GLOSSAE
European Journal of Legal History

ISSN 2255-2707

Citation
Urs Germann, "Toward New Horizons: Penal Positivism and Swiss Criminal Law Reform in the late 19th and early 20th Centuries", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 259-276
(available at http://www.glossae.eu)

Toward New Horizons
Penal Positivism and Swiss Criminal Law Reform in the late 19th and early 20th Centuries

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Received: 22.4.2020
Accepted: 21.6.2020

Abstract
This chapter discusses the influence of penal positivism on the codification of Swiss criminal law. It covers the period between 1890 and 1937, when the first Swiss criminal code was enacted. In Switzerland, the notion of penal or scientific positivism has never been very common. Nevertheless, the program of social defence, promoted by different international reform movements from the 1870s onwards, was crucial for the elaboration of the criminal code of 1937.

In Switzerland, criminal law reformers emerged as part of a multifaceted movement that united different professional groups, including lawyers, prison administrators, psychiatrists and youth welfare experts. From 1890 onwards, the political effort to unify cantonal legislation acted as a catalyst for the transformation of criminal law, allowing reformers to exert considerable influence and introduce important aspects of social defence into legislation.

In the end, Swiss criminal law reform would be a quite pragmatic undertaking. Reformers contented themselves with partial, select modifications, refining existing means of social control rather than putting fundamental principles of liberal law in question. The pragmatic character is also evident when one considers the reformers' reticence about positive science. At the core of the reforms, the drafts of the criminal code conceived of a dual-track system in which regular penalties were complemented by security and treatment measures. This made it possible to introduce indeterminate prison terms for specific classes of "abnormal" criminals, which included multiple recidivists, the mentally impaired, minor offenders or those addicted to alcohol. At the same time, these drafts suggested conditional sentencing for "occasional" and other "respectable" offenders. The combination of repressive and rehabilitative approaches was thus an important feature of criminal law reform in Switzerland.

Swiss criminal law is still based on the reforms enacted in 1937, and while they were the result of democratic processes, they remain problematic. On the one hand, these reforms were suffused by traditionalistic and moralizing interpretations of social deviance and by constant fears about the fragility of the social order. On the other hand, particularly with regard to security and treatment measures, prison administrators and public authorities were given greater scope for action at the expense of the rights of offenders. Swiss criminal law reform thus exemplifies fundamental legal and political problems surrounding the implementation of penal positivism in the 20th century.

Keywords
Penal positivism, criminal law reform, Switzerland, Carl Stooss, social policy

Summary: 1. Introduction. 2. Political and legal backgrounds. 3. Multifaceted reforms. 4. Fighting against the spectre of crime. 5. Pragmatic reforms between rigidity and leniency. 6. Critical voices and patterns of legitimation. 7. Conclusions. Bibliographical References

1. Introduction

"All those in Switzerland who have focused their efforts for the past thirty years on the unification and reform of criminal law have good reasons to be attached to Lombroso and his ideas, and to take an interest in the work Ferri and his followers have achieved in this time."[1] With these words, the Zurich professor of criminal law and Liberal Party politician Emil Zürcher (1848-1926) praised the achievements of Cesare Lombroso at a memorial ceremony for him held in 1921. In doing so, he explicitly recognized the impacts the *scuola positiva* had exerted on recent developments in Swiss criminal law. Zürcher, who belonged to the core group of Swiss criminal law reformers, also personally admired Lombroso, one of the founders of criminal anthropology, for his efforts to reform criminal law according to the findings of modern science and to substitute education and social prophylaxis for retribution. For him, Lombroso's repeated insistence on common sense and altruism was the most important legacy.[2]

In recent years, several scholars of law and history have shown that the codification of Swiss criminal law was closely intertwined with the movement to reform European criminal law initiated by Lombroso and his followers beginning in the 1870s. In fact, the 1937 Swiss criminal code, in force since 1942, resulted from these reform efforts, and implemented important elements of social defence. It strengthened special prevention and probation, and introduced conditional sentencing as well as security and treatment measures.[3] Shortly before the outbreak of World War II, the German-British criminologist Max Grünhut even called the criminal code of 1937 the "most representative achievement" of the reform era that had begun in the late 19th century.[4] Problematic as the legislation of 1937 may seem from today's point of view, for many contemporary observers like Grünhut, the Swiss criminal code was a path-breaking attempt to reconcile the reformer's concerns with a liberal understanding of the rule of law and the requirements of a direct democratic system.

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[1] "Tous ceux en Suisse, qui portent depuis une trentaine d'années leurs efforts sur l'unification et la réforme du droit pénal, ont des raisons particulières de s'attacher à Lombroso et à ses idées et de s'intéresser pour l'œuvre que Ferri et ses adhérents ont achevé dans ces temps." *Le Solenni Onoranze a Cesare Lombroso in Verona*, Torino: Fratelli Bocca, 1922, p. 22.

[2] Holenstein, S., *Emil Zürcher (1850–1926) – Leben und Werk eines bedeutenden Strafrechtlers*, Zürich: Schulthess, 1996, p. 296. Zürcher repeated his attachment to the international reform movement when he was commissioned to compose the official Message of the Federal Council when presenting the draft of the criminal code to parliament in 1918.

[3] Germann, U., *Kampf dem Verbrechen. Kriminalpolitik und Strafrechtsreform in der Schweiz 1870–1950*, Zürich: Chronos, 2015; Gerodetti, N., *Modernising Sexualities. Towards a Social-Historical Understanding of Sexualities in the Swiss Nation*, Bern: Peter Lang, 2005; Kaenel, P., *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien*, Bern: Stämpfli, 1981; Rusca, M., *La destinée de la politique criminelle de Carl Stooss*, Freiburg: s. n., 1981.

[4] Grünhut, M., *Penal Reform. A Comparative Study*, Oxford: Clarendon Press, 1948, p. 104.

After the First World War, Swiss lawyers and representatives of all political factions were eager to present the transformation of criminal law as the result of a path deeply rooted in national legal traditions. This concern was an important reason that notions like penal or scientific positivism, *scuola positiva*, *moderne Schule* or *neue Richtung* had difficulty in being incorporated into Swiss legal discourse. When they did nevertheless, it was mostly with reference to debates in other countries. However, it was clear the 1937 criminal code was broadly inspired by and strongly committed to a social defence perspective that sought to address crime using scientific expertise and individualized sanctions.

The aim of this chapter is to elucidate the specificities of the Swiss reform path and to show how penal positivism notions informed and shaped national legislation. Special attention is given to the question how the reformers managed to implement elements of social defence within the limits of Switzerland's direct democratic and federalist system.

2. Political and legal backgrounds

Like their peers in other countries, Swiss reformers distanced themselves from existing criminal law and administrative procedures. Unusually, however, Switzerland around 1900 had no national criminal law. So it is not surprising that demands for reform of criminal law were connected with attempts to unify existing cantonal criminal codes.

As early as in the 1870s, lawyers and liberal politicians had petitioned for a unified criminal law, as such law was traditionally under the jurisdiction of the cantons. Some cantons had enacted modern criminal codes by then, mostly modelled after German legislation or the 1810 French *Code pénal*. But some rural cantons had no codified criminal law at all. The resulting legislative and jurisdictional fragmentation engendered considerable legal uncertainty, especially when there were multiple crimes or cross-cantonal extradition procedures. Politicians and lawyers alike saw this situation as responsible for weakening the ability to enforce criminal law. Out of respect for federalist sensitivities, the revised federal constitution of 1874 refrained from introducing unified codes of criminal and civil law. It would only be in 1887 that the Swiss Lawyers Association would again petition for a national codification.

From the 1870s onwards, efforts at national unification were joined by critical voices which questioned the fundaments of liberal criminal law. In this regard, Swiss reformers were influenced by arguments generated in international penitentiary and criminal law reform movements. Until then, cantonal criminal law was mainly based on classical liberal doctrine, including the *nulla poena sine lege* notion as well as the principles of criminal accountability and the proportionality of punishment to crime.[5] At the organisational level, this conventional legal understanding was echoed by separating the judiciary from the penitentiary services. In practice, the vast majority of sanctions consisted of short prison sentences, as a rule served in district prisons. More serious criminal offenders were sent to do forced labour in penitentiaries. The penitentiary system as a whole resembled a chequered patchwork. Some cantons maintained proper

[5] Ludi, R., *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750–1850*, Tübingen: Bibliotheca Academica, 1999.

reform institutions and introduced modern systems of classification and parole, but others, for financial reasons, made do with out-dated jails. In the 1890s, some cantons instituted penal colonies where prisoners had to do agricultural work, and in these places, the cultivation of nature was conjoined with the idea(l) of moral betterment.

Outside the criminal justice system, a broad variety of welfare institutions also emerged during the 19th century. Often run by private organizations, they pursued a mixture of pedagogical and disciplinary objectives.[6] They included associations which provided support for former prisoners, or reform schools which housed neglected or delinquent minors. Like the penitentiary system as whole, these kinds of institutions were committed to social reform and individual betterment. Consequently, they positioned themselves at a certain distance to a criminal justice system more based on repression and retribution. Social control was also exerted through policing the poor (*Armenpolizei*), especially by means of administrative detention. Originally set up to address minor offenses such as the misuse of pauper relief or the neglect of maintenance obligations toward family members, and lasting until the interwar period, custodial measures expanded to become a sort of parallel judiciary at the disposal of police and public welfare administrators. Complex legislative mandates gave these authorities the power to commit "indolent" or "dissolute" men and women living at the margins of society to forced labour facilities without a prior hearing before a tribunal.[7]

Together with the criminal justice system as such, this network of public and private welfare institutions constituted a dense security network, with the help of which liberal and conservative elites could supervise and discipline members of the "dangerous classes". As I will argue later on, these kinds of institutions that originally evolved at the intersection of police and welfare administration were to serve as important blueprints for the reform of criminal law in the late 19th century.

3. Multifaceted reforms

Swiss criminal law reformers were a varied group that came from different professions, with some maintaining intense exchanges with members of the international reform movement. They were stimulated by their peers abroad and, in return, exerted considerable influence at international congresses and over reform debates in other countries.

[6] Keller, E., *Auf Bewährung. Die Straffälligenhilfe im Raum Basel im 19. Jahrhundert*, Konstanz: UVK Verlagsgesellschaft, 2019; Germann, *Kampf dem Verbrechen*, pp. 26–32. On Germany, see Rosenblum, W., *Beyond the Prison Gates. Punishment and Welfare in Germany 1850–1933*, Chapel Hill: University of North Carolina Press, 2008.

[7] Cantonal and federal laws regulating administrative detention were in force until 1981. In recent years, there has been widespread discussion of governmental responsibility, both legally and morally, for the violation of human rights connected to administrative detention. Between 2015 and 2019, a government-sponsored but independent expert commission investigated the legal framework and practices of administrative detention throughout the country. In addition, many case studies of the application of these measures in different cantons have been published by individual researchers. See Independent Expert Commission on Administrative Detention (ed.), *Mechanics of Arbitrariness. Administrative Detention in Switzerland 1930–1981. Final report*, Zürich: Chronos, 2019, URL: https://www.uek-administrative-versorgungen.ch/resources/E-Book_978-3-0340-1529-5_UEK_10D.pdf (accessed 27 Dec. 2019).

Reforms related to penal positivism first developed among a small group of prison administrators. Louis Guillaume (1833-1924), a physician and prison administrator from Neuchâtel and the first federal statistician, played an important role. Guillaume was Switzerland's representative at the International Prison and Penitentiary Congress in London in 1872 and presided over the International Prison Commission between 1878 and 1913. As early as 1875, he had criticised the failures of the existing criminal justice system by pointing to the high recidivism rate. Following the resolution of the 1870 Congress of the National Prison Association of the United States held in Cincinnati, Guillaume proposed fundamental reforms, including introducing the Irish progressive system, a differentiated treatment of juvenile offenders, the expansion of "preventive institutions" like reform schools, or improving the supervision of foster children. He also mentioned the prison administrators' approval of sentences of indeterminate duration, giving them the right to decide set the date of release.[8] Under Guillaume's influence, the Swiss Prison Association started a campaign to unify the penal system. Alarmed by a referendum which could (and then did) lead to re-introducing capital punishment in 1879, the association called for building a central facility for dangerous offenders, and during the referendum campaign, prison administrators began to position themselves as guarantors of public security. Thus, traditional considerations about moral reform were supplemented by an accentuated concern for social defence.

For a long time, Swiss lawyers showed little interest in criminal law reform. This was also a consequence of the fact that the position of criminal law was marginal at Swiss universities before the 1880s. Similarly, initial reactions to criminal anthropology, which began to be actively promoted after the Congress on Criminal Anthropology in Rome in 1885, were rather reticent. Many lawyers acknowledged the merits of Lombroso's and Ferri's efforts to release criminal law from the bonds of a scholastic "conceptual jurisprudence" (*Begriffsjurisprudenz*) and to direct criminal justice towards social purposes. And there is much evidence that, in the long run, political and legal debates on criminal matters in Switzerland were increasingly infiltrated by the spectre of the "born criminal".[9] This notwithstanding, Zürcher's strong enthusiasm for the "new horizons" opened up by the *scuola positiva* remained an exception among Swiss lawyers.[10] Among prison administrators, scepticism about the compatibility of moral reform and biological determinism was also prevalent.[11] The position eminent psychiatrists such as Auguste Forel (1848-1931) or Eugen Bleuler (1857-1939) took was closer to Zürcher's stance. Both wanted to replace the principle of criminal responsibility with the notion of dangerousness. Like many of their colleagues abroad, they both finally managed to integrate elements of Lombroso's

[8] Guillaume L., *Die Reorganisation des Straf- und Gefängniswesens im Kanton Bern,* Bern: s. n., 1875.

[9] Zeller, M.-F., "A propos de l'aliénation, de la criminalité et de l'alcoolisme au tournant des XIXe et XX siècles: le discours eugénique, *Les Annuelles* 2 (1991), pp. 51-63.

[10] Stooss, C., "Welche Anforderungen stellt die Kriminalpolitik an ein eidgenössisches Strafgesetzbuch", *Schweizerische Zeitschrift für Strafrecht* 4 (1891), pp. 245-267; Zürcher, E., "Die neuen Horizonte im Strafrecht", *Schweizerische Zeitschrift für Strafrecht* 5 (1892), pp. 1-16. When choosing the title of his article (and a public lecture held in Zurich in 1891), Zürcher referred explicitly to Enrico Ferris *Nuovi orrizonti* from 1881.

[11] *Verhandlungen des Schweizerischen Vereins für Straf- und Gefängniswesen* 15 (1887), pp. 72-78.

theory of atavism into psychiatric diagnostics such as "moral idiocy" or "psychopathy".[12]

A critical threshold was reached when, in 1889, the Swiss Federal Council commissioned Carl Stooss (1849-1934), a Bern professor of criminal law, to draft a Swiss criminal code. This was also the era in which a group of lawyers, prison administrators and social politicians gathered under the loose umbrella of the Swiss Journal of Criminal Law (*Schweizerische Zeitschrift für Strafrecht*) with the intent to advocate for a substantial reform of Swiss criminal law, as well as validate criminal law as an academic sub-discipline. The "modern school" of Franz von Liszt (1851-1919) and the founding of the International Union of Criminal Law acted as catalysts. Swiss lawyers were far more attracted by the juridical and theoretical framework elaborated by Liszt than by the pragmatism expressed in earlier prison reform efforts, not to speak of Lombroso's crude materialism. When the International Union of Criminal Law met in Bern in 1890, Federal Councillor Louis Ruchonnet (1834-1893), responsible for the Federal Department of Justice and Police at the time, strongly underlined the Swiss government's intention to craft a criminal code, much needed at the time, and gave priority to "fighting against the assault of crime".[13]

Ruchonnet's speech clearly linked unifying criminal law nationally to the aims of the international reform movement. As a consequence, the federal authorities backed the reformers by giving them influence in several expert commissions. These had been called together to discuss the drafts of the new criminal code, under the guidance of Stooss and Zürcher, between 1893 and 1918. Though the time-consuming debates would prove more controversial than expected and led to several major changes in direction, the final draft of the 1918 criminal code – as both Emil Zürcher's and Max Grünhut's statements would confirm – still breathed the spirit of the reform debate of the late 19th century.

After the turn of the century, the field of the "criminalists", as the reformers called themselves, expanded again, and most notably embraced the flourishing field of youth welfare.[14] The lawyers' attempts to give youth criminal law special status met with the desires of public and private welfare professionals, who advocated taking a more active approach to the problem of youth protection. At several congresses and conferences, these professionals argued for a more interventionist understanding of public welfare and guardianship, as already enshrined in the 1907 Swiss Civil Code (only in force by 1912). As a consequence of the new alliance between youth welfare and crime prevention advocates, offender-centred approaches based on psychological or medical expertise began to slowly but consistently increase, especially after World War I.

4. Fighting against the spectre of crime

[12] Germann, U., *Psychiatrie und Strafjustiz. Entstehung, Praxis und Ausdifferenzierung der forensischen Psychiatrie in der deutschsprachigen Schweiz 1850–1950,* Zürich: Chronos, 2004, pp. 120-124; Bomio, G., "Auguste Forel et le droit pénal", *Schweizerische Zeitschrift für Strafrecht* 107 (1990), pp. 87-105.

[13] *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 2 (1890), pp. 90-93.

[14] Ramsauer, N., "*Verwahrlost". Kindswegnahmen und die Entstehung der Jugendfürsorge im schweizerischen Sozialstaat 1900–1945,* Zürich: Chronos, 2000.

As many scholars of history and law have shown, the positivist program both wanted to classify criminals according to their potential for being reformed, using modern scientific methods, and wanted to protect industrial society from habitual criminals through taking appropriate measures. The popular image of the *homo criminalis* as a danger to public order and attempts to individualize legal sanctions were, in fact, different facets of the same intention: to reconcile law enforcement with the requirements of the industrial and scientific era.

Swiss criminal law reformers wanted to base future criminal policy on the findings of positive science and to bring criminal law into line with the "facts of life" (*Erscheinungen des Lebens*), following a popular metaphor of Franz von Liszt.[15] This intent is clearly mirrored in the subtitle of the Swiss Journal of Criminal Law, which epitomized the multidisciplinary approach of its editors and openly referred to Liszt's concepts of an overall approach to criminal law (*Gesamte Strafrechtswissenschaft*): "central organ for criminal law, criminal procedural law, judicial organization, penal system, criminal police, forensic medicine and psychiatry, crime statistics and criminal sociology".[16] With the initiation of the journal, Stooss made clear he wished to overcome the traditional separation of the professional groups involved in law enforcement. The offer to collaborate was addressed to prison administrators, but also to psychiatrists and crime statisticians.[17]

In practice, consolidating criminal policy on the basis of positive science proved a difficult challenge. This was not only due to the methodological problems criminologists encountered when they have tried to determine the causes of crimes and to classify criminals.[18] There were also impediments connected to Switzerland's federalist structure. Fragmented legislation and the notorious underdevelopment of public statistics, for instance, were considerable obstacles for setting up reliable legal statistics. In contrast to Germany or France, where statistical data was regularly used to "prove" the failures of law enforcement, it was hardly possible in Switzerland to gather evidence on the prevalence of delinquency.[19]

The national inquiry on prisons of 1893, which had also been undertaken to collect empirical data on the causes of crimes, makes also clear how strongly discussions about crime were still infused by moral categories stemming from the early 19th-century discourse on deviant behaviour. Ultimately, this inquiry strengthened the image of the criminal as an infamous and dangerous individual who resisted adapting to society. In large part, the inquiry mobilized moral stereotypes which legitimated the "fight against crime".[20]

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[15] Andriopoulos, S. *Unfall und Verbrechen. Konfigurationen zwischen juristischem und literarischem Diskurs um 1900*, Pfaffenweiler: Centaurus-Verlagsgesellschaft, 1996.

[16] "Zentralorgan für Strafrecht, Strafprozessrecht, Gerichtsorganisation, Strafvollzug, Kriminalpolizei, gerichtliche Medizin und Psychiatrie, Kriminalstatistik und Kriminalsoziologie".

[17] Germann, *Kampf dem Verbrechen*, pp. 74-77.

[18] See for example: Galassi, S., *Kriminologie im Deutschen Kaiserreich. Geschichte einer gebrochenen Verwissenschaftlichung*, Stuttgart: Franz Steiner, 2004; Wetzell, R., *Inventing the Criminal. A History of German Criminology 1880-1945*, Chapel Hill: University of North Carolina Press, 2000.

[19] Fink, D. (ed.), *Le compte du crime. Etudes d'histoire des statistiques de la criminalité et du droit pénal de la Suisse*, Bern: Stämpfli, 2016.

[20] Zürcher, "Neue Horizonte", pp. 11-14.

Moral stereotypes were further reinforced by psychiatric diagnoses put forward throughout Europe at the time by medico-legal discourses. Swiss psychiatrists, whose professional activity was then mostly confined to asylums, only incidentally undertook empirical research of their own about the causes of crime. They nevertheless were able to strengthen their role as experts in the courtroom. In fact, after 1900, psychiatry became an important aspect of crime and social policy; this tended to classify certain offenders as "morally deficient" or as "psychopaths" and to stress incapacitation as a legitimate reaction toward "social outcasts". Rather than being in opposition, psychopathological and moral interpretations of crime merged.[21]

The tenuous status of criminological knowledge was also evident when the lawyers around Stooss set out to define, in terms of the law, recidivists deemed resistant to punishment. The very existence of this class of criminals was, for Swiss criminalists and fellow reformers abroad alike, regarded as inconceivable. Attempts to define this category oscillated between more formal criteria (e.g., the number of previous convictions) and more qualitative traits (e.g., a "penchant to commit crimes"). Finally, Stooss and his followers associated this type of offender with a group defined as dissolute and indolent "habitual criminals". This quite fluid categorisation was in fact very close to the terminology long used by those engaged in policing the poor. At the same time, it was compatible with psychiatry's labelling of deviant people as "weak-minded" or "asocial".[22] The passionate search for a reliable definition highlights the epistemological shortcomings of basing criminal policy on empirical grounds. In the end, Stooss and his followers had to rely on a characterization of a class of criminals which was politically acceptable far more than it was empirically validated.

The weak base of knowledge about the prevalence and causes of crime notwithstanding, Swiss criminalists remained persuaded that crime posed a serious threat to society. In this respect, the network of international congresses was key. Reformers and politicians around the world convinced themselves that society must declare war on crime and other forms of social deviance. Delinquency was understood as a problem that united all civilized nations.

In Switzerland, military metaphors of combat and defence were increasingly used after Federal Councillor Ruchonnet spoke to the International Union of Criminal Law in 1890. In the following years, allusions to "crime's assault on society" or the "30,000 enemies" just waiting to overturn the social order became an integral part of political debates. The threat to society was closely associated with the perceived increase in recidivism. While difficult to prove empirically, this was cited as an explanation for the need to reform law enforcement. The dire scenario was augmented by fears of rising numbers of "defective people" and "psychopaths" and the spectre of juvenile delinquency, all of which were taken as unmistakable indications of the degeneracy of modern society.[23]

As in other countries, crime prevention in fin-de-siècle Switzerland was placed at the centre of debates about the fragility of the social order. Fears of cultural decay and social uproar culminated in a willingness to energetically counter the perceived "enemies of society" (Ruchonnet) and, legitimated by scientific expertise, to downplay

[21] Germann, *Kampf dem Verbrechen*, pp. 113-119.
[22] Germann, *Kampf dem Verbrechen*, pp. 143-146.
[23] For further references, see Germann, *Kampf dem Verbrechen*, pp. 77-80.

well-established legal principles such as criminal accountability or the principle of proportionality.

5. Pragmatic reforms between rigidity and leniency

In Switzerland, criminal law reform was closely linked to the efforts to make cantonal legislation more uniform. Both the publication of the first draft of a national criminal code in 1893 and the transfer of competence over civil law matters to the national level in 1898 were important steps toward national codification, though the process was halted several times and only came to an end by 1937. For the adherents of social defence, the political character of legal unification meant they had to adapt their goals to existing power structures. In principle, both the liberals, who were in the political majority, and social democrats on the left supported a crime prevention agenda. Those who supported the *scuola positiva*, like Zürcher or the psychiatrist Bleuler, were fully aware that reforms such as abolishing the principle of legal accountability or introducing indeterminate sentences were difficult to realize due to Switzerland's direct democratic system.[24] The effort at the time, according to Stooss's colleague Alfred Gautier (1858-1920), was to carry out a "reform without a revolution".[25]

The reform program that finally emerged combined different approaches quite pragmatically. On the one hand, the criminal code of 1937 for the most part still adhered to the principle of proportionality of punishment to crime. Actually, Stooss and his followers agreed that the majority of offenders were responsive to the intended effects of punishment. On the other hand, the system of conventional prison terms was augmented by treatment and security measures for those who were labelled as repeat offenders, addicts, or deemed mental defectives. Sanctions against minor offenders were decoupled from sanctions against adults. In all such cases, law enforcement authorities and tribunals were to consider offenders' past histories and character. Depending on the individual offender's status, the objectives pursued were education, betterment or (selective) incapacitation. The drafts also integrated provisions on conditional sentencing following Belgian and French models. Warning penalties and probation orders were thought efficient instruments to spare occasional delinquents from the social and economic consequences of prison sentences and to act as a deterrent. Conditional sentencing was, in fact, adopted by many cantonal legislators long before 1937. During the 1920s, for instance, up to 20 percent of all criminal verdicts were conditional sentences. Subsequent drafts of the Swiss criminal code developed parallel with reforms being realized at the cantonal level.[26]

Its pragmatic and eclectic approach notwithstanding, it becomes obvious that Stooss' reform program, as a whole, was intended to tighten society's reaction against "dangerous" and "abnormal" delinquents and, at the same time, to show leniency toward some categories of "respectable" offenders. By the means of defining different

[24] The Swiss electorate, composed at the time only of adult men, voted twice on the matter. In 1898, it approved an amendment to the federal constitution which gave the Confederation the competence to unify criminal and civil law. In 1937, the Swiss Criminal Code was accepted, by a slim majority, in a second popular vote.

[25] "Verhandlungen des Schweizerischen Juristenvereins", 5 September 1892, *Zeitschrift für Schweizerisches Recht* 11 (1892), pp. 579-618, see p. 574.

[26] Germann, *Kampf dem Verbrechen,* pp. 169–192; Pieth, M., *Bedingte Freiheit. Disziplinierung zwischen Gnade und Kontrolle,* Basel: Helbing und Lichtenhahn, 1996.

"sentencing tracks", the new legislation finally differentiated sanctions with respect to the offenders' past history and personality. This echoed a fundamental aspect of penal positivism and criminology. As far as security and treatment measures were concerned (as well as how minor offenders were treated), the duration of sanctions even depended on predictions made by psychiatrists or prison administrators. The same was true of minor offense cases in which conditional sentencing was an option. Here, tribunals had to consider not only the gravity of the act but also the offenders' conduct, lifestyle and prospects.

Prominent representatives of the international reform movement such as Franz von Liszt, with whom Stooss was in contact while writing his first draft, or Enrico Ferri considered security and treatment measures proposed in the Swiss draft as important contributions to reform discussions.[27] In fact, in subsequent years, the idea of crafting a comprehensive criminal law which included security and treatment measures became an important point of reference. At the 1894 meeting of the International Union of Criminal Law in 1894, Alfred Gautier, together with Adolphe Prins (1845-1919), suggested combining conventional penalties of specific duration with "measures or prevention" of indeterminate duration as an alternative to indeterminate sentencing. Both referred to Stooss's draft, which had been published the year before.[28] Nevertheless, this new model only gained traction after the turn of the century. In 1900, the International Prison and Penitentiary Congress argued for the first time in favour of the principle of custody of unspecified duration, as far as "measures of education, protection and safety" were concerned. In 1913, the International Union of Criminal Law adopted a similar resolution, after a long and difficult debate on the notion of "dangerousness".[29] Adolphe Prins, in his classic 1910 study on social defence also made a plea that one should complement penalties which were of specific duration with (indeterminate) *mesures de sécurité et de protection sociale* directed against specific classes of offenders.[30]

The idea of establishing "extraordinary" sanctions rapidly made its way through the drafts and laws of several countries, though the juridical interpretations could differ considerably between the Norwegian criminal code (1902), the German and Austrian drafts (both 1909) and the English Prevention of Crime Act (1908).[31] As the Swiss lawyer Ernst Hafter (1876–1949) put it at the International Prison and Penitentiary Congress of 1925, this model reconciled the need to protect society with fundamental principles of the rule of law. For this reason,

"[…] for the time being, in European countries at least, it is not possible to introduce indeterminate sentences for the penalties themselves. The situation is quite different for security measures motivated by the subject's personal condition and

[27] For further references, see Germann, *Kampf dem Verbrechen*, pp. 89-95.

[28] *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 62-76, 83-84, 260-265.

[29] *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 20 (1913), pp. 519–520; Teeters, N. K., *Deliberations of the International Penal and Penitentiary Congress 1872-1935*, Philadelphia: Temple University Book Store, 1949, pp. 106-107, 138.

[30] Prins, A., *La défense sociale et les transformations du droit pénal,* Bruxelles: Misch et Thron, 1910.

[31] Wetzell, R. F., "From Retributive Justice to Social Defense. Penal Reform in Fin-de-Siècle Germany", *Germany at the Fin-de-Siècle. Culture, Politics, and Ideas* (S. Marchand, D. Lindenfeld, eds.), Baton Rouge: Louisiana State University Press, 2004, pp. 59-77; Garland, D., *Punishment and Welfare. A History of Penal Strategies,* Aldershot: Gower, 1985.

legitimated by the need to protect society and to appropriately treat offenders individually."[32]

Around 1890, however, the idea of a dual-track system wasn't original at all. Ferri, for instance, had experimented with similar conceptualizations before he decided to advocate a uniform system of *mezzi di difesa* based on the principle of "social responsibility".[33] In Germany or France, systems combining penal and administrative sanctions against vagrants and beggars had existed for a long time. The widely discussed Belgian Act against vagrancy of 1891 also followed this model.[34]

In fact, it would be misleading to overestimate the originality and formal consistency of Stooss's first draft only because it was later praised as a model. This is all the more so, as on closer inspection it becomes obvious that Stooss's conceptualization changed considerably over time.[35] For an accurate understanding of Swiss penal positivism, it is also important to note that Stooss's conception of security measures was in large part based on instruments of social control which had already existed *outside* the fields of criminal law. This disciplinary aspect included the aforementioned institutions, including forced labour facilities for the "indolent" or "dissolute", psychiatric asylums, institutions for alcohol addicts, or boarding and reform schools for children and adolescents. In Switzerland, consignment or confinement into these institutions was traditionally within the purview of public or police administrators. Stooss's initial idea was to link these regulations and institutions more closely to law enforcement and, in criminal cases, to transfer the competence for admitting individuals to the judiciary. From a systemic point of view, this conception would burst the well-established boundaries between criminal and public law. Functionally, it was thought to link repression and prevention more tightly together.

For Stooss and Zürcher, redefining the role of law enforcement was part of a broader conceptualization of social policy. For them, delinquency was – like industrial accidences, sickness or redundancy – a kind of risk, and one which modern society had to address using preventive measures. As Zürcher's enthusiasm for Lombroso's understanding of empathy shows, this shift went along with an intention to redefine individual and social rights. The idea of the liberal subject, focused on liberty and moral responsibility, should be replaced by a conception that made the individual a part of a quasi-natural (de facto: national) community. Consequently, the moral understanding of crime was overlain by a risk-oriented conception of deviance which stressed the anti-social character of certain criminals and called for resolute state intervention.[36]

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[32] "[…]il n'est pas possible pour le moment, en pays européens du moins, d'introduire la sentence indéterminée pour les peines proprement dites. Il en va tout autrement avec les mesures de sûreté, qui sont motivées par un état déterminé du sujet et qui tirent leur sens du besoin de protection de la société et de traitement individuel approprié du délinquant". *Actes of the International Penal and Penitentiary Congress* 1925, vol. 2, p. 280.

[33] Gretener, X., *Über die italienische positive Schule des Strafrechts,* Bern: B. F. Haller, 1884, pp. 9-10; Pfenninger, H., *Grenzbestimmungen zur criminalistischen Imputationslehre*, Zürich: Meier, 1892, p. 48. Both authors refer to Ferri, E., *La scuola positiva di diritto penale,* Siena: E. Torrini, 1883, pp. 35-36.

[34] Prins, A., *Science pénale et droit positif*, Bruxelles: Bruylant, 1899, pp. 569-589.

[35] Germann, U., "Die späte Erfindung der Zweispurigkeit. Carl Stooss und die Entstehung der Zweispurigkeit von Strafen und Massnahmen im schweizerischen Strafrecht – eine historisch-kritische Retrospektive", *Schweizerische Zeitschrift für Strafrecht* 127 (2009), pp. 152-176.

[36] Germann, *Kampf dem Verbrechen,* pp. 105-113, 126-135.

In historical perspective, Swiss criminal law reform, with the dual-track system at its core, reveals quite ambivalent features. On the one hand, it seems to adhere, in many instances, to the program of penal positivism, a fact that was already noted by contemporary observers like Max Grünhut. On the other hand, the pragmatic character of the reform is obvious as well. Swiss reformers had to consider which political opportunities existed and to develop their reforms accordingly, as well as on the basis of existing institutions of social control. In this context, it is thus not surprising that, compared to academic discussions in other countries and at the level of international congresses, legal and public discourses about crime in Switzerland were rather devoid of theoretical and empirical considerations.

Though a product of direct democratic processes, Swiss criminal law reform reveals the ambivalence of social defence. First, the coexistence of different types of penal sanctions reduced the rights of certain classes of offenders. While "normal" offenders could still count on proportional penalties or even benefit from leniency, mentally impaired offenders, recidivists or juvenile offenders had to deal with a probationary system which stipulated sanctions of unspecified duration. Second, following the 1937 criminal code, decisions about release, as far as security measures were concerned, lay within the sphere of competence of public administrators, narrowing the role of the judiciary could play. Third, until the 1970s, there was little differentiation between carrying out penalties and carrying out security or treatment measures. In many cantons, different categories of convicts (and even administrative detainees) were placed in the same penitentiary institutions. In practice, the boundaries between repression and prevention were nearly non-existent. Fourth, the system of security and treatment measures, as well as of conditional sentencing, functioned with a range of fluid notions including "insolence", "dissoluteness", "moral neglect" or "endangering public order". This gave the relevant authorities an exceptional range of evaluating individuals and situations, and opened the criminal justice system for making judgements about conduct and morality. Reformers, relying themselves on categories which had been formulated by liberal elites for dealing with the "dangerous classes" in 19th century, could thereby circumvent the empirical and methodological shortcomings of criminology. The result was a kind of regulation and law-making that was based on a rather conventional set of bourgeois values, its utilitarian and scientific allure notwithstanding.

6. Critical voices and patterns of legitimation

From the very beginning, reform efforts were criticized. As early as 1892, private lecturer Heinrich Pfenninger (1846–1896) launched a scathing attack on how aligned the reformers were with the International Union of Criminal Law. For him, the new horizons of criminal law reform must lead to a "reckless application of the theory of betterment, danger and incapacitation" and, in consequence, to the abolition of the doctrine of free will and criminal responsibility.[37] Pfenninger's objection meant Swiss debates had considerable similarity to the debates between different schools (*Schulenstreit*) of criminal law in the German *Kaiserreich*. As in Germany, Swiss reformers were opposed by a group of lawyers and politicians who belonged to the

[37] "Verhandlungen des Schweizerischen Juristenvereins", 5 September 1892, *Zeitschrift für Schweizerisches Recht* 11 (1892), pp. 579-618.

Catholic-conservative wing, for whom the repressive element in punishment remained essential.

For several decades, this dispute hindered the implementation of the dual-track system and, more generally, expanding the preventive and therapeutic functions of law enforcement. The question whether security measures should replace or complement regular penalties (monism vs. dualism) would become a real bone of contention. Other important points were the treatment of minor "intensive offenders", or the question of how many offenders should benefit from more favourable conditional sentencing. Later, parliament was at odds over the question of the death penalty and about abortion. It is not surprising that these contentious issues, only definitively settled through parliamentary trade-offs in the 1930s, were all related to the basic question whether law enforcement should be an integral part of modern welfare and preventative regimes.[38]

However, it would be misleading to make the opponents of criminal law reform into fierce defenders of the liberal *Rechtsstaat*. In fact, their criticism was motivated by arguments related to public order and legal theory rather than by concerns for individual rights. Lawyers from the conservative wing did not reject the idea of prevention, and shared the popular prejudices toward former convicts. Unlike their progressive opposites, they insisted on a clear separation between repression and prevention. In consequence, they never questioned the state's right to pursue preventative goals *outside* the field of criminal law, notably through detaining "annoying" or "dangerous" people by "administrative means". It was no coincidence that discussions of criminal law reform were concurrent with a considerable extension of administrative detention law, affecting "indolent", "dissolute" or alcohol-addicted men and women in particular. At least for some of these interventions, the prevention of crime was given as a legitimate rationale. The 1930s and 1940s saw the apex of the Swiss "administrative judiciary", and within the competency of public and police administration.[39]

Concerns about the infringement of individual rights as a side-effect of modern criminal policy remained marginal in debates about criminal law reform in Switzerland prior to World War II. For contemporary lawyers and politicians, but also for the public at large, the effort to protect society clearly outweighed worries about offenders' (and other minority groups') individual rights. This bias was even reinforced by the therapeutic rationale of many sanctions, suggesting that state intervention was also in the interest of the people concerned. Fundamental reflections about balancing individual interests against societal interests were hardly present during this period.

Traces of this narrow understanding of the rule of law may be found in a 1937 publication by Hans Pfenninger. Pfenninger was a former visiting scholar at Franz von Liszt's criminalist seminar, and later became a military court judge, and finally professor of criminal law at the University of Zurich. In this publication, he distances himself from the evolution of criminal law in the Soviet Union and Nazi Germany, but this clear positioning notwithstanding, it leaves an ambivalent impression. On the one hand, Pfenninger clearly denounces the abolition of the *nulla poena sine lege* principle in the Soviet criminal code and the Nazi Law of February 28, 1935, as well as the curtailment of defendants' rights as incompatible with liberalism. On the other hand, he is critical about restricting state power as far as sentencing is concerned. Following von

[38] Germann, *Kampf dem Verbrechen*, pp. 71-73, 150-154; Rusca, *Destinée*.
[39] Independent Expert Commission, *Mechanics of Arbitrariness*.

Liszt, the principle of proportionality remained for him an "unbearable" concession to liberalism, hampering the "efficient fight against crime" and the persecution of "elements harmful to the *Volk*" *(volksschädliche Elemente)*:

"Once the criminal has been identified as such, and while respecting all the guarantees of truth, his individual interest must not prevent the national community *[Volksgenossenschaft]* from using the available punitive means, as appropriately as possible, for his re-socialization, or to protect the state from him."[40]

Protection by the law during criminal proceeding, but an almost complete lack of rights at the moment of sentencing – this was the quintessence of Pfenninger's argument, partly shrouded as it was in Nazi jargon. Even if the 1937 Swiss criminal code didn't go this far, splitting the offender into a legal person during criminal investigations and an object of discipline during sentencing (and beyond) was indicative of the effects penal positivism could produce even in democratic systems. In fact, the dual-track system created a sector in which a minority of offenders, defined according to their legal histories and their personalities, could be exposed to state interventions in their lives and have but little legal protection for themselves. In Switzerland, this included sentences of indeterminate duration or conditions of probation and supervision which went far beyond regular penalties. They also implied considerable dependence on psychiatric experts, prison administrators, or law enforcement agencies. Those subjected to security or treatment measures were prosecuted not for what they had done, but for what they were in the eyes of state authorities.

7. Conclusions

In Switzerland, the field of penal positivism was multifaceted. Compared to countries such as Italy or Germany, where the discourses on criminal law reform centred around certain key persons or "schools", different strands of the reform movement (liberal philanthropy; the prison reform movement; law; psychiatry; youth welfare) coexisted. Only in the 1890s, after the project for legal unification was launched, would they become more closely linked together. An important reason for this lies in the late institutionalization of criminal law as an academic discipline.

It is also important to note the almost complete absence of criminology as an academic discipline. Though some research on the prevalence and causes of crimes had been undertaken by individual psychiatrists and statisticians, there was never been a consolidated and concerted research effort to do so, at the time, that was based on international standards. Criminal law reform in Switzerland had a further particularity. The interdependence of law reform and national codification led to a rising politicization between expert opinion and public debates. Thus, reformers' expectations and the intensity of political or public conflicts were rather tempered, and that from the beginning.

[40] Pfenninger, H. F., "Liberalismus und Strafrecht", *Festgabe Fritz Fleiner zum siebzigsten Geburtstag*, Zürich: Polygraphischer Verlag, 1937, pp. 257-280, see pp. 279-280: "Ist einmal der Verbrecher unter Wahrung aller Wahrheitsgarantien als solcher festgestellt worden, darf sein Einzelinteresse die Volksgemeinschaft nicht abhalten, die zur Verfügung stehenden Strafmittel möglichst zweckmässig zu seiner Resozialisierung oder zur Sicherung des Staates vor ihm zur Anwendung zu bringen."

As for the coherence on the programmatic level, Swiss reformers could not really compete with their peers from abroad. Nevertheless, they shared the basic premises of penal or criminological positivism, in particular to protect society from crime by classifying offenders and individualizing penal sanctions. The reformers' attempts culminated in a dual-track system that complemented regular penalties with a set of largely individualized security and treatment measures. This system, which after the turn of the century would establish itself as a model for pragmatic criminal law reforms on the international level, was rooted in quite down-to-earth considerations. Basically, it adopted and transformed well-established instruments of public welfare, notably in the areas of policing the poor, psychiatry, and measures taken against alcohol addiction. Criminal law reform, therefore was in line with existing forms of repression and prevention directed at (or better, against) marginal groups, groups which until then had been beyond the reach of criminal law.

Swiss criminal law reform can serve as an example of the implementation of penal positivism in a liberal-democratic system, one which was not shaken to its core by the rise of totalitarianism in the inter-war period. Yet Switzerland also highlights the problematic features of penal positivism with regard to the respect shown for basic human rights. The newly created dual-track system implied a challenge to, and erosion of, established legal standards.

Scholars' attempts to contrast the "derailment" in authoritarian and totalitarian systems with a "tamed" version of penal positivism in democratic countries therefore miss, in some respects, the core of the problem. In Switzerland, the conception and implementation of criminal law reform was closely linked to a narrow understanding of conformity in an industrial nation-state which was experiencing increasing social and economic differentiation – and a distinct pressure to marginalize socially deviant groups. It would also be misleading to interpret the repressive effects of criminal law reform as standing in contradiction to the objective of social rehabilitation, exemplified by conditional sentencing. Rather we should see social rehabilitation and incapacitation as two sides of the same coin. It is also possible to sharpen the argument: the more Swiss legislation about crime promoted rehabilitative considerations and leniency for a large group of offenders, the stronger political consensus grew to take resolute action against the small group of those regarded as the real foes of society.

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