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Friedrich Honig

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RECENT CHANGES IN GERMAN CRIMINAL LAW

FRIEDRICH HONIG*

On the 28th of June, 1935, the German government promulgated far-reaching changes in the German Criminal Law which fundamentally alter the conception hitherto prevailing in Germany. It is difficult to understand the tendencies of these laws, unless one looks at them from a different standpoint than one is used to in democratic countries. The Third Reich, although it pretends, according to statements from authoritative quarters, to be a democratic country in the true sense of the word, is in fact an authoritarian State which demands from its citizens the sacrifice of subjecting their freedom to the well-being of the community, or in other words, to the well-being of the State itself. The citizen is living for the State, which is no longer a necessity, but an idol. The doctrine of Montesquieu that the three powers in the State—*pouvoir législatif*, *pouvoir exécutif*, and *pouvoir judiciaire*—have to be exercised by three different authorities, no longer holds good.¹ It follows that the government does everything in its power to subordinate the individual freedom to the benefit of the State. These tendencies can easily be recognized in the provisions of the new criminal law² which we propose to discuss. The slogan used in Germany for describing this tendency is: "common interest comes before self-interest."

The subject has to be discussed under two headings, the substantive law, and the law of criminal procedure, and must necessarily be confined to the broader outlines which reflect the now prevailing German conception of the "authoritarian" nature of criminal law. It is, however, of no practical value to use the stereotype characterization sometimes utilized by German writers, that the modern German tendency is that of "material justice superseding formal justice."³ The

*53 Cambridge Terrace, London, W. 2, England.

¹The government not only exercises executive powers, but legislative and judicial powers as well. Two laws of the years 1933 and 1934, respectively, provide that the government has power to pass legislation without sanction of Parliament, and that the Chancellor of the Reich appoints and dismisses the judges of the People's Court (Volksgerichtshof) which deals exclusively with the Law of Treason. The head of the government thus exercises indirectly judicial powers.

²See above all the new Law of High Treason, as promulgated on the 24th of April, 1934, RGBL. I, p. 341. For particulars: Lawrence Preuss in the American Journal of International Law, 1935, pp. 206 seq.

³See Schäfer in "Deutsche Justiz," 1935, p. 991.

new criminal law speaks for itself, and its tendencies can easily be inferred by the reader from the context which will, where necessary, be given in outline.

I. *Changes in Substantive Law*

1. Every system of criminal law is based on the principle: *nullum crimen, nulla poena sine lege*. This principle which has often been called the Magna Carta of the criminal was laid down in the German Criminal Code, §2. The statute of the 28th June, 1935, repeals this provision and provides instead that a man is not only punishable for having committed an offence declared to be punishable by law, but also for having committed an act "which deserves punishment according to the fundamental idea of a penal law, and to the sound conception (of law) of the people. If a specified statutory provision does not apply directly to the act, the act shall be punished according to a provision the fundamental idea of which is best applicable." (Art. 1, §2.)

Two difficulties arise in the interpretation of this section:

- (a) Is judge-made law to be regarded as a source of law?
- (b) What is the "sound conception of law" prevailing in the minds of the people?

(a) The German law hitherto in force, only knew two sources of law, viz., written law and—to a certain extent—customary law. The task of the judge was merely judicial and therefore confined to the interpretation of existing laws. This principle has been developed in consequence of the fact that there has never been a common law in Germany. The codes of civil and criminal procedure went even so far as not to provide any binding force of High Court decisions. Only the "Reichsgericht" itself was bound by its own decisions, but all the other Courts were entitled to interpret the law as they thought fit and just themselves. It seems that the idea, that the task of the judge is merely judicial, no longer holds good as far as criminal law is concerned. The judge—not only the High Court judge, but every judge in the particular case before him—creates law, and his decisions must therefore stand as sources of law. On the other hand, there is no provision to the effect that judgments are binding, so that we have the curious result, that, although judicial decisions are a source of law, they are not binding on the Courts. But the new law even goes a step further by providing in art. 2 that the "Reichsgericht" is entitled to depart from one of its own judg-

ments provided that it has been delivered before the promulgation of the present law.

The result seems to be as follows:

- (I) Judicial decisions are a source of law.
- (II) They are not binding on the Courts.
- (III) If, however, the "Reichsgericht" wants to depart from one of its own decisions, judgment must be given by the whole body of the "Senates" trying criminal cases.⁴ This rule does not apply where the Reichsgericht wants to depart from a decision given before the promulgation of the present law.

(b) The "sound conception of law" is a legal principle of doubtful value. It has been suggested that it does not necessarily represent the ideas of the average "man-in-the-street."⁵ It seems, however, to be appropriate to take the average man as representing the ideas which the new German law tends to introduce into the jurisdiction of the Courts. It should be noted that the principle is a very vague one, and that, furthermore, it is difficult for a legally trained judge to give decisions strictly complying with the sound conception of law prevailing in the mind of the average layman.

It must not be overlooked that in times of economic distress such a vague principle is subject to frequent changes, and that even transgressions which in normal times would be regarded as a mere carelessness may be treated as serious offences. The punishment to be inflicted upon the offender is to be taken from the statutory provision of an offence which is akin to the one in question, and which is therefore best applicable in the particular case.

2. §2a of the new law contains the following provision:⁶

"If the law which obtains at the time when judgment is given, is less severe than the law which obtained when the act was committed, the law which is less severe 'may' be applied; if at the time when judgment is given the act is not at all punishable any more, punishment may be dispensed with." This provision shows, as do all the others, the tendency to punish the offender more severely than was the case in the "liberal" criminal law before 1935. Until the present law was passed it was obligatory for the judge to punish the

⁴This is still the law as contained in the "Gerichtsverfassungsgesetz," section 136.

⁵See Schäfer in "Deutsche Justiz," 1935, p. 995.

⁶Only the alterations are mentioned in this article; the law hitherto in force which deals with the same subject, but which is left unaltered, need not be discussed.

offender according to the law which was less severe, whereas now it is a matter of discretion for the judge, whether he inflicts the heavier or the lighter punishment. A hard and fast rule as to the exercise of this discretion can hardly be given, and it remains to be seen which will be the principles governing the decisions of the judges. The danger that a decision might be governed by political considerations must be no means be overlooked.

3. A principle which was hitherto only applied by the "Reichsgericht" in the case of larceny and receiving of stolen goods⁷ has now been made generally applicable by the following provision in §2b of art. 2: "Where it is indisputable that a person has infringed one out of several statutory provisions, but there is (alternative) evidence only for either the one or the other, the offender shall be punished according to the provision which is the least severe!" If, *e.g.*, a person states a fact on oath and gives an affidavit as to the same fact, and one of these two "statements" must necessarily contradict the other, the offender has to be convicted of the lighter offence, although neither of the two can be sufficiently proved.

This provision dispenses to a certain extent with the principle that guilt must be proved beyond doubt.

4. Apart from these basic ideas of the new criminal law, the statute makes provision for certain specific criminal offences, such as slander of the National Socialist Party, unlawful carnal knowledge of persons both of whom belong to the male sex, and some others.

In connection with the new law of general conscription, it was necessary to reintroduce certain provisions which were repealed after the War. They are of minor importance in this general survey, and need therefore not be discussed in detail.

II. *Changes in Criminal Procedure*

The law of procedure can only be dealt with insofar as it is necessary in order to explain the fundamental changes of substantive law and their application in practice.

1. Where §2 of art. 1 of the new law, *viz.*, whether an act which is not made punishable by law, but which deserves punishment in accordance with the sound conception of law of the people, shall be punishable; applies, the Director of Public Prosecutions as well as the judge have to decide which statutory provision is best applicable in the particular case.⁸

⁷See decisions of the Reichsgericht, vol. 68, p. 257 (RG 68. 257).
⁸§170a in connection with §267a: RGBl, 1935, part I, p. 844

§347a of the amended Code of Criminal Procedure provides that by request of the Director of Public Prosecutions, the appeal against a decision dealing with the new art. 1, §2 shall be decided by the "Reichsgericht" instead of being decided by a District High Court. This provision is of high practical value, inasmuch as it guarantees, to a certain extent, the unification of the law dealing with the interpretation of the difficult and vague provisions of art. 1, §2.

2. Hitherto §331 in connection with §358 of the Code of Criminal Procedure prohibited the "reformatio in peius," viz., the Court of Appeal was not entitled to inflict a heavier punishment than that inflicted by the Court of first instance provided that the appeal had been lodged by the accused himself and not by the Director of Public Prosecutions. According to the new law, the Court of Appeal can inflict any punishment it thinks fit. This rule applies equally where the appeal is lodged by a guardian for a person under age. It does not apply, however, where the appeal is lodged by a husband for his wife, because a wife shall not, without her own will, be placed in a position which might possibly be less favorable than it was before the appeal. There, again, we have the tendency to vest a greater power in the authorities, and not to leave the course of the proceedings to the individual.

III. These few remarks will suffice to show the fundamental changes in German Criminal Law which have taken place since the authoritarian régime was established in Germany. It is impossible to confine the survey to purely legal problems if one wants to point out the tendencies prevailing in a country with an altogether different constitution from that of almost every other country. It is indispensable to describe the broader outlines which are more important than the law in the strictest sense of the word. Furthermore the law proper of a foreign country must necessarily be more or less strange to the reader. These considerations may serve as an excuse for having discussed the problem not only from the strictly legal point of view, but also from the point of view of its sociological outlook.