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Homicide Concept

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THE HOMICIDE CONCEPT

A STUDY IN COMPARATIVE CRIMINAL LAW

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The substantive criminal, as well as civil, law of most advanced nations differ less radically than their divergent legal terminology migh imply. One who has dealt with two of such systems recently wrote:

"In the course of some twenty years' experience, I have found that, historical accidents apart, the differences between large portions of French and English Law are little greater than is necessarily incident to the expression of the legal concepts of one country in the language of another."[2]

On some points of conception and classification, however, material differences exist and not infrequently these have a practical bearing which is reflected in diverse theories of punishment. Such is the case as regards certain phases of the homicide concept.

The Roman Law, like the Anglo-American, recognized the division of this crime into justifiable, excusable, and felonious,[3] though not under those terms, and substantially the same classification has passed into the Modern Civil Law. But in further analyzing the third form—felonious—a divergence appears.

ANGLO-AMERICAN LAW

The English common law has always treated homicide as including two separate crimes, viz., murder and manslaughter, the distinguishing ingredient of the former being "malice" or felonious intent.[4] Murder was not a divisible offense at common law nor until the enactment of the Federal Penal Code,[5] was it such under the Federal law of the United States;[6] but the statutes of many states prescribe

[1] Judge of the United States Court for China.

[2] Sir W. Bruyate, Judicial Adviser to the Egyptian Government, in his first Report; quoted in Journal of Society of Comparative Legislation XVII, 281.

[3] Mackenzie, Roman Law (7th ed.), 415.

[4] *This is the grand criterion* which now distinguishes murder from other killing; and this malice prepense, *malitia poe cogitata,* is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart." Blackstone, Commentaries, IV, 198*. See also Harris, Criminal Law (3d ed.) 135, 139.

[5] Sec. 273. See the note thereto in Tucker & Blood's edition.

[6] *U. S.* v. *Outerbridge,* 27 Fed. Cas. No. 15, 978, 9, Sawy. 620; *Bias* v. *U. S.* 3 Indian Terr. 27, 53 S. W. 471.

degrees of murder according to the circumstances under which it is committed. Thus, premeditation is frequently the distinguishing mark of murder in the first degree,[7] while the second degree is often identified by the absence of a specific intent to kill.[8]

Manslaughter,[9] however, was graded at common law into voluntary and involuntary,[10] the latter being distinguished by lack of intent.[11] Thus the commission of a lawful act in an unlawful manner, as negligently, may, if death result, constitute involuntary manslaugter.[12] But the absence of intent greatly mitigates the offense and reduces the penalty[13] and, as a leading English author well says:

"Cases of mere carelessness, etc., legally amounting to manslaughter, are often more appropriately punished by pecuniary fine than by the indignity of imprisonment."[14]

Roman Law

On the other hand the Roman law had but one crime of this nature, viz., *homicidium* (with its aggravated form of *parridicium* or slaying of a relative) and this originally was purely a crime of intent.[15] Thus, fatally wounding another with a sword was *homicidium;* but striking him with an iron key was not, even though the result should prove equally fatal.[16] And the reason for the distinction lay in the fact that the former was a deadly weapon whose employment implied homicidal intent.[17] So the crime was only complete when an intention to kill was manifested by an overt act.[18]

Negligence resulting in death is mentioned as early as the Twelve Tables, but not as a crime, nor was it visited with a serious penalty. "One who slays another accidentally," it is declared,[19] "shall provide a

[7] Cyc. XXI, 720 et seq.
[8] Id., 731.
[9] The classical American definition is that of Shaw C. J., in *Commonwealth* v. *Webster,* 5 Cush. (Mass.) 295, 52 Am. Dec. 711, as follows:
"Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life."
[10] Blackstone, Commentaries, IV, 191*, 192*; Harris, Criminal Law (3d ed.) 140, 141,
[11] Harris, *ubi supra,* 141; Cyc. XXI, 760.
[12] Blackstone, Commentaries, IV, 192*; Harris, Criminal Law (3d ed.) 141.
[13] Stat. 24 & 25 Vict., c. 100, sec. 5.
[14] Harris, Criminal Law (3d ed.) 142.
[15] Hunter, Roman Law, 1069.
[16] Justinian's Digesta, XLVIII, VIII, I, III.
[17] Hunter, Roman Law, 1069.
[18] Paulus, Sentencias, V, XXIII.
[19] XII Tables, VIII, 24.

ram to be sacrificed in his stead." This, as observed by Pliny,[20] was in striking contrast to the imposition by the same table[21] of capital punishment for the relatively moderate offense of "nocturnal trespass and larceny of crops." Nor does there even appear to have been a civil liability in such a case. For it was observed in a leading case under the Modern Civil Law:

"That, as a general principle, no such rule prevailed under the Roman law, we think, may be affirmed. If it existed, it has escaped the research of Gibbon and of Makeldy; and the diligence of counsel has referred us to no text or commentator which authorizes the opinion that the action was allowed. The Aquilian law gave actions for injury done by the death of slaves and certain animals, which it mentions by name. The title *'de his qui offenderint vel dejecerint,'* thus provides for the case of a free man killed by something being thrown in the public way from a building. If it is a free man who has been killed, *'damni aestimatio non aestimatio fieri potest';* but in this case the fine is of fifty pieces of gold. ff. lib. 9, tit. 3, par. 3. The law *de suspensis* is to the same effect, and had for its object the prevention of accidents in the public way. They were penal laws, and the special provisions they contain are rather in affirmance of the non-existence of the principle which would give an action to the heir for damages caused by the death of his ancestor.

"Far be it from us to undertake to state affirmatively, that any given text is not to be found in the mass of matter composing the *corpus juris civilis.* Finding no rule laid down in any of the elementary writers on which the action could be maintained, and bearing in mind the principle so frequently recognized in the Digest, that the life of a free man cannot be made the subject of valuation, we thought that an action of this kind could not be maintained under the Roman law. Digest 14, tit. 11, De lege Rhodia de jacta, par. 2, 1. *'Jacturae summam pro rerum pretio distribui oportet. Corporum liberorum aestimationem nullam fieri posse.'* Digest 9, tit. 1, par. 4."[22]

The development of the idea of *culpa* (fault or negligence) under the *lex Aquilia* supplied this deficiency to some extent in other cases;[23] but it was not, until the period of the Empire that death caused by negligence was punished as a crime.[24] And the punishment even then was a relatively light one, being *relegatio* the mildest form of banishment which might be for a time only and without forfeiture of goods.[25]

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[20] Hist. Nat. XVIII, III, XII.

[21] XII Tables, VIII, 9.

[22] Eustia C. J. in *Hubgh* v. *New Orleans & Carrolton R. Co.,* 6 La. Ann. 495, 510.

[23] "Under *culpa lata* is comprehended not only wrong caused wilfully and intentionally, but also wrong caused by simple imprudence or simple neglect, when it is *gross.*" Mackenzie, Roman Law (7th ed.) 209.

[24] Hunter, Roman Law (5th ed.) 1069; Justinian's Digesta, XLVIII, VIII, IV, I.

[25] Hunter, Roman Law, 1065.

THE MODERN CIVIL LAW

It was thus that the doctrine of negligence, in its criminal aspect, passed into the modern civil law. It has always been treated there as distinct from the ordinary crime of homicide and penalized more lightly. Thus in the French Penal Code all voluntary homicide is defined as *"meutre"*[26] but if committed with premeditation or ambuscade it becomes *"assassinat"*[27] and is visited with capital punishment.[28] On the other hand involuntary homicide, including that caused by negligence, is treated in a separate part of the code[29] and is punished with imprisonment from three months to two years and a fine of from fifty to six hundred francs.[30]

Similarly under the Spanish Penal Code intentional homicide is *"asesinato"* if accompanied by certain circumstances like premeditation, treachery, etc., and may be punished capitally.[31] In the absence of these the offense is merely *homicidio,* punishable with imprisonment only.[32] But all cases of death resulting from negligence alone are relegated to a distinct title (XI) of the Code where they are grouped with other offenses thus resulting and given a light term of imprisonment with a maximum of six months.[33]

Chapter XVI of the German Criminal Code defines murder as the killing of a person "intentionally and with premeditation" and imposes capital punishment therefor.[34] Intentional killing without premeditation is treated as ordinary homicide and visited with a maximum "penal internment" of five years.[35] The last article of the chapter is devoted to death resulting from negligence for which "confinement not exceeding three years is provided.[36]

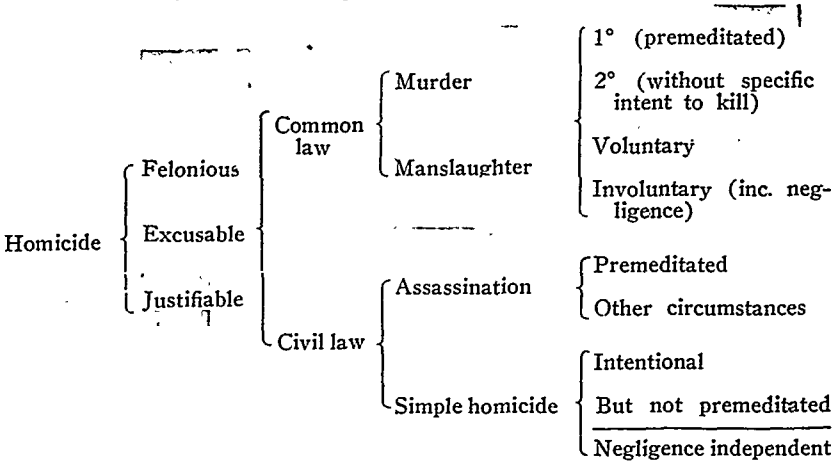
The Penal Code of Japan, like its other present codes, was modelled upon that of Germany which, like the French and Spanish, is a Civil Law instrument. Chapter XXVI of the Japanese Penal Code treats of (intentional) homicide which may be given capital punishment.[37] But Chapter XXVIII covers "involuntary (accidental)

[26]Art. 295.
[27]Art. 296.
[28]Art. 302.
[29]Title II, Ch. I, sec. III.
[30]Art. 319.
[31]Spanish (also Philippine) Penal Code, art. 403.
[32]Id., arts. 404, *et seq.*
[33]Id., 568.
[34]German Criminal Code, Art. 211.
[35]Id., Art. 212.
[36]Id., Art. 222.
[37]Japanese Penal Code, Art. 199.

homicide" which is "punished with a fine not exceeding one thousand yen."[38]

The "Provisional Criminal Code" of China is largely a copy of the Japanese. Chapters XXVI and XXVIII of the latter have been combined into one (XXVI) but the two concepts of intentional and involuntary homicide are still kept entirely distinct. Thus Art. 311 penalizes "murder," i.e., premeditated homicide—with death by penal servitude; while Art. 313 imposes the latter penalty for injuries resulting in death. Such injuries must, however, be intentional, for such alone constitute an offense "except in the case of negligence"[39] which, as in the other codes above mentioned, is treated separately.[40]

It will thus be seen that homicide as a civil law concept remains essentially a crime of intent while in common law jurisdictions, homicide includes, under its subclass of "manslaughter," unintentional and involuntary acts which, if the other system are treated as negligence and penalized lightly. The relation between the two systems may be made clearer by the following diagram:



[38]Id., Art. 210.
[39]Provisional Criminal Code of China, Art. 303.
[40]Id., Arts. 324, *et seq.*