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Introduction

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INTRODUCTION

I

Precedent, tradition, the thinking of bygone ages have all combined, in the field of law, to make legal progress especially slow. In criminology and penology, these factors have been particularly potent. Yet, on occasion, progressive viewpoints and perhaps legislative ingenuity break through with sufficient force and overcome the lag between scientific knowledge and statute. When this occurs, an up-to-date law results. Few advanced legislative or administrative achievements have come out of Europe recently. In contrast, it is our pleasure to present, in the following pages, the recently enacted Swiss Federal Criminal Code as an outstanding example of a courageous, scholarly, democratic and modern effort in code-making.

II

The loose Federation of twenty-five independent Cantons was consolidated into the Federal State of Switzerland only in 1848. Half a century later, on November 13, 1898, the Swiss Federation was constitutionally authorized to enact civil and criminal legislation. The administration of the Courts and juridical procedures as well as jurisdiction were left to the Cantons. Based on these constitutional rules, the Swiss Federal Assembly enacted the Federal Civil Code of December 10, 1907, which has found appreciation throughout the world.

In the field of criminal law a first effort at cooperation was made in 1291 by an Inter-Cantonal Treaty. The only later attempt at a national criminal code in Switzerland was that of the Helvetian Republic of May 4, 1799, based on the French Criminal Code of 1791. But the Napoleonic war dissolved the Helvetian Republic in 1803 and only five Cantons preserved the Helvetian Code as their own; the majority enacted independent penal legislation. Common characteristics of almost all of these penal laws were their simplicity, leniency, judicial discretion, and the lack of theoretical dispute as to principles of criminology. Toward the end of the nineteenth century, unification of penal law became a matter of broader concern in Switzerland. As Carl Ludwig von Bar points out in his *History of Continental Criminal Law* (Boston, Little, Brown, 1916, pp. 371 ff), the importance of this problem was increasingly

recognized. In 1874 the Federal Constitution abolished the death penalty and flogging, but an amendment in 1879 re-established the right of the Cantons to specify the penalties independently.

The pioneer in the movement for a unified Swiss Criminal Code was Carl Stooss, professor of criminology at the University of Bern and later at Vienna. His work: *Grundzüge des schweizerischen Strafrechts* (Outlines of Swiss Criminal Law), 1892 and 1893, was the basis for all further studies and preparation for a Unified Swiss Penal Code. Based on Stooss' work, the first draft was prepared in 1896 by a commission of experts. This resulted in a first government draft of 1908; it was then referred to a larger committee of experts which terminated its studies in 1916. In consequence of these proposals, the Federal Council, i.e., the supreme Federal executive body corresponding to the Cabinets of other European governments, presented a Bill of the Criminal Code to the Federal Assembly (Congress) on July 23, 1918. The discussions in the congressional committees were completed only when the Federal Assembly enacted the Criminal Code on December 21, 1937. The Federal Council submitted this law to popular referendum which approved the Criminal Code on July 3, 1938.

The Swiss Penal Code, like the Civil Code, is written in very clear, popular, readable language, restricting technical and professional terms to a minimum. The Criminal Code will take effect on January 1, 1942. Before this date, the Cantons are to enact their enforcement laws to regulate important new trends in the Code.

The main difficulty in securing the enactment of the Federal Criminal Code was the principle of Federalism, the old question of *Federal v. State* rights. There was little serious disagreement as to the content of the new law, even as to the abolition of the death penalty. The philosophy of unification of the penal legislation, however, was severely questioned. Many friends of the theory of Federalism feared that a united criminal code might endanger the constitutional sovereignty of the Cantons, and might strengthen the tendencies of centralization of the Federal government. But the new legislation does not involve the tendency to establish a national centralized state or the abolition of the federal character of the Union of Swiss Cantons. The constitutional independence and sovereign rights of each Canton have not been touched by the new Code. The administration of justice, the organization of all courts and authorities, the execution of sentences, and the administration of prisons and institutions of all kinds—in contrast to the develop-

ment in the United States—remain the *exclusive* task and jurisdiction of the Cantons. There is no interference with the decision of the Cantonal courts or authorities.

During the long preparation of the Code, some partisans of Cantonal prerogative erroneously pointed to the so-called “old tradition” of Cantonal penal legislation and criminal procedure. It is true, however, that almost the entire content of the Cantonal penal statutes had been taken from the French Code of 1810 or the different German penal laws enacted between 1813 and 1870. Five Cantonal penal laws were adopted between 1805 and 1830, ten more between 1830 (when the French revolution revised the royal legislation) and 1848 and, still more significant for dependency upon the French pattern, that between 1830 and 1836 sixteen Cantons adopted new constitutions. There was very little specific Swiss feature in the different penal acts, and the Helvetian Criminal Code of 1791, mentioned above, was based upon the French and partly upon the German penal legislation. But during the period of preparation of the new Criminal Code it became increasingly recognized that the establishment of a unified criminal law was a common cultural task of the whole Swiss nation, not a specific cantonal affair. To fight crime is one of the oldest and most basic functions of the community and state, or here, the Canton and the Federation.

Two basic principles of the Code have been transferred entirely from the older legislation in Switzerland. These two principles are: *nulla poena sine lege*, no punishment without law, and *nulla poena sine culpa*, no punishment without guilt, principles which have been abandoned recently by the legislation of the totalitarian states. The Swiss concept retains the fundamental rights of the individual. The new Code is based upon the principle that nobody may be punished for a crime which has not been specified by law or without being responsible for his act. Thus the penalty remains atonement for a committed injury. But the penalty in the concept of the new Code fulfills another function at the same time: it is to re-adjust the offender, to educate him for healthy social living. This is one of the most remarkable new features of the Code. It establishes the opportunity for the court and the authorities to individualize the punishment and to use—besides penalties—a series of measures for prevention of crime and for treatment which are applied either instead of punishment or in addition to a penalty.

The outstanding part of the new Code, according to Swiss experts, is the treatment of children and juveniles. The motive of that section is to provide for proper care, training and adjustment of

these children and adolescents, instead of the principle of punishment.

The purpose of this Federal Code is to provide major uniformity of the penal statutes in the several Cantons; beyond this, Cantonal legislation rules. For example, the Code delineates the penal philosophy governing the treatment of offenders throughout Switzerland. The actual trial of offenses, execution of sentences, and matters of probation, parole and other types of supervision are left to Cantonal administration (Art. 17). Another exclusive Cantonal jurisdiction embraces criminal procedure. Thus, within the general framework of this Code, the individual Cantons may vary as the local situation and traditions require or make advisable (Art. 56, ff).

III

We regard the outstanding provisions of this Code to be: 1. marked consideration for children; 2. wide discretion permitted the judge (with sentences on the basis of the circumstances as well as short sentences generally); 3. regard for the offender as well as the continuation of State control over him; 4. abolition of the death penalty; 5. measures in aid of the victim of an offense; 6. Federal aid to Cantons; 7. the seemingly restricted use of probation and 8. other provisions. We present these matters in detail below.

1. *Consideration for Children.* The Code establishes an outstanding special provision for the treatment of delinquent children and young persons. This means considerable progress, since the majority of the Cantons, prior to this Code, had neither juvenile courts nor special legislation for children. It discriminates between "children" (Art. 82 to 88), "juveniles" (Art. 89 to 99), and "minors" (Art. 100). Children under six years of age are considered *non compis* and are not under any criminal jurisdiction and therefore not subject to this Code. Above this age the division is: "children" (over six and under fourteen) are not punishable in the sense of adults, but rather subject to educational and preventive treatment whose main purpose is their own protection. "Juveniles" (over fourteen and under eighteen years of age) are primarily dealt with by measures of training or treatment; the usual criminal penalties of prison or penitentiary confinement cannot be imposed, although the court may impose a fine or order special detention. "Minors" (over eighteen and under twenty years) are less severely punished (by penal measures) than adults committing the same acts, and a life sentence may not be imposed for these young persons.

The application of all measures of treatment and prevention to persons within the above age limits is mandatory with the court. This avoids the unsatisfactory practice, as in some areas in America, of the Juvenile Court shifting its responsibility for some offenders (as when a much publicized offense is committed) by refusing to take jurisdiction and thus sending them to the Criminal Court to be tried and punished according to adult procedures. This mandatory provision is given in Arts. 82, 89 and 100. Jurisdiction in different American States, it will be recalled, over juveniles is not exclusive with the Juvenile Court but concurrent with the Criminal Court, for some age groups. Perhaps one reason for holding exclusive jurisdiction by the Swiss over all children is that the court is empowered to use as wide a range of educational and preventive measures as is required for the best solution of the individual case.

Specifically for those termed "children" here, there is provision for a mandatory social investigation of the child and his background and the authority to obtain professional advice and examinations, where necessary. The measures of treatment are supervision in the child's home, in a foster home or in an institution. Special placement for "handicapped" persons is also provided.

For "juveniles" (children between 14 and 18 years of age), the Code provides a thorough social investigation covering mental and physical health, family conditions and the life history of the juvenile delinquent. The principal measure for all wayward, neglected and delinquent young persons emphasizes re-adjustment rather than punishment. Commitment to a juvenile training school or other adequate institution or placement in a foster home under the supervision of the court or of another authority is the main feature of this regulation. There is no dearth of specialized institutions in Switzerland and the new legislation may encourage a still greater specialization of the numerous homes for difficult, handicapped or sick young people. Placement in his own family, in a foster home or in a proper institution, if necessary, is designed to secure a re-adjustment which will fit the youngster for decent life in the community.

The Code shows a curious reference to the old Quaker penology—the necessity of separation of "classes" or "ages" of offenders within an institution. This deals with the "moral contamination" of one group by another. The Quakers, it is recalled, set up the Pennsylvania system of prison architecture, where each convicted person was practically isolated from all other inmates in the same institu-

tion. This philosophy markedly influenced European penology. It is probably true that the child, as theoretically more suggestible than an older person, should be shielded from possible bad influence of older offenders. There is serious question of the value inherent in rigid mandatory separation of the child under fourteen, for example, from one just over fourteen and so on. We are here saying that the exact age of demarcation is impossible to describe in a statute and still use a realistic description. We pose the problem that the child, in all normal communities, is subject to the influences of older persons and that the normal social group comprises members of various ages in the family, the neighborhood, church, school and city. The efficacy of an artificially imposed (and unrealistic) age separation is seriously questioned. It is our feeling that the separation, if made, has reality values only when done on an individual basis. In fact, if we agree with Aichorn and his work, there are marked values for good in group association, in living with older persons, which Aichorn, in dealing with behavior problems, has captured.

We are reminded, by the provisions of Art. 93, "changes of treatment measures," of the English Borstal system where it is legally possible to remove from the usual institutions for minors persons who, for general considerations of the institutions and for their own needs, must be dealt with under more rigid conditions. On the one hand, therefore, it is possible to individualize treatment by supervision, confinement or detention for a comparatively short period; on the other hand, where public safety demands, the legal majority of the offender is not a bar to further public control of him. In the American legal process, there would be need for the offender (committed as a juvenile) to be released from a juvenile institution at his majority, for him to commit a new offense—with all the social danger involved—before such added control might be taken, control only by adult process and in adult institutions. Or, on the contrary, where the juvenile offender either commits a serious offense or is held not to be amenable to juvenile court treatment, American legislation unfortunately does not enable juvenile courts to continue their specialized methods of treatment; and the juvenile courts do not emphasize the importance of a consistent contact and the value of dealing with such juveniles but have surrendered them to adult courts and penal processes.

At all times, however, the new Swiss concept makes it possible to suspend measures of supervision, etc., which have been imposed,

if their purposes have been accomplished without the use of such measures.

Little mention is made here of the specific features of probation for juveniles and minors. Although by reason of necessary individualized treatment, most youngsters need another approach and understanding than adults, the purposes and conditions of probation for juveniles here approximate those generally known and applied wherever probation is used.

For minors (18 to 20 years of age), sentences are reduced both by type or category and by duration. While no life sentence may be imposed for these young people, a maximum penitentiary term of twenty years is the severest penalty possible for them. Strict separation from adult offenders is ordered for all categories of confinement for this group of minors.

2. *Wide discretion of judges.* By this code, the limits for each category of sentence are: for penitentiary sentences, a minimum of one year and a maximum of twenty years (with life sentence possible in certain instances by Art. 35); for prison sentences, a three-day minimum and a three-year maximum for those offenses which are punishable by a prison term without special limits; but there are many exceptions from this general range which provide for longer prison terms, such as for manslaughter (Art. 113), assault (Art. 122, 123), embezzlement (Art. 140), unfaithful management (Art. 159), etc., usually with a maximum of five years. For jail sentences, a minimum of one day and a maximum of three months is stated in Art. 39 of this Code.

We infer that the Code provides for a determinate sentence, that is, a fixed sentence within the limits provided by the statute. For the detention of habitual offenders and for the re-training and treatment of alcoholics, vagrants and drug-addicts a relatively unrestricted period of confinement is also provided.

The Code shows the general brevity of sentences possible for most offenses. A three- or five-year maximum is generally fixed for many acts punishable by a penitentiary term; for prison sentences, often periods of less than one year, or only a fine or jail sentence. It is also possible to impose, for a few grave crimes, a ten-year sentence or a life sentence; but these are the exceptions. In the current American practice the courts usually impose (and the statutes provide) considerably longer periods of incarceration for offenses such as robbery, burglary, embezzlement, etc.

As one example, for kidnapping for ransom the Swiss provide

a five-year maximum and for kidnapping a child for sexual intercourse, a minimum of three years (Art. 185). Rape carries a maximum term of five years (Art. 189, ff). Apparently the Swiss have not become emotionally disturbed over kidnapping, which almost never occurs in Switzerland and rape, which is also comparatively rare, as we have in the United States. In America, in state jurisdictions, either the death penalty or a life sentence is possible; and in the federal courts the same penalty is possible under the so-called Lindbergh act.

That brings us, logically, to the discretionary powers vested in the court and the wide range of sentences possible. If we take the offense of larceny (Art. 137, no. 1), for example, the Code says that there shall be confinement in the penitentiary for not over five years or in the prison. The penitentiary term (as given generally in Art. 35) has a one-year minimum, so that—if it is imposed—it may be between one and five years. For the same offense, the court may impose a prison term which, by Art. 36, is between three days and three years. Disregarding for the present the longer terms possible for groups specified in Art. 137, No. 2, Art. 139, No. 2, Art. 182, No. 2, and elsewhere, the court may impose a lesser sentence or a mitigated sentence, under the general conditions specified in Art. 63 and 64, with mitigation governed by Art. 65. Thus mitigation, generally, and the impression of sentences, generally, are discretionary with the court. Under extenuating circumstances the court is not even bound to the usual minimum of the statute or the category of sentence provided for by the Code, but merely by the minimum length of that sentence category imposable under such conditions (Art. 66). It is therefore possible for the court to individualize the sentence in any specific case, within the great variation of minimum and maximum, as well as category, provided by the Code. While mitigation is discretionary with the court, still the Code provides the general framework within which the court may act, to the end of guiding the jurist in his decision.

Discretion and mitigation are again measured by this Code by the desire to adjust the penalty to the social situation of the offender, his family, economic and vocational condition, his life history, background and education, as well as the acts involved in the commission of the offense, particularly the motives for the crime and the attitude the offender applied in committing the offense. These different considerations mean another measure of individualization of penalties (Art. 63).

The Swiss Code, by Art. 21 ff., recognizes degrees of guilt to distinguish between attempts and completed offenses. Here the law is not mandatory but leaves the decision to the court as to when a lesser sentence is to be imposed. The possibility exists of the court's recognizing the offender's voluntary withdrawal from the offense before its completion. A further distinction is made in cases where the criminal act is completed but without resulting in the intended offense.

Under certain circumstances the court is empowered to "refrain from sentence"; examples of the possibility of such a decision may be found in erroneous concept of the law (Art. 20), withdrawal from an attempt of the offense (Art. 21), thoughtless attempt (Art. 23), petit larceny while in need (Art. 138) and adultery (Art. 214). This differs from an acquittal in the following manner: the offender has been found guilty and the court does not impose sentence, but there is a permanent suspension of all sentence because of certain circumstances in the situation which the Code recognizes as calling for this measure.

Further discretion is given to the court to impose a lesser sentence or to distinguish between intentionally or feloniously committed offenses, on the one hand, and accidentally or negligently committed offenses, on the other hand (Art. 19 ff).

In the same thought, the court is also empowered to impose a more severe sentence under generally stated conditions. Here too the basis for the imposition of a severe sentence is not, generally, upon the Code prescription of a definite number of previous convictions. It is, however, upon a basis of the "social dangerousness" and social situation of the offender (Art. 139, No. 2), particularly where persons "make a business" of specified offenses (Art. 144, receiving stolen goods), or "repeatedly commit" specified crimes (Art. 156, No. 2, extortion and Art. 202, No. 2, pandering). This Code makes no mention of the required number of previous offenses but says: "Whoever has already served *many* sentences" (Art. 42, No. 1). Thus the Swiss Court may take into consideration the general reputation and the conduct of the offender toward the community. In determining sentence, the court may consider the family and other obligations of the defendant. The emphasis of the Code is here upon the protection of society from the acts of persons who are known to need removal from communal ranks.

We contrast the provisions of many American codes whereby an increased and statutorily prescribed penalty is imposed (usually

mandatory) for second conviction of any felony. The American codes also provide greater penalties for third and fourth felony convictions and, in some states, even for misdemeanors. We recall the "Baumes Laws" of New York State and their prototypes, and the famous Michigan statute where a life sentence was mandatory for fourth conviction of violating the prohibition law (as a felony). The latter was known as the "life for a pint" law and created considerable popular resentment.

By contrast, the Swiss Code attempts to measure the sentence, in the discretion of the court, to the individual standing before it, considering the specific acts of his offense and his individual situation.

3. *Unusual consideration for offenders.* Unusual consideration for the offender, as well as the extension of State control over him for the longest possible period is another feature of this Code.

An attempt is here made to credit the offender with everything for which it is possible to give credit. The Court may deduct from the sentence the time he has spent in jail pending trial, unless, by lack of cooperation, he prolonged his stay there (Art. 69; Footnote 36). This Code, in common with European Codes generally, does not give the citizen the right to bail, and a person accused of crime must remain under detention pending trial unless the court believes the offender will return for trial when required. By contrast, in American state codes, the time spent in jail is at the expense of the defendant, regardless of whether the trial results in acquittal or conviction. Some courts in this country credit the defendant with the time spent in jail. However, in many state codes, a sentence begins only on the day of admission to the penal institution and does not include the time pending trial, or appeal.

The Swiss permit the judge, in minor cases, to reckon the time spent in jail awaiting trial as the equivalent of a sentence or fine.

"Publication of the sentence" and "publication of the acquittal" in the interests of justice are also possible (Art. 61). This shows the official regard which the Swiss have for the acquitted defendant or citizen innocently accused of crime. It demonstrates, conversely, the continued control of the State over offenders' acts.

As in a few American jurisdictions, fines may be paid in installments, according to the social condition of the offender. Even where the court converts a fine into a jail term, the offender may work it out by voluntary labor for the State or commune. The goods or possessions of the person fined may be seized and sold by

official action if a) he makes no reasonable effort to meet the fine and b) there is a reasonable possibility of satisfying the fine by such seizure and sale.

Three troublesome classes of offenders—the so-called “asocial elements”—are dealt with in Art. 43 to 45. The provisions in American jurisdictions for these persons (alcoholics, vagrants, drug addicts) are generally short penal terms in county jails or houses of correction. The American houses of correction are merely junior penal institutions (without many of the facilities of the penal units) and not like the institutions contemplated or mentioned in this Code. The latter are institutions for re-training and re-education. One such Swiss institution, The Witzwill House of Correction, was discussed by W. A. Goldberg in the *Social Service Review*, VI: 326, June, 1932. Here, as in the provisions for habitual offenders, control is given to the courts to commit these three classes to specified institutions for comparatively indefinite periods. The basis for this treatment and for its duration becomes an individual matter, dependent upon the individual's readiness for release, as well as his capacity for re-training. This treatment is not a sentence but a training period, as shown by Art. 43, No. 1. This is also indicated by Art. 43, No. 6, where the court is to determine, when the inmate does not show his readiness for parole (because he is either untrainable or does not cooperate in the training program), whether all or part of the original sentence is still to be served.

The nearest American equivalent to this practice, with which we are familiar, is that of the Federal Government in dealing with narcotic addicts charged with a federal offense. Here probation will often be ordered conditioned upon the individual's acceptance of a period of treatment in a Federal Narcotic Farm. This is not a penal institution but a “closed” medical institution under the direction of the United States Public Health Service, with emphasis upon medical treatment rather than penal custody.

The treatment of habitual offenders is an outstanding feature of this Federal Code. In its main aspects, it aims to extend state control over recidivists who have not benefited, apparently, by prior penal measures. The contrast between the Swiss and American provisions is great. As we have said earlier, the Swiss do not measure “recidivism” by a legally fixed number of prior convictions. The Swiss do not deny to the “repeater” the supervision of parole. They do not hold with the American theory that when a

prisoner has served his maximum term (within the institution or by a combination of institutional service and parole), he must be discharged without supervision and from all legal control.

For example, in the United States, if a prisoner who has been sentenced to serve ten years completes that period within the institution or serves the total period within the institution and on parole, it becomes his legal right to demand discharge from all further state control. The American appellate courts have uniformly sustained this thinking. In event such a prisoner is on parole and still has only one or two years before his maximum, he can be returned to the institution, upon parole violation, only for the year or two years he "owes" the state. To hold him for any longer period would be a violation of his legal rights.

Again, if a prisoner in this country is considered a poor parole risk or his conduct prior to the offense or within the institution is such that parole is denied to him, he serves the maximum period and then is discharged without supervision. In this American thinking there is and can be no legal control over him for any extended period, short of trial as a "habitual offender" where again the statutes prescribe the length of the maximum sentence possible and where the statutes often make such sentence mandatory. The only way such persons can be detained is by virtue of conviction of another and new criminal offense. The "social dangerousness" of the offender cannot be a major factor in American treatment of him.

Necessarily all general statements have their exceptions and we refer to the United States Federal prison practice. Here, no prisoner is released from an institution without supervision. This applies to persons paroled, and to the person who is conditionally released following service of his maximum term. The latter remains in the community, under the supervision of Federal authorities, for a period equivalent to the "good time" he has earned. This period, it is recognized, is altogether too short for any effective supervision program to be initiated or undertaken, but its theory is undoubtedly progressive. The Swiss Code, as a means of social control, is superior in this respect to American practice and thinking.

The Swiss have brought forth the penal philosophy that the "social dangerousness" of the offender shall be the governing factor in the continuation of State control over him. The Swiss have progressive views of the place of parole in the penal scheme. They do not believe that parole is an act of official leniency to the offender, or the right of the offender, or a measure of earlier release

from an institution. They hold it to be a measure of protection to the community, in one sense. In effect they say that no person shall leave an institution, after a period of penal incarceration, without official supervision. They do not hold with discharges without oversight after completion of the entire sentence. They do not limit the parole period to the maximum term of the sentence. They do not have the American scheme of "debit and credit" reckoning of State control.

Contrarily, they provide that those offenders who have required longer penal sentences shall have correspondingly longer parole supervision periods. Here they recognize the deteriorating effect of incarceration and the principle that the longer a person remains within an institution, the longer the period of adjustment he will require, generally. And they also recognize that it becomes the State's duty to give such supervision to the offender. This type of person, they feel, requires much longer community supervision and must be also subject to return to detention for a longer period than would be required by the ordinary and "occasional" offender. In the second place, the Swiss view parole as a constructive factor in the life of an inmate. They therefore hold parole supervision to be incompatible with police supervision and order a separation of the two functions. In this same spirit, then, we find parole for inmates of houses of correction, prisons and penitentiaries, as well as for persons who have been confined in special institutions as habitual offenders, alcoholics, vagrants and narcotic addicts.

It may seem to be a harsh measure that all sentenced persons must serve two-thirds of the sentence before being eligible to parole. The sentences of the Swiss courts, by this Code, are relatively short and hence this is not a valid objection. The purpose of incarceration (Art. 37) and of parole (Art. 38, No. 1) are given as the improvement of the sentenced person, his re-training and his life in the community as a useful member thereof—as well as the implied purposes of the protection of the community.

Another matter of State control is the list of "disabilities" to which offenders, in certain situations, are subjected. They are "loss of civil rights," but in Switzerland they include more than is generally known for this same subject in America. Within this list of disabilities are encompassed: the right to vote, to participate in public elections, to hold public office, to function as an official, a member of an authority, guardian, custodian or, witness to documents. He may also lose parental and guardianship rights and suffer deprivation of the right to engage in any business requiring

a public license. Aliens are also subject to banishment from Switzerland for stated periods, as given in specific statutes.

This is another indication that the Swiss regard citizenship as an important privilege of the individual. This privilege carries with it, at the same time, responsibilities and, for violation of the law, the Swiss citizen may be deprived of many more rights than other Codes make possible.

These deprivations are mandatory for penitentiary sentences but generally discretionary with the court for other prison sentences. That so many of these are discretionary is another indication of the desire of the Swiss to adjust the penalty to the specific instances of the offense and the character of the offender. We may say that for the "occasional offender" the Swiss Code is unusually liberal and considerate of the individual's rights, that incarceration is not used harshly nor with the sole purpose of retribution.

4. *Abolition of the death penalty.* This Code abolishes the death penalty which still remains possible, to January 1, 1942—when this new Code goes into effect—in twelve Cantons for certain serious offenses, but not for political crimes. In fact, capital punishment almost never has been inflicted in Switzerland for decades, with few exceptions. The new Code commutes to life imprisonment, all unexecuted death sentences (Art. 336).

5. *Aid to the victim of an offense.* Unique here are the provisions in aid of the victim of an offense. In granting probation, in extending parole and elsewhere, the Code makes express mention of the offender's having made restitution. It is also one condition to the restoration of civil rights to the offender.

The victim of an offense, on his petition and on his assignment of a corresponding share of his claim to the State, may be recompensed for his damage from: the fine, the proceeds of goods seized and sold or confiscated, from the peace bond—a measure of recompense for his damage as a result of the offense and where the offender has not or cannot reimburse his victim. This too shows an unusual regard of the Code for the person innocently damaged by the crime committed against him.

6. *Federal subsidies.* The Federal government is authorized, by Art. 386 ff., to contribute to the Cantons in order to insure the establishment or improvement of institutional facilities and to recompense the Cantons for improvements already made. There is also enabling legislation authorizing Federal subsidy toward the operation of public Cantonal and private institutions where the

latter meet the requirements of the Code or the standards to be set up. The Federal Government has no detention, supervision or treatment facilities of its own. It uses those of the Cantons and obligates itself to pay the actual costs of care for persons committed by Federal order. In addition, of course, it is authorized to make partial contribution to the expense of the Cantons in their own institutions.

Cantons are also authorized to establish joint institutions, or for one Canton to use the facilities of another, with the obligation of paying for these services.

7. *Probation.* The Code seems to restrict, on first reading, the use of probation for adults to offenses where a jail sentence (of any length) or a prison term of not over one year is imposable. This seems to limit the possibility of its use greatly. On the other hand, the Code makes it discretionary with the court, in many offenses, to impose a prison sentence (many of which would then come within this one-year maximum) in lieu of a penitentiary term, and probation is possible for this group.

Thus, where an offense carries the alternative of either a penitentiary or a prison term, the first consideration is an appraisal of the offense and the offender. If the court feels the individual requires a penitentiary term, he is automatically excluded from probation. If, however, the court—in this appraisal of the offense and the offender—feels the ends of the community will be served by a lesser sentence, he may then impose a prison term of not over one year and the offender thus automatically comes within the group eligible for probation. By this we see that the seeming restriction of probation is not actually so.

The reading of Art. 41 and 47 gives a sense of satisfaction at the truly progressive spirit and purposes of probation, as defined here: its object being to re-establish the probationer as a useful member of the community under the friendly assistance of the probation authority.

When we say that probation is conceived as a suspended sentence, we have again made a general statement. To amplify: There are two types of probation orders. One, as used here and in the American Federal practice, calls for the actual imposition of a specified sentence, followed by its suspension during the probation period. If probation is observed, this sentence is voided. If probation is violated, however, the sentence originally imposed is ordered executed.

By contrast, there is another type of probation order, one used in the American States of Illinois, Michigan and others. Here, following conviction, an order granting probation is entered as a matter of court record. If the probation is observed, the offender is discharged from probation and the record of the court carries such a statement. If, however, the probation is violated and sentence is to be imposed, the court must then determine, *for the first time*, within the statutes and other limitations, the exact sentence to be served. The difference, therefore, is that in the first instance, an actual term of incarceration (or other penalty) has been ordered, followed by its suspension. In the second case, no mention is made by the court, at the time of the probation order, of any term of confinement and the question must be determined for the first time if and when probation is violated. The latter has never been used by the Swiss.

So too in the provisions for "juveniles" in this Code. Most measures ordered for juveniles must be considered, elsewhere as here, educational or training measures and definitely not punishment. However, by Art. 95 to 96, where a specific term of confinement or a fine is ordered, the court may order this suspended during good behavior within the probation period. In this sense, the provisions for juveniles fall under the theory discussed in case one in the preceding paragraphs.

8. *Other provisions.* We have grouped under this heading a number of assorted provisions which need brief mention. The provisions for witnesses are both liberal and regardful of the rights of individuals (Art. 335). The provision is made for mail summons of persons living in another Canton. At the same time, there is an obligation upon the Canton to provide the witness, at his request, with an advance to cover travel expenses; there is the obligation upon the citizen to follow the summons into another Canton or to respond to such summons, even when issued by a Canton outside of his own residence area.

A problem fundamental to prison industry and rehabilitation is dealt with in Art. 376 to 378—paying prisoners for work. The Swiss now provide for payment of wages to inmates from the profits of penal institutions. Such money may be used by the inmate for his own expenses while in the institution or for the expenses of his family. Such a process makes it possible for the prisoner to meet his own personal and incidental expenses as well as being a source of contribution to his dependents.

The Code makes such payments to prisoners mandatory, rather

than discretionary, with all Cantons. Of equal importance is that these wages are not limited to one type of institution but include prisons, penitentiaries, houses of correction, etc., in fact, all types of custodial institutions, not excluding institutions for juveniles. The universality of this provision is remarkable.

A further safeguard is made for these wages, even when the inmate is paroled, that they shall remain his own property and shall not be taken as a pledge, or to be considered assets and any assignment of them shall be considered void (Art. 378).

The Swiss Code regulations for work of prisoners may be contrasted with the important part which institutional employment has been held to play in the total penal scheme of the several American states. These have been excellently described in the recent reports of the Prison Industries Reorganization Administration, one of the independent bureaus of the United States Government.

IV

We have been able to touch only the outstanding features of the history and content of this Code. Space limitations have prevented further detailed comments and comparisons, as well as the translation of some parts of this Code, which do not show specific comparative value for persons outside of Switzerland. However, we have indicated the exact content of every article by insertion of all "catch-lines" and we have selected for translation all those provisions which may stimulate comparative thought in this country, as well as the theory and practice in the prevention and treatment of delinquency.