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The German Penal Code of 1871

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Again, Professor Curran suggests that frequently "litigation neurosis" is a very real ailment which can only be cured by settlement or by favorable adjudication. (P. 193.) Also interesting are the indications that increasing medical knowledge is constantly being manifested in the courts by the creation of new presumptions (for example, the effect of the blood tests in paternity suits) and by an acknowledged widening in judicial notice of medical matters.

On the other hand, it is not altogether certain that chapter 3, entitled "An Anatomy of Trauma," is of great value. This chapter deals with problems which are almost purely medical in nature, and unfortunately the articles which make up the bulk of the chapter are from medical journals or textbooks. Clearly, they cannot be, nor are they intended to be, an exhaustive account of current medical knowledge of trauma, but their value as a lawyer's introduction to this area is impaired by the highly technical writing of many of the authors. Perhaps this difficulty could be overcome by an expansion, in subsequent editions, of the glossary of medical terms which, at the moment, is woefully inadequate for the purpose of making the medical materials comprehensible to the non-physician.

These comments apart, however, Professor Curran has performed a valuable service to the legal profession; he has not only formulated with considerable insight the more difficult problems in medico-legal affairs but he has expounded such practical matters as the general system of hospital management and the nature and contents of hospital records. It only remains to add that a companion volume, written for physicians and seeking to acquaint the medical profession with the attitudes and difficulties of lawyers, would be of equal value.


Mirjan Damaska †

There can be plenty of room for disagreement on the purposes of the comparative study of criminal law, and the problems are increased, whatever purpose one assigns to the discipline, when one faces the task of examining the criminal law of two markedly different legal systems.

These difficulties and differences in approach are reflected in the preparation of materials for the study of foreign criminal law. One pos-

* The publication of the German code is the fourth in a series published under the auspices of the Comparative Criminal Law Project of the New York University Law School. Earlier numbers were the codes of France, Korea, and Norway. All references in this review are to those editions.

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sibly way of providing translated materials for such comparative research is to publish in treatise form a comprehensive guide to the foreign system of criminal law followed by translations of the necessary foreign legal texts. The reasons for such an approach are clear. As a jurist trained in civil law needs guidance to find his way in the sea of case law, so the common-law lawyer needs help in coping with the intricate system of a code. The legal concepts of the two systems, the very juridical atmosphere in which these concepts breathe, are often different, and the safest way to approach the foreign law is to start from scratch. Publications in treatise form are necessary, therefore, since they are tailored to the novice in the field. After such propaedeutic study, the student is in a better position to grapple with the foreign legal texts themselves. Without such preliminary instruction, the study of any foreign legal source would be fraught with the danger that the casual reader might draw wrong conclusions, while the careful reader would find more questions than answers. The preparation of a treatise designed for comparative use is, however, very difficult and calls for exhaustive preparation. Only collaboration between domestic and foreign scholars of comparative law seems likely to yield satisfactory results.¹

Another possible first step in a comparative law project is to provide translations of the foreign legal sources of criminal law—codes, statutes, cases. Such an approach rests on a belief that one cannot spread accurate information about the law of a foreign country unless one first presents its legal sources. This approach, too, bristles with difficulties. The greatest stems from translation and are further increased in the absence of the kind of vision and guidance which a previously prepared comprehensive treatise can afford. And, ultimately, there is the problem of how to render the translation understandable and useful.

For better or worse, the Comparative Criminal Law Project of the School of Law of New York University has adopted the second approach, following several European and one Latin-American example. In order to provide information on foreign criminal law, the first step in the Project was to publish a series of English translations of foreign penal codes. We are told that the translators were at first inclined to insert explanatory notes to the text, but were discouraged by the impossibility of confining them to reasonable limits and finally decided to leave them out altogether.² They probably hoped that the student would find adequate basic information in the bare text and could use it as a reliable starting point for further investigation. Those who seek further illumination are referred to the future when “treatise-like and encyclopedic information” on the translated texts will be published.³

¹ Considering this, the compendium on American law—Crime and the American Penal System—published by the American Academy of Political and Social Science in 1962, is a highly successful portrayal of American criminal law for foreign readers.
³ Mueller, Foreword to id. at xiv.
Given the decision not to insert notes explanatory of the text, the value and utility of the editions would have been increased had the original texts of the codes been published along with the translations. This would have provided a partial explanation and check of the translations for those who possess even a smattering of the respective foreign language. Even if, however, financial exigencies made this approach impractical, it seems proper to direct the attention of the editors, with all due homage to their important work, to some imperfections in their product.

There are points in any translation where "tradutore" is in danger of turning into "traditore." Footnotes are the usual resort of translators confronted with treacherous words and phrases. Uncompromising in their decision not to add explanatory notes, however, the translators here developed other means of coping with the danger of semantically misleading the reader. Their basic principle was to translate every foreign "terminus technicus" by means of the closest Anglo-American term of art. This was in effect a Hobson's choice. Only by this technique could the bare translations be understandable to the common-law lawyer. But since very few foreign legal concepts have their exact counterpart in Anglo-American law—and many differ widely—the translators were forced in many cases to measure the degree of discrepancy. When this was so high as to be apt to mislead the reader, they would translate the term by using a non-technical English word.\(^4\)

However, this method was not applied consistently from one translation to another. For example, inconsistencies appear in the translation of civil law concepts of parties to a crime. These concepts vary markedly from their common-law counterparts, and the translators of the Korean Criminal Code, which was patterned upon German law in this respect, rendered some of these concepts into nontechnical English (Arts. 31 and 32 of the Korean Code). On the other hand, the same concepts in the German Code (§§ 48, 49) were translated by their nearest English technical approximation as "accessory before the fact" (Anstifter) and "accessory" (Gehilfe). Similarly, "blessures et coups" in the French Code (Title II, § 2), roughly corresponding to common-law assault and battery coupled with mayhem, was translated literally as "wounding and striking," since it was felt by the translators that the difference between the French and the nearest common-law offenses was too great to warrant any other translation.\(^5\) However, the German offense of "Körperverletzung" (§§ 223, 223a, 224, 226) was translated by the common-law "termini technici" as "assault and battery" and "mayhem." To be sure, there are differences between the French and German concepts. Nevertheless, both represent substantially the same crime of "bodily injury," and both differ markedly from comparable common-law offenses.

\(^4\) It would seem that this same appreciation of degrees of difference could have provided a criterion for the inclusion of a limited number of footnotes.

\(^5\) Moreau & Mueller, op. cit. supra note 2, at xvi.
At present, these and similar inconsistencies do not seriously impair the value of the translations, but they may prove to be more important when the “treatise-like and encyclopedic information” is available. It will then become apparent that quite a few legal concepts of the continental criminal law are almost identical in their broad outline and possess a common core, particularly when viewed from a common-law perspective.\(^6\) This common core could easily be obscured should substantially the same legal doctrines and concepts be translated in varying ways. Moreover, the fact that the Project intends to publish a series of treatises should affect the choice between technical and nontechnical rendering of foreign law concepts. For example, when the need arises to explain the complex continental law of complicity, terms like “instigation” and “aid,” rather than the roughly corresponding common-law terms of art, will have to be used in the explanations. It seems obvious, therefore, that where technical terms were used to translate the civil law concepts of complicity in the German Code, these translations will not jibe with future ones.

Yet another example of the difficulties in the translation which is a potential source of difficulties may be found in the translation of the German procedural concept of “Strafantrag” as “private charge” in the general part of the code (§§ 61, 63) and as “petition” in the specific part (e.g., § 193).\(^7\) Since both of these translations convey to the Anglo-American reader a rough idea of the procedural concept in question, some explanation of the source of my objection seems in order at the risk of digression. On the European continent, criminal prosecution generally can be instituted in three ways. The usual one is for the prosecutor to act irrespective of the will of the aggrieved party. The second, reserved for specific crimes, is to make a complaint by the injured party a prerequisite for the commencement of the public prosecution—the German “Strafantrag,” Italian “querella,” and French “plainte.” It is designed for cases in which the injured party may be expected to have a strong interest opposed to the public prosecution.\(^8\) Finally, in some European states there are certain minor offenses which are prosecuted only by the aggrieved party, who files accusatory pleadings with the court and is responsible for the prosecution—“private accusation.” Thus, to return to the point, it will be necessary in the treatises to explain the difference between the “private accusation” in its strict sense and prosecution upon the complaint of the injured party. When this is done, the translation of “Strafantrag” as “private charge” will become perplexing and possibly misleading. To be

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\(^6\) This common thread is a result of similar principles in the “science of criminal law,” or, as Helen Silving would put it, to a similar “systematic structural conception of criminal law.” Silving, “Rule of Law” in Criminal Justice, in ESSAYS IN CRIMINAL SCIENCE 99 (1961).

\(^7\) The difference is probably due to an oversight. Still another translation (“complaint”) is found in art. 306 of the Korean Code.

\(^8\) In this type of case, a public prosecution might disrupt family or other important social relationships. In common-law countries, the decision to prosecute or not is made by the public prosecutor. In most civil law countries, this decision is left to the aggrieved party.
sure, the German concept of "private accusation" (Privatklage) differs from that which I have described as used in some other European countries, since it serves as a check on the abuse of nonprosecution by the public prosecutor and not as the normal means of prosecuting certain crimes. Nevertheless, even in German law "Strafantrag" and "Privatklage" must be distinguished, and the translation of the former as "private charge" therefore leaves much to be desired.

These marginal remarks on the translated codes should not be permitted to obscure a warm welcome for the whole Criminal Law Project. Eventually, the work of the Project will shed light on an area which until recently received too little attention on either side of the Atlantic—to the detriment of all concerned. This detriment consisted not only—and perhaps not principally—in the absence of a source of ideas for creating an ideal criminal law as in the lack of a perspective from which a lawyer can achieve a better understanding of his nation's legal system. Nor is the future of the Project of concern only for the Anglo-American scholar; the bridge which the Project is building between two legal systems is by no means a one-way street.

9 More specifically, in teaching a course in comparative criminal law at the University of Pennsylvania Law School in the spring of 1962, I found the materials made available by the Project very helpful.