PRINCIPAL CHARACTERISTICS OF LEGAL POLICY IN THE RECENT EUROPEAN DRAFTS OF CRIMINAL LAWS: A COMPARATIVE STUDY

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The modern policies of criminal law are dominated by the individualization of criminal legislation. The rigid scheme should be abandoned, so far as compatible with legal policy, and the act should not be viewed by itself alone, but also from the standpoint of the law-breaker. The opportunity should exist, while judging the crime, to consider not only the circumstances under which the act took place, but also to allow for the personality of the defendant. In other words, as far as possible under our present form of legislation, a means is to be provided for the realization of the ideal of every criminal code, which is that the defendant may obtain justice. Our desire is not solely to punish the malefactor; we wish also to improve him and, if there is any possibility, to make him a useful member of society.

The modern tendency of European criminal legislation as it is expressed particularly in the German, Czechoslovakian and Swiss legislative drafts, is not, however, intended to endanger or surrender the public interest in the attainment of this great goal. This position is the logical consequence of the fundamental viewpoint of criminology with regard to this very problem of criminal legislation, as described briefly above. During the evolution from the rigid standards to an elastic system, the State is under an obligation to observe carefully the experiment which is in progress. It is only an experiment because thus far there are no conclusive results clearly indicating the way to be taken. Furthermore, the European criminal laws show, in their broad outline, the increasing consciousness that it is not solely the state's duty to punish crime in each individual case, but that it is one of her most noble duties to prevent altogether the commission of crime, as, for instance, by means of physical restraint of the individual if necessary.

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The German, Czechoslovakian and Swiss drafts seek to attain this object in three different ways. In the first place they seek to give the criminal law the necessary elasticity by elaborating, when desirable, upon its various formulated rules. Secondly, they endeavor to broaden considerably the field of judicial discretion in order to give as much flexibility as possible and thereby allow for the peculiarities of the individual case. This leeway is generally limited by the prescribed rules regarding the forms of punishment. At the same time, there is a desire not to leave too much to judicial discretion, so as to insure uniform practice as nearly as possible, and avoid danger to sound legal policy. Thirdly, institutions specially adapted to the individuality of the defendant will serve for his segregation and improvement.

The special elaboration upon the formulated rules of the criminal law finds its most marked expression in the introduction of the doctrine of responsibility. Like the criminal codes of all civilized countries, the German, Czechoslovakian and Swiss criminal law drafts provide that the degree of responsibility is one of the elements governing punishment. However, the existing law generally recognizes only the extremes of mental states; *i. e.,* responsibility and irresponsibility. Now the modern European theories of criminal law demand an extension of that doctrine, in view of the fact that in many cases neither of the extremes can be ascertained. The application of the rigid system of the present law to the facts of a case leads to unjustified severity, on the one hand, or leniency on the other. This results when one in this middle stratum of so-called lessened responsibility is decided to be fully responsible or irresponsible. While the framers of the three drafts under consideration have given this matter a great deal of attention, they have further become convinced of the practical difficulty presented in ascertaining the state of mind in question, not to mention the problems which arise in reducing this postulate to a rigid form.

These difficulties induced the draftsmen of the Czechoslovakian draft to avoid introducing the term "lessened responsibility" into the rules of criminal law, while the German and Swiss drafts have given it a trial. This different attitude of the Czecho-

slovakian draft is merely of theoretical importance. Practically the drafts have a uniform basis, inasmuch as a more lenient punishment has been provided in the former cases in which the responsibility was lessened at the time of the crime.[1] The reduction in punishment is placed at the discretion of the court by special regulations in the Swiss draft,[2] and under the general provisions as to punishment in the German [3] and Czechoslovakian.[4]

A legal distinction between the causes of lessened responsibility is found only in the Czechoslovakian draft, which unequivocably provides that no leniency in the form of punishment shall be granted in cases in which the mental state in question has been caused by alcoholism through the criminal's own fault. In conclusion we can state from this example that, while a more thorough treatment of the problems may be desirable, the framers of the drafts are anxious to elaborate upon the fixed rules of criminal law.

The chief object of these criminal laws may be observed particularly, as stated above, in the provisions of the three drafts regarding the fixing of punishment. While the German draft [5] defines with particular clarity the limits within which the punishment is to be fixed, these limits are also shown in the paragraphs of the Czechoslovakian [6] and Swiss [7] drafts. According to the German (which permits waiving punishment altogether in certain cases [8]), the court in fixing the punishment shall particularly consider how far the act was caused by the malicious mind or will of the culprit, and how far it originated from causes for which the defendant cannot be blamed. It shall take into consideration:

> ". . . the motives of and incentives to the deed, the object which the criminal pursues, the premeditation required for the deed and the means employed; the conse-

[1] Under all three codes the responsibility is determined by the biological-psychological method.

[2] Arts. 11, 63.

[3] At 15.

[4] § 77.

[5] § 69, *et seq.*

[6] § 64, *et seq.*

[7] Art. 60, *et seq.*

[8] *Cf.* § 40, *et seq.*

quences of the deed, the measure of responsibility of the criminal and the influence of sickness or similar disturbances upon his will; the life of the criminal, his personal and economic condition at the time of the deed and the trial, his conduct after the deed, and particularly whether he has tried to make restitution for the damage."

The basis here laid for modern criminal laws is undoubtedly suitable to be the foundation for the desired reform of the entire criminal system. On the other hand, we must not overlook the dangers which lurk in too great extension of the idea of individualization, nor forget that it is important to maintain the golden mean.

Above all, when collating the facts of the crime, we must avoid creating an impression of indecision as to the surrounding circumstances, amid the multitude of these new considerations. Thus, not only is the responsibility of the judge increased to an unbearable degree, but also the danger is apparent that, in the desire to give justice to the defendant, the interests of the state and public may be subordinated. From this standpoint the German draft particularly seems to harbor considerable danger. This criticism applies, in some degree, to the Czechoslovakian draft, and, to a lesser extent, to the Swiss.

It is very commendable that the three drafts have not overlooked the doctrine of segregation and improvement. In the first place they wish to employ the method of conditional punishment of the sane criminal for lesser crimes.[9] In more serious crimes it is necessary to have protective oversight, as required by the German and Swiss drafts,[10] but not by the Czechoslovakian. Special confinement is required for the habitual criminal in accordance with the doctrine of public protection discussed above.[11] All three drafts contain provisions regarding the education of delinquent persons criminally inclined, but differ in that the Czecho-

[9] German draft, § 40, *et seq.;* Czechoslovakian draft, § 37, *et seq.;* Swiss draft, art. 39, *et seq.*

[10] German draft, § 61; Swiss draft, art. 44.

[11] German draft, § 59 ("Sicherungsverwahrung"); Czechoslovakian draft, § 58 ("Verweisung in eine Verwahrungsanstalt"); Swiss draft, art. 40 ("Verwahrung von Gewohnheitsverbrechern").

slovakian and Swiss [12] propose to use this in almost all cases where the crime is caused by the vagrancy of the defendant, while the German [13] reserves this means for certain kinds of transgressions. The German and Czechoslovakian drafts [14] provide that those acquitted because of irresponsibility, whether insane, abnormal or pathological, shall be confined to a sanitarium as long as required by public safety. The German draft extends this treatment to cases in which a person of lessened responsibility has been sentenced. According to the Czechoslovakian draft, persons are to be sent to such places if they have committed crimes caused by uncontrolled inclinations to use alcoholic beverages, other intoxicating concoctions, or poisons.[15] While, under the provisions of the Czechoslovakian draft, it is generally immaterial whether or not the act was done while intoxicated, the German draft [16] requires that the act must have been done while the defendant was intoxicated in order that he may be committed to a *Trinkerheilanstalt,* a place for the cure of drunkards, or to any similar place. In the interest of the battle against the abuse of alcohol, and against intoxication by alcohol or narcotics, this restriction is regrettable. The Swiss draft [17] provides only for separate treatment of the habitual drunkard, and requires some connection between the alcoholism and the act. In such cases, this draft permits of sending the defendant to a *Trinkerheilanstalt.*

Although it is very pleasing, on the one hand, to view the uniformity of the three drafts regarding the provisions for the segregation and improvement of the criminal, nevertheless one cannot but regret the disregard of the sound, scientific policy which requires a separation of criminal jurisdiction proper from police jurisdiction. Here the German draft undoubtedly shows the most glaring faults. True, it has superficially maintained the

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[12] Czechoslovakian draft, § 53 (1); Swiss draft, art. 41.

[13] § 58. It is reserved for the cases of § 370/71 (Vagrancy, etc.).

[14] German draft, § 56; Czechoslovakian draft, § 54 ("Verweisung in eine Anstalt fuer kranke Gefangene").

[15] § 54 (2).

[16] § 17.

[17] Art. 42.

separation—as it is there called—between the criminal law itself and the law of transgressions. In fact, however, the second book, called the *Buch der Uebertretungen,* on the law of transgressions, is so faulty in its development that we can only consider it a partial fulfillment of this requirement. The deficiency in the German draft is the more regrettable because there was a possibility that the demand for the establishment of a uniform police law might have been fulfilled. This might well have come from the second book, and thus have marked a most important step toward uniformity of the police system and police law. The Swiss draft has treated the police jurisdiction more thoroughly. True, the Swiss falls far below the standard which must be maintained, as essential to the preparation of an effective, coherent, organization and development of the subject-matter. Only the Czechoslovakian draft meets this minimum standard as to structure and arrangement. While in some cases the critic cannot overlook the arrangement and organization of the facts of the crime, nevertheless a proper foundation is here given, which will assist in reaching the great goal of modern criminal jurisprudence.