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NOTES ON THE GERMAN LEGAL AND PENAL SYSTEM

JAMES V. BENNETT

The author of this article, who is the Director of the U.S. Bureau of Prisons and Secretary of the Section of Criminal Law of the American Bar Association, received his A.B. degree from Brown and his LL.B. from George Washington. When the American Military Government took over administration of its territory in Germany, Mr. Bennett was placed in charge of the Prisons Branch. He describes the German prisons he saw immediately following VE day and comments upon Nazi concepts of Justice. He believes that Hitler was able to win complete control only after the courts had been stultified and the people lost all faith in the German judicial system. Mr. Bennett suggests development of a statement of judicial fundamentals which, if violated, would afford sufficient basis for intervention of the United Nations.

I had a rare opportunity a little over a year ago to visit Germany and observe at first hand its penal system and catch some glimpse of the impact of Nazi law on the German people. It was a privilege which ought to be accorded to as many people as possible because no one can see what went on in Germany without having a completely new perspective on the tasks we face in helping restore and maintain order and peace. The physical problems that Germany faces are obvious to everyone who spends even a few hours in that devastated country. It is a land of utter defeat, bewilderment, anxiety and fear. On every hand are grotesque paradoxes. The cities are bombed to a point where they are all but helpless and yet many of the rural areas and villages seem, superficially at least, to be almost untouched by the war. Square mile after square mile of such cities as Berlin, Nurnberg, Munich, Mannheim, Bremen and Stuttgart are merely tremendous masses of rubble. But the fields of Bavaria and Wurttemberg and Hesse are green and fruitful and life seems to be going on much as it probably did before the war. Bridges are out, railroads operate trains only occasionally, no telephones are available to civilians, and only recently has the postal service been reopened. Transportation has been demoralized but a few charcoal burning trucks and cars move precariously over the highways.

Industry, too, is at an almost complete standstill, only about 5 per cent of plants are now producing. The second most important industrial nation in the world is suspended in a sort of economic vacuum. This means great hardship not merely for the Germans but those dependent on her resources, her coal, her skill and her know-how. The people of Europe will have to wait a long time for clothing and shoes, for instance, because there is now no machinery with which these can be

manufactured. Practically all sewing machines, for example, in Europe were manufactured in Germany. Without sewing machines it is pretty difficult to supply a large population with the clothing they will need. The same is true of shoes. Not only are the Germans short of leather and hides, but, more importantly, they are short of the equipment with which to manufacture shoes. And it doesn't look as though they will get it very soon because most of the big shoe machinery cartels of Germany have been moved to Russia. Whether the Russians will ever be able to produce machinery to supply the market formerly supplied by the Germans is in the minds of many observers an open question.

Nazi Law and Penology

All of these things are there for him to read who runs, but to the lawyer and the penologist there are other significant trends which are of great interest. One cannot delve very far into the Nazi regime without noticing that the acts of Hitler and his party were committed under law. The Nazis recognized the necessity of law. Goebbels, for instance, said: "At the beginning of every revolution stands the deed, and when the new situation has been created it is the task of the lawyers to provide it with a substructure of law." The industrialists, the professors, the lawyers and the judges helped Hitler retain the tenuous hold he and his group obtained in 1923, first by financing his mass propaganda efforts and then providing him with the rationale and the law he needed. Hitler first made a deal with big business and high finance, and thus armed and equipped he was able to get the professors and the judges to give him the philosophical basis for his legal system.

When the people lost the protection of the courts and the written law, then they easily became tinder for his fire. Hitler accomplished this partially by direct methods of attack on the legal system and partially by his power to sway and influence the masses with economic nostrums and political panaceas.

It is not easy to describe the psychological basis for the so-called leadership principle since it is probably the outgrowth of a mass psychosis. All through history peoples and nations have succumbed at different times to national hypnosis, irrationality or psychosis. As Le Bon puts it:

"At bottom, then, it is ideas, and in consequence those who embody and propagate them that rule the world. Their triumph is assured when they are defended by the hallucinated and by enthusiasts. It is of slight importance whether they be true or false. * * * Of all the factors in the development of civilizations, illusions are perhaps the most powerful. It was an illusion that built up the pyramids, and covered Egypt for 5,000 years with colossal stone monuments. It was an illusion that, in the Middle Ages, raised our

gigantic cathedrals and induced the Western world to dispute the possession of a tomb with the East."

The Leadership Principle

But, however great the Nazi illusion was and however its spirit arose, the point is that the German people believed that the relatively small group of original Nazis were possessed of a sort of divine "communal spirit" which guided their lives and actions. These charter members of the Nazi Party were supposed to have a common heritage and supernatural solidarity derived from common hardships and sufferings during the first World War. As a result of this unity, this feeling of racial solidarity and the myth of the super man, it was not difficult to get the German people to accept the idea that the will, the spirit, the mystic power of the leader was supreme. Among other things it made the written constitution — the Weimar document — unnecessary. It was easy then to deprive the administration of justice of its independence. It became merely a vehicle for carrying into effect the will of the Fuehrer.

Purge of Courts

Hitler, however, didn't depend alone upon philosophical and psychological bases for being the lawgiver. He got the aging Von Hindenburg to sign a decree after the Reichstag fire in 1933 authorizing the Nazis to defend the nation against Communism even though this required setting aside the seven basic rights, similar in effect to our Bill of Rights, included in the Weimar constitution. Hitler aroused the fears of the people about Communism and the possibilities of a revolution to the point where they would accept nullification of the very measures they had established to protect themselves in such a crisis. Armed with this enabling act Hitler proceeded then and there to pass a large variety of laws all aimed at vesting more and more power in himself. He decreed that there should be no more parties. Legislative powers were to be lodged in the Reich cabinet. The freedom of the individual and the freedom of assembly and association, and the security of private property were abolished. Many *ex post facto* laws were passed and a completely new legal structure established. Virtually all criticism of the government was made punishable by long terms of imprisonment. Incidentally, the courts, which were gradually being purged by the Gestapo and Hitler's group, obediently decided that a defendant could not offer proof of the truth of his statements as a defense of his criticism of the government or any of its methods. It was under this law that the famous Pastor Niemoeller was tried but his efforts to prove the truth of his charges and the court's refusal to hear him caused

Hitler so much trouble that he finally had the case nonsuited, as we would say, and turned the Pastor over to the Gestapo, who very effectively locked him up.

During the days when these decrees, ostensibly for the protection of the Reich, were being issued, the use of the death penalty was enormously expanded and made to include such things as listening to foreign broadcasts, violating price regulations, defilement of the race through intermarriage of an Aryan with a Jew, as well as a large number of purely political offenses. It is important to remember that during the initial stages of the development of Nazism in 1933, 1934 and 1935 Hitler realized he could not get some of the older instrumentalities of government converted to his viewpoint. He was at first unsuccessful in getting the uniformed police, for instance, to carry out his dictates and so he increasingly used the Gestapo. Finally, he clothed the Gestapo with complete authority to do anything it wished in carrying out his will. He gave more and more power to the Nazi party organization from the top men around him to the individual block leaders and local party bosses.

Hitler had no faith in the German penal system. The prisons were run by a group of civil servants of long tradition and schooled in doing things in accordance with written law and regulations. When Hitler found that they were half-hearted about carrying out his measures he organized the concentration camps. Likewise with the courts. The German court system, as many of you know, was an ancient bureaucracy, so to speak, famous for its efficiency and moral integrity. The 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 several years of apprenticeship in the civil service, and the judges before receiving appointment had to pass a number of rigorous examinations, usually followed by several more years' service as a sort of intern or temporary judge. Hitler made one of his first objectives to break down the independence of the judiciary. This was done by abolishing all guarantees for the tenure of judicial office, changing the methods of appointment and removing or retiring the judges who were half-hearted in carrying out the Nazi policies.

As was to be expected, the higher courts stood out longer against the Nazi dictates than did the lower courts, but it was only a few years before they too were brought under control. But notwithstanding this complete emasculation of the independence of the German judicial system, Hitler was still reluctant to turn all cases over to the star chamber proceedings utilized by the Gestapo. He realized that his regime was bound

to fail unless he could continue to make the large mass of the people believe he was fair and just. He also made them believe he was trying to win for them the top-most place in the European world that was bound to follow the revolution, which he cunningly made the people think was in process. Perhaps, as a matter of fact, there was a sort of bloodless revolution in Europe caused by the social and economic forces growing out of a machine age which no one understood or could control. But, however that may be, Hitler felt that he would lose control unless he had at least the nominal support of the judiciary. Consequently, he tried to put as many cases as possible through the ordinary courts and make the written law apply.

Acts Found Illegal by Analogy

When he saw that he could not depend on the legal system that had functioned so long and so satisfactorily, he organized so-called "people's courts." A person could be tried in these special courts who did anything or said anything which was "contrary to the sound instinct of the people." Also he broadened the authority of these courts to punish acts which while not expressly prohibited could be said to be analogous to other illegal acts. In other words, it was possible to punish German citizens not only without having any written law prohibiting the act but without any precedent for finding the act illegal. To cap all this he claimed that it was proper to punish a person who might be contemplating an offense against the law or the Fuehrer. He claimed that if a person took the first step which might ultimately lead to an offense against a person or the State, he could be punished just as though he had completed all of the necessary steps. And so the whole structure of the Roman law, the Justinian and Mosaic codes and classical legal precedents which had played so important a part in German law and thinking were set aside.

The old penal system of defining individual crimes, misdemeanors, offenses and criminals was completely abolished and the judge was enabled, in effect, to create law to fill any gaps in the penal system that he thought desirable. It was small wonder that the people lost faith in the judicial system as the war progressed and as Hitler became more and more firmly entrenched, but they did not fear the prisons as they did the concentration camps.

It is important in this connection to distinguish between the concentration camps which were used for German citizens and those that were used for liquidating the Jews and the citizens of the conquered countries. We hear in this country mostly of the cruelties and barbarities of the concentration camps like Auschwitz, where more than six million innocent Poles, Czechs

and Russians were ruthlessly murdered. But there were also concentration camps like Dachau which were used for recalcitrant Germans, particularly of course, German Jews.

Prison Conditions

The German prisons, however, accepted only those Germans sentenced by the ordinary German courts. Robbers, sex offenders, bad check artists and a few German political offenders went to the civil prisons where they served out their time under a pretty rigorous regime. Soon after Hitler came into power he changed the prison regime by putting into effect several measures making it more rigorous. They inaugurated sterilization and castration procedures on a wide scale. Incidentally, they apparently believed this was a measure necessary to build up the myth of the super man. Long periods of solitary confinement were the regular order. The prisoners were forced to work 14 to 16 hours a day on pain of being sent to a concentration camp. German prisoners, incidentally, in keeping with the continental practice, stay continually in their cells except when working. There are no congregating dining rooms and each prisoner has his stew or his broth and black bread in his own room. They may read the Bible and occasionally some other carefully selected works, *Mein Kampf* for instance, and in good weather they are allowed to walk around the yard. The idea of group sports like football or volley ball or something of the kind shocks the Germans.

German prisons range from the medieval to the fairly modern. One of the oldest still in use in the American Zone is the institution at Kaisheim near Munich, which was built in 1100 A.D. It's an old monastic prison with a capacity for about 1700 to 2000 prisoners. Most of the prisoners are housed in single rooms with barred windows opening on a bleak yard. Despite the fact that it is surrounded by a wall, one familiar with prisons is impressed by the fact that it wouldn't be very hard for a bold man to crack it. But few ever attempt to escape, partially because they fear the consequences — almost certain death under the Nazis — and partially because of the difficulty of remaining at large any length of time since they would have no identification papers, no employment record, and no way of getting around the countless regulations and checks that surround every German citizen.

Some of the prisons are more modern — a few of them even having plumbing in each cell. But there is little of the modern about the program. Little is done to rehabilitate the men. There are few educational and training facilities. No parole system, no incentives or credits for good conduct, and no attention to the individual needs of the prisoner.

Just before the war ended there were about 100,000 German civil prisoners in the American Zone, which has an estimated population of about 15,000,000 people – roughly the size of New York State.

All during the war the Germans had a system of getting the prisoners out and into the Army. Usually they would organize the prisoners into special companies, regiments, or even battalions. They did not intermix them with the ordinary troops. Such units, of course, were given specially hazardous duties. As the war went on and manpower became short they released more and more prisoners and used them for bomb clearance squads and other types of work of an extremely hazardous character. By the time our armies reached the Rhine the Germans had driven most of their able-bodied prisoners out of jail. When our troops took over they found a goodly number of prisoners still incarcerated. These included those the Germans felt were untrustworthy or who were old or sick or who would not leave. In some cases our troops released the prisoners with little hesitancy and less ceremony whenever they captured a town where a prison was located. That was because they thought they were concentration camps and all the inmates were political prisoners. In other cases the Boards of Review required by the Military Government regulations were established. They screened the inmates of the prisons and released those who were held for political reasons, for atrociously long sentences, or under some of the Nazi laws that were abrogated when our Military Government people took over.

Preventive Detention and Criminal Biology

The Nazis had some interesting penal laws. For instance, a prisoner who was convicted during the war did not begin actual service until after the war was over. This was to preclude the possibility that a man would commit a crime in order to escape military duty. Also, the German prison wardens, most of whom had the power of judges, were permitted to hold a man in preventive detention after he had completed his sentence. And most of them were so held. Sometimes it was done after some hocus-pocus finding the prisoner was a confirmed or habitual offender and sometimes without going through this process.

The Germans were firm believers in eugenics, heredity and mental patterns. They made a lot of pseudo-scientific studies of a man based on the old theories of Lombroso about criminal characteristics. They took measurements of all the features of prisoners and if their biometric characteristics seemed to jibe with some other known criminal they were immediately earmarked as congenital offenders. You may be sure that when-

ever a prisoner's nose was a little longer than that of the ordinary Aryan type he was found to be a congenital criminal and held indefinitely in preventive detention. And so it went.

An interesting experiment of the Germans undertaken early in the Nazi regime was the establishment of a system known as "preventive detention." This was originally a sort of Baumes law to be invoked against habitual offenders by judges and prosecuting attorneys at the time the prisoner completed his original sentence. If the warden thought that an individual subject to preventive detention might still be dangerous all he had to do was to certify this fact to the court and the man could be held in custody for an indefinite time. Similarly, there was a system of protective custody which was a legal device enabling the Gestapo to arrange imprisonment or even to execute an individual who was held by the Gestapo to be dangerous to the public or to be undermining the will of the Fuehrer. 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, of course, whether such wrath exists or not. Usually the victim was a political suspect or a potential witness from whom the secret police were trying to extort information.

Denazification of Legal Concepts

All of these measures and laws are, of course, repugnant to us and we have extreme difficulty in understanding how they could have been accepted even by a docile people. But the fact is, I think, that the people were made to believe they were necessary if not absolutely fair. They were accepted, generally speaking, I believe, by the great mass of the German people. Now we are faced with the necessity of trying to denazify Germany and to make her a peace-loving nation. If we are to denazify Germany we must not only remove from public office those who hold to Nazi principles but we must find substitutes for the institutions which must be discarded. Not only must the Nazi philosophy be abolished but we must find something besides the Weimar republic as a substitute. Memories of the Weimar republic are chiefly of distrust. To re-introduce its methods or democratic methods by military force will, of course, eliminate their democratic momentum. We in America, whose genius for the most part lies in the technical world, must not, as we are inclined to do, overlook intangibles and philosophies and ideologies which are of the utmost importance in a country like Germany. Many of the principles of the Weimar republic in the fields of law, the judiciary and the prisons were unworkable in Germany not because they were basically unsound but because the German people were not ready for

them. They were too far ahead of German thinking. Germans had not been educated up to them. Consequently, they thought them soft and impractical and visionary.

We must not make the same mistake twice. We must find new concepts and ideas attractive to all decent German elements, but at the same time they must be practicable and accepted by the Germans as such. That is peculiarly the task of the lawyer and the jurist. In all of this process it must be remembered that the German people have been isolated from thinking people for years. For fifteen years there has been an intellectual black-out in Germany. Youth and the German people do not know what has been going on elsewhere in the world. No wonder, therefore, that they believe most of the propaganda they have heard. Can they be changed? I think so. Much progress has already been made, but more time and patience and firmness will be required. That means support of our occupational policies and a realization that for many years we must continue to guide and assist Germans and other peoples who are in danger of falling into the same abyss that engulfed the Germans. Incidentally, that means, it seems to me, that certain legal provisions might be drafted as a sort of international bill of rights which would make it impossible for a demagogue to secure national and international support for a legal system like that of the Nazis. If hereafter any nation attempts to establish a system of law that violates certain fundamental principles it will be a warning as compelling as the knowledge that a nation is making and storing atomic bombs. We, among others, failed to acknowledge, or at least did not acknowledge in time, the dangerous impact of Nazi law. Their laws were written in legal terms familiar to democratic courts. There was little interest in learning that Nazi legal terms frequently meant the opposite of their definition in democratic countries. Consequently, we were not able to appreciate and understand the degree to which Hitler was gaining control until it was too late. By having the United Nations, the World Court or some other international body constantly analyzing and studying the legal methods and concepts of other countries we can go far to avoid another world catastrophe and to maintain peace.
