THE DEVELOPMENT OF THE GERMAN PENAL SYSTEM 1920-1932*

BY

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I. GERMAN CRIMINAL LAW BEFORE 1914**

The penal system in Germany during the years 1920-1932 developed against the background of the German criminal law as shaped by the great codification movement of the 19th century. The results of this movement were almost exclusively embodied in the two main codes, i.e., the Criminal Code of 1870, and the Code of Criminal Procedure of 1877. Criminal law was the first branch of German law framed on uniform lines, simultaneously with the foundation of the new Reich of 1871. The Criminal Code of 1870 was first enacted as law for the North German Union. In substance, it was a mere revision of the Prussian Criminal Code of 1851. The latter, in turn, as also the Bavarian Criminal Code of 1861 were strongly influenced by the French Code pénal of 1810. It is thus evident that German criminal law owed much to the period of enlightenment. Though not influenced by Bentham himself, German criminal law was based on ideas of which he would certainly have approved. Like

*The aim of this contribution to the work inaugurated by the Cambridge Department of Criminal Science is to give a critical account of German criminal law and penal administration under the Weimar Constitution. This paper, a part of a wider comparative study, attempts to explain how during those years German criminal law has developed in response to certain fundamental social needs.

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**Abbreviations in footnotes: BGB—Bürgerliches Gesetzbuch; BGBL—Oesterreichisches Bundesgesetzblatt; EG—Einführungsgesetz; Entw—Entwurf; Ges—Gesetz; JM—Justizminister; JMBI—Justizministerialblatt; JW—Juristische Wochenschrift; Mitt. IKV—Mittellungen der Internationalen Kriminalistischen Vereinigung; MoSchrKrimPsych—Monatsschrift für Kriminalpsychologie und Strafrechtsreform; Pr—Preussen, Preussisch; RG—Entscheidungen des Reichgerichts in Strafsachen; RGG—Reichsgesetzblatt; StGB—Strafgesetzbuch; StPo—Strafprozessordnung; StVG—Strafvollzugsgesetz; Vfg—Verfügung; Vo—Verordnung; ZStW—Zeitschrift für die gesamte Strafrechtswissenschaft.
other European Codes of that era, it established the Rule of Law in a manner characteristic of early Liberalism with strong individualistic tendencies. The legislative technique of this period aimed at providing, first, clear-cut definitions of particular offences, and secondly, at fixing a certain scale of penalties prescribing the maximum and minimum limits for each crime so as to restrict discretion and thus to reduce the risk of arbitrariness. The enacted law was exhaustive. The rule obtained that an act is not punishable unless a penalty has been specifically prescribed for this act, before it had been performed—Nulla peona sine lege. As a typical product of its time, the Code protected the safety of the State, as well as life, property and personal rights of individuals, but lost sight of the social reality with its manifold differentiations and inequalities. In its original form, the Code left social dependence and economic weakness without any sanction against exploitation and usury. The protection of children and juveniles against ill-treatment was likewise insufficient. There was no liability of corporations, nor any protection of their reputation, while the law of extortion threatened even corporations when engaged in the performance of their legitimate purposes.

The system of punishment followed the principle of just retribution. Punishment was conceived as a specific amount of human suffering, meted out according to the gravity of the crime committed. Murder and the most serious forms of high treason were capital offences in peace time. The Code made a moderate use of fines. On the whole, deprivation of liberty characterized the penal system. The Code represented a stage of criminal legislation which developed imprisonment as the normal form of legal punishment. It represented the climax in the legal history of imprisonment. The Code knew four ordinary forms of deprivation of liberty: penal servitude, imprisonment, confinement to a fortress and detention. They differed partly in the length of the term to be served, and partly in the character of prison regimen. Penal servitude could be imposed either for life, or for a term of between one and fifteen years; convicts were under the obligation to perform any prison labour, or were to be employed in public works. Imprisonment ranged from between one day to five years. Prisoners could be employed in public works only with their own consent. The law assessed the respective severity of penal servitude and imprisonment in the proportion of 2 to 3: eight months of penal servitude corres-

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1 § 2 StGB in its original wording.
ponded to twelve months of imprisonment. Confinement to a fortress was a privileged form of incarceration, reserved for political offenders and duellists who did not act with a dishonourable intention. Detention, up to six weeks, was a type of punishment for minor contraventions. The Code contained no further regulations for prison management. It rather envisaged the prevalence of the cellular system, the favourite panacea of the 19th century, but it restricted the duration in order to avoid its detrimental effects on the health of the prisoner. Solitary confinement without the prisoner's consent, was not permissible for more than three years. In accordance with the French model, two further measures supplemented the fourfold system of deprivation of liberty. First, police supervision up to five years following the expiration of the prison term. Secondly, special detention up to two years, by order of the higher police authority, of idle and disorderly persons. Finally, the Code provided a complicated system, either obligatory or discretionary, of civil disqualifications thus stressing retaliation at the expense of the prisoner's social rehabilitation.

The penal system was combined with a system of criminal procedure which was a compromise between accusatorial and inquisitorial elements. From the middle of the 19th century onwards, German States enacted codes which established accusatorial forms of procedure, public oral proceedings, trial by jury, and legal guarantees for freedom from arrest. Those elements of liberal constitutionalism exercised a deep influence upon the law which emerged from the political movement of 1848. Also, English influence is evident especially through the writings of R. V. Gneist and J. Glaser. They pointed to the English accusatorial preliminary enquiry, to cross examination, to the jury system, as affording legal guarantees against judicial errors and abuses. The Austrian Code of Criminal Procedure of 1873, the work of Glaser, was an important precedent for the legislation of the Reich. The German Judicature Act of 1877 provided criminal courts for three different forms of jurisdiction. Minor offences were to be dealt with by Schöffengerichte, consisting of a judge and two lay assessors, a type of court first introduced in Hanover and some other territories in Central Germany. From these courts, appeals could be lodged, both on points of facts and of law, to the Criminal Division of the District Court (Strafkammer des Landgerichts), composed of three or five professional judges, and from this court, a further appeal, restricted to points of law, could be brought before the Court of Appeal.
made up of five judges. Crimes of a more serious character fell under the jurisdiction of the Criminal Division of first instance attached to the District Court which, like the French tribunaux correctionnels was composed of professional judges only, five of which made up one Court. From such a Court, appeals, restricted to points of law, went to the Supreme Court. Here seven judges sat together as a division of the Court, known as a Senate. Finally crimes of the most serious nature were reserved for the Court of Assizes composed of three professional judges and of a jury of twelve, the latter deciding the questions of fact. An appeal on points of law went to the Supreme Court.

The competence of the three types of Courts in respect of the various kinds of crimes was flexible. Practice and legislation combined in shifting competences from the higher to the lower Courts. Two appeals, the first on points of fact or law and the second on points of law only, were available only in the minor cases before the Schöffengericht. In more serious and very serious cases before the Criminal Division and the Assizes, only one appeal, confined to points of law, was open. In view of the German predilection for a multitude of legal remedies, this seemed rather paradoxical. It had been accepted by the Reichstag only after the introduction of some carefully framed rules provided the prisoner with efficient legal guarantees during the trial itself.

According to the Code of Criminal Procedure, the proceedings were accusatorial in the initial as well as during the trial steps. It was the exclusive right and the legal duty of the public prosecutor to initiate criminal prosecutions, but any measures of the executive which interfered with personal liberty or property, such as arrest, search and seizure, were provisional only and under judicial control. During the trial both parties were equals in law save for the virtual predominance of the prosecutor who represented the executive. It must be admitted that cross examination, which, however, was restricted to witnesses and experts only and depended upon concurrent applications by both parties, has always been a dead letter in German law. The Court had to interrogate witnesses, experts and the prisoner himself, but the latter was under no legal obligation to answer. It was the exclusive right of the judge to question witnesses and experts under oath, but he could never administer an oath to the accused. There were no formal rules of evidence, which limited the power of the judge to ascertain the facts. Strict legal rules, however, laid down that the parties was entitled to collaborate in collecting and producing the evidence. The power of the Court to reject evidence, or to
prevent a party from raising a particular question, was limited and regulated by law. This accusatorial type of prosecution and trial was, however, implemented by two intermediary stages of an inquisitorial nature. In serious cases, the preparation of the case for the prosecution was entrusted to a special judge for investigation, who fulfilled the same function as the French juge d'instruction. This judge, though acting for the prosecution, had—unlike the prosecutor himself—the judicial powers of arrest, search and seizure as well as the right to examine witnesses under oath. This is a typical instance of inquisitorial proceedings, which combined in one person certain functions of the prosecutor and the judge. The Court, without hearing the prisoner in person, decided exclusively upon the evidence collected by the prosecutor or by the special judge charged with the investigation, whether the prisoner should be committed for trial or not. Decisions of Criminal Courts, whether they be acquittals or convictions, were final unless the prisoner availed himself of the right of appeal within the period prescribed by law. In addition, under certain exceptional conditions, strictly limited by law, a new trial would be ordered. It was easier to obtain an order for a new trial for the purpose of reviewing a sentence than for the purpose of setting aside an acquittal.

These comprehensive enactments of the Reich regulated a criminal justice which was administered by the territorial courts of the various Member States. Only the Supreme Court at Leipzig was established as a Court of the Reich.

Prison administration was also decentralized. In 1879, an attempt was made to enact a Prison Code for the whole Reich, but it failed. Some of the States feared that such an Act of the Reich might entail a costly obligation to build new and expensive cellular prisons. In 1897, as a modest substitute for such an Act, an agreement was concluded by the authorities concerned regarding certain general administrative principles, in order to bring about a certain degree of uniformity in the execution of sentences.²

The criminal legislation of the Reich as embodied in the two codes of 1870 and 1877, though of an eclectic rather than of an original character, was on the whole a remarkable achievement. With slight alterations only, it remained the foundation of German criminal law during the decades which preceded the Great War of 1914. The codified law was explained and supplemented

²Zentralblatt für das Deutsche Reich 25 (1897) Nr. 45, p. 308. Draft 1879 and Agreement 1897 were reprinted in Entw. StVG 1927 (1) Begründung pp. 71 seq. and 75 seq.
by the precedents of the Supreme Court. A further notable contribution to the law was made by the juristic literature. These scientific efforts stimulated the tendencies to unify criminal law. As mentioned above, the Supreme Court fulfilled an important function in supplementing the law. In spite of the comprehensive character of the Code, the legislature left important questions "for the further consideration of jurisprudence." This applied mainly to the general part of criminal law, and more particularly to questions involving the concept of criminal liability. The practice showed that even a codified system of laws provides ample opportunity for scientific interpretation, for the elaboration of new principles and for judicial law-making. This activity, however, raised many controversial issues. The rule _nulla poena sine lege_ remained almost unchallenged. Generally speaking, the work of the classical school did not exceed the system of positive rules in force and developed new principles and concepts by applying the method of logical and historical interpretation. The wider considerations of the social purpose of criminal law did not play an important part.

On the one hand the system of public prosecution, the inquisitorial form of the preliminary investigation and of the committment for trial, and penalties of a retributory character upheld the authority of the State and of the legal order. On the other hand the accustorial system of trials, subtle rules of procedure and easy access to legal remedies, the carefully framed definitions of the substantive criminal law and the rule _nulla poena sine lege_ offered effective personal guarantees for the individual. This affords one more illustration of the fact that every system of criminal law has to find its own characteristic way of compromise between two antagonistic ends of criminal justice, namely, protection of State and society against the criminal, on the one hand, and, on the other hand, the idea of subjecting even this very aim to the rule of law, and of protecting the accused against errors and arbitrariness.

The volume of delinquency is not an exclusive test for the efficiency of a penal system. Many other factors have to be taken into consideration. The years before the Great War of 1914 were a period of growing prosperity and almost stable employment. Among first-offenders, convictions for theft decreased markedly, frauds increased, and sexual crimes remained almost upon the same level. On the other hand, juvenile delinquency steadily rose and reached a climax in 1906. During the last years before the War, juvenile delinquency followed the
general trend of delinquency, but it rose more rapidly and fell more slowly than that of adults. Recidivism showed a marked increase. The probability that a person would find himself again in court seemed to increase with the number of previous sentences passed upon him.

The apparent inefficiency of the law with regard to the two important criminological groups of juveniles and recidivists was the point of departure of a new school of criminal law. Far from merely analysing the logical structure of the system of legal rules, this school proceeded to a critical examination whether the law achieved the fundamental aim of penal policy, i.e., to protect the individual and the society, and to prevent crime. Ihering's idea of law as a means to an end influenced the doctrine of criminal law. The interest turned from the dogmatic analysis of the criminal act to the purpose and practical results of punishment. This teleological approach initiated a vigorous movement for the reform of criminal law. In Germany, Franz von Liszt was the leader of a new sociological school in criminal law. He first developed his ideas in the Marburg University Programme of 1882 on "Ends and Means in Criminal Law", and elaborated his doctrine in a series of essays on "Tasks in Criminal Policy, 1889-92". Scientific investigations into the causes of delinquency and the means for protecting society against crime called for international collaboration. In 1889, von Liszt, Professor van Hamel of Holland, and Professor Prins, the Inspector General of Belgian prisons, founded the International Union for Criminal Law. This Union had branches in most European countries. The work of this Association, as well as the growing volume of scientific investigation, stimulated the elaboration of penal legislation, which, based upon experience, aimed at the protection of society against crime. The first Swiss Draft Code of 1893-4 was the expression of a bold, but slow legislative activity followed up by many other countries.

The school inaugurated by von Liszt was "sociological" in contrast to the one-sided anthropological approach as developed by Lombroso. In Germany, Lombroso's ideas proved extremely provocative. He was indeed "a challenge to the medical profession." In the end, however, criminal science owed less to his conception of the born criminal than to numerous critical investigations, undertaken to re-examine his challenging thesis. The

sociological positivism of Gabriel Tarde also exercised considerable influence in Germany. Von Liszt, though supported by eminent psychiaters, E. Kraepelin and G. Aschaffenburg, always stressed the predominance of the social factor in the origin of crime. He was primarily concerned with crime as a mass phenomenon rather than as an expression of individual behaviour. In the wake of positivism and under the influence of the modern biological and social sciences, the empirical approach was also extended to the study of criminal activities. Criminal law was to be studied against the social background. Criminology—as a science—had to supply the empirical facts which explain "the anti-social aspects of crime and the social function of punishment".

This new attitude led to considerable practical consequences. The criminal offences envisaged by the law were not so much significant in themselves, but mere symptoms of an anti-social frame of mind. Legal guilt was to be supplemented by the conception of social danger. The social and biological approach involved individualisation. The traditional aim of "general prevention" to deter the vast majority of law abiding citizens from infringing the law seemed to be too vague to be effective. Criminal law, therefore, had to aim primarily at the "special prevention" of the individual criminal. This is how von Liszt expressed his famous programme: deterrence of occasional criminals, reformation of persistent, but corrigible criminals, and elimination of incorrigible habitual criminals. Many attempts at comprehensive classifications of offenders followed this suggestive formula. In the end, in agreement with similar suggestions made in other countries, it was generally agreed that five groups of offenders required a special type of treatment: juveniles, mental defectives, drunkards and drug-addicts, habitual criminals, vagrants and disorderly persons. It must, however, be stressed that the German modern school never recommended the abandonment of the ordinary legal safeguards, and the substitution of criminal law by administrative measures of public safety of a more or less undefined character. The modern school insisted that the repression and prevention of crime should be governed by three principles: the principle of *nulla poena sine lege*, the principle that no person may be punished only because he is socially dangerous, without having committed or attempted to commit an act prohibited by

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law, and finally the principle that the various offences must be strictly defined by the criminal law in force. Von Liszt himself framed the paradoxical catchword of criminal law as the Magna Charta of the criminal: not only the innocent accused, but also the guilty criminal has the right to be treated by law. It was a liberal conception tempered by social considerations. The rights of the individual were to be respected and guaranteed by law but greater sacrifices were demanded in order to protect society.

The period preceding the outbreak of the first World War witnessed a lively discussion between the exponents of the classical and those of the modern school of criminal law. Immediate legislative results were scarce. As a result of the agricultural crises of the eighties and nineties, various forms of usury were made criminal offences. In 1912 a further amendment to the Criminal Code reduced the penalties for certain minor offences against property committed under distress, and provided increased penalties for assaults against children and persons under the wrongdoer's care and protection. The ultimate aim, however, was to replace the Criminal Code of 1870 by modern legislation. In 1909, an unofficial Preliminary Draft Code was published. It did not pretend to be the product of any particular school, but rather a work of compromise between the traditional legal principles and some new methods of treatment made indispensable by the exigencies of the time, such as conditional remission of sentences, increased punishment for recidivists, special provisions for juveniles, detention of mental defectives and criminal lunatics. In 1911 a Counter Draft of a Penal Code was published by a body of private experts. On the eve of the War of 1914 a Joint Commission on the Reform of Criminal Law had just completed its comprehensive preparatory studies.

II. FIRST POST-WAR AMENDMENTS

The experience gained during the First World War and during the immediate post-war period gave new impulse to the ideas of the modern school. The social and economic upheaval of war and the fatal economic crisis after the collapse of the German currency, resulted in an unprecedented rise in crime with two marked peaks in 1917-8 and 1923. As compared with pre-war standards, thefts increased two-fold during the War and receiving of stolen property threefold among that part of the population

\[7\text{Law of 24. 5. 1880 and 19. 6. 1893; StGB, §302 a-302e.}\]
\[8\text{Law of 19. 6. 1912; StGB, §223a, Abs.2; since 1933 with further extension, §223b.}\]
which was not eligible for military service. The same occurred, but in a more acute form, during the inflation crisis. This extraordinary criminality was economic in its causes as well as in its manifestations. The complete devaluation of money led even in the criminal sphere to a desperate "flight into goods". Offences against property increased more than double as compared with normal times. Taking and receiving goods contributed mainly to the drastic rise in crime figures. Fraud, as a means for obtaining money, did not participate in the general increase. Arson, often committed in order to defraud the insurance companies, dropped to one third of the pre-war level. Both these offences rose markedly, when, after the currency stabilization, money once more became a much coveted object. Recidivism followed the trend of thefts, but in a lesser degree. The growing volume of delinquency affected the hitherto untouched groups of the population. Experience in prisons and in similar institutions confirmed this statistical observation. In those times a high fraction of the inmates consisted not so much of hardened offenders, but of such elements of the population, who, in normal times, had never left the ranks of law abiding citizens. This formed a favourable ground for educational experiments in prisons.

This twofold experience of a rapidly increasing mass delinquency as a result of a serious economic crisis deeply affected the outlook on crime and punishment. On the one hand this war delinquency brought to light the social and economic causation of crime. On the other hand, a new spirit of social responsibility led to an extension of welfare activities, which, in turn, affected the attitude of the community towards crime and destitution. The isolation of criminal law was to be broken and was to be co-ordinated with the expanding social services. The prevention of crime was to aim at eliminating those social evils which crime itself revealed. Punishment was more and more considered not only as a just suffering inflicted upon the prisoner, but also as a loss to the community.

This is the explanation why, after the war, when the volume of crime was rising, the first measures taken consisted in the reduction of penalties and in the elimination of some of their detrimental effects. For a considerable time, the abolition of short prison terms was a favourite point of the programme of reform. A short prison term, it was argued, has all the disadvantages of imprisonment without affording any opportunity for reformative

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treatment. A short term of imprisonment, especially if meted out for the first time, only weakens the deterrent character of punishment. Several other measures contributed to modify the policy of short term imprisonment. With the establishment of the German Republic, the right to grant remission of minor sentences ceased to be the prerogative of the sovereign and became a discretionary power of the courts. Thus it changed its character. It remained in substance an administrative measure which was not a part of the sentence, but, once in the hands of the judiciary, it developed from a mere pardon, unrestricted by law—"the quality of mercy is not strained"—into a rational instrument of penal policy. Under the new regulations, the court, if satisfied that a remission of the sentence was desirable, pronounced the sentence but, at the same time, suspended its execution for a certain period, with the possibility of definite remission. In Prussia the average number of sentences suspended during the years 1921 to 1923 was 93,000. It dropped gradually to something over 34,000 a year during 1926 to 1929. This means that approximately 30 per cent of all sentences of imprisonment or detention were suspended. At the end of this period, the percentage of revocations and re-commitments amounted to 27 per cent of the suspended sentences.

A further elimination of punishments which had proved to be ineffectual was achieved by an alteration in the system of public prosecutions. Hitherto, apart from a certain number of particular offences where prosecution depended on private initiative, the public prosecutor was under the legal obligation to take action whenever there were indications that a criminal act had been committed. This rigid principle was relaxed by allowing the prosecutor a certain discretion. "Contraventions" were not to be prosecuted if the guilt of the offender was but slight and the effect of his act insignificant. According to the same provisions, the public prosecutor could abstain from prosecuting even in cases of a more serious nature, but only with the consent of the court. A further amendment provided that "contraventions" were to be prosecuted only if it seemed advisable on grounds of public policy.

The Criminal Code punished numerous offences with imprisonment without the option of a fine. New legislation gave

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11 K. Schäfer, 52 ZStW. 236-250.
12 §153 StPO, amended by VO 4. 1. 1924; RGB1. 15.
13 §2, Chap. 1, Part VI, VO.6. 10. 1931 RGB1. 537.
the courts the power to impose a fine if, according to the rules prevailing hitherto, the particular offence would not have been punishable by imprisonment exceeding three months. In such cases the court could abstain from ordering imprisonment if "the purpose of punishment could be achieved by a fine." In order to avoid the vicious circle that the prisoner was first fined instead of being sent to prison and that subsequently, however, the prisoner was committed to prison because he was unable to pay the fine, it was provided that the court, when fixing the amount of the fine should take into consideration the prisoner's economic situation, and could permit payment in instalments, or allow the offender to remain in liberty and work off his fine. The latter substitute, however, remained a dead letter.

A rigid system of a general penal register is another obstacle to the social re-adjustment of the ex-prisoner, as it leaves him with a stigma for the rest of his life. A statute of 1920 introduced a particular form of rehabilitation which operated in two stages. If during an initial period the ex-prisoner had not again come into conflict with the law, the register was made accessible to a certain number of public authorities only. After the expiration of a second period, the record in the general penal register was to be destroyed. Time attenuates the stain of punishment by legal prescription—réhabilitation de droit according to the French pattern. The new statute, however, did not affect the prevailing system of civil disqualifications which result expressly from the imposition of certain penalties. As long as the prisoner is still subject to such disabilities prescription does not operate. Capital punishment and penal servitude were excluded from prescription altogether, but by an act of pardon the records could be given a limited effect and even extinguished—réhabilitation gracieuse.

These legislative innovations which aimed at the elimination of unnecessary punishment and of some of their undesirable effects, coincided with a similar tendency in the practice of the courts. Before the first World War, while the Criminal Code remained almost unaltered, a steady trend to pronounce milder sentences gradually changed the penal system. Sentences to penal servitude decreased by 75 per cent, sentences to imprisonment by 61 per cent, while fines rose more than twofold. It would seem that the

14 Ges. zur Erweiterung des Anwendungsgebietes der Geldstrafe und zur Einschränkung der kurzen Freiheitsstrafen vom 21. 12. 1921; definitely VQ über Vermögensstrafen und Bussen vom 6. 2. 1924; RGBI 44. StGB §27-29 in the wording of these amendments.

15 Straftilgungsgesetz vom. 9. 4. 1920; RGBI. 507. See also v. Liszt-Schmidt, 1. c. §§78, 78a, pp. 467-467.
rise in crime after the war of 1914 reversed this development. But under the new legislation which favoured the imposition of fines, the tendency to pronounce more lenient sentences manifested itself to an even greater extent. In 1926 more than fifty per cent of all cases of theft, embezzlement and receiving, and almost every second case of fraud were punished by fine. This was an all-pervading trend. If medium sentences increased at the expense of severer punishments, this increase was far outweighed by a corresponding decrease of medium sentences in favour of lighter ones, such as fines. It is difficult to explain this development which ultimately rests upon unconscious motives. Many factors, psychological, social and political, contributed to this development, all of which can be interpreted in different ways. A similar phenomenon can be observed in other countries.

The mitigation of criminal law was counter-balanced to some extent by its increased severity when particular needs arose. Special emergencies in the post-war period made it necessary to create new criminal offences. The social and economic disintegration during that period led to severer punishment of gambling. Not only the proprietor of a gambling house and the professional gambler, but every gambler who joined a public party or a circle of habitual gamblers became subject to the penalties of criminal law. The wave of political murders led to the enactment of a special law for the protection of the Republic. Participation in combinations which planned acts of violence against the Government or one of their members, was threatened by severe punishment. If such a combination led to the commission of homicide or even to an attempt only, participation in the combination constituted a capital offence. But two fundamental reforms of this period deserve a special analysis: the new system of treatment for juvenile offenders, and the re-organization of the prison system.

III. JUVENILE COURTS

The new legislation for the treatment of neglected and delinquent children and juveniles consisted of two important Acts: the Youth Welfare Act of 1922, in force since 1924, and the

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16 Fr. Exner, Studien zur Strafzumessungspraxis der deutschen Gerichte, Leipzig, 1931.
19 Ges. zum Schutz der Republik vom. 21.7.1922; RGBl. 585.
Juvenile Courts Act of 1923. This legislation no longer regarded the relationship between parents and children as a matter of private nature but of public concern and guaranteed every child “the right to be educated so as to be fit in body, mind and as a member of society”.

The first of these Acts consolidated and extended the competence of Municipal Youth Welfare Boards which were responsible for the care and protection of all minors under 21 years of age. These authorities had a flexible organization which co-ordinated the work of public officials and voluntary agencies. In many cases even far reaching educational measures could be initiated in co-operation with parents or guardians. Whenever preventive or compulsory measures interfered with parental rights, a judicial decision was necessary. German law assigned this function to special guardianship courts. In the whole of Germany, the lower courts, the Amtsgerichte, carried out this activity of non-litigious jurisdiction. The Civil Code of 1898 authorized the courts to take the “necessary measures” if the child were physically or morally endangered. In particular they could order the child to be educated under public supervision. This power, however, could be exercised only if the father had previously forfeited his parental right owing to his misconduct. There were two exceptions to this restrictive principle: the first was that public education could be ordered, if a juvenile under 18 years of age had committed a criminal offence. And secondly, the introductory Act to the Civil Code empowered the German States to provide by statute for public education for the purpose of preventing “complete moral depravation” even if the parents were not to be blamed.

The new legislation by the Reich mentioned above extended the right of the courts to order the public education of neglected or wayward children. If, through insufficient parental care, the child had actually been neglected or endangered, the court had now the power to order protective supervision or public education, for the good of the child and for the safety of the community. However, public education as a merely preventive measure, designed to counter dangers which might be expected in the future, could be ordered only if personal misconduct on the part of the father was established. Protective supervision worked on lines similar to those of the English probation system. It was exercised


21 Weimar Constitution a 120, Youth Welfare Act §1.

22 BGB §1666; StGB §§55,56 in their original wording; EG.BGB art. 185.
by a Youth Welfare Board or by voluntary agencies. Public education was provided either in an institution or in a foster family. In Prussia, the number of children and juveniles subject to public education fell from 64,000 in 1925 to 46,000 in 1932. This decrease in numbers was not so much a symptom of progressive social adjustment than a reflection of the economic crisis which curtailed the intention of the law. Out of that total, 42 per cent were under institutional treatment: of these, one fourth were in public and three fourths were in approved private institutions.23

In Germany—as in England—Juvenile Courts were criminal courts. Since the existing guardianship courts had ample opportunity within their far-reaching competence to deal with neglected and wayward children and juveniles, the legislature had the opportunity to develop Juvenile Courts and to determine the age-limits as to their competence by what was felt would be reasonable demands of criminal law. The new Act raised the lower age-limit from 12 to 14 years. Before the First World War 9,000 children between 12 and 14 had been tried by the ordinary law courts every year. Now, Juvenile Courts had exclusive competence to deal with juveniles between 14 and 18 years of age. Long before the Act of 1923 came into operation Juvenile Courts had developed within the frame-work of the prevailing law of procedure. A first inspiring experiment was made at Frankfort in 1908. These early tribunals were ordinary criminal courts with a special competence to deal with juveniles. They worked closely together with voluntary social agencies and medical experts, and tried to modify the rigidity of the prevailing penal system by an adequate use of suspended sentences which then still operated in the form of a pardon. Various reports on the American and English probation systems and the example of Judge Ben Lindsay at Denver, Colorado, stimulated an influential reform movement. The rise in juvenile delinquency and the increased feeling of social responsibility during the war gave new force to this movement.

The new law provided the court with a flexible mode of trial and put at its disposal a variety of measures. Reformation and education gained predominance over retributory punishment. The judge could abstain from further action against the accused juvenile if preliminary investigation revealed a lack of criminal responsibility, or if sufficient educational treatment could be provided, or if the offence was so trivial as to justify the discharge

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23 Statistik über die Fürsorgeerziehung in Preussen. See Zentralblatt für Jugendrecht und Jugendwohlfahrt 20, p. 159, and 25, p. 204.
of the culprit without punishment. If the trial led to conviction, the court was under the obligation to examine whether merely educational measures would be necessary and sufficient. If not, the court could impose a fine or imprisonment, but the latter could be suspended either wholly or in part for a probation period of two to five years. A conditional suspension of a part of the sentence to imprisonment gave it, to a certain extent, the character of an indeterminate sentence. A wise provision of the original Draft Code made probation possible before the definite judgment. The Act itself contained no such provisions. Suspension of the sentence could only be granted if the trial had been brought to an end and after sentence had been passed. The practice of the courts, however, led to the demand for a tentative application of educational measures while the trial was still pending and while it was still possible to impose a sentence. Many Juvenile Courts reached this aim by a wide interpretation of the law. The judge asked the public prosecutor to abstain from prosecution for the time being and took the necessary measures in his capacity as a Guardianship Judge. Some courts applied even those measures which were at the disposal of the Juvenile Court, but which—according to the letter of the law—were to be pronounced in the final judgment. The result of all these measures was that the trial, sentence and punishment of juveniles was avoided whenever any other method of dealing with them seemed advisable. But even if a juvenile was sent to prison, punishment—in the words of the Act—was to have a predominantly educational purpose. If, on the other hand, the Court decided upon a purely educational treatment, two ways were open. Either the Juvenile Court pronounced the measure—a warning, the imposition of a special obligation, protective supervision or public education—or the Court referred the matter to the Guardianship Court to decide upon the appropriate educational measure. The second alternative seems preferable where public education is envisaged. The law favoured an arrangement according to which the judge who presides in the Juvenile Court also sat as a judge in matters of guardianship. This arrangement enabled the judge to choose between the more formal procedure of trial, conviction and sentence on the one hand, and the informal procedure of making enquiries and taking measures of a non-litigious character on the other. Official or voluntary special workers attached to the Court co-operated throughout the entire proceedings. They made preliminary enquiries, submitted a report on the social background of the accused, attended the trial, supervised the juvenile during the probation period, kept contact with him while he was detained
in an institution or served a term of imprisonment, and assisted him after his release. This efficient service was called Juvenile Court Aid.

The establishment of Juvenile Courts was a remarkable step towards a new conception of the social and educational aspects of criminal law. Strictly speaking, it would appear that the Act retained the distinction between education and punishment, while attempting at the same time to emphasize and to reconcile these conflicting aims. The Act distinguished between educational measures and penalties—but punishment, too, was employed to serve educational purposes. The Act differentiated between the Juvenile Court, which was to be in substance a criminal court, and the Guardianship Court. It preferred to reserve for the Guardianship Court, a civil court, the right to take educational measures. But it facilitated a union between the two courts in the person of one judge who performed both functions. Before the reality of life the doctrinal contradictions faded, together with the differentiation between mere measures of education and punishment according to law. Owing to its flexibility, the new law proved to be an excellent instrument for the purpose of selecting the treatment suitable for each individual case. As their experience and insight grew, the Juvenile Courts, which, in co-operation with the Guardianship Courts and Youth Welfare Boards exercised such a wide jurisdiction, assumed an important social and educational function.

As the experience gained in other countries confirms, Juvenile Courts, like any other new institution of social reform, proved more successful in towns than in rural districts. Although in small towns with close personal contacts favourable conditions for intensified social work may be expected, big industrial centres where the social needs are more obvious and where a greater administrative staff is available offer a better opportunity for preventive and reformative experiments. Consequently average statistical figures for the whole country are mere generalisations which cover up considerable differences. In 1926, nearly one half of the trials before Juvenile Courts ended with a sentence. In big cities and small towns, fines were almost as frequent as prison sentences, while in medium-sized towns, prison sentences made up two-thirds of all sentences imposed. Three quarters of all prison sentences were conditionally suspended. One half of the educational measures consisted of warnings. Protective supervision was ordered in every tenth case in which the decision provided for educational measures. The right to impose special
obligations, the favourite instrument of the modern Juvenile Court, was exercised in 8.1 per cent of all cases decided in big cities and only in 2.6 per cent of those decided in small towns. The statistical information to the effect that public education was ordered in 3 per cent of all cases is rather misleading. It indicates that Juvenile Courts themselves refrained from ordering public education. Instead, they referred the case to the Guardianship Court for decision, or ordered public education in their own capacity as Courts of Guardianship, thus avoiding the formalities and the litigious atmosphere of a trial court.24

The Juvenile Court Act has generally been regarded as the most successful piece of modern German legislation, but it was only a stage in the development of the law relating to juvenile offenders.25 The question what was the appropriate age-limit never came to rest. As to the lower limit of fourteen, a minority of experts, both before and after the enactment of the law, advocated the exemption from criminal proceedings of further age-groups up to 16 or even 18 years of age. This movement was inspired by a genuine pedagogical impulse, but it failed to appreciate that owing to the far-reaching reform of the law, the Juvenile Courts themselves had been transferred into pedagogical institutions. It is always arbitrary to fix a strict age-limit, but it would appear indicated to fix the limit at the age of 14, for it is then that most children leave school and their home. The flexibility of the new law enabled the Court, on the one hand, to abstain from bringing the full force of the law to bear where other treatment seemed more appropriate, while, on the other hand, the threat of punishment for what amounts to a serious breach of the law was in itself a valuable educational factor and an impressive demonstration of the indispensable demands of society of which the juvenile begins to be a member. As far as juveniles between the ages of 14 and 16 are concerned, the courts avoided the imposition of punishments in two thirds of all cases which came before them. If a prison term had to be imposed, its execution was suspended in nine cases out of ten.

The suggestion to raise the competence of Juvenile Courts beyond the upper limit of 18 is novel and very important. It originated from practical experience rather than from theoretical considerations. If Juvenile Courts and Guardianship Courts are to be fully co-ordinated, the former must possess the same juris-

24 H. Poelchau, 51 ZStW 84-115.
diction as the latter, i.e., over all minors up to 21. Also, deeper psychological insight showed that the eighteenth year is not in fact as significant a mark, in the life of a juvenile, as the legislature had assumed. It seemed particularly desirable to provide for a close co-operation between the courts and the Juvenile Court Aid in respect of adolescents between 18 and 21 years of age. However, it is necessary to remember that adolescents represent a group of considerable criminality. They share to the extent of 12 per cent in the grand total of criminality. An analysis of the number of convictions per 100,000 persons shows that the ratio of criminality among adolescents between the ages of 20 and 22 amounts to 1,867, as compared with 1,200 for the population in general.\textsuperscript{26} The figures for the various forms of theft and embezzlement are even more illuminating. In 1930, convictions for these offences can be classified as follows:

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Number of Convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juveniles between 14 and 15</td>
<td>14,557</td>
</tr>
<tr>
<td>Adolescents between 18 and 21</td>
<td>22,763</td>
</tr>
<tr>
<td>Adults over 21 years</td>
<td>100,368</td>
</tr>
</tbody>
</table>

Of this number one seventh of the juveniles, nearly one third of the adolescents, and more than one half of the adults had previous convictions.\textsuperscript{27} These figures show that an extension of the age limit would have imposed a heavy strain upon Juvenile Courts and that it would have put the efficiency of their methods to a severe test, as it would have broadened their jurisdiction to cover a considerable proportion of all offenders. The practice of the courts anticipated legislation in this new field. In various places, as a result of a simple rearrangement of the administration of the court, the ordinary criminal jurisdiction of the Amtsgericht over offenders under 21 years of age was entrusted to the same judge who presided over the Juvenile Court. It was also suggested that Juvenile Courts should have jurisdiction over certain offences committed by adults, if a child or a juvenile is the personal victim or the principal witness. Thus, by the simple arrangement of combining several functions in his person, the judge of the Juvenile Court exercised a comprehensive jurisdiction, although partly according to the ordinary rules of criminal procedure. But even in the latter case he co-operated with the Juvenile Court Aid. As in the time before the Juvenile Court Act, the Juvenile Court Aid had “to accommodate itself within the gaps of the law,” as an old Juvenile Court Judge once said.

\textsuperscript{26} Fr. Hartung, \textit{loc. cit.} at p. 560.
The experience thus gained encouraged the Government to introduce in connection with the preparation of the Draft Criminal Codes certain legislative proposals for a special system of rules for adolescents, which was to occupy a place somewhere between the provisions for juveniles and the general criminal law for adults. As far as substantive law is concerned, these proposals exempted adolescents from capital punishment and preventive detention, lowered the legal maxima and minima of punishments, and allowed conditional remission of sentences without any regard to the length of prison terms. On the other hand, the proposals differed from the law relating to juveniles in as much as punishment was to be the rule. As an exception punishment could be dispensed with if the adolescent was already confined in an institution for educational purposes. As far as procedure is concerned, these proposals gave the public prosecutor the power to bring the case before the Juvenile Court if he deemed it advisable with regard to the prisoner's mental and normal development, or if the latter was still undergoing educational treatment as provided by the Juvenile Court Act. Even if the public prosecutor were not to apply for a trial before the Juvenile Court, the ordinary criminal court was to co-operate with the Juvenile Court Aid, the Youth Welfare Board and the Guardianship Court as if it were a Juvenile Court.

The development of the German criminal law relating to juveniles was further stimulated by the Austrian Juvenile Court Act or to quote its exact title, the Federal Law for the Treatment of Young Offenders, 1928. This Act relied much on the experience of the German Juvenile Courts gathered during the preceding five years, but it went still farther by introducing two bold innovations: conditional sentences and indeterminate sentences. The former appear in the commendable form of divided judgments: the court, if it thinks fit, pronounces a final judgment in respect of the prisoner's guilt, but refrains from pronouncing a sentence of punishment during a certain period of probation. This was a remarkable innovation, since German law and the legal systems allied to it had never separated conviction and sentence so far. If probation proved unsuccessful, the Austrian Judge pronounced the appropriate sentence taking into account at the same time the behaviour of the juvenile during the probation period—a bold application indeed of the principle that punishment should fit not the isolated offence, but the offender's personality. Indeterminate

28 Art. 72 Entw. EG.StGB 1930.
sentences providing a maximum and a minimum penalty corresponding to the scale of punishments laid down by the law in respect of the particular offence, were to be applied "if it was impossible to determine even approximately what prison term would be necessary to change the prisoner's frame of mind and to overcome his anti-social inclinations". The example set by foreign legislation stimulated the reform movement in Germany. The Parliamentary Commission considered the question of conditional sentences to be primarily a problem of criminal law in general. However, it was proposed to introduce indeterminate sentences for juveniles and adolescents in accordance with the Austrian pattern. In the German Draft the conditions in which indeterminate sentences may be pronounced are more formal in character than in the Austrian Act. The sentence may be indeterminate "if it cannot be determined in advance what prison term would be necessary in order to achieve the purpose of punishment". After the expiration of the minimum period, the prisoner may be released by the trial court, "if his personality appears thus far strengthened that it would be reasonable to expect that he will in future lead a law abiding and orderly life". However, none of these far-reaching legislative proposals ever obtained the force of law. Forming a part of the comprehensive proposals for the reform of criminal law, they shared the ultimate fate of the various succeeding Draft Criminal Codes.

IV. REFORM OF THE PRISON SYSTEM

Like the establishment of Juvenile Courts, the re-organization of the prison system was the outcome of a comprehensive educational movement, the influence of which made itself felt in post-war Germany not only in the schools, but also in the Youth Movement, in Vocational Training, Adult Education, and numerous forms of social welfare work. In many aspects of social life a new emphasis was laid on the importance of a personal approach. The prison system did not escape this influence. In 1923 the Inter-State Agreement of 1897 which had hitherto formed the basis of the existing prison system, was replaced by a new system of Principles of Prison Discipline. The reform was not confined to an adjustment of administrative practices: the prisoner himself, his fate, his reformation and rehabilitation, were the principal

30 Art. 72 head 9 Entw. E.G.StGB. 1930.
31 Art. 72 head 9 Entw. E.G.StGB. 1930. footnote.
32 Grundsätze für den Vollzug von Freiheitsstrafen vom. 7. 6. 1923, RGBI, II, 263.
concern of the new rules. "With the help of the prison discipline, the prisoner, as far as necessary, shall become accustomed to order and work as well as morally strengthened, so as not to again relapse into crime". "The prisoner shall be treated strictly, justly and humanely. His sense of honour is to be preserved and strengthened". "Regular work by the prisoner is the foundation of a proper prison system". "At work, the prisoner shall be trained gradually towards self-determination and responsibility".

Further regulations dealt with recreation and spare time, with lessons—which were obligatory for all prisoners under 30 years of age—and with communications, by visits and letters, with the world outside. Plans for after-care were to be initiated during the prison term. In the case of prisoners serving longer sentences a system of progressive stages "is to be aimed at." The whole work was a worthy precedent for subsequent legislation. In 1927, two official Draft Prison Codes were published. As a whole, they followed the Principles laid down in 1923, but their scope was wider. They covered all forms of punishment including some new measures of public safety, and elaborated and amended many particulars. The Drafts abandoned finally the traditional predilection for separate confinement. For the first time, the prisoner was conceded a legal right to his earnings, although it could neither be enforced in court nor be assigned or seized. Voluntary prison helpers were to assist officials and social workers. As to the system of progressive stages, the "aims which appeal to the prisoner's will-power and self-restraint" should not only consist in a gradual relaxation of the prison discipline leading up to the final transition into liberty, but also in "a growing burden of obligations which should stimulate and strengthen the prisoner's responsibility".

Even the existence of a complexity of ideal rules in matters of prison organization does not necessarily lead to a satisfactory prison reform. Within the flexible frame-work of the Principles of 1923, the general standard rose in respect of work and earning schemes, education and exercise, sanitary care and social service, while a marked education in disciplinary measures could be observed. The fact that the administration of German prisons rested with the Member States favoured a variety of new forms and of bold experiments—a fortunate rivalry which was stimulated

33 M. Liepmann, Die neuen Grundsätze über den Vollzug von Freiheitsstrafen, 1924. Also in Mitt. IKV. 22, Heft 4, p. 32.
34 Grundsätze SS 48, 49, 62, 69.
35 (I) Amtlicher Entwurf eines Strafvollzugsgetzes 1927.
36 Entw. StVG II 1927, §168.
by a growing theoretical interest in prison problems. Under the
inspiring influence of M. Liepmann and his school the principle of
social responsibility was applied even to those members of the
society who had violated its rules. The attitude of this school
was primarily based upon a sincere faith in the power of out-
standing personalities to influence their weaker and erring fellow-
men. In the first period, after the World War of 1914 at Hahnô-
versand near Hamburg, two young reformers were in charge of a
group of some thirty juvenile prisoners. They tried to fill the
prison atmosphere with a new spirit of personal guidance and
mutual confidence, and with educational activities born of the
vivid tradition of the Youth Movement. Some more compe-
rensive schemes of prison reform were connected with the intro-
duction of a system of progressive stages. Hitherto the prevailing
doctrine of strict retribution had been a formidable obstacle to
the adoption of more flexible and dynamic principles of prison
management. Only in 1912, under the influence of the American
reformatories, a first reformatory prison for young offenders
between the ages of 18 and 21 had been erected at Wittlich. The
system of reform by progressive stages has generally been identified
with the cause of prison reform itself. It was a remarkable step
indeed, when the traditional system of monotonous prison terms,
served from the first until the last day almost without any
differentiation, was supplanted by a dynamic principle which
gave the prisoner an opportunity to rise gradually in three stages,
marked by an increased relaxation of the oppressive character
of the ordinary discipline, and which at the same time appealed
more and more to the prisoner's self-control and active co-
operation. German promoters of such plans for reform saw
clearly that neither the historic Irish pattern nor that of the
American reformatories relied upon an automatic application of
a well regulated scale of relaxation. A properly organized scheme
of progression could only form the framework for untiring educa-
tional activities. The work of reform could only succeed if a
new type of prison official was created. Although the ideal was
never reached—as often in prison history—many valuable partial
reforms were initiated under the inspiring guidance of a new
penal policy.

Of German prison administrations that of Thuringia enjoyed
a remarkable reputation. Workshops were modernized, educa-
tional activities were carried out according to a high standard
of adult education. Prisoners of the third stage—representing
some 15 per cent of the convicts—were entrusted with a limited
self-government and with other responsibilities. They co-operated with a Prison Tribunal which imposed disciplinary measures. Only those prisoners who proved successful during the third stage were eligible for conditional release. Saxony started a large-scale experiment by appointing qualified social workers to prisons and to some places in the main reception areas for discharged prisoners. Bavaria tried to classify prisoners with a view to progressive and reformative treatment according to the results of a thoroughgoing socio-biological diagnosis, not without incurring the risk of prejudicing the prisoner’s future development by premature predictions. In Prussia the movement for reform met with more difficulties. In 1927 the number of prisoners in Prussia was 36,000, i.e., more than half of the total average daily prison population in Germany which amounted to 62,000. The vast organization of some 7,000 prison officials provided less favourable conditions for new experiments than an administration of medium size in a central German State, which possessed only few central institutions and a small homogeneous staff. A Prussian Regulation concerning the progressive stage system, published in 1929, was a radical programme rather than a practical solution. It went very far to render flexible the uniform prison system in force. It laid the foundation for a progressive stage system which—differing from other similar schemes—extended the relaxation accorded to the higher stages, also to the lower ones. The new intermediate stage almost corresponded to an ordinary final stage, while the latter was to be turned into an institution of transition according to the original Irish pattern. Every stage was to be served at a different prison. Further special institutions were provided for young offenders, mental defectives and practically incorrigible persistent criminals. Regular leave was to be granted to prisoners during their second and third stage—a proposal which gave rise to much controversy. Actually, these regulations remained almost a dead letter. In order to function properly such a modification of the system of reform in progressive stages presupposes far-reaching administrative measures and a judicial practice which favours sufficiently long prison terms.

On the whole, this period which was characterized by the introduction of a system of reform by progressive stages was susceptible to new ideas and bold experiments. The ambiguous term of “progression”, however, gave rise to much confusion. It fostered the old prejudice that prison reform could be achieved

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36 VO über den Strafvollzug in Stufen vom. 7, 6, 1929. Gedruckt in der Strafanstalt Berlin-Tegel. See also I Recueil de documents en matièrepénale et pénitentiaire 253 (1931).
by a mere change in organization alone, and seemed to justify at the same time every kind of relaxation of the prison discipline, even without a corresponding increase in the prisoner's personal responsibility and self-control. In the end the reformers themselves warned against the distortion of a wholesome principle, and emphasized the problematical character as well as the necessary limitation of any progressive system. Experience shows that even an ideal system of reform by progressive stages can never be an end in itself, although it may be an appropriate instrument to improve discipline, a reasonable remedy against the psychological and moral dangers of the prolonged monotony of prison life, and a suitable framework for a true educational atmosphere. The final success of the whole new system depends less on the form of progression from stage to stage than on the spirit of the prison administration. Thus it is closely connected with the ends of penal policy as a whole.

V. THE DRAFT CODES

All the statutory amendments and administrative innovations were intended to anticipate the final reform of the criminal law, i.e., the enactment of a new code. The numerous reforms made it still more desirable to co-ordinate the various measures by means of a comprehensive codification. All the steps taken so far, such as the extension of fines, the rehabilitation of criminals, the creation of Juvenile Courts, or the reform of the prison organization, were still compatible with a somewhat flexible conception of the traditional doctrine of just retribution. Further proposals, however, such as the plan to introduce conditional sentences and indeterminate sentences struck at the root of the whole penal system and required a decision in matters of principle. Moreover, it was a natural tendency that the sponsors of the new penal policy wished to see it laid down in a codified form.

In 1920 the Government published the draft code of 1913, the last Draft of the pre-war period, together with a newly revised Draft of 1919, which adapted the old legislative proposals to the conditions under the new Constitution. After a lively discussion by writers on criminal law, a new Draft was prepared in 1922 under the guiding influence of Professor Radbruch, then Minister of Justice, but it was not published. This Draft was the most progressive ever submitted in the history of German criminal law. It abolished punishment, replaced penal servitude

\[\text{37 See Professor Radbruch's report in 45 ZStW 417.}\]
by long-term imprisonment, and did away with all legal disabilities affecting civil status and personal reputation. These features were soon abandoned, but the general structure of the Draft of 1922 remained the basis for the first Official Draft of 1925. As the Bill was introduced by the Government, it had first to be submitted to the Reichsrat. After having been considered there, it came before the Reichstag under the title "Draft of 1927". The Bill was read for the first time on June 21st and 22nd, 1927. Three subsequent Parliaments considered the Draft in the committee stage. Special constitutional measures were necessary to preserve at least some of the results of these deliberations beyond the duration of each successive Parliament. The work came to a preliminary conclusion when the whole Bill had been read for the first time and the first sixteen chapters for the second time. In order to form a basis for further parliamentary discussions, the results of these deliberations were compiled in the so-called Draft of 1930. This, however, was the final stage of the movement for a reform of the criminal law. The refusal, in 1931, of the right wing parties to continue their co-operation in the field of legislation, and the frequent dissolution of Parliament in 1932, brought the reform of German criminal law to a fatal stand-still.

The remarkable series of Draft Codes was strongly influenced by modern criminological ideas which were, however, often modified for the sake of political compromise. In 1929 and 1930, two further Draft Introductory Acts put forward further proposals with a view to adapting criminal procedure and other branches of the law to the new penal system. During various stages of the legislative work Austrian jurists co-operated with the German reformers. It was envisaged to enact parallel codes in both German speaking countries and to create not a "common" law, arising from the same source, but "general" law, i.e., identical rules within divers independent jurisdictions. An Austrian Counter-Draft was published in 1922 as a contribution to the reform movement in Germany. The Austrian Draft Code of 1927 corresponded throughout to the German Draft of the same year except in two respects. It rejected capital punishment, and omitted a special proviso for medical abortion.

38 Entwurf eines Einfuhrungsgesetzes zum Allgemeinen Strafgesetzbuch und zum Strafvollzugsgesetz 1929 (Reichsratsvorlage) und 1930 (Reichstagsvorlage).
39 Oesterreichischer Gegenentwurf zum Allgemeinen Reil des deutschen Strafgesetzentwurfs, Wien, 1922.
The German Draft covered almost the whole field of criminal law. As regards the definition and enumeration of the particular criminal offences, the Drafts aimed at the greatest possible completeness. Legal definitions were multiplied, and numerous conceptions widened. Wherever the interpretation of the Code in force had left certain gaps, the network of legal offences was henceforth to satisfy the requirements of criminal justice. In respect of the problems, namely the prevention of perjury and the protection of personal reputation, the later stages of the work of reform produced new ideas. First, a substantial reduction in the use of oaths in legal proceedings was expected to strengthen the value of this principal instrument of proof. On the other hand it would diminish the number of prosecutions for perjury and render them more effective. Secondly, it was realized that the remedies for defamation were deficient as long as criminal prosecutions provided practically the only sanction. It could happen that personal reputation was seriously injured, but that special circumstances excused or justified the defamatory statement. In this case the accused had to be acquitted. In order to assist the injured party the Draft Code of 1930 provided an action for a declaration that the alleged fact was untrue, as an alternative to criminal prosecution.41 Outside the sphere of criminal law the only remedies consisted of injunctions prohibiting a repetition of the injurious statement, or of orders by the Court to withdraw it. Both these remedies were designed to protect the plaintiff from further damages. They were gradually developed by the practice of the courts. In this rather complicated matter a reasonable restraint of the purely criminal character of the complaint, supplemented by certain civil law remedies, enhances the protective function of the law.

On the Continent special importance is attached to the general part of criminal law, i.e., those fundamental rules and conceptions which must be considered whenever a criminal act of any kind comes up for decision. Here too, the Drafts were much more comprehensive than the original Code. The work of interpretation which had matured in the preceding decades was now embodied in the written law. The various forms and degrees of mens rea were defined, their typical mental elements characterised, as were the special conditions which justify or excuse the commission of what would be otherwise a punishable act. According to the final wording of the Draft Code of 1930, personal responsibility was to be excluded if, as a result of a

41 Art. 70 head 219 Entw. EG.StGB. 1930.
mental disease or of mental deficiency, the perpetrator was unable to understand the wrongful character of his action or being capable of understanding, was unable to act accordingly. The second alternative supplemented the traditional French doctrine, which required a merely intellectual "discernment", by a volitional factor. Acts were to be punishable only if they were committed either intentionally or negligently. An act was done with intention if the perpetrator committed the act consciously and wilfully or if he, thinking that his act may have consequences of a criminal character, accepted this risk nevertheless. Negligence as a form of mens rea was defined as absence of such diligence as is required of the perpetrator, and of which he is capable. The perpetrator is negligent if he either fails to see that his act will have illegal effects or if, while believing such a course to be possible, he acts in the hope that eventually illegal effects will not occur. The provisions concerning error underwent various changes. The final Draft made a nice distinction. A person who, by mistake, believes that factual circumstances exist which would justify his own unlawful act if they had really occurred, has no criminal intention but may be guilty of negligence. But if he is mistaken about the illegal character of his act owing to an error in law, he acts with intention. However, he is not guilty if this mistake can be excused, e.g., if it is based upon a false statement by a competent authority. The insertion of such a provision would have been a significant deviation from the traditional doctrine, so far still maintained by the Supreme Court, that error iuris criminalis semper nocet. Former Drafts contained a special provision in respect of criminal liability for injuries due to wrongful omissions. The criterion was to be whether the perpetrator was under a legal obligation to avert the incident complained of. But who, it may be asked, apart from a person who himself created a dangerous situation, would be under a legal obligation to prevent injurious effects arising from such a situation? As it was difficult to answer this question satisfactorily, the clause was omitted in the Draft Code of 1930. A criminal act committed in defence is justifiable; if committed in a state of necessity the act is sometimes justifiable and sometimes merely excusable. For the purpose of defining criminal attempt, the Draft Codes retained the classical formula, once elaborated by the Code pénal: commencement d'exécution. In other words, attempt is an overt act constituting the first stage in the commission of a particular crime. With regard to impossibility, the Draft Codes made a nice distinction. Either the plan was a reasonable one, viz.—to use the words of the Draft Codes—in the factual situation as
the perpetrator believed it to exist, the act committed would have constituted the beginning of a commission of a criminal offence. Or the plan itself was impracticable on the ground that having regard to the means applied, or the objective aimed at, the offence could never have been perpetrated. It may be useful to illustrate this distinction by an example. In the first case, the offender did not know that the rifle was unloaded; in the second he entertained the superstitious belief that he would be able to shoot even with an empty gun. The Draft of 1925 exempted the latter case from punishment, while the Drafts of 1927 and 1930 proposed that the courts should be given the discretion either to impose a more lenient sentence or not to punish at all.42

Thus, with the help of numerous rules, the Draft Codes tried to extend as widely as possible the application of the written law even as far as to invade the province of the discretionary power of the judge. Legal provisions of such a character cannot rely exclusively on abstract logical conceptions. Flexible terms may only guide and limit rather than supersede the indispensable judicial discretion. It is for the Court to decide whether a mistake is excusable, whether certain behaviour is reasonably to be expected, in what cases the disclosure of a secret is justified, whether an act was done in due performance of a profession. Where the question is a mixed one of law and of fact the higher courts are expected to give a valuable lead. The tendency of modern statute law to lay down comprehensive regulations requires, in practice, rules of a flexible character.

In the sphere of criminal law, one topic has always been the domain of judicial discretion. It is the power of the judge to determine the adequate sentence. The Draft Codes left the traditional system of punishments almost unaltered. They widened the range of punishment for the particular criminal offences and made their limits flexible by providing special clauses dealing with aggravating or extenuating circumstances. Extenuating circumstances may even justify the substitution of a different type of punishment instead of capital punishment provided in cases of murder. Even so, these regulations do not go so far in freeing the judge as English law does: statutory provisions regarding minimum penalties were to be abolished for certain particular offences only. In order to warrant a proper and uniform application of the judicial discretion, the courts were to be guided by a number of general principles concerning

the determination of sentences. In 1926 the Prussian Minister of Justice published these draft proposals as an official instruction for the public prosecutors who, in Germany, direct the preliminary enquiries, prosecute and suggest the measure of punishment.\textsuperscript{43} Such principles, however, can only be framed in very general terms which do not seriously impair the discretion of the Court. Therefore their practical importance should not be over-emphasized.

It was expected that the question of conditional sentences would be brought to a definite solution. The strange practice that pardons were granted by the State but that the power to grant them was delegated to the law courts was finally abandoned. Following the precedent established by the enactment of the Juvenile Court Act, the principles regarding conditional sentences were to be laid down by a Law of the Reich. The relevant regulations individually underwent considerable changes. According to the Draft Code of 1930, all offenders sentenced to a term up to one year or to a fine were to be eligible for conditional remission. The Court was to impose a probation period of between 1 and 5 years and was empowered to order protective supervision. The Juvenile Courts Act and some of the former Draft Codes required that after the successful expiration of the probation period the Court should pronounce a decision finally remitting the penalty which had hitherto been suspended. Since the Draft Code of 1925, however, the remission was to take place by operation of law. If the offender is not again committed for trial during the probation period, the penalty "is remitted" or, in the wording of the Draft Codes of 1927 and 1930 "is deemed to be remitted" without any further decree. Thus a mere conditional suspension was turned into a true conditional remission.\textsuperscript{44} As far as entries in the penal register and the effect of previous convictions in the case of subsequent recidivism are concerned, the prisoner was to be regarded as convicted notwithstanding the definite remission of his penalty. In a further legislative proposal the suspension of the trial, which had been developed by the practice of Juvenile Courts to stimulate a law-abiding conduct, found a tentative legal formulation. The newly-created discretionary powers of the public prosecutor were to be used for this purpose. The decision whether or not to take action should be provisionally suspended for one year "if this


decision (namely, whether the public prosecutor was to ask for a trial) depended upon the behaviour of the prisoner during this period. Such a suspension could only be granted if the judge and the public prosecutor concurred. Thus the German law of the future was expected to permit either a suspended trial, or a conditional remission of the penalty imposed, but not a conviction followed by a suspension of the sentence.

The crucial problem of modern criminal legislation is the introduction of new measures against various forms of persistent offenders. From the very beginning, this was the kernel of the reform movement. Criminal law should not only react against single offences, but also effectively deal with dangerous personalities. The law of the future should be directed towards two poles: personal guilt and social danger. Retribution may be achieved by a fixed penalty—prevention requires flexible measures. Consequently the traditional system of legal punishments needed thoroughgoing modifications, the visible expression of which was to be the indeterminate sentence. The plan owes much to the American Reformatory Movement as developed since the seventies of the last century. In America, indeterminate sentences had been propagated for the purpose of implementing an effective scheme of reform. Therefore, the main emphasis lay upon the shortening of the sentence of imprisonment as an incitement to self-restraint. Continental criminology stressed the opposite end: the prolongation of a prison term for the sake of public safety. In an ideal system, indeterminate sentences may serve the purpose both of reformation and of prevention, by selecting and stimulating the corrigible offender so as to make his early release possible or by extending the detention of the incorrigible delinquent. There were, however, other serious obstacles to such a clear-cut legislative solution. The legal traditionalism of the classical school and judicial conservatism insisted on keeping a clear distinction between the conception of punishment and what was regarded as inadequate preventive tendencies. In the end, this controversy led to the expedient of a "double track system". Penalties were to be administered according to the degree of personal guilt, and "mere" measures of public safety according to the degree of social danger. The German Draft Codes offer a characteristic illustration of the difficulty of fitting the vital requirements of crime prevention into a dual system which tries to reconcile punishment and prevention.

45 Art. 70 head 88 Entw. EG. StGB. 1930.
The most important group of persistent offenders consists of habitual criminals. The effective repression of this group had been the principal aim of von Liszt and his school. After the decline of post-war mass criminality, recidivism began to rise in a startling proportion once again. The number of sentences imposed was:

<table>
<thead>
<tr>
<th></th>
<th>First offenders</th>
<th>Recidivists with more than four previous convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925</td>
<td>575,745</td>
<td>38,273</td>
</tr>
<tr>
<td>1931</td>
<td>565,903</td>
<td>69,807</td>
</tr>
</tbody>
</table>

In 1927, in reply to a questionnaire, the German penal institutions described approximately 12,000 out of their 62,080 inmates as habitual criminals, and suggested that 4,000 of these prisoners should be detained after the expiration of their sentence. In view of the traditional reluctance of the courts to impose sentences to a long term of imprisonment, an official estimate expected the internment of some 2,000 to 2,500 of the most dangerous habitual criminals.

From a comparative point of view, modern law-makers have the option between four variations. First, they may add to a—perhaps increased—term of penal servitude a fixed term of prevention detention, as provided by the English Prevention of Crime Act, 1908, and the Belgian Law of Social Defence of 1930. They may, secondly, combine a fixed term of penal servitude with indeterminate preventive detention, as laid down by the Italian Criminal Code of 1930. Or, thirdly, they may substitute for the penalty “deserved” according to retributory standards, a preventive detention which is fixed, but meted out with a view to the prisoner’s dangerous proclivities, as envisaged by the Swedish Act for the Internment of Recidivists of 1927, and the English Criminal Justice Bill of 1938. Or, lastly, the penalty may be superseded by indeterminate preventive detention, as in the Danish Criminal Code of 1930, and the Swiss Federal Criminal Code of 1937. Apart from the first Parliamentary Draft of 1909, which simply provided aggravated terms of penal servitude for recidivists and habitual criminals, German legislation vacillated between the second and the fourth solution. The Draft Codes of 1913 and 1919 combined aggravated terms of penal servitude with obligatory, indeterminate, preventive detention. The Draft Code of 1925, however, contained an alternative clause which left it to the discretion of the Court to substitute indeterminate

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47 Anlage II zum Ent. StGB. 1927, p. 35.
preventive detention for a fixed term of punishment. The introduction of indeterminate detention, conceived as a vicarious sanction instead of penal servitude, would have meant the recognition of indeterminate sentences if not in the form, then at least in substance. But the Reichsrat rejected this important proposal and the Draft Codes of 1927 and 1930 returned to the cumulative principle; they recognised penal servitude combined with indeterminate preventive detention, which were to be imposed according to judicial discretion and subject to certain conditions. In spite of this setback the general impression prevailed that the indeterminate sentence was "on the way".

The Draft Codes gave conditional release its own place as a legal institution. "If the prisoner's character and his conduct during his prison term justify the expectation that he will in future conduct a lawful and orderly life" the Court, upon the application of the prison authorities, was to be empowered to remit the last quarter of his prison term conditionally. Under the same conditions conditional remission was to be obligatory with regard to prisoners who had reached the third stage within the progressive stage system. Thus a sentence to an ordinary prison term of four years would be a relatively determinate sentence in as much as the minimum term of three and maximum term of four years were fixed. Other legislative proposals followed the example of the Austrian Juvenile Court Act of 1928 and suggested indeterminate sentences for juveniles and adolescents. It seemed only reasonable to apply a similar measure to cases involving the repression of serious forms of criminality. In 1921, the German Juristentag, in 1922 and 1931, the German Group of the International Union of Criminal Law, voted in favour of the indeterminate sentence, as did the International Prison Congress in London in 1925. Meanwhile the Draft Codes represented a typical stage of transition. As a matter of fact the new criminological ideas dominated, but in the legislative sphere the classical doctrines still prevailed.

The criminological relevance of the vast group of mental defectives is obvious. An often repeated German estimate reckons that 50 to 75 per cent of all beggars, vagrants and habitual thieves are mentally below the normal standard. The attitude

50 Art. 72 head 9 Entw. EG. StGB, 1930.
of criminal law toward these types seems rather paradoxical. Their weakened will-power and their intellectual shortcomings render them less guilty but, at the same time, more dangerous. The group consisting of the most serious cases of mental illness and degeneration offers no theoretical difficulty. They are exempt from any personal responsibility, but, if dangerous, they must be detained in suitable institutions for the sake of public safety. The German Draft Codes empowered the courts to permit (Draft Code of 1927) or, better, to order (Draft Codes of 1925 and 1930) internment, if the insane prisoner had committed an act which was otherwise punishable. A first period of three years could be extended by a new decision of the Court, while release could be granted by the competent administrative authority. This solution entails certain consequences in respect of the object of criminal procedure. Not only ordinary offenders, but also a dangerous lunatic will be subject to prosecution and trial, even if there cannot be the slightest doubt that the lunatic criminal is not responsible for the act he performed. - The Draft Introductory Act, therefore, provided that at the trial stage the presence of the insane prisoner might be dispensed with; in this case, one judge of the trial court assisted by an expert, was to hear the prisoner beforehand.53

Apart from these typical cases of insanity modern criminal psychology acknowledges a medium stratum consisting of sub-normal personalities. It seems unjust to judge them by normal standards, but it would be unwise to exempt them from every liability. In view of this consideration the concept of limited responsibility or of relative irresponsibility was introduced. For this group, especially, the dual system of penalties and mere measures of public safety seemed to be particularly appropriate. Therefore the German Draft Codes provided for an optional (Draft of 1927) or obligatory (Drafts of 1925 and 1930) reduction of the penalty, but enabled the courts to permit (Draft of 1927) or to order (Drafts of 1925 and 1930) detention for an indefinite time in a suitable medical institution if public safety required it. At first this solution met with general approval. New studies, however, led to a considerable change of opinion as to the types eligible for this dual treatment.54 Originally, it seemed that limited responsibility should be attached to certain initial and transitory stages of psychotic processes, while later on the vast

53 Art. 70 head 152 Entw. EG.StGB. 1930.
group of psychopathic personalities attracted particular attention. Experience showed that it would be more advisable to subject these abnormal persons to a special form of prison discipline than to leave them in the indulgent atmosphere of a medical institution. Of the 62,000 inmates of German penal institutions in 1927, some 5,000 were mental defectives. Of these, approximately 4,000 seemed capable of undergoing a more or less modified form of prison discipline, while the remaining 1,000 were not fit for any proper prison discipline. Consequently, the Draft Prison Acts provided that mentally defective prisoners should be treated in the prison "with due regard to their state of mind", but that they should be removed to special penal institutions if, according to medical advice "they cannot be subjected to the ordinary system of prison discipline". This solution indicates a change in legislative policy. The principle of individualization, i.e., the principle that the various criminological groups should be treated differently, meant originally that the courts should differentiate in their sentences. The new development, however, seems to simplify the task of the courts by restricting them to practically one general type of sentence of a rather permissive character, and to rely on institutional experience and administrative discretion for the appropriate selection of prisoners for the particular form of treatment. The German Draft Criminal Codes expressed the first, the Prussian Regulation of 1929 and the Draft Prison Acts the second legislative tendency. There was, so far, no systematic co-ordination between the judicial and administrative method of differentiation, nor was there any definite compromise between both legislative tendencies.

This transitory character of the German Draft Codes is most conspicuous in the treatment of a group which German criminology describes as unsocial rather than anti-social, i.e., beggars, vagrants and disorderly persons. They are less characterized by the petty offences they usually commit than by their mischievous conduct of life in general. The Draft Codes call their typical behaviour "dangerous to the community as a whole". Legislative considerations were influenced by a twofold experience in criminal law and social welfare work. On the one hand, even penalties, mostly slight, seeing that only minor offences were committed by these persons, proved ineffective to check their constant decline into a state of destitution and persistent delinquency. The authorities concerned with public welfare work, on the other hand,

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had to resort to compulsory measures. A statutory regulation of 1924 concerning the administration of public social welfare, provided that persons capable of work who, through their own fault had to rely on public assistance and persistently refuse to work, may be compulsorily detained in an institution. The obvious consequence would be to abstain from ineffective punitive measures in all cases where administrative detention is advisable. This solution would be the counterpart of the suggestion that indeterminate sentences should be used against habitual criminals. As to the latter, adequate punishment should also include the necessary measures of safety. With regard to merely unsocial elements administrative measures should be substituted for punishment. The Draft Code of 1925 presented a tentative solution on these lines: begging in order to avoid work or an orderly life, inciting children to beg, common vagrancy and some scandalous forms of prostitution were not threatened with any particular punishment, but the courts were to have the power to send to a workhouse for an indefinite time persons guilty of such behaviour. The underlying idea was apparently to exempt this group from the operation of the ordinary criminal law and to shift the whole problem to a new sphere of social administration. A number of private Draft Detention Acts and the official Draft Principles of 1928 tried to respond to this challenge. They defined the conditions for the detention of adults with a view to compulsory social relief much as the Youth Welfare Act of 1922 authorized the courts to order public education. Experts expected that between 8,000 and 10,000 unsocial persons would be detained under this scheme. Such a policy would have excluded from the operation of the ordinary criminal law most offences connected with begging, prostitution and vagrancy except a few offences such as begging with threats or deception, or particular prohibited forms of prostitution, which would have remained punishable according to the ordinary criminal law unless the offenders, owing to their general behaviour, were to be detained. However, the Draft Codes of 1927 and 1930 abandoned this policy. As in the case of habitual criminals, they adopted a cumulative system: sentences to fixed prison terms and, additionally, detention in a workhouse for two years with a provision for an extension of this term in respect of recidivists.

The long delay of the legislative reform had a significant effect upon the actual administration of criminal justice. Within

56 §20 Reichsverordnung über die Fürsorgepflicht vom. 13. 2. 1924; RGBl. 100.
The framework of the old codified law still in force, the importance of judicial precedents grew considerably. It is a general experience that under a system of codified law, case law is an indispensable supplement which increases its range and influence in the same degree in which the code becomes, or appears to be, obsolete. Austria presents a characteristic illustration. The Code of 1852 was only a new edition of the Code of 1803, which in itself was substantially identical with the "Josephina" of 1787. It could not serve as the legal basis of the administration of criminal justice in the 20th century except with the help of a growing body of case law as a supplement.

The contribution of the courts to the development of German criminal law was less effective where the outstanding questions of penal policy were involved. New forms of sentences, preventive detention, asylum and other special institutions could not be created except by an Act of the legislature. It would have been possible to attain some of the objects of the reform movement by using sentences to a long term of imprisonment as an adequate protection of society. But judges, accustomed to mete out penalties in accordance with what is supposed to be a fixed standard of just retribution, are not easily persuaded to make the penalty fit the criminal. The experience in England with regard to the use made by the courts of preventive detention only confirms this observation. In Germany between 1920 and 1933 case law, by interpreting and supplementing the old Code in force, refined and differentiated the general elements of criminal liability and determined anew the limits of a certain number of particular criminal offences. In doing so, the precedents of the Supreme Court differed markedly from the pre-war tradition. More and more the courts anticipated the standards of the future law, while at the same time, by employing flexible conceptions and generalized formulas, they widened the field of judicial discretion substantially. The legal position of the judge in relation to statutory provisions became the crucial issue between the advocates and the adversaries of reform. In the end, while the old Code was still in force, the courts inclined more and more towards a wide interpretation of the statute. The ultimate limit, however, remained almost unchallenged: according to the Draft Codes the courts were still bound by the rule nulla poena sine lege. No conviction could be based upon an analogous application of a statutory provision. Every determination of criminal offences and of their elements by the courts must be authorized, if not according to the explicit, then at least according to the possible
meaning of the statutory provisions. In view of the fact that the law was passing through a stage of transition, German writers on criminal law were more concerned with questions of method than with a systematic presentation of the substantive law as a whole. The merely logical method of the classical school gave way to a new interpretation which applied the old conceptions of the law in accordance with the social experience and the legal value of the present society. In the end, under the fitting lead of the Supreme Court, criminal law was enriched by some important principles—an anticipated and inherent reform of criminal law.

By interpreting §51 of the Code in a wide-sense, but in conformity with the Draft Codes and the Juvenile Court Act, the Supreme Court excluded criminal responsibility not only in the absence of certain fundamental intellectual abilities, but also for a pathological weakness of will-power. Contrary to a long established doctrine liability for wrongful acts which had been committed negligently was not to be excluded for the reason that an intentional act of a third party was the immediate cause. A landlord who lets lodgings near stores of petrol without taking the necessary precautions against the spreading of a possible fire is liable for a subsequent death due to such fire, even if the fire was actually the result of arson. Apart from the statutory right of self-defence, any act which would be otherwise illegal may be justified if this act was a reasonable means of preserving a legally protected object of higher value at the expense of one of lower value. This principle was developed in order to justify a medical abortion, undertaken for the preservation of the life of the mother. The new rule leaves two substantial questions for the discretion of the Court: the comparison between the objects which were sacrificed and saved, and the reasonableness of the means applied. According to §54 of the Code, necessity is an excuse if the illegal act was committed for the purpose of saving the perpetrator or his relative from an immediate unprovoked danger to their lives or limbs—a concession to human weakness unknown to English law. Some decisions extended this principle to a limited number of other cases, provided that in view of circumstances of special urgency it appeared unreasonable to require abstention from an otherwise unavoidable illegal act. This is nothing less than an attempt to determine, by judicial decision, what should be the ultimate limits of legal obligations.

53 RG. in JW 1928, p. 2216.
54 RG. 61, 318.
60 RG. 61, 242; 62, 137.
In cases of criminal negligence the courts have always considered what degree of care could fairly be expected, and should justly be required from the offender with due regard to his particular conditions.\textsuperscript{62} Later on liability for a criminal act caused by an illegal omission was subject to similar considerations; here the Court would ask: Having regard to the offender's special position, was it fair to require that he should act for the sake of averting a probable accident?\textsuperscript{63} And, finally, with regard to acts of perversion of justice other than perjury, it was held that nobody is under the legal obligation to assist the authorities charged with the administration of public justice at the risk of laying himself open to the suspicion of having committed a criminal offence.\textsuperscript{64} Other decisions strengthened the legal protection of personal reputation by imposing restrictions upon the defence in actions for defamation. The defendant's right to prove the truth of his statement was limited to the particular facts which he had revealed. The introduction of new facts although of a similar character was prohibited. If the defendant fails to prove the truth of the facts upon which his statement is based, the plaintiff is not bound to suffer the torture of a thoroughgoing search of his past for other facts of a similar dishonourable character.\textsuperscript{65} The courts excluded the plea of fair comment or that the act was justifiable or excusable if the allegations had been made carelessly.\textsuperscript{66}

With regard to the protection of property, the Supreme Court included in this legal conception both formal ownership as well as any factual situation where an object belonged to a person's sphere of economic influence. The Court regarded a misappropriation for the benefit of a third party as punishable, if the latter was economically dependent on the perpetrator.\textsuperscript{67} Embezzlement was extended to cover an expenditure of the perpetrator's own money, or an alienation of his own goods, if he was under the legal obligation to keep this money or these goods for the benefit of a third party.\textsuperscript{68} It can fairly be doubted whether this mutation of the statutory conception of embezzlement into an offence which comes dangerously near to that of breach of trust did not amount to the creation of a new criminal offence by analogy, contrary to the rule \textit{nulla poena sine lege}. This consideration led to an intervention by the legislature, for an

\textsuperscript{62} RG 30, 25—an early decision of 1897.
\textsuperscript{63} RG 58, 97.
\textsuperscript{64} RG 60, 103 and 346; 85, 335.
\textsuperscript{65} RG 62, 95.
\textsuperscript{66} RG 63, 92 and 202; 64, 10.
\textsuperscript{67} RG in JW 1929, p. 2729.
\textsuperscript{68} RG 61, 174 and 341; 63, 406.
amendment of 1933 reshaped the wording of §266 of the Criminal Code. Thereafter the statute law is equated to the case law.

VI. CRIMINAL PROCEDURE

While the development of substantive criminal law, though of a transitory character, proceeded on certain principal lines, the changes in criminal procedure were marked by a permanent unrest and manifold vacillations. More than once, political difficulties and economic crises interfered seriously with the smooth working of the machinery of criminal justice. Urgent demands for effective prosecutions, speedy justice, and, at the same time, for a drastic curtailment of expenses led to hasty and inconsistent emergency legislation. The law of criminal procedure survived these years not without considerable losses and sacrifices. There are, however, still deeper causes for the apparent instability of this branch of the law. In the sphere of substantive criminal law, an orthodox liberal pattern was moulded into new social forms. But criminal procedure had still to overcome some remnants of the inquisitorial form of criminal justice dating from the era of absolutism. At the same time the new social aspects of criminal law required a re-orientation with regard to the relation between individual and State.

Following the example of some previous Constitutions of German States, the Weimar Constitution of 1919 expressly confirmed the main principles which are fundamental if the rule of law is to govern in criminal procedure, namely the independence of the judges, freedom from arbitrary arrest and nulla poena sine lege. These principles were safeguarded against modifications by statute, except by legislation passed by a majority sufficient to effect a change of the Constitution. In 1920 a Draft Code of Criminal Procedure tried to satisfy the belated liberal demands and to complete what the reform of the 19th century had only achieved in part, i.e., the introduction of a thoroughgoing accusatorial mode of trial. Once more, the English pattern or at least the English pattern as former German commentators of English law, especially R. Gneist and F. Glaser, had explained it, exercised considerable influence upon a legislative project. Preliminary investigations by an examining judge were to be abrogated. The conduct of enquiries was to be exclusively concentrated in the hands of the public prosecutor, but compulsory measures, such as administering an oath or ordering a search,
seizure or arrest, were to be taken only by the courts. Following preliminary enquiries by the public prosecutor, the judge, after having heard both parties, was to decide whether the prisoner is to be committed for trial. The prisoner was to be informed that he need not answer questions. At the trial stage, cross-examination was to be facilitated. The reception of these proposals was not very favourable. The majority of the critics rejected them as contrary to Continental requirements and traditions.

Meanwhile, the economic crisis which followed the collapse of the German currency made a drastic curtailment of the judicial machinery almost inevitable. Ever since the re-organization of the courts by the laws of 1877, the judicial system had been subject to continuous criticism. The two favourite demands, were, first, for a further strengthening of the lay element, and secondly, for an unrestricted appeal on questions of fact against all decisions of courts of first instance. In 1909 legislative attempts to comply with these popular requirements had failed. Under the pressure of the crisis of 1923 the Government tried to make a virtue of necessity. In virtue of the Enabling Act of December 8, 1923, an Emergency Regulation of 4. 1. 1924 abolished the Criminal Division of the District Court as trial court of first instance. Thereby, the administration of justice was freed of the expensive institution of five learned judges sitting together in one court and bound to a rather ponderous mode of trial, the burden of the Supreme Court was diminished and, at the same time, the bulk of more serious and a part of the very serious cases was shifted to the Schöffengerichte, where the demands for the participation of laymen and for appeals on questions of fact were fulfilled. At this price the jurisdiction over minor offences was detached from the Schöffengericht and assigned to a single trial judge—a bold innovation in a country where decisions by a court composed of several judges were traditional.

The same Regulation—not an Act of the Legislature—brought the German jury system to a definite end. The name remained attached to a type of court which in fact was a Schöffengericht, namely, six laymen deciding together with three judges both the questions of fact as well as the penalty. It may be noted that this result is only an illustration of the general phenomenon that

11 RGBI. 1179.
12 RGBI. 15; so-called Emminger-Verordnung.
13 See supra part I.
trial by jury has been modified and curtailed in Europe.\textsuperscript{74} Even English law has been influenced by this tendency.\textsuperscript{76} Since its introduction by the liberal reform movement of the mid-century the German jury system suffered from the fact that it imitated the French pattern too clearly and that it was not sufficiently adapted to the particular conditions under which German law had to operate. The judges were mostly sceptical as to its merits, and the general public remained almost indifferent. The attitude was widespread rather to trust the decision of independent learned judges and to rely on their guiding influence where the co-operation of laymen was required, than to expose a helpless jury to the rhetorics of counsel and public prosecutor. The real advantages of a well-established jury system have scarcely been understood in Germany. Once trial by jury had been abrogated, no attempt was made to re-introduce it.

In the course of further legislation, Germany returned to the original system of a tripartite division of jurisdiction in criminal matters. The simplified procedure before the \textit{Amtsgericht} was not fitting for a number of “monster trials” concerning criminal offences in the sphere of commercial law which involved evidence of an intricate nature, the more so as a second hearing of the facts before a Court of Second Instance had to be considered. As a result a new Emergency Regulation of October 6, 1931\textsuperscript{76} re-introduced Criminal Divisions of the District Courts composed of three judges and two lay assessors as criminal courts of first instance. From these courts only an appeal on questions of law could be brought. They were first established for the so-called monster trials, but by a further Regulation of June 14, 1932 their jurisdiction was extended to trials of all serious crimes which did not belong to the—now only so-called—Court of Assizes.\textsuperscript{77} Thus, on principle, the pendulum swung back to the original system of the Codes of 1877.

These vacillating alterations in the structure of the courts were accompanied by modifications of the mode of procedure. The economic strain made it necessary to check the traditional abundance of appeals at the disposal of the parties. In German law, an appeal to a higher court does not depend on a special leave granted by the court below. In divorce cases only, an

\textsuperscript{74} H. Mannheim, \textit{Trial by Jury in Modern Continental Criminal Law}, 53 Law Quarterly Review 99 and 388.
\textsuperscript{75} R. M. Jackson, \textit{The Incidence of Jury Trial during the past Century}, 1 Modern Law Review 182.
\textsuperscript{76} RGBl. 537.
\textsuperscript{77} RGBl. 285.
Emergency Regulation of June 14, 1932\textsuperscript{78} restricted the right to a second appeal from a Court of Appeal to the Supreme Court to cases in which special permission had been given by the Court of Appeal. This permission had to be granted, if the Court dissented from a rule laid down by the Supreme Court, or if a legal question of fundamental importance was at stake. Apart from these exceptions, German legislation had to rely on other means for the purpose of limiting appeals. The Regulation of 1924 introduced the \textit{revisio per saltum}: a party who wished to lodge an appeal on a question of law against a decision of an \textit{Amtsgericht} was allowed to bring the case before the Court of Appeal directly—without a previous appeal to the Criminal Division of the District Court. In 1932 the appellant was made to select between the two remedies and could not avail himself of both and the procedure was rendered more stringent. The appellant had to choose whether to lodge an appeal with the Criminal Division of the District Court on questions of fact and law, or with the Court of Appeal on questions of law only. If he decided in favour of the first, the respondent alone could lodge a second appeal. The Regulation of 1924 enabled the Supreme Court to reject an appeal \textit{a limine}—without hearing any pleadings—if the judges were unanimously of the opinion that the appeal was evidently unreasonable. By a further Regulation of 1931, the same powers were given to Courts of Appeal.\textsuperscript{79}

The modifications of the right to appeal affected the law of evidence. Again and again the wording of §§244/245 of the Code of Criminal Procedure was changed. When, in the seventies of the last century, the Code of Criminal Procedure was laid before Parliament, the \textit{Reichstag} favoured an appeal on questions of fact against every decision of a trial court, and insisted, as an alternative, on the enactment of strict rules which would warrant the hearing by the trial court of all the evidence which either party wished to produce. It was believed that such a procedure would help the Court to find the truth and that it would convince the accused that he was given a fair hearing. Even an unfavourable decision will be accepted as inevitable and just if, in the prisoner’s presence, the Court has heard every person the prisoner has called in evidence. Since the legislators regarded these rules of evidence as a substitute for appeals on questions of fact, the rules were not to apply to those trials where the law provided the possibility of a full appeal. Consequently two concurrent

\textsuperscript{78} RGGbl. 287.
\textsuperscript{79} §6, Ch. I, Part 6 VO of October 6, 1931; RGGbl. 537.
categories of rules provided what evidence was to be heard in court: rules of a strict character on the one hand, and rules referring to the judicial discretion on the other. The strict rules expressed two principles. First, all witnesses and other evidence, if present in court, must be examined. Secondly, any application to the Court for the production of further evidence was to be rejected by an express order of the Court only, and on one of the few grounds developed by the practice of the Supreme Court. Originally these strict rules were treated in the Code as the normal method of procedure, but as an exception the Schöffengerichte and the division of the District Court, composed of three judges who heard appeals in the case of simple "contraventions" and offences punishable upon private prosecution alone, were given full discretion in admitting or disallowing evidence regardless of any previous application, renunciation or court order. This rather complicated dual system was rendered even more intricate by legislation during the period after the first World War and by the various changes in the original jurisdiction of the courts of first, second and third instance.

When the Emergency Regulation of 1924 shifted the jurisdiction of the Criminal Division of the District Court as a court of first instance to the Amtsgericht, the strict rules of evidence were at once replaced by the power of judicial discretion, which extended over the entire field of jurisdiction of first instance, with the exception of trials by the modified jury. An Act of December 22, 1925 however, reversed the effect of that Regulation and restricted the judicial discretion to the trial of mere "contraventions" and of offences punishable upon private prosecution. Once the strong position of the parties was re-established, it was found necessary to pass a further Act of December 27, 1926, which, in addition to other amendments, contained a provision against the abuse of the right to call evidence: the Court should not be under the obligation to examine evidence which was called with intent to delay the proceedings. This, however, was not the end. Again, during a new crisis, the legal safeguards which assured that the evidence was complete were sacrificed to the urgent needs for economies in proceedings. The Emergency Regulation of 1932, which re-established the Criminal Divisions of the District Courts as courts of first instance, extended the sphere of judicial discretion to determine what evidence should be admitted to all trials before a single judge, before the

\[\text{RGBI. 475.}\]
\[\text{RGBI. 529.}\]
Schöffengericht and before criminal divisions of District Courts in appeal cases.\textsuperscript{82}

As to the German criminal procedure of the future, the Draft Introductory Act to the Criminal Code favoured strict rules of evidence similar to those in force before the last change by way of Emergency Legislation in 1932: strict rules of evidence were to remain normally applicable, but free discretion was to prevail only in trials for simple "contraventions" and for offences punishable solely upon private prosecution. But there was to be a provision regarding intentional delay of procedure. The Bill attempted, furthermore, to consolidate the principles governing the right to make application for the production of further evidence, a branch of the law which had hitherto been developed by decisions of the courts. A new rule gave the judge free discretion to determine what evidence should be admitted concerning the prisoner's personal and economic position, having regard to the question how far it is necessary to take this position into consideration in determining the sentence.\textsuperscript{83}

The last mentioned provision is a good illustration of the conflict between formal guarantees in favour of the accused and the new social trend of criminal law. Generally speaking, a policy of retribution based on isolated facts can be easily pursued in accordance with strict legal rules of procedure. But a differentiation of various types of criminals with a view to the readjustment of the offender and the protection of society would be impossible without a wide judicial and administrative discretion. While German criminal procedure was still advancing towards an entirely accusatorial method of procedure, the new social tendency foreshadowed a return to what may be called "neo-inquisitorial" procedure. The crucial issue was the Social Court Aid which was to provide the court with social reports on the prisoner's personal position and his background. Before Juvenile Courts, Local Welfare Boards and voluntary agencies had done excellent work in rendering information on social questions and in assisting the juvenile's readjustment through personal care and supervision. Like the Juvenile Courts themselves, this institution seemed to anticipate the new social trend of criminal law as a whole.

According to a frequent practice varying in different courts, the trial judge had such reports at his disposal which had been collected by specialized social workers. This was certainly a valuable counter-balance to any misleading personal impression

\textsuperscript{82} Art. 3 VO of June 14, 1932; RGBl. 285.

\textsuperscript{83} Art. 70 head 138 Entw. EG. StGB. 1930.
which might be created at the trial stage. There were, however, serious objections to such a practice. The report presented a piece of information which reached the judge by other channels than the ordinary evidence. This was contrary to the fundamental principle that the judicial decision was to rely exclusively upon the evidence heard in open court and in the presence of the prisoner. Consequently, the author of the social report was to be called as a witness. But this proposal was opposed by the social workers on the ground that their accounts were based on confidential information. In view of this consideration it was even demanded that a statutory provision should be inserted granting social workers the right to refuse to give evidence in respect of facts entrusted to them in the performance of their duties, similar to the right of ministers of religion, doctors and legal advisers. These difficulties show in a clear light the antagonism between the purpose of social welfare work and legal proceedings. The former is concerned with the well-being of the individual, though often for the community's sake and sometimes against his own will. But criminal proceedings are a fight for life and liberty in which the prisoner occupies a position of defence which is protected by law if only to a limited extent. These conflicting purposes can be reconciled before a Juvenile Court. With regard to adults, the two aims are incompatible. A solution seems only possible if two conditions were to be fulfilled. First, conviction and sentence should be separated as in English law, with the result that the social report could be submitted after conviction. Secondly, social reports should be separated from welfare work and should be given the status of a medical report.

The Draft Introductory Act took some tentative steps in the direction of the social aspects of criminal procedure only. In order to avoid the difficulties arising from the operation of the law of evidence, the Bill put the Social Court Aid at the disposal of the public prosecutor. He was to use the information from that source in his pleadings for the purpose of assisting the court in determining the sentences, the measures of public safety and the conditional remission of punishment.64

The Draft proposed a detailed regulation of the law relating to medical examinations. The original Code contained only one provision with regard to the observation of the accused by a psychiatrist. In this case full legal assistance was obligatory.65 The Bill permitted the physical examination of a person in

64 Art. 70 head, 99 Entw. EG. StGB. 1930.
65 §81, StPO.
analagous application of the rules relating to the search of a person. The accused was to be examined for the purpose of clearing up facts which are essential for the trial: blood tests and surgical operations were to be permissible if the health of the accused is not endangered thereby. Other persons than the accused were to be liable to examination for the purpose of determining whether they showed any traces or effects of a criminal act. The final decision was to rest with the judge, while the public prosecutor or the police were to act in emergency cases. During the preliminary enquiries before the commitment to an asylum or to any house for inebriates a medical expert was to examine the accused and to give evidence at the trial on the physical and mental state of the prisoner. If this statement, which was to be made in the presence of the prisoner, would be dangerous to the prisoner's state of health, the judge was to have the power to exclude him during this part of the hearing, but he was to inform him afterwards of the substance of the evidence and pleadings heard during his absence. One might feel inclined to regard this as an express provision granting obligatory legal assistance. In fact, according to the rather complicated provisions of the Bill, legal assistance was to be obligatory either by operation of law or upon application almost in every case where penal servitude or a measure of public safety may be imposed.

The law of criminal procedure is a compromise between the rights of the individual and the demands of the community. Recent legislation, as a whole, emphasized the side of society. But in one respect a statutory amendment strengthened the legal position of the individual, namely with regard to custody preceding trial. After a tragic incident an Act of December 27, 1926 introduced a new type of judicial enquiry as to whether the accused should continue to be detained in custody having regard to the provisions of the Code which permitted detention in the case of urgent suspicion that a criminal offence had been committed and that either the accused might escape or act in collusion with others. This enquiry must be held in the presence of the prisoner, if the prisoner demands it, and it is to be repeated at certain intervals, if the prisoner remains in custody for more than two months. The Bill maintained this procedure. In a further proposal it was intended to legalize and to limit a certain public practice which had been without a sound legal basis hitherto. If the police carried out an arrest they were under the legal

86 Art. 70 head 39, 41, 138, 139 Entw. EG. StGB. 1930.
87 RGBI. 529 (Lex Hoeffe).
obligation to bring the prisoner in due course before a judge who decides whether the arrest is lawful. It may happen that the police, although they have reasonable grounds for suspicion, need further time to collect sufficient evidence to satisfy the judge. Consequently they interpreted the words "in due course" in a wide sense and detained the prisoner for a number of days until they were prepared to submit their case to the judge. The Bill provided that the prisoner must be brought before the judge one day after the arrest at the latest. If the judge holds that a case for granting a warrant of arrest is not made out, but thinks it advisable to give the police a chance of collecting further evidence, he may order the detention of the prisoner for not more than five days.88

VII. CONFLICT OF CRIMINAL LAWS

No system of criminal law can function in isolation as a self-contained legal system. Conflicts of criminal law will arise which cannot be solved except by certain well established principles. It is the task of each system of municipal law to define the sphere within which its rules shall govern, but it should frame these regulations with due regard to other legal systems within the community of nations. On the whole, the German Draft Code followed the moderate course of the Code in force. German law has accepted the principle of territoriality which extends and limits criminal jurisdiction to all offences committed within the territory. The application of this principle requires a clear appreciation of the circumstances which indicate where a criminal act has been committed. This is a question of law, but the law, in determining the locality of offences, cannot differ much from what common sense would regard as natural. For that purpose, the Draft Codes, following some remote decisions of the Supreme Court,89 reaffirmed the accepted German doctrine. A criminal act has been committed at every place where an essential part of the criminal offence has been put into effect, e.g., where the shot was fired, where the victim was hit, and where the death occurred, or where the author wrote the insulting or intimidating letter and where the addressee received it. The Draft Codes added a new extension. An attempt shall be deemed to have been committed also at the place where, according to the intention of the perpetrator, the effect was expected to occur.

But although German criminal law claimed such a wide jurisdiction, it was deemed advisable to extend the jurisdiction

88 Art. 70 head 64-74 Entw. EG. StGB. 1930.
89 RG 11, 20; 20, 146 and 169.
beyond the territorial boundaries in respect of a certain number of crimes. In these cases jurisdiction is assumed, not because the offence, or an essential part of it is committed inside the territory but because it is regarded as potentially dangerous to German interests. The Code in force extends German jurisdiction to high treason and to crimes of public officials in German service even if committed abroad either by a German or by an alien. The Draft Codes penalize every kind of treasonable activity abroad regardless of the personal status of the perpetrator. This jurisdiction ends only where ordinary acts of war according to international law begin. Furthermore, the Draft Codes conferred jurisdiction in respect of crimes committed against a German official in the performance of his duties, perjury committed in the course of proceedings conducted by a German authority and—in the Draft Code of 1930—fraud committed in connection with the emigration of a German subject. Leaving aside this strictly limited number of cases, the Draft Codes abstained from generalizing the concept of allegiance and protection and from elevating it to a universal principle according to which criminal jurisdiction may be claimed over nationals abroad and over acts committed abroad which are injurious to German nationals. Further, the crime of traffic in women and children was added as a crime *juris gentium* to that of counterfeiting currency. International treaties bind states to prosecute both offences irrespective of the nationality of the perpetrator and the place of commission. In these cases it is for municipal law exclusively to determine whether a criminal offence has been committed. Prosecution and sentence are primarily acts of German authorities. A conflict of laws can occur in so far as the prisoner may have been previously tried and sentenced abroad in respect of the same offence. Consequently it is often inadvisable to begin a second trial in Germany, but a German criminal court is not thereby necessarily precluded from hearing the case. The Draft Codes, like the Code in force, provide that the court must shorten the sentence by deducting the penalty which the prisoner suffered abroad.91

The treaties establishing a common responsibility for the suppression of certain crimes *juris gentium* show that the authorities charged with the administration of municipal penal law are

91 StGB §7; Entw. StVG 1927 (II) §44; Entw. EG. StGB. 1930. Art. 70 head 145 to StPO §267b.
expected to co-operate actively with the corresponding authorities in other countries. Extradition is the traditional method of international co-operation for the prosecution of crimes. Since a universal international law of extradition has not yet been established, a variety of bilateral treaties determines the mutual obligations of States to deliver up fugitive criminals to the competent foreign authorities. In 1929, Germany enacted her first Extradition Act. Its object was twofold. First, it was to lay down guiding principles for future extradition treaties with a foreign power and secondly, it was to provide certain judicial guarantees, for the purpose of protecting the prisoner against arbitrary decisions of the executive. According to this new law, the German Government must submit to a Court of Appeal all requests for extradition made by a foreign State. If the Court rejects the request, no extradition may be granted by the German Government, but the Government, acting according to its own discretion, may refuse extradition, even if the Court holds that extradition is admissible. With regard to the conditions which must be fulfilled before extradition can be granted, the new German law follows the example of other Continental countries. According to the Act of 1929, extradition can be granted only if the act complained of would be a criminal offence according to German law. Political crimes are not extraditable. The Act provides a clear-cut definition of political acts. Not subjective intention—but as in English law—objective characteristics determine whether an act is a political offence. According to this new German rule, political acts are "those offences which are directed immediately against the existence or the security of the State, against the Head or a member of the Government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the friendly relations with a foreign Power". By exempting political crimes from the list of extraditable offences, political fugitives are granted implicitly the right of asylum. This right, however, is restricted in accordance with the Belgian model law of 1856 by an attentat clause, i.e., by a proviso which permits extradition for political crimes of the most atrocious character. The wording of the clause in the German text stresses the heinous nature of homicide which impresses it with the character of an attentat in the sense of the clause irrespectively of whether it is committed against a Head of a State or not. An attentat in the meaning of the attentat clause includes every intentional offence against

92 In re Castioni, [1891] 1 Q.B. 149.
human life unless committed in open combat. If the court is satisfied that the conditions for extradition are fulfilled, extradition is granted, subject to the condition required by law that the Court is satisfied that the foreign State will not prosecute and punish the prisoner for any other act than the actual offence for which extradition is being granted—the so-called principle of identity of extradition and prosecution.

Contrary to English law, Germany and certain other Continental countries such as France and Yugoslavia follow the principle of non-extradition of nationals. The German codification of 1877 adopted this rule from the earlier laws of the German States. The Weimar Constitution confirmed anew the principle that no German subject may be extradited to any foreign Power, and laid it down formally in the section on the fundamental rights of the citizen. This attitude is prompted by a distrust of the authorities charged with the administration of justice in foreign countries. Also it is the expression of a view which requires the State “to administer itself, and not to delegate to others the justice which it owes to its own subjects”. From an international point of view due regard to the mutual interests within the community of civilized nations demands that in the case of non-extradition a state exercises criminal jurisdiction as the representative of the country where the offence occurred.

The Code in force provides that a German who has committed a criminal offence abroad may be prosecuted and tried before a German court. The Draft Codes extended this provision to foreigners who, as a result of the exercise of administrative discretion, are not extradited although their extradition is legally permissible. In these cases German law courts exercise jurisdiction as representatives of the foreign country only. Consequently the question whether the act complained of is a criminal offence must be decided according to foreign law. Foreign law decides equally whether the period of prescription has begun to run and whether a complaint on the part of the injured person is required before prosecution can take place. Further, German courts may not give a sentence if the accused has been acquitted by the foreign court or if he has served his sentence. The Draft Codes

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93 Auslieferungsgesetz 1929; RGB 1, 1929, p. 239; p. 1930, 28. §§7, 9, 2, 3, 6 See also 1 Recueil de documents en matières penale et penitentiaire 4 (1931).


96 Art. 112.

add that a German court must take into account whether the accused has been pardoned or whether the sentence can no longer be executed owing to lapse of time. In these respects German courts must apply foreign criminal law. But if it appears that according to the foreign law applicable in the circumstances a criminal offence has been committed and that prosecution is permissible, German courts must pronounce sentence in accordance with German law. Thus, like other legal systems which adhere to the principle of non-extradition of nationals and exercise jurisdiction in behalf of the foreign country concerned, the German Code and the Draft Codes prefer expediency to a strict application of foreign law.

During the first three years following the enactment of the Extradition Act, a total of 406 extraditions to foreign countries were granted while 469 German nationals were extradited to Germany. Four-fifths of the applications submitted to German courts in the course of one year were successful. Most of the requests came from the eastern, south-eastern and southern neighbour States. The majority was concerned with offences against property. 98

 VIII. CONCLUSIONS

For the German penal system the years between 1920 and 1932 were a period of transition. The ultimate object has never been achieved. After much preparatory work culminating in several Draft Codes and after numerous critical discussions the new codification did not become law. Some individual reforms were secured by special legislation, such as the Juvenile Courts Act and the Extradition Act. An abundance of ministerial decrees and emergency regulations anticipated as well as frustrated far-reaching legislative projects. Since criminal law lost much of its character as a rigid and closed system, precedents gained in importance and authority. Such a casual development responding to new demands and experiences may not seem detrimental in itself. But as German law is a system of codified law, a casual development was undesirable. The failure of the movement for comprehensive legislation weakened the movement for the reform of the system of criminal justice and compromised modern criminal law. A resolute body of reformers worked desperately in the face of unfavourable political and economic conditions to achieve a legislative work of lasting value. Codification requires time. The new Swiss Federal Criminal Code

98 E. Roesner, 53 ZStW 534 seq.
was only completed after more than forty years of preparatory work. Regarded from a tactical point of view, the partial legislative solution of certain urgent problems deprived the comprehensive work of penal reform of its most attractive stimuli. The trend of most of these partial legislative measures was towards greater leniency. It is only necessary to mention the introduction of Juvenile Courts, the new preference for fines and the conditional suspensions of prison terms. On the other hand, preventive detention and other measures which were to form the necessary counter-balance for the better protection of society failed to become law. This, too, was exploited to discredit the reform movement.

Looking back at what has almost become history, there is much to be said to the credit of the legislative attempts and partial reforms which were carried out. The original idea of von Liszt and his school that criminal law must aim at the prevention of crime and the protection of society by differentiating the treatment of offenders has been accepted as the basis of a comprehensive legislative reform. The adaptation of criminal law to the needs of society (the social tendency of this new criminal law) led to an extension of judicial responsibility and administrative discretion. Emergency measures strengthened the claims of the community at the expense of individual rights. It was a lasting merit of German criminal science to have reconciled these divergent tendencies under the rule of law. Owing to this firm though not inflexible basis the penal rules embodied in the statutory amendments and Draft Codes preserved their character of criminal law. In criminal matters the relation between the legislature and the courts remained determined by the rule nulla poena sine lege. The infliction of legal punishment, however, presupposes a delinquent found guilty according to the rules of law in force. The delinquent certainly has the right not to be treated arbitrarily, but he is bound to concede to the community a reasonable power and discretion to prevent him from further wrongdoing. As a result of a somewhat doctrinal distinction between punishments and mere measures of public safety (mesures de sûreté) the latter are ordered without regard to certain formalities which the law prescribes for the infliction of punishments. Since these measures are not regarded as poenae, they may be applied even if they were introduced by law after the criminal act has been committed, and they would be permissible after the expiration
of a punishment abroad. With these modifications the two-fold principle of *nulla poena sine lege*, namely that of the exclusive authority of statutory law in criminal matters and that of the prohibition of substantive *ex post facto* laws was fully recognised. On the other hand, with the growing importance of the executive aspect of punishments and measures of public safety, the need arose to provide the prisoner with additional legal guarantees. It appeared that not only the choice of appropriate penal treatment but also a considerable part of judicial control had shifted from the stage of trial to that of the execution of the sanctions imposed by the court. The extensive measures, which the Draft Codes proposed for the purpose of protecting society could be applied only to overt acts and to objective facts which could be verified by evidence. The new criterion of the state of danger presented by a criminal which was to form the basis of measures of public safety was an empirical one, and was founded on sober experience. Except with regard to offenders whose social danger was due to their mental abnormality, personal guilt and responsibility remained the indispensable condition for the application of the rules of criminal law.

The rule of law was guaranteed by the fact that criminal justice was almost exclusively administered by the courts. No rival administration interfered with the due course of justice, or tried to assume functions which belong to the true sphere of criminal justice. Minor sentences inflicted by administrative authorities could always be submitted to judicial review. A steadily growing administrative law developed under the constant lead and control of independent administrative tribunals. The precedents of the Prussian Supreme Administrative Tribunal, with their strong persuasive authority, had a stabilising effect upon administrative practice.

The reform of German criminal law during the post-war period displayed a two-fold aspect. New social requirements had to be cast into legal form. The numerous statutory amendments, tentative legislative draft codes, critical considerations and counter-proposals all led to the accumulation of rich experience which will be of use when similar questions arise again. The fundamental problem is not confined to one particular country. Criminal law cannot abstain from deriving new measures of protection and prevention, but it must always preserve its strictly

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legal character. The development of the German penal system between 1920 and 1932 presents a valuable legislative precedent of how to reconcile the satisfaction of new social needs with the respect for constitutional forms. Only recently, an American writer has said:¹⁰⁰ “Our problem to-day, in a word, is to make needed changes in the laws, but always to keep them law.”