ENGLISH STUDIES IN CRIMINAL SCIENCE

SWISS CRIMINAL LAW (Continued)

PART III.

21. In what cases and to what extent can criminal legislation operate retrospectively? If so, what instances of this have there been in the period 1920-1939?

The Swiss Criminal Code applies to all crimes and medium offences which have been committed after the Code had come into force. If a crime or medium offence has been committed before it had come into force, but if the trial takes place after it had come into force, the law which is more favourable to the accused must be applied (Article 2 StGB). As far as indeterminate sentences (*measures de sûreté, Sicherungsmassnahmen*) are concerned, their nature excludes the question whether the law which is more favourable to the accused must be applied; only that law must be applied which is in force at the time when the sentence is passed.

22. To what extent has a tribunal discretion to declare as criminally punishable an act or omission not specifically covered by the penal code in force at the time of that act or omission?

It is a principle of Swiss Law that old laws do not operate after they have been abrogated and that new laws have no retroactive effect. As an exception, the law which is more favourable to the accused applies retroactively (see No. 21). Thus the courts have no powers to punish in respect of acts which were not punishable when the act was committed. This rule follows also from the principle: *nulla poena sine lege* (Article 1 StGB).

23. To what extent has a tribunal discretion to sentence an offender to a punishment (whether as regards kind or measure) which is not specifically mentioned by the penal code in force, or if mentioned, is not expressed to be applicable to the offence committed?

The principle *nulla poena sine lege* applies in particular to the kind and measure of the penalty to be imposed in each individual case. Only those may be punished who commit acts which are expressly declared punishable by law (Article 1 StGB). Consequently, the courts must never impose penalties which are not provided by law for the particular act in question or which exceed the limits laid down by law.

Thus the judge is prohibited from creating new rules of criminal law outside the statute, by means of analogy, inasmuch as he may not create new offences, or supplement existing offences or increase the penalties (*Hafter, Lehrbuch des Schweiz. Strafrechts*, Allgemeiner Teil, p. 13). As regards the interpretation of laws, extensive interpretation, which must be strictly distinguished from analogous application of laws to the detriment of the accused, is permitted in the sphere of criminal law, provided it does not exceed the purpose of the law. This principle has found repeated expression in the practice of the Federal Court. Former cantonal practice also did not hesitate in recent times to apply extensive interpretation which had been regarded as inadmissible for a considerable period. In particular the Federal Court allows extensive interpretation, if it is apparent that the wording of a provision is too narrow, and relies upon the clear purpose of a provision, even if the provision is thus extended to the detriment of the accused.

24. What classification of offences is adopted in the legal system of Switzerland? What are the legal consequences of this classification?

The Swiss Criminal Code recognises three types of criminal offences, namely crimes (*Verbrechen*), medium offences (*Vergehen*) and minor offences ((*Ubertretungen*). Crimes are all offences punishable with penal servitude (*Zuchthaus*), medium offences are those punishable with imprisonment (*Gefängnis*) at the most. Minor offences are those punishable alternatively with detention (*Haft*) or a fine (*Busse*) or with a fine only (Article 101).

25. How does this system of law define persons whom it claims as (a) wholly insane, (b) partially insane (c) children (d) juveniles (e) young adults?

26. To what extent are the rules of criminal law modified when the accused person (i) is within any of the special classes mentioned in question 25, or (ii) was drunk at the time of the act or omission complained of?

The Swiss Criminal Code contains no definition of insanity (*Geisteskrankheit*) or of partial insanity (*Geistesschwäche*) but their effect upon the mental capacity (consciousness and intention) of the offender as far as relevant in criminal law, are set out. Article 10 lays down that an offender is not punishable if, owing to insanity, imbecility, or a serious mental disturbance he was unable, at the time of the commission of the act, to realise its

unlawful character or to act accordingly. According to Article 11 an offender is regarded as partially insane if at the time when the act was committed his mental capacity or his consciousness was affected or if it was not fully developed with the result that his capacity to realise the unlawful character of his act or to act accordingly was seriously reduced (*Verminderte Zurechnungsfähigkeit*). In this case the judge is given full discretion to reduce the sentence.

The provisions regarding insanity and partial insanity do not apply if the serious mental disturbance or the reduction of consciousness was brought about by the offender himself with the intention to commit the criminal act while in this condition (*actio libera in causa*). The case, which is of some practical importance, where this condition has been brought about through negligence, is treated correspondingly. In addition, Article 263 StGB contains provisions regarding self-induced unconsciousness, if the offender, while bringing it about wilfully or negligently, did *not* envisage the perpetration of the act which was subsequently committed. Article 263 provides as follows: "Whoever becomes unconscious as a result of drunkenness or in consequence of stupefaction caused by himself and, in this condition, commits an act punishable as a crime or medium offence is punishable with imprisonment not exceeding six months or with a fine. If the act would be punishable with penal servitude, the offender shall be sentenced to imprisonment. If the drunkenness is not self-induced, the rules concerning partial insanity must be applied."

The Swiss Criminal Code classifies minors according to age-groups (Article 82 ff.): Children under six years of age are not subject to the provisions of the Code. Children over six years of age and juveniles between fourteen and eighteen years of age are subject to special measures of treatment. Minors between eighteen and twenty years of age are subject to the ordinary criminal law which is applied with certain mitigations. Moreover, special provisions apply in the case of insane or feeble-minded children and juveniles (Articles 85, 92 StGB). For details see below No. 34.

27. Does this system admit any of the following circumstances as a ground of defence, and, if so, how does it define them? (a) Necessity; (b) self-defence; (c) provocation; (d) mistake; (e) coercion; (f) conflict of duty; (g) defence of others?

As regards necessity (*Notstand*), Article 34 StGB provides as follows: "An act committed by a person to save his life, person,

freedom, honour or property from an immediate danger which cannot be averted otherwise, is not punishable if the danger was not caused by the offender and if he could not be expected in the circumstances to make this sacrifice. If the danger was caused by the offender or if he could be expected to make this sacrifice, the court, in its discretion, may impose a less severe sentence." The second sub-section of Article 34 contains a corresponding provision in respect of acts committed to relieve a state of necessity which has befallen a third party (*Nothilfe*).

As regards self-defence, Article 33 StGB provides as follows: "If a person is assaulted without cause, or is directly threatened with an assault, the assaulted person and every other person are authorised to resist the assault by suitable means. If the assaulted person exceeds the limits of self-defence, the court, in its discretion, may impose a less severe penalty. If the assaulted person exceeds the limits of self-defence owing to excusable excitement or surprise, resulting from the assault, he must be acquitted."

According to Article 64 StGB the court may mitigate the sentence, *inter alia*, if the offender acted from honourable motives, as a result of pressing personal needs, under serious threats, at the instance of a person to whom he owes obedience or on whom he is dependent; if the offender was seriously tempted by the conduct of the injured person; if he was overcome by anger or considerable pain in consequence of an unjust provocation or insult. A special provision envisages defamations due to provocation. Article 177 (2) StGB provides: "If the defamation was directly caused by the improper behaviour of the defamed person, the court may acquit the offender." As regards mistake, a distinction is drawn between mistake of fact and mistake of law: If the offender acts under a misapprehension concerning the actual facts (Article 19 StGB), the court must appreciate the facts in favour of the offender on the basis of the latter's conception of the actual facts; if the offender could have avoided the mistake, had be acted with due caution, he must be punished for negligence, provided that the negligent commission of the act is punishable. If the offender has committed the act in the belief that he is legally justified in so acting, the court, in its discretion, may reduce the punishment or may refrain altogether from sentencing him (Article 20 StGB).

It is a general principle that acts ordered by law or prescribed by professional or official duty, or which the law declares permissible or not subject to a penalty, must not be punished (Article 32 StGB).

28. What stages in the process between the first formation of the desire to commit an act and the final performance of that act are recognised in this system as involving criminal liability? What is the definition of each of such stages, and what is the punishment applicable to each?

The various stages in the perpetration of a criminal act and their relevance in criminal law are defined by Article 21 ff. of the Swiss Criminal Code. The mere intention to commit a criminal act is not punishable, unless accompanied by the initiation of the act. But acts which are merely of a preparatory nature do not lead to criminal liability. As a rule, every attempt to commit a crime or medium offence is punishable. Attempts to commit minor offences are only punishable, if the law provides so expressly (Article 104).

With regard to incompleted attempts or withdrawals, Article 21 provides as follows: "If the offender, having initiated the commission of a crime or medium offence, does not complete it, he may be punished less severely. If the offender, on his own initiative, does not complete the criminal act, the court may refrain from sentencing him in respect of the criminal act." Thus even in the case of an incomplete attempt the punishment is not automatically reduced. Completed attempts and active repentance are governed by Article 22 which provides as follows: "If a criminal attempt has been completed without resulting in the commission of the intended crime or medium offence the offender may be punished less severely. If (after having completed the criminal act) the offender, by his own initiative, has taken measures contributing to the prevention of the intended result, the court, in its discretion, may impose a less severe punishment." If the means used for attempting a crime or medium offence or if the object in respect of which the attempt was made were such that the offence could not be committed at all by these measures or in respect of this object, (impossible attempt, Article 23), the court in its discretion, may impose a less severe punishment or acquit the offender altogether.

29. What is the definition of incitement, conspiracy and complicity? In what circumstances is a person criminally liable who (a) incites another to commit an act, (b) conspires with another to commit an act, (c) takes part with another in the commission of an act?

Under the heading of "abetting", Articles 24-26 of the Swiss Criminal Code contain the following definitions of incitement, aiding and abetting:

Whoever intentionally encourages or directs or plans a crime or medium offence perpetrated by another is liable to the same punishment as the perpetrator. Whoever attempts to induce another to commit a crime, is liable to punishment as if he had himself attempted the crime (Article 24).

Whoever intentionally assists in the commission of a crime or medium offence may be punished less severely [than the principal] (Article 25).

Special personal conditions, characteristics and circumstances of the perpetrator, abettor or accessory, if existing, must be taken into consideration in determining whether a more severe or a less severe penalty or none at all is to be imposed (Article 26).

Indirect commission of an offence through the agency of an innocent perpetrator (*Mittelbare Täterschaft*) is not mentioned expressly in the Swiss Criminal Code, but according to the general opinion it is regarded as punishable. The Draft Criminal Code, presented by the Federal Council in 1918, contained a provision to this effect (Article 25 of the Draft Code). Equally, the Code contains no provision regarding the contemporaneous commission of the same offence by several perpetrators acting independently (*Mittäterschaft*). Such offenders are treated as independent perpetrators and each offender is punished for having committed the offence complained of.

Conspiracy (*Komplott, Bande*) is not treated by the Swiss Criminal Code as a special type of complicity. According to the facts of the case and the degree of complicity a conspirator may be punished for having perpetrated the offence or for aiding or abetting.

PART IV.

30. What is the classification of the punishments which can be inflicted upon adult offenders? Does the list include (i) capital punishment; (ii) suspension of the declaration of sentence; (iii) suspension of the execution of a declared sentence; (iv) release on probation; (v) compulsory labour without deprivation of liberty; (vi) payment of fines by instalments; (vii) police supervision? In what classes of cases can any of the above sanctions be applied?

The Criminal Code provides the following penalties for adults (Article 35 ff.). The most severe penalty involving deprivation of liberty is penal servitude which is served in a penitentiary (*Zuchthaus*). The shortest term is one year, the longest twenty years. In cases expressly provided by law, penal servitude for life

may be imposed. This is the most severe penalty existing, since capital punishment is not envisaged by the Swiss Criminal Code.

The shortest term of imprisonment (*Gefängnisstrafe*) is three days. Unless the Code provides otherwise, the longest term of imprisonment is three years.

A person who has been sentenced to penal servitude or to imprisonment and who has served two-thirds of his sentence may be granted a conditional release by the competent authorities, provided that his conduct in the institution has been satisfactory, that he may be expected to conduct himself properly after the release and that he has made restitution to the best of his ability. If conditionally released, he is put on probation for a period from one to five years during which he may be placed under protective supervision (*Schutzaufsicht*) (Article 38). This kind of protective supervision is not a matter for the police (Article 379 (3)). Its object is to assist the probationer with advice and active aid, particularly by providing accommodation and opportunity to work in order to enable him to obtain an honest living, and to supervise the probationer unobstrusively so as not to prejudice his career (Article 47).

The third type of penalty involving deprivation of liberty is detention (*Haft*). The minimum term is one day, the maximum is three months. The court may suspend sentences of imprisonment not exceeding one year and sentences of detention (Article 41) if the past record and the character of the convicted person justify the belief that this measure will deter him from committing further crimes or medium offences, if, furthermore, the convicted person has not served, within the preceding five years, a term of imprisonment in respect of a crime or medium offence committed intentionally and if he has made restitution to the best of his ability. If the court suspends the sentence, it must order a period of probation lasting from two to five years. Moreover, the court may put the convicted person under protective supervision and impose certain conditions for the period of probation. The sentence is carried out, if during the period of probation the probationer commits a crime or medium offence intentionally, or contravenes the directions given by the court after a formal warning or persistently evades protective supervision, or proves himself in any other way unworthy of the confidence reposed in him. The court orders the sentence to be expunged from the register of criminals, if the probationer has shown good behaviour during the entire period of probation.

Unless otherwise provided by law, a fine (*Busse*) must not exceed twenty thousand francs (Article 48). But if the offender

has acted for the purpose of gain, the court is not bound by this limit. The fine is determined with due regard to the financial circumstances of the offender so as to render the punishment commensurate to his guilt. A period of between one and three months is allowed for payment. A convicted person may be allowed to pay the fine in instalments, the amount and the dates of payment of which are to be determined according to his circumstances. He may also be permitted to work off the fine by voluntary labour, especially for the State or a Commune. If he neither pays the fine nor works it off, execution may be levied, or the court may convert the fine into detention. If it is converted into a sentence of detention, the rules concerning suspended sentences apply. A fine must not be converted into a sentence of detention, if the convicted person proves his inability to pay owing to circumstances for which he is not responsible.

The following ancillary penalties are provided in Article 51 ff. StGB: removal from office; loss of civic rights; deprivation of parental authority and of powers of guardianship; prohibition to exercise a profession, trade or business; banishment from Switzerland and exclusion from taverns.

The execution of a sentence may be interrupted by the grant of a conditional release. In all other respects, Article 40 provides that the execution of a sentence may only be suspended for important reasons. If a convicted person is transferred to an asylum while serving his sentence, he is credited with the time spent in this institution, unless the transfer was caused fraudulently.

The suspension of the declaration of sentence is unknown in Swiss law. But reference may be made to the rules concerning the pledge to keep the peace which may be applied for the purpose of prevention, if the accused has threatened to commit a criminal act or has expressed the intention of repeating a criminal act (Article 57). Upon application by the person so threatened, the accused may be bound over by the court and may be required to furnish an adequate bond.

Compulsory labour without deprivation of liberty is unknown in Swiss law, except that a convicted person may work off a fine by voluntary work, as mentioned above.

31. *To what extent can a person be charged at one and the same trial with more than one offence? How is the punishment to be calculated when in such a case the accused person has been so convicted of more than one offence? Is there any provision for*

the intensification of punishment in the case of an offence committed by a recidivist? Is such intensification at the discretion of the tribunal?

As regards concurrent offences or the concurrence of provisions of the Criminal Code, Article 68 of the Code provides as follows: If a person has been convicted in respect of one or several acts punishable by different terms of confinement, the court must sentence him for the gravest offence and must increase the sentence correspondingly. But the court cannot exceed the maximum limit of the penalty provided [by law] by fifty per cent [of the individual sentence]. In so acting, the court is limited to the maximum term provided for the type of penalty involved. If the offender is liable to several fines, the court must impose one fine which is adequate to his guilt. Ancillary punishment and measures may be imposed if they are provided in respect of one of the several offences or by one of the several provisions of the Code. If a sentence is to be imposed in respect of an offence committed by the perpetrator before he had been sentenced for another offence, the court must impose a sentence which does not affect the offender more severely than if the various offences had been included in one sentence.

Regarding the intensification of punishment in the case of recidivism, Article 67 provides as follows: If the offender, who is being sentenced to penal servitude or to imprisonment, has fully or partially served a sentence to penal servitude or to imprisonment within the preceding five years, or has been discharged from an institution mentioned in Articles 42-45 (*mesures de sûreté*), the court must increase the penalty. The court is not limited to the maximum term provided for the offence in question, but the legal maximum laid down for the particular type of penalty (see above, No. 30) must not be exceeded..

32. What mesures de sûreté are provided in this system for adult offenders? Is sterilisation included, and, if so, in what circumstances can it be ordered? To what extent are mesures de sûreté applied to persons who are (i) wholly insane, (ii) partially insane, (iii) drug addicts, (iv) vagrants, (v) idle, (vi) recidivists (vii) professional criminals, (viii) of proved criminal habits or disposition?

How are (iii) to (viii) inclusive defined? Are the definitions of (i) and (ii) the same in this connection as in connection with question 25?

33. In what cases are mesures de sûreté substituted for punishment? In what cases and in what ways are mesures de sûreté combined with punishment?

If the offender is wholly (*Unzurechnungsfahig*) or partially insane (*vermindert zurechnungsfahig*) in the sense of Articles 10 ff. StGB (see above, No. 25), he is subject to detention in an aslyum or institution, if he is a danger to public security and order (Article 14.) He is subject to treatment if his condition requires such treatment, or an appropriate care in a mental institution (Article 15). The court must suspend the execution of the sentence passed upon an offender who is partially insane. When the measures taken by the cantonal administrative authorities have come to an end, the court must determine whether and to what extent the sentence is still to be executed.

The detention of an habitual criminal (Article 42) may be ordered by the court for an indeterminate period, if the offender has already served numerous prison sentences for crimes or medium offences, if he shows a tendency to commit crimes or medium offences, or towards disorderly conduct or idleness, and if he again commits a crime or medium offence punishable with deprivation of liberty. In this case, detention is ordered *in lieu* of the sentence which is pronounced by the court. Detention is carried out in an institution or in a separate part of an institution exclusively destined for this purpose. Detention must be ordered for a period of at least three years, and if the sentence is for a longer term of imprisonment, for the duration of such term. When the term of detention corresponding to the term of imprisonment has been served, conditional release, coupled with protective supervision for a period of three years, may be considered. If during this period the convicted person commits a new offence, he may be placed under detention a second time for a period of at least five years. If ten years have elapsed since the sentence was passed, and if the order for detention could not be carried out during this period, the competent authority must decide whether the punishment or detention is still to be carried out. If the period of prescription has begun to operate, an order for detention must not be carried out any longer.

Concerning the training for work of disorderly and idle persons, Article 43 StGB provides as follows: "If the offender has been sentenced to a term of imprisonment in respect of a crime or medium offence, the court may suspend the execution of the sentence and commit the offender to a house of correction for an indeterminate period, provided that he is a disorderly or idle

person, that the offence is connected with this tendency, that there is a prospect of training him for work and that he has not previously been sentenced to penal servitude or to detention in an institution. If it becomes apparent that the person committed to a house of correction cannot be trained for work, the court must order the execution of the original sentence in full or in part. If the person so committed has stayed in the house of correction for a period equal to two-thirds of the sentence or for at least one year, he may be granted conditional release for one year, subject to protective supervision. If he intentionally commits a crime or medium offence during the period of probation, the original sentence must be carried out. If he resumes his disorderly or idle habits, or if he contravenes orders despite a formal warning, or if he evades protective supervision, the competent authorities may return him to the institution or may apply to the court for the execution of the original sentence. If the probationer behaves himself properly during the period of probation, the sentence is not carried out. If after detention in an institution for a period of three years, the circumstances do not permit as yet the grant of a conditional release, the court must order the sentence to be carried out in full or in part."

Habitual drunkards (Article 44) or drug addicts (Article 45) who have been sentenced to imprisonment or [simple] detention for an offence connected with their habits, may be ordered by the court to be committed to an institution for inebriates or to an institution suitable for their treatment, after they have served their sentence. If the condition of the convicted person requires it, the court may suspend the execution of the sentence and commit him to an institution for inebriates. He is released when cured, or after two years at the latest. If the execution of the sentence has been suspended the court must decide, prior to the release from the institution, whether the sentence is to be carried out, or whether it is to be remitted in full or in part. If released from an institution, an habitual drunkard or drug addict may be placed under protective supervision or, in particular, he may be ordered to abstain from intoxicating drinks. If his behaviour is unsatisfactory, he may be returned to the institution. Otherwise, the original sentence is not to be carried out.

The Swiss system of penalties and penal measures does not include sterilisation.

34. To what extent, of at all, would the answers to the preceding questions 30, 31, 32 and 33 be different in the case of (a) children, (b) juveniles, (c) young adults?

The rules concerning the treatment of children and juveniles is laid down in Articles 82 ff. StGB.

If a child over six years of age, but under fourteen years of age commits an act which is punishable according to the Code, the competent authorities must ascertain the facts and make investigations regarding the conduct, education and social circumstances of the child, as far as they are required to obtain an impression of the child. The observation of the child for a certain period may also be ordered. If the child is morally neglected, corrupted or socially endangered, the authorities commit the child to the care of a reliable family or to an institution for children. The education of the child may also be entrusted to his own family. In all these cases, the competent authorities supervise the education. They cancel educational measures if their purpose has been accomplished. Educative measures cease automatically when the child reaches the age of twenty-one. If the child is insane, feeble-minded, blind, a deaf-mute or epileptic, the competent authorities order the necessary treatment. If there is no reason to order the above-mentioned education subject to supervision (Article 84) or special treatment (Article 85), the law permits reprimands or detention at school beyond the usual hours as disciplinary measures (Article 87). In minor cases, punishment may be left to the person exercising parental authority.

In the case of juveniles between fourteen and eigteen years of age, a similar investigation of a comprehensive character is carried out and if the offender is morally neglected, corrupted or socially endangered, he is committed to a training school for juveniles. The period of detention is one year, at the least, and comes to an end when the twenty-second year of age is completed. Education in a foster family may also be ordered. If the juvenile is especially depraved or dangerous, he must be separated from the other inmates of the training school and must remain there until he shows improvement, but not less than three and not more than ten years (Article 91 (3)). Juveniles, too, are subject to special treatment, if their condition (such as insanity etc.) requires it (Article 92). The competent authorities may, at any time, substitute new measures for those ordered originally. If during this period of detention at an institution a juvenile, who has reached the age of eighteen, proves incorrigible or if his conduct is detrimental to the readjustment of the other inmates, he may be transferred to a prison where he must be kept separate from adult prisoners.

After one or three years the juvenile may be granted conditional release from the training school. In this case he is placed

under protective supervision for a period of probation lasting at least one year. If his conduct is unsatisfactory, he is sent back to the institution.

If the case is neither serious nor of a special character, the competent authorities may reprimand the juvenile, or fine him, or order his incarceration (*Einschliessung*) for a period of between one day and one year. Both penalties may be imposed together (Article 95). Incarceration must not be carried out in prisons or houses of correction which are used for adults. The juvenile must be given appropriate work. In all other respects incarceration is carried out like detention (*Haft*). The execution of the sentence or a fine or incarceration may be suspended, subject to a period of probation ranging from six months to three years and subject to protective supervision (Article 96).

Moreover, the declaration of sentence involving a penalty or a penal measure may be suspended, subject to the imposition of a period of probation coupled with protective supervision lasting from six months up to one year, if it cannot be stated with any degree of certainty that a juvenile is to be regarded as morally neglected, corrupt or socially endangered or that he is in need of special treatment (Article 97).

Where minors between the ages of eighteen and twenty are concerned (so-called age of transition (*Ubergangsalter*), the general provisions of the Criminal Code regarding adults are applicable subject to the following mitigations (Article 100): Penal servitude for life is superseded by penal servitude from five to twenty years. If the act is punishable with imprisonment and if a minimum penalty is fixed by law, the court is not bound by this restriction. In the case of extenuating circumstances, the court imposes a sentence of imprisonment ranging from six months to five years in *lieu* of a sentence of penal servitude or a sentence of detention in *lieu* of imprisonment.

35. *To what extent has a tribunal a discretion to decide on the kind, the intensity and the duration of* (*a*) *punishment,* (*b*) *mesures de sûreté?*

36. *Is there any special legal provision regulating what is to be taken into consideration by the tribunal in exercising discretion in any of the cases envisaged in question 35?*

The courts enjoy a wide discretion to determine the penalties and various measures.

In determining the intensity and duration of punishment, the court is frequently given a choice of various types of penalties; in respect of all other cases the court may fix the punishment

within a fairly wide scale. A strictly fixed penalty (i.e. penal servitude for life) is only provided in respect of murder. Article 63 lays down as a general rule that the courts, acting within the scale of penalties, must determine the punishment in accordance with the guilt of the offender, having regard to his motives, his previous conduct and his personal circumstances. The intensification of punishment beyond the legal maximum in the case of recidivism or if several provisions of the Code have been violated (Articles 67, 68), has been discussed above (see No. 31). Similarly the mitigation of punishment below the normal legal minimum in the case of extenuating circumstances in accordance with Article 64 has already been mentioned (above, No. 27). In addition, the Code provides an increased range of penalties for certain types of offences, if committed in special circumstances, or it gives the courts the power to intensify punishment. Apart from the mitigation of punishment owing to extenuating circumstances, which is to be granted in accordance with a detailed schedule (Article 65), the Code permits a discretionary mitigation of penalties (Article 66) in a number of cases enumerated by law. In these cases, the court is not bound to apply the type or the measure of punishment provided by law for the particular kind of crime or medium offence under review, but the court may not go below the minimum term provided by law for the type of penalty in question (see above No. 30). In addition, the Code contains many provisions permitting the discretionary mitigation of punishment (for these provisions, see the observations above, No. 25 ff.).

The suspension of the execution of a sentence is granted by the court in the exercise of its discretion. Not infrequently, the court is free to decide whether ancillary punishment or *mesures de sûreté* are to be imposed or not, or *mesures de sûreté* in *lieu* of punishment.

The answers to questions 30 and 32 show to what extent the Code offers the courts guidance in the exercise of their discretion and how far it lays down the main principles for the exercise of this discretion. References may be made to the rules governing the suspension of the execution of a sentence, extenuating circumstances, the type and duration of *mesures de sûreté* etc. and the penalties and measures applicable in the case of juveniles. But it must be noted that, even if the Code does not contain any detailed guiding principles, the court, when exercising its discretion to meet the individual case and especially the mentality of the offender, must base this discretion on principles of a general

character and not upon considerations which apply only to the particular case in question.

37. Is any body of persons charged with the duty to re-examine the persons undergoing mesures de sûreté with power (a) to suggest, (b) to order, either the termination or the prolongation, or the modification of the mesure de sûreté in each case? If so, what is the composition of such body, how are they appointed and on what data are they expected to base their decisions? To what extent do they collaborate with the tribunal which has ordered the mesure de sûreté?

Regarding the termination, prolongation or modification of *mesures de sûreté* the Criminal Code contains only provisions in the nature of substantive law which have been discussed above (Nos. 32 and 33). In this connection, the Code refers to "the judge" or to "the competent authority". Thus, for instance, Article 17 (2) provides that the competent authority must bring detention, treatment or commitment to an institution to an end, as soon as the reason for this measure has ceased to exist. If an habitual criminal has served a term of detention of at least three years, as provided by law, the competent authorities may grant a conditional release for a period of three years after consultation with the officials of the institution, provided that detention is no longer deemed necessary (Article 42 (5) StGB), and may detain him again for a further five years at the least, if his conduct is unsatisfactory.

Like all matters of a formal character, the designation of the competent authorities is the concern of the Cantons who have laid down the necessary provisions in their introductory Laws to the Criminal Code. In the Canton of Berne, for example, the Executive Council is the competent authority for granting conditional release from institutions of detention, for ordering the subsequent execution of detention or of punishment, and for ordering the conditional release from training institutions, and from homes for habitual drunkards or drug addicts (Article 24 EG). The court before which the case comes for trial is competent to order the subsequent execution of punishment in respect of persons who are partially insane, disorderly or idle and in respect of habitual drunkards and drug addicts (Article 22). Before arriving at a decision, the court must give the person concerned an opportunity to state his case.

38. When a sentence has been declared, what modification of it, for example by way of rehabilitation, or commutation, or pardon,

or reduction of sentence, or release on condition, can be made, and in what cases?

Articles 76-81 StGB contain the rules regarding rehabilitation.

Rehabilitation in the narrower sense includes the restoration of rights and capacities which have been withdrawn, i.e., the removal of all disabilities, which have been incurred in consequence of ancillary punishments such as loss of civic rights, removal from office, loss of parental rights or of the right to act as a guardian, the prohibition to exercise a profession or a trade or to carry on a business. In a wider sense, rehabilitation includes the erasion of the sentence from the register of criminals (Article 80).

Upon application of the offender, the court may order the restoration of civic rights if at least two years have elapsed since the offender has completed his sentence, if his conduct justifies this measure and if he has made good the damage to the best of his ability. The same applies to the other cases mentioned above (Articles 77-79).

Regarding the erasion of the sentence from the register of criminals, Article 80 provides as follows: "If the offender has been sentenced to imprisonment or to a fine and if, in the case of a sentence to penal servitude or to detention in an institution, at least fifteen years have elapsed since the sentence was carried out, or, in the case of other penalties or measures, if at least ten years have elapsed, the court, upon the application of the person concerned, may order the erasion of the sentence from the register of criminals, if his conduct justifies it and if he has made good the damage to the best of his abilities. The erasion may be ordered sooner, if a particularly meritorious act of the convicted person justifies it."

The termination of a sentence in consequence of a pardon is considered equivalent to a sentence which has been served. In the case of detention in an institution, rehabilitation may not take place before five years have elapsed since the final release.

The provisions concerning the register of criminals are contained in Article 359 ff. StGB. If the execution of a sentence has been suspended, the court orders the erasion of the sentence if the probationer's conduct has been satisfactory during the entire period of probation (Article 41 (4)). In the case of juveniles, Article 99 applies. A petition for a pardon (Article 394 ff. StGB) may be submitted by the convicted person, by his legal representative, by his counsel, or by his spouse. In the case of political crimes and medium offences the Federal Council or the Cantonal Government may also initiate proceedings for a

pardon. By means of a pardon all penalties which have been imposed by a sentence having the force of *res judicata* may be either totally or partly remitted or commuted into a milder type of penalty.

Apart from this commutation of sentences, the possibility noted above (No. 30) of commuting a fine into detention, must be mentioned (Article 49).

The conditional release of persons sentenced to penal servitude or imprisonment, of detained persons and persons placed under public care from the respective institutions and of juveniles from training schools has been discussed above (Nos. 30, 32 and 34).

PART V.

39. What are the authoritative text books and commentaries dealing with the definitions of the particular offences recognised in this system?

The Special Part (particular offences) of Swiss Criminal Law is treated in the second part of the text-book by Professor Dr. Ernest Hafter. Only the first volume of the second part has been published at present (published by Julius Springer, Berlin, 1939). Hafter's Text-book on the General Part was published by the same firm in 1926.

The Commentary to the Swiss Criminal Code by Professor Dr. Philipp Thormann and Professor Dr. Alfred von Overbeck treats both the general and the special part (published by Schulthess & Co., Zurich, 1938-1941).

40. What changes in the previously existing offences, and what new offences, have been created in the period 1920-1939?

Reference may be made to the observations made above (No. 1) and to our Article: "Swiss Criminal Code, its leading Principles". Since Swiss criminal law has been unified only recently, a detailed answer to this question would seem premature.

PART VI.

41. What, if any, changes have been introduced in the prison system since the publication by the Commission Internationale Pénale et Pénitentiaire in 1935 of the Aperçus des Systèmes Pénitentiaires?

No important changes in the Swiss prison system have taken place since 1935.

The Swiss Criminal Code contains provisions for the purpose of unifying the law relating to the execution of sentences and the administration of prisons. The prisons remain, as before, the concern of the Cantons (Articles 374 ff., 392 ff.).

Penalties involving loss of liberty (i.e. penal servitude, imprisonment, detention) must be carried out in institutions or parts of institutions exclusively destined for this purpose (Articles 35 (2), 36 (2), 39 (2)). The same applies to *mesures de sûreté* (Article 42 (2). A training institution may be attached to an institution for habitual drunkards (Article 43 (2), 44 (2)), provided that the administration is separate and that the inmates are kept apart. For the purpose of differentiating the various types of penalties, the Code contains a number of provisions regarding clothing, food, visits, correspondence and the execution of sentences according to the progressive stage system (Articles 35 ff., 42 ff.) (see also No. 44, below). All prisoners who conduct themselves properly and work satisfactorily must be allowed a share in the earnings of the prison. The proportion of the share is determined by the Cantons (Article 376). The prisoner's account is credited with these earnings which may be paid out according to the discretion of the prison authorities on the occasion of the prisoner's release.

The Cantons are under an obligation to establish institutions which comply with the provisions of the Criminal Code. The Cantons may make arrangements among themselves for the joint establishment and administration of institutions (Articles 382, 383). The Code also envisages the participation of Cantons in the use of institutions established by other Cantons. The Federal Government contributes to the expenses which are incurred in connection with the establishment and expansion of public institutions required by the Criminal Code (Article 386) in addition to contributions in respect of private institutions for habitual drunkards and of training schools for children and juveniles (Article 387). The Federal Council may also subsidise, *inter alia*, houses of detention and houses of correction (Article 388). The reform of institutions in accordance with the requirements of the Code must be carried out by the Cantons within twenty years after the Code has come into force (Article 393).

Part VII.

42. To what extent in this criminal system can it be said that the rights of the accused person as an individual are protected at each stage of the proceedings brought against him?

Reference may be made to the answers in Part II, in particular to Nos. 3, 4, 6, 8, 15-17.

43. What provisions, if any, exist, whether as to tribunals, to procedure, or to punishment, whereby offences regarded as inimical to the State are specially dealt with?

Reference may be made to the answer to question 9, as far as it deals with the jurisdiction of the Federal Assizes. It has been shown that criminal acts against the State are subject to the ordinary rules of criminal law.

44. To what extent does this system aim at (a) deterrence, (b) reformation of offenders?

The deterrent effect of penal servitude and of imprisonment consists mainly in the fact that the offender is deprived of his liberty. In all other respects, the execution of punishments aims at educating the offender (Article 37). Its purpose is to influence the prisoner and to prepare him for his return to civil life. The rules of the penal institutions must make provision for the relaxation of prison discipline to be granted in progressive stages to prisoners. As a rule, the prisoner is kept in solitary confinement during the initial period (for three months in the case of penal servitude, for one month in the case of imprisonment). If possible, the prisoners are to be given work in accordance with their abilities and which will enable them to earn a living after their release.

The educational character is still more marked in the case of such measures as protective supervision, pledges to keep the peace, houses of correction and in the sphere of criminal law concerning juveniles.

45. To what extent is the personality of the individual delinquent taken into account in assessing punishment and/or mesures de sûreté? Is there any machinery, and, if so, of what kind, for the examination of the personality of the accused for the information of the court, and, if so, at what stage in the proceedings is such information to be taken into consideration?

Reference may be made to the observations in Part IV, especially in Nos. 35 ff. In general no special machinery is established to examine the personality of the accused for the purpose of informing the courts. The court or the authorities charged with the investigations make the inquiries which they consider necessary (Article 40 BStP; Article 100 StV of Berne).

Special stress is laid upon this aspect in proceedings against juveniles (see above, Nos. 19 and 34). In these cases, the competent authorities frequently possess a specialized knowledge or they are assisted by experts (see *Recueil de documents en matière pénale et pénitentiaire*, Vol. IX, No. 3, [May 1941]: *L'organisation du régime pénal des mineurs en Suisse*, by Dr. H. Kuhn).

46. What, if any, changes in any branch of the criminal system are under consideration or have been suggested and not yet carried out? Is the present situation as regards, for example, the police force, the composition and the qualification of the tribunals, the procedure of appeal, the machinery for the defence of poor persons, the treatment of juvenile offenders, of young adults, of recidivists, and of those partially insane, regarded as satisfactory?

Since the great work of reform culminating in a uniform Swiss Criminal Code has only recently been brought to a conclusion, and is awaiting its realisation, no proposals for reform are under discussion at the present time. The law of criminal procedure of the Federation and of the bigger Cantons also has undergone far-reaching reforms during the last years and decades. In general, it is in accordance with the requirements of modern criminal procedure for differentiation and follows the liberal principles of Swiss national life. In connection with the introduction of the uniform Swiss Criminal Code several Cantons have carried out or initiated a reform of the law of criminal procedure. It is hoped that these reforms will include the creation of a criminal procedure for juveniles, including separate courts, by those Cantons which do not possess such a procedure already.

47. Are there any observations which you desire to make either on the above questions or by way of supplementing them?

No additional observations are required.