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INDETERMINATE SENTENCE AND SOVIET PENAL LAW¹

M. A. TSHELTROW-BEBUTOW

“There are no crimes but criminals.”—*E. Ferri*.

The conformity aim of punishment calls for its correspondence to the personality of each criminal. But this personality is certainly better revealed in the course of months of observation in prison than during a trial which lasts a few hours. Thus, in order to attain individualization of punishment, no court should be allowed to fix a definite term of imprisonment. The convict should remain in prison until it is believed that he has ceased to be a criminal. The determination of this question should be left to a board composed of men appointed on the ground of special fitness.

The idea was realized for the first time by the creation of the Indeterminate Sentence Act of 1877 in the State of New York. Connected with this reform movement are the names of E. C. Wines and Z. R. Brockway, the celebrated Superintendent of the Elmyra Reformatory.

The majority of European authorities on penology at first raised the gravest doubts concerning the advisability of such a procedure. Now it is widely acknowledged as correct in theory (*Ferri*, *Aschaffenburg*, *d'Asua*, *Vambery*, *Liepmann*, *Freudenthal*, *Liublinski* and many others) and has been incorporated in the newest legislation. (Comp. the Resolutions of the VIIth International Prison Congress of Washington, 1910, and those of the IXth Congress of London, 1925.)

The essential idea of the indeterminate sentence is the amendment of convicts. (See Brockway's "Protection by Reformation.") Thus all those sentenced may be placed in special institutions and subjected to a special set of rules designed to encourage reformation. The absence of a fixed term of imprisonment provides, however, for the incarceration of dangerous criminals during the necessary period of treatment with a view to the security of the community.

A definite sentence followed by "preventive imprisonment" is not to be recommended. (I. e., Norway; England, where the statis-

¹In commemoration of Z. R. Brockway on the occasion of the hundredth anniversary of his birthday—April 28, 1827.

tical reports have proved the worthlessness of "preventive detention";² Kahl, Freudenthal; also Congress of 1925.) This prolongation of the reclusion of habitual criminals after the expiration of punishment is usually applied in order to unite the old idea of "equitable retribution for the guilt" to the new one of social defense. But the indeterminate sentence, as a pure measure of social defense, has nothing to do with requital.

The reproaches of certain criminologists (Binding, Birkmeyer, Rich, Schmidt, Wulfert), to the effect that the indeterminate sentence is too sympathetic towards criminals and abolishes general prevention of crime, are quite incorrect.

The very fact that a convict is under an indeterminate sentence may incite him to reform. Mere passive obedience to ordinary prison rules cannot be accepted as proof that a prisoner is fit for liberty. There should be a system of marking, covering every detail of his life, requiring his actual co-operation with the administration, and constantly testing his character. There should be a constant effort of his soul and body and not a series of divertissements." (A Pamphlet of the Howard Association.) On the other hand absence of a definite term in a court sentence will show the gravity of the case and of the repression to all the people (general prevention by special prevention). Finally the American practice has proved that the application of the indeterminate sentence increases the medium term of imprisonment. (A. W. Butler's report on Washington Congress.)

The other objectors (Silvela, Sternau, Gintrager, Goldenweiser, Zhizhilenko, Poznishew, Huguency) fear that—the indeterminate sentence system being indispensably connected with arbitrariness of prison officers—the rights of convicts would not be sufficiently guarded; moreover the indefiniteness of term would inflict much psychic torture.

These reproaches are also groundless. By comparison with all other prison systems the indeterminate sentence system takes the greatest account of the criminal's personality, stimulates powerfully his activity toward reform and fortifies his belief in his own forces.

Abuses at the hands of prison officers would be taken care of as follows: there should be a minimum and a maximum length of term for holding office; the officers should be chosen with care; and finally public control should be introduced into the reformatories.

Speaking generally, individual guarantys and rights (Liszt's

²Lord Chancellor Cave's report on the London Congress of 1925.

“Magna Charta”) must give way to the principle of necessary social defense.

The provisions of the Soviet Penal Code regarding conditional liberation do not reach the aims of indeterminate sentence. (See Chimenez d'Asua, Shirwindt and Utevski.) Neither stimulation of criminals to amendment nor real social defense against the most dangerous offenders can be reached in consequence of: 1) short term imprisonments imposed by the articles of our Penal Code; 2) too broad, almost automatic application of conditional liberation (in R. S. F. S. R. upon the expiration of one-half of term, and in U. W. W. R. even one-third!) without keeping the released under any supervision; 3) frequent “discharging” of the prisoner.

The Soviet legislator has rejected the idea that crime is a guilty action, the moral responsibility of which carries with it a legal consequence which is punishment—retribution. The characteristic of the Soviet Penal Code is that it is not the objective gravity of the crime, but the personality of the criminal that comes to the attention of the legislator. The Soviet principle of criminology is social defense which calls for a measure of security.³ Places of punishment—prisons—have been abolished and in their stead there have been established institutions for habitual criminals, asylums for alcoholics, homes for correction and education, places for the education of adolescents, and asylums for the criminally insane.

Thus, the measure of security being indeterminate by its nature, the indeterminate sentence system is entirely conformable to the Soviet criminology.

For practical reasons we consider this system as indispensable in the treatment of certain categories of delinquents: 1) adolescents up to the age of twenty-five convicted of felonies and misdemeanors; 2) habitual (dangerous) criminals.

A system with a maximum and a minimum term of sentence is to be recommended. The maximum penalty provided by law should be the maximum sentence; the court should fix a minimum term of imprisonment (which should not be less than ten months in any case).

Such a system would effect both the conversion of those who are not incorrigible criminals into useful citizens and the real protection of the community.

³Comp. M. Grodzinsky, *Das Russische Strafgesetz*, *Zeitschr. für vergl. Rechtswiss.*, 1925, b. xli, and Ferri, *La fonction juridique de l'état de danger chez le criminel*, *Revue internat. de droit penal*, 1927, N 1, p. 56, n. 3.