DOCTRINE

RECENT DEVELOPMENTS IN GERMAN CRIMINAL LAW

by

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I. WHAT IS "RECENT?"

The "Criminal Code for the German Empire" as of 1871 is still the basis of present-day German criminal law. Divided into a First (general) Part, giving fundamental definitions, and a Second (Special) Part, describing delinquent acts in particular and setting forth their penalties, it contained several hundred sections and provided for prison terms of different lenght and severity as the standard penal reaction. During the last century, this rather momentous piece of legislation underwent, of course, many modifications[1]. If you add them all, you will arrive at an average of *one* new statute nearly every year changing the code in one way or the other, be it in rather specific detail, be it more fundamentally. Certainly no one of these modifications can be said to have been completely unimportant, since the clumsy legislative machinery will simply not start moving for an issue considered not to be important. Fines, for instance, have started to outnumber prison sentences in the early twenties, followed by pertinent legislation in 1924.

This makes it difficult, looking back from 1976, to carve out "recent" developments out of more than one hundred years of interesting events in criminal law. Still, there is the cleavage of 1945:

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1) On the other hand, the description of such a basic form of delinquent behavior as, e.g., theft has remained unaltered since 1871, cf. § 242 StGB.

The end of the war was certainly a millestone in German political history; does this hold true for criminal policy as well?

II. THE POST - WAR PERIOD OF RESTORATION

The nazi era has correctly been called a police state era. A police state may be characterized, first of all, by harsh administrative ("police") *practice*, the (e.g. criminal) law being but gradually adaptated to the new state of affairs. Between 1933 and 1935 criminal law being but gradually adaptated to the new state of affairs. Between 1933 and 1935 criminal law and criminal procedure had been changed just enough as to allow for a severe sentencing practice and rigid penal administration, deterrence ranking high in both regards. This was achieved, last not least, by abolition of the principle of legality: people could be sentenced for conduct that had not been criminalized at the time when it occurred (so-called "retroactivity"), and they could be sentenced as well ,if their conduct only came near to what had been criminalized in Part II of the criminal code.

One of the very first steps after the war was the return to the main elements of the "Magna Charta" of the accused: The principle of "nulla poena sine lege" was re-implanted in the criminal code, the interdiction of any "analogia contra reum" being re-inforced by the same time. The Federal Constitution of 1949 made the "nulla poena" formula even part of its own text besides setting up a rather complete catalogue of civil liberties being guaranteed against state encroachments. Remarkably enough it also abolished capital punishment, thus making life imprisonment the most severe sonction of the criminal code. For seventy-five years ago this very issue had nearly prevented the criminal code from being enacted at all: *Bismarck* himself who considered capital punishment a salient prerequisite of the code, had declared the whole codification otherwise unacceptable and thus extorted the stipulation of capital punishment against a strong abolitionist fraction of parliament[2].

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2) In the decades before 1949 there had been considerable differences in the application of capital punishment : 158 executions

But the post-war return to a system of constitutional rights and legal guarantees[3], overdue as it was after a period of lawlessness, may be considered a period of restoration as well. People were yearning for the "golden twenties", remembering the pre-nazi years as the only better times they had known, and criminal theory and jurisdiction did more or less the same. The logics were simple: Since criminal politics had been terribly bad for more than a decade, what is good must be found in the times before. And since that time had been characterized, *inter alia*, by considerable theoretical efforts to find the best interpretation and structure of the criminal act, these efforts were now taken up again and continued. That means, academic theory as well as higher jurisdiction were preoccupied for quite some years by elaborating on a series of substantial contributions to "classical" questions of criminal law, such as: the objective and subjective components of the criminal act, the distinction between criminal action and omission, distinction in responsibility of several persons committing a crime together, the delicate borderlines between negligence, recklessness and criminal intent, the difference between justification (e.g. by legitimate defense) and excuse (e.g. by error), and, time and again, the meaning of *mens rea* (criminal guuilt). Out of all this, one quite noteworthy decision of our Supreme Court of Appeals may be mentioned here, dealing with a defendant's error in law:[4] As early as 1952 the Court ruled that an ignorance or mistake of law on the side of the defendant, quite contrary to an ignorance or mistake of fact, was to hin-

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between 1920 and 1926, 16 executions between 1927 and 1932, more than 15.000 executions (on the ground of formal death sentences!) between 1933 and 1945, cf. E. SCHMIDHAESER (9), p. 79.

3) As a further example for this development there may be mentioned the extension (in 1953) of the principle **"nulla poena sine culpa"** on aggravating circumstances: These may not lead to an aggravated sentence unless the culprit is held responsible for them, at least because of criminal negligence on his part.

4) This decision, BGH § 2, 194, must be understood, of course, on the assumption that an "error in law" may work as a legal excuse **at all.** Books have been written on this since, in particular on the question of **what is** an error in fact when may it be considered "invincible", etc.

der conviction for the indicted act only if such ignorance or mistake would have equally occurred to a most conscentious and scrutinizing mind. It is obvious that such a decision was to enhance considerably the discretionary power of the courts.

In summary, the period up to about 1965 may be characterized as to have been aiming at a rather perfectionist system of criminal law; perfectionist not only in the sense of a most accurate development of the many aspects of the principle of legality, but perfectionist also in the sense of developing a most comprehensive system of defining and circumscribing all possible forms of punishable behavior. One might also call it a "closed system" if it were not for the system's tendency to continiously expand its own definitions of delinquent and/or criminal acts. And underlying reasoning was, of course, the reasoning of classical German philosophers such as KANT or HEGEL or FEUERBACH who assumed that the well-educated citizen would either refrain from delinquency in view of the criminal code's privisions or would, once having committed a crime, willingly accept retributional punishment. These aims and this way of reasoning also shaped the first post-war draft of a "new" criminal code which appeared in 1958; although re-drafted (and slightly modified) in 1960 and again in 1962, it nonetheless was never enacted and is now being considered a piece of legislative endeavor that has been "passé" by the very time of its completion.

However, there is one attribute of German criminal law that had sneaked through this whole period unquestioned and nearly unaltered: namely the parallelism of punitive sanctions on one side and of preventive measures on the other[5]. If a bad-lucked burglar, recidivist for the tenth time, was not punishable for his last criminal attempt but with — say — 15 months of prison, he could still be locked up indefinitely in preventive detention if appearing to be a permanent danger to his environments. This unhappy fellow does obviously not fit into the picture of the philosophers' ideal man and citizen; but he *does fit* into the picture of the dire necessities of society's self-defense against persistent offenders, There is, of course,

5) This parallelism, usually referred to as the "double-track" of criminal sanctions, had been introduced by an Act of 24.11.1933.

a tradition to this line of thinking as well, reachinug back far beyond the famous work of Franz v. LISZT (1882). And it was in continuance of this — and his! — tradition that our criminal policy of the last twenty years experienced a considerable swing to a much more matter-of-fact approach.

III. THE RECENT PERIOD OF REFORM

Strange as it is : Between 1945 and 1968 German criminal legislation produced but one major Act, that of 1953, by which *(inter alia)* probation was introduced into criminal law for adults (and was re-introduced into criminal law for minors). But between 1968 and 1975 a whole sequence of more than a dozen amendments to the criminal code gave it a rather new feature, remodeling some of its basic positions as to the extent of criminalized behavior and to the scope and severity of punitive sanctions. Here the major events of the period:[6]

— In 1968, a whole lot of minor delinquent acts were decriminalized. In particular, minor infractions of traffic rules would no longer cause criminal prosecution but be dealt with by administrative authorities. By this legislation the mass of every-day traffic contraventions was transferred to the competence of the police and to policemen's every-day standard (i.e. ticket) reactions.

— In 1969/70 further decriminalization took place in regard to other forms of behavior that no longer seemed to call for intervetion by the criminal justice system: (public) blasphemy, sodomy (with an animal), adultery, and homosexuality among adults. In other regards, the catalogue of sanctions at the courts' disposal was "modernized" which nearly always meant: mitigated. Besides all this, the hitherto three-

6) In 1968, the German Democratic Republic issued a completely revised version of the Criminal Code for eastern Germany, adapting split in the post-war development of German criminal law. The observations of this paper refer to the Federal Republic only.

fold sanction of imprisonment —severe, regular, and light— was transformed into but one sanction of deprivation of liberty which the judge may handle, of course, in different terms of lenght. But the possibility of imposing short terms (of up to 6 months) was restricted to exceptional circumstances by the same Act, thus enlarging the application of probation orders beyond the scope of the 1953 Act. And as probation had been restricted up to then to prison terms of nine months maximum, it may henceforth be granted for terms up to one year or even (under "exceptional circumstances" again) two years.

— In 1971, due to a world-wide criminal fashion, the penalties for taking hostages in connection with extortion or criminal compulsion, for high-jacking and for other forms of terrorism were considerably raised.

— In 1973, the adaptation of the law on sex crimes to societal standards of morality in sexual matters was continued, the partial decriminalization of pornography forming one main issue of that Act, another one the concentration on juveniles' needs for protection against sexual imputations.

— In 1974, abortion was made subject of pertinent legislation. But in the same year the Supreme Constitutional Court intervened against the Abortion Act declaring it to be too liberal; so the final shape of criminal abortion will not be quite clear until 1976.

— In 1975, the day fine system was introduced, one month was fixed as the new the minimum of a prison sentence, and the instrument of probation was extended to fine sentences. Punitive sanctions and preventive measures were made interchangeable to a large degree. The same Act did away with the centennial tri-partition of crimes —felonies, misdemeneanors and contraventions— by the simple device of eliminating the latter from the criminal code. Most of them were declared to be no longer criminal behavior and were handed over, as far as deemed necessary, to administrative procedures (in accordance with the 1968 Act). Some of them were retained in the criminal code, from now on classified as misdemeanors (e.g. petty theft).

— In 1976, a new law on economic crime may perhaps be expected. And parliament did finally pass a law on prisons, —the first one we ever had—, enumerating the obligations and the rights of prisoners as complimentary to the rights and the obligations of the prison authorities. The prison law also intends to provide for a gradual conversion of traditional prison atmosphere into a "tehareputic milieu" which is considered to be the starting point for processes of social learning within prison walls.

It seems improbable that this whole series of legislative activity just happened because of propitious circumstances or by sheer chance; moreover, the most important components of the series had been formally enacted as "*reform* laws" (instead of just "amendments" or "supplements" of the criminal code). How did it all come about? Had parliament or government experienced a sudden stroke or reformmindedness?

They had not. But in 1966 a group of professors of criminal law, teaching at different German (and Swiss) universities, had published an "alternative draft" for a new criminal code after they had worked on it for several years. This new draft did not cover the whole subject-matter of the existing criminal code, but it strongly emphasized those parts of the code that were the most relevant ones in terms of a "new" criminal policy. It was this "alternative draft" as well as the many debates it stirred that set the legislative machinery in motion again. It is no exaggeration to say that most of the achievements of the last decade can be traced back —be it directly or on detours— to the suggestions of this 1966 publication. What were the professors aiming at, which were their fundamental reasonings?

Aiming they were at a restricted function of criminal law as to the extension and quantity of criminalized behavior — and at an englarged fonction of criminal law as to the practicability and efficiency of criminal sanctions. It is futile, they argued, to try to make criminal provisions a "closed system" since criminal law will always be of a fragmentary nature. This fragmentary nature would seem to be not a deficiency of criminal law, but rather a virtue to be upheld by criminal legislation. For it neatly matches the view that public

punishment, being imposed by a criminal court and being executed by state authorities, must always be the "last resort" of ultimately combating socially untolerable behavior.

All this meant, of course, a veto against too perfectionist an adherence to the principle of legality, It is just this context that may b e used best to illustrate the new way of reasoning: Most sophisticated distinctions as between, e.g., robbery and criminal extortion are obviously loosing relevance if the penalty for either one would be exactly the same in a given case. The controversy between the classical determinist position and the claim that there exists no free will seems to be only half as important in view of the fact that more than 50 % of all convictions are for recklessness or criminal negligence. And the most exact rating of a given prison term in accordance with *mens rea* and criminal guilt within the minimum and maximum permitted by criminal law becomes just so more academic, as reconviction rates after imprisonnment are as high as they are. May-be the principle of *proportionality* (between behaviour and sanction) is on its way to more or less replace that of criminal responsibility in its present (i..e highly psychological) understanding[7].

The shift in criminal law which has been brought about in Germany by these "new" aims and reasonings briefly outlimed here are in no way a purely national development. They fit very well into modern approaches to the crime problem, at least in the western world. Here it has been equally common during the last 10 years to emphasize the difficulties of better knowing the delinquent person rather than the difficulties of better defining the delinquent act, and to consider the delinquent act a question of the damage or hurt it caused to the victim rather than a question of breach of law *in abstracto*. The German development in particular may call, however, for two further comments. First, it ought to be remembered that the new impuls here came from the academic side (and not from the side of the judges or the competent administrators or the members of parliament). This again is in continuance of a noteworthy tradi-

7) As far as the catalogue of preventive measures is concerned, that principle (of proportionality) was formally implanted by the 1960/70 Act.

tion: What formerly had been achieved by the work of single men like v. LISZT or RADBRUCH, has now been the work of the 14 authors of the "alternative draft", — which may be even more astonishing in view of the proverbial crux to have only two professors aggree.

The second point has to do with what I have called the more "matter-or-fact" approach of recent criminal legislation. At first glance one may indeed get the impression that the new acts and laws originated from an altogether factual orientation on the *status quo* of the crime scene, on public opinion's "index of crime", and on the degree of (in-) efficiency of criminal sanctions. Still I would say that facts did not play a dominant role, at least not the role of an ultimate parameter for deciding controversial issues in criminal policy, Of course, there has been arguing with statistics and with the state of prisons, with reconviction rates and public attitudes, but such facts —if they are— are rather loosely linked, as is well known, with the intricate evidence of criminological research on a given problem. If one may distinguish between more manifest facts (as, e.g., of official statistics)[8] [9] and more hidden ones (as to be pro-

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	Population over 14 years (age of crim. resp.)	crime rate (known to the police)	success-fully in-vestigated	sentenced persons (all ages)	1 : 100.000 of the per-tinent group
	millions	million			
1963	45,373	~1,7	55,5 %	~570.000	1.249
1967	46,894	>2	52,2 %	~630.000	1.348
1973	48,730	>2,5	46,9 %	~700.000	1.434

9)

	Fines	prison sentences (except juven. law)	probation granted	prison population (including juveniles, excluding detention before trial)
1963	~340.000	~160.000	>30 %	48.413
1967	~345.000	~210.000	>30 %	48.026
1973	~500.000	~100.000	<60 %	~36.000

cuded by scientific research), the "facts" supporting the new approach have certainly been the former ones, and be it only for the fact that the latter ones were still all too hidden a decade ago! So the "alternative professors" were biased more *against* philosophical justifications for a closed system of criminal law, than they were biased in favor of a strict accordance between research and criminal policy. Their endeavor may well be called that of a "Second Enlightenment", offering once again in history a rational approach to the basically emotional problems of crime and punishment.

IV. CONCLUDING REMARKS

Today the scene has changed again. The system of criminal law and the practice of criminal sanctions are under attack *as such*. They are labeled to be but an instrument of the higher social classes to label some members of the lower social classes as "criminals", thus satisfying society's desire to have their scape-gots cast out and by the same time enabling its managers to stay in power themselves. These critics do claim that criminological (and victimological) research corroborates their views, and they challenge legislators and "policy makers" to take the consequences. Personally, I doubt that these ever will do so, and be it only for the ideological background of the "new" criminologists. But the challenge as such may be very fruitful indeed. It may direct research (and its careful evaluation) to deal with those questions that are really relevant for criminal policy (e.g.: Which of the "fragmentary" porvisions of the criminal code can by no means be decriminalized? what are the most apt methods for treatment and rehabilitation of offenders?). And it may direct criminal legislation to arrive at an ever-improving balance between the legal rights of the accused and society's interest in preventing him and others from future delinquency.

In Germany, it has been decided to give up definitely the ambitious effort of creating a totally new version of the old criminal code. It has been aggreed upon, instead, to follow the method of adapting it step by step to the exigencies of the times, together with attempting to effectuate "modern" criminal policy here and

there. In the light of my sketchy paper, this has been a wise step after all.

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(*) Only some basic publications are stated here; most of them give numerous further references.