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## REFORM OF THE CRIMINAL LAW IN GERMANY.

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The law and the practice of the administration of criminal justice everywhere in the civilized world is one of the most characteristic features of the historic development and the actual conditions of a nation. One may fairly say that if one knows the law and the practice of criminal justice of a particular country, he knows a good deal of its political conditions and of the ideas prevailing in that country for the time being. So in Germany, criminal justice is very closely connected with German historical development and with the very character of German life of to-day, and for this reason German criminal justice is quite a different matter from criminal justice in the United States. Obedience to the laws of the state, and firm discipline conforming itself with these laws, are, in Germany, thought to be among the most needful things in public life. A king of Prussia at the beginning of the eighteenth century gave the keynote of his time and of all the future, till now, when he said in a quiet manner and in mixed French and German, according to the custom of the time: "*Ich will den Staat stabiliren wie einen rocher de bronze.*" (I will establish the authority of the laws of the state like a rock of brass.)

There has developed in Germany a very refined and very powerful machinery of criminal procedure, built up to punish relentlessly all acts of disobedience against the laws, atrocious crimes as well as petty offenses. A numerous body of public attorneys, very well disciplined and subject to the control of the government in fact, as well as by law, is inquiring with unceasing energy into all unlawful acts. Whenever there is suspicion that a crime has been committed, the public prosecutor never fails to make an investigation into the facts. The outcome of this system has been a natural one. Statistics show that the totals of punishment in Germany surpass by far the totals of other, nay, perhaps, of all other countries. Due attention being given to population, the German totals of punishment exceed by more than three fold those of England. In the trial, which is an inquisitorial one, the prisoner has not the right of a free man presumed to be innocent. Urged by the court in accordance with the law of procedure to be a witness against himself and unprotected by the constitution, he is a poor object of inquisition, out of

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whom in former times the court was accustomed to extort confession by torture. The jury system, so very familiar to free citizenship, together with the principle of presumed innocence, are largely wanting in Germany, the great bulk of felonies and misdemeanors being left to the decision of benches of learned judges only, not more than a few felonies of a very atrocious character being reserved for jury trial. Being restricted to a small part of all crimes committed, the jury system plays little part in the procedure of dealing with criminals in Germany. Here the jury system is, as yet, like a rare foreign plant, which thrives poorly in our soil.

Now, what we call modern ideas of criminal law reform are ideas which have made their way slowly in Germany. In our country, the ideas of prevention and reformation are believed in and adhered to in practice more and more; they rest on the principle that in the long run, uplifting a criminal is better for the public than to break him down. This fact shows that the modern ideas of criminal law reform are not merely an offspring of the friendly spirit of democracy or that they have evolved out of the disorder of a lawless public life, but that they have arisen through the development of mankind everywhere in the civilized world. It is probable, indeed, that the friendly spirit of democracy, the spirit of the American constitution, and the jury system suit best the principles of reformation and prevention. Therefore, all the conditions of the new world, which is not yet overcrowded like the old country, are favorable to the new ideas of reform. In the United States, where there is always plenty of opportunity for work, a criminal is much more apt to make a living in an honest way after his prison term has expired than he is in Europe. Nevertheless, these modern ideas are by no means an offspring of American conditions only, nor are they merely an outcome of the Anglo-American jury system. Everywhere they are upsetting the former historical notions of criminal law, and this fact, more than anything else, shows that there is value in them. One must admit, at the same time, that in the older countries very much, in these respects, has been done after the American pattern, since many of the modern reforms in the criminal law were first introduced in the United States. Many European reforms took on, so to speak, an American color, as was the case, for example, with children's courts. Many scientists in Germany, while admitting that the modern ideas have turned out to be of great value, are apt to express themselves by saying: "The American ideas of criminal law are frequently discussed in Germany. They are German ideas as well." Now, however, some of the American states might plunge fully in the great stream of modern ideas of reform at once, indorsing even the great principle that

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all prison sentences, with a few exceptions, should be sentences for an indefinite time, leaving it to the culprit himself to regain his liberty by reforming his conduct and character. It is not so in European countries, where thousands of years of historical development affect the prevailing notions of to-day. For this reason many new European codes of criminal law are like the older Roman statues of the deity Janus, having two faces, the one looking backward to former times, the other looking forward to the light of modern ideas. Customs and traditions coming down from centuries ago tell on public opinion very much; political parties of different kinds find themselves specially interested in maintaining the historical principles of the strictest state of the past—the state of discipline, of relentless retribution and of inquisitorial trial. A good many of the German scientists, and among them some very remarkable men indeed, cling to the historical criminal law.

Organization of courts is, no doubt, a matter of great importance for the spirit and the principles of the administration of criminal justice. How much the jury system imports in the modern reform of criminal law, checking in a good degree the spirit of relentless retribution, although not abolishing it, any German observer of the English and American systems of criminal justice may readily see. The jury system, with its protection to civil liberty, is not consistent with an inquisitorial procedure. There is a very close connection, not to be overlooked by any observer, between the inquisitorial manner of trying a prisoner and the predominance of the principle of vengeance. In Germany, it is true, public opinion in recent years has demanded that the administration of criminal justice be no longer left to learned judges only, but a great part of the German public, nevertheless, is not in favor of the jury system, but of the *schoffen gerichte*. These are courts composed both of learned judges and laymen. Under this system the laymen have their full share in the rights and duties of the bench, the judges their full share in the rights and duties of the laymen, both finding the verdict and giving the sentence together. This system since 1879 has been in force as to the criminal courts of the lowest order, which deal with small offenses against local ordinances and many misdemeanors of minor importance. As under this system the laymen are controlled by the learned judges—each layman sitting on the bench for a very few days in a year—one need not expect that the courts will be able to check the spirit of relentless retribution. One may fairly say that it is because such courts are foreign to the very spirit of the jury system and of what may come out of it that a great part of the public is still in favor of them. They are in accord with the inquisitorial customs and traditions which have come down to us from former times,

and, then, they are of pure German descent. The introduction of the jury system into Germany is resisted partly because of its English origin, as all foreign influences in our country are resisted.

In this connection it may be remarked that one of the modern reforms of criminal law, namely, the suspension of sentence, is not consistent with the continental judicial systems. Under the jury system the verdict of the jury is followed by the judgment of the court, there being two distinct acts, each of which stands for itself. Under the continental systems, on the other hand, suspension of sentence would leave the trial without a certain result, a verdict, distinct from judgment, wanting. So in the continental countries of Europe, suspension of sentence is supplied generally by the suspension of the execution of sentence, though there is no doubt that the suspension of sentence by itself is preferable, as a suspended sentence may be adapted to the character of the culprit and to all other circumstances, as they stand at the time the sentence given. One may see from this how the organization of the courts and the administration of justice are closely connected the one with the other.

I have said that the jury system in Germany is opposed partly because it is of foreign origin. To explain how complicated the problems of criminal law reform are in Germany, I may observe that the German system of administration of criminal justice is certain and expeditious beyond doubt. But, alas, oftentimes the outcome of punishment is crime! A punished person oftentimes comes to be an outcast of society, striving in vain to make a living in an honest way. The wife and children of such a man are very likely to become criminals also. Consequently there is reason for serious doubts as to whether the German system is not entirely too expeditious and certain, since it does not result in a decrease in the number of crimes, but rather an increase, and whether the enormous totals of German criminality cannot be explained partly in this way. German statesmen in recent years are well aware of this, but public opinion strongly approves of the seeming order resulting from such a system. In modern Germany patriotism is at a high pitch and national feeling and self-reliance on German institutions are very strong characteristics. Moreover, almost all male Germans are soldiers, accustomed to military discipline. In the atmosphere of national pride and military discipline, the modern ideas of prevention and reformation are oftentimes distrusted lest they may diminish the firm soldier-like order of national life. Consequently, public opinion as to these modern principles of criminal law is by no means unanimous, although, on the other hand, it favors them, as I have said, very much.

As the jury system is believed by a great part of the public, and by

a large number of jurists, to be a plant which will not thrive in our climate, and as political parties find themselves interested in upholding the old principles, it has been the part of the executive power to proceed in advance by administrative acts. There is now before the Diet of the Empire a draft code for the organization of the courts and another draft code of criminal procedure. A third draft code of substantive criminal law, prepared like the two others by the imperial government, is now open for public discussion. These three draft codes contain many provisions full of the spirit of modern reform, but very many others which cling fast to the historical criminal law. Together they are a work which may be likened to a statue of the deity Janus. They stick to the principle of inquisitorial trial, and make rather little concession to the principles of prevention and reformation as to adult criminals, though many provisions, as said, are of quite another character. But as yet it is utterly uncertain whether these codes will be enacted, great political parties being at a loss in regard to the attitude which they should take toward them, and there being in the public mind a secret but widespread feeling that questions of utmost importance have not been settled well. But progress will be made by the individual states as in the past under the lead of their executives.

As early as 1895 suspension of execution of sentence by means of conditional pardon was introduced as to youthful criminals by ordinances of particular state governments. While the legislatures have lagged behind, in recent years children's courts have sprung up everywhere in the great cities, allowed and promoted by the state governments and by the other courts, fostered by public opinion, and helped by philanthropists and humane societies, but quite unknown to the German laws. Executive power, so to speak, has moved in advance of the legislative. Social development went on at once, numerous free humane societies springing up and laying a firm ground for the probation system to stand upon. Taking advantage of all mitigating allowances of the law, these courts, going on "contra legum," at times, have striven to rescue unfortunate children from prison, educate them, and organize the probation system. Really retribution is no longer a principle in dealing with criminal youths in Germany, not even in those cases in which young defendants have committed a crime of a felonious character and are brought before the higher courts. The draft code of criminal procedure proposes to make lawful what is now going on everywhere in practice, and to remove the obstacles which are hampering juvenile court work. One must admit that the different parts of Germany, each having its own peculiar history, are much more different the one from the other than are the different parts of the United States.

So, not all parts of Germany are in advance alike. Social self-development has pushed on in the largest cities most, particularly in Berlin. While assisting at one of the weekly sittings of the Berlin children's courts, I felt something of the very genius of a new epoch shaking the principle of retaliation to its very depths. I felt that the flame of new ideas, kindled by the friendly feeling for children, must turn out at least to be a light shining so fully and purely in every direction that all criminal justice in the long run will be reformed, all hindrances to the contrary notwithstanding. The views I reached while assisting at those sittings, I may point out in this way: "society" as contrasted with the "state" will have its full share in the administration of criminal justice in Germany, and this share will not be consistent with the historical criminal law evolved out of former epochs when a powerful state subdued almost all social life. Statesmanship was well aware of this and did not refrain from lending a hand. It is curious that Germany and the United States, two countries the constitutions and laws of which are so widely different, find themselves as to the reform of criminal law in the same position. The one is in front, lacking at the same time the firm order resulting from historical conditions. The other is behind as to modern reforms. This fact may not be explained but by social life developing itself more and more in Germany and bringing with itself the spirit of friendly help. And out of the darkness of the past we see in Germany the first dawning of a new day of humanity. In Germany to-day it is lawful to release a convicted prisoner on good behavior after one year, if at least three-fourths of his term have expired. The totals of prisoners released by administrative boards have been lamentably small, but are increasing every year. The law under which this is done, it would seem, will turn out to be the way in which the indeterminate sentence will unconsciously be adopted in Germany. To endorse the great principle of indeterminate sentence, almost unknown to the German public, the majority of German scientists are very reluctant. Adopting this principle seems to them to be a step entirely too advanced. Reformatories for adults are institutions nobody in Germany till now has dreamed of. Nevertheless it may be that in the way of release on parole, indeterminate sentence will come in.

If the draft codes are enacted, a good deal more will be done to promote modern ideas. There are provisions in these codes to the effect that feeble-minded criminals, full responsibility not having been established, are to be subjected to a special treatment of an educational rather than of a punitive character and that convicted criminals may be restored to their rights after good behavior (rehabilitation). Moreover, it is

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proposed that it shall be lawful for the public to forbear prosecution in many cases of minor importance, leaving them to private prosecution when a certain individual has been offended, and that it shall be lawful for the court to dismiss an information brought in by a public or a private prosecutor when the offense is a petty one and the prisoner proves to be worthy of being let loose without punishment.