Radzinowicz

The Roots of the International Association of Criminal Law and their Significance

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The Roots of the International Association of Criminal Law and their Significance

A Tribute and a Re-assessment on the Centenary of the IKV

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Freiburg 1991

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Remembering the generous welcome
extended to me by

Professor Dr. Günther Kaiser
and
Dr. Barbara Huber

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Preface

A lot has been written, important and interesting, about the I.K.V. (International Association of Criminal Law) both at the time of its formation and in the course of its subsequent life. It may therefore seem pretenious on my part to add a further commentary.

Yet I do not think that much harm will be done if, in view of my long-standing involvement in the international study of crime and punishment, I cast my eyes over past achievements and re-examine them somewhat critically. Furthermore, a fresh study of the formative period of the I.K.V., although seemingly remote, contains much that is vitally relevant to many of our present-day concerns.

I am very pleased that this study was conceived and started in the Max Planck Institute with which my old friend Professor Dr. Hans-Heinrich Jescheck is so closely associated. In his capacity as President, he led the I.K.V./A.I.D.P. with justified pride as it approached its centenary.

I am grateful to Professor Dr. Günther Kaiser and Dr. Barbara Huber for having prompted me to embark upon this study and who have both, in so many ways, made my and my wife's visits to Freiburg so pleasing and fruitful an experience. I am delighted to have been allowed to dedicate this monograph to them. But, of course, they left me alone to shape my approach and draw my own conclusions.

My demands on the splendid Library of the Institute were heavy and persistent. Its Head, Professor Dr. Josef Kürzinger, went out of his way to help me. I am also grateful to Mrs. Marta Tarnawsky, the Foreign and International Law Librarian of the Biddle Law Library of the University of Pennsylvania Law School. The foreign collection of the Radzinowicz Library at the Cambridge Institute of Criminology also proved to be valuable.

Dr. Roger Hood kindly agreed to read the manuscript and as might have been expected made very many valuable suggestions.

Mrs. Margaret Thompson, my Secretary, and Humaira Ahmed typed and prepared for publication this rather cumbersome manuscript with their usual cheerfulness and efficiency.

1

A Very Promising Start

Careful thought and intense preparations - or to quote *von Liszt* '... rastlos fortgesetzte Bemühungen ...' - were needed to bring the *I.K.V.* into being. A Statute of the organisation was agreed upon by the three promoters on 17th September 1888 and approaches were made to enlist the support of important individuals. This was so successful that by 31st December 1888 the participation of seventy-five leading figures from Germany, as well as from abroad, had been secured. On 1st January 1889 the *Internationale Kriminalistische Vereinigung* (known in French as *Association Internationale de Droit Pénal*) was established. The event was welcomed by major professional periodicals and organs of the press with eager anticipation. On 16th April 1889 a more detailed plan of action was settled, and a few months later, more precisely on 7th August 1889, at the first international meeting of the new body in Brussels, its public and formal birth-certificate was sealed.[1]

1 See *Franz von Liszt*: Eine Internationale Kriminalistische Vereinigung, in: Zeitschrift für die Gesamte Strafrechtswissenschaft (hereafter cited as ZStW), (1889), vol.9, pp. 367-372; Die ersten zwei Kriegsjahre der Vereinigung, in: Bulletin (or Mitteilungen of the *I.K.V.* (1893), vol.2, p. 121, passim; Die Entstehung der Internationalen Kriminalistischen Vereinigung (hereafter cited as *I.K.V.*), ibid. (1914), vol.21, pp. 10. See also *Karl von Lilienthal*: *I.K.V.*, in: Revue Pénale Suisse (also cited as ZSchSt), (1889), vol.2, pp. 1 ff.; *P. F. Aschrott*: Die *I.K.V.* und die Reformbestrebungen etc. (1891); *Friedrich Kitzinger*: Die *I.K.V.* (1905). For a useful modern bibliographical account see *Karl-Heinz Hering:* Der Weg der Kriminologie zur Selbständigen Wissenschaft (no date), pp. 168-185.

The start was very promising indeed. Members from seventeen countries, their total number exceeding two hundred, participated in the event. Nothing seemed to impede a remarkable expansion. In barely nine years (by 1897) the number of countries represented had jumped to twenty-four and that of members to five hundred and ninety.

Eight years later (1905) the register recorded some thirty countries and one thousand two hundred participants. And though in 1913, the last year of the period with which we are primarily concerned, both indicators revealed a slight decline, the overall growth had been firmly consolidated: twenty-six countries with a total membership of one thousand one hundred and fifty.

2

Some Revealing Internal Shifts

A closer look at the distribution of members, national and international, prompts a few conclusions not deprived of some interest. Thus the French, though in general by national inclination rather reluctant to play a part in movements originating in other countries, joined this foreign organisation with unerring enthusiasm; their group, invariably of high quality, was led by acknowledged masters of criminal science, such as *Garraud, Garçon, Tarde, Vidal and Cuche.* As might have been expected, participation of the Belgian, Dutch, Swiss and Austrians was fruitful and influential. But rather unexpected was the intense interest that the enterprise evoked in some of the Nordic countries. Denmark, for instance, supplied eighty-four members as against nineteen from Belgium and thirty-five from France. And Sweden's contingent was of similar substantial size.

The case of Italy - renowned as *la patria del diritto criminale* - at first seems perplexing. There were fifteen Italian members to start with, dropping to two or three over the next fifteen years and reaching at the end of the period a maximum of six: and for that matter they were rather undistinguished. The explanation seems to be at hand. This was the time of the birth of the famous Positivist School. By then *Lombroso* had gone, but *Ferri* and *Garofalo* were at the height of their reputation. Though both adopted a co-operative attitude towards the *I.K.V.*, naturally, as the positivist *avantgarde*, they

were primarily anxious to build up their own alliances throughout the world, fighting hard for the implementation of their own programme of penal innovation. But the substance of the relationship between the Positivists and the *I.K.V.* requires more elucidation than that which I shall try to provide a little later.

A closer study of the list of participants reveals how rapid and far-reaching the impact of a changed (or changing) political climate can be on regressive or progressive developments in penal policy. In 1889 the membership from Imperial Russia was no more than five; it could hardly have been less. In 1897 it was up to twenty-three - a figure still strikingly low for a country of Russia's size and complexity. Barely eight years passed and the membership shot up to three hundred and fifty-eight. No doubt the fact that an International Congress of the *I.K.V.* took place in St. Petersburg made a big difference. Nor should one forget that the Russian school of criminal science was of an exceptionally high standing, comparing favourably with any of the leading schools of Western Europe. (The books and papers of *Nabokoff*, *Foinitsky*, *Taganzeff*, *Piontkowski*, *Drill*, *Lublinsky* come immediately to mind).[2]

Yet, the decisive reason was that in 1905, the year of revolution, the Tsarist regime embarked for a short-lived but intense period upon a hopeful and contagious flirtation with liberalism and constitutionalism. To be a member of the *I.K.V.* was part and parcel of this: a kind of progressive *carte de visite* to be held not only by the professors, but also by leading figures in the field of criminal justice, by eminent parliamentarians, and, last but not least, by the bar. The list of over three hundred members remained undisturbed up to 1913 and it reads like a *Who's Who* of seemingly purified Russia. No.123 of the list is rather significant: '*Alexander Kerensky*, Rechtsanwalt, Mitglied des Reichstags, St. Petersburg' ('*Alexander*

2 Even the most radical of school of criminal law, the Positivists, seemed to have been making bold advances. See *Alfred Frassatti*: Die neue Positive Schule des Strafrechts in Russland, in: ZStW (1890), vol.10, pp. 607-655.

Kerensky, barrister, member of Parliament, St. Petersburg'),[3] the future short-lived leader of Russia who failed and paved the way for *Lenin*. In vain did I try to find the name of the latter in the subsequent records of the *I.K.V.*[4]

The picture that emerges from England is *sui generis*. At the very beginning (1889) three distinguished experts joined the organisation: *Sir Edmund du Cane*, the head of the penal system, *Sir John Macdonell*, a professor of comparative legislation and an authority on criminal statistics, and *William Tallack*, a noted penal reformer and Secretary of the Howard Association. In 1897 the meagre contingent was but a mere thirteen, though it was enriched by *Havelock Ellis* and *Sir Howard Vincent*. By 1905 England's participation had disappeared altogether and in 1913 only one of the one thousand one hundred and fifty members was from Britain, a senior partner of a London firm of solicitors.

Perhaps an episode from a long time ago (some time during 1936), but which still keeps a firm hold on my memory, would not be irrelevant in this context. It was a late evening and London was enveloped by a fog which reduced visibility almost to nil. As I was struggling to find my way towards Piccadilly Circus I was confronted by the headlines in big black letters of the *Evening Standard* exhibited on a newspaper stand announcing: 'Continent of Europe cut off from England'.

And yet, although embarrassingly absent from active participation in the *I.K.V.*, England was conspicuously present in its deliberations and publications. An unusual fact, to which I shall again refer a little later.

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3 See Bulletin (1913), vol.20, pp. xxxv-xiv at p. xxxix.

4 The atmosphere was not always so serene. Thus, from the statement of the Russian section to the governing body of the *I.K.V.* in 1910, we learn that their meeting was dissolved by the police of Moscow because the head of the police was of the opinion that the presentation of a certain report by a member of the section and the discussion that would follow would 'endanger public peace and security', especially because representatives of the press were invited to attend. See Bulletin (1910), vol.17, pp. 394-397.

Even as late as 1913 the entire South American continent provided but five members, while an American group, established but three years earlier, consisted of barely twelve members.

3

An Elitist Grouping

How was the organisation run? It was a simple and effective setup. The *Bureau*, its governing body, was very wisely restricted in the early crucial years to the three founders of the Union. A President, a Secretary, and a Treasurer. In order to ensure the continued vitality of the organisation, the *Bureau* regarded as its crucial function the formation of national groups, of which there were at any given moment no less than twenty. The make-up of the latter reproduced faithfully the structure of the *Bureau* and the national chairmen were co-opted as members of the *Bureau.* At the end of the period the *Bureau* had grown to nine regular members including two assistant secretaries and one secretary specially appointed to deal with the comparative activities of the Union. The *Bureau*, usually without its co-opted members, met once or twice a year to decide matters affecting the life of the organisation, and to select and define questions to be put on the agenda of the international meetings. The latter were convened at two-yearly intervals. Each question was entrusted to two *rapporteurs*. They were not prevented from expressing their personal views but, as a general rule, the basis of their reply was grounded on reports emanating from the national groups. There was nothing to prohibit a national group from presenting a collective report but more often than not an individual report from each member was submitted and considered. A formal vote on the recommendations submitted by

the *rapporteurs* did not always take place. Frequently, agreement or rejection was decided by a show of raised hands. On occasions questions were abandoned or postponed.

The commanding force that shaped all the central developments of the *I.K.V.* and moulded its style in the period under review emanated from Germany and the vitality of its three hundred members (more than a quarter of the total) remained undiminished. Yet it was exercised with tact and flexibility. This the *I.K.V.* owed to *Franz von Liszt*, its founder, and to the intellectually inspiring relationship, grounded on mutual respect and confidence, that he forged with *Adolphe Prins* and *Gerard Anton van Hamel*. *Von Liszt*, perhaps the best-known German professor of criminal science outside his country at that time, was firmly established in the prestigious University of Berlin and made a *Geheimrat*; *Prins* held the chair of criminal law at the Free University of Brussels and was head of the penal administration of the country; *van Hamel* was a professor at the University of Amsterdam and a distinguished parliamentarian.[5]

The discussions at international meetings were invariably conducted in a civilised and genuine tolerant manner, in perfect harmony with the beautiful surroundings in which they were held under their irreproachably high patronage. The presence of the Minister of Justice and of leading judicial authorities was *de rigueur*. Not infrequently the Prime Minister was there at the opening or at the final banquet, and in a few instances a warm telegram of good wishes was conveyed to the participants on behalf of the Emperor or the King of the host-country.[6]

The impression has been sometimes conveyed of the *I.K.V.* as having an 'Anti-Establishment' flavour. That needs to be dispelled. There was nothing revolutionary, subversive

5 On this remarkable collaboration for penal progress see below, pp. 42-48.

6 Twelve Congresses took place within the period covered by my study. Brussels (1889); Berne (1890); Copenhagen (1891); Paris (1893); Antwerp (1894); Linz (1895); Lisbon (1897); Budapest (1899); St. Petersburg (1902); Hamburg (1905); Brussels (1910); Copenhagen (1913).

or even mildly threatening in its setup and in its activities. It was in no way divisive. It was very diplomatic, anxious to avoid confrontations. It tried to steer a course away from the really extreme movements of criminal science and policy of the period. It was not so much that the *I.K.V.* was so very radical, but rather that those opposed to it were so conspicuously conservative. The Association in fact represented a kind of a comfortable established élitist European club, earnestly engaged in thinking about and probing into the field of criminal justice at a time when Europe was at the height of its prestige and sophistication. And the main road seemed to be leading towards progress.

The extract that follows is taken from the speech of *Adolphe Prins* when, in his capacity as the President of the *I.K.V.*, he opened the International Congress held in Budapest in 1890. It catches the spirit of the period better than I could ever attempt to do.

> 'Messieurs!
> Au nom de l'Union internationale de droit pénal je remercie son Exc. le Ministre de la Justice pour ses cordiales et éloquentes paroles de bienvenue ... On dit, Messieurs, qu'il y a beaucoup de congrès, on dit même parfois qu'il y en a trop. Il ne faut cependant pas oublier que les congrès sont une des formes modernes de l'activité scientifique. L'échange des idées est devenu aussi fréquent et aussi nécessaire que l'échange des marchandises ... le progrès scientifique, jadis avant tout individuel et dû aux efforts du penseur isolé est devenu collectif et reçoit son impulsion des grand courants qui entraînent l'humanité entière. Oui, Messieurs, le titre de gloire du XIX-ième siècle c'est qu'il y a une conscience collective ... Nos congrès, Messieurs, sont l'expression de la conscience collective des criminalistes.'[7]

7 'Gentlemen! On behalf of the International Association of Criminal Law I thank His Excellency the Minister of Justice for his cordial and eloquent words of welcome ... It is being said that there are many congresses, indeed that sometimes there are too many. One should not however forget that congresses are one of the modern forms of scientific activity. The exchange of ideas has become as frequent and as necessary as the exchange of goods ... Scientific progress which in the past was primarily of an individual nature dependent on the efforts of an isolated thinker has become collective receiving its impulse from the great currents which direct the whole of humanity. Yes, Gentlemen, it is the glory of the nineteenth century that it embraces a collective conscience ... Our congresses, Gentlemen, are the expression of the collective conscience of criminal law scholars.' See *Adolphe Prins* in: Bulletin (1900), vol.8, pp. 219-222 at pp. 219 and 219-220.

4

The Agenda

It is not possible to identify with precision the number of topics examined by the *I.K.V.* in its first twelve international meetings, from 1889 to 1913. First, there were a few questions which, although included on the agenda, were nevertheless abandoned in the very crucial stage of discussion. Secondly, there were also a few which, after a brief examination, were dropped by general agreement, though recommended to be taken up at some future meeting. And thirdly, there was a substantial number of topics framed in such a way that in practice they were sub-divided into two, three or even four connected topics and which, while integrated into the main one, required separate answers and recommendations. And it should always be remembered that recommendations depend so much on the manner in which the questions are worded and this was particularly true of these international discussions.[8] In the circumstances I can do no better than take a broad view and make a broad estimate: approximately forty-

8 In support of this contention Professor *Donnedieu de Vabres* gave an exceptionally vivid illustration. It concerned the three formulations of the questions, to be debated at the Brussels Congress, of whether the state of danger of the delinquent should replace or restrict the criterion of the criminal act. The first by *von Liszt* (the most radical and the most suggestive); the second by *Emile Garçon* (less so) and the third by *René Garraud* (much more moderate than the two preceding ones). It was the latter which was ultimately put on the agenda and which in consequence of its formulation led to a recommendation very different from those which would have been endorsed if either the first or the second formula had been put up for discussion. See *Henri Donnedieu de Vabres*: Le Professeur *Emile Garçon* (1851-1922) et l'Union Internationale de Droit Pénal, in: Revue Internationale de Droit Pénal (1951), vol.22 (no.2-3), pp. 191-200, at pp. 197-198.

five questions were addressed. And I have grouped them under a few basic categories such as criminal law; criminal procedure; criminological concerns and criminal policy; this should be helpful in obtaining a better insight into their subject matter, always keeping in mind, however, that a certain amount of overlapping is inevitable under any classificatory scheme.

First one cannot avoid noticing that no strictly juridical and dogmatic topic ever found its way under the umbrella of the criminal law. This was a decision in perfect keeping with the declared objectives of the *I.K.V.*[9] Two topics, though belonging to criminal law proper, could not be divorced from vital considerations of criminal policy and criminology. I refer to 'The influence of the new concepts in the field of criminal law on ways of defining attempts and complicity', and to the question of 'the importance to be attached to psychological elements of crime as contrasted with its material consequences'. A third topic, that of 'Offences of Police Jurisdiction' (Polizeiübertretungen), as its very sub-title suggested ('Definition. Punishment. Procedure') also could not be cut off from basic procedural and criminal policy considerations. The fourth, fifth and sixth questions marked the beginnings of the involvement by *I.K.V.* in the field of international criminal law and international collaboration in crime prevention. I refer more specifically to the law and practice of extradition and the repression of traffic in women ('Mädchenhandel').

The choice of procedural subjects was even more restricted. I could discover but three. These again were not

9 *Van Hamel* acknowledged that the *I.K.V.* was less concerned with 'dogmatique pénale', though the latter would ultimately also feel the effect of the new approach. The task of modern criminology, he insisted, was to simplify the dogmatic contents of the criminal law 'which to a large extent will be replaced by criminology, psychological and sociological'. Criminal law as a juridical discipline would come to confine itself to differentiation and definition in legal terms of acts which are to be prohibited and those which are allowed - fundamental task of the highest importance'. See *van Hamel*: La Responsabilité pour le résultat dans le droit pénal, in: Bulletin (1902), vol.10, pp. 381-388, at pp. 381 and 387. But at a later stage he radically departed from these premises: see below, p. 46 and fn.100.

intended to be studied in isolation but had to be placed within the context of criminal policy. 'What procedure should be adopted with respect to juvenile delinquents found guilty?'; 'Is an extension of summary jurisdiction compatible with a differentiation between recidivists and first offenders?'; and 'How does the inquisitorial and accusatorial system of prosecution compare in effectiveness as well as in the extent to which they are likely to guarantee the rights of the accused?'

Even more striking was the thin and episodic treatment of criminological concerns. It is true that the organisation of international criminal statistics in general, and of statistics of recidivism in particular, were tackled with imagination. But the question of the reform of university legal education from the point of view of the expanding discipline of criminal science (both theoretical and practical) was rather narrowly conceived and vaguely concluded. Valuable surveys on the subject were compiled, primarily by Professor *Joseph Heimberger*, and stimulating suggestions were made (primarily by *von Liszt* and *Gustav Aschaffenburg*). But discussion at decisive stages was side-tracked by attaching too much importance to the emerging discipline of so-called 'police scientifique' launched by *Hans Gross*. The broad issue of the 'Concept of Moral and Penal Philosophy' was not well thought-out, with hardly any precise guidance for discussion, and not surprisingly its pursuance was hastily abandoned. On two other occasions questions out of the blue were introduced. 'The influence of old age on criminality' and 'Rape followed by mutilation from the anthropological and sociological point of view'. One cannot but be somewhat astonished to learn that according to *Prins* the former question was selected because 'elle touche à l'anthropologie', and as far as regards the second I was not surprised to note that, at a later occasion, *von Liszt* diplomatically acknowledged that the selection of the 'rape subject' met with 'some objections' from several members.

The bulk, or more precisely about four-fifths of all topics taken up, which were examined and concluded by endorsed recommendations, fell into the field of criminal policy: indeed they were an integral part of it. Moreover their significance was enhanced because they were all so specific and so topical. A gap that needed to be filled, practices which should be remedied or abandoned altogether, a new departure which should be initiated and experimented with, were the unmistakable catchwords of all the work carried out by the national groups of so many countries and ultimately put on the agenda of international gatherings. The enumeration that follows, though not exhaustive, will reflect the scope and direction of this ardent penological exploration.

Restriction of short-term imprisonment; compulsory work without incarceration; suspended sentence and conditional conviction; the need to make short-term imprisonment more rigorous; the part transportation could still play in the systems of repression; when and under what conditions should fines be adopted and effectively enforced by penal legislation; fixing a proper age of criminal responsibility and determining what compulsory education should be imposed on young offenders independently of the commission of an offence; should greater concern be paid to the victim of the offence and to compensation of the damaged party; what measures should be adopted with respect to offenders of diminished responsibility, to mendicants and to vagabonds; dealing with legislative flaws in combating recidivism; whether it was possible to single out offences most frequently committed by perpetrators who could be identified as incorrigible; should the concept of dangerousness be extended to certain categories of recidivists in lieu of the too exclusive concept of the objective material element in the commission of the offence; indeed what part should be assigned to habitudes of life and hereditary or personal antecedents in the sentencing process of legal recidivism; and to face the most divisive issue of all, how far should one go in adopting indeterminate sentences;

under what conditions could measures of social defence be made compatible with an effective guarantee of individual rights; after-care and ways of assessing its effectiveness in relation to discharged prisoners and juvenile offenders; and, going beyond national frontiers, what should be the reaction to international criminality.

The list reveals a striking immutability in the range of concerns within the field of criminal policy. Nine-tenths of the topics raised nearly a century ago still preserve today their acute topicality and significance. And the great bulk of them is today as far away from agreed effective solutions as it was then.

5

The Agenda Compared

No doubt all this amounted to a refreshing, invigorating agenda. But how did it compare with efforts deployed by others engaged in similar pursuits? And how original and innovative in reality was it? This was the time when international collaboration in criminal matters to exchange information and to raise standards was just beginning to take off, but it had been incubating for a long time.

It gives me particular pleasure in this context to note that the first international penitentiary congress ever held took place in Germany, at Frankfurt am Main, from 28-30 September 1846. Professor *Karl J.A. Mittermaier* of Heidelberg, whose European reputation came close to that enjoyed half a century later by *von Liszt*, was elected president. The event owed its origin to the initiative taken by *Eduard Ducpétiaux* of Belgium and *Whitworth Russell* of England - both leading penologists of the period. The second international congress followed closely, on September 20-23, 1847, and this time it was convened in Brussels. It was hoped that the third would be either in Switzerland or in Holland, but 1848 was the year of European revolutionary awakening and not surprisingly the idea was abandoned. Several more years were allowed to go by before the third congress was convened and again Frankfurt am Main (September 14, 1857) was chosen as the place of reunion, the delegate gathering in the Hall of the Emperor, in the Römer. *Moritz August von Bethmann-Hollweg* and the

eternally vital *Karl Mittermaier* were called upon to direct it. By then the pioneering cycle had come to an end. Apparently, on this last occasion, *Mittermaier* remarked that while he would like to see universal agreement upon penal matters, he entertained little hope that this could be achieved within a foreseeable furture due to the wide differences of opinion expressed and cherished. Professor *Negley Teeters* was inclined to attribute the lack of further initiatives to 'this note of pessimism from one of Europe's outstanding students of penal affairs'.[10]

I was fortunate to get hold of the proceedings of all three congresses which were published in German and French, and I enjoyed reading the five volumes, not just as a record of more or less incongruous relics of a remote past.[11] Thus, the debates on how to handle political offenders revealed differences of approach and solution that have a strikingly modern ring; the perception that the concept of solitary confinement as the mode of enforcing the sanction of imprisonment was a logical consequence of the classical doctrine of criminal law was startling; and the proposal that recidivists sentenced to imprisonment who failed to be reformed and whose discharge would present a danger to society inevitably leading to further recidivism should be subjected to a 'supplément de détention' - not exceeding double the original sanction - seems to me to be one of the earliest anticipations of the double-track system (*peine et mesure de sûreté*). But, in general, the scope of the proceedings was restricted and the exchange of views was rather superficial. However, they were the earliest precursors of the emerging ambitious movement of international col-

10 We owe a debt to Professor *Negley K. Teeters* for a most useful reconstruction of these proceedings: see his paper: The First International Penitentiary Congresses 1846-47-57, in: The Prison Journal (1946), vol.XXVI, pp. 190-210.

11 Verhandlungen der ersten Versammlung für Gefängnisreform etc., Frankfort-Sur-Le-Mein 1847; Débats du Congrès Pénitentiaire, Brussels 1847; Congrès International de Bienfaisance de Frankfort-Sur-Le-Mein, Session de 1857, Frankfurt 1858. I owe this favour to the courtesy of the Library of the Law School of Minnesota.

laboration in criminal matters and as such should be remembered.[12]

But let us go a step further. At the end of the 19th century the positivist explosion was at its height. *Lombroso's Criminal Man* (first published in 1876), *Ferri's Criminal Sociology* (1892) and *Garofalo's Criminology* (1885) passed through several editions presenting a powerful challenge to the *status quo*. Was there anything here that could provide a basis for comparison with the work accomplished by the *I.K.V.*? At a preliminary glance this might appear to be the case, especially as four years before the *I.K.V.* had made its voice heard a new development, grafted upon this explosion, attempted to leave its mark on the expanding field of collaboration in criminal matters. I refer to the *International Congresses of Criminal Anthropology* (which became known as the *I.C.C.A.*) of which seven took place within the period under review.[13]

On closer scrutiny this expectation fades away. Nearly two hundred subjects jostled for space on the agenda of these meetings. The range was fantastic: virtually nothing connected with criminal behaviour in its individual and social context, its evolution, prevention and repression was omitted. And yet hardly ever was a thorough report produced about any one of them. As a general rule they were covered by very brief communications hastily thrown together. Characteristically, at one stage the French anthropologist *Léonce Manouvrier* promised to carry out an enquiry of one hundred criminals and one hundred 'honest men' carefully selected to test the basic Lombrosian hypothesis and present

12 The self-satisfaction not uncommon in some of our contemporary international penal conferences was already, even then, glaringly obvious. 'We believe,' declared *Whitworth Russell*, the Prison Inspector, in 1847, 'that the experience gained in England with respect to prison reform ... est à peu près achevée ... and the solitary confinement which corresponds to the needs both of society and of the criminal ... mérite d'être adopté exclusivement et universellement.' The statement, we are told, was met by the congress with 'manifestations multipliées d'un assentiment général.'

13 Rome (1885); Paris (1889); Brussels (1893); Geneva (1896); Amsterdam (1901); Turin (1906) and Cologne (1911).

the results at the next congress. However, when he submitted a memorandum claiming that the planned comparison could not be valid the entire Italian delegation boycotted the congress leaving behind them a flamboyant manifesto. On another occasion when *Lombroso's* concept of the born criminal was attacked, the *Maestro* responded with this vehement expostulation: 'What do I care whether others are with or against me? It is my type; I discovered it; I believe in it, and I always shall'.[14]

The many good points which were made and the refreshing hypotheses which were thrown out were buried amidst a bewildering mass of uneven assertions and unwarranted conclusions. It is impossible to deny that the contribution of the *I.K.V.* was much more dignified and solid.

To make a more meaningful comparison it is necessary to re-direct attention for a while to the birth of yet another organisation. I refer to the *International Penal and Penitentiary Commission*, known in professional circles as the *I.P.P.C.*

From the middle of the nineteenth century onwards there was undoubtedly in the air a strong desire to be better informed about the problem of crime and a no less fervent hope that by more enlightened methods it would be brought under control. These aspirations and expectations transcended national frontiers and fertilised ideas of international collaboration in criminal matters. In a notable essay Monsieur *Marc Ancel* describes the growth in the nineteenth century of the '... climat de curiosité, d'attention et de sympathie pour les institutions et les expériences étrangères ...' and he quotes *Laboulaye*, the founder of the Société de Législation Comparée who, at the opening meeting (1869), declared '... que désormais chacun ressent le besoin de connaître la législation

14 See *Leon Radzinowicz* and *Roger Hood*: History of English Criminal Law, vol.5, The Emergence of Penal Policy (1986), p. 20.

et les manières de vivre de ses voisins'.[15] A glimpse at the curious history of the I.P.P.C. provides an eloquent illustration.

Count *Wladimir Alexandrowitsh Sollohub* was the governor of the central prison of Moscow. He may well have been the earliest fan of the penological *perestroika* because in his prison report of 1868 he threw out the suggestion that an international congress be convened for a broader study of the prison question and forwarded his document to Dr. *Enoch Cobb Wines*, the eminent and dedicated American penal reformer who had already made his mark by editing the Proceedings of the American Penitentiary Congress held in Cincinnati in 1870. The latter described *Sollohub's* proposal as 'both timely and practicable' and reiterated his belief that 'if ever true and solid penitentiary reform is to be had, it must in the end be through action of government'. This, he added, 'was the keynote of my work'. He enlisted the interest of *Rutherford B. Hayes* and *Ulysses S. Grant*, the successive Presidents of the United States of America, of the Congress, and of *Hamilton Fisch*, the Secretary of State. With an official introduction he crossed the Atlantic for Europe in 1871. The idea met with a most encouraging response from European Governments, and a particularly warm reception from the British government. The first Congress took place on the 3rd July 1872 in the splendid Hall of the Middle Temple and was presided over by the influential *Earl of Carnarvon*. It lasted ten days, was attended by one hundred official delegates and a further three hundred interested people. The Proceedings were published in 1872 and re-issued in 1912.

The establishment of the International Penal and Penitentiary Commission on a permanent basis followed. It was to deploy its activities through appropriate Committees, regular

15 See *Marc Ancel*: Utilité et Méthodes du Droit Comparé (1971), p. 15. '... the climate of curiosity, attention and sympathy for foreign institutions and experiences.' (*Ancel*); '... henceforth everyone felt the need to know the legislation and the ways of life of his neighbours' (*Laboulaye*).

Bulletin and through a major event of international congresses held at five-yearly intervals. In the course of the period with which we are concerned eight such gatherings took place.[16] All, except the Proceedings of the Washington Congress, were published in French, with splendid editorial help discharged by the highly qualified Secretary-General of the Commission under the vigilant eyes of eight eminent Presidents. The whole of Europe was *ex officio* represented by delegations under the authority of the respective governments and so was the United States of America under the authority of the Congress.

The scope and wealth of information contained in these *Proceedings* is truly exceptional. Inevitably they vary in quality but nevertheless they present a unique record on a vast comparative scale, of the evolution and of the dilemmas of penal policy in this period. In the production of the reports leading academics joined hands with seasoned practitioners. The prevailing tone was cautious, restrained, conservative, but by no means universally favouring the *status quo*. The discussions in the sections and in the plenary assembly sometimes lacked the fireworks of the exchange of views at the meetings of the *I.K.V.*, but they were precise and indicative of the shades in opinions or conclusions. The preparation and deliberations of the Congresses followed a carefully thought-out pattern which helped enormously to avoid overlapping and to sharpen the focus on the basic issues involved. To be more precise, the agenda was made up usually of four sections: penal legislation; penal administration; preventive means; children and minors. A section would, on the average, contain between four and seven questions. A question would usually be covered by between seven and ten reports, thus leading to about two hundred reports. Each section had a chairman and every question had one or two *rapporteurs*. All

16 London (1872); Stockholm (1878); Rome (1885); St. Petersburg (1890); Paris (1895); Brussels (1900); Budapest (1905); Washington (1910). Again Professor *Negley K. Teeters* provided a very useful introduction to the establishment of the I.P. P. C. and reproduced their agenda in his book: Deliberations of the International Penal and Penitentiary Congresses. Questions and Answers (1949).

questions of every section would ultimately find their way to the meeting of the general assembly, be reviewed afresh and concluded by carefully worded recommendations.

At the risk of appearing inhuman I must confess to having read and reflected upon the whole of these proceedings and reached the conclusion that the end-product of the I.P. P. C. is in scope, thoroughness, and volume superior to the contribution made by the *I.K.V.*, noteworthy as the latter is in so many ways. Furthermore, when the *I.K.V.* met for the first time, i.e. in 1889, the I.P. P. C. had already been in existence for seventeen years with three full-fledged congresses to its credit and a fourth just about to open. It is the I.P. P. C. which initiated the modern stage of international collaboration in criminal matters. The fact that its proceedings took place only every five years and those of the *I.K.V.* every two or three years should not be ignored, but cannot affect the ultimate all-round assessment of the two.

6

The Comparative Thrust

My account would, however, be seriously flawed if I failed to signal another sector of the *I.K.V.'s* activities which was definitely distinctive and path-breaking. I refer to the role it played in promoting a systematic and scholarly comparative study of the major branches of criminal science. And it endeavoured to achieve this objective by advancing almost simultaneously in four directions.

First, virtually every *Bulletin* of the Association included several pieces reporting some significant developments in the field of criminal law, criminal policy and criminal procedure in the member countries of the organisation. There were hardly any reviews of books, but the sporadic accounts of the other two international organisations were always worthy of careful reading and so were the disquisitions on the emergence of new schools of criminal law, such as the *Terza Scuola* or even the *Droit Pénal Oriental.*

The second activity was a good selection of expertly translated (primarily into German) foreign Codes and Statutes embodying new thinking in approaches and solutions. Many texts of this kind were published and thus made it so much more easy for legislators, scholars, administrators and students to expand their expertise.[17]

17 See Sammlung Ausserdeutscher Strafgesetzbücher published by the ZStW and the Bulletin (Mitteilungen) of the *I.K.V.* In vol.21 (1914) following p. 711 the first sixteen such publications are listed.

The third initiative was the publication of what in essence were expositions of the criminal law, and the penal legislation connected with it of the major European and Non-European states. The first volume was published in 1894 and the second in 1899. It was a collaborative effort of experts recruited from many countries and it was inspired by the principle formulated by *Carl Stooss* that a comparative critical study must be preceded by a systematic and coherent arrangement of the material to be compared. This was to be a basis for reference and a point of departure for subsequent critical analysis.[18]

The fourth thrust was truly majestic - and I use this word with all due deliberation. I refer to the *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts* contained in fifteen massive volumes published within the brief period between 1905-1908.[19] The work should not be regarded as an exclusive product of the *I.K.V.* It was initially promoted by the Ministry of Justice in order to achieve

> '... eine zuverlässige und erschöpfende Übersicht über die strafrechtlichen Grundsätze aller größeren Kulturstaaten zu besitzen und zu diesem Zwecke vergleichende Darstellungen der wichtigeren Materien aus dem strafrechtlichen Gebiete zu beschaffen ...'[20]

As a consequence, it was intended to be an important source for the construction of a new penal code to serve the German Empire. *Von Liszt* was prepared to go much further. He firmly believed that it was possible, and often highly desirable, to

18 See Die Strafgesetzgebung der Gegenwart in Rechtsvergleichender Darstellung (ed. by *Franz von Liszt*), the first volume of which (1894) dealt with the criminal law of European states and the second volume (1899), edited by *von Liszt* and *Georg Crusen*, with non-European states.

19 With a magnificent Index (a book in itself) by *O. Netter* and impressively published by *Otto Liebermann* of Berlin. A product of collaboration between forty-eight scholars, the series covered the general part, a group of major offences and some key problems of criminal policy.

20 Quoted by *Robert von Hippel*, in: Deutsches Strafrecht Allgemeiner Teil, vol.1 (1925), p. 359: '(to obtain) ... a reliable and exhaustive review of the basic criminal law principles of all the major civilised states and to provide comparative presentations of the most important topics pertaining to the field of criminal law.'

establish general principles of criminal law of international applicability and, indeed, to promote a unified criminal legislation cutting across national frontiers. This line of approach so fervently projected by *von Liszt* and which an author aptly described as 'L'unification des Codes Penaux' and the 'L'universalisation du droit pénal' has not been as fully examined as it deserves.[21]

The supporters of the *I.K.V.* were not the only ones involved in the project; as a matter of fact a great number of scholars belonging to the opposite or in-between schools of thought collaborated in it (*Carl Binding* refused to participate). But *von Liszt* and his German *I.K.V.* group played a vital role. I confess to having been impressed by several reservations and criticisms levelled against the work by *Hermann Kantorowicz*, one of the most cultivated and incisive Law Professors of the Weimar Republic period, but in no way do they impugn my belief that the ambitious and lofty objective had been secured to a remarkable degree.[22] I do not know of any country in the world which has to its credit a comparative *magnum opus* of criminal science so expansive, so diversified, and so thoughprovoking. This is the conclusion which I reached when, some forty-five years ago, I lost myself in reading a large portion of it.[23] And this is the conclusion that I endorse today when, in the course of the preparation of this

21 For a point of departure see *von Liszt's* preface to the first volume (quoted above, footnote 18), pp. XX-XXI and pp. XXIV-XXV. The two terms used by me in the text are taken from *Nurullah Kunter*: La Contribution de l'Union Internationale de Droit Pénal au Progrès de la Législation et de la Science du Droit Criminel, in: Revue Internationale de Droit Pénal (1951), vol.XXII, pp. 319-329 at pp. 325-329.

22 *Hermann Kantorowicz*: Vergleichende Darstellung des deutschen und ausländischen Strafrechts, in: Monatsschrift für Kriminologie und Strafrechtsreform (1908-9), vol.V, pp. 182-184, and his more basic piece: Probleme der Strafrechtsvergleichung, ibid. (1907-1908), vol.IV, pp. 65-112, and Der Strafgesetzentwurf und die Wissenschaft, ibid. (1910-11), vol.VII, pp. 257, passim, at pp. 333-344.

23 At the time I referred to it as an 'impressive, monumental enterprise, a landmark in comparative penal legislation'. See *Leon Radzinowicz*: International Collaboration in Criminal Science, in: The Modern Approach to Criminal Law (1945), pp. 467-497, at p. 485.

paper, I plunged afresh into several of its volumes. I regret that the collection, or a large part of it, was not at the time published in French and in English.

A knowledge of the continuity and diversity in penal evolution should always be present in the scholastic and professional formation of a criminologist or *Kriminal-Politiker*. When this ingredient is absent the balance and the perspective of judgment is gravely imperilled. To my mind it is this message that the *I.K.V.* aimed to convey through its comparative thrust. And it is inspiring to remember that long after *von Liszt* and his *compagnons de bataille* had gone, this message was kept alive, indeed actively pursued by the very many who shared his creed, until they were silenced temporarily or definitively by the intrusion of a dark age into the illustrious history of German criminal jurisprudence.

7

The Impact of Social Darwinism

I am reaching the section of this study in which I propose to identify the ideology that inspired and shaped the *I.K.V.* To retrace the attitude of the *I.K.V.* towards the question of capital punishment makes a good starting point. The debate on the death penalty seems to be always alive, although all the imaginable arguments in favour of it or against it were exhaustively reviewed a good hundred and fifty years ago. The retentionists have been, as a general rule, much less vociferous than the total or partial abolitionists. This is to be expected, for the retentionists can rest their case on the weight inherent in the maintenance of the *status quo*. Their tendency would be to enter into the affray only when the *status quo* appears to be seriously threatened, while the abolitionists would be anxious to keep up the pressure for change all the time. It is certainly true that during the period under consideration the question of the death penalty was hotly debated in very many leading countries of Europe and several states of America.[24]

Von Liszt's attitude was rather ambivalent. During this long period of nearly twenty-five years not once was the question of the death penalty put on the agenda of the Association's many Congresses, nor was there any attempt made to elucidate the attitude of the organisation. An eloquent effort in this direction initiated by a Belgian member at the Congress

24 This, I hope, emerges clearly from volume 5 of the History of English Criminal Law (1986), (by *L. Radzinowicz and Roger Hood*), chap. 20, para.2, A Comparative Perspective, pp. 671-676.

in Lisbon (1899) fell on deaf ears. In his very informative paper dealing with the attitude of the International Association of Criminal Law towards the death penalty, *Professor Hans-Heinrich Jescheck* acknowledges that '... C'est avec une certaine surprise que l'on doit constater ...' the absence of '...aucune déclaration formelle sur un problème d'une importance de principe telle que la peine de mort ...' on the part of the *I.K.V.* And in the course of his piece he again refers to '... cette abstention surprenante'.[25]

The *International Penal and Penitentiary Commission* could hardly be expected to get involved in capital punishment. It was a highly controversial issue with strong political undertones and the delegates, it should be remembered, were all appointed by their respective governments. Nevertheless its evasion was not as extreme as that practised by the *I.K.V.* At its Congress in Washington (1910) the Commission mounted an impressive collection of material on the state of capital legislation in several countries, a collection which even today has its value.[26] There was nothing to prevent the *I.K.V.* from at least marking its interest in the subject and acknowledging its significance. Its attitude may perhaps be described as regrettable rather than as 'surprising'.

A cursory examination of the list of members of the German Section of the *I.K.V.* vindicates the assumption that there were very many in the rank and file who would have stood up in fierce opposition to any abolitionist initiative. To my mind a major reason for the *I.K.V.* evasion was the fear of an acute split if ever the question were to come up for discussion and vote. In the circumstances the three leaders, considering their *savoir-faire* and their practical wisdom, would not have been reluctant to be evasive for tactical reasons. Indirect but persuasive evidence to support my sug-

25 See *H.-H. Jescheck*: La peine de mort. La position de l'Association Internationale de Droit Pénal, in: Revue Internationale de Droit Pénal (n.s. 1987), vol.58, pp. 331-339, at pp. 331 and 333.

26 Actes du Congrès Pénitentiaire International de Washington, October 1910 (Gröningen, 1913): L'enquête relative à la peine de mort, vol.1, pp. 326-408, and Le rôle de la peine de mort dans les différents pays, vol.5, pp. 13-97.

gestion is provided by *von Liszt* himself. When discussing what the minimum term of imprisonment fixed by law should be, no one being subjected to shorter sentences, he acknowledged that on this subject different opinions might be held and that he himself would like to advocate that the limit set should be no less than six weeks. However, he firmly advised that it was more important to make proposals likely to meet with general approval. And, again, with respect to the abolition of flogging as a disciplinary measure for incorrigible offenders, *von Liszt* acknowledged the controversial nature of the proposal. Yet he emphasised that, at a time when it was vital to find allies for essential reforms, it would be counterproductive to bring in a divisive subject on which solid support would in effect be unobtainable.[27]

It would be stretching things rather far to regard, as Professor *Jescheck* seems to do, '... la tendance libérale, humaine et rationelle de la philosophie de lumière ...' as a '...source spirituelle...' of the *I.K.V.* and of *von Liszt*. Certainly not in respect to the issue of capital punishment. When delineating what he regarded as the vital and topical 'Tasks of Criminal Policy' *von Liszt* frankly stated that he has no intention of going into the subject of the justification for the purpose of capital punishment. To raise questions which we know cannot find a generally acceptable solution, he said, is highly undesirable, especially at a time when all the available energies should be mustered to bring about many essential changes. The small number of offences to be punished by death and the still much smaller number of executions showed that capital punishment should

27 'Über das Mindestmass der künftigen Freiheitsstrafe mag man verschiedener Ansicht sein. Für meine Person wäre ich sehr gern geneigt, wohl höher zu greifen (he proposed a six week's limit). Aber es handelt sich darum, Vorschläge zu machen, welche einigermassen Aussicht auf Billigung in weiteren Kreisen haben.' And again in the same spirit he remarked about flogging: '... scheint es mir in jeder Beziehung überflüssig und unzweckmäßig, in diesem Augenblick, in welchem es sich um die Gewinnung der ersten Grundlagen für kriminalpolitische Reformbestrebungen handelt, durch die Hereinziehung dieser die Gemüter erregenden Streitfrage die Aussicht auf allseitige Verständigung zu trüben'. See *von Liszt*: Kriminalpolitische Aufgaben, in: Strafrechtliche Aufsätze und Vorträge (1905, reprinted 1970), vol.1, pp. 290-467, and p. 382 at p. 383.

not be regarded as a central issue and once a penal system was established the question of death penalty would be regarded as of secondary importance.[28] It is a revealing passage. Not even for a moment can I perceive *Beccaria, Voltaire, von Sonnenfels* and *Mittermaier* - the illustrious personages singled out by Professor *Jescheck* as representing in the penal sphere the ideas of the period of enlightenment - adding their signatures to *von Liszt*'s pronouncement in principle or even agreeing to it for reasons of temporary tactical expediency.

There was, however, another incomparably deeper reason which emerges on closer study. *Von Liszt* hinted at it by declaring in another article that 'Die Todesstrafe scheint mir entbehrlich, sobald die Unverbesserlichen unschädlich gemacht sind.'[29] It was a disturbing statement under any circumstances, but primarily because under the term 'incorrigible' *von Liszt* included an exceptionally wide and crudely differentiated mass of delinquents.[30]

28 Though long, it has to be reproduced in its full German version: 'In Auseinandersetzungen über Berichtigung und Zweckmässigkeit der Todesstrafe möchte ich mich nicht einlassen. Eine allgemeine Übereinstimmung ist hier nicht zu erzielen, und es kann sich für uns nicht darum handeln, Fragen aufzuwerfen, an deren Lösung von vornherein verzweifelt werden muß. Wir brauchen Zeit und Kraft für andere Aufgaben. Angesichts der geringen Zahl der in den modernen Gesetzbüchern mit dem Tode bedrohten Delikte, angesichts der noch viel geringeren Zahl der vollzogenen Einrichtungen kann die Frage der Todesstrafe, vom kühlen kriminalpolitischen Standpunkte aus, nicht als eine der brennendsten bezeichnet werden ... Für das Deutsche Reich habe ich nicht den Mut, die Abschaffung zu beantragen, wenn ich auch der Meinung bin, daß die Todesstrafe in einem zweckentsprechenden Strafensystem, bei vernünftig geregeltem Strafvollzug, sehr bald als überflüssig und unzweckmässig sich erweisen wird.' Ibid., p. 390. It is no less interesting to note that in his Obituary Notice of *van Hamel, von Liszt* went out of his way to praise him for his '... sehr vorsichtigen Ausführungen über die Todesstrafe ...' expounded in S.43 of his Treatise on the Dutch Criminal Law. See *von Liszt: G.A. van Hamel* († 1. März 1917), in: ZStW (1917), vol.38, at p. 568. ('Very cautious comments' about the death penalty).

29 'It seems to me that the penalty of death can be given up as soon as the incorrigible offenders are rendered harmless.' See *von Liszt:* Der Zweckgedanke im Strafrecht, in: Strafrechtliche Aufsätze (1905), vol.1, pp.126-179, at p. 173.

30 See on this below, pp. 30-33. It should, however, be noted that two out of the four recommendations proposed by *von Liszt* in his important speech addressed to the German Section of the *I.K.V.* in Munich (1912) intended to lay down that 'Any extension of the capital punishment beyond the criminal code in force is to be unconditionally rejected' and that 'with respect to crimes threatened by capital punishment taking account of extenuating circumstances should always be allowed.' See *von Liszt*'s speech to the 1912 meeting of the German Section of the *I.K.V.* (Munich) in Bulletin (1912), vol.19, at p. 309 ('Thesen', 1 and 3).

Of the three leaders of the Positivist School *Cesare Lombroso* was in favour of capital punishment for his 'born criminals' and for a very restricted number of incorrigible offenders.[31] *Raffaele Garofalo* was in favour of assigning to it a much wider scope. *Enrico Ferri* was the only one who was an outright abolitionist, not so much because he was a positivist but because he happened to be at that time a fervent socialist and the abolition of capital punishment was acknowledged to be an immutable ingredient of the socialist creed everywhere. Nevertheless, he also acknowledged the connection between the law of 'continued, natural selection' - a pre-condition of progress - and the punishment by death of certain criminals. Yet to him this was too simple an answer to a much more complicated question and he continued to oppose capital punishment, with the sole exception of approving the re-establishment of the death penalty for the 'Defence of the State' (24 November 1926, n.2008) following four attempts to assassinate *Benito Mussolini* within twelve months.[32]

We shall gain a sharper historical perspective by looking at the French scene. There, *Gabriel Tarde*, a leading versatile and influential criminologist of the period as well as an imaginative sociologist, devoted a powerfully reasoned chapter of his *magnum opus, Penal Philosophy*, to an ardent justification of capital punishment.[33] *Alexander Lacassagne*, the head of the

31 See the very thorough study of *Hans Schultz*: Lombroso et la politique criminelle, in: Revue de Science Criminelle et de Droit Pénal Comparée (n.s. 1977), pp. 303-318 at p. 316. With respect to them '... Lombroso se montre implacable ... (this) correspond aux idées directrices de son temps, comme Darwin les avait exprimées.' I owe to Professor *Schultz* the fascinating information that already in 1881 *Friedrich Nietzsche* (in Morgenröthe, Gedanken über die moralischen Vorurteile etc.) regarded the criminal as a sick person who should be liberated of his damaging and unbearable impulses and who, should there be no possibility of reformation, should be offered the possibility of committing suicide. See op. cit., footnote 59, p. 311.

32 *Enrico Ferri*, Sociologia Criminale (1930), Fifth Edition by Arturo Santoro, vol.2, pp. 487-488.

33 See Penal Philosophy (1912; reprint 1968), (first edition 1892), pp. 520-567 (first French edition in 1890; the fourth, of 1903, was translated into English and included in the famous Boston series).

Sociological School of Criminology at Lyons, is especially remembered for his aphorism 'les sociétés ont les criminels qu'elles méritent';[34] this, however, did not restrain him from proclaiming that some criminals deserve capital punishment and in effect should be subjected to it expeditiously. *Gabriel Tarde's* mind was much too subtle to miss this singular contradiction. 'On the whole,' he wrote, 'before 1870, or rather before the Darwinian doctrine met with its great success, the suppression of the executioner was, under the sway of general enthusiasm, the universal wish of enlightened minds ... The theory of natural selection has seemed, with reason, to justify the death penalty.'[35] In his view, Darwinism had an 'immediate effect ... upon the solution of this problem'. The label attached to this approach is laconic, but also expressive and correct: *Social Darwinism.* The eugenic movement was largely its direct off-shoot and so was the pressure (in some instances successful) to bring sterilisation and castration within the scope of criminal law and to regard them as measures of 'criminal prophylaxis'. For those who were committed to this ideology the death penalty was a justifiable solution to a wide range of what they believed to be hereditarily transmitted antisocial behaviour. Indeed, it is symptomatic that *von Liszt* often expressed the view, with approval, that punishment should be looked upon as the artificial selection of socially unfit individuals.[36]

34 It would appear that *Lacassagne* launched his famous epigram at the First Congress of Criminal Anthropology (Rome 1885) at pp. 165 and 166 and reiterated it at the Congress of Brussels (1893), p. 240, and the Congress of Amsterdam (1901), p. 232, always with the same *bravado.*

35 *Tarde*, op. cit., p. 531.

36 For the full text and reference see fn.39 below.

8

The Concern for Social Defence

To Social Darwinism a further ingredient has to be added, but one which eludes unequivocal definition. I refer to the formula which was so frequently used in the major pronouncements and writings of the *I.K.V.* - *Social Defence*.[37] Social Defence has always been a vital objective of the criminal law and in this sense there is nothing new in the term as such. But its contents and direction vary in time and space. The circumstances which lay behind its popularity in the concluding decades of the nineteenth century are well-known. The expansion of urban agglomerations, the manifold deprivations of the mass of the population, the authoritative and dedicated social enquiries exposing the shocking extremes of communal existence, the growth of an industrial proletariat, the spread of the marginal elements of society, of the sub-class and of the Lumpenproletariat, the emergence of organised forces - stubborn trade-unions, sophisticated socialist parties, fanatical anarchists - bent upon resistance and change. All this represented a threat to the existing order and conveyed the fear that violent upheavals as well as stagnant parasitism might jeopardise the steady advance of a prosperous and coherent industrial democracy. The 'dangerous classes', claimed *E. Buret*, who acquired eminence by his study of the condition of labouring classes in England and France, 'are more and

37 *Adolphe Prins* was one of the first amongst leaders of the *I.K.V.* to use it as his guiding vision. He even made it part of the title of his influential book: La Défense Sociale et les Transformations du Droit Pénal (1910).

more thrust back from civilised customs and laws, and reduced ... to the state of savages ... The poor like those Saxon bands who, to escape the yoke of the Norman conquest, went and hid their nomadic independence amongst the trees of forests; they are men outside society, outside the law, outlaws, and it is from amongst their ranks that come all criminals'. *Victor Hugo* expressed the same ideas in language even more arresting: 'C'étaient les sauvages, oui; mais les sauvages de la civilisation' - 'savages, indeed, but savages of civilisation'. The concept of 'dangerous classes' merged into the concept of 'criminal classes' and they were regarded as interchangeable - a process so aptly described by Professor *L. Chevalier* as the progressive metamorphosis of 'the criminal theme into the social theme'.[38] But I feel confident in going further and asserting that 'dangerous classes', 'criminal classes', 'habitual criminals', 'transportation' and 'indeterminate sentences' formed a quintuple conjunction which found a harmonious co-existence under the umbrella of 'Social Defence'.

In a striking passage *von Liszt* located the struggle against habitual criminality within '... jener Kette von sozialen Krankheitserscheinungen, welche wir unter dem Gesamtnamen des Proletariats zusammenzufassen pflegen.' And he went on to include within it a great variety of other groups of society who all represented according to him the army of the '... grundsätzlichen Gegner der Gesellschaftsordnung ...' In respect to all these anti-social strata punishment appeared as the '... künstliche Selektion des sozial untauglichen Individuums'.[39]

38 See *Leon Radzinowicz*, Ideology and Crime (Carpentier Lectures), Columbia University Press, 1966, pp. 38-42.

39 '... this chain of manifestations of social disease which we are accustomed to bring together under the common denominator of proletariat ... these basic opponents of social order ... (in relation to them punishment appears to be) ... the artificial selection of socially unfit individuals'. See *von Liszt*: Der Zweckgedanke im Strafrecht, in: Strafrechtliche Aufsätze (1905), vol.1, pp. 126-179, at pp. 167 and 164. And again in another place he refers to the 'Proletarianisation of criminality' (his italics) which expresses itself in the growth of 'parasite strata of the population', to be distinguished from professional criminals who refuse to lead an honest productive life - who are characterised by '... a roughness in their whole way of life ...' and who are doomed to be left behind in the forward surge of the modern industrial society because they are inadequate mentally or physically ...' See Die Gesellschaftlichen Faktoren des Verbrechens, ibid., pp. 444-445.

In this context the nexus between transportation and the indeterminate sentence is particularly revealing. To the extent that the adoption of the indeterminate sentence appeared to be a somewhat remote possibility the pressure to reactivate transportation became more intense, and inversely as the indeterminate sentence gained ground the importance of transportation receded into the background. And common to both was a firmly entrenched conviction that 'Social Defence' against crime could be very effectively ensured by either. In this respect the dynamics of the I.P.P.C. and of the *I.K.V.* showed a striking affinity in approach.

In 1872 when the question was raised at the first Congress of the I.P. P. C. whether transportation '... ought to be admitted as a punishment ...' apart from the delegates from Italy and from Russia '... the consensus of opinion was still against transportation'. Six years later, in 1878, at the Congress of Stockholm, when the question re-appeared, the Congress flatly declared that the penalty of transportation '... presents difficulties in the execution which neither permit its adoption in all countries, nor allow the hope that it can everywhere fulfil all the conditions of an effective penal justice'. But in 1894, at the Congress of Paris, any doubts concerning transportation had been expunged and the still hesitant inclination to consider it has been transformed into an emphatic endorsement. 'Transportation', we read, 'under different forms, with the improvements already realised, and still realisable, has its utility both for the execution of long sentences for greatest crimes, and for the repression of habitual criminals and determined recidivists'.

This *volte-face* might have been expected, emanating as it did from a Commission directed by hardened and realistic penal administrators. But an identical trend also developed within the *I.K.V.* - an organisation anxious to convey in so many ways a forward-looking, liberal image. An encouraging attitude towards transportation, displayed at the Congress in 1895, was carried to its extreme conclusion. The three advan-

tages of transportation were thus expressed by *M.J. Léveillé*, Professor of Criminal Law at the University of Paris and Member of Parliament, in crisp and firm French. It secures a '... Politique à la fois économique et décisive du débarras'; it is superior to imprisonment because it combines punishment with '... la meilleure solution de la crise redoutable de la libération ... elle n'aborde pas, comme l'emprisonnement, le problème pénal seulement dans sa première moitié, mais dans son intégralité' and the transported delinquent '... poussera plus vite et plus profondément ses racines, et il s'efforcera d'y vivre mieux, sachant qu'il doit y vivre toujours'.[40] On some previous occasions, *von Liszt* had expressed himself against the adoption of transportation. But it is significant that at this juncture he appears to have been somewhat ambivalent; his attitude lacked the categorical fervour of his usual intervention. He was even ready to accept transportation '... comme moyen de patronage pour les libérés améliorés des penitenciers'. With respect to transportation as a penalty he would not vote for it unless it was clearly stated what its purpose was to be and to which categories of offenders it was to be applied. His proposal was adopted and the question was to be put on the agenda of the next Congress. This, however, was never done, but in the meantime the Congress approved transportation '... dans son principe' and further re-affirmed that it '... réunit les conditions essentielles de la peine; et, de plus, elle peut aider, comme une force inférieure sans doute, mais puissante, à l'éclosion des colonies naissantes'. The resolution, when put to the vote was adopted by a majority of 38 to 5. It would have been comforting to be informed that *von Liszt* and *van Hamel* were amongst the minority, but I have no means of ascertaining it.

40 It ensures '.. a policy economical and at the same time of decisive elimination'; it is superior to imprisonment because it combines punishment with '... a much better solution of the frightening crisis of discharge ... it does not cover like imprisonment the penal problem in its first half but in its totality and the transported delinquent will grow his roots more quickly and more deeply, and he will endeavour to lead a better life, knowing that he will have to live there for good'. See *Léveillé*, in: Bulletin of the *I.K.V.* (1897), vol.6, pp. 518 and 520.

In the meantime the indeterminate sentence was gaining ground and it is fascinating to follow the march of events. The two organisations, like two would-be victorious horses at Ascot, ran neck-to-neck towards the prescribed finishing line. 'Prolonged detention' was firmly recommended for certain categories of habitual vagrants, beggars, drunkards and those suffering from diminished responsibility, both by the I.P. P. C. and *I.K.V.* Then, stage by stage, inroads inspired by similar principles were made into the incomparably wider and fluid categories of advances recidivists, habitual and professional offenders, violent and dangerous criminals. There were still some differences of opinion whether the indeterminate sentence should simply replace the traditional punishment, or whether a dual system should be set up, i.e., punishment plus an indeterminate sentence, and whether the latter should have no maximum or minimum, or have both. But the principle of the matter was settled on a grand scale. It was decided that the indeterminate sentence, grounded on the state of danger of the individual offender, should form an essential and expansive part of the penal system.

With respect to the *I.K.V.* the Congresses of Brussels of 1910 and of Copenhagen of 1913 provided the justification and the guidance for future legislative reform along these lines in the major countries of Europe. In the case of the I.P. P. C. it was the eighth Congress, the one held in Washington in 1910, that marked the new departure. Several pillars of the *I.K.V.* crossed the Atlantic for a friendly invasion to give firm direction: indeed, *Adolphe Prins* was made the chairman of the crucial section, dealing with the indeterminate sentence and, together with several other members of the *I.K.V.*, played an important role in pushing the discussion towards the objective so close to his heart. It was by no means easy and a complete victory was not achieved. Nevertheless, the Congress approved '... the scientific principle of the indeterminate sentence' and more specifically that '... the prevailing conception of guilt and punishment ...' was compatible with it. The

recommendation when taken in its entirety legitimised the extension of the indeterminate sentence in several crucial directions.

It would, however, be misleading to assume that everybody was enthusiastic about the indeterminate sentence as were the three leaders of the *I.K.V.* The French group, for example, was emphatically hostile. In a 'Note' sent to the Société Générale des Prisons Professor *R. Garraud*, a leading authority of that country, bluntly referred to this '... institution qui repugnera toujours, à raison du vice d'arbitraire qui la caracterise, aux idées et aux moeurs françaises'.[41] This did not mean that considerations of social defence were thrown overboard, but simply that the option of transportation was selected instead. To quote the same *Garraud*, upon another occasion he thundered: 'La guerre dont il s'agit, c'est elle que l'État mène, depuis le commencement des siècles, contre l'éternel ennemi de tout ordre social, *le criminel*. Celle-la, il ne faut pas en demander l'abolition, puisque les sociétés ne se maintiennent que par une lutte incessante et énergique contre l'activité malfaisante ...'[42] The French way was penal deportation to their colonies. Between 1886 and 1906 France banished for life 15,837 habitual criminals.[43]

At the Washington Congress of the I.P. P. C. it was expected that through the indeterminate sentence '... individual treatment of the offender would be assured', but in fact what is striking is the virtual absence, in either the I.P.P.C. or the *I.K.V.*, of any concrete and detailed elucidation of the code of enforcing

41 '... this institution which will always be repugnant to French ideas and customs because of the vice of arbitrariness which is its characteristic'. See *R. Garraud*: Note (on the subject of the Indeterminate Sentence), in: Revue Pénitentiaire (1899), pp. 817-818. It was the occasion when the Société Générale de Prisons (of Paris) was engaged in one of the most important debates on the subject ever held. See Rapport de Monsieur *van Hamel* sur les Sentences Indéterminées, Séances du 19 April et du 17 Mai 1899, ibid.

42 'The war which is in question is the one that the State wages, from the beginning of centuries, against the eternal enemy of the entire social order, *the criminal*. This war, one should not dispense with, because it is only through a continued and energetic fight against criminal activity that societies preserve their existence ...' Speech of *R. Garraud* at the *I.K.V.* Congress in St. Petersburg.

43 See *Leon Radzinowicz* and *Roger Hood*: History of the English Criminal Law (1987), vol.5, footnote 83, at p. 489.

the indeterminate sentence, or for that matter of fixed long sentences to be applied to habitual or dangerous offenders. In this respect *von Liszt* was the most forthcoming and what he had in mind was, to put it mildly, frightening. This is particularly so because of the very clear perception he had of the reality of the mode of enforcement in relation to a sentence pronounced by the court. '... Nicht der Richter, sondern der Leiter der Strafanstalt bestimmt Bedeutung und Inhalt des richterlichen Urteils, und der Leiter der Strafanstalt, nicht der Gesetzgeber, verleiht den leeren Strafdrohungen des Gesetzbuches Leben und Kraft'.[44] He acknowledged, fairly and freely, that early International Congresses, such as the one held in Frankfurt in 1857, the Stockholm Congress of the I.P. P. C. in 1878, as well as several distinguished penal scholars and practitioners, had all pleaded for a single unified form of imprisonment - 'unification de la peine privative de la liberté'. But not he. To him the concept appeared '... gänzlich verkehrt ...' as long as there were incorrigible criminals ('Unverbesserliche'), and he pleaded with all his firmness and eloquence for maintaining penal servitude ('Zuchthaus') separate and different from imprisonment. 'Der unserem heutigen Recht verloren gegangene Unterschied von Gefängnis und Zuchthaus muß wieder belebt und so weit als irgend möglich durchgeführt werden, darin erblicke ich eine der wichtigsten und dringendsten Forderungen der Kriminalpolitik.'[45] The minimum of *Zuchthausstrafe* should never descend below the maximum of the *Gefängnisstrafe* and the enforcement should be such that it leaves a lasting imprint on '... the legal conscience of the people ...' ('... Rechtsbewußtsein des Volkes ...' - a language reminiscent of our most undesirable legislators). This was his

44 '... It is not the Judge but the governor of the prison who determines the meaning and the contents of the judicial verdict, and again it is the governor of the prison and not the legislator who instils into the empty threats of legal punishment life and strength.' See *von Liszt*: Kriminalpolitische Aufgaben, in: Strafrechtliche Aufsätze und Vorträge (1905), vol.1, p. 328.

45 'To revive and to implement as far as possible the difference forgotten under the contemporary law between penal servitude and imprisonment - I regard as one of the most important and urgent requirements of criminal policy'. See ibid., pp. 398 and 399.

firmly embedded conviction. On another widely publicised occasion, when he attacked *Adolf Wach's* views concerning imprisonment, he emphasised 'the sharp separation of penal servitude from prison which I have urged more than once ...'[46]

The occasional offender ('Augenblickstäter') should be restrained by individual deterrence; the offender capable of being reformed ('Besserungsfähige') should be dealt by a reformative punishment ('Besserungsstrafe'); but those who cannot be reformed should be put in a condition which will make them harmless ('Unschädlichmachung'). He regarded the effective control of the third group as the central and most urgent task of criminal policy.[47] He did not spend much time in defining how widely the net should be cast. It all seemed so very simple to him. About seventy per cent of all prisoners were recidivists and at least half of them should be designated as 'incorrigible habitual offenders'. Against them society must protect itself and as '... wir nicht köpfen und hängen wollen und nicht deportieren können ...' ('... as we do not wish to behead or to hang and cannot transport ...') what is left is detention for life or for an indeterminate period. Every five years a supervisory board attached to the court which had initially passed the sentence should be authorised to make a proposal for a conditional discharge of an offender so detained. 'Mistakes' by judges were always possible and therefore the possibility of release should not be excluded. '... aber die Hoffnung müßte

46 *Von Liszt*: Die Reform der Freiheitsstrafe, in: op. cit. (1905), vol.1, pp. 511-536, at p. 513. The few remarks (of *von Liszt's*) on the mode of enforcement of penal servitude and imprisonment definitely appear as old-fashioned and out of date ('... ausgesprochen und überholt'). This critical judgment comes from the late Professor *Rudolf Sieverts* known for his gentle temperament and admiration of *von Liszt*. See *Franz von Liszt* und die Reform des Strafvollzugs, in: ZStW (1969), vol.81, pp. 650-659 at p. 658.

47 See his Kriminalpolitische Aufgaben (1889-1892), in: op. cit. (1905), vol.1, pp. 290-467 at pp. 391-405; Der Zweckgedanke im Strafrecht, ibid., pp. 126-179 at pp. 165-171. See also Aus einem Briefe Franz v. Liszt an Dochow d.d. Giessen, 21.11.1880 contained in: Auszug aus dem Tagebuch von Franz von Liszt, p. 2 ('Extracts from Franz von Liszt's Diary') deposited in the Library of the Max-Planck-Institute in Freiburg by Eberhard Schmidt (who in turn received it from Lydia Radbruch) and kindly put at my disposal by Professor Josef Kürzinger, Head of the Library.

eine ganz entfernte, die Entlassung eine ganz ausnahmsweise sein'.[48]

Von Liszt's attitude towards this complex and crucial subject was, to put it mildly, perfunctory and glaringly inconsistent. When, at the Washington Congress of the I.P. P. C., *van Hamel*'s proposal that the final decision concerning the duration of an indeterminate sentence should be entrusted to a Court was rejected, *von Liszt* in his subsequent reference to it seemed to play down the rejection as '... une petite difference de technique...' He then declared that an administrative board composed of the head of the institution, a public prosecutor, the committing judge and two members connected with social work and aftercare would give complete confidence that the right decisions would be taken. But yet, on another much later occasion, and without any reference to his previous proposal, he expounded in solemn language that the long-lasting measures of security (a form of indeterminate sentence) constitute '... a serious invasion of the personal freedom of citizens...' and in a constitutional state should not be left to the discretionary power of administrative authorities, but their imposition as well as their termination should be decided by the courts alone.[49]

He did acknowledge that not enough was yet known about which crimes were most likely to be committed persistently, but contended that criminal statistics and criminal anthropology could be expected to clarify this important point. This, however, did not inhibit him from rapidly laying down the rule, without any qualifications, that every offender convicted for the third time should be regarded as an incorrigible offender, and as such should be committed to this type of *quasi* permanent segregation. He was also rather vague about the gravity of the offences which had to be committed to provide the basis for the decision, quoting as an example

48 '...But the hope should be as far remote as possible and the discharge should be very exceptional indeed'.

49 *Von Liszt:* Die Sichernden Maßnahmen in den drei Vorentwürfen, in: Österreichische Zeitschrift für Strafrecht (1910), vol.I, pp. 3-24, at pp. 22-23.

offences against property or sexual offences. He also envisaged an extension of the list in the light of further experiences.

Again, he did not go into the details of how this eliminatory measure would be enforced, but he said enough not to leave any doubts as to what should be the fundamental purpose of the régime and the coercive ingredients to achieve it. The system - to quote the characterisation which he so willingly accepted - should be a 'Strafknechtschaft', the Workhouse with military severity, without much ceremony and as cheap as possible even if the 'fellows' ('Die Kerle') went down under it. Flogging was indispensable. The Habitual Offender had to be made harmless at *his expense* (*von Liszt*'s italics) 'not ours'. To grant him food, air, mobility, etc., according to rational principles, would amount to the misuse of taxes. Solitary confinement as a disciplinary measure should be combined with detention in darkness ('Dunkelarrest') and with the most severely regulated fasting ('Fasten'). To keep such people in a solitary confinement prison of modern style would be ('... stereotyped humanity...'). Their civil rights ('Ehrenrechte') should automatically be withdrawn on their discharge, permanently or for a long duration. But the right and obligation to join the Army or the Emperor's Navy should be respected.

This programme, translated into the ugly penitentiary reality then prevailing, would have had but one result, inevitable individual extinction. This is exactly a case which corroborates the observation sometimes made of the danger inherent in the concept of social defence: it can so easily be transformed into social aggression.

Professor *Jescheck* refers to '... la sévérité comme moyen de politique criminelle propre au positivisme de l'école moderne du XIXe siècle ... et qui ne reculait même pas devant l'idée de l'anéantissement corporel des criminels dits incorrigibles.'[50]

50 '... severity as a means of criminal policy characteristic of positivism of the modern school of XIXth century... and which would not even reject the idea of physical destruction of so called incorrigible criminals'. See *H.-H. Jescheck*: La Peine de Mort. La position de l'Association Internationale de Droit Penal, op. cit., pp. 333-334.

I venture to question this broad statement. I can find no text or pronouncement by *Cesare Lombroso* which would even in its most general terms subscribe to this type of regimen devised to bury within its pitiless enclave so vast a class of criminals. At about the same time that *von Liszt* was putting forward his model *Enrico Ferri* was making a speech in the Italian Parliament on a project of law brought in by the government to deal with recidivists. It was a carefully thought-out and deeply felt speech but at no point did he propose a regime which even superficially would have resembled the penitentiary Katorga of *von Liszt.*[51] Quite to the contrary, he warned against modes of enforcement of sanctions against habitual, or incorrigible, delinquents which in reality would constitute a '... forma larvata di pena di morte'.[52] Nor anything of this kind is to be found in the successive editions of his *Sociologia Criminale* or his *Principii di Diritto Criminale.*[53] *Garofalo* would probably have come a little closer to *von Liszt* on this matter, but *Garofalo* was fundamentally a very conservative jurist whose views on many penal matters were distinctly insensitive.

Von Liszt's views on the subject are not only exceptionally crude when compared with modern knowledge but they also stood in sharp contrast to contemporary thinking. Illumination in this respect are the debates of the I.P.P.C. Congress held in 1890. Eleven reports were presented to answer the question 'whether one can admit that some criminals may be regarded

51 *Von Liszt* was as keen as any prison reformer could be in castigating the Italian Draft Code of 1887 for replacing capital punishment by an exceptionally severe type of penal servitude carried out in very long solitary confinement as 'langsame qualvolle Hinrichtung ...' and wondered whether this '... unvermeidlicher Kerkermarasmus nicht unendlich viel grausamer, raffinierter, für das Gefühl verletzender ist als die Todesstrafe...' See his article: Der italienische Strafgesetzentwurf von 1887, in: Strafrechtliche Aufsätze etc., vol.1, pp. 252-289 at p. 262. His observations about the Italian code could have been just as easily applied to the model he was proposing for his own country.

52 'A hidden form of the death penalty'. See *Enrico Ferri*: Il Progetto di Legge suli Delinquenti Recidivi. Parliamentary speech of 1899 reproduced in *Ferri*'s Studi sulla Criminalità (2nd edn. 1926), pp. 456-477 at p. 472.

53 Nor in his Draft Penal Code for Italy (1927) included in the Principii di Diritto Criminale, pp. 602-784.

as incorrigible, and if so what means should be adopted to protect society against them'. Six of these reports rejected the concept of incorrigibility and five were in favour of it. An enquête with a similar object in view was launched in 1893 (probably the first of its kind in Europe) by *Dr. Louis Guillaume*, a noted Swiss penologist and criminal statistician. It reached similar conclusions to those reached by *von Liszt*, on the necessity for special measures but on the question of the regime it was much less extreme and much more differentiated.[54]

No wonder that those who stood close to him made no secret of their embarrassment and sadness. Thus *Gustav Radbruch*, in his laudatory essay on *von Liszt*, nevertheless acknowledged that his old mentor expounded his proposed system '... in frighteningly harsh words ...'and Professor *Claus Roxin* referred to it as a rather unfortunate scheme which showed where the concept of a purposeful punishment might lead if the rights of prisoners were not secured.[55] In his, if I may so, most attractively written article, *Claus Roxin* tried to attenuate his visible pain and somewhat redress the depressing impact of *von Liszt*'s views, first by stressing *von Liszt*'s faithful adherence to the guiding principle of legality intimately linked to the basic concept of a *Rechtsstaat* - a state grounded on the rule of law - and, secondly, by pointing out that *von Liszt* had softened his penological model as he advanced in years. This is a fair corrective but only up to a point. His famous formula that the criminal code should be the *Magna Carta* of the criminals

54 See Proceedings etc., of the I.P.P.C. Congress in St. Petersburg (1890), vol.III, pp. 416-598 and vol.I, p. 335 ff.; and *Dr. L. Guillaume*: Les recidivistes et le Code pénal Suisse, in: Revue Pénale Suisse (1893), vol.6, pp. 292-312. Perhaps the very first enquête of its kind was the one launched by the Société Générale des Prisons in 1877 on 'L'État de la Récidive' (see Bulletin of the Society, vol.1 (1877), p. 254, passim). But it was not a very satisfactory one.

55 *Gustav Radbruch*: Franz von Liszt - Anlage und Umwelt, in: Elegantiae Juris Criminalis (2 ed., 1950), pp. 208-232 at p. 229; *Claus Roxin*: Franz von Liszt und die kriminalpolitische Konzeption des Alternativen Entwurfs, in: ZStW (1969), vol.81, pp. 613-649 at p. 646 and footnote 124, ibid. And a few decades earlier, *Gustav Aschaffenburg*, no mean admirer of *von Liszt*, wrote: 'Ich persönlich kann mich nicht davon überzeugen, daß ein autoritäres Strafrecht einen anderen Weg geht als die Lisztsche Schule'.

did not, in fact, cover the mode of enforcement of the criminal law, an area of criminal justice which is so much more exposed to charges of arbitrariness and cruelty by being by its very nature so much less open and so much more fluid than a code. There is no inevitable contradiction between a criminal code based on the rule of law and a reactionary penal system.

On the second point I would gladly agree that his attitude had softened over the years.[56] But it was still radically out of tune with what was needed. And one can never be sure whether his suddenly less harsh approach, expressed in a different context and at a different time, signaled a genuine change of mind or rather a tactical move dictated by a different set of circumstances. Thus, for instance, writing in 1905 about professional criminals he repeated the phrase which he seemed to like so very much: 'But as we cannot hang them or behead them and as transportation cannot be ordered' nothing was left but their elimination from society through deprivation of liberty for the natural duration of their life. The much less extreme solution he ultimately proposed was frankly attributed to the fact that the basic one, in his view the only correct one, might not be found acceptable.[57] On several occasions he stressed how natural, indeed how healthy, it was in the field of criminal policy to change one's opinion in the light of new experiences or one's own process of revaluation. In this important instance, however, he failed to practice the gospel which he preached. Even as late as in 1919, when he was busy preparing the 21st and 22nd edition of his outstanding *Lehrbuch* (textbook), he was perfectly alert and quite capable of rejecting his regressive model if he had wished to do so. His warning was thoroughly welcomed but disappointingly vague: 'Übertreibung des Besserungs-

56 See, for example, his concluding remarks about the necessity of showing sympathy and care towards the incorrigible offender in his paper: Die Strafrechtliche Zurechnungsfähigkeit, in: Strafrechtliche Aufsätze (1905), vol.2, pp. 214-229, at p. 229.

57 See *von Liszt*: Das gewerbsmäßige Verbrechen, in: Strafrechtliche Aufsätze (1905), vol.2, pp. 308-330, pp. 327 and 329-330.

gedankens wird dem Rechtsbewußtsein der Gesamtbevölkerung und damit der Lebenskraft des Staates ebenso verhängnisvoll werden wie rücksichtslose Härte dem Gelegenheitsverbrecher oder rohe Grausamkeit dem Unverbesserlichen gegenüber.'[58] But is it not true that penal history amply proves that the second alternative occurs so much more often than the first?

I must confess that the gallant effort by Professor *Müller-Dietz* to prove that a forward-looking and articulate penitentiary policy played an important part in *von Liszt*'s programme of criminal policy left me rather unconvinced.[59] In what was probably one of *von Liszt*'s last utterances before he passed away he used a fresh argument which seems to support my contention. The main purpose of the Note, according to his own statement, was to pay a tribute to the more recent endeavours of *Lilienthal* who had expounded the thesis that imprisonment is a legal relationship, and more specifically a legal relationship falling within the sphere of public law. This is so, confirmed *von Liszt*, it should become more and more so and should grow into the 'Penitentiary Law of the Future'.[60] But having said this, all in laudatory terms, instead of using his first-class mind to enrich this remarkably anticipatory approach by further reflections, he centred his note on criticising *Lilienthal* for not having paid enough attention to the different purposes of punishment

58 'Exaggeration of the reformative purpose can be as damaging to the legal conscience of the general population and hence to the vital strength of the state as a reckless harshness towards occasional offenders or raw cureIty towards the incorrigible criminal'. See *von Liszt*: Lehrbuch des Deutschen Strafrechts (21 und 22 ed.), 1919, p. 19, point 3.

59 See *Heinz Müller-Dietz*: Das Marburger Programm aus der Sicht des Strafvollzugs, in: ZStW (1982), vol.94, pp. 599-618. The two quoted pieces contributed by *von Liszt* to the Handbuch des Gefängniswesens, edited by von *Holtzendorff* and von *Jagemann* (1888) are definitely pedestrian. Nor does *Albert Krebs* succeed in making the contribution of *von Liszt* to penitentiary matters appears substantial or original. See *A. Krebs*: Franz von Liszt. Zum Vollzug der Freiheitsstrafe, in: Kultur. Kriminalität. Strafrecht (Festschrift für Thomas Würtenberger, 1977), passim.

60 *Von Liszt*: Gefängnisrecht, in: ZStW (1914), vol.35, pp. 657-659, '... die Gefangenschaft ist ein Rechtsverhältnis, und zwar ein Rechtsverhältnis des öffentlichen Rechtes ... und sie soll es mehr und mehr werden ... Gefängnisrecht der Zukunft ...'

and security measures. A criticism which was neither here nor there, and hardly relevant to the basic theme of *Lilienthal's* fertile message.[61]

In some ways this rather negative approach to prison reform was also reflected in the attitude adopted by the *I.K.V.* as a whole. It is of course true that it was the I.P.P.C. (The International Penal and Penitentiary Commission) which was expected to concentrate their major efforts on penitentiary matters. Nevertheless one would be justified in hoping that, at least on one occasion, the *I.K.V.* would have put the subject on their agenda and explored it on a higher plane within the context of the general criminal policy they decided to propagate. It is rather disappointing to note that the only occasion on which prison reform was examined was when the question was raised at the International Congress at Antwerp in 1894 of whether the prison system was not too lenient with respect to offenders undergoing short term imprisonment. The *rapporteur* informed the Congress that in seven European states no aggravation in the enforcement of deprivation of liberty had been introduced but that apart from that '... we witness in Europe a recurrence on forty-three occasions of a truly daunting list of aggravations, pliable enough to be used as the instrument of arbitrariness and torture.[62] Nevertheless, although regretting it, the Section concluded (even though no vote was taken) that in principle, aggravations in the enforcement of deprivation of liberty 'could not be avoided' and this subsequently was approved by the General Assembly.[63] This was an indefensible attitude adopted

61 For a solid and reflective account of this aspect of German penitentiary thought see Professor *Günther Kaiser*: Rang, Recht und Wirklichkeit des Strafvollzugs in der hundertjährigen Entwicklung der Zeitschrift für die gesamte Strafrechtswissenschaft, in: ZStW (1981), vol.93, pp. 222-248.

62 The grim enumeration comprised: 'régime du pain et de l'eau; couche dure; cachot sombre; travail forcé dur; confinement; châtiment corporel; ferrage avec chaînes ou avec boules; catorga; pilori.' See *Dr. Felish*, report on the Fourth Question, in: Bulletin (1896), vol.5, pp. 146-156 and 177-180.

63 See Résolutions votées dans les neuf derniers Congrès de l'Union Internationale de Droit Pénal (edited by *Ernst Rosenfeld*), in: Bulletin (1906), vol.13, pp. 46-71 at p. 69 (Congress of Antwerp, 1899).

with hardly any relevance to the major shortcomings of the prison system as a whole.[64] In vain would one look for an example of their condemnation of both sharp and extended solitary confinement as a basis of the penal system - a solution which *Enrico Ferri* did not hesitate to stigmatise again and again in his many writings and speeches as 'one of the aberrations of the twentieth century'.[65]

64 Much later, and on a 'domestic' occasion (Meeting of the German Section of the *I.K.V.* at Munich) one of the recommendations put forward by *von Liszt* at the end of his speech was to the effect that 'aggravations in the enforcement of deprivation of liberty should be unconditionally rejected'. See Bulletin (1912), vol.19, p. 310.

65 Even *van Hamel* still adhered to the view that solitary confinement should play an important part in the penal system. See his report (presented to the 2nd International Congress of Criminal Anthropology, 1889), 'l'emprisonnement cellulaire etc.' reproduced in his Collected Essays, Verspreide Opstelben, vol.1, pp. 503-510.

9

The Permeation of Social Liberalism

Yet it would be infinitely unfair to regard the *I.K.V.* and *Franz von Liszt* simply as the remorseless importers of Social Darwinism and Social Defence into the penal sphere. Parallel to those two *Idées-Forces*, a conviction was also gaining ground across Europe that strict interpretation of liberalism, confining the state to a passive role, was much too narrow and that the state had a moral duty towards society as a whole as well as towards its individual members to pursue (naturally within limits) a comprehensive and imaginative policy in the economic, fiscal, social and cultural sphere: a policy which would benefit all, but especially those less fortunate. This would promote '... die Idee der Gerechtigkeit im Sinne des sozialen Ausgleichs in den Vordergrund und den Staat in den Dienst dieser Idee ...'[66] This movement of thought and action is usually described as *Social Liberalism*. The *I.K.V.* was forcefully influenced by this outlook and a large part of their programme fits this image. The firm and sincere dedication of *von Liszt, Prins, van Hamel*, indeed of the *I.K.V.* as a whole, cannot be questioned.

A drastic curtailment of imprisonment; a combination of methods to deal with first offenders and occasional delinquents

66 [Pushing] '... the idea of justice in the sense of social equalisation to the forefront and gear the State to it'. See *Herbert Dannenberg*: Liberalismus und Strafrecht im 19. Jahrhundert (1925), p. 57 - a study which still deserves to be read. And so does the book, which is so very much to the point, by *Jannis A. Georiakis*: Geistesgeschichtliche Studien zur Kriminalpolitik und Dogmatik Franz von Liszts (1940).

through probation and suspended sentence; a different procedural framework to be followed in relation to young offenders and a cluster of remedial devices to counteract adolescent criminality; a radical re-casting of the system of fines; a much more generous machinery to ensure legal rehabilitation following discharge - these and many other proposals were inspired by the ingredient of social liberalism. They constituted part of a message continuously conveyed by the *I.K.V.* in professional quarters and to public opinion in general, a message far removed from the more or less metaphysically conceived concepts of retribution and expiation, the more or less vaguely assumed benefits inherent in general and special deterrence expressed in abstractedly calculated sentences. And there were also many proposals relating to the general part of the Criminal Law such as a more nuanced approach to criminal responsibility, including the adoption of the concept of diminished responsibility, proposals to re-cast the concepts of attempts and preparatory acts, of complicity and premediation; for adopting much less technical definitions of a number of particular offences. All of these were to a large extent inspired by the deep conviction that strictly juridical and dogmatic constructions weakened the social utility of the criminal law and of the criminal code.

Commitment to social liberalism? Undoubtedly - but not to socialism and certainly not to Marxism. And yet this was the period when a vital and dedicated school inspired by these creeds strove hard to leave its imprint on criminology and criminal policy. *Marx* and *Engels* were followed in virtually every major European country by a host of dedicated disciples and propagandists, bent upon validating the Marxist thesis in the field of criminal science and practice. Frenchmen, Italians, Belgians, Russians, Germans, English, Poles vied with each other in the ideological contest to be the worthy heirs of the two prophets.[67] It is characteristic of the exceptional topicality of

67 The enumeration that follows is not exhaustive, but it includes the leading lights of the pioneering marxist school of criminology: *Filippo Turati, Paul Lafargue, Bruno Battaglia, Napoleone Colajanni, K.J. Rakowsky, H.P. Hirsch, E. Reich, E. Belfort Bax, E. Carpenter, S.E. Ettinger.* For its birth and evolution in England see *Leon Radzinowicz* and *Roger Hood*: History of the English Criminal Law and its Administration (1987), vol.5, pp. 34-48.

these preoccupations that a leader of the *I.K.V.*, Professor *van Hamel*, was instrumental in persuading the Faculty of Law of the University of Amsterdam to offer in the year 1899-1900 a prize, open to students of all Dutch Universities, for the best work presenting 'a systematic and critical survey of the literature concerning the influence of economic conditions on crime'. The first prize was awarded to *Joseph van Kan* and his book, also published in French, but to-day unfortunately almost entirely forgotten, stands out as an enduring contribution, subtle and thorough.[68] *William Adrian Bonger* was the recipient of an 'Honourable Mention' and his subsequently published work included, in addition to the Amsterdam dissertation, a large section expounding his views on crime and other anti-social manifestations against the background of contemporary society. The whole, translated into English, found its place in the famous Boston Series of 'Modern Criminal Science'. *Van Kan* unfortunately left the field and lent his vigorous intellectual qualities to another branch of the law, while *Bonger* became the first monolithic of Marxist criminology.[69]

On this subject *van Hamel* remained eclectic. He acknowledged the immense importance of economic conditions in the etiology of crime and their close connection with modern industrial society. But he refused to endorse, in common with all the other members of the *I.K.V.*, the Marxist line that they constituted the all-pervading, exclusive determinant of crime, and, even more emphatically, that crime would be eliminated with the advent of a truly socialist society. It is revealing of the growing impact that *von Liszt* and the German Section of the *I.K.V.* was having on public opinion, as well as on the

68 *Joseph van Kan*: Les Causes Économiques de la Criminalité with a preface by *G.-A. van Hamel* (Paris 1903).

69 *W.H. Bonger* (also a pupil of *van Hamel*): Criminality and Economic Conditions (1916), reprint 1967 (Agethon Press, New York). Subsequently the Professor of Sociology at the University of Amsterdam, he made criminal sociology his chosen subject and greatly contributed to it. A faithful socialist and Senator he was a widely respected public figure. He committed suicide when Nazi Germany invaded his country. His last manuscript on *Race and Crime* reached America after his death and was published by Yale University Press.

powerful socialist party of Germany, that the whole subject of criminal law reform was put on the agenda of the meeting at Mannheim in 1906. The position the socialist party took up was foreshadowed by two pugnacious articles by *Wolfgang Heine* in the Sozialistische Monatshefte and by a trenchant report submitted to the party by another member. They emphatically declared that it made no sense for Social Democrats to endorse any school of criminal law and that *Bonger's* book had enlightened them enough on the subject.[70]

Nor were they interested in the issue of determinism versus free will. They were concerned with specific changes in several crucial areas of criminal justice. The document adopted by the party included five recommendations relating to criminal law, four to the penal system and nine to criminal procedure and court organisation. To analyse this trenchant position-paper fully would be out of place here, suffice it to state that *von Liszt* was criticised indirectly for failing to propose the immediate total abolition of capital punishment, of solitary confinement, and of the 'brutal prison disciplinary measures', as well as for his insistence that the application of punishment should be determined by the 'disposition' of the criminal ('Gesinnungsstrafe'), that widely defined categories of criminals should be contained within a system of indefinite detention and that political offenders should be struck by fierce punishment.[71] As might have been expected, *von Liszt* was quite able to take this

70 '... es hat für die Sozialdemokratie keinen Wert, sich für die eine oder andere Kriminalschule zu erklären ...[*Bonger*] hat in seinem Buch gezeigt, was wir aus der sozialistischen Literatur lernen können...'

71 See on this *Franz Dochow*: Die Sozialdemokratie und die Strafrechtsreform, in: ZStW (1907), vol.27, pp. 115-120; *Ernst Feder*: Die Gesinnung des politischen Verbrechers, ibid. (1905), vol.25, pp. 219-225 (in defence of *von Liszt*); *Gustav Radbruch*: Die Politische Prognose der Strafrechtsreform, in: Monatsschrift für Kriminalpsychologie und Strafrechtsreform (1908-1909), vol.5, pp. 1-7 (in search of a civilised 'solution'). Much valuable information of a wider scope is contained in *Theodor Gertner*: Sozialdemokratische Partei und Strafrecht (doctoral dissertation, University of Freiburg, Law Faculty, 1927).

confrontation in his stride, and the position he had earlier categorically affirmed remained unaltered.[72]

Neither the Association as a whole, nor any of its three leaders, ever undertook an empirical examination of the etiology of crime. But like so many others *von Liszt* was very much interested in criminal statistics, frequently using them to justify several of his proposals. Sometimes he dug into a recent publication to make a special point or urge further explorations.[73] But only once did he embark upon a distinctive statistical analysis to throw light on the causation of crime. This exception was his study of the criminality of Jews.[74] What prompted him to undertake it is not clear to me. However, *Alexander von Oettingen*, the leading moral statistician of the period, informs us that already in the eighten eighties the question whether the participation of Jews in crime was higher and more intense than that of the other strata of the population was hotly debated in Berlin, leading to radically opposed conclusions by reputable social researchers,

72 See for instance: 'It is not the external result of the act but the criminal (anti-social) disposition of the perpetrator, which should *primarily* (our italics) determine the kind and measure of the punishment' and 'the legal order would simply cease to exist if it were to regard and to treat him [the political offender] as this "Man of Honour" and not as its deadly enemy' ('Todfeind'). See *von Liszt*: Nach welchen Grundsätzen ist die Revision des Strafgesetzbuchs in Ansicht zu nehmen? (1902), in: Strafrechtliche Aufsätze (1905), vol.2, pp. 356-410 at pp. 409 and 386. Though he had acknowledged, in an earlier article, that the concept of political crime belonged 'to the most controversial and difficult concepts' he nevertheless firmly adhered to the view that it should not be differentiated from other crimes by 'motive or purpose of the perpetrator'. See Sind gleiche Grundsätze des internationalen Strafrechts für die europäischen Staaten anzustreben? in: ZStW (1882), vol.2, pp. 50-81, at p. 66.

73 See for instance his article: Die Reichskriminalitätsstatistik des Jahres 1883, in: ZStW (1886), vol.6, pp. 372-387, which prompted him to ask the question whether '... its figures are the expression of social misery or social degeneration' (sozialen Elends oder sozialer Entartung) or to make the prognostication that, in the future, work done on figures would teach us not to consider crime and punishment exclusively from the point of view of the 'formal juridical logic' ('... formal juristischer Logik').

74 *Franz von Liszt*: Das Problem der Kriminalität der Juden (Giessen 1907). Originally published as an essay in a Festschrift to celebrate the three hundred year anniversary of Giessen University.

although often it was also examined in a grossly biased and politically coloured manner.[75] *Von Liszt's* conclusion seemed to be unequivocal: '... the idea of regarding the Jewish criminality as criminality conditioned by race must be rejected ... not racial characteristics but the social situation of the race should therefore be regarded as decisive'.[76] Indeed, he warned against interpretations prompted by intolerance and prejudice. Yet, in another paper, although again advising against accepting the so-called scientific theories of race expounded by *Gobineau, Chamberlain* and others, he nevertheless stressed that race played an important role in social development in general, a role which should not beunderestimated. 'I do not doubt that race exercises its influence on crime' and, rather surprisingly, he suggested that a comparative study of criminality by Jews with that of Bavarians would not fail to reveal the role of the race factor.[77] Even more unexpectedly, Professor *Ernst Rosenfeld,* with hardly any criminological or anthropological background, seems to have endorsed a similar view on 'the connection between race and crime' in a report presented about the same time.[78] They were, however, by no means alone in

75 '... Die heutzutage in agitatorischer Tendenz angeregte Frage ...' and quotes examples to this effect. See *Alexander von Oettingen*: Über die methodische Erhebung und Beurteilung kriminalistischer Daten, in: ZStW (1881), vol.I, pp. 414-438 at p. 431. The persistent continuation of the interest in the subject is well illustrated by the analysis devoted to it by *Georg von Mayr* and the wealth of literature by which it was supported. See his Statistik und Gesellschaftslehre (1917), Dritter Band, pp. 824-833 and 844-846.

76 *Von Liszt*: Das Problem der Kriminalität der Juden (1907), p. 5 ('... der Gedanke, die jüdische Kriminalität als Rassenkriminalität aufzufassen, muß abgelehnt werden...').

77 See *von Liszt*: Les facteurs sociaux de la criminalité, speech delivered at the Ninth Congress (St. Petersbourg, 1902), reproduced in the Bulletin (1904), vol.11, pp. 255-268 at pp. 263-264. Reprinted in his Strafrechtliche Aufsätze (1905), vol.2, pp. 433-447. For *von Liszt's* rather unexpected strictures of Disraeli's predeliction for his 'co-religionists' ('Glaubensgenossen') and '... our modern Jews...' see Auszug aus dem Tagebuch von *Franz von Liszt*, p. 20, quoted in full in footnote 47.

78 See his report: Über den Zusammenhang zwischen Rasse und Verbrechen, in: Bericht über den VII. Internationalen Kongreß für Kriminalanthropologie, Köln (1911), pp. 83-92.

affirming it. *De Roos*, for example, a highly respected and qualified criminal statistician, reached a similar conclusion.[79]

Apart from what *von Liszt* had to say about the role of race, his frequent references to the social forces conditioning crime were always expressed in very general terms. In his later years he became more and more convinced that they were '... the most important roots'. According to him 'this "sociological" perception of crime can today be described as generally the dominant one', and this, he affirmed, was also the basic conception which had inspired the *I.K.V.* from the very start in 1889.[80] Yet a comparison of the passages in *von Liszt's* two papers bearing upon this subject, one written in 1898 and the other in 1902, reveal, even within this short span of time, an important shift in substance and emphasis: not much significance is attached any more to individual disposition, while the social environment is up-graded and regarded as the primary cause of crime.[81] A shift which *Bonger*, the vigilant Marxist, was quick to notice and quick to applaud.[82] In unison with the *I.K.V. von Liszt* was persuaded that to make the control of crime more effective a practical agenda shaped by definite social concerns was imperative. Like so many other progressive students of society and crime, either preceding or following him, he had no doubts that in the final analysis a dynamic social policy would prove to be incomparably more potent than any criminal policy could ever be.

79 See *J.R.B. de Roos* (Head of the Judicial Statistics at the Hague): Über die Kriminalität der Juden, in: Monatsschrift für Kriminalpsychologie und Strafrechtsreform (1909-10), vol.VI, pp. 193-205. To him the criminality of Jews was the product of the interaction between '... the natural disposition of the Jewish people and their social economic conditions'. But for a radically opposite point of view see *Rudolf Wassermann*: Die Kriminalität der Juden in Deutschland in den letzten 25 Jahren (1882-1906), ibid., pp. 609-618 and more fully in his monograph: Beruf, Konfession und Verbrechen. Eine Studie über die Kriminalität der Juden in Vergangenheit und Gegenwart (1906).

80 '... die wichtigste Wurzel... Diese "soziologische" Auffassung des Verbrechens kann heute als die allgemein herrschende bezeichnet werden'. See his Lehrbuch des Deutschen Strafrechts (21 and 22 ed. 1919), p. 12, footnote 5.

81 See: Das Verbrechen als sozial-pathologische Erscheinung (1898), pp. 55 and 233, compared with Die gesellschaftlichen Faktoren der Kriminalität (1902), pp. 438-439 and 440.

82 See *Bonger*: Crime and Economic Conditions (English ed. 1916, reprint 1967), p. 189, footnote 2.

In tune with the then prevailing opinion he brought within its preventive scope not only crime but also suicide, mortality of children, indeed all the other 'socio-pathological manifestations' - the product of environmental conditions and relations which mould the life-cycle of successive generations. This was the age of the 'average man' ('l'homme moyen') and any departure from the conduct expected from him would almost automatically be classified as 'socio-pathological'. Moral statistics ruled universally and criminal statistics were but a part of them. Social policy was the noble instrument to bring about all the major beneficial changes within the spectrum of the entire communal life.

In glowing and visibly inflated terms he pointed to the intimate, inevitable, connection between social policy and criminal policy. 'The same great spiritual current', he said in his speech at the meeting of the German section of the *I.K.V.* at Munich in 1912, 'which has given us social policy has also given us the concept of criminal policy. Our modern School of Criminal Law emerged as a transference of economic and political thought and exigencies into our specialised field of work ... This is what explains the rapid victory of our views'.[83]

83 'Dieselbe große geistige Strömung, die uns die Sozialpolitik gebracht hat, hat uns auch den Begriff der Kriminalpolitik gebracht ... Unsere moderne strafrechtliche Schule erscheint als Übertragung wirtschaftlicher und politischer Gedanken und Forderungen auf unser spezielles Arbeitsgebiet ... Daher der rasche Sieg unserer Gedanken...' *von Liszt*: Speech at the meeting (1912), of the German Section at Munich, in: Bulletin of the *I.K.V.* (1912), vol.19, pp. 376-400 at pp. 378 and 379.

10

A Happy Triumvirate

Von Liszt's reputation as a scholar, teacher, lecturer, adviser to the Ministry of Justice, parliamentarian and leader of the criminal law reform movement grew rapidly and smoothly and he soon became an eminent figure on the national and international scene. No wonder that during his life-time, and long afterwards, *von Liszt* as a 'political animal' inevitably came under close scrutiny, giving rise to divergent interpretations. One such interpretation, I am afraid, I cannot but reject with hardly veiled contempt: I refer to an attempt undertaken by a professor from the other part of Germany to represent all that *von Liszt* stood for as a Fascist (or words to this effect) doctrine of criminal law and criminal policy.[84] A collection of essays edited by *Wolfgang Stangl*, and written by a group of gifted collaborators, provides a much more sophisticated, and yet unconventional, assessment of *von Liszt* as a political figure.[85] The contention of *G.Th. Kempe* that *Liszt's* Marburger Programme of Criminal Policy and everything else he advocated in the field of criminal justice was but the reflex of the prevailing political platform,[86] like the thesis echoed by *Wolfgang Naucke* that *von Liszt's*

84 See *Joachim Rennenberg*: Die kriminalsoziologischen und kriminalbiologischen Lehren und Strafrechtsreformvorschläge von Liszt's und die Zerstörung der Gesetzlichkeit im Bürgerlichen Strafrecht (1956) - a more portentous, confused and demagogical title is hardly possible to concoct.

85 *Wolfgang Stangl* (ed.): Liszt der Vernunft, in: Kriminalsoziologische Bibliographie (1984/Jg.11), and especially the piece by *Herbert Ostendorf*, op. cit. pp. 1-36. (Franz von Liszt als Kriminalpolitiker).

86 See *G.Th. Kempe*: Franz von Liszt und die Kriminologie, in: ZStW (1969), vol.81, pp. 804-824, passim.

object was to make criminal law an instrument of politics,[87] are striking examples of generalised and abrupt conclusions which should be avoided when attempts are made to search for causal connections or even parallelisms between phenomena as complex and as fluid as ideology in criminal justice and the prevailing spirit of the age. But it must be recognised that, on one or two occasions, *von Liszt* himself seemed to acknowledge this simple interconnection.[88] *Edward Kohlrausch's* epigram in his splendid address as the Rector of the Berlin University that '*von Liszt* remained a Liberal with a social ideal in his heart'[89] caught well a vital element of his approach, but to my mind it stretched too far in one direction and did not pay enough attention to the stubborn splash of conservatism, traditionalism and paternalism which were also an integral part of his outlook. He was very much attracted by the English pattern of constitutional monarchy, but he was utterly loyal to the Emperor. *Bismarck* was his great hero who could do no wrong. He was distrustful of socialists and they were of him. He was an unflinching advocate of stern punishment of offenders found guilty of political crimes.[90] But he was also a pragmatist, ready to compromise, a believer in the art of possible. The truth is that his exceptionally rich, complex and captivating personality would under no circumstances fit a tight mould. I have a hunch that a comparison between *von Liszt and Max Weber* in terms

87 He refers to criminal law as '... ein Mittel der Politik ...' and he concludes that 'Die Politisierung des Strafrechts, das ist das Ziel der Zweckorientierung des Strafens'. See *Wolfgang Naucke*: Die Kriminalpolitik des Marburger Programms 1882, in: ZStW (1892), vol.94, pp. 525-564 at p. 536.

88 See above, pp. 41-42.

89 *Edward Kohlrausch*: Die geistesgeschichtliche Krise des Strafrechts (1932), p. 16.

90 See note 72 above. He did seem, however, to endorse the many resolutions of the *I.K.V.* that indeterminate sentences should never be applied to political offenders. This was in contrast to *van Hamel*, who affirmed that dangerous anarchists should be subjected to an indeterminate sentence, and also that they should suffer capital punishment if they committed crimes subject to it. See his Collected Works, vol.2, p. 856, passim. For the full reference see fn.97 below.

of their personalities would be rather exciting. But of course it is only a hunch.[91]

In the course of this paper I have referred to *Prins* or *van Hamel* rather infrequently. This is because more than anyone else *von Liszt* would have been justified if he had paraphrased the famous saying attributed to *Louis XIV* and said '*L'Union Internationale de Droit Pénal c'est Moi*'. But in no way did I intend to minimise the very important role the other two played in the formation and direction of the *I.K.V.* It was, to use a worn out *cliché*, love at first sight for all three of them. In presenting this report in 1884 to the International Penal and Penitentiary Commission *van Hamel* took as his motto *von Liszt's* famous epigram[92] and his reasoning closely followed *von Liszt's* deeply felt convictions.[93] No wonder that it led to the ecstatic approval of the latter. Furthermore, the appearance of *Prins'* book in 1886 evoked an enthusiastic review by *von Liszt* under the characteristic title 'Der strategische Ausgangspunkt im staatlichen Kampfe gegen das Verbrechen. Eine Stimme aus Belgien'.[94] And thus, an ideological and personal bond was forged between the three men which went from strength to strength over the next three decades, ultimately only to be shattered by world events clearly beyond their control. In the adaptation and transposition of *Social Darwinism* and of *Social Defence* into the sphere of criminal justi-

91 The piece of *Gustav Radbruch* (quoted above, 55) will always richly repay reading, while the articles by *Eberhard Schmidt* (quoted below, fn.150) and those of *von Lilienthal* and *von Hippel* (Franz v. Liszt, in: ZStW 1919, vol.40, pp. 529-534 and 535-543) will always evoke in us a spontaneous sympathy for *von Liszt* as a loyal colleague, a caring Mentor of his many pupils and a devoted family man. On *von Liszt's* distinguished background and early colourful influences the exquisitely drawn portrait by Professor *Reinhard Moos*: Franz von Liszt als Österreicher, in: ZStW (1969), vol.81, pp. 660-682, and *Victor Liebscher*: Franz von Liszt - familiengeschichtlich gesehen, in: ZStW, ibid., pp. 619-631.

92 Quoted below at p. 50.

93 *Van Hamel's* report on 'Quelle latitude la loi doit-elle laisser au juge quant à la determination de la peine', in: The Proceedings of the Penitentiary Congress at Rome, vol.1 (1885), pp. 308-334.

94 *Von Liszt*: The strategical point of departure in the fight against crime by the State: A Voice from Belgium, in: ZStW (1885), vol.5, pp. 243-244 and ibid. (1887), vol.7, pp. 179-186. A review of *Prins'* book Criminalité et Répression (1886).

Professor Adolphe Prins,
Brüssel.

Professor Dr. Franz v. Liszt,
Berlin.

Professor Dr. G. A. van Hamel,
Amsterdam.

DIE BEGRÜNDER
DER INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG

ce *van Hamel* and *Prins* were on occasions less extreme than the 'Commander-in-Chief'. But in their commitment to *Social Liberalism* and its penological implications they both stood in undisturbed, indeed harmonious, accord with him.

Adolphe Prins was widely known in international circles because his books were written in French and because he held the very visible position of the head of the penal institutions of Belgium. He seemed to be rather expansive and extrovert, finding it easy to communicate with all kinds of people. He had imagination, verve and a social conscience which he kept well within the boundaries set by the existing economic and political order. He was a fluent, even inspiring, speaker though perhaps a little too flamboyant. Also, he was endowed with the enticing journalistic gift of being able to present complicated matters in a simple (though perhaps sometimes too simple) manner: an easy turn of phrase and a style of writing with an immediately rebounding appeal. Even to-day his several books are highly readable and succeed well in provoking and sustaining an interest throughout. At the time they created quite a stir in his native country because of the very heavy classical heritage in criminal law and penal practice then prevailing in the courts, in the penitentiary administration, and in the universities of Belgium. He had, as a professor, a great influence on a group of young Belgians at the University of Brussels. Being-well connected, gifted and forward-looking, they soon became very influential in the public life of their country and started a well-staged campaign for departing from the *status quo*. *Carton de Wiart, P. E. Janson, Émile Vandervelde, Jean Servais*, were among them. The *Lejeune Acte* of 1889 (named after the Minister of Justice who promoted it), introducing the suspended sentence into the Belgian penal legislation, was a significant forerunner of things to come.

Until quite recently there has been no incisive scholarly dissection of *Prins'* penological outlook set against the back-

ground of the times in which he lived, reflected and toiled. This gap has now been filled by a splendid essay.[95] However, there is still room for a full-scale monograph.

The contribution made by *Gerard Anton van Hamel* is not as widely known as it deserves to be, precisely because, in contrast to *Prins*, his major work in the field of criminal law was written in Dutch.[96] Fortunately his collection of essays and speeches contains several important papers published in French.[97] As compared with the other two he came closest to the Positivists. According to *von Thót* he was the first in Holland to get interested in criminological positivism and make it known there.[98] An aphorism of his which at the time made a *tour du monde* is still attractive and meritorious: 'L'école classique exhorte les Hommes à connaître la Justice; l'école positive exhorte la Justice à connaître les Hommes'.[99] He appears to me as the most intellectual of the three and most certainly he must have been a very lovable human being.

95 See *Françoise Tulkens* (Professor at the Catholic University of Louvain): Introduction to *Adolphe Prins* La Défense Sociale et les Transformations du Droit Pénal (reprinted 1986), pp. I-XXIV. A publication containing a selection of *Prins'* major works edited by *Louis Wodon* and *Jean Servais*: L'oeuvre d'Adolphe Prins (1934) gives a useful but not complete insight into his approach. It was presented to Madame *Prins* in a moving ceremony, Manifestation Adolphe Prins le 15 Décembre 1934 à l'Université de Bruxelles under the direction of *Léon Cornil*. See: Revue de Droit Pénal et de Criminologie (1934), pp. 1070-1092. See also *Paul Cornil's* paper: Adolphe Prins et la Défense Sociale, in the Revue Internationale de Droit Pénal (1951), vol.22, pp. 177-189, which makes for lively reading.

96 *Van Hamel's* treatise Inleiding tot de studie van het nederlandsche Strafrecht (vol.I, first ed., 1889), a volume of five hundred pages dealing with General Part grew into a volume of over seven hundred pages when it reached its third edition in 1913. It was dedicated to *von Liszt* and *Prins*. *Von Liszt* was emphatic in describing *van Hamel* as '... einer unserer bedeutendsten strafrechtlichen Dogmatiker'. See *von Liszt*: G.A. van Hamel († März 1917), in: ZStW (1917), vol.38, pp. 553-569 at p. 563. *M.P. Vrij's* article ('Pour Commémorer le Pionnier G.A. van Hamel et pour combler une Lacune', in: Revue Internationale de Droit Pénal, vol.22, pp. 361-394). This respectful tribute by a distinguished compatriot contains much pleasing and interesting information, but does not supersede the need of a proper monographic assessment.

97 *Van Hamel*: Verspreide Opstellen, vol.1 (1870-1891) and vol.2 (1892-1912) published in Leiden in 1912.

98 See *Ladislaus von Thót*: Die positive Strafrechtsschule in einigen europäischen Ländern, in: Monatsschrift für Kriminalpsychologie und Strafrechtsreform (1912), vol.8, pp. 401-420 at pp. 401-402.

99 *Van Hamel* put it at the heading of his essay: L'Anthropologie Criminelle et les Dogmes du Droit Pénal, in: L'Opera di Cesare Lombroso nella Scienza e nelle sue Applicazioni (New ed. 1908), pp. 265-274 at p. 265. Also reproduced in his Verspreide Opstellen, vol.2, pp. 1045-1054.

Unlike so many aging men who, to put it mildly, find it rather awkward to re-examine critically their long-cherished views and expectations, *van Hamel* had an exceptionally refreshing mind even when close to death. In his speech to the *I.K.V.* on the occasion of their twenty-fifth jubilee in 1914 he declared:

> 'Die Kriminal-Ätiologie, die Untersuchung nach der Ursache der Kriminalität hat gewiß noch bei weitem nicht die Ergebnisse gehabt, die wir vor 25 Jahren von ihr erwartet haben. Das muß zugegeben werden. Aber warum sollte ein weiteres Erkennen für die Zukunft verschlossen sein?'[100]

But much more challenging were his reflections, contained in a paper written about the same time, regretfully ignored by so many students interested in the evolution of the *I.K.V.* in particular and in the evolution of penal ideas in general. First, because of its unusual substance and topical accent and, secondly, because it revealed an incipient but basic departure from the creed of the two other leaders, indeed from the cardinal premises of the *I.K.V.* as a whole. And, in keeping with *van Hamel's* amiable personality, it was not a crude confrontation, not a pointed polemic, not a hurting rejection of the things believed in the past. It was more in the nature of a death-bed self-imposed inquest, tortuous and somewhat circuitous.

> 'It cannot be denied that the Modern School of Criminal Law largely grew out of the soil of the rationalism of the nineteenth century. To an exceptional high degree the School expanded under the impact of the utilitarian and positivist attitudes ... the rational search for what is purposeful and useful, the firm belief in the prowess of human insight and the insignificance of the naturalistic interpretation of the world have had the effect of depriving the School of its character and strength. Human psychology requires ethics; but no ethics can be built upon science. The trust in intelligence alone - the principle of pur-

100 See *G.A. van Hamel*: Zur Erinnerung und zum Abschied ('Reminiscences and farewell), in: Bulletin (1914), vol.21, pp. 440-445 at p. 445. 'Criminal-etiology, the search for the cause of criminality, has certainly failed by far to provide results which I expected twenty-five years ago to be made available. This has to be acknowledged, but why should further knowledge in the future be ruled out?'

> posefulness which the spirit of the age chose to be its leader - they all have to recede a little in the background; they have failed to fulfil their assigned tasks ... are one-sided and unsatisfying rationalism ... the ideas of incorrigibility, of inferiority, of exterminating punishment, of sterilisation etc., should be examined with utmost care because of their much too emphatic (and therefore unsatisfactory) insistence upon reasonableness and logic'.[101]

There you have the seeds of a neo-classical revisionism in criminal law, especially arresting because of the unexpected source from which it originated.

I was sorry to be informed by *Eberhard Schmidt*, in his stylish reconstruction of the impact of the Enlightenment on the development of criminal justice, that *von Liszt* is '... virtually forgotten and if at all is considered only from a historical point of view'.[102] I suppose *Schmidt* would also be

101 *G.A. van Hamel*: Die Bedeutung der heutigen anti-intellektualistischen Strömungen für die strafrechtlichen Grundgedanken (The significance of today's anti-intellectual currents for basic thoughts in criminal law), in: Bulletin (1914), vol.21, pp. 166-176 at pp. 169, 168 and 176. I am, alas, aware that my English translation fails to communicate adequately the many important shades of the German text:
'Es läßt sich nicht leugnen, daß die moderne Kriminalistische Suche großenteils aus dem Boden des Rationalismus des 19. Jahrhunderts emporgewachsen ist. Sie ist in besonderem Maße in utilaristischer und positiver Gesinnung großgezogen ... Die vernunftmäßige Suche nach Zweck und Nutzen, der feste Glaube an das Vermögen der menschlichen Einsicht und die Nüchternheit der naturalistischen Weltanschauung haben ihr Charakter und Kraft verliehen... Die Menschenpsyche verlangt eine Moral; auf Wissenschaft aber läßt sich keine Moral bauen. Die Intelligenz, der man allein sich anzuvertrauen versuchte - das Prinzip der Zweckmäßigkeit, die ein Menschenalter zum Führer gewählt, sie haben ein wenig in den Hintergrund zu treten; ihre Aufgaben haben sie nicht erfüllt ... einseitiger und unbefriedigender Rationalismus ... die Ideen der Unverbesserlichkeit, der Minderwertigkeit, der Vernichtungsstrafe, der Sterilisation usw. mit strengster Vorsicht auf ihre allzu große (und deshalb ungenügende) Vernunftmäßigkeit zu prüfen sind'.
Van Hamel wrote this paper in August 1913 (he died in March 1917). But the question still remains whether it represents his definitive views rather than tormenting doubts, for it is contradicted in several essential respects by yet another piece of his written about two years earlier. See: Die ethische Bedeutung der modernen Richtung im Strafrecht, in: ZStW (1911), vol.32, pp. 25-31.

102 *Eberhard Schmidt*: Die geistesgeschichtliche Bedeutung der Aufklärung für die Entwicklung der Strafjustiz aus der Sicht des 20. Jahrhunderts, in: Revue Pénale Suisse (1958), vol.73, pp. 341-360 at p. 358. And again, in another important article, *Schmidt* affirmed that German criminal science takes notice of *von Liszt* only in 'historical terms' and he is mentioned in historical introductions only when the history of penal theories is retraced. See *Eberhard Schmidt*: Kriminalpolitische und strafrechtsdogmatische Probleme in der deutschen Strafrechtsreform, in: ZStW (1957), vol.69, pp. 359-396 at pp. 395 and 396.

inclined to include in this judgment *van Hamel* and *Prins*. I hope that he was wrong, but if not it is those who ignore them who are the losers. The three leaders and the *I.K.V.* in its first quarter of a century's existence provided an exceptionally rich mine of knowledge and experience, both negative and positive, central to our contemporary penal concerns in Europe and far beyond it.

11

The Blurred, Fading Away or Distorted 'New Horizons'

'New Horizons' were a *cri de coeur* of the Italian Positivists from the very birth of their programme to long afterwards. To *Enrico Ferri* - my venerable and inspiring Maestro - the wide-spread usage of this skilfully publicized label is primarily due.[103] But the gallant campaigners of the *I.K.V.* also quite often used it, especially in their polemical thrusts against their classical and traditional adversaries. *Social Defence* was that other so often tempting slogan.

The primary substance - ideological and tactical - of the New Horizons belonged to the Italian Positivists. With all their flagrant flaws, blunt exaggerations and bombastic self-congratulations, they were the true undiluted pioneers of the New Horizons in criminal science, perceived in its widest terms as encompassing criminal anthropology, criminal sociology, criminal policy and criminal law.[104] The *I.K.V.*, let us wholeheartedly pay a well-deserved compliment to them, never really denied it. But it is also fair to say that they missed

103 The first edition of his famous lectures delivered at Bologna in 1880 appeared under the title: I Nuovi Orizzonti del Diritto e della Procedura Penale (Bologna 1881), while the third edition merged into the new title of Sociologia Criminale (1892).

104 Some eighty years ago, *Emile Garçon*, himself not a Positivist, said it in a way that only a Frenchman can say it: 'Toutes les écoles modernes ... se rattachent ... à l'école anthropologique: ce sont des filles émancipées, certes, ingrates et révoltées même, mais il est impossible de ne pas voir le lien qui les unit à elle'. *E. Garçon* preface to *E.S. Rappaport's* La lutte autour de la Réforme du Droit Pénal en Allemagne etc. (1910), pp. V-XV at p. X.

no opportunity to show the weaknesses (and there were many) in the positivist position, especially of *Cesare Lombroso*, but also of *Enrico Ferri*. Moreover, they were anxious to dissociate themselves, as emphatically as they could, from the Italian School. This naturally sometimes produced irritations and impatience on the part of the Positivists. Thus, for example, in a light-hearted and yet clearly targeted way, *Enrico Ferri* complained that *von Liszt* continued to attack the concept of the 'Criminal type' as originally conceived, ignoring the very important amendments adopted by *Lombroso* and by himself, and concluded by citing the rather acid proverb '... che non c'è peggior sordo di chi non vuole sentire'.[105] More than half a century later, the late Professor *Silvio Ranieri* of the University of Bologna, in a delicately perceived and elegantly expressed article, written on the occasion of paying a tribute to *von Liszt* and the *I.K.V.*, nevertheless tried to make the point that the pioneering significance of the Positivists had not been as fully recognised as it deserved.[106] I share this feeling.[107]

What about the *I.K.V.* of this early seminal period? The two publications which signalled the outbreak of a doctrinal storm, an intense ideological ferment, were *von Liszt's* thesis, 'Der Zweckgedanke im Strafrecht' ('the purpose in Criminal Law'),

105 'There is no deaf person more deaf than the one who does not wish to hear'. See *Enrico Ferri*: Les avant projets sur code pénal en Allemagne, Autriche, Suisse, au point de vue de l'anthropologie et de la sociologie criminelle. Report presented at the Cologne Congress of Criminal Anthropologie (1911) in Actes du Congrès etc., pp. 49-55 at p. 50. In fairness it must be said that the many criticisms and sarcastic remarks about *von Liszt*, as well as about *Tarde* and *Prins* in *Lombroso's* periodical Archivio di Psichiatria, Antropologia Criminale e Scienza Penali and in *Ferri's* Scuola Positiva were often unnecessarily hurting.

106 *Silvio Ranieri*: Franz von Liszt und die positive Strafrechtsschule in Italien, in: ZStW (1969), vol.81, pp. 700-722. The volume contains a large and rich collection of essays in memory of *von Liszt* under the editorship of Professor *Jescheck*.

107 In my Ideology and Crime (1966), pp. 46-59, I have tried somewhat to correct this imbalance but much more is needed to do it convincingly. *Thorsten Sellin's* piece on *Enrico Ferri* (see Pioneers in Criminology (ed. by *Hermann Mannheim*, 2nd ed. 1972, pp. 361-384) still stands out.

best remembered in the 'Marburger Universitäts-Programm',[108] and Die Satzung der *I.K.V.* ('The Statute of the I.K.V.') in its initial version of 1888.[109]

To start with the first. The concept of the 'Purpose in Criminal Law' *von Liszt* owed to his professor, the great *Rudolf von Ihering*, whose courses he attended as a student and who had left so deep and permanent an impact on him. Indeed, it was the title that *Ihering* had assigned to his *magnum opus*, Der Zweck im Recht, in 1877. And *von Liszt* succumbed to it like an adolescent boy or girl when falling in love for the first time in their lives. 'Das Leitmotiv', he explained, 'das aus der endlosen Melodie von der Negation der Negation des Rechts uns rettet zu Klarheit und Einfachheit - es ist der Zweckgedanke'.[110] The concept appears and reappears in all his major pronouncements and writings and becomes the true anchor of his Textbook which, as noted before, went through twenty-two editions during his lifetime and was translated into half a dozen foreign languages. In expounding his position, *von Liszt* expected fierce opposition and he got it.

It would be very difficult, if not outright impossible, to find a criminal law scholar of the period of any importance who did not rush to enter the fighting arena. I would need the help of an experienced librarian to unravel all the articles, pamphlets and public lectures which centred round this memorable controversy. And three were, besides, the very many critical references which found their way into the authoritative textbooks of the criminal law proper and, of course, the inevitable mountain of doctoral dissertations. However, the list which I have drawn

108 (1889-1892) originally published in the ZStW, and re-published in *von Liszt's* Strafrechtliche Aufsätze (1905), vol.I, pp. 290-467. Also important in this respect are: Die Zukunft des Strafrechts (1892), ibid., vol.2, pp. 1-24; Die deterministischen Gegner der Zweckstrafe (1893), ibid., pp. 284-298.

109 See for the Statute: Bulletin of the *I.K.V.* (1889), vols. 1-2, pp. 3-5.

110 'The guiding motive which, out of the endless melody of negation of the negation of the law, guides us towards clarity and simplicity - is the thought of purpose'. Or as his master put it much earlier: '... purpose is the creator of the entire Law' (Der Zweck ist der Schöpfer des ganzen Rechts).

up for my own edification, though it may to some appear to be rather thin, seems to me to give an effective insight into the matter.[111] A term was born, 'Der Schulenstreit' (The Struggle of Schools) and it swiftly became an integral part of the then prevailing legal and penal vocabulary heralding the advent of the 'New Horizons'. The indubitable world-prestige then enjoyed by German scholarship in the field of criminal law, and the intimate connection that it had with the very *raison d'être* of the *I.K.V.*, made this ideological dispute reverberate far beyond its land of origin. 'La lutte allemande en droit pénal' - as an astute contemporary observer did not fail to note - 'n'est qu'un épisode important de la crise et de la lutte ouverte sur le terrain international'.[112]

The debate was important at the time because it made people think about, challenge and doubt, the hitherto widely accepted essential premises of the criminal law in general and of the institution of punishment and allied measures in particular. Furthermore, the controversy, carried on with vehemence,[113] succeeded in exposing a few glaring failings in the camp of the extreme-wing of the classicists and in consequence was helpful in opening up new legislative and penological approaches. It is, for instance, impossible to visualise today the extraordinary amount of persuasion and pressure which was needed to secure the adoption of a suspended sentence, of conditional discharge, not to speak of probation. They were all regarded as an unmitigated violation of the sacred equation

111 My list includes, in addition to the relevant writings of *Binding, von Bar* and *von Liszt* ten polemical articles by *Benedict, Zürcher, Merkel, Lamash, von Hippel, Birkmeyer, Kraepelin, Lipps, Liepmann* and *Delaquis.* Although *von Hippel's* list contained nearly one hundred items (divided unter the 'modern' and the 'classical' school) he still warned the reader that it did not pretend to be exhaustive and that the literature called for an independent monograph. See *von Hippel*, op. cit., footnote 3, at pp. 484-486.

112 See *E.S. Rappaport*: La lutte autour de la Réforme du Droit Pénal en Allemagne, etc. (Paris, n.d., but probably 1910), p. 95.

113 The very comme il faut *Robert von Hippel* remarked with obvious pain: 'Der Streit ... hat viel Wertvolles, aber im Eifer des Gefechts auch viel Einseitiges, Schiefes und Verkehrtes sowie manches persönlich Unerfreuliche zutage gefördert. See his Deutsches Strafrecht (1925), vol.1, pp. 484-485.

according to which crime must correspond to a proportionate and determinate penalty.[114]

But, in addition to its educative value and its attempt to de-ossify the classical scheme of penology in theory and practice, what was the intrinsic and durable merit of it all in clarifying the essence of the institution of punishment? I am afraid very little indeed. A great amount of it conveyed but a confused picture and its repetitiveness was truly depressing. *Von Liszt* (along with his close associates) was under a fatal illusion that he could evolve a concept of punishment that would leave an exclusive and permanent impact on penological thought, legislation and the mode of its enforcement, a concept which would contain within it a capacity to ensure a definite direction to the criminal law as a whole, and virtually for ever.

Every punishment has a 'purpose', or more often than not, several 'purposes'. Expiation, retribution, deterrence (general and special), incapacitation, reformation, ensuring communal cohesion and maintaining the authority of the state and of the law - are all inherent in the concept of punishment. They have all played a role, and are still active, in the shaping and application of punishment - though with changing intensity and varying combinations.[115] Basing criminal law on, say, retribution or any other of the punitive attributes automatically gives it a 'purpose'. A unifying theory of punishment, a single general principle of punishment, can only exist in abstract reasoning. Some twenty years ago I ventured to state that the

114 See, for instance, *A. Gautier*: A propos de la condamnation conditionelle, in: Revue Pénale Suisse (1890), vol.3, pp. 299-333, and the study of *von Liszt*: Bedingte Verurteilung und bedingte Begnadigung, in: Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts (1908), vol.III, pp. 1-94.

115 To the formidable *Karl Binding* '... Das Delikt ist ein Grund und die Vergeltung ein Zweck der Strafe...' and '... die Idee der Vergeltung, vielleicht die tiefste der Weltgeschichte...' ('The offence is the reason and retribution a purpose of punishment' and '... the idea of retribution is perhaps the deepest in world history ...'). See *Karl Binding*: Grundriß des Deutschen Strafrechts Allgemeiner Teil (1907, 7th ed.), p. 209 and Footnote 1, at p. 209. *Binding* chastised *von Liszt* and his followers as 'die Dilettanten' and *Luccini* abused *Ferri* and his disciples as 'gli Simplicisti'.

question still remains: is not the search for a single purpose in punishment like the search for a single cause of crime?[116] I believe as firmly as ever that this question still remains valid. And when it comes down to particular cases, those various penal purposes must sometimes clash or have to act in mutual supplement and re-inforcement.

It is, for instance, all very tempting to bring, as *von Liszt* did, his system for dealing with what he called the incorrigible mass of criminals under the seemingly innocuous formula of 'Unschädlichmachung' ('mettre en état hors de nuire ...'). Yet what, in practice, was the coercive purpose underlying it, expressed as it was by a virtually absolute indeterminate sentence and a mode of enforcement of extreme rigour? One thing is for certain: not reformation. But was it retribution, deterrence (general and special), social protection or perhaps a kind of penological cocktail which suited *von Liszt*, but would be most emphatically rejected by many others? Die *richtige, d.h. die gerechte Strafe ist die notwendige Strafe ... Nur eine notwendige Strafe ist gerecht* (his italics).[117] This perhaps sounded all right as a philosophical or moral pronouncement but what was its practical, concrete significance?

A real insight into the institution of punishment and allied sanctions can primarily be obtained when its evolution in time and space is retraced and examined within its anthropological, social, political and moral contexts and its usefullness assessed in empirical terms.[118] The theories or penal views of greater thinkers, philosophers, jurisprudential writers, sociologists, scholars in the field of criminal science, or seasoned practitioners, all deserve earnest attention but they gain in real significance only to the extent to which they reflect stages or trends

116 *L. Radzinowicz*: Ideology and Crime (1966), pp. 113-116.

117 'The right, that is the just punishment is the necessary punishment ... Only a punishment which is necessary is just'.

118 With respect to the latter aspect of punishment, i.e., its effectiveness, *von Liszt,van Hamel and Prins*, and indeed virtually the whole of the *I.K.V.* tended to exaggerate the expected effectiveness of their own projected penal measures. *Von Liszt* used to warn that measures of social policy were so much more effective than measures of criminal policy, but neither he nor any other of his followers really ever got to grips with the full implications of this insight.

of this basic many-sided societal evolution.[119] The scholarly foundations for such an approach were being laid at the very time when the confrontation between the protagonists of the Schools of Criminal Law was at its hottest. They would have been more useful to all of us if, instead of hurling at each other their subjectively conceived constructs, they had made a fuller and less biased use of these materials.[120]

The Statute of the *I.K.V.* of 1888 made things no easier from the point of view of clarification and possible compromise.[121] The first two articles (the second with nine sub-divisions) were crucial. Crime and punishment should be considered not only from a judicial but also from a sociological angle: the latter approach should be reflected in criminal science as well as in criminal legislation and more specifically this should apply to the results obtained by anthropological and sociological researches. The task of punishment is to control crime as a social occurrence ('soziale Erscheinung'); and though punishment is one of the most effective means for combating crime it is not the only one and it should therefore be brought into a closer relationship with all the other means directed against crime, especially those falling within the pro-

119 *Kohlrausch's* remark that punishment '... trotz aller historisch wechselnden Erscheinungen ihre Eigenart in sich trage' ('in spite of all the historically changing appearances still holds its own peculiarities') quoted by *E. Schmidt* in his paper at p. 204 (and referred to below in Footnote 160) does not contradict my statement but rather confirms it.

120 I particularly refer to he massive work of *S.R. Stenmetz*: Ethnologische Studien zur Ersten Entwicklung der Strafe, 2 vols. (1894); *E. Westermarck*: Ursprung und Entwicklung der Moralbegriffe (1907/1909). Of books published in recent times *Hans von Hentig's*: Die Strafe, vol.1 (Frühformen etc.) and vol.2 (Die modernen Erscheinungsformen) (1954-1955) and *Hans Kelsen's*: Vergeltung und Kausalität etc. (1941) deserve fuller recognition. Attractively and interestingly presented are the four volumes edited by *Raymond Verdier; Raymond Verdier and Jean-Pierre Poly; Gérard Courtois*. All prepared by a group of scholars from various disciplines and all centered upon the theme La Vengeance (Paris, 1980 and 1989). They add to our insight but they still move forward at a detached doctrinal level. *Von Liszt* confined himself to going hastily over the well-trodden path of the transition of punishment from an emotional, revengeful, largely individual response to crime to a more reflective and regulated reaction on the part of the state and in this context almost exclusively relied on *A.H. Post's* works such as Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis (1880-1881, 2 volumes).

121 Cited above fn. 109).

vince of crime prevention ('Verhütung des Verbrechens'). In many ways this approach was related to *von Liszt's* initial conception of the 'Gesamte Strafrechtswissenschaft' - a term which cannot be rendered into English without distorting its meaning. Nor are the French or Italian terms of 'sciences pénales' or 'scienze penali' very helpful. Until *von Liszt* appeared on the scene, at least in Germany, 'Strafrechtswissenschaft' primarily denoted criminal law and criminal procedure, but by prefixing 'gesamte' he intended to link it much more closely with the so-called 'auxiliary disciplines' such as 'criminal biology', 'criminal psychology', 'criminal sociology', 'criminal policy'; indeed often, but not constantly, he went so far as to regard criminal law proper as but their end-product.[122] The second group of postulates emphasised the necessity of differentiating by law and mode of enforcement between occasional and habitual offenders; the need for much longer detention of incorrigible habitual offenders, even if they were only found guilty of frequent repetition of minor infractions; the urgency of improving the state of prisons, especially in view of the dominant position played by deprivation of liberty; the application of other more effective means, instead of short-term imprisonment.

It is clear from what precedes that the cluster of postulates contained in the first group of principles was utterly unacceptable to criminal law traditionalists of all kinds and shades, while the second group, owing to their very vague formulation, could also not be endorsed without further precision. Furthermore, as implied in subsequent paragraphs of the statement, the admission of a new member of the *I.K.V.* automatically assumed his agreement with this platform *in toto*. Each individual application was to be decided by the governing body of the

122 On this concept in *von Liszt's* thinking see *Heinz Leferenz*: Rückkehr zur Gesamten Strafrechtswissenschaft? in: ZStW (1981), vol.91, pp. 192-221. This discussion about terminology and scope of approaches to the study of crime and punishment continued for a very long time and did a lot of damage to its scientific status and credibility. See *L. Radzinowicz* and *J.W.C. Turner*: The Language of Criminal Science, in: Cambridge Law Journal (1940), vol.1, pp. 224-317, also in The Modern Approach to Criminal Law (1945), pp. 12-26. See also my in Search of Criminology (1961), pp. 167-168.

I.K.V. and supported by a written recommendation by an already accepted member. The decision was made by a majority vote with no reasons given for rejection.

All this sounded like an intransigent *cri de guerre.*[123] But as time passed by the challenge began to lose its rigid and sharp doctrinal edge. In fact it was rather rapidly acquiring the much more benevolent appearance of just a 'window-dressing'. Even so, it must have continued to be a constant irritant, unnecessarily antagonistic, and hampering the spread of the influence of the *I.K.V.* across the world. As early as in 1895 the matter was raised at the International Congress of Linz and when an influential member remarked that 'a great many' of the principles would not be approved by the majority of the assembly it met with no denial. *Von Liszt's* intervention was again characteristic of his disposition to compromise, as far as he could, in order to secure a consensus even in scientific matters where divergence of views was justifiable. He almost apologised for the very basic articles in the statute of the Association of which he was the principal author. These articles, he declared, '... were not a dogma but an expression of a programme, not a *credo* of a scientific school but a plan of work to be shared by a number of specialists inspired by a similar vision. However times have changed ...'[124] No wonder that the decision to revise the Statute was taken with no opposition at all. Indeed, article 2 was expunged. The exchange of views and the new provisions were revealing of how tamed *La Lutte des Écoles* had by then become. Henceforth, the Statute read, as follows:

123 It was regarded as such by the uncompromising and enraged lions of the old school and expressed in the letters of *Merkel* from Germany and of *Luccini* from Italy when rejecting the invitation by *von Liszt* to join the *I.K.V.* See also two full-scale and subtle articles by *Albévie Rolin*: L'Union Internationale de Droit Pénal, in: Revue de Droit International et de Législation Comparée (1880), vol.22, pp. 105-131 and 279-302.

124 *Von Liszt* speech at the meeting at Linz (12-14 August 1895) in Bulletin (1897), vol.6, pp. 74-77 at p. 74.

> 'Die *I.K.V.* vertritt die Ansicht, daß sowohl das Verbrechen als auch die Mittel zu seiner Bekämpfung nicht nur vom juristischen, sondern ebenso auch vom anthropologischen und soziologischen Standpunkt aus betrachtet werden müssen. Sie stellt sich zur Aufgabe die wissenschaftliche Erforschung des Verbrechens, seiner Ursachen und der Mittel zu seiner Bekämpfung'.[125]

Friedrich Kitzinger, a reluctant modernist, and the first conscientious historian of the *I.K.V.*, welcomed the change with obvious relish. The organisation had thereby provided '... a neutral ground on which representatives of all Schools of Criminal Law can move, precisely because they do not express their attitude towards the struggle of the Schools'.[126] But in somewhat whimsical vein *Paul Cuche* went out of his way to remark that '...the attitude of the Union in the face of the essential problems of penal law has become "imprécise pour ne pas dire équivoque"'.[127] Of the two, it was the Frenchman who was right. The new formulation, or rather lack of any meaningful formulation, left hardly any trace of ideological distinctiveness. It may well be that an International Association, especially in the field of criminal policy cannot function otherwise. An eclectic option may save the appearances but does not dispose of the substance of the matter. And in evaluating the intrinsic worth of the international work tainted by so fundamental a drawback great caution, indeed vigilant scepticism, should remain our firm guide.

Thus revised the New Statute remained in force until the breakup of the *I.K.V.* in 1914.

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125 'The International Association of the Criminal Law is of the opinion that criminality should be considered from the anthropological and sociological point of view as well as juridical. The purpose of the Association is the scientific study of criminality, of its causes and of the proper means to combat it'. See Statute of the *I.K.V.* adopted at the session in Lisbon in 1897, in: Bulletin (1899), vol.7, p. 2 (for the German and French text).

126 *Friedrich Kitzinger*: Die Internationale Kriminalistische Vereinigung (1905) at p. 10; 'Die *I.K.V.* ist, grundsätzlich wenigstens, ein neutrales Gebiet, auf welchem die Vertreter aller kriminalistischen Schulen sich bewegen können, eben weil sie zu dem Schulstreit keine Stellung nimmt'.

127 *Paul Cuche*: L'Union internationale de droit pénal et l'individualisation de la peine, in: Bulletin (1914), vol.21, pp. 43-49 at pp. 43-44. *Cuche*, a professor of Criminal Law at Grenoble, should be remembered as the author of the first modern treatise on penitentiary matters in French.

12

Stimulator or Originator?

In a rapid but very informative survey Professor *Hans-Heinrich Jescheck* signalised legislative and penal advances across the world to show the considerable (erhebliche) influence the *I.K.V.* has had on the international development of criminal policy. The occasion for such a stock-taking exercise was particularly appropriate: it followed the unanimous election of Professor *Jescheck* to the Presidency of the Association.[128] But, at the same time, perhaps this was not the ideal moment for a probing assessment of this kind. The paper, like so many other learned articles of his, raises a basic question which in some ways goes beyond its specific subject matter. What influence, in fact, can any international association, however distinguished and active it happens to be, have upon important developments within its national components? No doubt some of us who have been intimately involved in international collaboration must have asked ourselves this question on more than one occasion and, I am pretty certain, must have found it rather difficult to answer in an unequivocal and convincing manner.

Professor *Jescheck* refers to the 'Getreuen der *I.K.V.* ('the faithful of the *I.K.V.*') who spared no efforts in promoting in their countries of origin the implementation of the programme of the *I.K.V.* And truly dedicated they were, as well as highly

128 See *Hans-Heinrich Jescheck*: Der Einfluß der *I.K.V.* und der *A.I.D.P.* auf die internationale Entwicklung der modernen Kriminalpolitik, in: ZStW (1980), vol.92, pp. 997-1020.

appreciative of the stimulus they invariably received from it over the years. In effect, an Association of this type is expected, through the steady impact of its diversified pursuits, to focus international attention on matters of topical and exceptional significance, to provide progressive public opinion with sharper instruments for advance, to promote a worthy competition, at least between the leading nations, and to break new ground for self-criticism. Perhaps the word *Stimulator* conveys it best and undoubtedly the *I.K.V.* fully deserves this designation.

But, I venture to say, it would not be correct to define it as *Originator*. Two concrete examples will illustrate this. It may appear surprising that Switzerland was the first country in Europe to promote a project for a penal code in many ways closely and coherently reflecting the essential programme of the *I.K.V.* and at the very time when the latter was just feeling its way and groping for influence. I refer, of course, to professor *Carl Stooss* who, virtually single-handed, produced the first comparative Digests of the Criminal Law in force in all the Cantons (and there were twenty-five of them) and followed it up by the *Avant-Projet du Code Pénal.*[129] Possibly *Stooss* did not have *von Liszt's* scholarly depth and diversity, nor did he have in him the potential of an international leader, nor could he make use of (even if he wished to do so - which I am by no means certain) the power and pressures of the German official and academic machines. He was inevitably, and understandably to some extent, over-shadowed by the brilliant, forcible and single-minded *von Liszt*. But he was a man of many outstanding qualities, of inventive mind, of inexhaustible common sense, of great gifts of legislative technique refreshingly free of abstract accretions, of hard accretions, of hard work and great patience.

129 The works and the dates to remember are: Die Schweizerischen Strafgesetzbücher, zur Vergleichung zusammengestellt (1890); Die Grundzüge des Schweizerischen Strafrechts, 2 volumes (1892-93); Vorentwurf zu einem schweizerischen Strafgesetzbuch. Allgemeiner Teil (1893); Motive, etc. (1894). A masterly translation of the Project and of the Motive into French by Professor *Alfred Gautier* of the University of Geneva followed immediately.

He deserves a place of honour next to *von Liszt* as the leading European *Kriminalpolitiker* of the period.[130]

While a Penal Code for the German Empire inspired *von Liszt's* School and the *I.K.V.* never saw the light of the day, the Draft Penal Code of *Stooss* became (understandably after several revisions) the first Penal Code of the Helvetic Republic. *Stooss* was a vital incarnation of the *I.K.V.* from its very early days and for a very long time afterwards. As one would expect from *Stooss*, he graciously stressed the part played by the *I.K.V.* in the elaboration of his code,[131] but *von Liszt* nevertheless emphatically acknowledged it as being '... eine selbständige, durchaus eigenartige, hoch verdienstliche Leistung, die sich in der allgemeinen Richtung unserer Bestrebungen bewegt'.[132] *Stooss* reached the goal following an independent path and instead of referring to him as an example of *I.K.V.*'s influence, it would have been more correct to reverse this proposition.

130 In a delightful autobiographical sketch revealing his engaging personality he wrote: 'Da ich weder naturwissenschaftlich noch künstlerisch oder technisch begabt war, os bin ich, eigentlich ohne Neigung und Beruf, im Frühjahr 1868 Jurist geworden' ('As I had no scientific, artistic or technical gifts, I became early in 1868 a jurist, in fact without following a disposition or a vocation.' See Autobiographical sketch by *Carl Stooss* in *Hans Planitz* (ed.): Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen (1925), pp. 205-235 at p. 205. But as a matter of fact he soon proved to be both a scientifically-minded technician and an artist in the shaping of modern criminal legislation.

131 *Stooss* had been in close contact with *von Liszt* for a long time as well as with many other *I.K.V.* members. The second international congress of the *I.K.V.* took place in Bern in 1890 and proved to be a most successful affair. Already in 1894 the Swiss Section of the *I.K.V.* consisted of seventy-one members of high standing. See Bulletin (1894), vol.4, pp. 61-62.

132 '... an independent, throughout original contribution of the highest merit which moved in the general direction of our endeavours'. See *von Liszt*: Die Forderungen der Kriminalpolitik und der Vorentwurf eines schweizerischen Strafgesetzbuchs, in: Strafrechtliche Aufsätze (1905), vol.2, pp. 94-132 at p. 101. And so does Professor *Jescheck* in his article published in 1958 (in the Revue Pénale Suisse, vol.73, pp. 184-201): Der Einfluß des schweizerischen Strafrechts auf das deutsche. The literature about *Stooss's* design of criminal policy and of his Penal Code is very substantial indeed. See the Introduction in the Revue Pénale Suisse (1984, vol.101, pp. 1-2) marking the fiftieth anniversary of *Stooss's* birth. (He was born in 1849 and died in 1934). To be followed by *Peter Kaenel*: Die Kriminalistische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorie (1981). The articles by *Jean Graven* and *Hans Schultz* (of 1969) quoted therein particularly deserve to be read. The collection of essays dedicated to *Carl Stooss* (Carl Stoos gewidmet, Fünf strafrechtliche Abhandlungen, Wien 1907) is disappointing.

This seemingly paradoxical development is strikingly reinforced by the example of England. The idea of a School of Criminal Law and Criminology in the continental sense, I observed a quarter of a century ago, is alien to a criminal lawyer in England. But it is the very first thing which an Englishman interested in criminal and penal matters encounters when he goes abroad and mixes with his foreign colleagues. And in this context I like to quote *Sir Evelyn Ruggles-Brise* when he remarked that England '... has not participated to any great extent in these controversies of the criminological schools, which have been so active and have excited so much interest on the continent of Europe... It may almost be said that there is no school of criminology in England'.[133]

This was particularly so in the period covered by my paper. The conspicuous lack of participation by England in the work of the *I.K.V.* already referred to requires no further elaboration.[134] *Fitzjames Stephen, Havelock Ellis* or *William Tallack* may have had a more or less vague idea of what was going on over there, but in effect *terra incognita* is the expression which most fittingly comes to one's mind to describe it. More importantly, while the *I.K.V.* was debating the English Parliament was legislating. And legislating it was in a truly big way. Very many dreams and hopes of the *I.K.V.* were translated into sombre, flat, but meaningful statutory language. Probation, changes in the system of paying fines, treatment (substantial and procedural) of young offenders, of young adult recidivists, of habitual and professional criminals, of mentally deficient delinquents, of those under the influence of alcohol, new prison rules - all these crucial subjects were examined and decided upon in a novel light both in legislation and in their mode of enforcement. They were all duly noticed in successive volumes of the *I.K.V.*'s Bulletin, in independent monographs, in works of translation

133 See *L. Radzinowicz*: In Search of Criminology (1961), p. 1, and *Sir Evelyn Ruggles-Brise*: Prison Reforms at Home and Abroad (1925), p. 16.

134 See above, pp. 3-4.

into German and in the discussions at the meetings of the *I.K.V.*, especially its German Section.[135]

Yet, neither directly nor by implication can any aspect of this movement be placed under the umbrella of the *I.K.V.* To lump together, as Professor *Jescheck* does, the Prevention of Crime Act of 1908 with the series of German habitual criminal statutes, the Argentine Penal Code and several other pieces of legislation, and look upon them as products or reflexes of the influence of the *I.K.V.* and *A.I.D.P.* seems to me misleading in terms of history and substance.

In Europe, similar but by no means identical forces and considerations were coming to the forefront, but there was also another primary factor, one which was peculiarly European. This was the widely shared belief that the principles of legality, constitutionality and moderation had at last been faithfully absorbed by the modern States, based on and functioning in accordance with the rule of law. This was the heritage of the Enlightenment and of the French Revolution and it was the Classical School which in the criminal sphere was its jealous and vigilant guardian. But there were many who also began to feel and their number was rapidly increasing, that this guardianship was too rigidly perceived and in practice pushed too far. Or as *Enrico Ferri* put it 'the affirmation in the second half of the nineteenth century of the

135 The list, though impressive enough, is by no means exhaustive: *L.Grube*: Zur Frage der bedingten Verurteilung. Die Parlamentarischen Verhandlungen etc., ibid. (1892), vol.3, pp. 34-51; *A. Lenz*: Die Zwangserziehung in England etc. (1894); *P. Liepmann* and *M. Wolff*: Summarisches Strafverfahren in England etc. (1908); *E. Rosenfeld*: Neueste Englische Kriminalpolitik (1909), (including the Probation Act of 1907, the translation of the Prevention of Crime Act of 1908 and the Children's Act of 1908); *H. Kriegsmann*: Die Kriminalpolitische Bedeutung des Borstalsystems, ibid. (1911), vol.18, pp. 506-551; *E. Behrend*: Die Schutzaufsicht über Jugendliche (probation system), etc., in: Bulletin (1912), vol.19, pp. 53-567; *E.H. Loewenfeld*: Trinker und ihre Unterbringung in Trinkerheilanstalten in England, ibid. (1912), vol.19, pp. 68-88; *W. Seelmann*: Die Londoner Polizeigerichte, ibid. (1912), vol.19, pp. 228-301; *E. Behrend*: Die englischen Reformbestrebungen in der Behandlung geistig minderwertiger Personen etc., ibid. (1913), vol.20, pp. 125-155; *A.M. Oppenheimer* and *E. Behrend*: The Criminal Law Amendment Act, 1912, ibid. (1913), vol.20, pp. 279-315, with Extracts on Flogging, ibid., pp. 316-337; *E. Behrend*: Das englische Gesetz betreffend die Fürsorge und Verwahrung geistig Minderwertiger etc. (1914).

rights of man was carried to an excess not now admissible, since it led to the sacrifice of the most obvious social necessities'.

Even if the *I.K.V.* had not existed, programmes of penal renovation close to the *I.K.V.'s* platform would have come into being in various countries across the world, but especially in Europe, simply because great and dynamic historical forces were inexorably propelling the traditional ideology of Criminal Law towards this promising and yet uncharted direction. Perhaps some of the nationally sponsored reforms, if left to themselves, might have avoided embarking upon a perilous road of pseudo-reform or would have found it easier to retrace their steps. I refer to the concept of the dual system of repression comprising punishments and security measures, the uncritical promoting of which by the *I.K.V.* I regretfully regard as the darkest spot on its record. In this respect the year 1910 is a date to remember.

In that year *von Liszt* published a leading article in the first issue of the newly established Austrian periodical in which, with his characteristic directness, he gave his unqualified support to this innovation.[136] He welcomed the introduction of Measures of Security into the three most recent Draft Penal Codes (of Switzerland, Norway and Austria) as expressing the objectives of the Modern School in a form which was most likely to enlist the agreement of the less extreme exponents of the Classical School. The dual system of repression represented a compromise which, although it might meet with opposition on the part of the Left and of the Right, would satisfy all those who were committed to a gradual further development of penal legislation. His whole piece was inspired by the advantages inherent in what he called '... Der ruhige Fortschritt' ('The quiet progress'). But, on an earlier occasion, he had castigated those who believed in combining punishment with treatment as 'frightened people hoping that by going two steps forward and

136 See *von Liszt*: Die Sichernden Maßnahmen in den drei Vorentwürfen, in: Österreichische Zeitschrift für Strafrecht (1910), vol.I, pp. 3-24 at pp. 3-4 and 19-23.

one backwards they would succeed in harmonising old views with new requirements - an attempt which similarly reveals the many weaknesses inherent in a compromise'.[137] As time passed by concrete evidence was forthcoming to show the very grave and incurable defects of this 'reform' and the painful epithet of 'Etikettenschwindel' ('Fraudulent Label') was being attached to it with increased frequency.[138] But, in the years to come, the Association continued to sing its praises without even suggesting that thorough comparative enquiries should be promoted into the way the system of security measures was taken up by legislators, applied by the courts and enforced by penal administrators.[139] What was no more than a tactical expediency was erected into a far-reaching beneficial penological development worthy of firm support - a victory which the leaders of the *I.K.V.* and of its post-war reincarnation the *A.I.D.P.* (Association Internationale de Droit Pénal) felt proud to cite over and over again as an example of their 'influence'.[140]

137 *Von Liszt*: Die Strafrechtliche Zurechnungsfähigkeit, in: Strafrechtliche Aufgaben (1905), vol.2, pp. 214-229 at p. 225. On this occasion 'ängstliche Gemüter' ('frightened minds') were his targets.

138 See on this *Sir Leon Radzinowicz*: The Persistent Offender, in: The Modern Approach to Criminal Law (1945), (vol.IV of the English Studies in Criminal Science ed. by *L. Radzinowicz* and *J.W.C. Turner*), pp. 162-173, especially pp. 164-169 and footnote 2 at pp. 172-173. The paper initially appeared in the Cambridge Law Journal in 1939.

139 For a very attractively presented, but to my mind excessively optimistic survey of the international penal scene see *Marc Ancel*: Le Code Pénal Suisse et la Politique Criminelle Moderne, in: Revue Pénale Suisse (1958), vol.73, pp. 165-183. Monsieur *Ancel* preferred 'le système alternatif' (either Punishment or Security Measure) to the 'système cumulatif' (Punishment plus Security Measure). But he provided no empirical material in favour of either. Professor *Jescheck*, in an article published in 1979, acknowledged that the double track system was intensely criticised because of its 'dishonesty' and would henceforth find very little support. See Die Krise der Kriminalpolitik, in: ZStW (1979), vol.91, pp. 1037-1064, at p. 1053.

140 As late as in 1926 the re-constructed Association (*A.I.D.P.*) passed a resolution on the subject which was significant because of its perfect evasiveness. I can do no better than to quote the comment made by the then Secretary of the Association, *J.A. Roux*, a leading professor of criminal law at the time and a future Judge of the Supreme Court of France: 'On pourra certainement critiquer ce qui est finalement résulté de leurs débats. On pourra prétendre que la resolution qui a été adoptée manque de netteté, qu'elle est même empreinte d'une équivoque, qui peut-être est pleine de danger pour l'avenir ...' See Congrès de A.I.D.P. (Brussels, 26-29 July 1926), in: Revue Internationale de Droit Pénal (1926), vol.III, pp. 149, passim at p. 447.

Ernst Rosenfeld, a learned and experienced observer of the German and international penal scene, writing in 1909 was convinced that the breakthrough leading to reform inspired by *von Liszt* was at hand '... when the contents of the Draft project of the Criminal Code (1909) became known - the great battle was won. Victory has been secured by the modern school of criminal law with the *I.K.V.* at its head ...'[141] But in vain would one look in the succeeding years for the fulfilment of this expectation.

141 See *Ernst Rosenfeld's* Introduction to the Volume of the Bulletin celebrating the 25th anniversary of the Association (1914), vol.21, p. V. '(als) der Inhalt des Vorentwurfs zu einem Deutschen Strafgesetzbuch bekannt wurde, da war die große Schlacht geschlagen. Die moderne Strafrechtsschule, an ihrer Spitze die *I.K.V.*, hatte den Sieg davongetragen'.

13

The Road into Catastrophe[142]

Heavy clouds were assembling on the international horizon and soon *Sir Edward Grey*, the British Foreign Secretary, on leaving his office on that tragic evening of 14 August, 1914, was to utter his famous remark 'The lamps are going out all over Europe: we shall not see them lit again in our lifetime' - and was proved right. However, the optimism of the *I.K.V.* in general, and of its German section in particular, was as robust as ever.

The twenty-fifth anniversary was celebrated in Berlin on the 4 January 1914 at a banquet held in the leading hotel of the city, the *Kaiserhof*.[143] It was a true gala. The three founders of the Association were still there, deeply moved of course but also still very much alive. A splendid group exceeding one hundred members and guests from several parts of Europe attended. In his speech of welcome *von Liszt* singled out several of them individually including '... our only British member, *Mr. Albert H. Oppenheimer* who has also appeared.'[144] *Van Hamel* insubdued dignified speech took leave of the Association on his

142 The heading is not mine. I may have borrowed it from *Heinrich August Winkler's* book: Der Weg in die Katastrophe.

143 See Die Feier des 25jährigen Bestehens der *I.K.V.*, in: Bulletin, etc. (1914), vol.21, pp. 459-470.

144 '...Auch unser einziges englisches Mitglied, Herr *Albert M. Oppenheimer*, war erschienen...', op. cit., p. 460. The enthusiastic crowd of the faithful included *Graf W. Gleispach* (professor of criminal law in Vienna) and *Dr. Bumke* (the future President of the Supreme Court of Germany) who in the years to come played so nefarious a role in promoting the Nazi system of criminal justice.

impending retirement from public and academic life.[145] *Adolphe Prins*, in a peroration virtually identical to the one he had delivered fourteen years earlier,[146] stressed again that by their shared social concerns the *I.K.V.* served the ideal of solidarity between all the nations and raised his toast to *Humanity* which was the very purpose that animated their entire work. The German 'Gemütlichkeit' ('cosiness') expresses itself often on public occasions by someone (usually eminent) producing a poem, the poetic quality of which stands as a general rule in inverse ratio to its sincerity. And so it was on this occasion. Professor *Dr. Alexander Löffler* '... kleidete seinen Glückwunsch in die Verse ...' which, duly recited, found its way into the proceedings.[147]

Do not, however, underestimate the leader's earnestness.This was to be more than a celebration of past achievements. On the same occasion the Bureau of the *I.K.V.* met and following '... une délibération approfondie ...' laid down a programme of work which was to be pursued by the Association in 'the next twenty years' (in the French version) and within 'nächste Jahrzehnte' (in the German version). It embraced complex questions of reform in the field of criminal law and criminal procedure, the exploration of the causes of crime, and the professional formation of jurists.[148] This was not only an eloquent testimony of excessive optimism, but also of a rather surprising lack of scholarly restraint.

Eight months later the First World War broke out. How this affected the intimate relationship of *von Liszt* with his two old friends, the country of one of whom had been invaded by the Imperial German Army, I cannot assess from this considerable distance of time. After all, *von Liszt* was not only a great criminal lawyer but he was also a highly competent

145 *G.A. van Hamel*: Zur Erinnerung und zum Abschied (Reminiscences and Farewell), ibid., pp. 440-445.

146 See above footnote 7, p. 6.

147 '... dressed his felicitations in verse...', ibid., p. 470.

148 See Das neue Arbeitsprogramm der *I.K.V.* (Minutes of Records of the meeting held by the Governing Body on 4 January 1914), in: Bulletin (1914), vol.21, pp. 447-452 (German version); pp. 453-458 (French version).

professor of International Law and the author of a well-established treatise on the subject which by pleasant coincidence was about to come out in its eleventh edition. I do not know whether they, or any one of them, left personal papers, and even if they did, it is by no means certain how much light those exchanges would throw upon so sensitive a subject. *Von Liszt* wrote a warm obituary note on *van Hamel* who died in March 1917.[149] Two years later he passed away and so did *Adolphe Prins.*

Brief references published by *Eberhard Schmidt* and *Ernest Delaquis*, both former students of *von Liszt* and subsequently his close collaborators and friends, provide a few clues. According to the former, already in the early months of hostilities *von Liszt* was deeply hurt when '... eine entsetzliche Welle des Hasses gegen alles Deutsche schlechthin ausbrach, die in wildester Propaganda vor keiner Lüge und Herabsetzung Halt machte'.[150] When (on 25th December 1914) in response to the invitation by the Vossische Zeitung *van Hamel* published a gracious article expressing hope for international reconciliation, renewal of collaboration and a 'new frame of mind', with direct reference to the 'highly respected professor of Berlin University', *von Liszt* in his reply in the same paper aired his resentment in emotionally charged words, declaring that the Germans would after the war resume collaboration, though not with their open enemies, the international frame of mind having been 'driven out for decades'.[151] *Delaquis*' account clearly indicates that ultimately *von Liszt's* central preoccupation was

149 Quoted above, footnote 96.

150 '... a horrible wave of hatred broke out against everything German... which through wildest propaganda did not refrain from any lies and degradation'. See *Eberhard Schmidt*: Persönliche Erinnerungen an Franz von Liszt, in: ZStW (1969), vol.81, pp. 546-555, at p. 550.

151 Ibid., p. 551. 'Nicht der Krieg an sich hat in uns die Wandlung bewirkt, denn dem ehrlichen Gegner wird jeder von uns nach dem Kampfe gern die Hand reichen. Wohl aber die *Schmutzflut von Haß und Lügen* (*von Liszt's* italics), die alle Kulturwerte mit sich hinweggeschwemmt hat'.

the revival of the *I.K.V.* in one way or another.[152] He appeared to ignore, or to under-estimate the bitterness of feelings, their depth and pervasiveness, felt by the other side. As a matter of fact the war meant the breaking up of the *I.K.V.* and a painful split. *Enrico Ferri* tactfully advised to await for the 'demobilisation of the minds' to take place.[153] It took several years for the wounds to heal and a new re-united Association to be brought into life again.

In the meantime the German-speaking section of the former *I.K.V.* embarked with vigour upon an independent existence, though stressing remembrance of the past by assiduously using the formula of 'Neue Folge' at the head of its proceedings. But within the group one could hear a *crescendo* of voices heralding the total rejection of the *I.K.V.*'s heritage, and the elaboration and imposition, stage by stage, of the Nazi doctrine of the so-called 'new criminal justice'. The Frankfurt meeting of 1932 gave an unmistakable signal of the impending burial of the legacy of the *I.K.V.* as forged in the first twenty-five years of its existence. When the subject of the 'Continuation of the Criminal Law Reform' appeared on its agenda the two rapporteurs, faithful to the dignified debates of times gone by, were immaculately civil to each other, but the very calm of their confrontation was ominous. *Kohlrausch*, holding firm to the inspiring past which seemed to be rapidly fading away, versus *Gleispach*, unashamedly ready to grasp the unfolding ugly present. The resolution, adopted by twenty-five votes against

152 See *E. Delaquis*'statement: Internationale Zusammenarbeit auf dem Gebiete des Strafrechts, in: Mitteilungen der *I.K.V.* Neue Folge (1933) vol.6, pp. 127-140. See also ibid., pp. 140-144, a statement by my old professor in Paris (and subsequently good friend) *Henri Donnedieu de Vabres*, who in terms very relevant to our present situation in international collaboration deplored the 'double emploi', the 'déperdition de forces', the '...inévitables empiétements' produced by too many '... diverses sociétés scientifiques ...' (p. 141).

153 It is hard to sympathise with the reaction of some of the German scholars such as *Finger* and *Oetker*, the two right-wing editors of the very conservative juridical the Gerichtssaal who resigned from the *I.K.V.* in January 1915, '... aus nationalen Gründen...' (see *Delaquis*, op. cit., p. 128). Or with *von Hippel*, for whom the issue seemed to have been resolved by his laconic and pointed designation: '... das Verhalten unserer Gegner...' (the conduct of our adversaries). See Deutsches Strafrecht etc. (1925), vol.I, p. 356.

twenty-three with seven abstentions, added to the poignancy of the parting of the ways. With respect to criminal law reform the group declared itself to be faithful to its shared objectives of criminal policy but '...without prejudice to the recognition of the influence of the new spiritual currents and significant changes in the relationship of political forces'.[154]

On the 8 March 1935 *Kohlrausch*, in pursuance of a resolution adopted by the governing body, resigned his Presidency. The poignancy of the occasion was enhanced by the fact that the legacy of *von Liszt* was handed over to *Dr. Hans Frank*, the notorious Nazi Minister of Justice and the President of the newly-established Academy of the German law (he was to become the no less notorious General gouverneur of Poland).[155] In a dignified and firm introduction to his speech *Kohlrausch* referred to the many contributions made by the *I.K.V.* in the past and, in his speech, he rejected it as unfair to blame the *I.K.V.* for having contributed to the increased leniency of the sentencing policy of the period, the 'penal softening of the bones' ('strafrechtliche Knochenerweichung'). The concluding paragraph of his surrendering peroration makes for rather sad reading. The national-socialist state, he said, demands a 'total surrender of the individual to the state and to the community ... we recognise this requirement unconditionally and wish to co-operate in achieving this great, wonderful goal which the Führer has set out for us. We thank you Mister Minister for having given us this opportunity...' On the 26 November 1937

154 See Mitteilungen der *I.K.V.* Neue Folge (1933), Band 6 (Frankfurt a.M. Sept. 1932), Dritte Frage: Fortführung der Strafrechtsreform, pp. 145-201. For a succinct, restrained, almost pedantic and yet deeply felt account of these early confrontations see also *Gustav Radbruch's* paper: Autoritäres oder Soziales Strafrecht included in his book: Der Mensch im Recht (1957, 3rd ed.), p. 63 at p. 71 passim. The article originally appeared in the Gesellschaft, a respected doctrinal periodical of the Social-Democratic party of Germany. The periodical was soon afterwards suppressed. *Gustav Radbruch* himself was removed from his chair in Heidelberg in 1933 but re-instated with all the honours due to him, after the war in the new Federal German Republic.

155 On *Frank* see *Christian Schudnagies*: Hans Frank: Austieg und Fall etc. Frankfurt/M. 1989.

the German Section was dissolved and the new regime subjected the legacy of the *I.K.V.* to a never-ending untrammelled derision.[156]

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As I am reaching the end of my study a question surges forward and exercises my mind: what would have been the attitude of *von Liszt* if he had happened to be present at these agonising meetings? Would he have endorsed the resolutions, he who had been so keen to stress the necessity of taking into account the immediate reality, or would he have stood up and pleaded for its total repudiation? It would be grossly unfair to try to answer this question on his behalf, but it is fair to quote a statement of his relevant to the frequent inevitability of acute conflicts between criminological convictions and political expediency, a statement which I very much hesitate to endorse because of the categorical and simplified terms in which he voiced it:

> 'Truth does not allow to be tinkered with; consequently science accepts no compromises and this applies even more to our personal philosophy. But matters are different in the field of practical participation, especially in legislation. There compromises are not only possible: they are the necessary premise for undisturbed progress; they cannot be avoided unless political life bogs down in hopeless stagnation or degenerates into brutal imposition by the majority. Who in the field of legislation describes the proposals of compromise as scientific

156 For the resolution of the German Section of the *I.K.V.* to dissolve itself and its justification see 'Notizen', in: ZStW (1934), vol.53, p. 348; for *Kohlrausch's* Statement and address to the Minister of Justice see 'Internationale Kriminalistische Vereinigung', ibid. (1938), vol.57, pp. 666-674; and for the new body taking it over, see *Gleispach*: Gründung der Gesellschaft für Deutsches Strafrecht, ibid., p. 665.

> eclecticism and for this reason rejects them misunderstands the essence of science no less than that of politics'.[157]

Writing in 1919, and conscious that his life was coming to an end,[158] *von Liszt* continued to be optimistic as to the chances of Germany at last obtaining a new criminal code which would naturally reflect his and the *I.K.V.'s* outlook, once the turmoil that followed the end of hostilities had subsided.[159] However, there can hardly be a more stern rebuttal of all such confident expectations than the dry, chronologically arranged, inventory by a meticulous expert of the very many unsuccessful efforts deployed up to the Second World War in Germany to endow it with the benefits of a 'total reform of the criminal law' and a Criminal Code which would embody it.[160]

Inevitably this compels one to reappraise the *I.K.V.'s* real 'influence' in the very country where, according to many appearances, its roots grew so firmly and so abundantly. And perhaps, even more importantly, this experience urges upon us to weigh up much more carefully and realistically the influence that a penal movement, of any kind and in any country, is, in the final analysis, capable of wielding as compared with the

157 See *von Liszt*: Das gewerbsmäßige Verbrechen (1900), in: Strafrechtliche Aufsätze (1905), vol.2, pp. 308-330, at pp. 329-330. 'Die Wahrheit läßt mit sich nicht handeln; die Wissenschaft kennt daher keine Kompromisse und die Weltanschauung (difficult to render into English in his context) erst recht nicht. Aber anders liegt es auf dem Gebiet der praktischen Betätigung, auf dem Gebiet der Gesetzgebung insbesondere. Hier sind Kompromisse nicht nur möglich; sie sind die notwendige Voraussetzung für jeden ruhigen Fortschritt; sie können nicht umgangen werden, soll nicht das politische Leben in trostloser Stagnation versumpfen oder in brutale Majorisierung ausarten. Wer auf dem Gebiete der Gesetzgebung Kompromißvorschläge als wissenschaftlichen Eklektizismus bezeichnet und darum verwirft, der verkennt das Wesen der Wissenschaft nicht minder als das der Politik'.

158 '... (dieses) Vorwort, das vielleicht zugleich ein Schlußwort ist...' See Lehrbuch etc. (21 and 22 ed. 1919), p. IV.

159 See *von Liszt*, ibid., 'Die neue Auflage geht in einem Zeitpunkt hinaus in die Öffentlichkeit, in dem wieder einmal die Umgestaltung unseres Strafgesetzbuchs in greifbare Nähe gerückt scheint'.

160 See *Ulrich Weber*: Strafrechtsreform, in: Handbuch der Kriminologie (2nd ed. by *Rudolf Sieverts* and *Hans Joachim Schneider*, 1983). Erste Lieferung, pp. 40-76 at pp. 40-43. According to *Eberhard Schmidt*, the period between 1909 and 1960 witnessed the birth of ten new projects of Criminal Law Codes. See Handwörterbuch (2nd ed. by *Rudolf Sieverts*), (1966), at p. 333.

impact of the political and social pressures prevailing at the time.

In the nineteen-thirties *Eberhard Schmidt* still did not feel inhibited from writing a piece in favour of a sentencing system grounded on indeterminate sanctions applied throughout the criminal code.[161] He mobilised in support of his 'Theorie' a considerable scholarly apparatus, though rather divorced from the vital practical and constitutional issues involved in the imposition of indefinite sentences and in their mode of enforcement. His enthusiasm for the indeterminate sentence built into the General Part of the Criminal Code was truly contagious and I do not believe that in this respect even *Kräpelin* could have done better.[162] Professor *Mittermaier*, another leading light of the period, made a no less hazardous projection soon to be so ruthlessly demolished by reality. He believed that the chances of reforming the criminal law in the direction of *von Liszt's* School had much increased because guarantees of individual freedom had been built into the Administration so much more firmly than at any other time before and he concluded; 'we therefore do not need to be afraid of police arbitrariness as the adversaries of the Criminal Law Reform are in the habit of repeating.'[163] In contrast to the old law which rejected the lower strata of wrong-doers as if they were a different caste, to-day *Mittermaier* claimed, 'we know that the criminal is flesh of our flesh, that in this field also we are all brothers. Criminal

161 See *Eberhard Schmidt*: Zur Theorie des unbestimmten Strafurteils, in: Revue Pénale Suisse (1931), vol.45, pp. 200-236. But *Karl Binding's* prophecy deserves to be noted: 'Ich bin überzeugt', he wrote with respect to indeterminate sentence, 'sie wird bei uns nie annehmbar werden', in: Grundriß des deutschen Strafrechts, Allgemeiner Teil (1907), 7th ed., footnote 2, p. 238.

162 *Emil Kräpelin*, the eminent psychiatrist (1856-1926) was drawn into the debate of the Criminal Law Schools. His lecture, part of a symposium, represented the most extreme point of view, a view which in recent years has been stigmatized as 'the crime of punishment'. See *Kräpelin*: Das Verbrechen als soziale Krankheit, in: Vergeltungsstrafe. Rechtsstrafe. Schutzstrafe. Vier Vorträge, Franz von Liszt, Karl Birkmeyer, Emil Kräpelin, Theodor Lipps (1906), at pp. 22-44.

163 'Wir brauchen daher keine Polizeiwillkür zu fürchten, wie das die Gegner der Reform mehrfach tun'. See *W. Mittermaier*: Der heutige Stand der Entwicklung im Deutschen Strafrecht, in: Revue Pénale Suisse, vol.30, pp. 202-236, at p. 221.

law transcends national boundaries and is eminently non-national'. This was the kind of loosely thought-out and no less loosely worded verbiage the Nazi criminal law ideologues have been awaiting for to make good demagogical use of.[164]

It is painful to note how the two 'Evil Empires' shared in the spoils of some of the end-products of the modern criminological doctrine. The Soviets imported the Positivist School's concept of 'legal responsibility' of 'state of danger' and of 'measures of social protection' in their first Criminal Code with far-reaching extensions, while the components of Social Darwinism and the system of 'measures of security' as advocated by the *I.K.V.* were amongst the first to be taken over by the Nazi legislators, and, of course, also ruthlessly expanded.

The outlook for criminal law reform in Germany was becoming very grim if so acknowledged a master of criminal jurisprudence, and so keen an observer of political institutions as *Gustav Radbruch* (the author of a Draft Penal Code and at one time the Minister of Justice), should have turned his eyes towards the Soviet Union for brighter things to emerge. After having rebuked them for hiding ('camouflaging' would have been a better word) under new terms old-fashioned reactionary punishments, including the death penalty, he then rounded off his realistic judgment by the following utterly unproven flight into an undiluted utopia:

> 'But perhaps through it a still remote final aim is signalised: not a better criminal law, but something that is better than the

164 'Das alte Recht stand ... auf dem Standpunkt der schroffen Ablehnung der unteren Schicht der Übeltäter, als ob sie eine andere Kaste sei. Heute wissen wir, daß der Verbrecher Fleisch von unserem Fleische ist, daß wir auch auf diesem Gebiete allesamt Brüder sind ... Denn ich halte unser Strafrecht für stark anational ...', pp. 217 and 202.

> criminal law, namely a rational treatment of the lawbreaker in the sense of his re-education and the protection of society'.[165]

Yet we have known for a very long time that from there, also, nothing good came but an endless dark night crowded by calculated cruelty in so many of its bestial manifestations.

What is it that makes so many of us working in the field of criminal justice so prone, so vulnerable, to unjustified, indeed often quite irrational, hopes? Is it because this field of ours is so consistently intractable that we need the stimulus of hope to make us stick to our endeavour?

165 'Aber ein vielleicht noch fernes Endziel ist damit gekennzeichnet: nicht ein besseres Strafrecht, sondern etwas, was besser ist als Strafrecht, nämlich eine rationale Behandlung des Rechtsverbrechers im Sinne seiner Erziehung und der Sicherung der Gesellschaft'. See *Gustav Radbruch*: Der Erziehungsgedanke im Strafwesen, in: Der Mensch im Recht (3rd ed. 1957), pp. 50-79 at p. 57.

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