Journal of Criminal Law and Criminology

Volume 24
Issue 1 *May-June*

Article 16

Summer 1933

Development of the Administration of Criminal Justice in Germany

Franz Exner

DEVELOPMENT OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN GERMANY[1]

FRANZ EXNER[2]

A survey of the entire work done in the field of the German practice of criminal law during the last twenty-five years, shows an eager tendency forward in all directions; a tendency, to be sure, which up to now has borne fruit only to a relatively limited extent. The reason for this small result is to be found especially in the field of politics. The war, the revolution, the financial need, and finally the parliamentary difficulties are to blame that only a part of what in this field could be wished for has been realized.

Legislation

The strong tendency forward in the field of legislation was the most striking one, but only to a small extent successful. The German penal code now in use was written in 1871. But already in the year 1881 a lively reform-movement began under the leadership of Franz von Liszt. Since the beginning of the century the government also has held the opinion that a modernization of the criminal law in absolutely necessary. First, a scientific preparation for the reform-work has been suggested. And so a great work of sixteen volumes has been published which still today can be considered the standard work in this field: *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts* (1909). In the meanwhile, a bill had been worked out by a commission of specialists, which in 1909 was published by the Reichsjustizant. This was the first preliminary bill for a German penal code. This bill was given to the public for criticism. On the basis of this criticism a new preliminary bill had been worked out by a commission, enlarged by scientific advisers. This work has been interrupted by the war. But on account of the political revolution a change of the penal code and its accommodation to the new political situation has become yet more important. Immediately after the war, therefore, the work was taken up again and new bills were worked out. There is no use to describe

[1]Translated by Dr. Frank Spiecker, Northwestern University, Evanston, Ill., U. S. A.

[2]Professor of Criminal Law, University of Munich, Germany.

all the details of this development. It may only be mentioned that in 1925 a new era began; for an official bill was published and laid before the Reichsrat and later on before the Reichstag for parliamentary procedure. This was the bill for a "general German penal code," which should be valid for Germany as well as Austria, since both allied countries wish to live under the same criminal law. The parliamentary deliberation in the committee of the Reichstag, however, has been interrupted again and again on account of the repeated dissolution of the Reichstag. Nevertheless, this commission has fully debated the bill in its first reading and has begun with the second one.[3]

Entirely new in this plan of criminal law is the following: the former penal law was opposing crime essentially by punishment and—corresponding with the idea of just reprisal—intended to strike each crime *always* with punishment, but also *only* with punishment which should correspond to the seriousness of the deed. But the new bill of penal law, modeled after the Swiss plan, has added to punishment a system of guaranties for protection of society and for the improvement of the prisoner (*bessernde und sichernde Massnehmen*). Their aim is to improve the criminal by special treatment as far as necessary and where this is impossible, to make him harmless in order to protect society. The judge in the criminal court, therefore, in the future shall be able to send mentally diseased or less responsible persons to sanitariums; dipsomaniacs to asylums for drunkards, which is something new in the field of German law practice; and dangerous habitual criminals, who have been punished several times unsuccessfully, to a house of detention, in which they have to remain for an indefinite time. Here their condition shall be examined again and again at certain intervals. As a principle, however, it is possible to keep them there for life. The imposition of this measure and the determination of its duration does not depend on the severity of the offense but on the personality of the criminal. Also, regarding the determination of punishment, the personality as a potential source of danger, shall be taken into consideration more than it has been done before. The judge in the criminal court, on one side, has the power to raise the punishment above the ordinary limit if he has to deal with repeated offenders; on the other side, he may impose only a fine as a reminder instead of an unwholesome short term imprisonment, if he has to deal with persons who are not of a danger-

[3]The result of these deliberations has been published in a small book. Walther de Grüyter, Berlin, 1932.

ous character. He may also decree a conditional postponement of punishment, and in less important cases he is even permitted to dismiss the case without punishment in spite of the established guilt. This viewpoint of the bill signifies a giving up of the idea of reprisal in the meaning of the word hitherto. For this idea demands that each crime be met only and always by a corresponding penalty.—The consequences of this more intensive consideration of the criminal personality are a much farther-reaching freedom of the judge, which enables him to mete out penalties to suit the individual case. The indefinite sentence, in use in America—which would be a logical consequence of this idea—has not been included in the bill. In view of the ideal of individual freedom we are still afraid to leave the power to determine punishment in the hands of the penal administrative body—in other words, to an administrative office. Only the judge should be empowered to measure the penalty. Of course, the institution of a preliminary dismissal gives the penal administrator the possibility of abbreviating the term of punishment. It is evident that the bill introduces innovations not alone from the criminal-political standpoint. It tries also to improve the legal condition of today especially in regard to the definitions of guilt, error and measurement of punishment, as well as to fixing the limits of the concept of crime.

In general, the criticism of this bill was favorable. In the deliberations of the *Reichstag,* there was a weighty divergence of opinion. But the argument was not so much about questions of importance to the criminologists as about problems of penal philosophy; of retention of capital punishment; treatment of perjury; of high treason; of abortion; of unnatural prostitution, etc. It is tragic that the passage of the bill was frustrated, not by differences in the conception of its criminal-political principles, but by problems which are of second or third order as far as the struggle against crime is concerned.

However, if we have not yet succeeded in instituting a complete reform, the code has been very substantially remade since the war. In some fields the new ideas already have been realized. Two new laws of basic importance should be mentioned especially.

The Juvenile Court Law (1923)

The claims of the modern reform-movement are realized in this law for young people between fourteen and eighteen years of age. The treatment of the youthful delinquent is guided exclusively by

ideals of education. The notion of a just reprisal for his deed has almost disappeared. The judge has to form his mind according to pedagogic principles, whether a punishment is necessary or whether educational means should take its place, or whether neither punishment nor educational measures shall be imposed. The legislator gives the judge a great deal of latitude in selecting penal or educational measures. This law can be considered as a really important advance in the German penal law, and it even seems that its principles should be extended to those under age between eighteen and twenty-one years.

The Law of Fines (1921-24)

This law also is inspired by a characteristic modern idea. The short term imprisonment shall be eliminated as far as possible. The judge has the power to substitute fines for imprisonments up to three months, if the purpose of the penalty can be fulfilled by such a fine. This rule has become of the greatest practical importance. Today for instance, simple theft is being expiated by fines in almost half of all cases, while before this law, each larceny involved imprisonment. The increasing use of the fine and the recession of imprisonment as a penal method is characteristic of the newer German practice of penal law.

Every extension of the system of fine, to be sure, heads into the question: what should happen in case of impossibility to pay the fine? There our law tries to introduce a new idea: *to work off the fine in free labor for public purposes.* This would be an excellent solution, but up to now a practical realization of it has scarcely been anywhere achieved and will be more difficult than ever in any time of employment like this. Therefore, the principle remains that if a fine can not be paid, imprisonment is substituted for it. But the judge, and this also is new, has the power of suspending a sentence to imprisonment that has been imposed instead of a fine, if the condemned person, *without his fault,* is not able to pay the fine.

Other reforms of the German penal law during recent years are not connected with a new criminal-political orientation, but are results of internal political events. Legislation for protection of the republic, as well as a series of emergency decrees against riots and other acts of violence, belong to this group. They contain especially severe regulations against elaboration of a plot and against political acts of violence. Even the application of capital punishment for such cases has been resolved as a temporary measure. On the other hand,

keeping pace with the times, the penalty for abortion has been considerably mitigated by a new law.

Legislation on Criminal Procedure

During the last two decades an especially active movement has been shown in this field. The legislators came to the conclusion that the law of procedure can be reformed only when the content of the material law which has to be applied in the procedure is clear. On account of the bill relating to criminal laws of 1919 a bill relating to criminal procedure was worked out in the year 1920. But when this was disapproved by public criticism, the lawmakers restricted themselves to proposing only the most necessary changes in legal procedure in a bill introductory to the new penal code (1929).

Although it was decided to postpone a reform of the procedure for the near future, there was one point regarded as so important, that, independently of all other reformatory movements, it was considered as immediately necessary: the *proceedings against youthful criminals.* The juvenile court law (1923) not only changed the penal code as mentioned before, but reformed substantially the procedure against juvenile offenders also. This was absolutely logical; for if the penal law for the youth is to be dominated by educational ideas, these ideas must be embodied in the legal procedure. The proceedings against juveniles had to be given form especially in three directions and, in fact, in all these directions the law respecting the juvenile court has strongly interfered. (a) In proceedings against juvenile offenders it is a matter of concern that the courts should be headed by especially competent persons. Therefore, the law requires that the function of judge or juror or states attorney be undertaken only by persons who have had experience in juvenile affairs. (b) It is a matter of concern also that the welfare of the juvenile defendant be not prejudiced by the procedure. Therefore, the law requires that the procedure shall not take place in public; that the youth be excluded from trial if questions have to be discussed which might be harmful to his education; that all contacts with adult defendants shall be avoided as much as possible, etc. (c) It is of greatest importance, that the court be informed as exactly as possible about the personality of the defendant and the conditions of his environment. Therefore, the law requires that the court should work together with the public and private organizations for the protection of youth, in order to get the necessary facts. Also, as far as juveniles are concerned, certain kinds of abbreviated procedure are

prohibited, which, for the sake of simplicity, are allowed in the case of adults.

As to the penal procedure against adult defendants the reform, as mentioned, should have been postponed until the new penal code had been accepted. But things took another course. The legislature, under the pressure of the times, has been compelled to act and to make important changes in the field of the law for criminal procedure. It was the financial need of the state that required a more simple and inexpensive practice of penal law. On account of these measures the character of the German criminal court has changed entirely during the last decade. Reforms have taken place by means of decrees which hardly would have found the approval of the *Reichstag.*

The last decade has brought the following important reforms:

1. *The abolition of the jury in its traditional form.* For grave crimes the regulation for criminal procedure of the year 1879 had provided for a jury in English-French form, that up to that time had existed only in single territories of Germany. The essence of this jury was as follows: the juror's bench, occupied by twelve laymen, had only to answer "yes" or "no" to certain formal questions of guilt. The court, consisting of three judges, were required to preside at the trial, to formulate the questions and to mete out the penalty in accordance with the sentence of the jurors. This form of court has been very often criticized, not only on account of its size and cost and not only because the judges were not able to give the reasons for the sentence, since they had not taken part in the deliberation of the jurors; but the most important argument against the former jury was the following: the jurors, without any legal adviser, had to decide upon a sentence and in doing this they often made the most serious mistakes. Besides, they did not take part in meting out the penalty, but they desired to be influential on this point, which was most important to them. To obtain influence they often answered the question of guilt contrary to their true opinion. It has happened for example that the jurors denied the question of murder and answered in the affirmative to the question of manslaughter only for the reason that they did not consider the defendant as deserving capital punishment. On the other hand, there was danger that the judges would sentence to punishment especially severe or especially light as the case might be, because they considered the sentence of the jurors to be wrong and believed that they would have found the defendant guilty of a more serious or of a less

serious crime, if they themselves had been authorized to influence the sentence.

On account of all this, the critics said, an element of dishonesty enters the administration of justice. But in spite of this criticism the jury has been considered as a palladium of civil liberty by large circles in Germany and it would not have been touched but for reasons of economy. Now this kind of jury has been abolished (1924) and a new form of court has taken its place. This also has been named *Geschworenengericht* i. e. "jury," but it looks substantially different from the former jury. Now the jurors—there are six—form, together with the three professional judges, a unitary bench of judges. And these nine judges, in joint deliberation and decision, have to answer the question of guilt as well as the question of penalty. Therefore, it really is an enlarged "Schoeffengericht," which according to German law, is especially peculiar in this: that professional and non-professional judges perfectly equal, have to solve all the problems of the criminal court.

2. Besides the abolition of the jury the *constitution of the court* has been substantially changed in another direction. These changes also have been made in the interest of economy. After a few experiments, more or less successfully tried in this field, the *Leienprincip* (the *lay jury* principle) has been restricted, since 1932, in the following manner: Especially the single judge, that is a professional judge without non-professional collaborators who formerly figured in criminal matters hardly at all, has obtained a very important position in the German republic. All insignificant offenses, and under certain circumstances also more severe ones and even crimes, are disposed of by professional judge without the cooperation of non-professionals. For all remaining punishable deeds, as far as they do not belong to a jury on account of their special seriousness, the *Schoeffengericht* is competent, (one professional and two non-professional judges). But the states attorney has the power to bring them before the *Grosse Strafkammer,* (three professional and two non-professional judges).

3. The right to appeal from sentence has been restricted also for economy. Formerly the defendant was empowered in most cases to protest the sentence by appeal and to demand for legal reasons a revision of the sentence imposed by the appeal-court. Today the defendant has only one appeal at his disposal. If he appeals against the sentence, he cannot again appeal the sentence of the appeal-court. But it is up to him to demand revision of the first sentence and to

bring his case directly to the court of revision for examination from a legal angle. Legal measures are much restricted also in that, against sentences of the *Grosse Strafkammer,* only an appeal to the court of revision is possible.

4. Another innovation—also for economy—may be mentioned. Up to now, in a German trial, the *Legalitaetsprincip* had been considered as an important principle, namely: the duty of the states attorney to prosecute every punishable action when brought to his attention. Recently the law has more and more abandoned this principle especially in trials against juveniles and in respect to light offenses that have been charged against others. Today trespassers are prosecuted only if public interest in an individual case requires it.

5. An innovation which may be considered as undoubtedly in the direction of progress, is the invocation of the aid of *social agencies* in large sections of the Republic. The purpose of these organizations is to make the court acquainted better than before with the personal conditions of the defendant. They are mostly private organizations which, under public guidance, are working in this line. Practices that have been operative for a long time in the juvenile court thus become fruitful in trials against adults.

Penal Administration

A very satisfactory report can be made about *the development of the execution of penalties* in Germany. Here, the reformatory movement has significantly succeeded. This was possible, because in Germany the whole prison system is regulated not by law, but by decrees. Therefore, in spite of the refusal of the legislature, reforms may be realized, and without exaggeration one may say that the penal administration has been changed entirely during the last ten years. Penal administration has been made educational in character.

An essential improvement of criminal law in practice, is certainly unthinkable without a reform of penal administration. Therefore, shortly after the war, this reform was initiated. The aim was not only modernization but also unification of the Administrative system, which up to now has been regulated differently in each of the German countries. The most important event in this field is the agreement of the divisions of the German Republic to new principles of penal administration. they are found in the so-called *Reichsratsgrundsätze* of July 7th, 1923. On this basis the divisions of the Republic singly have issued new decrees concerning penal administra-

tion. Prussia, Thuringia, Saxony and Hamburg especially should be mentioned.

The modern German penal administration is influenced strongly by English and American ideas. The most important part of this reform consists in the introduction of *progressive* penal administration which long before the war had been demanded, but was realized only in certain tendencies. The administration of the penalty of imprisonment is to be considered from an educational standpoint. Therefore, it is to be built up gradually. According to the conduct of the prisoner and to the prognosis for the future the administration will move toward an ever greater freedom and greater responsibility for the prisoner, so that he may be inspired to work for his own advantage, and that, at the same time, when he has reached the highest degree of responsibility and freedom in prison, the transition to complete freedom may not be too difficult. Three degrees are distinguished through which the prisoner must pass. These things are well known in America. Therefore, I wish to call special attention to only a few peculiarities.

(a) While the prisoners in the various classes, as a rule, are lodged in different sections of the same institution, Prussia has made the experiment first for the limited district of Berlin, of giving to each class a special institution, so that the prisoner, changing to a higher class, will be brought into another institution. There has been some protest on the ground that it would be of doubtful value to transfer a prisoner, who is very well known in one institution, to another one, where he is altogether unknown. On the other hand, the Prussian system has the advantage of offering the possibility of completely changing the management of the classes of prisoners, since the entire spirit of each of these institutions is quite different from that of any other. The Prussians believe also that many a director, who is very well fitted for the rigid discipline of the first class may not be qualified for the more lenient administration of the institution for the third class and vice versa.

(b) In Thuringia, the *Gefängnis-fürsorger* are especially distinctive. These are officials, academically trained, who have to devote themselves exclusively to the educational problem of penal administration. While the jailors are occupied with the technique of administration, the instruction in labor and the maintenance of order, it is the duty of the *Fürsorger* to influence the prisoner during his free time, to keep him occupied and to advise him. The idea at the basis of this provision is a very fruitful one. Till now, the prisoner has

been left to himself in his free time, and it was entirely satisfactory, if only he did not disturb the good order of the institution during such periods. Now, however, the best men have been chosen to use their good influence upon him while he is not occupied with his duties in the prison.

(c) Not all prisoners are eligible for the gradually progressive feature of prison administration. The short term penalties, of course, are to be withdrawn.[4] The incorrigible, are, as they are often called, those who are extremely hard to educate the mental defectives and the sick; the *Überzeugungstäter* (those who are technically criminals because of their ethical, religious or political convictions that have led them to violate the law)—all these are excepted from the operation of the progressive system. Especially the incorrigibles present very delicate and even debatable problems. On the one hand, there is no doubt if these people are brought into close contact with the rest of the prisoners, their bad influences must disturb the entire educational work; on the other hand, it is very difficult or hardly possible at all to recognize, with sufficient certainty, everyone who, on entering the institution, is incorrigible in the senses described above. There is, therefore, a danger that somebody will be declared incorrigible who is capable of being helped.

This leads to another innovation in the German penal administrative system. The authorities recognize the necessity of an exact examination of the prisoner, *psychological as well as sociological,* in order to prepare for his classification. Here it is important not only to determine whether the prisoner is corrigible or incorrigible, but especially to get a true picture of him in order that a suitable treatment may be made possible during the penal administration. In this direction Bavaria has taken the lead through its research bureaus, the results of which are made known in the reports of the International Prison Congress in London (1925). Recently, Prussia also has introduced research bureaus in the institutions into which the prisoners are first delivered.

About the success of these innovations nothing definite can be said at the present time. But one thing may be observed that often is forgotten: even if this educational administration should fulfill all hopes, the problem of penal administration would not yet be solved. For the short term penalties, to which the system described does not apply, are very frequent, especially since our courts show a general tendency toward more and more lenient punishment. Ac-

[4]The minimum, as a rule, is a term of nine months.

cording to the statistics for Prussia, recently published, one may take it for granted that, in the entire German Republic, yearly, 120,000 persons pay a penalty of imprisonment, each of which lasts not longer than fourteen days. And these penalties are paid off by actually going to prison. They are not merely pronounced and then remitted. More than half of these short term imprisonments are compensations for non-payment of fines. I consider these short term penalties as one of the darkest points in our criminal legal practice. Relief, to be sure, can hardly be found. It will be the problem of the future to abolish short term imprisonments and to replace them by other measures of punishment. Since they are so short, an educational value cannot be expected of them, and, therefore, their result is more harmful than useful. Two steps already have been taken: 1—Short term penalties can be changed to a fine, and (2)—the administration of a short term imprisonment becomes very often useless by a conditional remission of punishment and a later pardon. The first of these measures to be sure, opens another problem: what is to be done in the case of non-payment of fines? And this problem is doubly urgent in a time of need, in which so many people simply are not able to pay a fine. It has been mentioned before that the law of fines has proposed a remarkable solution, which to the present has scarcely been realized. The second measure can lead to a satisfying result only when it becomes the practice to order long term punishments, which are to be conditionally remitted in the place of short term imprisonments, ordered unconditionally. In this connection perhaps obligatory legal instructions may be necessary.

As to the reform of penal administration it may yet be mentioned, that the government of the Reich has worked out a bill for penal administration (1927) and has proposed it to the Reichstag. It has been planned to have it come into force simultaneously with the new criminal code.

Summarizing, I should like yet to say the following about the work of the legislature and the reforming movements of the last years:

Our criminal code and our entire practice of criminal law is based on principles, made in the period of liberalism and individualism. It has been the tendency in the last years to *change this liberal criminal practice into a social one.* Positively, this can be seen in the emphasis upon the idea of educational treatment of corrigible criminals, and upon the idea of protecting society from incorrigible criminals. Hitherto only the first part of this program has been

partly realized in the law of the juvenile court, the law of fines and the new practice of penal administration, while the safety-function is still altogether but a program. Negatively the turning away from liberalism and individualism can be seen in the partial abolition of many a guarantee of individual freedom, which formerly was considered as indispensable. To this belongs the *extension of judicial determination* by which the individual, more than before, is exposed to the judgment and therefore to the eventual arbitrariness of state organs. Of the same fabric as the foregoing is the extension of power which has been gained by the administrative authorities. Subordinate offices have a more important part than ever before in determining the manner in which the penalty of imprisonment shall be administered. But this turning away from liberalism is most evident in criminal procedure in so far as it has begun to loose itself, more and more, from the ideals that originated in a liberal period. The abandonment of the former jury is of this character. Of the same nature, furthermore, is the limitation of those procedural rights, which had been given the defendant as a guarantee of his civic freedom. Thus the publicity of the trial has been restricted, the right of appeal has been cut down and, it may be added, the obligation of the judge, to use the arguments given by the defendant, has been limited. But on the other hand the states attorney has been furnished with greater power. To a certain extent he decides upon what kind of court will pass the sentence and what legal means to protest the sentence are admissible. Indeed, now it often depends upon his judgment, whether a prosecution will take place at all. The states attorney, however, is an administrative body dependent on the government. And if the fate of the defendant has been laid more than before, in his hands, it shows clearly that the value of our liberal ideals has deteriorated. Especially the procedure against juveniles of today is administrative in its character and is no more consonant with ideals of criminal procedure we had in the time of liberalism.

If the times do not deceive us, the convictions, which dominate a large body of the German youth, will advance more and more this development of the German practice of criminal law away from individualism.