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ADVERSE LEGAL CONSEQUENCES OF CONVICTION AND THEIR REMOVAL: A COMPARATIVE STUDY (PART 2)

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This study was originally made for the International Prisoners Aid Association and conceived as a pivotal point to which various national studies could later be related. The whole activity of the Association was connected with the Human Rights Year 1968 sponsored by the United Nations.

In Part I of this two-part article, published in the September, 1968 issue of the *Journal*, the author described the variety of adverse collateral legal consequences flowing from criminal judgments in contemporary legal systems. After observing the origins and development of such collateral disabilities, the author noted that the trend is toward lessening the legal restrictions on former convicts. A comprehensive catalogue of consequences of conviction began in Part I and continues in Part II. The author concludes his study with a survey of methods by which adverse effects of conviction may be removed.

III

Effects of Conviction Entailing Restriction of Freedom

In keeping with the limitations stated in the introduction, we will not deal with restrictions of personal liberty inherent in the execution of prison sentences. Nor will we discuss various limitations imposed on convicts on probation or parole. Rather, our attention will be focused on restrictions of freedom outlasting the definitive discharge—police surveillance and restrictions on *residence* and *travel*.

A. Police Surveillance:

This measure originated in the days of the European absolute monarchies. Originally, surveillance was ordered of persons who could not have been convicted for insufficency of evidence, although a strong suspicion remained that they were probably guilty. Following trial, these persons were neither definitely acquitted nor convicted. Their case was only "tabled," as it were, and a further mandatory consequence—police surveillance—was imposed. When the idea of the presumption of innocence became prevalent, police surveillance was restricted to those cases where a person was actually convicted of certain serious crimes. Even in this limited capacity, it was discarded by most European countries around the turn of the century.

A milder form of this brain-child of the European police state still exists in some countries. In *Turkey* and *West Germany*, it is still technically a punishment, even though efforts are being made to find its "true nature" in non-penal security measures. In *West Germany*, the court never *orders* police surveillance. Instead, following conviction of certain offenses (mostly political offenses and some offenses against morality), the court may empower higher police officials to subject the convict to surveillance upon his discharge from the institution.[77] Police surveillance entails the removal of certain legal barriers to searches, and may also lead to prohibitions from frequenting certain places. The measure is often criticized and allegedly seldom used in practice. The new *West German* draft code of 1962 no longer mentions police surveillance.

In *Italy*, police surveillance is designed as a security measure, and it is specifically spelled out in the Penal Code[78] that surveillance has to be undertaken to promote reintegration of the offender into society. This is, of course, the legislator's aspiration. The mandatory imposition of surveillance in a great number of cases[79] provides a

[77] Sec. 38, P.C.
[78] Art. 228.
[79] Art. 230.

certain degree of inflexibility to the scheme. No information was available as to its *practical* application, or as to whether some agency other than the police may not better perform the rehabilitative task. In *Luxembourg*, police surveillance may be ordered for life.[80] Outside of Europe, police surveillance can be found, for instance, in *Ethiopia*,[81] *Egypt*,[82] and *Israel*.[83]

B. Obligatory Settlement in Certain Locality:

Until quite recently, this consequence of conviction was very widespread; in contemporary legal systems, it is less frequently found, and the tendency to restrict its application seems noticeable.[84] Variously regulated, it appears in such politically diverse countries as *Ethiopia*, *Greece*, *Greenland*, *Israel*, *Portugal*, *Russia*, *Spain* and *Yugoslavia*, but the somewhat unprecise language often made it difficult to determine the exact nature of the restriction. Typically, the statutes speak of obligatory "settlement," failing to mention whether or not the convict may leave his "settlement" for a short trip. Complementary regulations in some countries (*e.g.*, *Yugoslavia*) explicitly state that permission is required from police authorities even for temporary absence. In most countries, obligatory settlement may be ordered by the court on conviction of serious crime. However, in *Yugoslavia*, its use is restricted to minor offenses at the discretion of the police. *Israel*, which does not limit its use to minor crimes, also empowers the police to order obligatory settlement (coupled with the measure of police surveillance). Sometimes obligatory settlement is classified as a non-punitive measure,[85] and other times as a punishment.[86] In all surveyed countries, it is temporary rather than permanent.

Some codes attempt to reconcile this old criminal law measure with modern penology. Thus, for instance, the 1954 Penal Code of *Greenland*, generally inspired by modern criminological thinking, provides that the convict can be restricted only to his native locality, provided compelling reasons exist for his removal from the locality where the crime was committed and job opportunities exist at his birth-place.

Transportation to penal colonies (*e.g.*, the notorious *French* relégation) amounts to restriction to a certain locality. However, since problems of "relégation" and similar measures are inextricably bound up with traditional punishments consisting of deprivation of liberty, and for the further reason that they are connected with the problem of multi-recidivism, transportation to penal colonies will not be further discussed.

C. Prohibition from Living in Specified Localities:

Prohibition from living (usually also from appearing) in specified localities, less restrictive than compulsory settlement, is still known in a great number of countries, *e.g.*, *Austria*, *Columbia*, *Ethiopia*, *France*, *Greece*, *Italy*, *Norway*, *Portugal*, *Russia*, *Spain*, *Switzerland*, *Venezuela*, *West Germany* and *Yugoslavia*.

As can well be imagined, regulation of this measure varies widely from country to country. Sometimes the court (or administrative agency) draws up a list of municipalities from which the convict is barred (*e.g.*, *France*). More often the "prohibited zone" is determined by specifying the distance from the place where the crime has been committed (*e.g.*, *Spain*,[87] and a number of Latin American countries which, like *Columbia* and *Venezuela*, follow the *Spanish* example). In *Switzerland*, the convict can be prohibited from settling in the "canton" where the crime has been committed, unless this happens to be his native "canton."[88]

In some countries, the prohibition may be imposed only by courts. In others, it is imposed either by courts or administrative authorities, or only by the latter (*e.g.*, *Yugoslavia*). Sometimes it is technically a punishment (*e.g.*, *France*, *Norway*, *Portugal*, *Russia* and *Spain*); other times it is labeled a non-punitive measure (*Ethiopia*, *Greece*, *Italy*, *Yugoslavia*). In modern times, it is, as a rule, a *temporary* restriction. An exception, in this respect, is found in *Ethiopia* where the court may impose a permanent ban.[89] While in the majority of the countries the prohibition represents an independent sanction, in *West Germany* it depends on the imposition of police surveillance.[90]

The present prohibition has been subjected to

[80] Art. 36, P.C.
[81] Art. 152, P.C.
[82] Art. 29, P.C.
[83] Crime Prevention Ordinance of 1933, §§3(b), 13.
[84] This is the case in *Russia*. Compare Stepichev, *Vosylka kak mera ugolovnogo nakazaniia*, 8 SOVETSKOE GOSUDARSTVO I PRAVO 106–08 (1958).
[85] *Ethiopia*, art. 151, P.C.; *Greenland*, art. 100, P.C.; *Yugoslavia*, Statute on Police Offenses.
[86] *Portugal*, art. 62, P.C.; *Russia*, art. 25, P.C.
[87] Art. 88, P.C.
[88] Art. 45, Federal Constitution.
[89] Art. 150, P.C.
[90] Sec. 39, P.C.

criticism for quite some time now as being inhumane and at variance with attempts to reclaim the former convict. The justification of the prohibition depends, to a great extent, on the practical purposes of its imposition. In some countries, the motive of its imposition is the desire to get rid of certain undesirable classes of people (*e.g.*, prostitutes, vagabonds, other social parasites, etc.), without much regard as to what happens to them in the new locale. Banned from the big cities, they may encounter difficulties in finding jobs and may be exposed to ostracism by the local people. On the other hand, the imposition of the present restriction may be prompted by the desire to remove certain criminogenic situations and prevent relapse into crime. Coupled with suitable aftercare, the prohibition takes on a widely different significance. Still, even in this context, many claim it is not effective, and it is much resented by former convicts who expect complete freedom following definitive discharge.

It would appear that it is less and less used in practice. In *Russia*, where "re-settlements" were traditionally in vogue, it is specifically provided only for persons convicted of pandering,[91] and the same is true for *France*. *Germans* also claim that very little use is made of the measure, which in that country is coupled with police surveillance, and *Sweden* has totally abandoned this legal restriction on former convicts.

D. Prohibition Against Frequenting Certain Places Within a Locality:

This legal restriction, which takes effect following definitive discharge from the institution, should be distinguished from identical prohibitions connected with probation and parole. In *Italy*[92] and *Switzerland*,[93] the prohibition is very specific and applies only to establishments selling alcoholic drinks. In *Ethiopia*,[94] it is couched in much broader terms. The duration of the measure is rather limited (*e.g.*, one year in *Ethiopia*). Whether or not the present prohibition can be enforced, particularly in a big city, is a consideration to be taken into account in assessing its meaningfulness.

[91] As accessory punishment, "banishment" is provided only in R.S.F.S.R. (P.C.) art. 22. Legally, it is always possible to impose banishment as an independent, principal punishment in lieu of imprisonment. It is, however, seldom used in practice. See SHARGORODSKII & BELIAEV, SOVETSKOE UGOLOVNOE PRAVO, OBSHCHAIA CHAST 469 (1960).

[92] Art. 234, P.C.

[93] Art. 56, Federal P.C.

[94] Art. 149, P.C.

E. Banishment from the Country:

Expulsion from the country following conviction of crime is, in contemporary legal systems, seldom applied to *citizens*. *French* citizens, however, are still subject to banishment for a maximum of ten years following conviction of certain political offenses.[95] Similar provisions also exist in *Spanish* law.[96]

The execution of this type of banishment depends, of course, on foreign governments, and may involve diplomatic negotiations. Since the severity of the measure depends on the likelihood that the person involved would find means of existence in a foreign country, an argument may be made that it is not equitable. Its humanitarian side is also subject to criticism. Thus, it is not surprising that some countries of late have rejected banishment of citizens (*e.g.*, the *Soviet Union*).

On the other hand, expulsion of *foreigners* from the country has been found in practically all countries surveyed.[97] Sometimes this type of expulsion is labeled as punishment (*e.g.*, *Switzerland*); sometimes as a non-punitive security measure (*e.g.*, *Greece*). While it is usually ordered by the courts, in some countries (*England*, *France* and *Norway*) it is imposed by administrative officials. *Switzerland* provides for both possibilities. As a rule, the imposition of banishment is discretionary, but instances have been found in which it is mandatory. For example, in *Switzerland*, it follows mandatorily from a conviction of pandering. Sometimes it is pronounced in lieu of punishment, but typically it follows the execution of sentence.

Banishment of foreigners is regarded by most people as a natural reaction of the state. Yet some forms of banishment create difficulties and should be carefully re-examined. Suppose a country decides to expel a convicted foreigner who is wanted in his native land for a political offense. In practice, the only state willing to accept him is usually his own country. But banishment in this instance amounts to extradition for a political offense. Some legislators (*e.g.*, the *Belgian*) seem to be aware of

[95] Art. 32, P.C.

[96] Art. 86, P.C.

[97] *Austria* (§25, §249 P.C.); *Canada* (Immigration Act); *Columbia* (art. 58, P.C.); *Denmark* (art. 76, P.C.); *England* (Alien Order 1953, s.i. no. 1671); *Ethiopia* (art. 154, P.C.); *France* (Ordinance of November 2, 1945); *Greece* (art. 74, P.C.); *Italy* (art. 235, P.C.); *Norway* (Chapter 5, Act of 1956 concerning admission of aliens into the country); *Portugal* (art. 71, no. 9, 3); *Spain* (art. 86, P.C.); *Switzerland* (art 55, P.C. and Federal Statute on Residence Permits of 1931, art. 10); *Yugoslavia* (art. 63, P.C.); etc.

that and refrain from banishment in such a situation.[98] Also, banishment of stateless persons has been labeled as inhumane.

F. Effects of Conviction on Foreign Travel:

These effects have been studied in two areas: in the area of issuance and revocation of *passports*, and in the area of *refusal to admit* into the country.

The issuance and revocation of passports is often controlled by hardly accessible regulations. The available information points to the conclusion that the grounds of denial of passports are usually couched in general terms so that in the absence of internal instructions it is difficult to assess what effect a criminal conviction may have on the matter. However, pending criminal *prosecutions* and unexpired criminal *sentences* are frequent grounds for denial of passports. Only one instance has been found of denial of a passport as a *punishment.* In *France*, a passport may be denied to persons convicted of pandering.[99]

With regard to admission of persons with a known criminal record into a foreign country, various systems are utilized. In some countries, as in *England*, persons convicted of extraditable offenses may be denied admission to the country.[100] Other countries deny admission, *inter alia*, to persons convicted of offenses involving "moral turpitude." In most Continental European countries, no such legal restriction will be found. Consequently persons with a known criminal record will be admitted into the country, but their application for an extended sojourn may be rejected.

IV

Consequences of Conviction Affecting Standing

There are many legal consequences flowing from conviction which may affect standing, but only two will command our attention here.[101] One is the *publication of the criminal judgment by court order;* the other the *entry of the judgment into the criminal record.* Both may very seriously hamper the reinstatement of the former offender.

A. Publication of the Judgment of Conviction by Court Order:

Originally the sole purpose of the publication of conviction was to tarnish the standing of the convict in the community; it was classified as a "humiliating punishment." In keeping with this idea, publication was usually an automatic collateral penalty resulting from conviction of serious offenses. This type of regulation existed in *France* until very recently.[102] Today very few would admit that the sole purpose of the publication is to affect the standing of the convict. However, it is sometimes openly avowed that at least part of the *raison d'être* resides in the infliction of such harm.[103] As a result of this change in criminal policy, publication of criminal judgments is rarely an automatic consequence of certain convictions today.[104] Also the range of offenses, the conviction of which may be publicized, has been greatly reduced. General formulas authorizing publication without specifying the offense involved are rather rare.[105] Typically, criminal statutes defining an offense also specify whether or not the conviction may be publicized. Perusal of these specific provisions reveals that publication is usually authorized when the offenses involved imply illegal business practices (*e.g.*, fraudulent bankruptcy, adulteration of merchandise, illegal hoarding of goods, etc.). This is often explained as a result of the desire to notify the public of the hazards of the market. This possible gain should, however, be set against the fact that the practical result of the publication is similar to the one which follows confiscation of a business and the imposition of occupational disqualifications.[106] In view of the fact that there are alterna-

[98] See the *Belgian* Statute of March 28, 1952, on alien's police (police des étrangers).

[99] The French Ordinance of Nov. 25, 1960, incorporated this authority in art. 335, P.C.

[100] Alien Restriction Act of 1914, §1(2); Alien Order of 1953.

[101] Standing is also affected by forfeitures of honorary degrees, appelations of dignity, etc. Forfeitures of this type exist in most jurisdictions, except for rare countries like *Denmark* and *Sweden*. The effect of these forfeitures, however, usually does not extend beyond the act of deprivation, unless the deprivation is accompanied by some public ceremony. Since our interest is centered on lasting obstacles to the convict's normal life in the community, these forfeitures will not concern us here.

[102] *See* the old art. 36, *French* P.C. For details, see DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPAREÉ 396–98, Paris (1947).

[103] *Compare*, however, STEFANI & LEVASSEUR, DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE 329, Paris (1966). *See also* MAURACH, DEUTSCHES STRAFRECHT, Allgemeiner Teil 648, Karlsruhe (2d ed. 1958). Of interest in this connection is the provision of art. 177 of the *Greek* law on public officials (1951), by virtue of which convictions of public officials entailing deprivation of office should be published in the Official Gazette.

[104] An exception is judgments containing death sentences under *Italian* law. See *Italian* P.C., art. 36.

[105] As as example of such broad authorization, see art. 159 of the P.C. of *Ethiopia*.

[106] *Compare Les principaux aspects de la politique criminelle moderne*, (Tribute to Donnediue de Vabres) 96, Paris (1960).

tive ways of warning the public, and considering that in other cases occupational disqualifications may be a more appropriate measure, voices have been raised against the publication of conviction even in this context.

There is yet another purpose which may be served by the publication of conviction: the publication may be a device for repairing the damage suffered through the commission of the offense. Examples that come to mind are damage done by false accusation, plagiarism, and particularly public defamation. If, for instance, a criminal defamation has been perpetrated on television, publication of the conviction through the same mass medium of communication may be the best way of counteracting the damage sustained. This last purpose of the publication of convictions seems so perfectly legitimate that some would restrict publication to convictions of defamation.[107] This is the case under *Yugoslav* law[108] which, consistent with the idea of compensation, makes the publication dependent on the victim's request.

In respect to the manner of publication, there is a wide spectrum ranging from the very old fashioned (*e.g.*, town-crier in *Ethiopia*) to limitations to the medium of the press[109] and to the electronic mass media.[110]

B. Entry of Conviction into the Criminal Record:

There is a considerable body of opinion that would consider this legal consequence of conviction as one of the greatest barriers to the rehabilitation of former offenders. Most social consequences which haunt the convict in later life stem from information obtained from the criminal record. Yet, for a variety of reasons, criminal records are very important[111] and hardly anyone would argue that they be abolished. Rather, attempts are made at restricting communication of the information contained in the criminal record. In this context two problems obtrude: (1) What degree of secrecy surrounds the record; and (2) should the former offender, under certain conditions, be entitled to have his conviction expunged from the record. Since the latter problem will be taken up in connection with the removal of legal restrictions flowing from conviction,[112] only the problem of secrecy of information remains for our discussion here.[113]

In this connection the central problem, at least in non-socialist countries, is whether or not *private individuals* should have access to information from the criminal record.[114]

In all surveyed countries this question is answered in the negative, insofar as information is sought by third persons. As regards certificates about one's own conduct, solutions vary from jurisdiction to jurisdiction. The laws of many countries entitle everybody to obtain information on himself, either in the form of extracts from the record or certificates of good conduct. This is the case, *e.g.*, in *Denmark*, *France*, *Norway*, *Sweden*,[115] *Switzerland* and *West Germany*.

The system whereby everybody can obtain information about himself seems very natural. However, closer reflection reveals that it represents a Trojan horse that throws the door to communication to third persons wide open. What namely happens in practice is that private employers re-

[107] *Compare* Strahl, *Rapport General sur les Consequences de la Condemnation Penale*, 28 REVUE INTERNATIONAL DE DROIT PÉNAL 580 (1957) [hereinafter cited as RIDP].

[108] Art. 178, P.C.

[109] *E.g.*, art. 51, *Polish* P.C.

[110] For details *see also* art. 61 of the *Swiss* Federal P.C. and art. 36 of the *Dutch* P.C. Publication of conviction does not exist in *English* and *Swedish* law.

[111] When the criminal record in the modern sense of the term first appeared late in 19th century France, what prompted its invention was the desire to ascertain recidivism and thus assess the punishment properly. Today the desire to establish the antecedents of crime is coupled with the need to enforce various disqualifications resulting from criminal conviction.

[112] See pp. 563–67 *infra*.

[113] By way of aside the reader should perhaps be given some background information on criminal records. Under the original *French* system of "casier judiciaire," records were kept by certain *courts*. This is still the system in *France* as well as in countries which follow her. Sometimes (*e.g.*, *West Germany*) records are kept by *public prosecutors*. A third group of countries entrusts the *police* with keeping records (*e.g.*, *Denmark*, *Ethiopia*, *Yugoslavia*, etc.). In *Japan* some criminal registers are kept by the officers of civil status.

Usually records are located at the place of the person's birth, but in smaller countries like *Norway* there is only one central recording office for the whole country. While usually all convictions are entered, in a smaller number of countries (*e.g.*, *Sweden*) fines or less important convictions (*Russia*, art. 57, P.C.) do not appear in the record.

The main sources of information on criminal records available to us were: *Ethiopia*, art. 160, 179, Penal Code; *France*, art. 768 et seq. of the Code of Criminal Procedure; *Norway*, 28 RIDP 364–65 (1967); *Switzerland*, Ordinance of November 14, 1941; *West Germany*, Decree regulating criminal registration of 1934 (Strafregisterverordnung); *Yugoslavia*, arts. 88, 89 of the Criminal Code.

[114] The socialist countries should in this respect be distinguished from the non-socialist because private individuals are of negligible importance as employers in the former.

[115] Thus, social consequences of conviction (less job opportunities, etc.) may in Sweden be quite important, even though legal consequences are almost non-existent.

quire job applicants to produce a certificate of good conduct. If they fail to produce it, private employers often refuse to employ.

Reacting against this practice, some of the above-mentioned jurisdictions have restricted in various ways the scope of prejudicial information a person can obtain about himself. In *Norway* it is in the discretion of the police to attest to a clean slate of a former offender if in their judgment a true extract from the record would be unreasonably prejudicial.[116] The *West German* system seems somewhat more acceptable to us. It provides that after the lapse of a period of time following release from the institution,[117] the former offender is entitled by statute to the omission of the conviction from certificates intended for use in relationships with *private persons*. (Certificates for official use will, however, still contain the conviction.) In *France*, certificates issued to individuals will contain only unsuspended prison sentences. Mere convictions and other punishments (*e.g.*, fines) will not be contained in the extracts.[118]

Of late a small number of jurisdictions refuse even to give information to a person about his own past, and prospective private employers are not in a position to require certificates of good conduct. Only by way of exception can a private person obtain extracts regarding himself. This is permissible only if certificates are required by law for the acquisition or exercise of some right or privilege (*e.g.*, the issuance of a weapon's license). The volume of legal provisions requiring a clean criminal record assumes in this context a critical significance. This new system can be found in *Yugoslav* law.[119]

In all surveyed countries, information from the criminal record is accessible to certain *public authorities*. These always include the courts and law enforcement agencies. Beyond that circle regulations vary. On the one end of the spectrum, *Swedish* law excludes all authorities other than prosecutors, courts and the police. In *West Germany* "higher administrative authorities" also have the right to information from the criminal record.[120] *Danish* law enlarges the circle to the child welfare administration, educational and custom authorities, agencies for the care of the mentally deficient, postal authorities, railways and some other state agencies.[121] In *France* only the "judicial authorities" have access to all convictions, but a number of other public authorities can obtain information on convictions of some importance.[122] *Yugoslav* law authorizes various administrative agencies, and social and economic enterprises[123] to seek information from the record, but only upon showing of "justifiable cause." The latter is obviously present if information is sought in order to establish whether the person is striken with any disqualification flowing from conviction, provided this information is relevant in the circumstances of the particular case.

V

Various Occupational Disqualifications

A. Loss of Right to Hold Public Office:

The term "public office" differs from country to country.[124] Moreover, even within a single jurisdiction the concept often has a wide penumbral zone. Thus, we are forced to operate with a rather loose concept of "public office." Precision in using the term would call for a preliminary comparative study of what is meant by "public office" in various legal systems and how a common denominator can best be established. With the hope of not touching on falsification, we will adopt the following definition of public office. Public office will cover all state, municipal and local employments, except for employments consisting of the

[116] A *Norwegian* author uses the following example of an unreasonable prejudice. A seventy-year old man applies for the job of night-watchman. As a youth of 20 he was convicted of petty theft and has not been in trouble with the law since. The true extract would unreasonably decrease his chance to obtain the desired job. See Knut Sveri in 28 RIDP 364 (1957). According to the same source about 20,000 certificates of conduct are issued to private individuals in Oslo each year.

[117] In *West Germany* information is normally obtained only indirectly from the criminal record. Citizens apply for a certificate of good conduct from the police, who in turn have access to information from the record kept by public prosecutors. The lapse of time provided in the "Straftilgungsverordnung" varies from 5 to 10 years, depending on the punishment. If the punishment is other than imprisonment, the period of time is computed from the finality of the criminal judgment.

[118] Art. 777, Code of Criminal Procedure.

[119] Art. 89, subsec. 2, P.C.

[120] After the lapse of a period of time only the highest authorities have access to the information (§32 of the Decree on Criminal Registration of 1934).

[121] Postal and railway authorities and some other agencies have a right to access not longer than 5 years following release from the institution.

[122] Art. 776, Code of Criminal Procedure.

[123] Art. 89, subsec. 1, P.C.

[124] *E.g.* under *West German* law, *jurors* and *attorneys at law* are considered public officers (§31 P.C.); while the *Norwegians* classify *clergymen* as public officers. The *Finnish* definition (§12 P.C.) is very broad, embracing employees of *semi-public corporations*.

performance of merely clerical functions. Consequently, the offices considered together will include elective as well as appointive public offices, judicial and administrative, those whose functions are political *par excellence* as well as those whose functions are more technical.

The effect of criminal judgments on public officers' status may be twofold. Conviction may entail *forfeiture* of the office they are holding. This consequence of conviction will be found probably in all countries. Again, conviction can entail *ineligibility* for public office. In our study, we will deal primarily with the latter disability; for, it is this disability which outlasts the execution of the traditional punishments and affects the former convict's life in the community.

The loss of the right to hold public office can arise in various ways. It can be pronounced in the *judgment*, it can be a further *collateral consequence* of the judgment, and it can also represent a *disciplinary sanction*. Our emphasis will lie on disqualifications imposed by the judge, for it was on this aspect that we had the most available information. Provisions dealing with loss of public office as a collateral consequence and as a disciplinary sanction are scattered in a very great number of laws in the majority of countries.

1. *Disqualification imposed by the judge.*

a. Some countries provide for the prohibition against *holding any public office*. It has been said in support of this total disqualification that people who have run afoul of the laws of the State should not be permitted to serve and represent the State.[125] The practical result of this is that the State sometimes refuses to employ the former convict in any job of some importance.

Sometimes the imposition of this broad disqualification is *mandatory*, and sometimes it is optional with the judge. In order to provide a better insight into various degrees of flexibility in the imposition of the disqualification, we will treat mandatory and optional systems separately. It must, however, be pointed out that often mandatory and optional disqualifications coexist in one legal system.

The mandatory system is variously organized. Sometimes it is contained in the punishment of loss of civil rights. For instance, the *Polish* Penal Code provides that conviction of crimes against the state entails the mandatory loss of certain rights, including the right to hold public office.[126] In many other countries, the loss of the right to hold public office is also contained in the punishment of loss of civil rights, but the latter does not attach to conviction of certain crimes, but rather to the imposition of certain punishments. Examples are: *Argentina, Columbia, Egypt, France, Greece, Italy, Spain* and *Switzerland*. With respect to serious offenses, the disability is always permanent in *France*, while it may be either temporary or permanent in *Argentina*,[127] *Columbia*,[128] *Italy*,[129] *Poland*,[130] *Spain*.[131] *West Germany* has yet another variant of the system of mandatory imposition, independent of the loss of civil rights. It flows from the imposition of a degrading type of punishment (the so called Zuchthaus) and is always permanent.[132]

In some countries, ineligibility to hold public office is a specific punishment designed only for public officers (thus not applicable to those who did not possess this status at the time of commission). This punishment attaches mandatorily to certain sentences.[133] Finally, in a number of legal systems, disability to hold public office applies only until the punishment has been fully served.[134] This limited disability does not concern us here, for it is just another restriction inherent in the execution of prison sentences and possibly parole.

The *optional system* obtains in *Ethiopia*,[135] *Holland*,[136] and, limited to certain sentences or crimes, in *West Germany*,[137] *Switzerland*,[138] *Portugal*[139] and *France*.[140] The disability is usually temporary and computed from the day the main punishment has been served. In *Ethiopia*, however, the loss may be permanent.

b. The number of states in which the convict may be disqualified from holding not all, but only *specific* public offices seems to be on the increase. The reasons—as we see it—are multiple.

[125] *See* Lebrun, *Une Nouvelle Sanction Pénale*, 15 RIPD 299 (1938).

[126] Art. 47, P.C.
[127] Art. 19, P.C.
[128] Art. 56, P.C.
[129] Art. 28, P.C.
[130] Art. 46, P.C.
[131] Art. 35, P.C.
[132] Sec. 31, P.C.
[133] *E.g.*, *Finland*, §11 P.C.; *Switzerland*, Art. 51, Federal P.C.
[134] *E.g.*, *South Korea*, art. 43, P.C.; also certain instances under *Argentine* and *Japanese* laws.
[135] Art. 122, P.C.
[136] Art. 28, P.C.
[137] Secs. 34 & 35, P.C.
[138] Art. 52, P.C.
[139] Art. 65, P.C.
[140] Art. 42, P.C.

The total disqualifications came under attack as too sweeping. It has been said that rather than applying the bar to public offices *in toto*, discrimination should be exercised in selecting the offices to be covered by the bar. While some do require an unblemished record (judgeships, etc.), others are less demanding. A specific situation has arisen in countries in which very comprehensive nationalization took place. Refusal on the part of the State to employ may, in this context, represent a barely tolerable restriction of job opportunities. An argument can also be made that the State has no moral standing to blame private employers for refusing to employ former convicts if the State itself indiscriminately refuses to employ them.

Under *Norwegian* law, a disqualification for public office may be imposed only if a high degree of confidence in the particular office is required, or if the convict has proved through the commission of the offense that he is either unfit for the particular job or might misuse the office in the future.[141]

In both *Russia* and *Yugoslavia*, public offices are not expressly mentioned in provisions dealing with disabilities flowing from conviction. However, in both countries the judge may disqualify the convict for *certain* public offices if there is a connection between the crime and a particular office, and the imposition of the disability appears to the judge necessary for the protection of public interests. Technically, disabilities are differently conceived.[142] However, their actual nature is very similar.

In *Sweden*, there is no prohibition against holding public offices as a consequence of conviction. If a public officer commits a criminal offense, he may only be punished by dismissal or by suspension from the office he is *holding at the moment*. But, there is no legal bar to the acquisition by the convict of the same kind of office elsewhere.[143]

2. *Loss of public office as a collateral consequence of conviction.*

Loss of public office is often a collateral consequence of conviction. In legal systems which provide for disqualifications imposed by the judge, this type of disability is usually limited to particular offices.[144] It is most commonly found in various statutes dealing with election and/or appointment of the judiciary. Not infrequently disqualifications are found in various pieces of delegated legislation. In *Yugoslavia*, they can be laid down only by federal statute.[145] To the best of our knowledge, this is a very rare limitation of authority.

In legal systems in which the loss of public office is not a sanction imposed by the judge, statutory disqualifications in the nature of collateral consequences are sometimes very large. An example in point are various *Israeli* statutes.[146] *England* has a very sweeping statutory disqualification. Persons convicted of serious offenses are barred from holding any civil office under the Crown, from public employment, and from being elected to or sitting as a member of either House of Parliament.[147] However, along with most other *British* disqualifications, this broad one *does not outlive* the execution of the sentence. No disqualifications exist in *Sweden*.

3. *Loss of public office as a disciplinary sanction.*

This last possibility shall be mentioned only for the sake of all-inclusiveness. Its discussion would take us onto the boundless sea of numerous, often confusing and usually inaccessible disciplinary laws.[148]

4. *Loss of old-age pension rights.*

In connection with the disqualification to hold public office, the loss of pension rights should be mentioned. Loss of old-age pensions may flow from conviction of public officials in the following randomly chosen countries: *Argentina*, *Columbia*, *England*, *Greece*, *Italy*, *Norway* and *West Germany*. In *Norway*, the forfeiture is, however, very limited. It may be imposed only on those convicted of vagrancy within five years preceding the filing of the application for retirement. Moreover, the practice seems to be to send the old-age benefits to the official's family.[149]

During the last few decades, forfeiture of pension rights often has been attacked as inequitable. Old age benefits have come to be regarded as *vested rights*, remunerations for past services rendered. Pursuant to this new attitude, *Sweden* abolished the disqualification in 1936,

[141] Sec. 29, P.C.

[142] *Russia*, art. 29, P.C.; *Yugoslavia*, art. 61(b), P.C.

[143] See Ch. 31,§1, *Swedish* P.C. The maximum duration of the suspension is one year.

[144] See, however, art. 48 of the *West German* Statute on Public Officers (Beamte).

[145] Art. 37(a), P.C.

[146] *E.g.*, State Service Appointments Law of 1959, § 17(c).

[147] Forfeiture Act of 1870, § 2.

[148] As an example, consider *Greek* law in 29 RIDP 82 (1958).

[149] See Sveri, *Les conséquences de la condamnation pénale*, 28 RIDP 363 (1957).

Poland in 1954 and *Yugoslavia* in 1959. Art. 31 of the old Criminal Code of *RSFSR* provided for the loss of pension rights, but a corresponding provision has been deleted from the new *Russian* Code of 1960.

B. Other Occupational Disqualifications:[150]

As a result of the deluge of licensing and regulatory legislation from the second half of the nineteenth century onwards, the area we are now turning to is so vast that its contours are barely visible. For the sake of greater clarity and order, the various disqualifications will be broken down into five large groups:

1. Disqualifications imposed by court decision;
2. Disqualifications imposed directly by statute;
3. Disqualifications imposed by administrative decision;
4. Disqualifications imposed by professional and occupational groups; and
5. Closing of the place of business.

The reader must, however, not be misled into thinking that each legal system clings to a particular type of disqualification. The technical organization of disqualifications is often very complex even within a single legal system. Thus, various types of disqualifications dealing with the same occupation, often co-exist in a single country, sometimes in unresolved conflict.

1. *Disqualification by court decision.*

Two great systems seem to be discernible. Under one, the court derives its authority from a *broad formula* inserted in the Penal Code. Under the other, the judge bases the imposition of the disqualification on *specific statutory provisions* dealing with various occupations.

a. General provisions (broad formulas) authorizing the judge to prohibit the exercise of a particular occupation on conviction of crime, will be found in many Continental European countries. Suffice it to mention *Greece*, *Italy*, *Norway*, *Portugal*, *Russia*, *Switzerland* and *West Germany*. Outside of Europe similar provisions will be found, for instance, in *Argentina*, *Columbia* and *Ethiopia*. Technically, the disqualification is more often than not considered as a punishment (*e.g.*, in the Penal Codes of *Argentina*, *Columbia*, *Greece*, *Italy*, *Norway*, *Poland*, *Russia* and *Switzerland*). It is a security measure in the Penal Codes of *Ethiopia*, *Yugoslavia* and *West Germany*.

The usual prerequisite for the imposition is the finding by the judge of a *link* existing between a particular occupation and the offense committed. The wording of the codes varies from rather general to quite specific. Thus, for instance, the *Russian* Code authorizes the imposition of the disqualification when "because of the nature of the crime committed by the offender in his occupation, the court deems it unfeasible to preserve his right to exercise a certain occupation."[151] The language of the *West German* Code is more specific:

> The court may order the prohibition to exercise an occupation . . . for anybody convicted of a felony or gross misdemeanor committed under misuse of his occupation and in flagrant violation of the duties which his occupation entails, and sentenced therefore to a sentence term of at least three months, if such prohibition is necessary to protect the public from further danger.[152]

Because of the nature of the prerequisites for the imposition of occupational disqualifications (*e.g.*, abuse of the profession), the latter in most countries can be imposed only on persons who had exercised the occupation *at the time of commission*. In *Norway*, however, the court can prohibit the convict who was not practicing an occupation at the time of commission from taking up a certain occupation in the future. This is so with respect to occupations for which a high degree of public confidence is required.[153]

Under the codes of some countries, the disqualification is limited to licensed occupations.[154] Other codes put practically no limits on the spectrum of occupations which may be affected by the disqualification. For instance, under *Norwegian* law a director of a summer camp for youth may be

[150] The meaning of the term "occupation" should perhaps be explained. As the Continental European reader knows, most disqualifications covered here would be labeled in Europe as "professional disqualifications". The term "profession" has, however, a more restricted meaning in most English speaking countries. It is limited to those occupations which render highly specialized intellectual services (*e.g.*, lawyers, doctors, etc.). Thus, the term occupation should be taken to be a descriptive group label for various trades, professions, businesses, callings, etc., with the common characteristics of providing a legitimate source of income.

[151] Art. 29, P.C.

[152] Sec. 42, 1, P.C.

[153] Art. 29, subsec. 2, P.C.

[154] *E.g.*, *Greece*, art. 67, P.C.; *Italy*, art. 30, P.C.; *Portugal*, art. 70, 8, 5, P.C.; *Switzerland*, art. 54, Federal P.C.

disqualified from holding that position as a result of conviction of a sexual offense.

The important problem is how broad the court's prohibition can be. The Supreme Court of the *Russian* Republic has held in one case that the prohibition must never prevent a person from being employed in a wide field of activity, as for instance commerce.[155] A similar tendency is noticeable in *West German* law. Here a specific statutory provision, Section 42(1)(2), was required to extend the disqualification from practicing an occupation in one's own name to practicing for another, or directing another's practice. In *Yugoslavia*, the court may exclude the convict from all "positions involving the handling of money and safekeeping of property." It cuts across many jobs from night-watchmen to bank directors. Still, conviction of certain property crimes is relevant to fitness for all these positions.

The imposition of this disqualification is as a rule not *mandatory*. Usually it is only *temporary*. In *Norway*, however, it may be permanent.

b. Some countries have no general provision authorizing the judge to impose a prohibition against the exercise of any given occupation. Rather, they have provisions dealing with specific occupations scattered in numerous statutes and pieces of delegated legislation.

Perhaps the most widely known European example of such a country is *France*. Until the middle of the 19th century there was very little law on occupational disabilities, except for disabilities for public office. Most trades and professions were organized in the so-called "corporation des métiers" and the latter were authorized to disqualify undesirable members. The need for judicially imposed disqualifications was not felt. Later, *pari passu* with the disappearance of the "corporations des métiers," courts became vested with powers to impose occupational disqualifications. As a particular need was felt, disqualifying provisions were inserted in ordinances and statutes. As a result of this *ad hoc* approach, this area of *French* law is in a pretty undesirable state. Disqualifications are sometimes so *broad* that they appear out of all proportion to the particular conviction. Often they are *mandatorily* imposed. It is not rare to come across disqualifications having *no connection* with the crime of which the person is convicted. Also, *conflicts* between some disqualifications have been established. In short, there is no consistent policy behind the large body of law that has developed over the years. The volume of disqualifications is so large that we should limit ourselves to presenting only some examples. Conviction of certain crimes (notably property crimes) entails the broad prohibition against carrying on *commerce*.[156] Conviction of pandering carries mandatory disqualifications from the *hotel business*, as well as various business in related fields.[157] Many disqualifications will be found in the field of the *medical* and *para-medical professions*,[158] some of these in the Penal Code.[159] Also in the Penal Code will be found disqualifications from the *teaching profession*. Loss of civil rights entails the prohibition to be a school principal, to teach, or to have any position in a school.[160] In contrast to other countries, no provisions will be found on the *legal profession* because its professional organization (Conseil d'Ordre) has exclusive jurisdiction over lawyers.[161] Some disqualifications appear in unusual places. The Statute of June 1, 1965, passed in order to curb doping in sporting events, provides the complementary punishment of a complete prohibition against *organizing sporting events* and *taking part in sporting events*. Most disqualifications, however, even though sometimes called punishments, are actually collateral consequences of convictions arising by operation of law and will be considered below.[162]

In the realm of the civil law systems, no general authorization will be found in some older codes such as those of *Austria*, *Belgium* and *Luxembourg*. Outside of the Continental system, absence of a general authorization for judicial disqualification is more frequent. This is, for instance, the case in *Canada*, *England*, *India* and *Israel*, countries which have very little or nothing in the way of judicial disqualifications. *Israel* relies on collateral consequences provided in a great number of laws, while

[155] *Lazarenko* case, see Bulletin of the Supreme Court of RSFSR (in Russian), no. 6, at 12 (1961).

[156] Statute of August 30, 1947. For the long list of crimes entailing this broad disqualification see HERZOG, REVUE DE SCIENCE CRIMINELLE 852 (1963). Commerce "should be taken to mean any engagement in the sale of goods," either as a proprietor or an employee.

[157] Ordinance of Dec. 23, 1958, art. 34.

[158] Ordinance of September 24, 1945.

[159] *E.g.*, art. 317, P.C., dealing with illicit abortion.

[160] Art. 34, no. 5, P.C.

[161] Revocation of driving licenses will be discussed in connection with disqualifications for certain activities. Only with respect to professional drivers does it amount to an *occupational disqualification*.

[162] See pp. 552–53 *infra*.

England, Canada and *India* seem to rely on the governing bodies of professions to deprive persons guilty of professional misconduct (which may include conviction of certain offenses) of the right to practice the profession. Thus, these countries will be discussed below.[163]

It is worth noting, however, that most countries which have adopted the general prohibitive formula, provide, in addition, numerous specific occupational disqualifications. Sometimes this provision deals with *attorneys at law*. Thus, under the *West German* Code, a sentence to a special type of imprisonment calls for the mandatory imposition of permanent disability for the "Nótariat." [164] In *Greece*, the right to practice as a lawyer is forfeited incident to the imposition of loss of civic rights.[165] Also in *Greece*, the court may sometimes impose a permanent bar from the *medical profession*.[166] In *Switzerland*, the court may order a prohibition against the issuance of the *traveling salesman's* license.[167] Similar power exists in *Switzerland* with respect to the persons engaged in the *insurance business*.[168]

2. *Disqualifications imposed directly by statute.* In the surveyed countries, various statutes often automatically attach certain occupational disqualifications to convictions of certain *offenses* or sentences to certain *punishments*. Usually, not always, these statutes complement disqualifications imposed by the judge. Very little or no automatic disqualifications exist in *Canada, England, India* and *Sweden*. The number of disqualifications imposed in various countries directly by statutes is so large and the details of regulation so varied, that the compiling of an exhaustive list for even a single jurisdiction would require a separate voluminous study. All we can do here is to present a fairly comprehensive list of discovered disqualifications.

The following disqualifications seem to be quite common:

Bar from the practice of *law*
Bar from the practice of *public notary*[169]
Bar from the practice of *medicine*
Bar from the practice of *dentistry*
Bar from the practice of *veterinary science*
Bar from various *para-medical* professions (*e.g.*, nursing, midwifery etc.)
Bar from the practice of *pharmacy*
Disqualification to be an *auditor*
Loss of *liquor license*
Disqualification from the *insurance* business
Disqualification from the *brokerage* business (notably real estate and stock-exchange)

Less common seem to be the following disqualifications:

Bar from certain positions in *banking*. The bar usually relates only to positions in governing bodies (*e.g., Belgium* and *Israel*), but sometimes also to any kind of bank employment (*France*)
Exclusion from leading positions in *private corporations* (*e.g., France, Belgium*)
Exclusion from directorships in *business enterprises* (*Yugoslavia*)
Disability to operate *hotels, night clubs* and *amusement places* (*e.g., France*)
Prohibition against engaging, whether as proprietor or employer, in the *sale of goods and services* (*e.g., France*)
Exclusion from *foreign trade* positions (*e.g., Yugoslavia*)
Bar from engaging in *installment selling* deals (*e.g., Belgium*)
Bar from the practice of *physical therapy* (*e.g.*, some *Swiss* cantons)
Bar to *beautician's license*. (Sometimes statutes are even more specific. *E.g.*, a statute of the Canton in Geneva, *Switzerland* bars the convict from the practice of cosmetic depilation.)[170]
Disqualification from *teaching positions* (*e.g., Austria, Israel*)
Disqualification from any kind of employment in a *driving school* (*e.g., France*)
Prohibition from being a *taxi driver* (*e.g.*, Canton Geneva)
Disqualifications affecting *crafts* and *trades*. (Thus in *Germany* the convicted craftsman cannot employ apprentices. In *Greece*, certain convictions entail prohibition from being a mechanic aboard ship, etc.)
Disability from some *ecclesiastical* positions (*e.g., Austria, Norway* Penal Code)

[163] See *infra* p. 553.
[164] Sec. 31, P.C.
[165] Art. 63, P.C.
[166] Statute no. 1565 of 1939, arts. 3, 6 & 9.
[167] Federal law on traveling salesman of 1930.
[168] Art. 11 of the Federal law on insurance matters of 1886.
[169] The reader should not lose sight of the important difference between the office of *notaries* in civil law and common law countries.
[170] See statute of February 14, 1947, art. 2.

Bar from editorial positions in the *press* (*e.g.*, *Austria*)[171]

Disability for *publishing activity* and managerial positions in institutions of *mass media* (*e.g.*, *Yugoslavia*)

Assuming that as a matter of general criminal policy criminal convictions should be considered as a source of occupational disqualifications only to the extent that they are actually relevant to fitness for the particular occupation, evaluation of these automatic disqualifications depends on familiarity with some details of their imposition. It is, for instance, important to know whether the disability attaches to conviction of specific *offenses*, or to the imposition of particular *punishments*. While it is hard to see why a person sentenced to hard labor, irrespective of the offense involved, should *ipso facto* be disqualified for cosmetic depilation for instance, this particular occupational disability seems more acceptable if the ground on which it attaches is conviction of a sex offense. As a general matter it can, however, be said that automatic occupational disability appears to be an acceptable solution only in a very limited area (*e.g.*, positions requiring public trust or involving danger, etc.). With respect to most occupational disqualifications, consideration of the merits of each particular case seems appropriate, and automatic disqualifications should be avoided.

Worthy of note is the requirement found in *Yugoslav* law to the effect that automatic disabilities may be imposed only by the state legislator. Thus the *Yugoslav* law avoids the proliferation of bodies and agencies authorized to lay down automatic disqualifications which plagues many contemporary legal systems.

3. *Disqualifications imposed by administrative authorities.*

Most frequently, occupational disqualifications result from decisions taken by administrative authorities. The latter are seldom vested with power to regulate particular occupations and consequently their decisions dealing with occupational disabilities are typically based on statutory provisions.[172]

a. Sometimes administrative permission is required in order to *enter* an occupation. The permission takes the form of a license, franchise or entry into a professional register.

(i) In describing prerequisites for the issuance of licenses, statutes often use very broad language. Usual formulas are: the applicant should "enjoy a good repute," "be of a good moral character," or "inspire confidence." So often are these formulas found that they are referred to by some as "passe-partout" formulas. Since most convictions reflect on one's character, repute and trust, various convictions may and often do constitute bars to qualification for particular occupations.

Let us use the *Norwegian*, *Swiss* and *West German* laws as an illustration. In *Norway*, "good repute" is required for the issuance of licenses to practice the following: *medicine, dentistry, veterinary science, pharmacy, physical therapy, massage, real estate* and *stock exchange brokerage, accounting* and *law*. It is also required for *liquor licenses* and the license to engage in the *hotel business*.

In *Switzerland*, under federal law, "good moral character" is required for operating a "*gaming establishment*," and for the *insurance business* and *liquor* licenses. Under cantonal law, the same formula is also often used. Thus, the Canton Vaud requires "good moral character" for the licenses of *optometrists*, *ski instructors* and *pedicurers*.

In *West Germany*, the Code on occupations (Gewerbeordnung) contains a long list of occupations where the licensing agency can refuse to issue the licence to persons not "inspiring confidence." Among these are licenses to operate a *private hospital* or *swimming pool*, give *dance*, *swimming* or *gymnastic* lessons, run or own a *pawnshop* or *secondhand* shop, *sell lottery tickets*, own or operate an *information agency*, etc.

(ii) Sometimes statutory provisions dealing with licensing are more specific. The degree of leeway left to the administrative authorities differs. On the one extreme are provisions like that of art. 57 of the above-mentioned *West German* Code on occupations which specifically lays down convictions entailing mandatory refusal of a traveling salesman's license. More latitude is left to the administration if the statutory provisions speak of "grave failings," or crimes involving "moral turpitude." Thus in *West Germany*, the entry into the *medical*, *dental* and *pharmaceutical* professions is barred to those convicted by the criminal court

[171] The constitutionality of judicial disqualifications for journalism is hotly debated in *West Germany*. See COPIC, BERUFSVERBOT UND PRESSEFREIHEIT, JURISTENZEITUNG 494 (1963). See art. 26 of the Penal Code of *Austria*.

[172] In many countries, the administrative decision can be challenged in courts (contentieux administratif).

of "grave failings."[173] Even more room for the exercise of discretion is permitted by the *Norwegian* Statute on Commercial Activities and Crafts. Under amendments made in 1953, if the applicant for the license has been sentenced to imprisonment, the license should be refused if "the *facts* on which the judgment is based indicate that the applicant is likely to relapse into crime."

Sometimes the provisions dealing with entry into a particular occupation require the applicant to submit a *certificate of good conduct.* In this case, any conviction can entail refusal of entry into an occupation. Examples of this type of licensing regulation were found in some *Swiss* cantons (*e.g.*, Valois) and in *Norway* (*e.g.*, the "entrepreneur's" license).

b. As we have seen, *exclusion* from a particular occupation can be provided directly by statute. However, it is often complemented by administrative exclusion from the occupation. As a general rule, where an administrative agency is authorized to issue a license, it is also empowered for the "contratius actus," *viz.*, the revocation of licenses. Lack of symmetry is, however, found in *Norwegian* law. Even though administrative authorities issue licenses to doctors, dentists, pharmacists and veterinarians, revocation of their licenses can only be ordered by the court.[174]

An interesting provision can be found in the *Austrian* Penal Code. Under Section 30, the court must, in certain cases, following the entry of judgment, transmit a copy thereof to the licensing authority. The latter will then consider whether the conviction should entail revocation of license.

The broadest disqualification by administrative authorities has been discovered in *French* law. On conviction of tax fraud, an administrative agency is empowered to impose on the convict the prohibition "against carrying on any industry and commerce or practicing any profession."[175] It seems, however, that this provision is seldom applied in practice.

[173] *E.g.* § 3 of the Statute on Physicians of 1961.

[174] It is interesting to note that symmetry exists with respect to the legal profession. Practice of law in *Norway* depends on the license issued by the administration, and administrative authorities can revoke the license. Thus, the legal profession is more dependent on administrative authorities than the medical and paramedical professions. The reverse is true in *France*, where disqualification for legal practice can only be decided by professional bodies, whereas disqualification from the practice of medicine can be ordered by extra-professional authority.

[175] Statute of April 14, 1952.

4. *Disqualifications imposed by professional and occupational groups.*

Professional and occupational groups are often vested with the power to decide on qualifications for *admission* and standards for *exclusion* from the profession or occupation.

In *France*, the executive council of the Lawyers' Guild (Barreau) decides on the moral suitability of a candidate for admission to the bar and a virgin criminal record is required of him.[176] In some *Swiss* cantons, even admission to the bar examination will be refused to persons with a criminal record. In *Yugoslavia*, the professional governing body of the bar decides on the "moral suitability" of the person to be entered in the professional register of lawyers. Certainly, not all convictions will be a bar to admission.[177] Similar regulations exist in a great number of countries.

Professional and occupational governing bodies, if entitled to admit to the occupation, are usually also vested with the power to permanently or temporarily exclude from it. Exclusion is usually preceded by the so-called *disciplinary procedure.* In the scope of this study, we cannot enter into the complexities of disciplinary law. Suffice it to present only a few illustrations. In *France*, the executive council of the Lawyers' Guild can permanently disbar members of the bar guilty of professional misconduct (which, of course, may include criminal convictions). The same is true for the medical profession. In *Canada*, similar powers are vested in the professional governing bodies of *architects*, *accountants* and *engineers*. In *France* and *Yugoslavia*, certain University bodies can dismiss the student for misconduct and sometimes disable him from enrolling for some time. Student misconduct includes certain criminal convictions.

5. *Closing of the place of business.*

As a result of conviction of crimes involving illegal exercise of certain occupations, either the court or the administrative authorities can order closure of the place of business where the illegal activity took place. Sometimes this measure is coupled with the prohibition against exercising a particular occupation, and thus the owner of the business can neither run it himself nor sell it to another.[178]

[176] A student of comparative law will note that we are dealing with the "avocats" and not with other branches of the French legal profession.

[177] *Yugoslav* Statute on the Advokatura of 1957.

[178] *E.g.*, art. 335, §2 of the *French* P.C.

Closure by judicial decision was briefly abolished in *France* in 1933, but soon thereafter reestablished. However, it is today very limited. Certain businesses can be closed following conviction of pandering, and pharmacies can be closed as a result of certain offenses against the public health. This judicial closure may be permanent. Temporary closure can be ordered by the administration (usually police) in a great number of cases.

Administrative closure can also be found in *West Germany*[179] and probably in the administrative provisions of most countries. Closure by the criminal judge is less frequent. Outside of Europe, it found its way into the *Ethiopian* Penal Code.

VI

Disqualifications Affecting Participation in the Legal Process

Many states disqualify persons convicted of crime for a variety of roles in the administration of justice. Some of these disqualifications have already been considered. Judges being public officials, disqualifications for the *bench* have been implicitly considered in discussing the loss of the right to hold public office.[180] The same holds true of public prosecutors,[181] as well as some court personnel (clerical personnel, execution officials, etc). Disqualifications from the *bar* have been dealt with in connection with professional disqualifications. Thus, what remains for consideration here are only those roles in the administration of justice which are independent of public office and the exercise of the legal profession.

A. Lay Participation in the Adjudicatory Process:

In contemporary legal proceedings, lay participation may take two forms. One is the jury system, under which a lay panel serves as the sole trier of facts. The other is variously called, but we will refer to it as the system of lay assessors. In this system, the lay assessors deliberate *with* the professional judge in the decisions of both legal and factual issues. Consequently, we will find in various countries disqualifications from serving on a jury and from serving as a lay assessor.[182] Occasionally both systems were adopted within a single country.

Disqualifications for lay participation in the adjudication process is sometimes inferred from broad statutory language. However, very often specific references to lay judges (jurors or assessors) will be found. Sometimes, the disqualification follows from the loss of the right to vote imposed by the court on conviction.[183] Ineligibility for assessorship under *Ethiopian* law is an optional measure the court may impose on conviction of a grave or repeated offense.[184] By *Yugoslav* law, conviction of a crime involving moral turpitude is an impediment to eligibility for lay assessorship.[185] Quite widespread is the regulation patterned on the *French* Penal Code, under which the loss of the right to serve on a jury is a consequence of the loss of civil rights.[186] It exists under the statutes of many *Swiss* cantons,[187] and under the Penal Codes of *Belgium*,[188] *Greece*,[189] *Italy*,[190] *Luxembourg*[191] and *Monaco*.[192]

Since some jurisdictions adopted both the jury and the assessorship system, references to both will be found in them. This is, for example, the case in *Austrian* law, which still retains the genuine jury system,[193] and under *Norwegian* law.[194] In *West Germany*, disqualification from the jury and assessorship follows from the ineligibility for public office. For the purpose of penal statutes,

[179] SCHÖNKE & SCHRÖDER, STRAFGESETZBUCH (12th ed., München, Berlin, 1965), commentary to § 42 L.

[180] Therefore, in some legal systems only disqualifications from public office are mentioned. However, other systems, in dealing with disqualifications, specifically refer to judgeships (*e.g.*, *Austrian* P.C. in §26). Some countries inserted in their public employee statutes or statutes dealing with court organization, specific provisions that persons convicted of certain crimes cannot even be candidates for positions on the bench (*e.g.*, *Israel*, *Japan*, *Yugoslavia*).

[181] In most civil law countries, public prosecutors, though legally trained, need not be members of the bar. Thus, exclusion from the bar does not *ipso facto* render a person ineligible for the office of public prosecutor.

[182] A difficulty arises from the fact that in some countries, due to the process of legislative inertia, some lay panels are called juries, even though they were transformed into panels of lay assessors (e.g., *France* and *West Germany*). The reader with a common law background should therefore beware of equating each civil law jury with the jury in the common law system.

[183] *E.g.*, the *Norwegian* Statute on Court Organization.

[184] Art. 122, P.C.

[185] Fundamental Statute on Courts of General Jurisdiction, art. 13.

[186] Under art. 34 of the *French* Penal Code, the loss is a permanent and mandatory consequence of the imposition of certain prison terms, while under art. 42 it is only temporary and optional.

[187] *E.g.*, the Statute of the Canton of Geneva on Criminal Procedure, art. 216.

[188] Art. 31.

[189] Art. 31.

[190] Art. 28.

[191] Art. 31.

[192] Art. 35.

[193] Sec. 26, P.C.

[194] Statute on Court Organization.

public office is construed to involve any participation in the adjudication. Disqualification is either an automatic consequence of the imposition of certain punishments,[195] or an optional additional penalty.[196]

No disqualification for jury or assessorship exists in *Sweden* and the *Soviet Union*. Both countries seem to rely on the judgment of the voters.

B. Testimonial Disqualifications:[197]

It is well known that in the old days certain criminal convictions entailed total testimonial disqualification. It can safely be said that today the majority of jurisdictions in Europe and Latin America, as well as the modern codes in Africa and Asia, do not attach testimonial disqualifications to criminal convictions. Yet some countries belonging to the civil law orbit still retain a number of archaic provisions, vestiges of total testimonial incapacity.

An example of archaic regulations will be found in countries which modeled their criminal legislation on the Napoleonic Penal Code. Under this Code, loss of civil rights entails either a permanent or a temporary incapacity of the convict to render testimony.[198] This harsh provision is, however, alleviated by the possibility of obtaining "mere information" (not technically testimony) from the convict. This regime will be found in *Belgium*,[199] *Egypt*,[200] and, of course, still in *France*. In substance, the same rule will also be found in *Greece*.[201] Here, loss of his civil rights does not technically incapacitate a person from testifying, but rather from testifying under oath. In addition, the *Greek* Code of Civil Procedure contains a provision whereby the interested party in a civil action can prevent the person deprived of his civil rights from testifying at all.[202]

These statutory relics of olden days are vulnerable to criticism. The fact that a person has been convicted of certain heinous crimes or sentenced to particular strict punishments is not necessarily related to his credibility as a witness. A former convict may be a precious evidentiary source and his disqualification can harm the state or third persons interested in his testimony.

Fully aware of this, even the Napoleonic Code developed an escape from total testimonial incapacity. It does not incapacitate the convict from "merely informing" the court, which amounts to testimony without oath, widespread in many countries of the world. What is the practical result of this archaic disqualification? Under the Continental rule of free evaluation of evidence, the court can attribute to "mere information" equal or even greater weight than to sworn testimony. Thus, the credibility of the convict as a witness is not affected. In effect the disqualification, intended to be a punishment, only relieves the convict of the duty to take an oath and makes him incapable of committing perjury.

Much less vulnerable to criticism is the provision of *West German* law by virtue of which only some convictions of perjury carry as an automatic collateral penalty the disqualification to testify under oath.[203] The disqualification is permanent. Here, at least one finds a relationship between the disqualification and the conviction that prompted it.

What has been said regarding witnesses in general also applies to *expert witnesses*. Countries with testimonial incapacitations extend them to experts as well.

C. Other Disqualifications:

Perusal of codes and statutes reveals some sporadic additional incapacities connected with participation in the legal process. The *Austrian* Penal Code[204] disqualifies persons convicted of serious crime from any *representation of parties* before public authorities. This disability is much broader than exclusion from the bar. The *Greek* Penal Code and Code of Criminal Procedure[205] contain disqualifications, incident to conviction, from serving as a *court interpreter*. The *West German* Code of Civil Procedure provides for the possibility of disqualifying convicts from serving

[195] Sec. 31, P.C.

[196] Secs. 33 & 35, P.C. The reader will remember that the *German* jury should not be equated with the common law one.

[197] Also included in this section are disqualifications for rendering expert testimony. Although civil law lawyers sharply distinguish between "experts" and "witnesses", both can be treated together for the purposes of the present study. The reader must also be reminded that there is in Continental systems no exact counterpart of impeachment of witnesses. Thus some problems that convictions present for impeachment purposes in American jurisdictions (see, *e.g.* State v. Blevins, 2 CrL 2502) do not arise in civilian legal systems.

[198] Arts. 34 & 42, P.C.

[199] Art. 31, P.C.

[200] Art. 25, P.C.

[201] Art. 221, Code of Criminal Procedure.

[202] Art. 324, subsec. 8.

[203] Sec. 161 P.C., §393, No. 2, §452, Code of Criminal Procedure.

[204] Sec. 26.

[205] Arts. 226 & 234.

as *arbitrators*.[206] The very broad formula used by the *Polish* Criminal Code[207] deprives the person convicted of certain crimes (mostly political crimes) of "*all rights to participate in the administration of justice.*" However broad this formula may be, it does not include testimonial incapacity, and incapacity to sue and be sued.[208]

VII

Disqualifications from Activities Independent of Employment

Under this heading, various disqualifications will be discussed which affect activities unrelated to employment. Thus, a person may be disabled from hunting or fishing, driving a car, possessing arms, competing in sporting events or engaging in a host of other activities.[209]

A. Hunting and Fishing:

As a result of certain criminal convictions, *administrative authorities* will not issue hunting and fishing licenses, or may withdraw the license. Provisions to this effect probably exist in most countries, but only a limited amount of specific information was available. A general authority to withdraw the mentioned licenses can be found in Section 17 of the *West German* Federal Game Statute. Cancellation of hunting licenses by administrative authorities was approved by the *Swiss* State Council (Conseil d'Etat) in a decision rendered on September 6, 1940. Under *Yugoslav* law, the "hunting card" will not be issued to persons convicted of "more serious" criminal offences.[210] In *France*, revocation of the hunting license is authorized by art. 381 of the Rural Code.

Upon conviction of certain offenses, criminal *courts* are sometimes authorized to revoke a license. In such a case, their authority exists parallel to the authority of administrative officials. Thus, under the Penal Code of *Ethiopia*, the judge may cancel the hunting or fishing license upon conviction of a grave or repeated criminal offense.[211] Such a general authorization regarding offenses not necessarily connected with hunting or fishing is rather rare. However, if the offense involved consists of a violation of fish and game laws, the authorization to withdraw the license is more common. Thus, *e.g.*, the *Swiss* judge may revoke the hunting license for a period of up to ten years on conviction of an offense against the Federal statute on hunting and protection of birds.[212] A similar provision exists with respect to fishing licenses.[213]

B. Right to Possess Weapons:

The right to possess and bear arms may be forfeited incident to conviction in a number of countries. While this forfeiture is in most systems clearly related to the potential danger of the former convict, in a number of countries this connection need not exist. Rather, the forfeiture is contained in sweeping degrading punishments (*e.g.*, loss of civic rights), or in some other way proves that it is primarily devised as a retributive sanction. It is probably a carryover from the days when the possession of weapons was a matter of social status and prestige.

The latter type of degrading forfeiture exists under *French* law and is entrusted solely to the criminal court. On conviction of serious crime, the prohibition to bear arms is mandatory and permanent.[214] With regard to less serious crime, it is optional and temporary.[215] Almost identical provisions will be found in the Penal Code of *Monaco*,[216] and similar provisions in *Belgium*[217] and *Luxembourg*.[218] Revocation by judicial decision is not widespread. In most countries, it is entrusted to the administration and a certain relationship between the forfeiture and the potential danger of possession of weapons must be ascertained.[219]

Issuing licenses is, of course, a monopoly of the administration. In contradistinction to the administrative revocation of licenses, issuance of licenses may sometimes be refused as a result of conviction even though there is no visible relationship between the conviction and fitness to possess weapons. Thus, under the statutes of various *Yugoslav* jurisdictions, the police will not issue licenses to persons convicted of certain exhaustively enu-

[206] Sec. 1032.
[207] Art. 45.
[208] In many codes and statutes, one can find, as a consequence of criminal conviction, an incapacity to be a witness to "public acts" (*e.g.*, legal documents like wills, etc.). *See Austria*, §26 P.C.; *Ethiopia*, art. 122, P.C.; *France*, arts. 34, 42, P.C.; *Poland*, art. 956, Civil Code; *Switzerland*, art. 52, Federal P.C.; etc.
[209] The legal restrictions on foreign travel have been discussed elsewhere. Disqualification from driving, if a professional driver is involved, takes on the meaning of an occupational disqualification.
[210] See PRAVNI LEKSIKON 433, Belgrade (1964).
[211] Art. 146, P.C.
[212] Art. 58 of the Statute of June 10, 1925.
[213] Art. 32, Federal Statute on Fishing.
[214] Art. 34, P.C.
[215] Art. 42, P.C.
[216] Arts. 35 & 39, P.C.
[217] Art. 31, P.C.
[218] Art. 31, P.C.
[219] *E.g.*, art. 14 of the *West German* Statute on Weapons.

merated offenses or sentenced to certain *punishments*.[220]

C. Participation in Sporting Events:

An unusual disqualification has been inserted in the *French* Statute of June 1, 1965, enacted for the purpose of preventing doping in sports. Upon conviction under this statute, the court may prohibit the offender from taking part in any sporting event, professional or otherwise.

D. Radio Amateurism:

In *West German* law, the license to operate a radio receiver-transmitter can be obtained only by persons without a criminal record.[221] Similar provisions are likely to exist in the laws and regulations of many other countries.

E. Driving License:

This is by far the most widespread and important license whose issuance, suspension or withdrawal can be affected by a criminal conviction.

A criminal record may in some countries affect the *issuing* of the license by the administrative authorities. Thus, in *Norway*, as a general statutory requirement, the applicant for the driver's license must be "worthy of trust and temperate". Also, submission of a certificate of good conduct is required. Hence, even a conviction of a minor offense (*e.g.*, disorderly conduct) may result in the refusal to issue the driver's license. Similar requirements are found in the *Swiss* Federal Statute on traffic of 1932. Even in the absence of such general statutory requirements, the courts or the administrative authorities may prohibit the issuance of a driver's license to a particular person as a result of a criminal conviction. However, since the prerequisites for the mentioned prohibition are the same as those for the withdrawal of a license, we will consider this question in discussing the latter.

1. Withdrawal of a driver's license is often ordered by the *criminal court*. Some countries provide for this measure specifically in their criminal codes.[222] Others rely on the broad measure (or punishment) of disqualification for certain professions and *activities*.[223] Sometimes relevant provisions are found in statutes dealing with road traffic.[224]

The usually encountered condition for the withdrawal of the license is conviction[225] by the court of an offense in connection with the driving of a motor vehicle (*e.g.*, *Canada*, *England*, *France*, *West Germany*, *Yugoslavia*, etc.). Sometimes, however, an additional variously formulated condition is required. All such formulations reduce to the finding by the court that further holding of the license would be dangerous (*e.g.*, *France*, *Germany*, *Yugoslavia*). Whenever this additional finding is required, the measure loses the character of a punishment for traffic violations and becomes a preventive non-penal measure. Less frequent are laws under which the license may be withdrawn although the offense of which a person is convicted is unrelated to road traffic. This is the case with the *Ethiopian* Penal Code under which the withdrawal of a driving license may be ordered upon conviction of any "grave or repeated offense."[226] In *France*, conviction of pandering can entail withdrawal of a driver's license, even though the offense is unrelated to the operation of a motor vehicle.[227]

Revocation of the license is usually optional with the court. This solution appears to be satisfactory because it enables the court to consider the particular circumstances of each case. Even repeated traffic offenses need not necessarily imply unfitness for the operation of a motor vehicle. Still, cancellation is sometimes *mandatory*. Thus, in *Finland* and *France* repeated convictions of drunken driving entail mandatory withdrawal. The law under some *Canadian* statutes is similar. A middle-of-the-road solution is provided by some *English* statutes and the *West German* Penal Code. Under some *English* statutes, recidivism in traffic offenses entails mandatory revocation of the license unless special reasons exist to the contrary.[228] Under the

[220] *See* PRAVNI LEKSIKON 590, Belgrade (1964).

[221] *See* 27 RIDP 348 (1956).

[222] *E.g.*, *Canada*, Criminal Code, art. 225; *Ethiopia*, art. 146, P.C.; *West Germany*, §§37 & 42m, n & o, P.C.; *Yugoslavia*, art. 61c P.C.

[223] *E.g.*, art. 29, *Russian* P.C.

[224] *E.g.*, *England*, Road Traffic Acts of 1930 and 1956; *Finland*, Decree on Automobiles; *France*, Ordinance of Dec. 15, 1958.

[225] The *West German* Penal Code attaches the revocation also to acquittals by reason of insanity (§42m). It should be noted that in addition to the suspension of a driving license as a non-penal measure, *West German* law also provides for a temporary (not to exceed three months) "prohibition from driving" as a collateral penalty for traffic offenses (§37 P.C.).

[226] Art. 146.

[227] Art. 335, P.C.

[228] Sec. 11, Road Traffic Act of 1930.

West German Code, conviction of certain offenses, such as drunken driving or hit-and-run offenses, creates a presumption that the convict is unfit for driving and that the license should be withdrawn. The presumption is, however, rebuttable.[229]

Even though a number of countries provide for the possibility of *permanent* revocation (*e.g., Ethiopia, Finland, West Germany*), it would seem that the majority of legal systems authorize only *temporary* withdrawal. The period is usually specified by statute (*e.g., Canada* and *France* set the maximum at three years, *Russia* and *Yugoslavia* at five). In *England*, however, the judge can set such period as he sees fit.

If the convicted person is not yet in possession of a license, the court may disqualify him from *obtaining* one. The regulations governing the imposition of this disqualification closely resemble those governing withdrawal, being but a substitute for the latter. Special problems arise in cases of foreign driving licenses, but this need not concern us here.[230]

2. Besides the withdrawal of licenses by the criminal judge, most countries provide also for withdrawal by *administrative authorities*. This parallelism sometimes creates conflicts.[231]

The usual pattern seems to be for the administration to have equal or somewhat less authority than the court (*e.g., Finland, West Germany, Yugoslavia*). However, in some countries just the opposite seems to be the case. In *Switzerland*, under the Federal Statute on Road Traffic of 1932, the police have authority to withdraw licenses for "bad reputation" and criminal records not necessarily related to the operation of motor vehicles.[232]

Upon conviction of drunken driving, the police in *Norway have* to withdraw the license for the minimum period of one year. If the offense is repeated within five years of the previous conviction, the driving license is automatically and permanently cancelled.

Only administrative withdrawal of driving licenses exists in *Sweden*.

[229] Sec. 42(m), P.C.

[230] Specific provisions to this effect will be found in the *Yugoslav* and *West German* Penal Codes and in the European Convention on the Repression of Traffic Offences.

[231] *See* STEFANI & LEVASSEUR, *op. cit. supra* note 103, at 336.

[232] The newspaper "La Suisse" reported on June 17, 1956 that in 1955 licenses were revoked for bad reputation and unrelated criminal records in 135 cases.

VIII

Consequences Affecting Property, Contracts, Inheritance, Family and Lawsuits

A. Management of One's Estate:

Convicted persons are severely incapacitated in those countries which still retain the *French* idea of the so-called *legal interdiction* (interdiction légale). As a result of this interdiction, the legal status of convicts closely resembles that of legally insane persons. They cannot enter into contracts, transfer property,[233] sue nor defend against a claim. In short, they are *deprived of the right to manage their estate*, and a guardian is appointed for them. However, the exercise of their family rights, as well as their inheritance rights, are not affected. In most countries which retain the legal interdiction,[234] the incapacity does not outlive the release from the institution. Even so, the sweeping incapacity is hard to justify in the light of modern correctional thinking. It is also not a necessary incident to imprisonment. Thus, it should come as no surprise that it has of late come under sharp attack.[235]

A different broad incapacity of convicted persons results from another *French* idea, the so-called *"twofold incapacity to gratuitously transfer and acquire property"*.[236] The convict stricken with this incapacity cannot take property without consideration, be it by way of donation or by testate or intestate succession. Nor can he transfer property gratuitously, be it by way of gifts or by will. Wills made prior to incapacitation are null and void. This incapacity is an automatic consequence of life sentences. However, if the sentence is commuted, the incapacity may outlast the release from the institution.

"Twofold incapacity" has been criticized even in those rare countries which still retain this legal child of civil death. The fact that it affects the convict's family is alone sufficient to prove its inconsistency with contemporary criminal policy.

[233] In *Belgium* and *Luxembourg*, they can make a valid will (art. 22, P.C.).

[234] For the list of countries with legal interdiction, see the historical part of the present study.

[235] See Resolution (62)2 on electoral, civil and social rights of prisoners passed by the Council of Ministers of the Council of Europe [Recommendation no. 195 of February 1, 1962].

[236] For countries with the twofold incapacity, see the historical part of the present study.

B. Incapacity with Respect to Inheritance:

Some consequences of conviction affect the *capacity to inherit.* Most of them are today rather limited and seem acceptable.

Thus, under the laws of succession of most civil law countries, conviction of an offense against the decedent entails "unworthiness to succeed" resulting in incapacity to take under a will or on an intestacy. Sometimes very broad language is used to describe grounds of incapacity. To take an example, *Russian* law incapacitates "anyone who has promoted the inheritance through unlawful acts directed against the decedent or any of his heirs."[237] The Civil Codes of *Austria,*[238] *Czechoslovakia*[239] and *Poland*[240] speak of a "criminal offense" against the decedent. *West-German, French* and *Swiss* law are more specific and declare as incapacitated only persons convicted of having killed the decedent or attempted to kill him.[241] West German law adds forgery in regard to the will to the incapacitation grounds.[242] The *Yugoslav* statute on inheritance also proclaims as unworthy to succeed those who fled the country in order to escape conviction of a grave crime.

Conviction of crime may, in addition, be a ground for the denial of the so-called compulsory portion.[243] Thus, certain relatives may be deprived by the testator of what is reserved by law as their portion of the estate. Here, grounds are not limited to offenses against the testator. *Polish* law broadly stipulates that relatives "flouting social values" may be deprived by the testator of their reserved portion.[244] *Yugoslav* law permits disinheritance on conviction of offenses against the testator, his spouse, children and parents, as well as on conviction of some *political offenses.*[245] *Austrian* law allows the testator to disinherit only persons sentenced to life or twenty years imprisonment.[246]

[237] Art. 531, Civil Code.
[238] Sec. 540.
[239] Sec. 469.
[240] Art. 928
[241] *German* Civil Code, §2339; *French* Civil Code, Art. 729.
[242] Sec. 2339, No. 4 Civil Code.
[243] On the concept of compulsory portion, see PLANIOL & RIPERT, TRAITÉ ELEMENTAIRE DE DROIT CIVIL, 12th ed., Vol. 3, Pt. 2, no. 3047 [Engl. transl. by the Louisiana State Law Institute].
[244] Art. 1008, Civil Code.
[245] Art. 47, Statute on Inheritance.
[246] Sec. 768, Civil Code.

C. Donations:

Conviction of a crime against the donor may entitle the latter or his successors to *revoke a donation.*[247]

D. Termination of Contracts:

Conviction of certain crimes may entitle the employer to *rescind the employment contract.* Such an effect of conviction has been found only in *Greek* law.[248]

E. Marriage:

Frequently, conviction of crime may affect *marriage.* The commonest legal effect is that of constituting a *ground for divorce.* As a rule, the ground is peremptory, and the court has no discretionary power to refuse to grant the divorce.

By *French* law, conviction of a serious crime is a *divorce ground,*[249] and similar formulas will be found in *Belgium, Italy, Japan, Norway* and many other jurisdictions.[250] More specific is the language of the *Yugoslav* Fundamental Statute on Marriage whereby only convictions of political offenses and those involving moral turpitude, as well as sentences exceeding three years, constitute a divorce ground. However, some marriage laws do not refer specifically to criminal convictions of a spouse as divorce grounds. For instance, the *West German* Statute on Marriage very generally speaks of "violations of marital duties causing irreparable disruption of marriage."[251] However, by a unisonous agreement of *German* doctrinal and judicial authority, one such "violation of marital duties" is commission of a criminal offense.[252] Conviction of an offense may also be a *ground of annulment.* Thus, to take an example from *Yugoslav* law, if one of the spouses at the time of celebration was ignorant of the criminal conviction of the

[247] *E.g., Austria,* Civil Code §948; *France,* Civil Code art. 955; *Poland,* Civil Code arts. 898–99; *West Germany,* Civil Code §530.
[248] *See* 29 RIPD 83 (1958).
[249] Art. 232, Civil Code.
[250] "The stigma flowing from condemnation to a serious penalty falls indirectly upon the spouse of the convict. It is proper that this spouse, thus affected by the unworthiness of the convict, should be able to obtain the rupture of the marriage and have nothing more in common with such a spouse." PLANIOL & RIPERT, *op. cit. supra* note 243, Vol. 1, Pt. 1, no. 1171.
[251] Art. 43.
[252] See BIETZKE, FAMILIENRECHT 105, München, Berlin (8th ed., 1959).

other, subsequent discovery represents a ground of annulment if it disrupts marital harmony.[253]

The last possible effect of conviction on marriage is restricted to conviction of adultery. Conviction of adultery may operate as an impediment to subsequent marriage between the adulterers. This marital impediment of Roman origin (Lex Julia de adulteriis coercendis) was inserted in the Napoleonic Code,[254] but abolished in 1904. It still exists in some Civil Codes.[255]

F. Parental Power:

Though variously organized, most jurisdictions provide for the possibility of ordering forfeiture of *parental powers* incident to certain convictions.[256] If the crime involved is directed against the child or entails other violation of parental duties, the forfeiture, provided it is not automatic, seems appropriate. However, some countries go beyond that and authorize forfeiture even when the conviction is unrelated to violation of parental duties. Thus, the authority of the *Swiss* judge is not limited to decreeing forfeiture of parental powers when the offense involves violation of parental duty.[257] Even if there is no such violation, but the parent seems to the judge "unworthy" to exercise parental power, the court is empowered to suggest to the guardianship authority that it order deprivation of parental rights. Very rigid and harsh is the deprivation of parental powers flowing from the imposition of the punishment of "civil interdiction" provided in art. 43 of the *Spanish* Penal Code. The forfeiture may be totally unrelated to the convict's fitness to exercise parental powers. On the other hand, the fact that the prisoner may be prevented from exercising parental power should only lead to the appointment of a temporary guardian as provided in some jurisdictions.

Usually the decision to deprive of parental rights is reserved for the welfare agency, guardianship authority or the family courts. Sporadically, the criminal courts are empowered to order forfeiture as an additional *punishment*.[258] But the latter systems seem to be progressively discarded.

G. Guardianship:

Another disqualification in the area of family relationships is that of forfeiture of the right to be a guardian.[259] In countries like *France, Greece, Spain, Switzerland* and *West Germany*, this forfeiture is the result of the loss of civil rights. Often it is independent of this sweeping penalty and not provided by criminal law at all. Rather, it is provided by legislation on family law, and pronounced by guardianship authorities or family courts.

H. Family Council:

In jurisdictions which adopted the institution of the so-called *family council*, the disqualification from deliberating and voting in the council is a frequent consequence of criminal convictions.[260]

I. Capacity to Sue and Defend Against a Claim:

This capacity was often suspended or forfeited in the old days. Since the reform years of the nineteenth century, it has very seldom been a consequence of conviction. Nowadays the convict (imprisoned or not) possesses the right to the court process. If he is not in the position to exercise his right in person, he can act through a representative. Only sporadically will we encounter this anachronistic procedural incapacity. It follows, of course, from the "legal interdiction" during imprisonment and will be found in all old countries that still retain this broad incapacity to manage one's estate. Other than that, procedural incapacity was found in *Switzerland*. Laws of some *Swiss* cantons attach this incapacity to the imposition of the loss of civil rights.[261]

[253] Art. 45, Fundamental Statute on Divorce.

[254] Art. 298.

[255] *E.g., Greece*, art. 1363; *Mexico*, art. 156; *West Germany*, §6 Statute on Marriage; etc.

[256] As to the various systems of deprivation, see *Spain* (art. 43, P.C.); *West Germany* (art. 1676, Civil Code); *Japan* (art. 834, Civil Code); *Greece* (art. 1525, Civil Code); *Russia* (art. 31 of the Code of 1926, now superseded by the Code of 1960); *Switzerland* (art. 53, Federal Penal Code); *France* (art. 61 et seq., statute on the forfeiture of parental powers). In *France*, the convicted husband can also forfeit the father's preponderance in the exercise of parental power (art. 213, Civil Code).

[257] Art. 53, P.C.

[258] *E.g., Columbian* P.C., art. 45; *Russian* P.C. of 1926; *Spanish* P.C., art. 43; *Swiss* P.C., etc.

[259] Both civil law forms of guardianship (tutorship and curatorship) may be affected.

[260] On the family council *see* PLANIOL & RIPERT, *op. cit. supra* note 243, Vol. 1, Pt. 2, No. 1770. The disqualification to deliberate and vote in the family council can be found in the penal codes of *France* (arts. 34, 42), *Greece* (art. 1622), *Spain* (art. 43) and *West Germany* (§34). However, in some of these jurisdictions family councils are practically obsolete.

[261] *E.g.*, art. 2, Statute on Civil Procedure of the Canton Geneva.

REMOVAL OF ADVERSE EFFECTS OF CONVICTION

There are two basic ways in which the convicted criminal can, upon execution of the sentence pronounced by the court, obtain release from various adverse legal effects resulting from conviction. Relief can be obtained through various *clemency procedures* which are not specifically designed for this purpose but may sometimes serve it. The other avenue of relief is various *reinstatement procedures* specifically designed for the restoration of rights and capacities, following the execution of the sentence. In this last part of the present study we shall first briefly consider some clemency procedures, and then turn to the more detailed discussion of specific reinstatement procedures.

A. Clemency Procedures

Probably the oldest function of clemency was to reduce the harshness of certain direct punishments. It was granted in individual cases as an act of compassion or special favor. Much later, it came to be used also as a safety valve for redress against wrongful convictions after all legal remedies against the criminal judgment were exhausted. This oldest form of clemency, usually called *pardon* (grâce, Begnadigung), traditionally was the prerogative of the head of state or some other high executive official. In its pristine form, it is still found in some contemporary jurisdictions.[262] Since such clemency only affects the sentence pronounced by the court and never removes other consequences of conviction, it should not concern us here.

A more modern variant of pardon exerts a variety of effects, some of which extend beyond the court ordered punishment. Depending on the discretion of the person empowered to grant pardon, the latter can result in immunity from prosecution, complete or partial exemption from the execution of the sentence, substitution of a milder sentence, or annulment of various collateral punishments and other consequences of conviction. This type of pardon will be found, for instance, in *Belgium*,[263] *Japan*,[264] *Soviet Union*,[265] *West Germany*,[266] and *Yugoslavia*.[267]

Another form of clemency adopted by most civil-law jurisdictions and unknown in the world of common law, is *amnesty*. In contradistinction to pardon, amnesty does not relate to one or more individuals, but rather to a generically determined group of convicts (*e.g.*, all persons convicted of a specified offense during a year, etc.). Also, while pardon is an executive prerogative, amnesty is—at least in modern times—a prerogative of the legislature.[268] In many jurisdictions these are the only differences between the two forms of clemency.[269] Jurisdictions that still limit the effects of pardon to the sentence imposed upon conviction, typically establish an additional difference between amnesty and pardon. In such jurisdictions, pardon does not affect any consequences of conviction beyond the main punishment, while amnesty may annul a variety of the former.

Thus, as we can see, adverse effects flowing from a criminal judgment in civil law countries can be removed either by amnesty or by some forms of pardon.

What adverse effects beyond the court ordered penalties can be affected by acts of clemency is not always clear. Of course, all consequences classified as collateral punishments and predicated on the "guilt" of the convict can be removed.[270] However, as regards non-penal measures, imposed because of the future dangerousness of the convict,[271] the question has not been finally settled. The prevailing view seems to be that these should not be affected by acts of clemency.[272] Thus, the classification of criminal law measures into penal and non-penal takes on a crucial importance. Another area of ambiguity is the effect of clemency on various collateral consequences not contained in the criminal judgment (*e.g.*, professional disqualifications, consequences regarding capacity to inherit, marriage impediments, etc.). While authorities in some countries claim that all consequences of conviction should be annulled (*e.g.*, the Penal Codes of *Ethiopia*, *Spain* and *Yugoslavia*), authorities in others would discriminate among various collateral con-

[262] *E.g.*, *France*, *Italy*, *Ethiopia*, etc.
[263] *See* art. 87, P.C.
[264] *Compare* 27 RIPD 314 (1956).
[265] ROMASHKIN, AMNESTIIA I POMILOVANIE V SSSR, Moscow (1959).
[266] MAURACH, *op. cit. supra* note 103, at 725.
[267] See art. 85, P.C.
[268] Distinctions between pardon and amnesty are of late somewhat blurred in *French* law. *See* STEFANI & LEVASSEUR, *op. cit. supra* note 103, at 437.
[269] *E.g.*, *West Germany*, *Yugoslavia*, the *Soviet Union*, etc. This is usually the case with countries which have adopted the modern variant of pardon.
[270] *E.g.*, the punishment of loss of civil rights.
[271] *E.g.*, revocation of driver's license.
[272] This is the view in *Germany*. MAURACH, *op. cit. supra* note 103, at 728. The *French* case law seems occasionally to vacillate. STEFANI & LEVASSEUR, *op. cit. supra* note 103, at 440–42.

sequences.[273] Clemency leads in some jurisdictions to the expungement of the criminal record (*e.g.*, by way of amnesty in *Ethiopia*, *France*, *Japan* and *Spain*), while in others it has no such effects (*e.g.*, *Greece*, *West Germany*,[274] and *Yugoslavia*). It is almost universally accepted that rights acquired by third persons on the basis of the criminal conviction should remain unaffected by acts of clemency.[275]

The common law lawyer will perhaps be surprised to find that the importance of acts of clemency is in almost all civil law jurisdictions overshadowed by special procedures for the reinstatement of former convicts.[276] Only in countries strongly influenced by the *English* legal system clemency procedures remain the only avenue of relief. Thus, in *Israel* the only possible way to restore rights and capacities lost on conviction is by a full pardon granted by the Head of State.[277] This is also the case in many *United States* jurisdictions.

B. Reinstatement Procedures

Reinstatement procedures may be *general* or *special*. The latter provide relief only for a particular collateral effect of a criminal judgment (*e.g.*, revocation of driving licenses). General reinstatement procedures[278] are devised for the purpose of enabling the convict to obtain, following execution of the sentence, a more or less comprehensive release from various legal effects flowing from the judgment. Usually they also provide a way for the former convict to obtain a general certificate of restoration.

Special reinstatement procedures are closely linked to particular disabilities and disqualifications. They are rather varied and often complex even within a single jurisdiction. Since their discussion would carry us into much technical detail, we shall not consider them here. Rather our attention will be focused on general reinstatement procedures.

Neglecting a few isolated examples of general procedures for reinstatement,[279] the roots of the continuous modern development are usually found in the so-called "lettres de réhabilitation" issued by the French kings during the *Ancien Régime*. By virtue of these letters "good reputation and renown" were restored to persons struck with infamy as a result of being convicted of a crime. This reinstatement device, often confused with various other forms of clemency, was significant for the latter development in that it was *specifically* designed to provide relief for collateral effects of conviction.

Following the fall of the *Ancien Régime*, the view gradually evolved that in order to prevent relapse into crime, the former offender *should* under certain conditions be released from most collateral effects of conviction and be given the right to a general certificate of rehabilitation. Thus, the idea of clemency, royal or otherwise, was slowly pushed aside and modern reinstatement ideas crystalized. However, legislation on the matter often changed in nineteenth century *France*. Following the break-away from clemency, reinstatement was at first organized as a *judicial procedure* (réhabilitation judiciaire) and granted by court decision. Limited originally to relief for collateral punishments imposed for serious crime, judicial reinstatement later provided relief for various legal effects of other convictions. After the introduction of the keeping of criminal records,

[273] *See, e.g.*, MAURACH, *op. cit. supra* note 103, at 728 for the solution of *West German* law. According to this doctrinal authority, marital impediments for adulterers, *e.g.*, are not affected.

[274] *West Germany* has, however, a *special* type of pardon by the Ministry of Justice leading to the expungement of the record.

[275] Indemnification of the victim is an illustration in point. In this respect, the latest developments in *French* case law may constitute an exception. STEFANI & LEVASSEUR, *op. cit. supra* note 103, at 438 *ab initio*.

[276] The fact that the Penal Codes of *Finland*, *Holland* and *Portugal* contain no provision for reinstatement (réhabilitation) must be considered much of an exception.

[277] Reuven v. The Head and Members of the Law Council, 5 P.D. 7, 37; Attorney General v. Mattana (F.H.), 16 P.D. 430.

[278] The technical term for them in civil law jurisdictions is "réhabilitation". Rarely this term is used to express *cancellation of wrongful convictions*. To the best of our knowledge this is the case only in the *Soviet Union* and *Portugal* (art. 126, P.C.).

[279] The idea of restoring to the ex-convict the legal situation existing prior to conviction can be traced all the way back to the Roman "restitutio in integrum", used, however, for a variety of non-penal purposes as well. The Penal Code of the Austrian Empress *Maria Theresa* (1768) contains two embryonic ideas of reinstatement, one as an act of clemency, the other by operation of law. Automatic reinstatement in the plenitude of rights was contemplated by the penal Codes of *Leopold of Tuscany* (1786) and Maria Theresa's son Emperor *Joseph II* (1787). See Part I of this paper, 59 J. CRIM. L., C. & P.S. 347, at 352. All these legislative attempts were short-lived.

Those interested in history may find an old doctrinal view, advocating reinstatement following a period of time after execution of punishment, in BLANCUS, PRACTICA CRIMINALIS 160, Venice (1556). Most historical information may be found in the excellent work by Delaquis and Polec, *Materialien zur Lehre von der Rehabilitation*, Berlin (1905).

reinstatement also affected the annulment (expungement) of conviction. Finally, in 1899, *reinstatement by operation of law* (réhabilitation legale) made its way into *French* law.[280]

French law on the matter was, directly or indirectly, a nursery for many Continental European jurisdictions. But, since the transplantation took place at various stages of the development of French law, imported ideas differed. Blended with domestic additions, they account for a great variety of reinstatement procedures in contemporary criminal law.

On one point, however, most jurisdictions seem to be in agreement. If more than one criminal judgment was rendered against a person, general release cannot be ordered from consequences flowing from a single judgment. Reinstatement wil be granted only when statutory requirements have been met with respect to all criminal judgments rendered.[281] Reinstatement procedures vary with respect to the *manner* of *reinstatement* and in terms of the *scope of relief*.

1. *Manner of Reinstatement*

a. Reinstatement by court decision. In many jurisdictions, the decision to restore rights and capacities lost on conviction is rendered by the court in a special procedure. The prerequisite for reinstatement is that certain statutory conditions be met. Two conditions found in all jurisdictions are (1) lapse of a period of time following execution of the sentence, and (2) proof of the ex-convict's good behavior. Sometimes the requirement is added that the damage caused by the offense must be made good. The court does not commence the reinstatement procedure of its own initiative; the former offender, sometimes also the public prosecutor, must make the appropriate motion to the court.

Only this type of reinstatement exists in, *e.g.*, *Brazil*, *Colombia*, *Ethiopia*, *Greece*, *Italy*, *Poland*, *South Korea*, *Switzerland* and *Turkey*. It is also the reinstatement procedure under the widely debated Draft *West German* Penal Code of 1962 and the Model Penal Code of the American Law Institute.

Many jurisdictions adopted judicial reinstatement as well as reinstatement by operation of law. This arrangement was adopted, *e.g.*, by the penal codes of various republics of the *Soviet Union*. It will also be found in the codes of criminal procedure of *France*[282] and *Egypt*.[283]

b. Administrative reinstatement. In a smaller number of jurisdictions the offenders must apply for restoration of lost rights and capacities to the Executive or some administrative board. Thus, in *Spain* reinstatement is granted by the Ministry of Justice,[284] and under the penal codes of *Cuba*[285] and *Iceland*[286] reinstatement is granted by the president of the republic. The now repealed *Norwegian* statute of 1897 vested the power of reinstatement for certain crimes in the attorney general. Administrative reinstatement procedures can also be found in a number of American jurisdictions.[287]

c. Reinstatement by operation of law. Restoration procedures depending on judicial or administrative decision are regarded by some as superior to automatic reinstatement. They feel that restoration of rights and capacities should be in the nature of a reward for a law abiding life. Others claim that restoration procedures are too complicated and too costly, thus accessible only to people of means.[288] On an empiric level, studies have revealed that many former convicts who meet the statutory requirements for reinstatement seldom apply for restoration of rights; Checking whether they deserve restoration involves an investigation with all the attending dangers that the criminal antecedents will be called to the attention of the public.[289]

Although the scholarly dispute still goes on, many jurisdictions have adopted automatic restoration, notably in the area of less serious crime.[290] Restoration follows automatically with

[280] Details on the development of the "réhabilitation" in *France* can be found in DONNEDIEU DE VABRES, *op. cit. supra* note 102, at 561.

[281] Only rarely will partial reinstatement be possible (*e.g.*, in relation to unrevoked suspended sentences). Rather unique is the approach of the *Belgian* law, favoring partial rehabilitation. *See* CONSTANT, MANUEL DE DROIT PÉNAL, 885 Liége (1956). On latest developments *see* Meeus, in *Revue (belge) de droit pénal et de criminologie* 607 (1964–65).

[282] Arts. 782–99.

[283] Arts. 537 & 543.

[284] Art. 118, P.C.

[285] Code of 1936, art. 107.

[286] Code of 1940, art. 85.

[287] In contradistinction to clemency, reinstatement is here conceived as something the former offender *deserves* rather than as an *act of compassion*.

[288] *Compare* CHIKVADZE, SOVETSKOE UGOLOVNOE PRAVO (Soviet Criminal Law) 346 (Moscow, 1959).

[289] *See* Strahl, *Les Conséquences Légales, Administratives et Sociales de la Condamnation Pénale, Rapport General*, 28 RIDP 581 (1957).

[290] *E.g.*, *Bulgaria*, *Egypt*, *France* and after the reform years beginning in 1958, the *Soviet Union*.

the lapse of a period of time from the execution of sentence. The heavier the sentence, the longer the period. Before the period has expired, the convict can in some jurisdictions (*e.g., Russia*) obtain relief by judicial reinstatement.

A smaller number of jurisdictions have automatic restoration only. This is the situation in *Japan, West Germany* and virtually in *Austria.*[291] More recently the adoption of automatic restoration has been recommended by the VIIth International Congress on Criminal Law.[292]

2. *Scope of Reinstatement*

a. The narrow prototype of reinstatement. When it first appeared in *France,* reinstatement only had the limited effect of restoring rights and capacities lost through the imposition of the sweeping punishment of loss of civil rights.[293] The person who recovered his civil rights was considered "rehabilitated". This prototype found early acceptance in a number of jurisdictions (*e.g., Greece,* some *Scandinavian* countries, *Switzerland,* etc.). When the collateral punishment of loss of civil rights was either rejected (*e.g., Denmark, Sweden*) or else broken down into a variety of independent collateral punishments (*e.g., Norway*), reinstatement conceived in this narrow way was also discarded. It lost its *raison d'être.*

This narrow concept is still often found in legal writing.[294] Less frequently it is contained in legislative enactments.[295] However, the reader interested in cross-jurisdictional comparisons should beware: in some systems the ex-convict is considered as "rehabilitated" (reinstated), although he remains shackled with a variety of legal disabilities and notwithstanding the fact that his conviction appears in the criminal record. The explanation lies in the fact that in the particular system the narrow meaning of reinstatement prevails.

b. The broad type of reinstatement. Since the reforms begun in the last decades of the nineteenth century, the original scope of *French* reinstatement has been considerably increased. The now effective article 794 of the French Code of Criminal Procedure proclaims that "réhabilitation" vacates the judgment of conviction and puts an end to all disqualifications flowing therefrom.

This language should not be taken to mean that the ex-convict returns to the same legal position which he held before the conviction. Reinstatement has only prospective operation, and consequently the former offender will not be restored to lost offices, returned forfeited medals, etc. Also, security measures resulting from conviction are not affected and the vacated conviction is not removed from the criminal records. Still, the effect of reinstatement is rather encompassing: it covers all *punitive consequences* of conviction, even those which are not contained in the criminal judgment itself (*e.g.,* conviction as a divorce ground). Reinstatement also affects *criminal records.* This calls for somewhat detailed explanation.

Under *French* law each individual criminal file contains three separate sheets (so-called "bulletins"). The first sheet is reserved for the judicial authorities, the second sheet for various administrative officials and agencies, and the third sheet serves as a basis for extracts from the criminal record. Following reinstatement, the conviction must not be mentioned in any extracts from the record. Nor can information on convictions covered by reinstatement be obtained from the second sheet. These two effects of reinstatement are, of course, of crucial importance. As long as the former convict cannot obtain a certificate of a virgin record, he remains handicapped in a variety of ways and is "reinstated" only in a Pickwickian sense. Judicial authorities will, however, be able to obtain information on convictions covered by reinstatement. Yet, a note will be inserted into the first sheet indicating that the judgment has been vacated. The main result of this vacation lies in the fact that the cancelled judgment cannot be used as a basis for adjudication of recidivism. In a way a *legal fiction* is created that the ex-convict has a clean slate.[296]

[291] The *Austrian* system appears at first blush to be middle of the road between judicial and automatic restoration. Reinstatement is pronounced by the court, but the court has no choice but to order restoration after a period of time. See RITTLER, LEHRBUCH DES OSTERREICHISCHEN STRAFRECHTS, Allgemeiner Teil, 2d ed., at 283 *et seq.* (1954).

[292] *Compare* 70 *Zeitschrift fur die gesamte Strafrechtswissenschaft* 42 (Mitteilungsblatt) 1958.

[293] The reader will remember that various occupational disabilities were unknown and that criminal records in the modern sense had not yet been adopted.

[294] *See* Strahl, *supra note* 289, at 583. Many participants to the VIIth Congress of Penal Law in Athens (1957) shared this view.

[295] *See,* however, art. 66 of the *Greek* P.C. and art. 113 of the *Columbian* P.C. The *Swiss* "rehabilitation stricto sensu" is actually the prototype described *supra. See* THORMAN & OVERBECK, DAS SCHWEIZERISCHE STRAFGESETZBUCH 234.

[296] *French* law on the matter is contained in arts. 782–99 of the Code of Criminal Procedure.

In sum, the modern *French* system of reinstatement has three principal effects: it removes disqualifications flowing from conviction, it causes omission of the conviction from any extracts from the criminal record, and it creates in possible future prosecutions a legal fiction that the reinstated person has not been convicted.

This broad type of reinstatement has been adopted by a considerable number of jurisdictions. Suffice it to mention *Austria*, *Egypt*, *Italy*, *Japan* and *Ethiopia*. Article 245 of the *Ethiopian* Penal Code seems on the surface to go as far as any other legal provision in restoring the prisoner to the status of a non-convicted person. It reads as follows:

> Reinstatement, since it cancels the sentence, shall produce the following effects:
> (a) the convicted person is relieved, for the future, of any forfeitures of rights or privileges, incapacities and disqualifications and recovers the capacity to exercise his civic, family and professional rights;
> (b) the sentence shall be deleted from his Police record and for the future be presumed to be non-existent;
> (c) a reproach referring to an old conviction made either by ill-will or any other reason shall come under the provisions of criminal law regarding defamation, and the defences based upon justification or public interest shall not be admissible.

However, for a period of five years following reinstatement, the convict's position is precarious. If within that period of time a fresh sentence is imposed upon the reinstated person, reinstatement is revoked, and the original sentence taken into account in connection with a new prosecution.[297]

c. Reinstatement limited to the cancellation of conviction. Under this model, restoration of rights and capacities occurs, if at all, prior to the cancellation of the conviction from the criminal record and, as a rule, in a piecemeal fashion. Various disabilities come to an end by virtue of separate court decisions, or through the lapse of different periods of time. Special restoration techniques are not even called reinstatement in the technical sense. Rather, the essence of reinstatement is the subsequent cancellation or expungement of conviction. While the word reinstatement (réhabilitation) is often used in this connection (*e.g.*, in *Spain*, *Switzerland* and *West Germany*) it is largely a misnomer.

It is said that under this model the conviction is "cancelled" or "expunged". This should not be taken literally since the notice of conviction is not actually removed from the criminal record. Instead, the cancellation clause is entered and the ex-convict is entitled to a virgin extract from the record. However, the cancelled conviction can be taken into account for certain purposes, usually for the purpose of establishing a history of prior convictions.

Cancellation of the conviction takes effect either automatically after the lapse of a statutory period of time (*e.g.*, *West Germany*), or by administrative (*e.g.*, *Spain*) or court (*e.g.*, *Bulgaria*, *Italy*, *Poland*) decision. Sometimes there will be a combination of automatic and decisional vacating. Thus, under the *Russian* system most convictions are cancelled automatically, but those entailing the heaviest sentences are vacated only upon court decision.[298]

By *West German* law the ex-convict is entitled to a clean extract from the record for official and non-official use. Except in court proceedings and in his relations with the public prosecutor during criminal procedure, he is also justified in stating that he has not been convicted of crime. In subsequent proceedings, vacated convictions will be considered for the purpose of fixing the penalty, establishing the capacity of a witness to take the oath, etc. Technically, however, the former offender will not be considered a repeater and criminal statutes presupposing recidivism are not applicable to him.[299]

In *Russia* vacated sentences are said on principle to be considered as non-existent and the ex-convict is not considered as having a record. Cases have arisen, however, in which cancelled convictions were taken into account for the purpose of assessing the punishment[300] and ascertaining eligibility for amnesty.[301]

In *Spain*, vacated sentences are used to determine the so-called special recidivism.[302]

[297] Revocation of reinstatement is also possible in *Italy*. See art. 178, *Italian* P.C.

[298] Art. 57, P.C., RSFSR.

[299] *See* MAURACH, *op. cit. supra* note 103, at 632.

[300] *Compare* Bulletin of the Supreme Court of RSFSR 1962, no. 11, at 11 (Taskaev case).

[301] *Compare* Bulletin of the Supreme Court of USSR 1959, no. 3, at 38 (Zamaskhaev case).

[302] Art. 118, P.C. In the criminal law of the civilian system, special recidivism means relapse in the *same*

d. The type of reinstatement under Yugoslav law. A further type of reinstatement has been provided by the *Yugoslav* Penal Code following the amendments in 1959. From a practical point of view its results come close to those under the immediately preceding type. The technical organization and labeling are, however, quite different.

General release from various adverse legal effects stemming from conviction can only be obtained by court decision after the lapse of at least three years from the day on which the sentence has been executed.[303] If reinstatement is not obtained in this general fashion, relief is provided only for specific adverse effects (*e.g.*, lapse of time for some consequences, judicial decision for others, etc.). But, after the lapse of ten years following release from prison, all adverse effects come to an end. This is a result of the facts that no collateral consequence provided by statute can last longer than ten years[304] and that collateral sanctions imposed by the court (even of a non-punitive nature) can never be imposed for a term longer than ten years following release.

Problems of criminal records are completely divorced from reinstatement. Sentences to imprisonment for terms exceeding three years always remain in the record.[305] All other criminal judgments of conviction are expunged after a statutory lapse of time.

Even more so than under the preceding systems, expungement has a Pickwickian quality. The conviction is, of course, not removed from the record, only the accessibility of information from it is drastically limited. As a practical matter, it can be obtained only by the courts and law enforcement agencies in connection with a new criminal prosecution.[306] Moreover, and in contradistinction with the systems in which the conviction is vacated, the "expunged" conviction is never presumed, for the purposes of criminal procedure, to be non-existent. It can, thus, be a basis for the adjudication of recidivism.

type of crime. For details on cancellation of the sentence under *Swiss* law see Logoz, *Commentaire du Code Penale Suisse*, Partie Generale, at 314 et seq. (1941).

[303] Art. 87, P.C.

[304] Art. 37a, P.C.

[305] This does not mean that information is freely accessible. See text accompaning notes 101–23 *supra*.

[306] Information can also be obtained if it is indispensable to ascertain whether a statutory collateral consequence of conviction is still effective. Collateral consequences can sometimes last for ten years following release, while the expungement will, under certain circumstances, take place five years after the execution of sentence. In practice this situation will seldom result in disclosure of a conviction with the possible exception of professional disqualifications imposed by the court.

Conclusion

In the historical part of this study, we have learned that the sweeping penalty of loss of civil rights seems to be slowly passing to the museum of juridical antiquities. We have further seen that the movement is afoot to limit, or perhaps discard, punitive disqualifications stemming from criminal judgments and to replace them by disqualifications of a non-punitive nature when so required by utilitarian interests. This development has lately exerted an influence on procedures devised for removal of adverse consequences imposed on conviction.

The usefulness of *general reinstatement* is increasingly questioned. If disqualifications are imposed to counter a danger emanating from the offender, or in order to protect another public interest, then these disqualifications should be removed only when the reasons prompting their imposition have ceased to exist. The removal of each disqualification should be considered on its merits by competent bodies or persons. General removal of legal restrictions imposed on conviction makes sense only in the original context of punitive collateral consequences. The latter are predicated on the idea of inflicting harm for evil done, rather than preventing the offender from engaging in criminogenic activities, protecting the dignity of an office, or similar utilitarian grounds. With regard to the problem of criminal records, it is argued that judgment entered into the records should never be presumed to be non-existing for the purposes of a new criminal prosecution. If prior records cannot legally be used as a basis for the adjudication of recidivism, as well as in many other aspects in which they are legally relevant, the criminal judge can easily be frustrated in his attempts to apply the most suitable criminal law sanction.

This train of thought has led some jurisdictions to reject general reinstatement procedures.[307] Today no general reinstatement (réhabilitation) exists in *Scandinavian* countries which, having no general provisions on the restitution of rights and capacities, joined those jurisdictions, mostly in the common law orbit, that never developed general reinstatement procedures. It must, however, be

[307] Also specific restorations by operation of law were eliminated or curtailed.

remembered that *Denmark* and *Sweden* totally rejected punitive consequences of conviction, while *Norway* has drastically reduced their number.[308] Inasmuch as a jurisdiction still retains punitive collateral consequences of conviction, some sort of general reinstatement procedure seems still to be worth considering.

[308] The debatable feature of the *Scandinavian* system remains the arrangement whereby the former offender is always entitled to an extract from the record. Since the latter is never "expunged", there is no end to the social consequences attached to the failure to produce a "clean slate". Many *Scandinavian* lawyers seem to be acutely aware of this failing. *See* Strahl, *supra* note 289, at 581 *in fine;* Sveri, 28 RIDP 364.