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Frederick Hoefel

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THE NAZI PENAL SYSTEM — I

Frederick Hoefler

The writer describes certain aspects of the Administration of Criminal Justice in Germany under the Nazis. On the basis of available information, the writer believes he is giving a true account. It is possible that some of the details will need to be corrected later. The author is a member of our armed forces. The article was written while he was stationed at the University in Champaign, Illinois. A second article, by the same author, will be published in our next number. It will cover The Secret Police, Political Trials, Prisons and Concentration Camps.—Editor.

Penal Legislation

The penal law of both the Hohenzollern Empire and the Weimar Republic was codified in the Criminal Code of 1871¹ and the Code of Criminal Procedure of 1877².

The Criminal Code of 1871 was essentially a product of the penal jurisprudence of the classical school. Its legal definitions, distinctions, and other technical matters may be traced to Napoleon's Code Penal of 1810. However, the "deterrent" philosophy and rather cruel punishments of the French Code had been eliminated by the humanitarian jurisprudence of the nineteenth century. For those features, the classical jurists had substituted a rather lenient variety of "retribution." The penalties were mostly simple imprisonment (par. 16; from 1 day to 5 years); imprisonment with hard labor (par. 14-15; from 15 years to life), and fines from three RM to 10,000 RM (par. 27 ff.). Death penalty was provided for murder only³. It was executed by decapitation (par. 14).

For the protection of the innocent, par. 2 laid down the doctrine of *nulla poena sine lege*, and prohibited retroactive punishment. This was repeated in Art. 116 of the Weimar constitution.⁴

Among the Fundamental Rights of Citizens recognized by the Weimar constitution, the following were particularly important for the administration of criminal justice and were supplemented by appropriate statutory law:

Equality of all citizens before the Law (Art. 109); freedom from illegal arrest (114) and from illegal search and seizure (115); inviolable secrecy of all communications by mail, telegraph or telephone (117); freedom of speech and freedom of the

¹*Strafgesetzbuch fuer das Deutsche Reich, vom 15. Mai 1871*. Annotated edition: v. Liszt. Delaquis und Kohlrausch, *Strafgesetzbuch*, etc. 30th ed., 1932.

²*Strafprozessordnung*, revised text of March 22, 1924, RGBI I, 299, 322. The citation "RGBI" refers to the *Reichsgesetzblatt*, official edition of statutes, published currently.

³Par. 211. Prior to 1918, the attempted murder of the Kaiser or the ruler of a German State was also punishable by death, par. 80.

⁴*Verfassung des Deutschen Reichs, vom 11. August, 1919*. RGBI 1919, 1383, Art. 109 ff.: *Grundrechte und Grundpflichten der Deutschen*.

On this German "Bill of Rights" and its limitations, see Loewenstein in Shotwell, *Governments of Continental Europe*, 1940, pp. 398-399.

press (118); freedom of assembly (123); and freedom to organize clubs and associations (124).

The Weimar Republic made definite progress along the lines of individualized correctional treatment. Rehabilitation rather than mere punitive measures were stressed in the Juvenile Welfare Law of 1922⁵, the Juvenile Court Law of 1923⁶, and the Federal Prison Rules of 1923⁷.

The penal legislation of the Hitler government since 1933 may be summarized under the following aspects:

I. Abolition of all constitutional guarantees for the freedom of innocent citizens.

II. Legislation by government decrees.

III. Creation of new and hitherto unknown criminal offenses in order to promote political, racial and religious persecution.

IV. Increase in the severity of punishment; increased use of the death penalty.

V. Creation of new punishments.

VI. Dualism of legal and extra-legal punishment.

A more complete discussion of the above topics follows:

I. On February 28, 1933, in the first days of terror government, a presidential decree⁸ abolished the most important civil rights of the Constitution, namely: freedom from unlawful arrest, search and seizure; inviolability of mail, telegraph and telephone; freedom of speech; freedom of the press; freedom of assembly; freedom to organize; inviolability of private property.

Ostensibly, these civil rights were only temporarily suspended as an emergency measure, but they have never been re-established.

The constitutional prohibition of unlawful punishment was violated by *ex post facto* laws⁹ and finally abolished by a decree of June 28, 1935¹⁰. This decree recognized punishment *ex post facto* as a general principle of the criminal code. Likewise it abolished the doctrine of *nulla poena sine lege*; for it permitted the punishment of acts offending the "sound feeling of the people" even though no existing law was violated¹¹.

II. The totalitarian state tolerates neither a legislative power nor an independent judiciary as they are understood in constitutional government. Accordingly, law is no longer made by the

⁵RGBI 1922 I 633.

⁶RGBI 1923 I 135.

⁷*Grundsätze fuer den Vollzug von Freiheitsstrafen vom 7. Juni 1923.* RGBI II 263. Published by the Reich government following an interstate agreement of all states.

⁸RGBI 1933 I 83, par. 1.

⁹Decrees of March 29, 1933, RGBI I 151, death penalty for political offenses; July 3rd, 1934. RGBI I 529. See Ebenstein, *The Nazi State*, pp. 73-74.

¹⁰RGBI 1935 I 839.

¹¹On this principle, see Ebenstein, *loc. cit.*, p. 74; Preuss, Punishment by Analogy in National Socialist Penal Law, *Journal of Criminal Law*, etc., 26, 847-856. See also Advisory Opinion of Dec. 4, 1935, Publications of the Permanent Court of International Justice, Ser. AIB No. 65.

legislature; it emanates directly from the executive power. This was accomplished at first by presidential "emergency decrees," based on Art. 48 of the Constitution; soon, however, a more convenient device was found by simply delegating all legislative power to the Cabinet.¹² A good example of how this integration of government powers operates was the famous blood purge of June 30, 1934. Having murdered probably more than 1,000 political opponents in a few days, Hitler declared that he had acted as the "Supreme Lord of the Law,"¹³ and a decree¹⁴ signed by Hitler, Frick and Grtner declared that all government measures taken in this matter were legal.

III. Substantive penal law was changed by a number of decrees threatening the most severe punishment against political, racial and religious minorities.

a) The Law on Treason was codified in a decree of April 24, 1934,¹⁵ replacing par. 80-93 of the old criminal code. Almost all activities of opposition groups were punishable by death, the death penalty being either mandatory or alternative with imprisonment and hard labor for life or for not more than 15 years. The penalties applied to: preparation of treason (new par. 83), such as any work with non-Nazi political organizations (underground work); the establishment or continuation of such organizations; acts of sabotage; anti-Nazi radio broadcasts; printing, circulation or smuggling into Germany of forbidden literature, likewise not only the betrayal of "state secrets" (88-89), but also the attempt to discover such secrets (90).

The "forging" of state documents (90-A) was punishable with imprisonment at hard labor. This provision probably made it possible for the government to issue a *dmenti* in case a genuine document should be smuggled out of Germany.

Under this law "preparation for high treason" has been found in cases in which the accused had received anti-Nazi leaflets from someone and had neglected to turn them over to the police; likewise when the accused had a discussion with a person opposed to Naziism without making an immediate denunciation to the Gestapo.¹⁶

b) Virtually all public and private criticism of the govern-

¹²Including the power to make constitutional amendments. Law of March 24, 1933. RGBl I 141.

¹³*In dieser Stunde war ich verantwortlich fuer das Schicksal der Deutschen Nation und damit des Deutschen Volkes Oberster Gerichtsherr.* Hitler's address to the Reichstag, July 13, 1934, German text in *Deutsche Allgemeine Zeitung*, 15. 7. 1934.

¹⁴Decree of July 3, 1934, RGBl I 529.

¹⁵RGBl 1934 I 341.

¹⁶Roper and Leiser, *Skeleton of Justice*, 1941, p. 95.

The author, Edith Roper, was an officially licensed newspaper correspondent in the criminal courts of Berlin, 1934-1938. She had access to most political trials and to secret files of the Ministry of Justice.

ment by the spoken word was prohibited and made punishable by imprisonment up to five years by the decrees of March 21, 1933¹⁷ and December 20, 1934,¹⁸ the latter known as the so-called *Heimtueckegesetz* (Law against treacherous criticism of the government). The official wording of this law, as published in the RGB1, spoke only of untrue statements, but the authentic interpretation, given by the government,¹⁹ did not permit the defendant any proof that his statement was true.

It was believed²⁰ that as many as 80% of all political trials in 1934-38 were based on this law. It was especially applied against ministers of the gospel, who had spoken against the government's interference in church matters. The famous pastor Niemoeller was tried in 1938 under this law.²¹ Less prominent victims of the same law may be found among old women and others who were guilty of grumbling against the government.

c) Among the notorious anti-semitic manifestations in the administration of justice,²² the so-called "Law for the protection of German blood and honor" of Sept. 15, 1935,²³ deserves a prominent place. This law created the new criminal offense of race defilement" (*Rassenschande*). It prohibited all marriages between Jews and Aryans under penalty of imprisonment with hard labor up to fifteen years. The same penalty was provided for extramarital sexual intercourse between members of these two racial groups. Jews were not permitted to employ Aryan female domestic help under 45 years of age, this offense being punishable with imprisonment up to one year and with fines. The same law also punished German Jews for showing the Swastika flag, probably an infrequent offense. Another decree of the same day deprived all German Jews of German citizenship.²⁴ The connection between the two decrees is obvious; both were manifestations of racial persecution in the field of law.

IV. The legislative use of the death penalty has enormously increased. This penalty for numerous new categories of "treason" has been mentioned above under III-a. Other laws, enacted in the past ten years,²⁵ have provided mandatory death penalty for kidnapping, violation of economic regulations, highway robbery through automobile traps, espionage in peacetime, theft and burglary in areas under military law, theft of metal

¹⁷RGB1 1933 I 135.

¹⁸RGB1 1934 I 1269—English translation by Roper and Leiser, pp. 93-94.

¹⁹RGB1 1934 I 1269, *loc. cit.*

²⁰*Ibid.*

²¹See below.

²²Roper and Leiser, p. 134 ff., 141 ff.

²³RGB1 1935 I 1146.

²⁴RGB1 1935 I 1146.

²⁵Ebenstein, p. 82 ff. German newspapers in 1938 published an average of two executions per day, according to Roper-Leiser, pp. 286 ff.

pieces from scrap collections, acts of violence perpetrated with a weapon, and so forth. Possible death penalty was also threatened for listening to foreign broadcasts, blackmarket operations, undermining the military strength of the nation, etc.

The laws concerning imprisonment have similarly become more severe. This was done in three different ways: the penal laws provided for longer terms of imprisonment²⁶; often for life terms; the prison regime was made more severe²⁷; and last but not least, imprisonment was followed by preventive or protective custody for an indefinite time.

V. The government has introduced several new punishments. Most important among these are the so-called "preventive custody" (*Sicherungsverwahrung*) and the "protective custody" (*Schutzhaft*). Both are legal devices enabling the government to imprison individuals for indefinite periods of time; however they serve different purposes and should not be confused with each other.

a) *Sicherungsverwahrung* was introduced by the "Law against dangerous habitual criminals," etc. of November, 24, 1933.²⁸ This law is comparable to the New York "Baumes Law" against recidivistic offenders, but is far more severe than the latter and gives more arbitrary power to the courts and other government authorities. Under this law any person who is convicted of a criminal offense for the third time,²⁹ will not only be given a prison term of many years, but will, after the expiration of his term, be placed in "preventive custody" for an indefinite time. Although the law does not call this a punishment, it is in reality a most severe one. The available German literature³⁰ indicates that it is carried out in practically the same fashion as regular imprisonment with hard labor. It is always for an indefinite time. The release from this "custody" is always a conditional release; it can be revoked at any time without trial or any other legal guarantees.

Among other "preventive measures," the same law also introduced the castration of sex offenders. In this connection it should be remembered that "race defilement" as described above is a sex offense in Germany. Moreover, the religious persecutions against Catholic priests, monks and nuns have frequently taken the form of "sex" trials, as will later be shown. Accordingly it

²⁶For instance, Law of Nov. 24, 1933 "against dangerous habitual criminals," etc. RGB1 1933 I 995.

²⁷Decree of May 14, 1934, RGB1 I 383.

²⁸RGB1 1933 I 995. On this law, see Mannheim in *Journal of Criminal Law and Criminology* 26, 517-537 (1935).

²⁹Under Nazi administration, these terms will frequently include political offenders.

³⁰Articles by Mayr in *Blaetter fuer Gefaengniskunde* 67 (1936) pp. 402-408; Hildebrandt, *ibid.* pp. 409-417; Mayr in *Monatsschrift fuer Kriminalbiologie* 27 (1936), pp. 209-215.

is evident that the innocent as well as the guilty may live in fear of this "preventive measure."

b) *Schutzhaft* (protective custody) is no legal institution at all, but is just a name for imprisonment by the Gestapo. There are virtually no laws governing this subject, and no court of justice has anything to do with it. The activities of the Gestapo will be discussed later. It will be sufficient to say here that the Gestapo has the power to arrest, imprison or execute any individual without giving any explanation to anyone. Its actions are expressly exempted from judicial review.³¹ It is also authorized to imprison the accused who has been acquitted in criminal court or who has served his sentence.³² The words "protective custody" are based on the theory that the victim is a heinous offender who is to be protected against the wrath of the people, no matter whether such wrath exists or not. In other words, the ground for imprisonment is entirely fictitious. In reality the victim is either a political suspect or a potential witness from whom the secret police is trying to extort certain information.

VI. The Nazi government has thus created a peculiar duplicity of legal and extra-legal punishment. Under the existing laws, the various regular and special courts may try and sentence the innocent as well as the guilty under certain legal charges. However, this is not sufficient for a true regime of terror. Therefore there is another, independent system of punishments, operated by the Gestapo, which is completely exempt from law. Its actions are solely dictated by political expediency.

This duplicity of legal and illegal action is deeply rooted in the history of National Socialism. Long before Hitler came into power, his party had a double policy. Legally it took its place as an organized political party under the Weimar Republic, was represented in the Parliament, published newspapers and propaganda literature, etc. Illegally it used the Storm Troop and Special Guards armies for purposes of terror, planned the overthrow of the government by force, caused street riots and committed assassinations. After coming into power, this old duplicity was preserved in a system of both legal and illegal administration. Lastly this shows that Law as such is irrelevant for tyrants and is used by them merely as one of several tools of power.

Judicial Administration

Prior to 1933, the judicial administration in Germany was regulated by the Federal laws of 1877 and 1924.³³ Jurisdiction

³¹Decree of Feb. 10, 1936, *Preussische Gesetzsammlung* 1936, p. 21.

³²Decree of the Ministry of Justice of April 13, 1935 (not available); Ebenstein, pp. 74 ff. Loewenstein, *Hitler's Germany*, 1939, pp. 93-97.

³³*Gerichtsverfassungsgesetz* vom 27. Januar 1877, RHB1 1877, 41. Revised text RGB1 1924 I 299. This law is cited as "GVG."

in civil and criminal law suits belonged mostly to the several states (*Länder*), but the federal law prescribed general principles for judicial independence, for the organization and hierarchy of state courts and the distribution of business between higher and lower courts. The federal government (*Reich*) had only a few tribunals; most important among these was the Supreme Court (*Reichsgericht*) in Leipzig. This *Reichsgericht* was the highest tribunal of Germany. It decided all matters of federal law as a court of revision, i. e., upon errors in the interpretation of law by the state courts. The *Reichsgericht* also had original jurisdiction in all cases of treason, for impeachment of members of the federal government and in matters concerning litigation between different state governments or between state and federal government.

The judicial hierarchy in each state as well as in the *Reich* was centralized in a state (or federal) ministry of justice. Each ministry of justice was headed by a cabinet minister. All his subordinates were civil service men. In each state the ministry of justice was the highest authority for the organization and administration of courts. It controlled the appointment and retirement of judges, subject to federal and state law.³⁴ However, it had no right to interfere with judicial decisions, the latter being within the sphere of judicial independence.

The ministry of justice also appointed and controlled all public prosecutors, the latter being subjected to its orders in all matters. Likewise, most prisons in Germany were under the control of state ministries of justice, especially after 1918.

The judicial personnel in all states represented an ancient bureaucracy, famous for its efficiency and moral integrity. All judges and prosecuting attorneys received their appointments through a century-old civil service system. Every judicial officer was a university graduate, trained in the law, who had gone through a several years' apprenticeship in the civil service. Before receiving a judicial appointment, he had to pass several rigorous examinations, usually followed by several more years' service as a temporary judge (Assessor).

After receiving a permanent appointment, the individual judge was theoretically independent in all legal matters.³⁵ He was more or less obliged to follow the principles laid down by the Supreme Court in the interpretation of law, but he would not tolerate interference from the executive branch of government in any law suit. His tenure of office was for life, subject to retirement at a certain age. He could not be removed from office except for having committed a serious offense and only through the action

³⁴GVG, par. 2-11.

³⁵GVG Par. 1.—Weimar Constitution Art. 102.

of a special, independent tribunal (par. 68 GVG, Weimar Constitution Art. 104).

Nevertheless, judicial independence was limited in certain ways. If a judge belonged to an opposition party or was otherwise refractory, the Ministry of Justice could refuse to promote him to a higher rank or to grant his application for a transfer to a different city; he could thus be "frozen" in an insignificant position or in an undesirable location.

When Hitler came into power in 1933, one of his first objects was to break the independence of the judiciary. This was done by removing all anti-Nazi judges, abolishing all guarantees for the tenure of judicial offices, and changing the civil service system gradually into a system of political appointments.

The first step in this direction was the famous decree of April 7, 1933, ironically called the "Law for the Restoration of Civil Service."³⁶ This decree removed from office all judicial officers of Jewish or "Non-Aryan" extraction, all judicial officers who had been members of liberal or socialist parties or other democratic organizations, or all those who were likewise "politically unreliable." They were replaced by loyal National Socialists, and henceforth all judicial appointments required membership in the National Socialist Party or its affiliated organizations.³⁷ The Civil Service Law of 1937³⁸ required a personal oath of loyalty to Hitler and made all judicial officers removable for political causes.

The political control over the judiciary was strengthened by the federalization of all state governments in 1934; all courts became federal courts and subject to control from Berlin.³⁹

In the first years of Nazi government, the higher courts still showed a certain degree of independence; this was especially true in the famous Reichstag's fire trial in 1933⁴⁰ when the Supreme Court in Leipzig refused to convict certain Communist leaders for the alleged burning of the Reichstag building, the accused being obviously innocent.

In order to prevent similar occurrences in the future, the government removed all political offenses from the jurisdiction of the *Reichsgericht* and the regular courts, and created special tribunals of a Star Chamber type for treason and other political

³⁶RGB1 1933 I 175. At first an exception was made for Jewish and non-Aryan officials who had done combat duty in the first World War or been in office before August 1, 1914. This exception was abolished in 1937 and the "veterans" were removed from office.

³⁷Roper-Leiser, p. 57 ff., Ebenstein, p. 82 ff.

³⁸Law of January 27, 1937. RGB1 I 39.

³⁹Ebenstein, pp. 89 ff. Schuman, *The Nazi Dictatorship*. 2nd. ed. 1939, pp. 330-339.

⁴⁰Decrees of April 24 and June 12, 1934, RGB1 I 341, 345, 492, and April 18, 1936, RGB1 I 369.

crimes. Major cases were brought before the "People's Court" (*Volksgerichtshof*),⁴¹ others before "Special courts" (*Sondergerichte*).⁴² Only the most loyal representatives of the Nazi movement were appointed to these courts. There is no appeal against their sentences.

Even the *Reich's* Ministry of Justice was not given full power in matters of the judiciary. This central authority soon began to receive orders from the Propaganda Ministry in all matters concerning political trials.⁴³ Moreover, the Gestapo was permitted to interfere in all these cases. While a geographical centralization took place, there developed thus what may be called a functional decentralization. The latter was increased through the creation of military courts⁴⁴ and party tribunals,⁴⁵ each absorbing a certain quota of cases. As a result of these developments, the old judiciary was deprived of the last shred of independent power and was turned into a body of government agents, controlled by political authorities and functioning as an instrument of despotism.

⁴¹Decree of March 21, 1933, RGBI I 136.

⁴²Law of Feb. 16, 1934, RGBI I 91.

⁴³Roper-Leiser, pp. 29-37, 96 ff., 108 ff.

⁴⁴Decree of May 12, 1933, RGBI I 264.

⁴⁵Ebenstein, p. 60. Morstein-Marx, *Government in the Third Reich*, 2nd. ed. 1937, p. 81.