recklessly and negligently. "Willfully" comprises the first three kinds. According to subsection (2) the culpability required, if nothing else is stated in the specific statute, is willfully. This means that the most general line of division is between recklessly and negligently.

The Study Draft differs from the Continental tradition, which only has three main degrees of culpability: purposely, intentionally (broadly corresponding to knowingly in the draft) and negligently. Since intention (corresponding to "knowingly") is the kind of culpability ordinarily required, the most important

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[3] The General Part of the German Criminal Code was totally revised by the Second Criminal Law Reform Act of 4 July 1969. This reform comes into force 1 October 1973. An intermediate and less thorough revision, coming into force partly 1 September 1969, partly 1 April 1970, was undertaken by the First Criminal Law Reform Act of 25 June 1969.

[4] *See, e.g., R. v. Instan*, 1 Q.B. 450, quoted in PAULSEN AND KADISH, CRIMINAL LAW AND ITS PROCESSES at 225.

[5] For a more detailed discussion I refer to my book, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY § 13 (1965).

line of demarcation goes between intention and negligence. Few Codes try to define the different kinds of culpability; normally this task is left to the courts and scholarly tradition. The German Drafts of 1960 and 1962 had definitions of purpose, intention and negligence, but they were omitted from the final text in the revision of the Code in 1969.

Negligence includes, in European systems, the conscious risktaking ("conscious negligence," roughly corresponding to the American "recklessness") as well as the inadvertent creating of a risk ("unconscious negligence"). It is conceded that the two forms of negligence are psychologically very different, but it is generally thought that it would be difficult in practice to distinguish between them. Sometimes specific penal provisions distinguish between gross negligence and ordinary negligence, but this distinction does not coincide with the distinction between conscious and unconscious negligence (see, for instance, section 18 of the German Draft 1960).

The solution of the draft simplifies the decision in some cases where European courts have difficulties in deciding whether the conduct is intentional or merely negligent, and where there has, perhaps, sometimes been a tendency to extend the concept of intention too far. On the other hand it seems that the distinction between recklessness and negligence must be difficult to draw in practice. As I read section 302 (2) (c) and (d), the objective deviation from the standard is the same for the two kinds of culpability: the conduct must represent "a gross deviation from acceptable standards of conduct." The difference lies in the degree of awareness in the actor. If *A* and *B* are driving equally wildly, and *A* is acutely aware of the risk he is taking whereas *B* trusts completely in his own competence and good luck, *A* could be convicted of manslaughter if somebody is killed, while *B* could be convicted of negligent homicide only. It seems that the court would be in great trouble making its decision about the state of mind of the offender, if it was not assisted by an admission from the defendant.

The draft requires a gross deviation from acceptable standards of conduct to establish negligence. European systems do not usually have this requirement, but in some—not all—countries it is accepted that there must be a greater deviation from the standard to incur criminal rather than civil liability. I sympathize with the solution of the draft with regard to offenses such as homicide, but I am more doubtful with regard to regulatory offenses. Here it seems to me that even a smaller deviation from the acceptable norm should incur liability. This is more appealing than to fall back on the traditional device of American law, strict liability. The definition in the draft seems to exclude such a flexibility of the negligence concept.

D. CASUAL RELATIONSHIP BETWEEN CONDUCT AND RESULT

In section 305 the draft gives a definition of casual relationship. Although the concept of causation has attracted great interest in European literature of criminal law, legislatures have normally abstained from giving it a definition. The Italian Code of 1930 is an exception. In section 41 it gives rather complicated rules on concurrent causes, distinguishing between preexisting, simultaneous and supervening causes—rules which it is suspected, have created more difficulties of interpretation than they have solved.

The comment in the Study Draft mentions that an alternative approach would be to have no specific provision on causation, leaving the matter of judge-made law, but that the proposed section is intended to be an aid to uniformity and clarification. It is doubted whether the provision will be of much help. Legal questions concerning causality occur rather rarely in criminal cases. When questions of causation arise they will most often be questions of a factual nature, pertaining to the competence of the expert. But, although infrequent in practice, the legal questions may be very complex and not easily solved through one short formula. The proposed provision deals only with a part of the problem of causation. Thus it does not deal with the solution of cases in which the chain of causation has been of an irregular kind (the question of "adequate causation" in Continental terminology).[6]

The meaning of the provision is, if I interpret it correctly, that in the case of concurrent causes, the "but for" test should not be applied to each single cause, but to the concurrent causes taken together. If *A* and *B* each independently

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[6] *See* ANDENAES, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY § 12. V.

administer one ounce of a poison to the victim, and one half ounce is the lethal dose, the death would have followed even if either *A* or *B* had not acted. According to a strict "but for" test, none of them could be said to have caused the death, but according to the proposed provision they will both be held responsible. If *A* administered one ounce and *B* one quarter ounce, *A* will be responsible, whereas *B* can only be punished for attempted murder. If *A*, *B* and *C* each administer one quarter ounce they will all be responsible. If two or more persons have acted in complicity it is not section 305, but section 401 (complicity) or section 1002 (criminal facilitation) that appiles.

I have no objection to these solutions, but have doubts about the application of the proposed rule when the unlawful act operates concurrently with a cause for which nobody is responsible, for instance a disease or defect, or an accident. *A* gives a sedative to a railroad signal man, with the effect that he is unconscious when he should have performed his duties. In the meantime a flood destroyed a bridge which he had to cross to perform his duties, so even without the sedative he would have been missing. Is *A* responsible if a railroad accident takes place? It seems doubtful whether in such cases responsibility for causation should be stated unless the unlawful act has led to a change (for instance with regard to the time or the circumstances of the result) which makes it natural to look upon the outcome as a different result from that which would otherwise have occurred.

I am inclined to think it would be wiser to delete the section and leave it to the courts to solve the problems.

E. COMPLICITY, FACILITATION, AND CONSPIRACY

Section 401(1) defines the liability for accomplices. I have had some difficulties with the interpretation of these provisions, which do not seem to be drafted with the same clarity as most other parts of the draft.

Subsection (1)(a) deals with the case where one person acts through an innocent or irresponsible person—in Continental terminology the responsible person is here spoken of as "indirect perpetrator."[7] Subsection (1)(b) is apparently intended to cover the ordinary type of complicity, but as the paragraph is drafted, it seems to deal with the same category as subsection (1)(a). The difficulty lies in the words "such other person,"[8] which refers to the "innocent or irresponsible person" who is mentioned in the preceding paragraph.

There are two differences in wording between paragraph (a) and paragraph (b), the justification for which seems dubious.

Subsection (1)(c) defines as a separate category of complicity the case where a person "is a co-conspirator and his association with the offense meets the requirements of either of the other paragraphs of this subsection." This seems redundant and confusing. If the conduct of the defendant is covered under paragraph (a) or (b) it is immaterial for the question of guilt whehter he is also a conspirator. The comment explains that subsection (1)(c) rejects the doctrine of *Pinkerton* v. *United States*, that mere membership in a conspiracy creates criminal liability for all specific offenses committed in furtherance of the conspiracy. If paragraph (c) is omitted it seems to follow from the principle of legality that liability as accomplice only exists when the requirements in paragraph (a) or paragraph (b) are met. Moreover, the intended result seems to follow explicitly from section 1004. If it is felt appropriate for the sake of clearness to mention the limited liability for conspirators also in section 401, it would be preferable to do it by a specific provision, rather than by listing the conspiracy cases as a separate category in addition to the categories mentioned in paragraphs (a) and (b).

In paragraph (a) the act of the accomplice is described as to *cause or aid* the innocent or irresponsible person to engage in the criminal conduct. In paragraph (b) the act is described as to *command, induce, procure, or aid* the other person to commit the offense. Is a difference intended between "causes" in paragraph (a) and the more detailed "commands, induces, procures" in paragraph (b), and if so, what should be the justification for this difference? The linguistic reasons which are given in comments to a similar provision in the Model Penal Code (Tentative Draft No. 1, at 16–17) are not perfectly convincing.

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[7] In the Final Report, "an innocent or irresponsible person" was changed to "the other".
[8] In the Final Report, "such other person" was changed to "the other".

Secondly, the omission to prevent the commission of the offense is explicitly mentioned in paragraph (b), but not in paragraph (a). Is there any reason why the intentional omission, in breach of duty, to prevent the commission of an offense should be punished if the perpetrator himself is guilty, but not if he is innocent or irresponsible?

Several modern Codes have dropped the distinction between complicity to a guilty and to an innocent perpetrator, just stating in a general provision that the penalties provided in the specific provisions shall appiy not only to the one who committed the act but also to any who furthered it by instigation, advice or deed.[9] This seems a simple and logical solution, which seems to work well in practice.

I note that the Study Draft deals differently with the two categories insofar as "the kind of culpability required for the offense" is sufficient for the accomplice to an innocent or irresponsible person, whereas "intent that an offense be committed" is necessary for an accomplice to a guilty person. Aiding with *knowledge* that the other intends to commit a crime is punishable, if at all, as the lesser offense of facilitation (section 1002). This distinction is foreign to modern European Codes, where the general rule is that the requirement of guilt is the same for the accomplice as for the perpetrator. If it is felt that justice requires a limitation of the accomplice concept to cases in which there is intent that an offense be committed, and accordingly that special provisions on criminal facilitation are necessary the question is raised whether the same should not apply when the perpetrator is innocent or irresponsible.

It should be mentioned that in European Codes solicitation as well as participation in a conspiracy normally would be considered complicity if the offense is committed according to plans. If the offense is not committed, the soliciting or conspiring person could, according to most modern Codes, be punished for attempt, provided his activity has progressed beyond mere preparation which does not fall under the definition of criminal attempt. Conspiracy itself is only punishable with regard to offenses for which this is expressly provided.

F. MENTAL DISEASE OR DEFECT (SECTION 503)

The difficult problem of the effects of mental disease or defect is, as in the Model Penal Code, solved through the formula that responsibility is excluded if the person as a result of the disease or defect "lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." The formula comes close to the solutions chosen by several European Codes, for instance the German Code of 1871 (as amended in 1969) and the Swiss Code of 1937. The German Code has this wording (section 20) :

> Anybody who at the time of the act is incapable of appreciating the unlawfulness of his act or of acting in accordance with such an appreciation, by reason of a morbid mental disturbance, a serious disturbance of consciousness, mental deficiency, or other serious mental abnormality, acts without guilt.

As will be noted, the German Code uses the expression "is incapable of appreciating" whereas the Study Draft has the expression "lacks substantial capacity to appreciate. . . ." It is not clear to me whether this is a real difference or not.

It seems as if provisions of this type work reasonably well, and that psychiatrists feel competent to testify on the question whether the defendant was capable of appreciating the criminality of his conduct or of acting in accordance with such appreciation. In my opinion this is bound to be an illusion. When a mentally disturbed person does not conform to law I do not see how it could be decided whether this is because he was unable to conform or because he chose not to conform although he was able to. The test is of a metaphysical character. The law, by presupposing, in accordance with unreflected common sense, that the normal person has a power to act or not to act, builds upon an indeterministic hypothesis. Further is presupposes that the mentally disturbed person may lack this power, but it gives no real assistance to the determination of when this is the case. I therefore submit that when a court or a psychiatrist makes a decision on the basis of the test, what they really do is make a moral judgment : Was the man so deranged that it seems unreasonable or unjust to hold him criminally

[9] *See, e.g.,* SWEDISH CRIM. CODE ch. 23, § 4 ; DANISH CRIM. CODE § 23.

responsible? For this reason I find intellectually more satisfying the formula which was put forward as an alternative in the draft of the Model Penal Code: whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law "is so substantially impaired that he cannot justly be held responsible".[10]

Another way, which sticks closer to psychiatric diagnosis, is used by some of the Scandinavian Codes. The Norwegian Criminal Code states simply (section 44) that an act is not punishable if committed while the perpetrator was insane or unconscious. "Insane" here means psychotic according to psychiatric terminology. The law does not ask for a connection between the disease and the act; it is based on the view that such a connection must always be suspected when an insane person commits a crime, and that in any case the treatment of insane persons should be a matter of mental health, not of criminal justice. The Swedish Code has a more elaborate provision as chapter 33, section 2:

> For a crime which someone has committed under the influence of insanity, feeble-mindedness or other abnormality of such profound nature that it must be considered equivalent to insanity, no other sanction may be applied than surrender for special care or, in cases specified in the second paragraph, fine or probation.

As will be seen, this provision does not exclude responsibility altogether; some sanctions are prohibited, others allowed. Apart from this, the Swedish Code differs from the Norwegian Code on two points: it requires that the act has been committed under the influence of the mental abnormality; on the other hand the scope of the provision is extended to cover abnormality which cannot be diagnosed as insanity (psychosis), but must be considered equivalent thereto.

My personal preference would be a provision somewhat in between the Norwegian and the Swedish Codes: absolute exemption from criminal liability in the case of insanity (psychosis), but with an extension of this rule to cover mentally abnormal states which are profound enough to be considered equivalent to insanity. I realize, however, that the workability of the system may be highly correlated to the organization of forensic psychiatry. In the Scandinavian countries the dependent is always examined by court-appointed psychiatric experts whenever there is a suspicion of mental illness or defect, and organizational measures are taken in order to secure a uniform terminology and practice. Thus, in Norway there is established a Commission of Forensic Psychiatry which examines the written reports of the experts and makes the comments it may find appropriate. In the United States the situation is very different.

G. SELF-DEFENSE (SECTIONS 603–607)

One cannot but be struck by the difference in drafting techniques between European Codes and the Study Draft on this subject. European Codes tend to deal with the subject in short provisions in general terms, whereas the Study Draft has very detailed provisions, dealing separately with self-defense, defense of others, and defense of premises and property, and within each of these categories it makes distinctions between the use of deadly force and other force. The provision of the German Code (as amended by the Criminal Law Reform Act of 4 July 1969) on self-defense (including defense of others and defense of property), consists of 30 words only (section 32). In addition there is a section on marginal transgression of the limits of justification, consisting of 17 words (section 33). The Swedish Code deals with the subject in more detail (chapter 24, section 1), but is nevertheless very short as compared with the Study Draft. Contrariwise, the provisions of the German Code which correspond to the sections of the Study Draft on "conduct which avoids greater harm" (section 608) and "duress" (section 611)[11] are rather more elaborate than their American counterparts (see section 34–35 of the German Code).

I note these differences without drawing any conclusions. For the person engaged in defense of himself or others I do not think a detailed statutory regulation gives more guidance than a provision framed in general terms, leaving more to sound judgment and common sense. But for judge and jury the detailed statutory solution gives, of course, more stringent guidance than general formu-

[10] MODEL PENAL CODE, comment at 27,157 (Tent. Draft No. 4).

[11] Study Draft section 608 was deleted in the Final Report, Study Draft section 611 is Final Report section 610.

lations (compare the remarks of Professor Schwartz in the Study Draft at lxi–lxii. And it may well be that the situation in American Federal law, described as "non-statutory and chaotic" (Study Draft at lxi, and the reformative goals of the draft, make a highly detailed statutory regulation appropriate.

H. MISTAKE OF LAW (SECTION [12] 610)

The draft has a rather narrow description of circumstances under which mistake of law excuses from criminal liability. As far as the provision goes no objection could be made. Some European Codes have taken a bolder course. In Norway the rule, as worked out by the Supreme Court in interpretation of the relevant provision of the Criminal Code is that ignorance of law excludes liability when it is "excusable," which here means the opposite, not of "inexcusable," but of negligent. The ignorance of law exonerates if no blame or fault can be attributed to the offending person. Thus the principle of blameworthiness or fault as a prerequisite for criminal liability is upheld also in this connection. In Germany the same rule has been accepted by the Federal Supreme Court after World War II, and it is now given statutory force in the Criminal Code (section 17), as amended in 1969. The provision reads as follows:

> If the perpetrator in committing the act lacks the understanding to be acting unlawfully, he acts without guilt provided he was unable to avoid the mistake. If he could have avoided the mistake the punishment may be mitigated in accordance with § 49, subsection (1).

The well-known Swedish Professor Thornstedt in his remarkable monograph on mistake of law, after a thorough discussion of various solutions, comes to the conclusion that the solution thus embodied in Norwegian and German law—"the doctrine of fault"—is to be preferred "de lege ferenda." A person who has shown reasonable care in observing the law should not be declared guilty of a criminal offense, and Thornstedt does not think that law enforcement should have to suffer through this solution, provided the requirement of heedfulness is made relatively severe.[13] Experience from Norway and Germany would seem to support this view.

The comment of the Study Draft (at 47) explains that not even the limited defense defined in section 610 is available for infractions where proof of culpability is generally not required. It seems to me tough justice to inflict a fine or other sanction, be it called punishment or not, on a person who has acted in good faith on the words of a statute, a judicial decision, an administrative order, or an official interpretation by the appropriate public authority.

III. THE SENTENCING SYSTEM

A. GENERAL REMARKS

The sentencing system is a battlefield of differing ideologies and assumptions concerning the functions and possibilities of punishment. It is also a field in which American experiments have met with great interest and exerted a considerable influence in Europe. Of the proposals in the Study Draft some are in accord with the prevailing trend in European systems whereas others, especially the sections on indefinite sentences, run counter to them.

According to section 3001 the sentencing provisions of the draft are applicable to "every person convicted of an offense against the United States". I assume from the context that "offense against the United States" here means offense falling under Federal jurisdiction, and that the provision does not contain a substantive limitation as section 109 (ae)[14] might seem to indicate.

The draft does not contain a general statement on the purposes of sentencing, but inferences can be drawn both from the section on General Purposes of the Code (section 102, especially subsections (a) and (c)) and from the criteria mentioned for the applications of special sanctions, for example, section 3003 on persistent misdemeanants, section 3101 on probation and section 3202 on ex-

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[12] Study Draft section 610 is Final Report section 609.

[13] For a fuller discussion with reference to the book by Thornstedt, *see* Andenaes, *Ignorantia Legis in Scandinavian Criminal Law* in ESSAYS IN CRIMINAL SCIENCE (Mueller, ed. 1961).

[14] Study Draft section 109(ae) is Final Report section 109(an).

tended terms for felonies.[15] For comparison it might be interesting to quote the general statements on sentencing in two modern Codes, which represent very different philosophies of criminal law, the Swedish and the German.

The Swedish Code of 1962, chapter 1, section 7 provides:

> In the choice of sanctions, the court, with an eye to what is required to maintain general law obedience, shall keep particularly in mind that the sanction shall serve to foster the sentenced offender's adaptation to society.

The German Code, section 46, as amended by the Second Criminal Law Reform Act, 4 July 1969, provides:

> The guilt of the offender is the basis for the choice of punishment. The effects of the punishment which are to be expected on the future life of the offender in society, are to be taken into consideration.

Subsection (2) of the provision contains an enumeration of circumstances which the courts must take into consideration, for example, the motives and goals of the offender, his previous life and his conduct after the act, especially his endeavors to make amends for the harm.

B. CLASSIFICATION OF OFFENSES (SECTION 3002)

The draft classifies offenses into six categories: three classes of felonies, two classes of misdemeanors, and the category of infractions which is not further classified. Infractions are declared to be noncriminal.

This classification is much more detailed than the classifications which are found in European Codes. Most Codes only have two or three classes, for example, crimes, delits and contraventions in the French Code and Verbrechen, Vergehen and Übertretungen in the German Code. Some codes have no classification at all, but speak uniformly of crimes or offenses, for instance the Danish and the Swedish Code, or English law after the Criminal Law Act of 1967. German law has, in the post World War II period, in addition to the three categories of criminal offenses, created the noncriminal Ordnungswidrigkeit, which may be the closest parallel to the infractions of the Study Draft.

The classification in the draft has purposes different from those of the classifications in European Codes. The purpose of the latter classifications is threefold: (1) to have denominations which express the greater or lesser gravity of the offense, (2) to facilitate technically the restriction of some rules to one or two of the categories (for example, that only attempt of a crime, not attempt of a misdemeanor, is punished), (3) to work as demarcation line for procedural purposes. The classification in the draft, on the other hand, has its main purpose in defining the limits of punishment. The classes are primarily categories of maximum punishment. The classification of European Codes has no corresponding function, since each criminal provision contains the maximum, and sometimes the minimum, penalty. (For example, robbery is punished with imprisonment from 6 months to 10 years; larceny is punished with imprisonment up to 3 years.)

A direct comparison of the draft with the classification of European Codes therefore is of little interest. The classification of offenses in the draft is one aspect of the sentencing system, but an aspect which can be isolated and discussed apart. The question could be put thus: is it preferable to express the statutory maximum punishment directly in each criminal provision or through reference to one of a limited number of categories? I do not consider this a very important question, since the court will have a wide range of choices within each category. The choice of category therefore will not strongly restrict the choice of maximum term. Moreover, there will exist a possibility of reducing the category (section 3004).[16] The designation of an offense as felony or misdemeanor represents an exemption from this flexibility. The maximum term fixed by the court for a felony will be at least 5 years (3 years imprisonment and 2 years parole, *see* section 3201(3)), whereas the maximum term for a misdemeanor will be—dependent on further consideration of the draft—1 year, 6 months or 3 months (section 3204

[15] In the Final Report, "Extended Terms" was changed to "Upper-Range Imprisonment".
[16] This section was deleted in the Final Report and appears only as bracketed subsection (6) of section 3001.

and comment at pp. 286–7).[17] Especially if one of the two last terms are decided upon by the legislature there will be a gap between the most serious sentence for a misdemeanor and the most lenient sentence for a felony, and I understand that the draft purposely has tried to avoid an intermediate sentence—"one too short for rehabilitation but longer than necessary for shock purposes" (Study Draft at 290).

It appears from the comment that the draftees of the Study Draft felt little doubt about the advantages of the classification system, and that similar classifications have been provided in other modern American Code revisions (Study Draft at xxii, xxxiii and 268). Nevertheless I feel inclined to prefer the traditional European solution. It seems to be simpler, and I see no real advantage in confining the choice of the legislator to six defined steps on the ladder. The comment to the draft refers to and exemplifies the chaotic and inconsistent categories in present Federal law (Study Draft and xxxii–xxxiii and 268). But as indicated there this state of affairs is the result of historical accident, not of considered judgment. When sentencing maxima are contemplated in the setting of a systematic and comprehensive Code there is no reason to expect inconsistencies or chaos because the limits for judicial discretion are fixed in connection with each offense. And it may well be that there is greater need for judicial discretion in one type of offense than in another—that one type of offense covers a wider range of gravity than another. I am aware that the classification system has some terminological functions in formulating various rules (for example, sections 607, 3301 and 3105), but I do not think this is essential.

C. PROBATION AND UNCONDITIONAL DISCHARGE

Section 3101 gives the court wide discretion to sentence to probation (or unconditional discharge) for all categories of offenses, and, in subsection (2), restricts the application of prison sentences to cases in which such a sentence is called for by one of the reasons enunciated under subparagraphs (a), (b) or (c).

This regulation differs from traditional European Codes in several respects, but is, on the whole, in harmony with recent trends of law reform. I shall briefly comment on some points.

1. *Form of Suspended Sentence.* When suspended sentences were introduced on the European continent towards the end of last century it was in the form of suspension of execution of a fixed prison sentence. The sentence may or may not be combined with supervision by a probation officer. This is still the dominant form, but law revisions in several countries in the post World War II period have, inspired by English and American law, introduced suspension of sentence as an alternative. This is the case in Denmark, Norway, and Sweden. (In Germany, on the other hand, this alternative has been discussed, but not accepted.)

The difference between such modern legislation and the Study Draft is that the Study Draft does not give the court the possibility of measuring out a fixed prison term, the execution of which is suspended. I realize that this would not fit in well with the system of indefinite sentences which the draft establishes for felonies, but I am inclined to think it might be a useful alternative in the field of misdemeanors. I mention that English law introduced suspension of execution of sentence as an alternative through the Criminal Justice Act of 1967.

2. *Choice Between Suspended and Unsuspended Sentences.* In Continental Codes the unsuspended sentence has traditionally been considered as the rule, suspension of sentence as an exception which needs justification. In practice, however, the suspended sentence has in many countries become the normal sanction against first offenders who have committed less serious crimes. And newer Codes tend to accept suspension of sentence as a normal or even preferable choice for the judge.

3. *Restrictions on the Use of Suspended Sentences.* European Codes used to have rather strict limitations on the use of suspension of sentence. Suspended sentences were, for instance, excluded for serious crimes, for prison terms of more than 3 (or 6 or 12) months, and for persons who had previously served a prison sentence. The development in recent reforms goes towards the relaxation or abolishment of such restrictions. The formulation of Study Draft section 3101

[17] In the Final Report the maximum term for a felony does not have to be 5 years; it may be any term up to the statutory maximum. The statutory maximum fixed for a Class A misdemeanor by the Final Report is 1 year with 6 months in brackets. All statutory maxima are set forth in Final Report section 3201.

(2) seems to me very adequate. It could be asked whether the list of factors to be considered (subsection (3)) is very useful, but it certainly does no harm.

4. *Supervision.* It is not explicitly stated in the draft whether a sentence of probation always includes supervision by a probation officer or another fit person, but as far as I know this is traditionally considered an essential part of probation. Modern European Codes give the judge the choice of establishing supervision or not. In many cases where a suspended sentence is adequate, supervision of the offender seems quite useless, as for example, when a middle-aged housewife is convicted of shoplifting. Economy as well as the wish to avoid unnecessary humiliation of the offender seems to commend the possibility of a suspended sentence without supervision. In the Swedish Criminal Code, probation (chapter 28) is always combined with supervision, but if supervision seems unnecessary the court may hand out a suspended sentence without supervision (chapter 27, section 1).

5. *Periods of Probation.* Section 3102 fixes the period of probation at 5 years for felonies, 2 years for misdemeanors and 1 year for infractions. The comment to the provision says that the draft changes present law in denying the court the power to fix initially a shorter period of probation.

In Continental Codes the modern tendency has been to shorten the periods of probation. Thus the Norwegian Code in 1955 changed the normal period from 3 to 2 years but empowers the court to go up to 5 years in special cases. The Danish Code, as amended in 1961, provides "not more than 3 years", but under exceptional circumstances up to 5 years. The Swedish Code has a fixed period of 3 years. The German Code, as amended in 1969, authorizes a period of at least 2 and at most 5 years.

6. *Unconditional Discharge.* The power of the judge to grant unconditional discharge is unknown in most European Codes, and in most countries legislators would probably be hesitant to introduce this institution, because of fear that the public would not grasp clearly the distinction between acquittal and discharge. However, both the Swedish Code of 1962 and the German Second Criminal Law Reform Act of 1969 authorize unconditional discharge under certain circumstances. The Swedish Code, chapter 33, section 4(3), provides: "A sanction may be completely dispensed with, if because of special circumstances it is found obvious that no sanction for the crime is necessary." The German law (Criminal Code, section 60) has a more narrow scope. It authorizes an unconditional discharge only "when the consequences of the act, which have hit the offender, are so serious that the imposition of a penalty would obviously be out of place.")

Personally I do not feel strongly about the objections raised against the institution of unconditional discharge. On the other hand a suspended sentence which does not fix a penalty and does not impose supervision comes very close to serving the same function as an unconditional discharge.

D. DEFINITE AND INDEFINITE SENTENCES

The draft makes a fundamental distinction between felonies and misdemeanors with regard to the sentencing system. A sentence of imprisonment for a misdemeanor shall be for a definite term, fixed by the court. A sentence of imprisonment for a felony, on the other hand, shall be indefinite.[18] The maximum term is fixed by the court within certain limitations.

The ordinary maximum prison term for all categories of felonies is 3 years (in addition to a parole component of 5 years for Class A felonies, 3 years for Class B felonies and 2 years for Class C felonies).[19] Extended terms of up to 25 years' imprisonment for Class A felonies, 12 years for Class B felonies and 5 years for Class C felonies can be imposed under the conditions specified in section 3202(2), but the reasons must then be set forth in detail.[20] Normally the sentence has no minimum term, but for Class A and Class B felonies the court may under exceptional circumstances impose a minimum term. The release date will be determined by the Board of Parole.

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[18] In the Final Report, a sentence of imprisonment of more than six months, whether for a felony or a misdemeanor, is indefinite. A shorter sentence is definite whether for a felony or a misdemeanor.

[19] There is no "ordinary maximum term" in the Final Report for all classes of felonies. Additionally, in the Final Report, the parole component is not statutorily fixed according to the class of felony, but rather, is generally one-third of the term actually imposed. See section 3201.

[20] In the Final Report, a hearing must be held.

In European Codes the prison sentence for all types of offenses is for a definite term, but with certain powers for the prison authorities to grant parole after the prisoner has served, for example, two thirds or one half of the term. Indefinite sentences are known in the form of measures of safety and rehabilitation, which may be imposed on special categories or offenders, for instance mental defectives or persistent recidivists, and which are not considered as punishments.

Up to World War II the principle of indefinite sentences was met with great interest among many European penal reformers. The idea that the offender should be kept in prison as long as necessary for his reform, not longer and not shorter, is easy to grasp and gives the penal system a seeming rationality which is felt lacking in the ordinary meting out of punishment. The trend has, however, definitely changed. Few European criminalists would, today, favor a system of indefinite prison sentences. In fact the indefinite sentences for certain categories of offenders (the measures of safety and rehabilitation) have come increasingly under attack.

The reasons for this change of trend might be summarized as follows: (1) There is a breakdown in the belief that a hospital analogy can be applied to a prison. Criminological research has shown that many beliefs have been based on wishful thinking, and has made us realize that we know little about how to reform offenders, and still less about the criteria for deciding that reform has been achieved. (2) It is felt that decisive decisions about a man's life should be taken by the courts, working in the light of publicity, not by administrative agencies, behind closed doors and without procedural safeguards. (3) An indefinite sentence is considered to be a harder strain on the prisoner than a sentence where he can calculate the day of his release. (4) Experience seems to show that the so-called measures for safety and rehabilitation have come to sweep in a great many petty recidivists, more a nuisance than a danger to society, thus violating the principle of a reasonable proportion between offense and sanction (although the measures, as previously mentioned, are not considered as punishment).

E. SENTENCING FOR MISDEMEANORS

The different principles applied for misdemeanors and felonies in the Study Draft is motivated by the different aims of punishment in the two categories.

For misdemeanors deterrence is the only end to be served, since neither the time available under misdemeanor sentences nor the place where such sentences are served, lend themselves to educational programs; for incapacitative purposes short sentences are inadequate. Since no reeducation or rehabilitation program is or can be undertaken in short terms, there is no occasion to measure the prisoner's progress towards reform with a view to early release. (Study Draft at xxxiv and 286-287.)

I have three comments; none of them contradicts the conclusion of the draft that a system of definite sentences is preferable for misdemeanors: (1) Deterrence refers both to the effect on the prisoner and on others who might be tempted to violate the law. This sometimes seems to be forgotten in the comments to the draft. It is stated that there "is growing awareness that misdemeanor sentences longer than six months, and even longer than three months, serve little, if any, penological purpose, may harm rather than help the prisoner, and thus impose unnecessary drains on the correctional system" (Study Draft at 286). Even if a three months' sentence has as good or better effects on the offender than a longer sentence, this does not preclude that the longer sentence may have a superior and useful general deterrent effect (as implicitly accepted at xxxiv). (2) Deterrence should not be taken in a narrow sense, comprising only the conscious fear, but should also include the moral effects of penalization—criminal law as a means of creating and strengthening moral inhibitions against socially reprehensible conduct.[21] The graduation of sentences may have a certain function in this direction. (3) It seems unduly defeatist when the comment to the draft categorically excludes the rehabilitative purpose of short sentences. As will be seen from the next section of this paper, I am not a strong believer in rehabilitative effects of imprisonment. However, penological literature gives examples of interesting therapeutic experiments in short term in-

[21] *See* Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects*, 1969 WIS. L. REV. 550.

stitutions. Certainly, many misdemeanants do not need any kind of "treatment" or "rehabilitation" plan—this will apply for many white collar offenders. In many other cases lack of time, resources and, above all, knowledge make possibilities small. But all this should not exclude an effort to do whatever possible. To deprive a man of his liberty for several weeks or months is such a far reaching infringement on his life that there seems to be a kind of duty for society to do whatever it can to help him solve the emotional and social problems which may have brought him to prison. This question may look somewhat different from, say a Scandinavian perspective, where only a small fraction of offenders are sentenced to more than one year of imprisonment, than in the United States which has relied so heavily on long prison sentences.[22]

The comments to the draft express the opinion that if the maximum for misdemeanors is fixed at 1 year, provisions permitting parole of a defendant after serving 6 months should be considered (*see* p. 287). I wholeheartedly agree with this suggestion. Scandinavian Codes authorize release on parole for considerably lower sentences. This question has been the subject of coordinated legislation in all the Scandinavian countries in recent years. In Denmark, Finland, Norway and Sweden the rule now is that a prisoner is eligible for parole when he has served two thirds of the sentence, but at least 4 months. The great majority of prisoners are released on this date; only when special circumstances make release inadvisable is the date of release postponed, and perhaps the whole term served. When special reasons so warrant the prisoner may be released after having served half of the sentence, at least 4 months. This rule is used rather restrictively, and has its most important field of application for long prison sentences. The German Code, section 57 (as amended in 1969) has rules similar to the Scandinavian laws, but the minimum term which has to be served before release is here fixed at only 2 months.

I note that the draft has no minimum for a prison sentence, and since the maximum for a Class B misdemeanor is 30 days, I take it that the great bulk of misdemeanor sentences will be of very short duration. The question of an absolute minimum is not mentioned in the comments (but is perhaps discussed in the Working Papers). Many modern European Codes try to avoid the very short prison sentences, which are thought to degrade the offender and expose him to undesirable prison acquaintances without having a great deterrent effect. The reasoning is that if the offense does not necessitate more than a few days of imprisonment a fine may be sufficient. The Swedish Criminal Code of 1962 establishes 1 month as a minimum, and the same applies for the German Code, as amended in 1969 (section 38). In Norway a minimum of 21 days was introduced through the Criminal Code of 1902, and I do not think there would be any sympathy for a change. It is difficult to say whether the reasons which have been invoked against the very short prison sentences are valid. I know of no research which could validate or negate them, but in any case the question seems worthy of serious consideration.

The German Code, section 47 (as amended in 1969) provides that imprisonment under 6 months shall be imposed only if it is considered necessary because of special circumstances concerning the commission of the act or the person of the defendant. I am inclined to think that this goes too far and is based on unsubstantiated beliefs in the superiority of long prison sentences as compared with short ones.

F. SENTENCING FOR FELONIES

For felonies the comment indicates that the draft takes rehabilitation as its point of departure. Thus the shortest maximum prison component for a felony is fixed by statute at 3 years, "because a useful rehabilitative program frequently takes several years, and the necessary period of confinement cannot be determined in advance" (comment, at 280).[23] The date of release will be determined by the Board of Parole "based on the prisoner's progress". The comment further speaks of the time when a prisoner is "ready for release", "the optimum term for release". Extended sentences (section 3202) mainly perform an incapacitative function.

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[22] Thus, in Norway in 1968, 2,055 persons were sentenced to unconditional imprisonment for felonies, but only 157 sentences were for more than 1 year, and only 8 for more than 3 years. Of the more than 3,000 prison sentences for misdemeanors the great bulk were for less than 3 months.

[23] The Final Report does not fix a shortest maximum prison component for felonies.

These statements reflect the rehabilitative ideology which lies at the bottom of the system of indeterminate sentences. If the basic premise is acceped that the goal of prison reform, and that the prisoner should be kept there as long as necessary to achieve this goal, it inevitably leads to a system of indeterminate sentences, since it must be admitted that the prison administration, which has followed the development of the prisoner during the execution of the sentence, is in a better position to judge his future behavior than the judge at the trial stage.

Personally I am highly skeptical of a system basing release on the progress of the prisoner. An appraisal of the principle of indeterminacy involves both value judgments and empirical questions. Perhaps the main points could be summarized in the following three questions:

(1) Is the principle compatible with justice? An unqualified acceptance of the principle of indeterminacy could lead to the release of a murderer as soon as the necessary examination has been performed, whereas a petty offender might be kept for a lifetime. In fact, homicides are often committed under circumstances which make repetition of the crime seem very unlikely; on the other hand many petty thieves seem next to incorrigible.

(2) Is the principle compatible with considerations of general prevention, meaning both the purely deterrent and the educative functions of criminal law in the community? Is it not more important to deter serious crimes than more trivial ones, and therefore better to grade the community disapproval inherent in the sentence according to the gravity of the crime?

(3) Is it really possible to diagnose with any reliability when the offender is reformed and thus ought to be released under the rehabilitative theory? Research of recent years, both on the prison community and on the relative effectiveness of various sanctions, has created serious doubt about the rehabilitative possibilities of prison. The destructive influence of fellow inmates and the prison atmosphere works strongly against the efforts of the prison personnel. There is little evidence that a long prison sentence has a rehabilitating effect stronger than that of a short sentence. The traditional skepticism against short prison sentences seems as well founded against long sentences (exception made for the very long sentences which consume the active years of the prisoner). Still more important in this connection: there is little evidence that it is possible from the conduct of the prisoner to tell what real progress he has made and what is the bset moment for release. In some cases, especially those including a psychiatric aspect, there may be a reliable basis for determining the right moment for release. In other cases the whole ideology of reform and rehabilitation seems quite out of place, for instance when an officer or a scientist is convicted of delivering defense secrets to a foreign power. In some cases, for example murder out of unhappy marital relations, one may say with great certainty from the beginning that there is a very small risk of recidivism. In many other cases, for example cases of repeated larceny, it is equally clear that prospects for the future are bad whether the offender is kept for a long or a short period.

Modern techniques of prediction afford possibilities of giving a reasonably good prediction about the success rates of inmates, but this is a prediction irrespective of the term served. We have little basis for relating the chances of success to the length of time served. In the Scandinavian countries most prison staff, including prison psychiatrists, would agree with these propositions. It is possible that American prison staffs have more advanced methods of treatment and of assessing the effects of treatment. If this is so, it is the more admirable since American institutions normally are much bigger and have a more unfavorable staff-inmate ratio than Scandinavian institutions.

The preceding discussion refers to the principle of indeterminacy as stated in the comment to the draft, and does not have the same validity with regard to the draft itself. Through the grading of offenses, the draft has accepted that the length of the sentences of imprisonment must rest in part upon the seriousness of the crime, and thus the draft limits the degree of indeterminacy. And a scrutiny of the criteria for parole reveals that the system of the draft is not really based on the principle of an assessment of the progress of the prisoner, but on a more workable scheme.

After 1 year (or any minimum term) the prisoner is to be released unless the Board of Parole finds that his release should be deferred for one of the four reasons stated in section 3402. The first reason is that there is a substantial risk that he will not conform to reasonable conditions of parole. The most important

condition is that the parolee not commit another crime during the period of parole (*cf.* § 3404). A substantial risk will in fact exist in the majority of cases.[24] As I read the draft, this does not in itself exclude release, but only when the Board is of the opinion that release ought to be deferred for this reason. If the Board finds that a prolonged stay in prison would be in disproportion to the gravity of the offense it may grant parole although the chances of success are not too bright. It is certainly not in the spirit of the draft to prolong the institutionalization of relatively minor offenders indefinitely because they are, and in all probability will continue to be poor risks.

The second reason stated in section 3402 for excluding release is that release at that time would unduly depreciate the seriousness of his crime or promote disrespect for the law. This refers to the general deterrent and, perhaps, retributive function of punishment. The question of a reasonable proportion between crime and punishment will here be in focus.

The third reason deals with the effect of the release on institutional discipline. Indeterminacy of sentence is, in this case, used as a means of discipline, which may be perfectly reasonable, but has little to do with the effects of the prison on the offender.

Only the last of the stated reasons is based on the idea of the rehabilitative effects of the treatment in prison. Release may be deferred if the Board finds that "his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released a a later date." As previously stated I am skeptical with regard to the possibiilty of making assessments of this kind, at least apart from special cases of personality disorders. It is, of course, difficult to foresee how the Parole Board will exercise its discretion. But from the text of the draft it seems reasonable to infer that release after 1 year (or the minimum period) will be standard procedure unless this is felt to be too lenient, considering the seriousness of the crime. And the same goes for later reconsiderations of the parole question, which are to take place at least once a year (*cf.* section 3401).

These somewhat loose speculations may or may not be correct. What seems undeniable is that the decision on release cannot be taken on the basis of the prisoner's progress alone, but will be the outcome of a compromise between different aims of punishment. The prevailing view in Europe, in any case in the Scandinavian states, would be that decisions of this kind ought to be made by the courts, not by administrative agencies. The difference between the system is mitigated by the power of prison authorities in Europe to grant parole after the prisoner has served part of his sentence, but the difference is still of great importance.

There are, however, two features of the penal system in the United States, which may make the indeterminate sentence, and the corresponding authority for the Board of Parole, more attractive than it would be in a European setting. The first is the great discrepancies in the sentencing policies of American courts (*cf. infra.* Under Apellate Review of Sentencing). In European states there are ample opportunities for judicial review of sentencing. This results in fairly uniform sentencing practices; to leave the decision of the length of imprisonment to a Parole Board would be felt to be a serious impairment of judicial safeguards. In the United States this is different. Under American conditions the transfer of authority from the courts to a Parole Board could mean more uniformity, not less.[25]

The second feature is the wide use of very long sentences by American courts, even for crimes which are not very serious. May it be that, historically, the in-

[24] The commentary to the Model Penal Code states that data on parole violation is unsatisfactory, but the data presented seems to indicate that about one-half of the paroles from State institutions are revoked during a period of 3 to 4 years. *See* MODEL PENAL CODE 118–120 (Tent. Draft No. 5). For the recidivist group the risk is of course considerably greater.

[25] "Indeed, the original purpose of the indeterminate sentence law of California was less to permit an 'individualization' of treatment by a central board than to 'equalize' sentences which under older legislation had been imposed by judges, each of whom used his own standard so that prisoners arrived from different courts with sentences of sometimes very different length for the same crime."

NOTE.—Thorsten Sellin, *The Adult Authority of California as a Sentencing and Parole Board* (a research paper prepared for The American Law Institute, not printed). The release practices which Sellin describes in his paper no doubt contribute strongly towards the end. Paradoxical as it may seem, the Adult Authority could be said to perform a function similar to that of an Appeal Court of Sentencing.

determinate sentence in the United States has functioned as a device to bring down the actual terms served in prison? Another device effectively serving the same end is the eligibility for parole after having served only a small part of a fixed sentence, for instance one third or one fourth of the sentence. The difference between a "fixed" sentence of this kind and an indeterminate sentence is purely formal.

G. SENTENCE OF DEATH OR LIFE IMPRISONMENT

The Study Draft has not made a definite decision whether to recommend retention of the death penalty, but chapter 36 has provisions for the eventuality that the answer is affirmative. In this case life imprisonment will be an alternative to the death penalty. If the death penalty is abolished the maximum penalty will be the 30 years prescribed in section 3201 (including 5 years as a parole component).[26]

(1) With regard to the death penalty I should only like to make one point. The animated discussions on the subject have mainly concentrated on capital punishment for murder. In my view there is a much stronger case for capital punishment for treason, espionage and sabotage. I mention three reasons: (a) The interests which the sanction is intended to protect may be much greater in the case of these political crimes than in the case of murder. Acts of treason, espionage or sabotage, committed by a trusted member of the civil or miiltary leadership, or on an organized, fifth column scale, may endanger vital national interests and the lives of thousands or even millions of citizens. (b) The deterrent effect of the death penalty for murder is reduced by the fact that the crime is often committed under exceptional circumstances of tension and excitement, or by people who are used to taking ultimate risks (gang murders and gang warfare). Acts of treason, espionage or sabotage usually represent well planned conduct, often committed by otherwise respectable, middle-class people. It seems reasonable to assume that the deterrent effect of the threat of the death penalty has greater possibility of making itself felt under these circumstances. (c) I take it for granted that the death penalty will be retained in martial law. In wartime, and in the preparation of war, acts of civilians may be as detrimental to the interests of defense as acts by members of the armed forces. The wisdom of making an absolute distinction with regard to punishment seems to me doubtful.

In Norway, capital punishment for ordinary crimes was abolished by the Criminal Code of 1902; in fact no death sentence had been executed since 1876. In the Military Criminal Code capital punishment was retained in time of war, and when the legislation on treason and other political crimes was revised in 1950 it was felt that, with a view to experience of modern warfare, the restriction to armed forces and wartime was no longer appropriate. Accordingly the law now authorizes the death penalty for "war treason"—a concept which comprises also espionage and sabotage—for civilians as well as for military personnel, and not only in time of war or military attack but also under certain specified conditions with a view to a future attack.

(2) European Codes usually have imprisonment for life as an alternative for the most serious crimes. On the other hand the upper limit of other prison sentences is often much lower than the 30 years of the draft, for example 10 (Sweden), 15 (Germany) and 20 (Norway). A sentence for life does not exclude parole or reprieve. In the Scandinavian countries in the last decades the average time served of life sentences has been around 11 years in Norway and Sweden, 13 in Finland and 14 to 15 in Denmark. Served times of more than 15 years are most exceptional. This means that the difference between a sentence for life and a sentence for a definite number of years is not as great as could be expected on the face of it. Whether there will, in actual practice, be a difference in time served between a 30-year sentence and a sentence of imprisonment for life will depend on the rules on parole for those sentenced to life. Nor do I think it has much bearing on the deterrent effect whether a sentence is for 30 years or for life, although the latter alternative may have a somewhat stronger psychologi-

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[26] In the Final Report, abolition of the death penalty is recommended with life imprisonment as the maximum penalty for treason and intentional murder. The bracketed alternative would retain the death penalty for treason and intentional murder with life imprisonment or 30 years as the sentence if death were not imposed.

cal impact. Consequently, I do not consider it a very important question whether the maximum term of imprisonment is fixed at 30 years or at life, and if the last alternative is chosen, whether the maximum of sentence not for life is, say, 20 or 30 years. It may be only an effect of habit that I personally would prefer to retain the possibility of a sentence for life, and on the other hand have a limit shorter than 30 years for other sentences.

H. CONCURRENT AND CONSECUTIVE TERMS OF IMPROVEMENT (SECTION 3206)[27]

The section continues the authority of a Federal court to impose either concurrent or consecutive terms in the case of conviction for more than one offense, but tries to restrict the use of consecutive sentences and fixes an aggregate maximum of such sentences. The proposed provision will no doubt substantially reduce the irrational and sometimes harsh results of the present system. A more radical, and in my view more rational solution would be to abolish altogether the choice of the court between concurrent and consecutive terms, and ask it to fix a joint sentence for the several offenses. It is hard to understand how a judge can mete out the sentence for several offenses without taking into account whether they are to be served concurrently or consecutively. The fixing of a joint sentence is the solution, which has prevailed in the modern Scandinavian Codes. See, for instance, the Swedish Criminal Code, chapter 1, section 6:

> Unless otherwise provided, a joint sanction for the crimes shall be imposed when someone is to be sentenced for several crimes.
>
> If there are special reasons for it, a person may be sentenced for one or more crimes to pay a fine together with a sanction for additional criminality, or to imprisonment together with conditional sentence or probation for the rest of his criminality.

The same principle is adopted in German law. (See the German Criminal Code, sections 53–55, as amended in 1969.)

The statutory maximum term for multiple offenses is somewhat extended as compared with the term for one offense only. (See, for instance, the Norwegian Code, section 62 and the Swedish Code, chapter 26, section 2.)

I. FINES (CHAPTER 33)

Section 3302(1) prescribes that in determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual. This seems to be a just and reasonable principle, which is in accord with modern European Codes. I infer from section 3001(4) that the principle applies also to convicted organizations, and that here the financial resources of the organization will be decisive, but the use of the expression "financial resources of an individual" in section 3302(1) makes me feel some doubt about the meaning.[28]

The dollar limits in section 3301, which range from $10,000 for a Class A or Class B felony to $500 for a Class B misdemeanor or an infraction will, however, substantially restrict the application of the principle of subsection (1), in a way which might be attacked as a protection of the well-to-do offenders. Moreover it may be argued that a high maximum of fines may be ever more necessary for misdemeanors and infractions, sometimes consisting of sizeable economic dispositions, than for the crimes categorized as Class A and Class B felonies. Rather narrow limits of fines have been the tradition from a time with a different social organization than our own, but several modern Codes go further than does the draft in authorizing fines which make it possible to apply the principle of section 3302 also against a rich offender. Some Codes do it through the system of day fines, originally a Swedish device. The sentence of a fine falls, according to this system, in two parts: (1) the imposition of a number of day fines which expresses the seriousness of the offense, and (2) the amount of every day fine, which is proportioned to the financial resources of the offender. In the Swedish Code the maximum number of day fines is 120, and the maximum amount of each day fine is 500 Swedish kroner. The German Code, as amended in 1969, authorizes

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[27] Study Draft section 3206 is Final Report section 3204.

[28] In the Final Report, "individual" was changed to "defendant".

up to 360 day fines, with a maximum of 1,000 DM for each day fine, that is a compounded maximum of 360,000 DM. The Norwegian Criminal Code has not adopted the day fine system, but in 1946 abolished all maxima, on the grounds that minima and maxima for the fine are in contradiction to the idea that the fine shall be proportioned to the financial resources of the offender. It seems difficult to understand why it should be necessary to severely curtail the power of the courts with regard to the imposition of fines when they are entrusted with such broad discretion with regard to imprisonment.

It is true that in many cases much higher fines than those authorized under section 3301 (1) of the draft will be possible as alternative measure under subsection (2), but there may well be a need for higher limits also in cases which are not covered by subsection (2). Thus, under subsection (2) a person who has been convicted of an offense through which he derived pecuniary gain, may be sentenced to a fine up to twice the gain so derived. The comment mentions that subsection (2) will be particularly useful for economic offenses—offenses such as price fixing, tax evasion, currency smuggling, share pushing or other offenses which may represent tempting financial propositions come to mind. But the magnitude of the offense and the necessity of a stern economic sanction may be the same even if the plan has been thwarted, so that only a small gain or none at all has actually been achieved. The comment mentions that it might be desirable to set a separate and higher fine limit for organizations for use when subsection (2) is unsatisfactory. With the low fine limits in subsection (1) this seems a reasonable proposition. But I am inclined to think that the most rational solution would be to abolish all fine limits altogether or at least to fix them at a level which would make them suitable for corporations as well as for individuals.

Section 3302 (2) is intended, according to the comment, to discourage the use of fines, unless some affirmative reason indicates that a fine is peculiarly appropriate.[29] Fine is thus made a "second choice." The wording of the provision, which makes it a condition for using a fine as the sanction "that the fine alone will suffice for the protection of the public "leads one to think of the choice between fine and imprisonment. But section 3101(2) restricts the applicability of imprisonment, giving a certain priority to probation, and it is not clear to me what the effect of the two provisions taken together will be.

In at least several European countries it is considered a goal of penal reform to restrict the use of short prison sentences, *inter alia* by an extended use of fines (see for instance the German Code, section 47.2). The comment to section 3302 gives as reasons for the reserved attitude toward the use of fines that fines do not have affirmative rehabilitative value and that the impact of the imposition of a fine is uncertain, for example, it may hurt an offender's dependents more than the offender himself. This is not entirely convincing. It is true that a fine can work only as a deterrent, but this does not mean that it is ineffective. A great many of the offenders who may be eligible for a fine do not need rehabilitation, but a stern admonition. In research on the comparative effectiveness of various sanctions the fine fares well, not only in comparison with prison, but also in comparison with probation. Thus, the English criminologist Nigel Walker states that "it is worth noting that there is no direct evidence whatsoever to suggest that this (*i.e.*, a fine) is less effective than a reformative measure such as probation; indeed, prima facie, the opposite seems to be the case." [30]

I am inclined to think it would be better to delete subsection (2) of section 3302, thus leaving the choice between a fine and other measures to the discretion of the court. The same applies for subsection (3) which deals with fines in combination with other sanctions.[31] In the Scandinavian countries a fine in combination with a suspended prison sentence has in recent years been frequently used where a suspended sentence alone is felt to be too lenient and an unsuspended sentence unnecessarily severe.

J. APPELLATE REVIEW OF SENTENCE

To a European observer it seems that perhaps the most serious weakness in present criminal justice in the United States lies in the lack of a consistent and uniform policy of sentencing. For similar crimes different courts give highly

[29] This subsection was deleted in the Final Report.
[30] NIGEL WALKER, SENTENCING IN A RATIONALE SOCIETY (London 1969). Walker refers especially to the research carried out by W. H. Hammond of the Home Office Research Unit.
[31] In the Final Report subsection (3) was merged with subsection (1).

different sentences, perhaps based on different philosophies of punishment. Whereas appellate review of sentence is taken as a matter of course in European systems, the traditional American approach has been that sentencing belongs basically to the province of the trial court. Only recently has the question of appellate review of sentences attracted more widespread interest.

For these reasons the provision of the Study Draft (28 U.S.C. § 1291) is to be welcomed. It is, however, hard to understand why the power of the appellate court should be restricted to reducing the sentence given by the court below. The comment gives no reason for this restriction. In European systems it is taken for granted that the appellate court has power to correct errors both ways, except that many of the Codes of criminal procedure deny the court the power to increase sentence when only the defendant has appealed.

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EXTRATERRITORIAL JURISDICTION — CRIMINAL LAW — Extraterritorial Reach of Proposed Federal Criminal Code — Government Employees Abroad — Conduct Endangering Certain Interests of the United States — *Section 208 of the Proposed New Federal Criminal Code*, National Commission on Reform of Federal Criminal Laws, Final Report at 21 (1970).

Although most crimes are of interest solely to the State in whose territory they are committed, situations often arise in which a State is interested in prosecuting individuals for illegal conduct outside its borders. For example, the accused offender may be one of its nationals, or the crime itself may be directed against the State or its government. In these two situations, and certain others of less importance, international law recognizes a State's right to prosecute under its own law even though the conduct asserted to be criminal has taken place outside its territory.[1] Virtually every nation in the world gives its courts jurisdic-

1. *See* Harvard Research in International Law: Jurisdiction with respect to Crime [hereinafter Harvard Research], 29 Am. J. Int'l L., Supp. 1, 435, 445 (1935). After exhaustive inquiry into the criminal laws and procedures of most of the nations of the world, the research committee discerned five general principles on which States have claimed penal jurisdiction:

1) the territorial principle, determining jurisdiction by reference to the place where the offense is committed,

2) the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense,

tion over some extraterritorial crimes, and many countries exercise jurisdiction over such crimes to the full extent permitted by international law.[2]

The United States, however, has rarely sought to prosecute for crimes committed outside its territorial jurisdiction.[3] The common law has traditionally emphasized the territorial principle as the basis for criminal jurisdiction, and this country's relative isolation from the rest of the world throughout its early history created little need to deviate from this pattern.[4] But, as the United States has developed into a major

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3) the protective principle, determining jurisdiction by reference to the national interest injured by the offense,

4) the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense, and

5) the universality principle, granting jurisdiction to whatever nation has custody of the offender.

The first two principles were found to have universal recognition, the third, nearly so. The fourth, though claimed by a considerable number of countries, is challenged by others. The fifth is generally accepted only in the case of recognized international crimes, such as piracy. *See also* Restatement (Second) of Foreign Relations Law of the United States [hereinafter Restatement] §§ 10–36 (1965).

Note that these authorities do not approve the prosecution of extraterritorial crimes outside the territorial jurisdiction of the prosecuting State. The Restatement sharply distinguishes between jurisdiction to prescribe a rule of law and jurisdiction to enforce it in §§ 6 and 7. While the sections noted above provide that a State may validly prescribe rules affecting the conduct of people outside its territorial limits, they indicate that it may only enforce those rules within its territory. *Id.* § 20.

2. *See* Harvard Research, *supra* note 1, for a thorough analysis of the extent to which different countries have relied upon each of the general principles. Civil-law states generally claim a far more extensive extraterritorial jurisdiction than the common-law countries. Sweden, for example, relies on all five principles in defining its criminal jurisdiction — perhaps to a greater extent than recognized in international law. As the passive personality principle has only questionable authority and as it is doubtful that the nationality concept includes alien residents, the Swedish Code also provides that "attention shall be paid to the limitations resulting from generally recognized principles of international law." The Penal Code of Sweden, ch. 2 (T. Sellin transl. 1965). *Cf.* The German Penal Code, §§ 3–7 (G. Mueller transl. 1961). Comparisons with the civil-law countries of Europe should also take into account varying formal procedural arrangements reflected in domestic law and extradition treaties. *See, e.g.*, G. Stefani and G. Levasseur, Procédure Pénale 294 (4th ed. 1970) (France); Council of Europe, Legal Aspects of Extradition Among European States (1970).

3. The United States has, however, always considered its "territory" to include American vessels on the high seas (and, more recently, American planes in flight). *See* 18 U.S.C. § 7 (1970). The Supreme Court has justified this deviation from the strict territorial principle "on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state which owns [the vessel]." Lauritzen v. Larsen, 345 U.S. 571, 585 (1953).

4. The medieval English rule that a trial should be held in the "vicinage" of the crime was developed for the convenience of jurors at a time when the jury took an active role in the investigation of crime. *See* M. Radin, Anglo-American Legal History 204–12 (1936). It was never held to preclude the prosecution of extraterritorial crimes, but it probably did discourage the practice.

Following this tradition, the Sixth Amendment to the U.S. Constitution states that every accused criminal shall have the right to trial by "an impartial jury of the State

world power, and as international trade, foreign travel, and the imperatives of American foreign policy have dispersed millions of Americans around the world,[5] the number of criminal activities in foreign countries which may affect United States interests has grown substantially. It would thus seem wise to reconsider our national policy concerning extraterritorial jurisdiction.

The extent to which present law gives United States courts jurisdiction to try extraterritorial crimes is unclear. Although the Supreme Court recognized the federal government's power to punish extraterritorial offenses as early as 1808,[6] Congress has only rarely indicated an express intent either to restrict the application of its criminal statutes to acts committed within United States territory or to authorize their application to acts committed abroad.[7] Consequently, the extraterritorial applicability of specific statutes must be determined by the courts on a

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and district wherein the crime shall have been committed," but the Supreme Court has not considered this to apply unless the crime is committed within the boundaries of a state. *See* United States v. Jackalow, 66 U.S. (1 Black) 484 (1861). Instead, as indicated in art. III, § 2 of the Constitution, "when not committed within any State, the Trial [of a federal crime] shall be at such Place or Places as the Congress may by law have directed." The present Congressional direction is that "the trial of all offenses begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district shall be in the district in which the offender . . . is arrested or is first brought." 18 U.S.C. § 3238 (1970).

Outside of the Sixth Amendment, the Constitution suggests no restriction of federal criminal jurisdiction to crimes committed in U.S. territory. The Supreme Court has twice upheld the exercise of extraterritorial jurisdiction over American nationals, but it has never considered the question of constitutional authority to exercise extraterritorial jurisdiction over aliens. *See* United States v. Bowman, 260 U.S. 94 (1922); Blackmer v. United States, 284 U.S. 421 (1932). Two Courts of Appeals have avoided searching the Constitution for any specific provision authorizing such jurisdiction. Instead, they upheld the exercise of jurisdiction according to the protective principle on the basis of the "inherent powers of external sovereignty," citing Justice Sutherland in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). *See* Rocha v. United States, 288 F.2d 545 (9th Cir. 1961); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968). *Rocha* affirmed a district court decision which had found express authority for jurisdiction over an extraterritorial immigration offense in art. I, § 8, clause 10, which grants Congress the power "to define and punish . . . offenses against the law of nations," and in the necessary and proper clause. United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960), *noted in* 13 Stan. L. Rev. 155 (1960). *Contra*, United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955).

The *Rodriguez* decision stated that the Constitution leaves Congress free to assert extraterritorial criminal jurisdiction to the fullest extent permitted by international law. 182 F.Supp. at 491. Despite *Baker*, it appears that this conclusion is right — at least with respect to the nationality and protective principles.

5. Counting only federal employees, members of the armed forces, and their families, the 1970 Census found more than 1,737,000 Americans living abroad. Statistical Abstract of the United States 6, Table 3 (1971). A conservative estimate would put the number of Americans in foreign countries on private business or vacations at several hundred thousand at any given time.

6. Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808) (dictum).

7. One exception is the statute covering treason, which expressly applies to conduct engaged in "within the United States or elsewhere." 18 U.S.C. § 2381 (1970).

case-by-case basis and, despite the effort of the Supreme Court in *United States v. Bowman*[8] to prescribe a general rule of statutory construction, disagreement among the lower courts regarding constitutional issues and congressional intent continues.[9]

A proposal now before Congress would end this uncertainty by specifying eight situations in which the government would be empowered to prosecute crimes committed outside American territory, including some which are clearly not covered by present law. These suggestions appear in Section 208 of the proposed New Federal Criminal Code, which was drafted by the National Commission on Reform of Federal Criminal Laws and released in February, 1971. The new Code would replace the present hodgepodge of criminal statutes now in Title 18 of the United States Code with a comprehensive criminal code, which would separately define substantive offenses and the situations in which federal jurisdiction could be exercised. Section 208 is the basic provision for determining the extraterritorial applicability of the substantive offenses defined elsewhere in the Code.[10]

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8. 260 U.S. 64 (1922). Speaking for the Court, Chief Justice Taft suggested that when, as in the case before him, the federal statute makes no mention of extraterritorial applicability, a court should examine its purpose. If it is to protect private citizens from crimes disrupting the "good order" of the community, it should be assumed that Congress was interested only in applying strict territorial jurisdiction. But if the statutory purpose is to protect the government from obstruction or fraud, it should be construed to cover acts committed abroad, because not to do so would curb its effectiveness. 260 U.S. at 97. Bowman and his accomplices were accused of conspiracy to defraud a corporation in which the United States was a stockholder; as the statute had obviously been designed to protect the government, there was federal jurisdiction even though the crime had taken place in Brazil. While the opinion speaks only of statutory construction and not of constitutional or international law, and even though the case involved only American nationals, the *Bowman* rule seems to indicate approval of the protective principle.

9. *See* note 4 *supra*.

10. The provision reads:

> Except as otherwise expressly provided by statute or treaty, extraterritorial jurisdiction over an offense exists when:
>
> (a) one of the following is a victim or intended victim of a crime of violence: the President of the United States, the President-elect, the Vice President, or if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any individual who is acting as President under the Constitution and laws of the United States, a candidate for President or Vice President or any member or member-designate of the President's cabinet, or a member of Congress, or a federal judge;
>
> (b) the offense is treason, or is espionage or sabotage by a national of the United States;
>
> (c) the offense consists of a forgery or counterfeiting, or an uttering of forged copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents issued by the United States; or perjury or a false statement in an official proceeding of the United States; or a false statement on a matter within the jurisdiction of the government of the United States; or other fraud against the United States, or theft of property in which the United States has an

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This Note will consider the merits of the Commission's recommendations in the light of applicable rules of international law and considerations of national and international policy. The present draft of Section 208 will be compared both to the present state of the law and to other approaches that might be taken to deal with the problem of extraterritorial jurisdiction. In particular, it will be argued that the nationality principle should be used to apply federal criminal law to all citizens abroad rather than only to those who are closely connected to the government, as suggested by the Commission in subsection (f).

PROVISIONS OF SECTION 208

Most of the situations named in the Commission's proposal are those in which a court would probably exercise jurisdiction under present statutes. According to the rule of construction established in *Bowman*,[11] congressional intent to apply a statute to extraterritorial conduct would ordinarily be inferred in the case of a crime against the government or endangering national security. Subsections (a), (b), (c) and (e) of Section 208 refer to crimes of this type: violent crimes against high ranking federal officials, treason and espionage, counterfeiting federal documents or currency, smuggling and illegal immigration, and fraud against the United States. Subsection (b), which covers treason, espionage, and sabotage, and the general "obstruction or interference" clause of subsection (c) are limited in their effect to nationals or residents of the United States, but there is no reason that they need be. Under the protective principle, a nation may exercise extraterritorial jurisdiction over an alien as well as one of its own nationals when the crime threat-

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interest, or, if committed by a national or resident of the United States, any other obstruction of or interference with a United States government function;

(d) the accused participates outside the United States in a federal offense committed in whole or in part within the United States, or the offense constitutes an attempt, solicitation, or conspiracy to commit a federal offense within the United States;

(e) the offense is a federal offense involving entry of persons or property into the United States;

(f) the offense is committed by a federal public servant who is outside the territory of the United States because of his official duties or by a member of his household residing abroad or by a person accompanying the military forces of the United States;

(g) such jurisdiction is provided by treaty; or

(h) the offense is committed by or against a national of the United States outside the jurisdiction of any nation.

National Commission on Reform of Federal Criminal Laws, Final Report 21 (1970). For the Commission's own view on Section 208, *see* Official Comment, *id.* at 22; 1 National Commission on Reform of Federal Criminal Laws, Working Papers [hereinafter Working Papers], at 69–76 (1970).

11. *See* note 8 *supra.*

ens national security or the operation of its government.[12] Such a crime may be just as dangerous to the United States if committed abroad as it would be if committed at home. Thus, providing for extraterritorial jurisdiction over non-nationals in such cases is highly desirable.[13]

Subsection (d) would ensure that persons, whether nationals or aliens, who engage in conspiracies or attempts to commit crimes within the United States, could be prosecuted by the United States. This expanded view of territorial jurisdiction has been approved in judicial constructions of existing statutes[14] and does not violate international law.[15] Here too, provision for extraterritorial jurisdiction appears wise because the United States' interest in prosecuting those who participate in the planning or commission of crimes within American territory remains the same whether a particular offender is in or out of the country at the time of the offense.

The last three subsections of Section 208 would enlarge the scope of federal extraterritorial jurisdiction. Subsection (g) would give the

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12. *See* note 1 *supra*.

13. *But cf.* Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. Pitt. L. Rev. 567 (1958), arguing that the "mischievous" protective principle might be used to restrict the legitimate right of aliens to express their political views, including opposition to foreign governments. The limitation in subsections (b) and (c) of jurisdiction over espionage, sabotage, and general "obstruction or interference" offenses to U.S. nationals might be defended on the ground that it protects aliens against abuse of the protective principle, although the National Commission explains it only on the basis of Anglo-American tradition. Working Papers, *supra* note 10, at 74. *See also* Ex Parte Quirin, 317 U.S. 1 (1942), where executive preemption of such jurisdiction over aliens in wartime was upheld by the Supreme Court. Another objection applicable to subsections (a) and (c) is that, through the use of vague language, they have failed to solve the *Bowman* problem of interpretation. The term "crime of violence" used in (a) should be defined by reference to specific substantive offenses in the Code. Subsection (c) clearly defines the situations in which extraterritorial conduct by nonresident aliens is a federal crime, but the "obstruction or interference" clause applied to American citizens and residents leaves wide latitude for judicial interpretation.

The omission of U.S. ambassadors and consuls from subsection (a) is curious. The national interest in punishing extraterritorial crimes against these officials would seem at least as great as in the case of a congressman or federal judge.

14. *See* Rivard v. United States, 375 F.2d 888 (5th Cir. 1967) (Canadian conspiracy to smuggle heroin into the U.S.). In the words of Justice Holmes:

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.

Strassheim v. Daily, 221 U.S. 280, 284 (1911). *See also* Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 Mich. L. Rev. 238 (1931). It is open to question whether subsection (d) could validly provide jurisdiction in a case where the extraterritorial conspiracy or attempt did not actually cause a deleterious effect or involve some overt act committed within the United States. No such case has yet been decided.

15. *See* Harvard Research, *supra* note 1, at 487–94. *Accord*, Restatement, *supra* note 1, at § 18.

federal courts jurisdiction in situations specifically agreed to by other nations in international agreements. This automatic provision for jurisdiction-by-treaty would give the President a new, potentially valuable negotiating tool. This subsection, however, may be objectionable on the grounds that it grants both too little power and too much: too little, because it is doubtful that many countries would choose to transfer or share significant jurisdictional power with the United States, and too much, because it would give the President full authority to extend United States extraterritorial jurisdiction subject only to the Senate's power of advice and consent. As it provides no standards to guide the President in determining what extensions of jurisdiction should be made, subsection (g) might also be an unconstitutional delegation of legislative power.[16] Congress would do better to provide for adjustments in jurisdiction as individual treaties are made.

Subsection (h) would extend the reach of federal criminal law to cover actions by or against American nationals in such places as Antarctica and the moon, which are outside the territorial jurisdiction of any nation — an extension that could be important in the future as polar and space exploration develop. It finds precedent in section 7(4) of title 18 of the United States Code, which provides that uninhabited guano islands may be deemed United States territory for purposes of criminal jurisdiction, and appears to be consistent with generally accepted principles of international law.[17] In the absence of international agreements governing conduct in such locations, the application of American law through this provision is necessary to fill a jurisdictional vacuum. In the case of space exploration, the United States may have a treaty obligation to provide for such jurisdiction as well.[18]

16. *Cf.* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). When Congress has given the President a clear standard to guide his discretion in expanding the scope of federal criminal law, the Supreme Court has upheld Presidential action. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Justice Sutherland's opinion in *Curtiss-Wright* suggests that the "plenary" powers of the President over foreign affairs may permit him to define crimes affecting foreign relations without Congresssional standards, but even if this view of the Constitution is correct, it would be an unwise abdication of political responsibility for Congress to allow the President the unfettered discretion of subsection (g).

17. Jurisdiction over crimes by Americans would rest on the unquestioned nationality principle. *See* note 1 *supra*. Jurisdiction over crimes against Americans would be based on the passive personality principle. Although such an extensive passive-personality jurisdiction as that claimed by Sweden (note 2 *supra*) would be subject to challenge if used to prosecute a crime committed by an alien in another country, the principle is generally accepted when applied to crimes committed outside the territory of any country. Harvard Research, *supra* note 1, at 589–591.

18. The United States is party to two international agreements concerning territories outside any national jurisdiction, but neither agreement resolves the problem of when a state may or may not exercise jurisdiction over a crime. *See* The Antarctica Treaty of December 1, 1959, [1961] 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 [hereinafter Antarctica Treaty]; Treaty on Principles Governing the Activities of States

The most important innovation of Section 208 is in subsection (f), which deals with offenses committed by "federal public servants" and members of their households while serving abroad. As it would affect greater numbers of people than the other subsections, it raises the most important issues to be considered in deciding whether or not to provide for wide-ranging extraterritorial criminal jurisdiction. Consequently, it will be examined more closely than the other sections.

SUBSECTION (f)

As both the Commission's Comment to Section 208 and its Working Papers indicate,[19] subsection (f) was designed specifically to remedy three gaps in existing law. First, American diplomats and the members of their households generally enjoy immunity from prosecution in the States in which they serve.[20] At the present, their acts abroad are not generally subject to the jurisdiction of the United States. Consequently, they may escape all criminal liability in a significant number of cases.[21]

Second, dependents of American servicemen and other civilians accompanying the military abroad are also generally beyond the reach of present United States jurisdiction. And, although Status of Forces Agreements normally allow the host nation (receiving State) to prosecute these individuals for violations of local law,[22] in many cases,

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in the Exploration of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, [1967] 18 U.S.T. 2410, T.I.A.S. No. 6347 [hereinafter Space Treaty]. Both treaties provide that the land in question be used only for peaceful purposes (Antarctica Treaty, art. I; Space Treaty, art. IV), and the exercise of U.S. jurisdiction over crimes committed there involving its nationals would seem to promote this goal. Moreover, with regard to crimes committed by Americans in outer space or on the moon, a provision in the Space Treaty suggests that the United States may have a duty to exercise jurisdiction:

> State Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by government agencies or by non-governmental entities . . . The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. *Id.* art. VI.

Even though a treaty requires the United States to punish certain conduct as criminal, the treaty alone cannot make it a crime; congressional legislation is required. *See* The Over the Top, 5 F.2d 838 (D. Conn. 1925).

19. National Commission, Final Report, *supra* note 10, at 22. Working Papers, *supra* note 10, at 75.

20. *See* Restatement §§ 73–82. There are two United Nations conventions on diplomatic and consular immunities. The Vienna Convention on Consular Relations, Apr. 24, 1963, [1969] 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, has been ratified by the United States. But the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, has not.

21. The United States could remove a diplomat's immunity to permit prosecution by the foreign State (Restatement § 80), but the possibility remains that the other government would decline to prosecute. *Cf.* note 23 *infra.*

22. *E.g.*, NATO Status of Forces Agreement, art. VII, June 19, 1951, [1953] 4

particularly when the victim is an American, no prosecution is pursued.[23] The United States does have military jurisdiction in countries where American forces are stationed,[24] and civilians accompanying the military were once subject to prosecution in overseas courts-martial under the Uniform Code of Military Justice (UCMJ).[25] The Supreme Court, however, put an end to this practice in a series of decisions holding that the subjection of civilians to military law in peacetime violated their constitutional rights under the Fifth and Sixth Amendments.[26]

Military law also once provided that servicemen would remain subject to court martial after their discharge for crimes committed while in service.[27] The Court, however, has held that this practice is prohibited by the Constitution.[28] Hence, the third problem is that, upon discharge from the military, a serviceman who has committed a crime outside United States territory is also completely free from American prosecu-

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U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67. The NATO agreement has not only affected troops and civilians in those countries to which it applies; it has also served as a model for most other such agreements made by the United States *See generally* S. Lazareff, Status of Military Forces under Current International Law (1971). For consideration of the special effects of the agreement on civilians, *see* G. Draper, Civilians and the NATO Status of Forces Agreement (1966).

23. While no comprehensive statistics are maintained, a six-month survey taken by the Air Force in Europe in 1964–65 reported that of 292 "serious crimes" committed by civilian personnel and dependents, only 11 were prosecuted by the host country. *Hearings on Military Justice before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services* [hereinafter *1966 Hearings*], 89th Cong., 2d Sess., pt. 1, at 65 (1966). Testifying before a Senate Subcommittee in 1966, Maj. Gen. Robert Manss, Judge Advocate General of the Air Force, explained that when a crime was committed by a civilian on a U.S. military base, the host nation was rarely sufficiently concerned to undergo the expense involved in prosecution and incarceration in a local jail or prison. *Id.* at 62.

24. *See* NATO Status of Forces Agreement, *supra* note 22, art. VII.

25. Uniform Code of Military Justice [hereinafter UCMJ] art. 2(11), 10 U.S.C. § 802(11) (1970).

26. *See* Reid v. Covert, 354 U.S. 1 (1957) *and* Kinsella v. U.S. ex rel. Singleton, 361 U.S. 234 (1960) (dependents); Grisham v. Hagan, 361 U.S. 278 (1960) *and* McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (members of the civilian component of the armed forces). The Court found that the Fifth and Sixth Amendments guarantee a grand jury indictment and a trial by petty jury to all persons except those actually in the military service. These decisions followed the reasoning of the *Toth* case, note 28 *infra*.

Another provision of the UCMJ authorizes military jurisdiction over civilians accompanying military forces in the field in time of war. UCMJ art. 2(10), 10 U.S.C. § 802(10) (1970). This provision is apparently constitutional. *See* Reid v. Covert, 354 U.S. at 33. The Army attempted to use this provision to prosecute civilians for crimes committed in Viet Nam, but the Court of Military Appeals rejected this approach, construing the statute to apply only to wars declared by Congress. *See* United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

27. UCMJ art. 3(a), 10 U.S.C. § 803(a) (1970).

28. United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

tion, even in cases where the United States has assumed an obligation to prosecute under international conventions.[29]

The draft proposal would remedy these problems by subjecting all federal employees and officials, both military and civilian, and the members of their households to the federal criminal laws while in government service outside United States territory,[30] thereby including Peace Corps members, A.I.D. officials, diplomats and military-connected civilians. Given the large number of people who would be affected by this provision[31] and the significant change from current practice that its enactment would cause, it becomes important to inquire into the legal and practical problems that would arise if federal extraterritorial jurisdiction were expanded in this manner.

LEGAL AND ADMINISTRATIVE OBSTACLES TO DOMESTIC TRIAL

The major difficulties with this proposal stem from the fact that Section 208 offenders, like all others under the Proposed Code, would be indicted and tried before federal courts within United States territory — probably thousands of miles from the scene of the crime. If the accused offender failed to return voluntarily to United States territory, it might be impossible to compel appearance for trial. Furthermore,

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29. For a good analysis of the problems raised by *Toth*, *see* Note, 22 Case W. Res. L. Rev. 279 (1971); Metzger and McMahon, *The Return of U.S. Servicemen for Offenses Committed Overseas*, 22 Case W. Res. L. Rev. 617 (1971). The present inability of U.S. authorities to prosecute ex-servicemen for extraterritorial crimes in either a military or a civilian court is particularly frustrating with regard to possible war crimes committed in Viet Nam, for the Geneva Conventions for the Protection of War Victims may require the United States to prosecute them. *See* Note, 12 Harv. Int'l L.J. 345 (1971).

30. Specific offenses under the Proposed Code are defined in §§ 1001–1861 and cover the full range of crimes to be expected in a comprehensive penal code. Section 208(f) would extend jurisdiction over all these offenses to the persons named except as specifically provided otherwise.

31. In 1970 there were more than 1,737,000 federal employees, servicemen and members of their households residing abroad. Statistical Abstract, note 5 *supra*. At the same time there were 245,000 foreign nationals employed by the Defense Department who would also be subject to federal jurisdiction under § 208(f). *See* Working Papers, *supra* note 10, at 75.

Jurisdiction over aliens under paragraph (f) is predicated upon a corollary to the nationality principle which provides that a State may exercise extraterritorial jurisdiction with respect to crimes committed by an alien "in connection with the discharge of a public function which he was engaged to perform for that State." Harvard Research, *supra* note 1, at 539–42. Thus crimes committed off base by an alien Defense Department employee or by his dependents could probably not be prosecuted without a specific international agreement permitting it. This would, however, constitute only a minor restriction on the operation of the statute. Most alien federal employees (and their dependents) are nationals of the country in which they work, which would probably take jurisdiction over any crimes that they might commit.

even if the defendant were within the jurisdiction, it might be difficult to ensure that the trial would be fair and adequate in all respects.

In the case of an individual whose crime is discovered after his return to the United States, there would be no particular problem in securing his appearance before a district court. He could be arrested by federal authorities and tried at the place of arrest.[32] If the crime were discovered while the accused remained outside American territory, however, it would be difficult to secure his removal to the United States. International law would prevent the federal government from sending American authorities abroad to arrest the accused without the express consent of the foreign government involved.[33] Formal extradition would also be highly unlikely, for most extradition treaties to which the United States is a party apply only to crimes committed within the territory of the State seeking extradition.[34] Thus in most cases, removal of an extraterritorial offender to the United States would depend upon the voluntary cooperation of the foreign government.[35]

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32. *See* 18 U.S.C. § 3238 (1970).

It is in this situation that U.S. extraterritorial jurisdiction would be most desirable because, if the offender is an American, he generally cannot be extradited to the State in whose territory the crime was committed. Most extradition treaties between the United States and other nations do not authorize either country to surrender its own nationals to the other. *See* I. Shearer, Extradition in International Law 94–97, 100–114 (1971). For European practice in this respect, *see Symposium — Les Problèmes Actuels de l'Extradition*, 39 Revue International de Droit Pénal 447 (1969) (German views).

33. In the words of the Permanent Court of International Justice:

> The first and foremost restriction imposed by international law upon a state is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another state.

Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9, 18.

The NATO Agreement establishes a "permissive rule" with regard to the exercise of military jurisdiction, but not civilian jurisdiction:

> The military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.

NATO Status of Forces Agreement, *supra* note 22, art. vii(1)(a).

This would seem to permit arrests only by U.S. military authorities, and only of active servicemen, because civilians are no longer "subject to the military law" of the United States. *But see* text at note 45 and note 48 *infra*.

There is a federal statute which specifically authorizes the arrest and removal of Americans charged with federal crimes from foreign countries. 18 U.S.C. § 3042 (1970).

34. *See* Evans, *The New Extradition Treaties of the United States*, 59 Am. J. Int'l L. 351, 354 (1965). A few treaties permit extradition of nationals of the requesting State when the alleged crime has taken place in the requested State. *See, e.g.*, Sweden, October 24, 1961, [1963] 14 U.S.T. 1845, T.I.A.S. 5496, 479 U.N.T.S. 358. Treaties with those countries in which the largest number of Americans are stationed, however, retain the territorial restriction. *See, e.g.*, Germany, July 12, 1930, 47 Stat. 1862 (1931), T.S. No. 836.

35. *See* testimony of Edward S. Cogen and Lawrence Speiser on behalf of the American Civil Liberties Union, *1966 Hearings*, *supra* note 23, pt. 1, at 343, 349–354. The Defense Department once opposed enactment of a bill similar to Section 208(f) because of the high travel expense it would cause. *Id.* pt. 2 at 640. By 1970 the Department

Even if the offender could be reached, there would be administrative difficulties in conducting his trial. Most of the witnesses for both sides would probably have to be transported to the trial from overseas. Special investigators might also have to be sent from the United States to the scene of the crime.[36] All of this travel would constitute a substantial expense. Consequent legal problems include the possibility that a defendant's Sixth Amendment right to compel the appearance of witnesses in his behalf might be impaired if an important witness chose to remain outside the United States.

The burden of limiting travel and administrative expenses in prosecuting offenses under subsection (f) — or any other part of Section 208 — would rest upon the government.[37] Because most prosecutions based on extraterritorial offenses would be more expensive than those in domestic cases, the Justice Department would probably not want to prosecute every crime committed by civilians or ex-servicemen abroad; in practice, only cases judged worth the cost of holding a trial in the United States are likely to be brought. Even though weighing administrative costs might result in proportionately fewer prosecutions of extraterritorial crimes than of domestic offenses, it would seem to be a legitimate exercise of prosecutorial discretion, for the same sort of weighing and balancing takes place in deciding whether or not to prosecute a domestic crime. While not every offender would be prosecuted, each one would run the risk of having his case found either important enough or easy enough to warrant prosecution.[38] One factor which might permit a greater number of extraterritorial prosecutions by re-

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had decided that, at least when serious crimes were involved, the expense would be tolerable. *See* note 38 *infra*.

36. An example of American-European police cooperation is offered by the U.S.-French narcotics enforcement agreement. For a discussion of problems with this agreement, *see* Note, p. 336 *supra*.

37. A substantial number of crimes are involved. In one recent year, the Defense Department reported that 2079 civilian employees and dependents were charged with criminal offenses by foreign States. *See Hearing on the Operation of Article VII, NATO Status of Forces Treaty, Before a Subcomm. of the Senate Comm. on Armed Services* [hereinafter *1970 Hearing*], 91st Cong., 2d Sess. 28 (1970). Considering the reluctance of most foreign governments to prosecute American military-connected civilians, the actual number of crimes committed is probably substantially higher. Presently some administrative sanctions can be applied by the military command, but revocation of a driver's license and suspension or dismissal from employment are not adequate sanctions against serious crime. *See 1966 Hearings*, *supra* note 23, at 62, 65. Furthermore, these sanctions may be applied without giving the accused a real opportunity to refute the charges against him.

38. If Congress should have doubts that prosecutorial discretion would be used fairly and wisely, it could amend Section 208(f) to provide jurisdiction only in the case of more serious crimes. In July, 1970, the Defense Department proposed the establishment of extraterritorial jurisdiction for the federal district courts over military-connected civilians in the case of twelve serious crimes. *See 1970 Hearing*, *supra* note 37, at 4–12, 23.

ducing travel expense is the likelihood that many defendants will plead guilty before trial, as they do in domestic cases.[39]

Situations in which a defendant's right to obtain witnesses in his defense would be abridged would probably be rare. The Federal Rules of Criminal Procedure permit a defendant to substitute a deposition for live testimony when a necessary defense witness is out of the United States,[40] and the subpoena power can be used if necessary to compel American nationals to appear at trial, with the Government bearing the travel expense.[41] In some cases, the cooperation of the foreign government might be secured in encouraging or requiring aliens to appear. And, even if a particular witness should remain beyond the reach of a federal court, this fact alone would not deprive the defendant of his constitutional rights. In prosecutions based upon the territorial principle, it sometimes occurs that a witness cannot be found, but in the absence of bad faith on the part of the prosecution in preventing the appearance of a defense witness, convictions in such cases have been sustained.[42] The possibility of such an injustice occurring should not in itself prevent the much-needed expansion of jurisdiction provided by subsection (f). Cases in which the defendant would be prejudiced by the inability of compulsory process to reach an essential witness would probably be rare, and if a defendant's rights should be violated by any particular prosecution, he could still rely on the courts to protect them.[43]

As noted above, the inability of American authorities to arrest offenders abroad, however, would seriously limit the effectiveness of the statute.[44] Yet Status of Forces Agreements appear to offer a solution to this problem in countries to which they apply. According to an expert on the operation of these treaties, the power which they grant to American military authorities includes the right to arrest individuals and remove them to the United States for trial—in civilian as well as military courts.[45] If American military officers were given the authority

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39. *See* D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (1966). The author states that "roughly 90 per cent of all criminal convictions are by pleas of guilty." *Id.* at 3.

40. *See* Fed. R. Crim. P. 15.

41. *See* 28 U.S.C. § 1783(b) (1970); Fed. R. Crim. P. 17. If need is shown, the court may direct that the travel and subsistence expenses incurred for the defense attorney's attendance at the examination be paid by the government.

42. *See, e.g.*, Ferrari v. United States, 244 F.2d 132 (9th Cir. 1957); United States v. Edwards, 366 F.2d 853 (2d Cir. 1966).

In state prosecutions, the right to compulsory process does not extend to witnesses outside of the state. *See* cases cited in 2 L. Orfield, Criminal Procedure Under the Federal Rules § 17:28 (1966).

43. *Cf.* Rideau v. Louisiana, 373 U.S. 723 (1963).

44. *See* note 33 *supra*.

45. S. Lazareff, *supra* note 22, at 136.

to arrest civilians who committed federal crimes under subsection (f), then there would be no need to seek new international agreements to permit arrests by American civilian authorities.

The Constitution seems to present no obstacle to the arrest of civilians by the military so long as the ensuing prosecution is conducted by civilians.[46] In presenting its own recommendation that federal criminal jurisdiction be extended to cover military-connected civilians abroad,[47] the Department of Defense also urged Congress to authorize the military to arrest civilian offenders, explaining that the expansion of jurisdiction would be "a futile measure unless the Congress also provided the means to implement it."[48] The effectiveness of subsection (f) could only be enhanced by enactment of a statute authorizing extraterritorial arrest, and Congress would do well to consider such legislation as a complement to Section 208 of the Proposed Code.

POSSIBLE OVERSEAS FORUMS

Two alternative proposals have been suggested to avoid the difficulties presented by having to hold trial in the United States. First, to deal with the problems caused by the *Toth*[49] and *Reid*[50] cases, it has been suggested that the UCMJ be amended to provide for constitutional trials of civilians within the military court system.[51] If this feat could be accomplished, then military-connected civilians could be tried by American courts-martial without violating international law, for the present Status of Forces Agreements permit the military authorities of the sending State to exercise enforcement jurisdiction in the receiving State over "persons subject to the military law of the sending State."[52]

Although it might be possible to satisfy the requirements of a grand jury indictment and a trial by petty jury by selecting the members of such bodies from among other American civilians on a military base, it is doubtful that any change in court-martial procedure could meet the requirements of due process. All units in the armed forces

46. Justice Black's objections to the subjection of civilians to military justice in *Toth*, 350 U.S. 11 (1955), and *Reid*, 354 U.S. 1 (1957), (*see* note 54 *infra*) concerned the indictment and trial phases of the criminal process, where military procedure is substantially different from that in civilian courts. At the arrest stage, military procedure and civilian procedure are substantially the same; command influence affects civilian policemen as well as the military. The exclusionary rule could be employed just as in civilian cases to protect a defendant's rights under the Fourth and Fifth Amendments.

47. *See* note 38 *supra*.

48. *1970 Hearing*, *supra* note 37, at 7–8. *See also* the Department's suggested bill at 13–22.

49. 350 U.S. 11 (1955).

50. 354 U.S. 1 (1957) .

51. *See, e.g.*, Shaneyfelt, *War Crimes and the Jurisdiction Maze*, 4 Int'l Law. 924, 929–931 (1970).

52. *See* note 33 *supra*.

necessarily operate in a command structure and are ultimately subject to the direction of the President as Commander-in-Chief.[53] Despite efforts to reduce the likelihood of "command influence" in military courts, the Constitution may demand that civilians be tried with independent, tenured judges of the kind prescribed in article III.[54] If not, the reformed arrangement, unless also applied to servicemen, might be subject to attack by other parties to the Status of Forces Agreements on the ground that American civilians were not really subject to military law. And even if this alternative should prove acceptable, it would leave American diplomats and other civilian federal officials beyond the reach of federal criminal law. Hence, it cannot be considered a fully effective substitute for the jurisdiction provided by Section 208(f).

The second alternative proposed would create no constitutional problems, but would face formidable obstacles in international law. The suggestion is that Congress establish new federal courts stationed abroad to apply United States criminal law in the cases contemplated by subsection (f). While the number of cases would probably not warrant maintaining a court at every military base — certainly not at every diplomatic mission — "roving" courts could be established to sit in each location as needed. The crippling drawback to this proposal is the need to obtain the consent of every country in which the courts would operate.[55] Such a concession by a foreign power would be a major departure from current international practices.[56] Certainly at a time

53. U.S. Const., art. II, § 2, cl. 1.

At present, the UCMJ authorizes the President to change military judicial procedures when he so desires, so long as the changes are consistent with the general purposes of the Code. UCMJ, art. 36, 10 U.S.C. § 836 (1970).

54. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1. In *Toth*, Justice Black wrote for the majority:

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential for fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

350 U.S. at 17. *See also* Reid v. Covert, 354 U.S. 1, 35–36.

55. *See* note 33 *supra.*

56. In the nineteenth century, the United States pressured Japan and China into permitting American tribunals to sit within their territories.

when public opinion in many countries is running against the continued presence of United States forces within their territories, few governments will be eager to authorize an expansion of American power within their borders. In nations where there are no United States servicemen stationed, the authorization of a roving federal court to sit on occasional cases involving diplomats or Peace Corps volunteers would probably face insurmountable diplomatic obstacles.

Since the other parties to Status of Forces Agreements did permit American jurisdiction over civilians when they were covered by the UCMJ, they might appear more likely than other countries to allow federal civilian courts the same privilege now.[57] Certainly in practice, receiving States have not shown a compelling desire to exercise their own jurisdiction. In one recent year, foreign authorities agreed, at the request of American military authorities, to terminate 24 per cent of the prosecutions they had initiated against American civilians, although the United States lacked jurisdiction to prosecute the alleged offenses. During the same period, foreign authorities waived jurisdiction in 81 per cent of the cases involving American servicemen who were subject to prosecution in American military courts but over whom the receiving States held primary authority to prosecute.[58]

Despite the acceptance of military courts on foreign territory, there are significant differences between military and civilian courts which may make the latter less acceptable. Military courts may be considered to be a necessary evil connected with the presence of foreign troops required for national defense, but civilian courts would appear to be an avoidable insult to national sovereignty.[59] Hence, even in receiving States, the United States cannot be sure that American extraterritorial courts would be accepted.

AN ALTERNATIVE GRANT OF GENERAL JURISDICTION

As presently written, subsection (f) would provide extraterritorial jurisdiction on the basis of the nationality principle only over federal employees and members of their households. Hundreds of thousands

57. Despite the Agreement's very clear language restricting the enforcement jurisdiction of the sending State to its military authorities (note 33 *supra*), both the Working Group and the Judicial Subcommittee which participated in drawing up the NATO Agreement indicated their willingness to allow civilian authorities to exercise some powers within the territory of the receiving State. S. Lazareff, *supra* note 22, at 134–35. However, it would seem reckless to rely on these statements as support for a construction of the Agreement which would permit the operation of federal civilian courts in the territory of the receiving State.

58. *1970 Hearing*, *supra* note 37, at 27–28. For a discussion of the concurrent jurisdiction provisions of the Agreement which determine when each State involved has the primary right to prosecute, *see* S. Lazareff, *supra* note 22, at 160–208.

59. *See* S. Lazareff, *supra* note 22, at 135.

of other American citizens abroad would not be included. While there may be more compelling reasons for exercising jurisdiction over the former group than over the latter,[60] the anomalous situation that would result from extending jurisdiction over only one group should lead Congress to consider applying the federal criminal laws to all American nationals throughout the world. If the Commission's proposal should be adopted, the criminal liability of an American citizen in an American court for the extraterritorial murder of her husband would depend on whether or not her husband had been employed by the federal government. Such discrimination would raise questions of fundamental fairness in the application of federal criminal law.

There are other important reasons for extending jurisdiction to all nationals. As the experience of American businessmen in foreign countries has shown, the actions of private citizens as well as of public officials may adversely affect the foreign policy interests of the United States. By requiring Americans traveling abroad to answer for their foreign crimes in American courts, the United States might be able to exercise somewhat better control over extraterritorial conduct which might impair the national interest. The possibility of holding trial in an American court rather than a foreign court would also offer the defendant the benefit of the procedural rights guaranteed him by the United States Constitution — some of which, at least, would almost certainly be lacking in a foreign proceeding. Despite this country's legal tradition of relying almost exclusively on the territorial principle of jurisdiction, a substantial proportion of the American public would prefer to see their countrymen tried at home, rather than at the locus of the crime,[61] and most foreign countries have shown that they will be less likely to prosecute an American offender if he is subject to prosecution by the United States than if he is not.[62] The number of Americans abroad who are not covered by subsection (f) is only a fraction of the number who are,[63] so that substituting a provision for jurisdiction over all nationals would not add unreasonably to the number of cases that the United States would prosecute under subsection

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60. *See* text at note 19 *supra*. A few countries have limited their nationality jurisdiction to public servants. *Harvard Research*, *supra* note 1, at 530–531.

61. After the Supreme Court upheld the prosecution of an American serviceman by a Japanese court pursuant to concurrent jurisdiction provisions of the Status of Forces Agreement with Japan (*see* Wilson v. Girard, 354 U.S. 524 (1957)), patriotic organizations such as the Veterans of Foreign Wars expressed fervid objections to the prosecution of Americans by foreign governments. *See Hearings on H. R. Res. 8704 Before the House Comm. on Armed Services*, 85th Cong., 1st Sess., pt. 3, at 572 (1957). Justice Clark, who dissented in *Reid v. Covert*, did so partly because he feared that a foreign trial would offer less protection to an American defendant than a U.S. military trial. 354 U.S. at 89.

62. *See* note 23 *supra*.

63. *See* note 5 *supra*.

(f), while it would provide for an equal application of federal law to all Americans.

Jurisdiction based solely on nationality, does, however, have its dangers. Potentially, it might be used to punish extraterritorial conduct which, while criminal under United States law, is legal according to the law of the locus — for example, selling pornography in Denmark.[64] In these situations, the reasons for holding American citizens to the federal standard are no longer valid. The crime is unlikely to affect adversely the relations of the United States with the foreign country, because the latter does not consider it a crime, and because prosecution in a foreign court is impossible. Thus there is no need to provide the alternative of trial in the United States. In order not to restrict the acts of Americans more stringently than do the States to which they may travel, subsection (f) should also be changed to provide nationality jurisdiction only when the prohibited act is also a crime in the country in which it was committed. Many other nations exercising extraterritorial jurisdiction based on the nationality principle have this kind of restriction.[65] By amending subsection (f) in this manner, it should be noted, Congress would not be freeing nationals from prosecution for any act permitted by a foreign State, for jurisdiction based on the protective principle (in subsections (a), (b), (c), and (e)) and on the objective territorial principle (subsection (d)) would not be affected.

CONCLUSION

While the provisions for extraterritorial jurisdiction in the proposed New Federal Criminal Code represent a welcome step toward recognizing that the nation's interest in criminal activities extends beyond its borders, Section 208 as presently written does not deal with the problem as effectively and as fairly as it could.[66]

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64. *See* N.Y. Times, July 2, 1969, at 4, col. 4.

65. *See* Harvard Research, *supra* note 1, at 524–525. One example is West Germany, whose Penal Code provides:

> Sec. 3. Applicability to Germans
>
> 1. German criminal law applies to the deed of a German citizen, no matter whether it was committed within Germany or abroad.
>
> 2. German criminal law is not applicable to a deed committed but not punished abroad, if this deed is no offense abroad by reason of special considerations obtaining there. . . .

The German Penal Code, § 3 (G. Mueller trans. 1961).

66. In a paper prepared especially for the use of the Commission, a Yugoslav jurist recommended the wide exercise of extraterritorial jurisdiction. Noting that present American law on this question is "opposed to the legislation of much of the rest of the world," he explained that "[c]ontinentals would consider traditional common law jurisdictional notions less rational than their own, disguising real policy issues by fictions." Damaska, *Comment Comparing Study Draft of Proposed New Federal Criminal Code to European Penal Codes*, 3 Working Papers, *supra* note 10, at 1478–1479.

Subsection (g) merits outright rejection, not because the jurisdiction it contemplates would be unwise as a matter of international law or policy, but because it would offend the domestic principle of separation of powers within the federal government. Subsection (f) would close an important gap in existing law, but would discriminate unnecessarily and unfairly between public servants and private citizens; a statute providing for jurisdiction over all American nationals abroad would be a more equitable solution. In those countries where permission has been or can be obtained for American military authorities to apprehend extraterritorial offenders, a grant of arrest authority would substantially increase the effectiveness of the Code's provisions for extraterritorial jurisdiction.

By adopting Section 208 with the changes suggested above, Congress would help protect American interests throughout the world and enable the United States to fulfill international treaty obligations[67] which today are beyond its power.

Stephen B. Swigert

67. *See* notes 29 and 30 *supra.*