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ADVERSE LEGAL CONSEQUENCES OF CONVICTION AND THEIR REMOVAL: A COMPARATIVE STUDY

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This study was originally made for the International Prisoners Aid Association and conceived as a pivotal point to which various national studies could later be related.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

Collateral consequences flowing from criminal judgments are legion in the great majority of contemporary legal systems. Views regarding removal of these consequences widely differ. It is safe to say that there is little conscious policy behind legal provisions dealing with this problem. At least some of these provisions are not in harmony with modern correctional thinking; a few are obviously relics of a distant penological past. This study proposes to present a panoramic view of areas in which consequences of conviction usually attach. Different techniques of their removal are also reviewed. The resulting view of the whole is offered as a basis for rethinking some aspects of the law in this rather neglected area.

The number of adverse consequences flowing from criminal judgments is very large in most countries of the world. The relevant provisions are scattered all over the body of law, so much so that they are almost untraceable. It is safe to say that even judges are often unaware of all collateral effects their decisions entail. Views on the desirability of removal of these adverse effects, as well as techniques of removal, differ widely, sometimes even within a single country. America, with its highly complex legal system in which laws emanating from different historical periods can be found in disconcerting symbiosis, is as good an example as any.

In the light of our professed changing attitudes toward criminals, laws dealing with adverse effects of convictions and their removal must be subject to re-evaluation. The present study proceeds on the assumption that in doing so an orientative comparative study may be rather helpful. The tracing and cataloguing of various disabilities that shackle convicts in contemporary societies can provide a useful point of reference; a survey of removal techniques may offer a list of available alternatives. In order to serve as a contrast to the American reader, the present study will focus on foreign law. However in view of limited information available, no attempt shall

be made at selecting a truly representative sample of foreign jurisdictions.¹ Nor shall we be concerned with the adverse *social* consequences occasioned by criminal judgments. By social consequences we mean those that do not attach by virtue of a legal norm, but rather on account of societal disapprobation (ostracism, refusal to employ, etc.). The line between social and legal consequences is somewhat tenuous. Some disqualifications and disabilities may be contained in regulations of

¹ In the preparation of the present survey, extensive information was available on the following jurisdictions: *Canada, France, Greece, Israel, Norway, Sweden, Switzerland, West Germany and Yugoslavia.*

In respect to *Argentina, Columbia, Denmark, Egypt, England, Ethiopia, Italy, Japan, Russia, South Korea and Spain*, sources of information were more limited. However, provisions contained in the penal codes of these countries were considered and available commentaries were consulted. Most useful were national reports presented by some countries to the VIIth International Congress on Criminal Law held in Athens in 1957.

On a number of points, references shall be made to a much greater number of countries. Information regarding Russia is largely valid for all other constituent republics of the Soviet Union. The Russian criminal law is mainly patterned upon the so-called Fundamentals of the criminal legislation passed by the federal parliament (Supreme Soviet) in 1958, which served as a legislative model for all states of the Union.

The "status juris" for some countries is quite up to date; for others it goes back a number of years.

non-governmental bodies and a persuasive argument may be made that such regulations belong to the "globus normativus", or formalized body of law. However, the inclusion of these *non-governmental restrictions* would render our subject matter almost boundless, and in the interest of expediency we will not deal with them.

Neither should all legal consequences emanating from governmental sources concern us here. Our interest will be centered on those consequences which shackle the convict in his social relationships in the community. It is here that we find a number of restrictions which may be inconsistent with modern correctional policy and criminal law thinking, and thus worth investigating. Typically these restrictions come into play after the sentence has been served and the person is released from the institution, although sometimes adverse legal consequences flow from a criminal judgment even if no prison term is imposed.

In keeping with this outlined general limitation, we will exclude from our survey adverse consequences necessarily incident to *property* punishments (fines), *corporeal* punishments, and punishments consisting of imprisonment,² as well as the indemnification of the victim, conversion of fine into prison terms, and assessment of costs of proceedings. Included, however, will be those restrictions of freedom which are independent of traditional punishments and outlast their execution (e.g., police surveillance, expulsion from the country, etc.).

This brings us to a variety of restrictions imposed in connection with *probation* and *parole*. Although their study is of interest to persons concerned with the life of convicts in the community, these restrictions cannot be discussed in a comparative survey of this scope because they are closely linked with various and intricate systems, and very often depend on the nature of a particular offense. Moreover, they are substitutes for traditional punishment and do not outlast the execution of the sentence. Also we will exclude from the present study those *indirect* legal consequences resulting from the commission by the former offender of a new offense (e.g., adjudication as habitual offender, aggravation of punishment, etc.).

The problem of *criminal registration*, however,

will be considered. True, the entry of a conviction in the criminal record is in itself not an adverse legal consequence of criminal judgments. But, if information from the record is readily accessible, the entry into it may be the source of various difficulties that the former convict encounters in society.³

A special problem arises from the fact that the *concept* of *criminal offense* varies from country to country—some types of conduct that fall within the purview of the criminal law in America are considered in other countries as administrative, non-criminal offenses. If a prostitute, for example, is fined by an administrative official in a given European country and banned from a locality, is the banishment an adverse consequence flowing therefrom? Whenever information is available, we shall consider adverse consequences flowing from conviction of *punishable conduct*, irrespective of whether it is classified as criminal or non-criminal by a given legal order.

CLASSIFICATION OF LEGAL RESTRICTIONS SURVEYED

Even with the described limitations of the subject matter, the adverse consequences flowing from conviction are still quite numerous and heterogeneous. Their orderly presentation calls for some kind of classification.

(a) Classification of restrictions incident to conviction may be predicated on their legal origins or, in other words, on the nature of the legal norm providing the restriction. While a trend seems to be discernible toward limiting the power of regulation in this area, the fact still remains that a great number of governmental bodies and agencies may regulate consequences of conviction.⁴ A disqualification may be spelled out in a constitution, code or statute, but it may also be contained in a variety of delegated legislation (decrees, ordinances, licensing regulations, etc.). Such a classificatory scheme can and has been used in dealing with one jurisdiction, but it is not acceptable for a comparative survey. Too much

³ American readers may think that the omission of records of *arrest* is due solely to the fact we are concerned with consequences of *conviction*. However, there is an additional reason. That a record of arrest should be given any significance whatsoever is virtually unthinkable in most legal systems outside the United States.

⁴ E.g., the *Yugoslav Criminal Code* provides that consequences flowing from the criminal judgment may be provided *only by statute*, and most of them by federal statute (art. 37a). See also the *Model Penal Code* of the American Law Institute, Official Draft, art. 306.1.

² Thus we will not discuss limitations of behavior and freedom of action imposed by the administration in penal institutions.

depends on the lawmaker's whim; for instance, the revocation of a driver's license may be provided by the code in one country, by statute in another, and by an ordinance in still another.

(b) Some adverse legal consequences attach to any judgment of conviction, others presuppose conviction of specific offenses, while still a third group result from the imposition of particular punishments.⁵ This distinction depends too much on national idiosyncrasies and should be rejected in a comparative survey.

(c) Some legal restrictions are imposed by statute and arise by operation of law; these are "consequences of conviction" in the strict sense, not contained in the judgment itself (e.g., impediment to naturalization). Others require a judicial or administrative decision, which may be discretionary or mandatory. Some of the latter disabilities are labeled "punishments", either principal, complementary or accessory.⁶ Finally, some disabilities are characterized as "nonpenal" security measures,⁷ sanctions involving no blame but a mere reaction against a dangerous situation. They may be retroactively imposed and recognized and enforced in other countries.

These distinctions provide an insight into the various degrees of flexibility in imposing disabilities on convicts, but they are not suitable as a classificatory criterion in a comparative study. The same adverse effect of conviction would have to appear under different headings depending upon the more or less arbitrary decision of the lawmaker. Suffice it to illustrate the point by just one example. Under *West German* law, loss of a given office may be either a "consequence" of certain punishments (§31 *West German Penal Code*, hereinafter cited as P.C.), or an "accessory penalty" (§35 *German P.C.*); and under the *Yugoslav* law, it is a security measure (art. 61b, *Yugoslav P.C.*), or a "consequence" of conviction

(art. 37a, *Yugoslav P.C.*). This classificatory scheme, therefore, should be rejected.

(d) It is tempting to classify adverse consequences according to the *motive* which prompted the lawmaker to attach them to criminal judgments. As will be seen later, some legal restrictions are obviously prompted by the desire to stigmatize and degrade the convicted person. Others may be considered as a reaction to a danger emanating from the offense or the offender, or as relating to some other public interest. However, determining a lawmaker's often complex motive is in many instances not more than guesswork. There may also be a discrepancy between the original purpose of a legal restriction and its actual use in practice. The present survey, in providing an "inventory" of various legal disabilities resulting from conviction, can only hope to provide the groundwork for possible further complex studies of the motivation problem.

(e) In certain civil law jurisdictions, one encounters the tripartite classification of some adverse effects engendered by conviction: loss of *political*, *civic* and *civil* rights. The classification is not all-encompassing and some effects of conviction cannot be reduced to loss of rights. Moreover, terms such as "political rights", "civic rights", and "civil rights" have very little meaning to common law lawyers; their meanings are clear to Frenchmen whose *Civil Code* clearly distinguishes between *nationality*, which confers "civil rights", and *citizenship*, which confers political rights.

(f) For want of a more suitable criterion of classification, we shall organize various adverse effects of conviction into groups as follows:

1. citizenship and political activity
2. military matters
3. restrictions of freedom
4. standing in the community
5. public office, profession and other occupations and employments
6. participation in the administration of justice
7. activities independent of employment
8. property, contracts, inheritance, family and law-suits.

TERMINOLOGICAL DIFFICULTIES

As is often the case in comparative legal studies, the terminological difficulties are very great. Not only does legal parlance greatly differ as we go from the civil law to the common law system, but also in countries belonging to the same system.

⁵ Cases exist in which certain disqualifications result from judgments of acquittal. See Kunter, *Les Conséquences Positives Directes ou Supplémentaires des Jugements Répressifs Européens*, *REVUE INTERNATIONALE DE DROIT PÉNAL* 108 (1965). (Hereinafter quoted as RIDP.)

⁶ "Principal" punishment may be imposed independently of any other; "complementary" may be imposed by the judge only in conjunction with another penalty; and, "accessory" may flow imperatively from the infliction of certain other punishments. This civilian distinction is sometimes a source of confusion. See STEFANI & LEVASSEUR, *DROIT PÉNAL GÉNÉRAL* 317, Paris (2nd ed., Tome I, 1966).

⁷ On the civilian concept of non-penal criminal law sanctions, see Silving, *Rules of Law in Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 113-119 (1964).

Identical or similar adverse consequences of conviction can sometimes be found behind widely different labels. This is particularly the case with many punishments. Very treacherous is the reverse situation—false homonyms. A good illustration may be the different meaning of the terms “civil service” or “profession” in various countries. By far the greatest problem stems from the fact that it is often very difficult to establish the precise reach of legal concepts. For example, disqualification from holding “public office” often figures among the adverse consequences resulting from conviction, but the penumbra of the concept “public office” is unusually large even in a single jurisdiction. The problems are compounded if we compare “public office” as understood, for example, by the Germans with that of the English.

Confronted with these difficulties, we shall adopt the following approach. Whenever possible non-technical, neutral concepts will be used and will serve as a common denominator. Thus, for instance, we will disregard often complex classifications of offenses in different countries and loosely speak of serious and less serious offenses. This of course, while enabling rough comparisons, will somewhat decrease the precision of our description. Therefore, conclusions may safely be drawn from our study only so far as the firm core of concepts is concerned. This brings us to various caveats and disclaimers.

CAVEATS AND DISCLAIMERS

There are few countries of the world in which we can find comprehensive surveys of consequences of conviction, particularly in the area of licensing and regulation. What bedevils the problem is that studies in different countries are of various degrees of breadth, and consequently the volume of information varies greatly.⁸ This, of course, may be a source of erroneous conclusions. The fact that a given country has pooled all legal restrictions in a single piece of legislation, or undertaken a rather comprehensive study of the problem and made a rich catalogue of disabilities resulting from convictions, may hastily be taken to mean that this particular country shackles the former convict with the largest number of legal restrictions.

⁸ An illustration in point are various reports on the problem of disabilities resulting from conviction presented to the VIIth Congress of the International Association of Criminal Law (Athens, 1957).

The scarcity or absence of legal restrictions found in certain areas in some countries should not *ipso facto* be taken to mean that the former convict encounters no legal obstacles put in the area by the government. Rather than expressly mentioning convicts in disqualificatory provisions, the government may rely on broad formulas.⁹ Another reason may be that what in one country may be obtained as a matter of right, is in another a matter of discretion. If, for instance, in country X the issuance of certain documents is a matter of right, the express exclusion of former convicts may be required; if in country Y issuance of the same document lies in the discretion of an agency, no such exclusion need be spelled out. Finally, the relative importance of law as a means of social control differs as we go from country to country. Common law lawyers may be surprised at the paucity of decisional law in this study. Fully developed systems of reporting do not exist in the civil law orbit, so the court decision is a less pronounced authority.

HISTORICAL OUTLINE AND OVERVIEW OF PRESENT STATUS

Many contemporary adverse consequences resulting from conviction have a very long history and derive more or less directly from ancient reactions to crime. Thus, a cursory outline of their development seems to be in order.

Probably the earliest precursor of our present-day disabilities resulting from conviction is the ancient penalty of *outlawry* imposed for certain heinous crimes. In Western civilization it can be found early in Roman history (declaration to be “*sacer*”), and among various Germanic tribes. Outlawry, as known by at least some Germanic tribes, implied the ousting of the offender from the community and the deprivation of all rights. The outlaw’s children were considered as orphans, and his wife a widow. Besides losing his family rights, he also lost all his possessions and even his right to life (if we can use that expression), for anybody could kill him with impunity.¹⁰

⁹ The reader should bear this in mind in considering various formulas used in defining *divorce* grounds or ineligibility for the *bench* or the *bar*. The laws of some countries may speak of “moral turpitude”, others may be more specific and expressly mention conviction of crime.

¹⁰ See Lear, *Treason in Roman and Germanic Law* 95 et. seq. (1962); Von Bar, *History of Continental Criminal Law* 39 (1916); Brissaud, *A History of French Private Law* 883–84 (1912).

In the mature days of the ancient Greek and Roman civilizations, a more humane approach toward disabilities flowing from convictions of crime prevailed. The consequence of certain heinous crimes, in old Athens, for example, was the so-called "infamy". It entailed the loss of all rights which enabled a citizen to influence public affairs, such as the right to attend assemblies, vote, make speeches and hold public offices. The right to serve in the army, conceived as an honor and a source of standing, was also forfeited, and the persons declared infamous could not appear in court.¹¹

In the Roman republic, outlawry fell into desuetude and was only exceptionally applied in the form of proclaiming a person guilty of treason as the enemy of the country. Infamy, similar in consequences to that found in Athens, seems to have been a widespread way of degrading citizens convicted of certain crimes involving moral turpitude. In the late days of the Empire, specific disqualifications resembling contemporary ones appeared: the court could pronounce forfeiture of the right to carry on a trade, hold certain public offices, etc. Exile, previously a means of escaping punishment, now became a penalty. Some forms of exile entailed loss of Roman citizenship, confiscation and loss of hereditary rights.¹²

The barbarian states of the dark ages, by superimposition of the Roman "infamia" and the measure of "excommunication" applied by the Roman church over old Germanic practices, produced a wealth of variously called forms of outlawry. In some European laws, notably in the early Italian Statutes, the old outlawry was retained in all its vigor. Referring to the precursor of present-day banishment ("bannitio"), these statutes explicitly state that the "bannitus" could be attacked by anybody with impunity. In some other European laws, the outlaw retained at least some rights.¹³

"Civil death", in medieval continental countries, was the mandatory legal consequence of death sentences and sentences to imprisonment for life. The only practically important consequence of civil death in regard to those sentenced to death was confiscation of property. As far as those

imprisoned for life were concerned, the idea was to emulate the results natural death would produce, e.g., succession would be opened. The "civilly dead" could not transmit upon intestacy or by will, or receive gifts. All family and political rights were forfeited. However, as a result of rudiments of compassion, some rights were left to them: they were capable of entering into onerous contracts, acquiring property for consideration, etc.¹⁴

In England, the so-called "attainder" was the mandatory consequence of the death sentence, as well as certain instances of absconding from the jurisdiction. Attainder entailed confiscation of property and various disabilities known under the label of "corruption of blood". Foremost among them was the deprivation of all rights to inherit by or through the attained person.

In some Continental countries, a less harsh consequence, called "infamy", resulted from the infliction of some degrading punishments such as the pillory, flogging or the "iron collar". In France, for instance, persons struck with infamy were excluded from public office, disqualified from testifying, and lost all hereditary rights.¹⁵

The European Middle Ages also developed a great number of punishments whose only purpose was to expose the convict to public shame and ridicule. Old sources reveal that the "penologists" of the times attributed a great deterrent value to the loss of face in the community. Thus, convicts were forced to ride on a donkey through the streets, carry certain objects, etc.¹⁶ Even though these degrading punishments (in the most direct sense of the word) did not technically entail "infamy", they seem to have been very effective in exposing the convict and his family to ridicule and loss of face. Such humiliating and disgraceful punishments were retained in Europe much longer than one might expect. Most countries abolished them only around the middle of the 19th century, although in others they remained on the books until the last decade of the century. For example, some degrading punishments ("carcan") were abolished in France as late as 1894. Sweeping disqualifications resulting from death and life sentences were also retained very long. What

¹¹ See Tsitsouras, *Les Conséquences Légales, Administratives et Sociales de la Condamnation Pénale*, 28 RIDP 384 (1957); Von Bar, *op. cit. supra* note 10, §1, note 7.

¹² MOMMSEN, *ROEMISCHES STRAFRECHT* 996, 1004, Leipzig (1899).

¹³ Von Bar, *op. cit. supra* note 10, §39.

¹⁴ For details see PLANIOL & RIPERT, 1 *TREATISE ON CIVIL LAW*, Part 2, no. 372-373, translated by the Louisiana State Institute (1959).

¹⁵ See Brissaud, *op. cit. supra* note 10 at 885.

¹⁶ For details: Von Bar, *op. cit. supra* note 10, §38: footnote 22.

made them particularly harsh was the fact that they affected the convict's family as well.

The Age of Enlightenment produced two legal provisions predicated on the view that the former convict, following execution of sentence, should be reinstated in the plenitude of his rights and capacities. This Phoenix-like restoration was specifically provided in the 1786 Criminal Code of Leopold of Tuscany¹⁷ and in the Code of the Austrian Emperor Joseph II of 1787.¹⁸ These two astonishing provisions were, of course, not based on ideas of reclaiming the individual and reintegrating him into society, but were the outcome of legalistic views inspired by contractual thinking, coupled with the idea of expiation. Upon execution of the sentence, the offender was thought to have "paid his debt" to society, and any legal disqualifications outlasting the execution of sentence seemed unjust. Both Codes were, however, short lived. Although the century witnessed an important movement toward less cruelty in dealing with former convicts, even the French revolution, notwithstanding some humane views toward punishment, did not introduce changes in the area which concerns us. For instance, even though "civil death" does not appear in the revolutionary laws of 1791, it was provided by a statute of 1793. Provisions dealing with civil death reappeared in the Napoleonic codification,¹⁹ and were not abolished until 1854. In the majority of German-speaking countries, "civil death" was abolished around the middle of the century (Bavaria in 1849), and "attainder" disappeared from English law in 1870.²⁰

Consequently, in contrast to America, Europe entered the 20th century free of the anachronism of "civil death". To say that the medieval idea of civil death disappeared from the European scene before the turn of this century should not be taken to imply that similar sweeping disqualifications were not retained in many European countries. The only vestige of even more ancient reactions to crime known to this author is due to the revolutionary upheavals following the Russian revolution. A criminal statute enacted during Stalin's rule, dealing with the crime of "fleeing the country for the purpose of going over to the

enemy", provided the sanction of "declaration to be outside of the law". Imposed in absentia, this sanction entailed confiscation of property and execution within 24 hours of the moment the outlaw's identity is established. This statute was abolished following Stalin's death.²¹

In presenting the 20th century development of the law dealing with adverse effects of conviction, perhaps the best starting point is *France*. It was the French law that directly or indirectly served as a source of inspiration to a great number of contemporary laws on the matter.

In regard to serious crime,²² "civil death" and "infamy" were replaced by three measures of disqualification, classified as punishments: a) *twofold incapacity to gratuitously acquire or transfer property*, b) *legal incapacitation*, and c) *civic degradation or loss of civil rights*. All these measures are still positive law in France.

The statute of 1854 abolished "civil death" and substituted *twofold incapacity* which attaches by operation of law to all life sentences and continues even if the life sentence is commuted. Twofold incapacity includes the incapacity to receive gifts or take by way of succession and the incapacity to make a valid will or make donations. Obviously, only the most objectionable disqualifications contained in "civil death" were rejected.

*Legal incapacity*²³ attaches by operation of law to prison sentences of a particularly serious type (so-called "deprivative" and "infamous" punishments) and deprives the prisoner, until his release from the institution, of the exercise of the rights to manage his estate. His status resembles closely that of certified persons and a guardian is appointed for him.

Loss of civic rights ("degradation civique",²⁴ successor to medieval "infamy") provides for a mandatory and permanent loss of a package of rights, privileges and capabilities. Because it served as a prototype of a great number of rather general, blanket disqualifications in other countries, usually called loss of "civil" rights, the disqualifications included in this punishment deserve to be presented in their entirety:

²¹ Compare CHIKVADZE, *SOVETSKOE UGOLOVNOE PRAVO* (Soviet Criminal Law) 275 (Moscow, 1959).

²² At this point the reader should recall our discussion of terminological difficulties, and our decision to disregard technical classifications of crimes and punishments in various legal systems.

²³ Art 29, P.C.

²⁴ Art 34, P.C.

¹⁷ ch. 57

¹⁸ Art. 184

¹⁹ Art. 25, Civil Code; Art. 18, Penal Code.

²⁰ However "outlawry" in cases of *absconding from jurisdiction* was abolished in England only in 1938. On this type of "outlawry", see Richards, *Is Outlawry Obsolete?*, 18 LAW Q. REV. 297 (1902).

The loss of civil rights consists of:

1. the removal and exclusion of the convict from all public functions, positions or offices;

2. the deprivation of the right to vote, to elect and to be elected and, generally, of all civil and political rights and of the right to wear medals or decorations;

3. disqualification from being a court-appointed expert, a witness to legal instruments, rendering testimony, but not from merely giving information;

4. disqualification from being a member of the family council, a conservator-guardian, a curator, a joint conservator-guardian or a court-appointed guardian, except for his own children and only with the approval of the family;

5. prohibition to bear arms, to be a member of the National Guard, to serve in the French Armed Forces, to be a school principal, to teach, or to have any position in a school as a professor, teacher or school monitor.

In the area of less serious crime, a more flexible technique was adopted. Article 42 of the Penal Code contains a long list of "civic, civil and family rights" which may be forfeited incident to conviction, but the imposition of these disqualifications has been made optional and the idea of blanket loss rejected. Here the judge can pick and choose from the list of disqualifications. In short, under this system, disqualifications, no longer automatic and in a package, may now be related to the crime, the criminal, and the public interest.

This bird's eye view of adverse effects flowing from convictions in France is far from complete. It leaves out a great many disabilities which will all be taken up later in dealing with specifics. The brief description is, however, sufficient for our present purposes. It provides us with a rough sketch of the by now "traditional" regime of sweeping legal disabilities resulting from convictions, which served as a basis of quite recent, further development in some countries.

The "traditional" French regime, described above, is still positive law in a great number of countries. But the idea of depriving the convict of his capacity to manage property and placing him under guardianship has not found widespread acceptance. The equivalents of the *French legal interdiction* are mostly limited in Europe to countries bordering on France, such as *Belgium*,

Italy, *Luxembourg*, *Monaco* and *Spain*.²⁵ Outside of Europe it appears, for instance, in the *Egyptian* Penal Code.²⁶ Thus, in contrast to *America*, it is very rare to find suspension or loss of the right to sue, to contract, to take or transfer property, etc. But, the successor of "infamy", the accessory punishment of *loss of civil* (sometimes called "honorary") *rights* in its traditional form of mandatory deprivation of a variety of rights, privileges and capacities, has mushroomed and found its way into a great number of legal systems. The list of disqualifications, however, varies. In some codes or statutes, it closely resembles the *French* (e.g., *Italy*, *Monaco*). In others it is restricted to political rights regarding participation in public life. ("Civic" rather than "civil" in the technical parlance of some civil law countries). Details also vary (e.g., the permanent or temporary nature of disqualifications), but the basic pattern remains the same. Outside of France, yet in Europe, the described sweeping and mandatory disqualifications attached to certain sentences will, for instance, be found in *Austria*, *Belgium*, *Greece*, *Lichtenstein*, *Luxembourg*, *Monaco*, *Poland*, *Norway*, *Portugal*, *Spain* and *Switzerland*.²⁷ Outside of Europe, they are known in *Egypt* and countries which (like *Chile*) follow the *Spanish* or *Portuguese* example.²⁸

An early criticism of the traditional regime of disabilities consisting in the loss of "civil rights" was that the penalty was too *inflexible*. The criticism did not apply in its full force to jurisdictions like the *Dutch* or *German* where the imposition of the accessory penalty was not mandatory.²⁹ But even there, or in countries like *Argentina*,

²⁵ *Belgium* (Code of 1867, art. 20-23); *Italy* (Code of 1931, art. 32) *Luxembourg* (Code of 1879, actually the Belgian Code, art. 20-23); *Monaco* (Code of 1874, art. 19); *Spain* (Code of 1944, art. 43). It is also inserted in the Civil Code of *Greece* (art. 1700). It is interesting to note that the legal incapacity also known to the old Spanish Code of 1870 and applicable in the Philippines, caused the U.S. Supreme Court to familiarize itself with the penalty. See *Weems v. U.S.*, 217 U.S. 349. See also note 27 infra and the respective text.

²⁶ Art. 25

²⁷ *Austria* (Code of 1852, art. 26); *Belgium* (Code of 1867, art. 31); *Greece* (Code of 1950, art. 59 et seq.); *Lichtenstein* (Code of 1859, art. 26); *Luxembourg* (Code of 1879, art. 31); *Monaco* (Code of 1874, art. 35); *Portugal* (Code of 1886, art. 76); *Poland* (Code of 1932—still in effect—art. 45, 47); *Spain* (Code of 1944, art. 34, 52); *Switzerland* (Federal Code, art. 52); *Norway* (Code of 1901 until 1953).

²⁸ *Egypt* (art. 25); *Chile* (Code of 1875, art. 27 et seq.)

²⁹ *Germany* (Code of 1871, §32); *Holland* (Code of 1881, art. 28); *Yugoslavia* (until 1959).

Colombia or South Korea,³⁰ the regime was inflexible in the sense of failing to provide for the possibility of "dismembering" the long list of disqualifications, and imposing only some of them.

Further development is closely linked to the new criminological thinking with its strong emphasis on reintegration of the offender into society as a means of preventing recidivism. Proponents of this approach came to view many adverse effects resulting from criminal convictions as either unnecessary and irrational, or harmful and inhumane legal barriers. Often they can prevent normal life in a community, impede efforts at rehabilitation and be instrumental in causing relapse into crime.

The punishments of loss of civil rights and legal incapacity came under sharp attack. There is little doubt that the motive behind their infliction is that of degrading the offender. Occasionally even terminology testifies to it, e.g., *German* "Ehrenstrafen". Disqualification of former convicts should never be motivated by degradation. It is justified only if it is in some way related to a public interest such as a concern for the authority of and respect for certain offices, prevention of recidivism, etc. Relation to public interest cannot be established unless each disqualification is individually considered and its imposition left to the discretion of the judge. Some disqualifications contained in the punishments of loss of civil rights were declared as objectionable on principle (e.g., testimonial incapacity). Some critics went so far as to argue that even the label "punishment" should be discarded and another label expressive of nonpunitive nature be adopted.

This orientation ran into opposition in some quarters. A considerable body of opinion considered degrading punishments as useful because fear of disgrace in the eyes of the community has a greater deterrent value than the fear of suffering involved in traditional punishments. Yet, there is no doubt that the views of opponents of the disqualifications motivated solely by the desire to degrade now prevail among criminologists and lawyers. This was reflected in the final acts of the Seventh International Congress of Criminal Law held in Athens in 1957. Although a result of compromise, it still contains the following passage: "... all legal consequences of conviction motivated by the

sole goal of degradation should be abolished."³¹ Legal interdiction and loss of civil rights are specifically mentioned.

Equally significant is the recent development in another direction. The great inflation of regulatory activity in our century produced a colossal number of statutes, decrees, regulations and ordinances providing for various adverse "side-effects" of convictions. As will later be seen, some appear in areas one would never expect. However, the process of rehabilitation of the offender requires a thought-out policy. Obviously the latter cannot be implemented if numerous legal restrictions, many unknown to the judge, shackle the ex-convict. Hence, the strong feeling in many quarters that there should be a general overhaul of the whole body of law, notably that dealing with licensing and regulatory restrictions. The view seems to be gaining ground that the powers of regulating restrictions incident to conviction should either be centralized or at least the activity of various authorized bodies and agencies coordinated. Some of these views found their way into the final acts of the VIIth International Congress of Criminal Law as well.³²

These recent developments were not limited to specialists in the field of criminal law and criminology. Echoes of new views reached the legal systems of some countries. The most timid step, taken by countries which retained the punishment of loss of civil rights, was empowering the sentencing judge to impose only those disqualifications from the list which seem warranted in a particular case. "Public interest" is sometimes explicitly mentioned. This is the case, e.g., with the *Norwegian* Penal Code³³ as amended in 1953, and the modern Code of *Ethiopia* (1957).³⁴ A similar technique can be found in the *Italian* Penal Code³⁵ of 1930, and the *Russian* Code of 1922,³⁶ abrogated in 1960.

Some countries went further and abolished this type of punishment altogether, while retaining a number of disabilities in their codes, usually dealing with occupational disqualifications. The *Soviet Union* abolished the punishment of loss of civil rights by a repeal statute in 1958, and there is no such penalty in the new *Russian* Criminal

³¹ The full text of the resolution may be found in 29 RIDP 229 et seq. (1957).

³² *Id.* at 237.

³³ See 29 *et seq.*

³⁴ Art 122.

³⁵ Art. 28.

³⁶ Art. 25-34.

³⁰ *Argentina* (art. 19); *Colombia* (art. 56); *South Korea* (Code of 1953, art. 43).

Code of 1960. *Yugoslavia* abolished the punishment in the amendments to the Criminal Code passed in 1959. These two countries thus joined the group of countries that never adopted the sweeping disqualifications contained in the loss of civil rights (e.g., *England, Canada, Israel, Japan*, etc.). An unsuccessful attempt to abolish the punishment was made in the Parliament of *Finland* in 1948.

On the other end of the spectrum, from the traditional approach to effects flowing from conviction, are *Sweden* and *Denmark*. In 1936, *Sweden* not only abolished the usual disqualifications such as the loss of electoral rights, testimonial incapacity, but also the almost universal disability to hold public positions, various occupational disqualifications, etc. As a result, revocation of driver licenses became one of the very few legal consequences resulting from conviction.³⁷ The changes seemed to have been successful in *Swedish* circumstances, for the new Penal Code of *Sweden* which went into effect in 1965 did not revert to more traditional solutions.³⁸ *Denmark* followed the *Swedish* example in 1951.

The movement in national legislation has of late been paralleled by an interesting development in the international arena. In 1950, a number of Western European countries signed the so-called European Convention on Human Rights, securing a long list of rights and privileges to individuals. An enforcement machinery was also established consisting of the European Commission on Human Rights as well as the Court of Human Rights. In keeping with the traditional view that the individual, the real party in interest, has no *locus standi* under international law, individuals were not accorded the right to directly reach the Court. However, an optional clause signed by *Belgium* and other countries provided for the right of individuals to petition the Commission if they felt their rights under the Convention were violated. The Commission is then to study the matter and if it finds merit in the case, refer the matter to the Court. The signatories agreed to abide by the judgment of the Court.

³⁷ Problems regarding entry into the criminal records and its effects will be discussed below. Consequences other than legal are discussed in Simpson, *Les Conséquences Légales, Administratives and Sociales de la Condamnation Penale*, 28 RIDP 349 (1957).

³⁸ The new Code contains, however, the punishment of "suspension of public servants." But, the period of suspension can never exceed one year (P.C. Chapter 32, section 2).

In 1960, a case was referred to the Court involving disabilities flowing from conviction under Article 123 of the *Belgian* Penal Code of 1867 (incorporated in 1944):

Any person convicted of an offence or attempted offence under Title I, Vol. 2, Chapter II of the Penal Code or Articles 17 and 18 of the Military Penal Code, committed in time of war, shall, *ipso facto*, be deprived for life of the following rights:

(a) the rights set out in Article 31 of the Penal Code, including the right to vote and the right to be elected;

(b) the right to appear on any roll of barristers, honorary counsel or probationary barristers;

(c) the right to take part, in any capacity whatsoever, in instruction provided by a public or private establishment;

(d) the right to receive remuneration from the State as a minister of religion;

(e) the right to have a proprietary interest in, or to take part in any capacity whatsoever in the administration, editing, printing or distribution of a newspaper or any other publication;

(f) the right to take part in organising or managing any cultural, philanthropic or sporting activity or any public entertainment;

(g) the right to have a proprietary interest in, or to be associated with, the administration or in any way with the activity of any undertaking concerned with theatrical production, films or broadcasting;

(h) the right to carry out the duties of director or manager or authorised representative of a private company, limited shareholding partnership, co-operative society or credit union; the office of manager of a Belgian establishment, under Article 198 (2) of the consolidated Commercial Companies Acts; to practise the professions of stockbroker, broker's agent or bank auditor, the profession of banker or director, governor, manager or authorised representative of a bank as defined in Royal Decree No. 185 of 9th July 1935, or those of managers of Belgian branches of foreign banks specified in Article 6 of Royal Decree No. 185 of 9th July 1935;

(i) the right to be associated in any way with the administration, management or

direction of a professional association or a non-profitmaking association;

(j) the right to be a leader of a political association.

This long list of disabilities was applied in 1946 in the case of a Belgian journalist, de Becker, convicted for collaboration with the Nazis. In 1951, following an act of clemency, de Becker was released on parole on condition that he take residence in France. Subsequently de Becker asked the Belgian authorities on several occasions to restore at least some of his rights and capacities and approve of his residence in Belgium. All his requests denied, he finally lodged a petition with the Commission, alleging, *inter alia*, that the imposed disabilities violated human rights as spelled out in the European Convention. After a somewhat lengthy procedure, the Commission referred the case to the Court. In 1961, while the case was still pending, the Belgian legislature amended the controversial Article 123 in such a way that de Becker lost interest in the litigation and the proceedings came to an end in 1962.³⁹

Although the representative of the Belgian government vigorously refuted the idea that the legislative changes were related to the proceedings before the international bodies, the fact still remains that probably for the first time in history the question of sweeping disabilities flowing from conviction was considered by an international tribunal and its possible incompatibility with human rights considered.

Only tangential to the subject-matter of this study, but significant as evidence of the growing concern of international bodies over the rights of convicted persons, is yet another development. In 1962, the Committee of Ministers of the *Council of Europe* passed a resolution on *electoral, civil and social rights of prisoners*. In it, claiming to express "European legal conscience", they urged member Governments of the Council of Europe to exercise great restraint in depriving prisoners of their rights *during the execution of sentence*. Some of the specific recommendations, notably those dealing with capacity to sue and defend legal actions, seem to be specially applicable to those countries that still have the system of legal in-

capacity and similar restrictions placed on convicts.⁴⁰

Thus, the historical trend in the development of disabilities resulting from conviction seems to be decidedly in the direction of increasingly fewer legal restrictions on former convicts. The direction of the future seems to be toward retaining only those restrictions necessary for the safeguard of some public interest. But, as the survey of specific adverse effects of convictions will reveal, this trend only holds promises.

VARIOUS CONSEQUENCES OF CONVICTION

(A Catalogue)

I

Consequences of Conviction Affecting Citizenship & Political Rights

The consequences of conviction affecting citizenship will be taken up first, because it is citizenship which represents the basis upon which all political rights are superimposed.⁴¹ Next we will deal with the possible loss of political rights—those rights which enable a person to participate in public affairs.⁴² Consequently we will not only deal with various electoral and voting disqualifications, but also with various restrictions on the freedom of public expression, freedom of assembly, etc.

A. Effects Regarding Citizenship:

Very few countries surveyed *explicitly* provide that conviction of certain offenses entails loss of citizenship. Until the reform years beginning in 1958, Soviet law contained an expatriation statute. Included in all criminal codes of the constituent republics was the measure of "designating the convict as an enemy of the toilers", which implied stripping of citizenship and even expulsion from the country. This punishment was, however, limited to the most serious offenses considered to

³⁹ See Resolution (62)2 adopted by the Ministers' Deputies on February 1, 1962, containing Recommendation no. 195 on "Electoral, Civil and Social Rights" of prisoners. These recommendations would put an end to "legal" incapacity.

⁴¹ The term "citizenship" is not used in the strict technical meaning it often has in civil law legal literature, where it is opposed to "nationality". See 1 PLANTOL & RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* (12 ed.) Partie 2, Chapitre 3, §1, no. 425.

⁴² We avoid speaking of participation in "political life" and preferred the term "public affairs" because some legal systems use disqualifications going beyond the domain of political life proper.

³⁹ See *Affaire "de Becker"*, Publication de la cour européenne des droits de l'homme, 154 et seq., 190, Strasbourg (1962).

endanger the security of the state, and was hardly ever used in practice; the new Soviet criminal legislation contains no such expatriation statute.⁴³ Some countries still *explicitly* provide for the punishment of loss of nationality to others than natural-born citizens. They apply only to persons who acquired citizenship through naturalization or some other legal device. This, for instance, is the case under the *French Code on Citizenship* of 1945, which contains a provision whereby citizens, other than natural-born, may forfeit their nationality, *inter alia*, in case of conviction of an offense against the "internal or external security of the state." Similarly, by *Spanish law*,⁴⁴ naturalized citizens convicted of some offenses of treasonable nature and various offenses against international law, may suffer loss of citizenship. Treasonable conduct, coupled with failure to return to the country and stand trial, may cause a naturalized *Canadian* citizen to lose his citizenship (*Citizenship Act*, as amended in 1958).

Perusal of various nationality laws reveals, however, that the number of countries in which the state has the power to strip convicts of their citizenship may be much larger. Many nationality laws, in speaking of grounds leading to the forfeiture of nationality, use language so broad that they obviously cover convictions of criminal offenses. Analysis of all these laws falls, however, outside of the scope of this study.

In this connection, it should perhaps be noted that a few nationality laws explicitly prohibit deprivation of citizenship following conviction of a criminal offense. An example of this rare provision is the *Yugoslav law on citizenship* of 1945, which allows the stripping of one's nationality only if the citizen resides outside of the country, damages his homeland, and acquires another nationality; conviction of a criminal offense *per se* will not suffice.⁴⁵

On the other side of the coin, conviction may operate as a legal impediment to the *acquisition* of citizenship by way of naturalization. If used discriminately, this particular effect of conviction appears understandable and justifiable. But, here

again, few countries expressly refer to conviction as an impediment to naturalization (*France* and *Norway*). Most jurisdictions use broad formulas in describing prerequisites to the granting of naturalization, and such formulas, no doubt, cover conviction of at least those offenses which involve moral turpitude. An illustration in point is the *West German Statute on Federal and States' Citizenship* of 1913 (§18) which requires as a prerequisite to naturalization, "blameless life". Soviet law, in this area, is less restrictive than most others in that it provides practically no impediments to naturalization usually inserted in contemporary nationality laws.⁴⁶

B. Effects Regarding the Right to Vote:

Although this disqualification is one of the most commonly found in contemporary legal systems, its scope is somewhat ambiguous. Most civil-law (legislative) enactments simply refer to the loss of the right to vote, without amplification. As a rule, the disqualification is broadly construed so as to encompass not only voting for electoral purposes (parliamentary, municipal or local), but also voting in plebiscites, referenda and the like. Marginally, with respect to voting in various aspects of public life (school boards), the demarcation line is not clear. In *West Germany*, the right to vote is understood as relating only to the right to elect; this disqualification however, is coupled with another—"voting in matters of public concern" (§34 *West German P.C.*). The clarity is somewhat greater in countries like *Canada*, *Greece* and *Israel*, which enacted specific electoral laws for different elections and inserted disqualifications therein.

Loss of the right to vote is invariably found in countries which still include the sweeping penalty of loss of civil (civic or honorary) rights in their catalogues of punishments. In most of these countries, the disqualification attaches to certain sentences either by *operation of law*, or as a result of a *mandatory decision* on the part of the judge.⁴⁷

Disenfranchisement sometimes attaches to conviction of specific offenses, sometimes manda-

⁴⁶ Compare LEPESHKIN, *KURS SOVETSKOGO GOSUDARSTVENNOGO PRAVA* 467 (Moscow, 1961).

⁴⁷ *Argentina* (art. 19, P.C.); *Columbia* (art. 56, P.C.); *Finland* (chapter 2, art. 14, P.C.); *France* (art. 34, P.C.); *Greece* (art. 63, P.C.); *Luxembourg* (art. 31, P.C.); *Monaco* (art. 35, P.C.); *Poland* (art. 54, P.C.); *South Korea* (art. 43, P.C.); *Switzerland* (art. 52, Federal Code) and *West Germany* (§32 P.C.). Automatic disenfranchisement is also found in *Canada* (Crim. Code, section 654(1)), although the punishment of loss of civil rights does not exist there.

⁴³ See CHIKVADZE, *op. cit. supra* note 21, at p. 275.

⁴⁴ Art. 34, Criminal Code.

⁴⁵ Leaving aside other considerations, let us note only one, often deplored, possible consequence of expatriation laws. Unless the expatriated person has already acquired another nationality, he becomes a stateless person—a status most countries pledged to keep down to a minimum. See the preamble to the 1930 Hague Convention on Citizenship.

torily, at other times in the discretion of the judge. Thus, for instance, in *Norway*, the judge may deprive the convict of the right to vote only upon conviction of particular offenses and with the further proviso that this disqualification be required in the public interest.⁴⁸ Similar provisions are found in the *Ethiopian* Penal Code.⁴⁹

In many countries, the disqualification from voting is only temporary (unless, of course, the life sentence is involved).⁵⁰ In others, the disqualification may often be permanent (e.g., *France*).⁵¹ The disqualification takes effect on the day the sentence becomes final, but the time spent serving one's sentence does not count as part of the period during which the disqualification is imposed (e.g., *Norway*, *Switzerland* and *West Germany*).

Some countries provide for loss of the right to vote only while the convict is *imprisoned*. The disqualification, in other words, does not outlive the execution of the sentence. This limited disqualification is found in *Japan* (unless the crime involves electoral fraud), *Spain*,⁵² *England* (Forfeiture Act of 1870), and various *Canadian* jurisdictions (e.g., the Ontario Election Act). As will soon appear, the practical consequences of this system approach the one in countries which have discarded all voting disqualifications.

The usual justification for the loss of the right to vote as a consequence of conviction is that anti-social elements should not partake in the political life of a country. This *raison d'être* of the disqualification was challenged in *Sweden* as early as the thirties. Although the weight of argument on this matter depends on the particular circumstances of a given country (such as the actual meaning and importance of the right to vote), it still may be of interest to briefly present the *Swedish* argument against the voting disqualification. The mere desire to attach legal stigma on a convict is in itself no sufficient justification for voting disqualifications. What other considerations may be used in its support? The ratio of convicts to the total voting populace is so negligible that convicts are not likely to materially affect the outcome of elections. On the other hand, voting disqualifications soon become a matter of common knowledge (particu-

larly in small townships and rural areas), the result in reactions impeding the reintegration of the former convict into the community. Following this line of reasoning, the *Swedes* abolished voting disqualifications as early as 1936; *Denmark* followed in 1951.

Independently of this Scandinavian movement, voting disqualifications were discarded by the *Soviets* in 1958, and *Yugoslavia* in 1959. The *Yugoslav* law, however, suspends the exercise of voting rights of prisoners during the execution of sentence.⁵³ Of the countries surveyed, no voting disqualifications exist in *India* and *Israel*.⁵⁴

C. Effects Regarding the Right to be Elected:

As a rule, disqualification to be elected receives treatment parallel to the disqualification to vote. In fact, the "right to vote" in many civil law countries is understood to include the so-called "active" and "passive" right to vote, the latter taken to mean the right to be elected. It is probably only for purposes of clarity or perhaps because "*poenalia sunt restringenda*", that statutes refer, often redundantly, to the right to be elected besides the right to vote. Consequently, what has been said regarding the right to vote applies to the present disqualification. The reader, however, may be curious about the *Swedish* argument in support of the former convict's right to be elected. While it seems plausible that the convict in exercising his right to vote will probably not affect political life, the former convict elected to an office may. Here, the *Swedes* rely on the voters. It seems very likely, they say, that the former conviction will become an issue during the campaign and the voters will not be misinformed about the candidate. If they nevertheless choose to elect him, it is felt that the legislature should not interfere with their choice.⁵⁵

The fact that in a few countries the former con-

⁴⁸ Art. 55a, P.C.

⁴⁹ A separate problem is the *opportunity* of prisoners undergoing punishments in an institution to exercise their right to vote. Many electoral laws require electors to vote only at the polling place at which they are registered, and prisoners are excluded from voting unless they can cast their ballot by proxy. To change this, the Committee of Ministers of the Council of Europe recommended in 1962 that prisoners be afforded the opportunity to vote by whatever legal expedient seems appropriate. See Resolution (64)2 on electoral, civil and social rights of prisoners.

⁵⁵ Compare Strahl, *Les conséquences de la condamnation pénale, Rapport Général, Présenté au VIIème Congrès International de Droit Pénal*, 28 RIDP 573 (1957).

⁴⁸ Art. 31, P.C.

⁴⁹ Art. 122, P.C.

⁵⁰ *Holland*, *Norway*, *Poland*, *Portugal*, *Switzerland* and *West Germany*.

⁵¹ Art. 34.

⁵² Arts. 35, 37, 39 P.C.

vict suffers no electoral disqualifications should not be taken to mean that he can be elected to any office or position. While retaining his general elective capacity, he may be shackled with various occupational disqualifications.⁵⁶

D. Disqualifications from Positions of Influence:

If political rights are taken to mean rights enabling one to partake in the public life of the country, then many occupational disqualifications should concern us here. This is the case with the disqualification to hold *public office*, found in various forms in almost all countries. The concept of public office is, of course, quite elusive and differs from country to country. But, whatever the meaning of public office, at least *some* public offices are considered distinctly political.

Other occupational disqualifications, such as prohibition from managerial and leading positions in the press and publishing activity, disqualification from leading positions in the trade unions and political parties,⁵⁷ are relevant here, but they are inextricably bound up with various other occupational disqualifications, and their proper situs is among them. Thus, we shall consider them later.

E. The Bar to Public Appearance:

The bar to public appearance imposed on a convict may be motivated by political as well as non-political reasons. The lawmaker, for instance, may decide to attach such a disability as a consequence of the abuse of mass media for obscene purposes. However, because of the potential the measure has in the way of preventing a person from influencing public life in any way, we will deal with this disability in the present context.

The bar to public appearance exists in *Yugoslav* law, and consists of the prohibition from publishing in the press, appearing on the radio and television, or speaking at public gatherings. The bar can take

⁵⁶ On this point, *Swedish* law is unique; as will appear later, there are practically no occupational disqualifications in that country.

⁵⁷ Such disqualifications can be found in the famous article 123 of the *Belgian* Penal Code before its repeal in the wake of the de Becker case. They also appear among the numerous disqualifications entailed in the so-called "national degradation" provided by a *French* decree of 1944 for the crime of "national indignity". For details see Donnedieu de Vabres, *Traité de droit criminel et de législation pénale comparée* 368, Paris (1947).

two legal forms. It may be provided by statute as a collateral consequence of certain convictions,⁵⁸ and in that case takes effect by operation of law,⁵⁹ or it may be imposed upon conviction by the judge if, in the court's opinion, public appearance has been misused in committing a crime.⁶⁰ Since the disability imposed by the judge is classified not as a penalty but rather as a security measure, it is justified only as a means of preventing recidivism and, in both its forms, is temporary.

F. Other Disabilities Affecting Political Rights:

Some jurisdictions limit the disabilities affecting the convict's participation in political life to those voting disqualifications and occupational restrictions specifically delineated by the legislator. In addition to, or in place of, specific disabilities, other jurisdictions have enacted a broad provision depriving the convict of all "political rights". Such a sweeping formula has been found in the penal codes of *Italy*,⁶¹ *Portugal*,⁶² *West Germany*,⁶³ and, with a slightly different wording, in *Columbia*.⁶⁴ The scope of this prohibitive formula is quite ambiguous and the Commentaries, great repositories of law in civil law countries, are unenlightening.⁶⁵ No illuminating cases arising under the relevant provisions are known to this author. Many questions remain unanswered—probably in view of the delicate nature of the subject. Can the convict join or form a political party? Can he express his views on political matters on any mass media, etc.? The relationship of at least some of the imaginable disqualifications to the constitutions of the respective countries is not altogether clear.

⁵⁸ Art. 37a, C.C.

⁵⁹ It is interesting, however, to note that so far not a single statute has provided this kind of disability and it remains only a legislative possibility. This is not surprising if the legislator's motive is revealed. The legislative purpose of article 37a, providing many other consequences of conviction besides the one we consider here, was that of *limiting* the power to lay down disabilities flowing from conviction. Before the amendment adding art. 37a, disabilities were provided by a host of bodies (municipal and local regulations, charters of enterprises, etc.). Now, the legislator has the *monopoly* in laying down collateral consequences of conviction.

⁶⁰ Art. 61c, C.C.

⁶¹ Art. 28.

⁶² Arts. 60, 61.

⁶³ Sec. 34.

⁶⁴ Art. 42.

⁶⁵ Compare, for instance, SCHÖNKE & SCHRÖDER, STRAFGESETZBUCH (12th ed., München, Berlin, 1965). Comment explanatory of §34.

II

Adverse Consequences with Respect
to Military Matters*A. Disqualification from Serving in the Armed Forces:*

This disqualification is conceived in two different ways. In some countries, it is largely a holdover from the times when being a soldier was basically an honor rather than a duty. Consequently, the disqualification is technically conceived as a *degrading punishment*. This is the case under *French* law in which the disqualification is incorporated in the larger punishment of "civic degradation."⁶⁶ Whether this type of legal disqualification is also experienced as a punishment by the convict is, of course, another matter. It seems very likely that some convicts consider this restriction more of an advantage than an adverse disability. Changing times have prompted the *French* lawmaker to provide many exceptions to the imposition of the disability which would otherwise flow automatically from certain sentences. Rather than being disqualified from serving, some convicts are sent nowadays to special units.⁶⁷ Exceptions will also be found in *West Germany* whose Statute on Military Duty of 1956 provides dismissal from the army and disability from serving as a consequence of certain convictions.

A modern approach to the present disqualifications is illustrated by the Penal Code of *Norway*.⁶⁸ Although labeled as a penalty, the disqualification resembles a non-punitive, protective measure, imposed only if it appears to the judge to be in the public interest that a convict not serve in the armed forces (e.g., disloyal persons convicted of espionage, alcoholics, etc.).

In the codes of the surveyed countries, the disqualification from serving in the armed forces has also been found in *Holland*.⁶⁹ It was discarded by *Sweden* in 1936, by *Greece* in 1928; and it is not found in the statutory law of the *Soviet Union* and *Yugoslavia*.

⁶⁶ Art. 34, P.C.

⁶⁷ See Statute of March 31, 1928, art. 3.

⁶⁸ Sec. 30.

⁶⁹ Art. 28, P.C.

B. Forfeiture of Military Decorations:

This is a widespread consequence resulting from criminal judgments. "Loss of civic rights", in countries which still have that punishment on the books, often entails forfeiture of military decorations.⁷⁰ Sometimes the forfeiture of decorations is coupled (as in *Greece*) with the disability to acquire them in the future.⁷¹ In other countries, it is not technically a *punishment* contained in the criminal judgment, but rather a collateral *consequence* flowing from conviction. Thus, under *Yugoslav* law, certain sentences carry forfeiture of military decorations by operation of law. However, decorations for valor in time of war are forfeited only in exceptional cases provided by statute.⁷² Important limitations on the power of courts to take away certain medals also exist in the *Soviet Union*.⁷³ *Swedish* law does not provide forfeiture of decorations.

C. Forfeiture of Military Ranks:

As with decorations, the lowering or deprivation of military ranks is in many countries involved in the loss of civic rights. This is the case in *Austria*, *Belgium*, *Columbia* and *West Germany*. The laws of some countries provide only for the deprivation, not the lowering, of military ranks.⁷⁴ In others, forfeiture of rank is coupled with the disability to acquire it in the future.⁷⁵ Sometimes forfeiture of military rank is coupled with dismissal from the armed forces.⁷⁶

In a great many countries, special military laws provide for an elaborate public ceremony in the course of which the soldier is stripped of his rank, the purpose being to emphasize the degrading nature of the demotion.

(To be continued in next issue.)

⁷⁰ *Austria*, *Columbia*, *Egypt*, *France* and *Italy*.

⁷¹ Art. 63, C.C.

⁷² Art. 3, *Yugoslav* Statute on Decorations.

⁷³ Compare art. 36 of the Criminal Code of *R.S.F.S.R.* (England, Forfeiture Act of 1870, sec. 2; *Poland*, art. 45, P.C.; various republics of the *Soviet Union*).

⁷⁴ Art. 31, *Belgian* C.C.

⁷⁵ E.G. Art. 126, *Ethiopian* P.C.; art. 36, 38 of the *Swiss* Military Penal Code.