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Major Stages of Criminal Law Reform in Germany

MAJOR STAGES OF CRIMINAL LAW REFORM IN GERMANY

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According to our programme, this session is to serve as a “general introduction” to our colloquium. Experience shows that assignments of this sort face two grave dangers: they are either confined to the trivial or they bite off more than they can chew. In order to avoid these pitfalls, I have chosen to present an historical review of the major stages of criminal law reform in Germany. Because Israel is also in the process of reforming its criminal law, it might be interesting for the Israeli participants to hear about the reform process in our country. In the course of my presentation I shall, of course, pay particular attention to those aspects of the law which will be dealt with during this conference.¹

I.

In a discussion of criminal law in Germany, at least one date, must be mentioned, 1532 (C.E.), the birthdate of the first unitary criminal law of Germany. This Code, the so-called *Constitutio Criminalis Carolina* (CCC), is also known as the Penal Code of Charles V who, at that time, was Emperor of Germany, King of Spain, and thus, also ruler of large territories in the newly discovered Americas. The code was important in that it served as a sort of default code in all those states of Germany that did not have codes of their own. On this basis, the CCC continued to exert influence in some parts of Germany until 1871.

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1 For more details and sources on which the following presentation is based, see Albin Eser, “A Century of Penal Legislation in Germany”, in A. Eser and J. Thormundsson (eds.), *Old Ways and New Needs in Criminal Legislation*, (Freiburg, 1989) 1-26, with updates also in Albin Eser, “Strafrechtsreform in Deutschland, mit Blick auf die polnischen Reformtendenzen”, in Albin Eser, G. Kaiser and E. Weigend (eds.), *Viertes deutsch-polnisches Kolloquium über Strafrecht und Kriminologie*, (Baden-Baden, 1991) 47-86.

It was in 1871 that a second unitary code for all of Germany was established. This code, however, was not a genuinely new product, but merely an adaptation of the penal code enacted by the North German Federation in 1870 which, in turn, was largely based on the Prussian Penal Code of 1851. The Prussian Code had been subject to the influence of both the French Code Pénal of 1810 and Feuerbach's enlightened Bavarian Penal Code of 1813. Hence, the resulting Imperial Code of 1871 was dominated by the ideas of the liberal "Rechtsstaat" (a state governed by rule of law) of the 19th century.

The code's fundamental conception of punishment was "general prevention" by way of "retribution" for the act committed; only scanty reference was made to "special prevention" aimed at the particular offender. Since the Imperial Penal Code brought a preceding development to conclusion rather than setting the stage for future developments, it was soon claimed that it had already been out of date at the time of its birth. Nevertheless, it proved stable enough in its basic structure to last until the 1970s, despite having undergone 70 more or less substantial amendments over the years. Finally, the entire Penal Code was newly codified, effective January, 1975. These reforms and amendments introduced profound changes in the special part though numerous provisions of the original special part still continue to be in force today.

II.

When looking back to the period shortly after the inauguration of the Imperial Code of 1871, we see that calls for reform had begun almost immediately. Franz von Liszt, in his famous Marburg Programme of 1882, advocated "special prevention" in the sense of either reforming or deterring offenders. However, it was not until the 26th German Lawyers Day in 1902, about 30 years later, that the first concrete steps were taken in this regard. One step was the preparation of a comprehensive comparative restatement of German and foreign criminal law. The restatement was published in 16 volumes and inspired the official draft penal codes of 1913 and 1919. These drafts were rather conservative in that they did not challenge the essential ideas of the old code. In 1922, however, Gustav Radbruch presented a draft with a fundamentally new approach. Radbruch, professor of criminal law, legal philosopher, social democratic politician and, most significantly, Minister of Justice at that time, possessed both the intellectual ability and the political energy to

introduce a truly modern conception. However, his draft broke too many traditional taboos (it proposed the abolition of capital punishment and advocated special treatment for so-called conscientious offenders) to be acceptable to the legislature of that time. By the time it finally reached parliament in 1927, his draft had lost its cutting edge. Furthermore, repeated dissolutions of the Reichstag prevented its final enactment. Hence, it may indeed be fair to say, as Jescheck once did, that criminal law reform in the Weimar Republic went down with the Republic itself.

However, the Weimar Republic's inability to bring about a total revision did not mean that it did not succeed in achieving essential and lasting improvements in at least some areas of the Penal Code. Reforms were instituted in areas such as the deregistering of served sentences (1920), the development of a special juvenile criminal law (1923) and the enactment of fines legislation aimed at suppressing short-term prison sentences (1921-1924). The primary goals of these reforms were special prevention and better treatment of offenders.

The development of the Penal Code under National Socialist rule was inconsistent: some constructive reform efforts were continued, but, for the most part, National Socialist criminal law embraced new and terrible methods. Although this totalitarian regime was eventually to depart more and more radically from the established safeguards of a "Rechtsstaat" governed by rule of law, it profited initially from preliminary work done during the Weimar Republic. This was the case, for example, in the introduction of the long-planned "dual-track system" which divided state-imposed sanctions into two categories: punishment, and non-punitive measures of security and rehabilitation. Other lasting innovations included the mitigation of punishment in cases of diminished capacity, the introduction of a special offence of total intoxication, and two additional developments in juvenile criminal law: the separation of the juvenile system of sanctions from the adult system and the modernization of juvenile justice in terms of special prevention. In general, however, the numerous changes in criminal law introduced by Nazi legislation were characterized by extreme severity in general deterrence, such as the uncurtailed expansion of capital punishment. Most of those alterations, including the measure regulating castration of dangerous sexual offenders, and the imposition of criminal liability by analogy, were abolished after the collapse of the Third Reich.

Remarkably, the Nazi regime was no more successful than was the Weimar Republic in effecting a comprehensive reform of the criminal code. Clearly, this was for reasons other than those that had previously

prevailed. Whereas the criminal law experts in the Weimar Republic were more progressive than were the Weimar politicians, for the Nazi rulers the draft criminal code of 1936 was not radical enough. Besides, the Nazis believed that the enactment of numerous, isolated provisions was more conducive to the achievement of their political goals than comprehensive recodification. A new code would have required them to exercise irksome self-restraint, and would have curtailed their freedom to act arbitrarily.

III.

It should come as no surprise that during the post-World War II era, the primary concern following the division of the German Empire into occupation zones and continuing throughout the early years of the Federal Republic of Germany, was to eliminate the worst excesses of the Nazi era and to carry out particularly urgent changes. Apart from the constitutional abolition of capital punishment, special mention must be made of probation for adult offenders. After an interruption of more than 15 years, work on a total reform of the criminal law was resumed in 1953. Once again reform began with a comprehensive survey of German and foreign criminal law. Starting in 1954, seven volumes of materials on criminal law reform were published. With this as a basis, the Federal Minister of Justice set up the "Grand Criminal Law Commission", composed of practitioners and politicians as well as jurists, which by 1959 had produced a number of different drafts. When the official Draft Penal Code of 1962 finally reached the Federal Assembly (Bundestag), its prospects of adoption were soon reduced to a minimum. However distinguished the draft of 1962 may have been for its comprehensive and precise formulations of the general requisites of criminal liability and for the precision with which the offences were defined — comparable in some ways to the meticulousness with which certain elements, such as intent, are defined in the new Israeli draft — it lacked a modern criminal policy conception, particularly with regard to its sanction system. Although it included provisions for an extensive system of rehabilitation and security, supposedly reflecting the requirements of special prevention, the draft of 1962 was essentially based on a narrow notion of punishment that demanded retribution for wrongfulness and culpability. Accordingly, the Draft retained penal servitude (*Zuchthaus*), felt to be particularly stigmatizing, and short

prison sentences, which, from a rehabilitative perspective, are plainly detrimental. Furthermore, probation was ruled out in cases in which an offender's culpability or general deterrence called for his imprisonment. In sum, the Grand Criminal Law Commission did not strive for fundamental change in criminal policy. Instead, it chose a more conservative approach, confining itself to filling gaps in the old criminal code, clearing up misinterpretations, and codifying established judge-made law. Thus, even members of the Grand Commission itself were forced to admit that their reform work did not live up to the demands of modern criminal policy and that criticism in this vein was not unfounded. Their work also seemed to have an increasingly paralyzing effect on the "Special Committee on Criminal Law Reform" which was set up by the Bundestag in the interim.

In this atmosphere of resignation, which might have developed anywhere, it was important to revive the spirit of reform. To that end, a private working group consisting of 14 German and Swiss criminal law scholars and criminologists took the initiative. In an uncompromising and courageously experimental spirit of reform, they produced an Alternative Draft Penal Code, whose general part was published for the first time in 1966. Other drafts, devoted to various areas of the special part soon followed. (If I may, I would like to mention that I had the privilege of being a member of this group of so-called "alternative professors" during the second round of drafts). Whereas the Alternative Draft tended towards self-imposed restraint regarding the general elements of the offence (the more doctrinal prerequisites for punishability), its primary concern was to adjust the sanction system to reflect the notion of rehabilitation and to restrict the criminal law to socially harmful conduct. Like the Official Draft Penal Code of 1962, the Alternative Draft adhered to the principle of culpability as well as to the dual-track-system of punishments and measures. However, culpability was no longer conceived of as the reason for punishment but simply rather as setting a limit to punishment. Within that limit, a penalty was to be meted out in accordance with the criteria of rehabilitation and deterrence. Similar thinking led to support for uniform imprisonment (by giving up the separation between "*Zuchthaus*" and "*Gefängnis*") and the abolition of short-term imprisonment (less than six months). The newly introduced "social therapy institution" is characteristic of the Alternative Draft's system of measures.

In addition to this professorial initiative, a complete breakthrough in the reform of our criminal law required yet another impetus: political

force. In this connection, two factors turned out to be useful for further reform. One was the support of the Free Democratic Party, the liberal party in parliament — numerically small but, at least at that time, strongly reform-oriented. It came out in favour of the Alternative Draft and adopted it as a formal (parliamentary) bill in the deliberations of the (parliamentary) “Special Committee on Criminal Law Reform”. The other factor was a result of the formation of a grand coalition between the Christian Democrats and the Social Democrats: Gustav Heinemann, who later took office as Federal President, became Minister of Justice. Through his efforts, criminal law reform received new backing. Deeply inspired by a humanism, in the light of which the deficiencies and injustices of the old criminal code must have seemed abhorrent, he made every effort, as did his Social Democratic successors in office, to see to it that at least a number of partial reforms were enacted.

IV.

This new strategy of “reform by installments” is another point, of a more procedural nature, that deserves attention. Departure from the German tradition of extreme comprehensiveness and systematization in codification meant that the German parliament was able to follow the English model of step-by-step legislation. This turned out to be a blessing for two reasons: first, because the hectic pace of modern parliamentary life does not leave parliamentarians with enough time and energy to contemplate comprehensive codification; and second, because smaller partial reforms are more readily adaptable to the course of social change. In this respect, the experience of criminal law reform in Germany may serve as an interesting lesson in the general history of legislation.

The stepwise approach to reform was apparent in the legislature’s response to the long called for decriminalization of certain criminal offences. In 1968, various petty crimes were downgraded to “Ordnungswidrigkeiten”, or mere regulatory offences.

The main elements of reform, however, are contained in the so-called Criminal Law Reform Acts, five of which have been passed so far. I shall discuss only the first two in more detail.

The First Criminal Law Reform Act dealt with the most pressing demands for reform. The most important of these were: the structuring of sanctions in a manner more favourable to rehabilitation (this was accomplished by introducing a uniform type of deprivation of liberty in

place of penal servitude and imprisonment); the curbing of short-term imprisonment; and the linking of safety measures to the principle of proportionality. This Reform Act went into force in 1969.

The Second Criminal Reform Act, effective the beginning of 1975, ushered in a complete reform of the general part of the Penal Code. This Reform Act instituted a considerable number of substantive changes. One of these, in the field of international criminal law, the reintroduction of the territoriality principle (§ 3 German Penal Code) has also been adopted in the new Israeli draft. Furthermore, mistake of law (§ 17) which had previously been recognized by the courts, was now defined by statute. "Justifying necessity" (§ 34), which had been recognized by the courts in cases of abortion as the so-called extra-statutory necessity, also received a statutory definition. Finally, "coercive necessity" (duress by a third party) was combined with (non-justifying) necessity through exposure to danger (duress by external circumstances) resulting in the so-called "excusing necessity" (§ 35).

Of much greater importance in this Act, however, were the innovations in the system of sanctions. For instance, the minimum term of imprisonment was raised to one month (§ 38). Consequently, prison sentences shorter than one month were replaced by fines. The fines system was (re-)modelled on the basis of the Scandinavian day-fine system (§ 40). Other innovations included the introduction of probationary warning (§§ 59-59c), and the replacement of police supervision by new methods of supervision of conduct (§§ 68-68g). The original, rather narrow provision governing forfeiture of the benefits acquired from wrongful acts was superceded by a more general forfeiture provision (§ 73), whose coverage was expanded in 1993 to include the proceeds of money laundering (§§ 43a, 73d). Last, but not least, the "social therapy institution" was introduced (§ 65), although its actual establishment was repeatedly postponed and finally almost completely abandoned.

V.

I shall devote my final remarks to the highlights of the ongoing reform of the special part, i.e., the various crime definitions.

German reforms in this area, such as the constitutional abolition of capital punishment (1949) and the extension of the scope of conditional release (1953) can be seen as trends in favour of humanization and resocialization. In this light, the reforms have, as early as 1952,

decriminalized petty criminal offences and redesignate them as “Ordnungswidrigkeiten”. Additional examples of decriminalization include the reform of the offences against morality and decency (1969). These offences are now more oriented towards the protection of sexual freedom; they have abandoned the notion of indecency and assigned more weight to the violation of women’s freedom. It is also worth mentioning the very difficult and controversial reform of the abortion law (1975, 1992, 1995), as well as the various reforms and counter-reforms of the so-called demonstration offences (1970, 1976, 1985, 1986).

The aforementioned decriminalization trend, however, has, to some degree, been counterbalanced by the introduction of new instances of criminalization, especially in the areas of economic crime (1976, 1986, 1992) and environmental protection (1980, 1994).

Finally, the German reunification in 1990 marked a turning point in the development of our criminal law. Reunification did not so much provide an impulse for reform as rather, it presented our criminal justice system with the challenge of coping with crimes committed on behalf of, or at least under the protection of, a totalitarian regime.²

2 For more details for these last developments, with updates to the reports cited *supra* in n. 1, cf. Albin Eser, “Strafrechtsentwicklung in Deutschland seit der politischen Wende von 1989”, in A. Eser and G. Kaiser (eds.), *Zweites deutsch-ungarisches Kolloquium über Strafrecht und Kriminologie*, (Baden-Baden, 1995) 13-37.