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## CRIMINAL LAW AND PROCEDURE IN SWITZERLAND SINCE THE ARMISTICE

ERNEST HAFTER<sup>1</sup>

Dr. John R. Oliver, Chairman of the Committee of the Institute on "Criminal Law and Procedure in Europe," has transmitted to me the plan which he published in Volume 11, page 468, of the AMERICAN JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY as a basis for the work of his Committee. According to this plan, he proposes to collect brief reports on the development of Criminal Law and Procedure in European countries during the late War and especially during the years that have elapsed since the Armistice. He has requested me to give an outline of conditions in Switzerland.

I have accepted this invitation with the greatest pleasure. The plan of Dr. Oliver's Committee is, to my mind, of great interest and importance, because criminal law, more than any other domain of the law, must have for its ultimate aim the attainment of a development that shall be both international and unified. Crime is a social factor which works itself out over the whole world along almost similar lines. The problems of guilt and punishment are everywhere the same. And, therefore, the goal of our struggle with crime must be fundamentally the same in all countries of the globe. It is true, of course, that the general advances of criminology show important differences in different countries; and it has been clear to all European jurists for a long time that the states of the American Union have, in many questions connected with the struggle against delinquency, bravely accepted theories and methods and have set their feet firmly on a road along which European countries may follow them, even though following with some hesitation. For, after all, these differences are only differences of quantity and not of quality. The final goal is the same, namely, the greatest restriction of crime that is humanely possible. Europe must thankfully admit that numerous innovations in criminal procedure, which in the last ten years have either been definitely included in European criminal codes, or the possibility of which has at least been considered, may be traced directly or indirectly back to American influence. In this connection I would lay stress on the de-

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velopment of the care of juvenile delinquents, especially on the creation of juvenile courts; and further, on the successful struggle against professional or habitual lawbreakers. In the realm of prison reform, Europe has looked to America for many years as a leader that may be safely followed. Surveillance of discharged prisoners in Europe has been worked out more and more along American lines. Finally, the protective method of asexualization in the cases of certain criminals convicted of sexual assaults, which has, I believe, been given legal force in a few American states, has been seriously considered in Europe, especially in Switzerland, for many years.

Dr. Oliver's Committee has suggested definite lines along which the reports from the various European countries are to be made. I base my present report on conditions in Switzerland on these suggestions of the American Committee.

#### CHANGES AND DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE DURING THE WAR AND SINCE THE ARMISTICE

In order to understand present developments in Switzerland, it will be necessary to give a brief statement of the conditions that surround our ordinary legislation. The principal characteristic of the criminal legislation that is in force in Switzerland today is lack of unity. Like the United States, Switzerland is a Confederation. It consists of twenty-five cantons and half-cantons. In each of these cantons a special criminal code is in force and the various criminal codes and ordinances differ greatly from one another. Side by side with satisfactory and modern criminological ideas, we find, still in force, old and long outworn codes that still have the force of the law. It is true, however, that outside of and above the law of the cantons there exists the law of the Confederation. For instance, all military legislation is unified and federal. (See the laws concerning Courts-Martial of 1851 and the Criminal Procedure of Courts-Martial of 1889.) Moreover, there is still in force a Code of Federal Civil Law, of 1853, which, however, is fundamentally restricted to offenses committed against the Confederacy by Federal officials. There are also Federal Laws of 1851 and 1893, still in force, which deal with the legal procedure in cases that are tried before the Federal Court of the Confederation, the highest court in Switzerland.

Although the initiation of legislation dealing with procedure and also with the infliction of punishment (prisons and their organization) is still and must still remain in the power of each canton or state, nevertheless, we are at least at work upon the unification of

fundamental Federal legislation. The foundation of this unification is to be found in Article 64, which was included in the Swiss Federal Constitution in November, 1898. This article states that "the Confederation has the power to legislate in the domain of criminal law." In connection with this, the same article declares that "the Federation has appropriate power to fee the cantons definite sums for the building of prisons, workhouses and reformatories, and for the improvement of the conditions under which punishment is inflicted." It is also authorized to share in the establishment of institutions erected for the care of neglected children. On the basis of this constitutional provision plans have been worked out for a Federal Criminal Code. During the War the preliminary work was brought to a conclusion and at the present moment a bill including the proposed Criminal Code of the 23rd of July, 1918, has been presented to the Federal Parliament. On the 26th of November, 1918, another bill was laid before the same Parliament containing a plan for a revised code of courts-martial. When these bills will pass and become law it is at present hard to say. But we can at least welcome the fact that these bills and the Criminal Code which they contain will stand the test of scientific criticism, and that they are thought out on clear and satisfactory lines of modern criminology. They include many important reforms: the conditional sentence and conditional release from prison; the surveillance of released prisoners; regulations for the care of persons who are irresponsible or whose responsibility is restricted; measures of safety against professional and habitual delinquents, who are either lazy or alcoholic; measures for removing juvenile delinquents from the domain of the ordinary criminal law, and for the working out of a distinct code in dealing with them along the lines of institutional care and education.

When in August, 1914, war broke out in Europe, the lack of a unified and complete Federal Criminal Code made itself especially felt in Switzerland. It is true that Switzerland remained *directly* untouched by the War, but she was completely surrounded by four countries who were in arms against one another. Her boundaries were threatened for years, and the longer the War lasted, the worse her economic situation became and the more dependent she grew upon the warring countries that surrounded her. The peculiar situation in which she found herself forced her during the entire War to keep her army mobilized. The effect of this upon the criminal law was a hitherto inexperienced domination of all civilian life by military law, a domination that developed by leaps and bounds. But the civil law itself also developed tremendously in certain directions under the pressure of

existing conditions. Switzerland was a neutral island in the heart of warring Europe. Especially during the first years of the War, her territory was overrun by a mass of the most undesirable human elements out of all the other countries of the Continent. Swiss territory was, at certain times, the most fertile field for international spies, whose activities were directed against the work of the political and military Intelligence Service of Switzerland, and who worked solely in the interests of the warring countries. Moreover, the peculiar economic condition of Switzerland, the lack of foodstuffs and of other necessities, resulted in usury, profiteering and dishonest speculation that reached unheard-of dimensions. In the year 1914 neither the Federal law nor the laws of the cantons were able to cope with these dangers. Nevertheless, quick action of some kind was necessary. Inasmuch as the process of ordinary legislation would have been too slow to accomplish the ends in view, the Federal Parliament entrusted the government with unlimited powers "in the undertaking and the carrying through of all measures that should seem necessary to maintain the safety, the integrity and the neutrality of Switzerland and to uphold the credit and the economic interests of the country, especially in the providing of sufficient raw materials and foodstuffs" (Art. 3 of the Federal Resolution Concerning Measures for the Protection of the Country, the 3rd of August, 1914). Herewith an era of mandatory legislation began which resulted in the passage of a great mass of regulations fitted to each need as it arose. It would be absolutely impossible to describe these laws in detail. We can only sketch a few of them in broad outlines.

In general, we may map out two chief divisions: (1) Martial Law in its relation to political problems; and (2) Martial Law in its relation to economic conditions. On the 6th of August, 1914, the Penal Code, established for the duration of the War, went into effect. By this Penal Code I mean the regulations of the courts-martial which were established to meet war conditions. However, inasmuch as the Penal Code of the Courts-Martial of the year 1851 had become antiquated and incomplete, it had to be enlarged by various Federal legislative acts which were passed from time to time to meet pressing needs. The most important part of this legislation is composed of the ordinance of the Federal Government, which is dated August 6th, 1914, and which deals with the penal regulations made necessary by the War. This contains severe measures against treason, especially against spying, against the betrayal of military secrets and against any effort to disturb or endanger the military undertakings of the Swiss Army.

Moreover, it forbids the activities of so-called "Intelligence Officers" on Swiss territory who were acting in the interests of a foreign power; in other words, international spying. The foundation of the military penal regulations for the protection of our economic existence was formed by the Federal ordinance of the 10th of August, 1914, which was directed against profiteering in foodstuffs and other necessary means of subsistence; the so-called "Anti-Profiteering Act." This ordinance was later improved and extended by a decree of the 18th of April, 1916.

I cannot at this time follow out the further development of these ordinances. Today they are for the most part without legal force. Nevertheless, a great body of legal experience in the field of legislation and of penal law, which were forced upon us during the War, has not been forgotten or lost. In building up the system of permanent legislation, which since 1919 has gradually taken the place of the temporary war measures, it was necessary for us, and it is still necessary today, to determine whether certain elements of criminal law which came into being during the War should be permanently included in our new legislation or not. This question was answered in the affirmative by the National Association of Swiss Jurists, which was held in the autumn of 1920 at Basle, especially in regard to those prevailing laws that deal with war profiteering and with the various minor delinquencies connected with it. To give an example of this tendency, I may note that a part of the proposed legislation dealing with the establishment of a new code for the courts-martial (which I have already mentioned) is based on experiences which were forced upon us during the War. Articles 107 to 112 of "The Anti-Profiteering Act," which were laid before the Federal Parliament in the autumn of 1918, bear the title "Offenses Against the Rights of Nations During War." These articles contain provisions for the punishment of the use of unpermissible methods and types of warfare, and forbids the misuse of the Red Cross. It forbids attacks on the Red Cross; it punishes the failure to fulfill the duties to helpless or dead enemies established by international law; the breach of a treaty of peace or of an armistice; and finally, the maltreating and insulting or unjust retention of a duly accredited envoy.

CHANGES IN THE GENERAL ATMOSPHERE OF THE CRIMINAL COURTS,  
ESPECIALLY THOSE DEVELOPMENTS WHICH INDICATE A  
MORE ENLIGHTENED AND MODERN TREATMENT  
OF CRIMINOLOGICAL PROBLEMS

It is very difficult to give any definite statements that will throw much light on this question and that will show in what measure the

courts and the individual judges have been influenced in their activity by the general tendency of modern criminological thought. This is all the more difficult in Switzerland because of the many divisions in our country and the great divergences that naturally arise as a result in Swiss criminal procedure. There is also another element in this question which is based on the fundamental difference that exists between the position of a judge in English or American countries and his position in the countries of Continental Europe. The judges in Continental Europe, especially in the domain of the criminal law, are strictly bound to the letter of the law. The business of such a judge is merely to apply to various cases the law as it exists in the statute books. On this account, so long as a law is in force, no matter how antiquated it may be or how far removed from the principles of modern criminology, the judge has very little power to introduce new trends of judicial thought, or even to develop the law as it exists along modern lines. Nevertheless, within the narrow limits which the law imposes on the Swiss judge, the general trend of judicial activity has somewhat changed in the last few years. For example, the problem of criminal irresponsibility or of restricted responsibility are considered and examined with much greater care than was formerly the case. In all doubtful cases the judge has recourse to the opinion of a psychiatrist. Moreover, the average Swiss judge of today attempts more and more to understand not only the act of which the person is accused, but also the entire individuality of the accused, the present and past circumstances of his life, his moral and physical development and the general type of his personality. The glimpses which such a judge obtains into these more personal elements in the case guide him in his determination of the length of the sentence to be imposed and may influence him under certain circumstances to arrange for the protection of convicted persons more or less irresponsible by committing them to a state hospital for the insane or to a sanitarium for alcoholics, or by placing them under legal guardianship. Unfortunately up to the present time the Swiss legislators have never been able to accept even the possibility of introducing into our criminal procedure the indeterminate sentence, which has already been introduced in various parts of America with satisfactory results. Modern penal legislation, however, has developed rapidly in Switzerland along other lines, especially in the creation of juvenile courts. The cantons of Zurich, Genf and St. Galen have now special courts for juvenile delinquents. In working out these penal codes for juvenile offenders we have received most thankfully the suggestions and experience that has been transmitted to us by our study of similar legislation in America. There is one other tendency towards

modern development which I should like to mention. The Swiss judge of the old days was very adverse to the infliction of fines. This tendency, however, has changed and the courts are gradually becoming more and more willing to impose fines, especially for those offenses that have their roots in greediness and a desire for unjust gain. For example, in cases of war profiteering, the judges are now accustomed to impose heavy fines, which are intended to touch the transgressor in his tenderest spot; that is, in his pocket. This change in our criminal practice is also a result of the experiences acquired during the War, and the principle of punishing the greedy man by depleting his bank account will be a valuable acquisition to our future criminal procedure. It will never be forgotten.

#### CHANGES IN PENOLOGY, PRISON REFORM AND KINDRED MATTERS

The most difficult domain in the criminal procedure of Switzerland is the infliction of punishment. The difficulty here lies also in the provincial divisions of Switzerland. The twenty-five small states, which constitute the Swiss Confederacy, are sovereign in the sphere of the infliction of punishment, and even though we may hope that Switzerland can attain to a unified penal code within a reasonable time, nevertheless, the erection and the discipline of prisons, workhouses and reformatories will remain within the administrative power of the various cantons. On account of the provincial conditions of the cantons and also because of the restricted finances from which they all suffer, it is absolutely impossible to bring various cantonal penal institutions, in all details, to the desired level of modern development. Only a few of the larger cantons (Zurich, Berne and St. Galen) possess really good penal institutions, in which the demands of modern penology can adequately be met, especially in the classification of prisoners, the adaption of varying types of labor to varying types of delinquents, and especially in the psychological study of the classified individuals.

Existing conditions in the entire domain of Switzerland have been described in a memorial published in March, 1916, by the Federal Department of Justice and Police. This document contains the results of the investigations of a commission which was entrusted with the task of drawing up a report on the whole question of penal reform. (Schweizerisches Strafgesetzbuch. Beilagenband zum Protokoll der zweiten Expertenkommission: Strafen und sichernde Massnahmen. Strafvollzug. Behandlung der Jugendlichen. Schutzaufsicht und Verdienstanteil—Bern, Stämpfli und Cie., 1916.) Nevertheless, a great improvement in conditions has been planned and appears possible in

two directions. In the first place, the smaller cantons are becoming more and more accustomed to give up their own poor penal institutions and to make contracts with larger cantons that possess good ones, by means of which convicted persons can be interned in these larger, more satisfactory prisons and penitentiaries. Secondly, Art. 64 of the Federal Constitution, which has been already mentioned, permits the Federal Government to make financial grants to the cantons for the erection of penal institutions and, more generally, for improvements in the entire realm of penology. In the primary report of the commission entrusted, on July 23, 1918, with the entire reform of the Swiss Penal Code, a unified system of such financial grants was suggested according to the provisions of the Federal Constitution, which lays down the conditions and the limits of these financial grants that can be made to the cantons by the Federal Government. (Art. 406 to 416 of the Report of the Commission.) However, these considerations are all more or less Utopian. Many years must pass before the reform in the infliction of punishment in Switzerland can reach any satisfactory level of development and before we can attain any definite unity in the administration of penal institutions in all parts of our country. For the present, the initiative of reform remains entirely with the cantons themselves. In the meanwhile, the larger cantons must attempt, in their own territory, to carry through the ideals of modern penology. The period since 1914 has brought with it some interesting developments along this line also. In the first place, we may mention the tendency to use convicts more frequently in outdoor work, such as farming and road-making, etc. As a model institute in this respect, we may point to the penitentiary of Witzwil, which lies on a large estate of its own and which is one of the most productive farms or estates in Switzerland. The lack of foodstuffs, under which Switzerland suffered so greatly during the War, has induced other penal institutions to develop more and more their outdoor or farming work, or to introduce such work for their convicts. This is a definite advance of the past few years which will never be lost, and it is quite possible that it may constitute the beginning of a new era in the history of Swiss penology. If, however, our penal institutions develop more and more into large farms or estates, this will naturally endanger the future possibility of introducing any definite system for a progressive classification of prisoners, since such classifications must become difficult in an institution in which all prisoners are doing more or less the same type of outdoor or farming work. It is natural, therefore, that the defenders of the system of progressive classification should look

with distrust on the present developments in the penal institutions of Switzerland. Time, however, will clear up this question both in Switzerland and in other countries; and at any rate, no one can be absolutely sure that the suggested system of progressive classification in enclosed prisons is the last and final word of wisdom in modern penology.

There is another modification in the infliction of punishment in Switzerland that has been the result of the War and that possesses a certain fundamental value. The Swiss Army remained mobilized for a period of many years. As a result the number of purely military delinquencies and offenses increased very greatly. On account of purely military breaches of discipline, such as refusal to bear arms, desertion, insubordination, etc., a great number of soldiers whose reputation in civil life had hitherto been entirely blameless, were brought before the military tribunals for punishment. The Code of the Courts-Martial recognizes only one type of punishment: confinement in a jail or a penitentiary. The infliction of such punishments, however, and the imprisonment of these hitherto blameless people in existing penal institutions would have involved for many of these military delinquents humiliation and suffering which could scarcely have been defended. Therefore, an order of the Federal Government of the 29th of February, 1916, introduced imprisonment of a military type. The courts could, "in so far as the convicted person appeared worthy," allow him the leniency of "military imprisonment." Such military prisoners were confined in forts, or in the cases of officers and soldiers, in quarters in some government institution especially set apart for the purpose. The old idea of the "custodia honesta" became once more a living legal concept. In this way, a man who had been found guilty of certain breaches of military discipline was spared imprisonment in the old degrading sense of the word. He was also spared the usual prison routine. This military punishment was intended to consist of a term of military service combined with a definite temporal loss of personal liberty. During the period of the mobilization of the army, this type of military punishment did a great deal of good. According to the fundamental conception of this type of punishment, it is not intended to be disgraceful or to leave behind any social stigma, and on this account especially, it doubtless helped to reduce the feeling of personal bitterness that many military prisoners might otherwise have felt. This new development has also been taken over into the present from the past period of the War. It is true that since the army is no longer

mobilized it has lost some of its practical importance. Nevertheless, the valuable thought that lay at the basis of it remains for all time.

While writing down these somewhat disconnected thoughts on a few elements in the development of the criminal law in Switzerland, I have become more and more impressed by the realization that no matter how universal the basic principles of criminal law may be, the development of the administration of justice must always be largely dependent on the various local peculiarities of every country. The fundamental general principles may be universal, but the concrete application of them is dependent on divergences of geographical position and of national individuality. And so, we may consider modern developments in Switzerland merely as one possibility among many, or as one example among many, of the manner in which modern criminology is able gradually to work its way forward. From this standpoint a consideration of Swiss conditions will be of some value to foreign penologists.

The program proposed by the American Committee contains still another point which I have not touched upon. I have been asked to write on "The influence of the more radical tendencies (Soviet tendencies of government, etc.) on the administration of criminal law." On this matter I can say only one thing. There exists at the present no influence of such tendencies on Swiss Criminal Law and Procedure. Indeed, under present conditions, such an influence is hardly to be thought of at all. Swiss law, especially the organization of its legal procedure, is based on the principles of democracy. The Russian Soviet idea, however, is the enemy of democracy—the enemy of the democratic state as it exists today. Whether it will ever be able to establish itself in opposition to democratic principles only the future can show. Should it ever succeed in thus establishing itself, then it must not merely influence criminal law and procedure; it will transform them utterly or annihilate them altogether. But not till then.