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Judicial and Extrajudicial Political Persecution under the National Socialist Dictatorship – Structures, Logic, and Developments

All states whose legal or constitutional foundations rest beyond the rule of law disregard human rights *(Unrechtsstaaten)*. They prevent freedom of speech in general and, all the more so, in the courtroom. No dictatorship can endure an independent judiciary that checks the state's use of force and, if necessary, blocks the state's use of force. Usually, political systems that are not founded on the rule of law deny and conceal this fact. However, in contrast to this, in the Third Reich, the abolition of rules based on constitutional law was undertaken openly and with religious zeal. Above all rights stood the National Socialist worldview, and what was regarded as a right was "what Aryan people considered a right, and what they rejected, was not a right" (Alfred Rosenberg).[1] Unlawful actions were, according to the legal doctrine of the day, "actions taken against the German National Socialist worldview".[2] National Socialist dogma of the identity between Führer and Volk based on blood *(blutmäßig)* and race *(artgemäß)* stated that the Führer spoke and acted in the name of the entire people, and this was infallible. Every criticism of those in charge therefore became treason, and every revealed abuse signified criticism of the Führer, and by extension, the people. According to this doctrine, independent jurisprudence was unthinkable because that would have separated the judge from the people qua one homogeneous body. Courts did not acquire their legitimacy by independent appointment and obliga-

1 Alfred Rosenberg, 'Lebensrecht, nicht Formalrecht', *Deutsches Recht: Zentralorgan des Bundes Nationalsozialistischer Deutscher Juristen*, 4/10 (1934), 233-4, 233.

2 Edmund Mezger, 'Die materielle Rechtswidrigkeit im kommenden Strafrecht', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 55 (1936), 1-17, 9.

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tion to uphold the law, but took their legitimacy by will of the Führer. According to a memorandum written by the party-run Academy for German Law, "overall management (of the justice system) rests in the hands of the Führer, while the judges, who are merely *Unterführer*, are granted a derived legitimacy from the Führer in individual cases of law."[3] Lawyers known to have been committed to democracy, to republican and liberal views, as well all those who were of "non-Aryan stock", were banned from the judiciary, universities, the civil service, and the Bar; the Law for the Restoration of the Professional Civil Service of April 7, 1933 *(Gesetz zur Wiederherstellung des Berufsbeamtentums)*[4] and the Law on Admission to the Profession of Attorney *(Gesetz über die Zulassung zur Rechtsanwaltschaft)*,[5] imposed an eerie uniformity on lawyers especially in regard to penal and criminal proceedings issues. The result of this "new criminal law" – 80,000 death sentences handed down by criminal courts, special courts, courts martial, the People's Court *(Volksgerichtshof)*, the Reich Military Court *(Reichskriegsgericht)*, and lastly, the drumhead courts martial *(fliegende Standgerichte)* – can all be attributed to the law schools, legislation, and jurisprudence, because all three acted in concert, and each did their bit in the commonplace miscarriage of justice in the criminal courts of the Third Reich.

Academic Law

Much of the responsibility for the decline of law in the Third Reich can be attributed to academic criminal law, though this was not necessarily tied to the education of young lawyers "in the new spirit". The graduating classes from 1933 to 1939, their training hardly finished, were needed as officers at the front, and only began to really practice their legal calling in the postwar period. Nazi jurisprudence functioned above all as propaganda. Since the liberal rule of law – state power constrained by a constitution, equality before the law, independent administration of justice, and inviolable areas of personal liberty – had already been largely liquidated during the "National Socialist Revolution", the law, especially academic criminal law, saw its purpose in extinguishing the remnants of liberal-constitutional ideas from German jurisprudence.

3 Roland Freisler, *Denkschrift des Zentralausschusses der Strafrechtsabteilung der Akademie für Deutsches Recht über die Grundzüge eines Allgemeinen Deutschen Strafrechts* (Berlin, 1934), 17.

4 Reichsgesetzblatt (further RGBl.) 1933 I, 175.

5 RGBl. 1933 I, 188.

Since those in power could not simply change every law even if they did actively participate in creating laws, it was important that the judiciary would develop a new attitude to the law, and to make it plain to those who remained in office after the purge of the judiciary, that judicial independence would "need to be placed within certain limitations in the interest of unified governance", and that it was now important "to be clear, the rule of an exclusive bond *(alleinige Bindung)* between the judge and the law, beginning today, will be stated somewhat differently than before",[6] because "we are looking for a bond that is more reliable, more alive, and deeper than the deceitful bonds of malleable letters in thousands of paragraphs."[7]

The ideal of the level-headed and impartially detached judge was suspect in the eyes of this legal school of thought, its "abstract normative thought" appearing to be an "expression of helplessness, deracination and effeminacy" (Wolfgang Siebert).[8] The new judge was to make his decisions "not by an analytical inspection of the various elements, but by holistically and concretely capturing the essence intuitively *(Wesensschau)*." Legal acumen and an impartial consideration of cases were rejected as mere "rational analyses" of the facts (Georg Dahm),[9] and replaced with an "emotionally value-aware *(emotional-wertfühlende)*, holistic approach" (Hans Welzel).[10] Simply put: a judge was to approach a case "with a healthy bias" and "render value judgements … in order to conform with the political leadership,"[11] because "in the day-to-day life of the legal world, real National Socialism will likely find itself in those instances where the ideas of the Führer are agreed to tacitly, but loyally observed."[12]

6 Erik Wolf, 'Das Rechtsideal des nationalsozialistischen Staates', *Archiv für Rechts- und Sozialphilosophie*, 28/3 (1934/35), 348-63, 349.

7 Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der Politischen Einheit* (Hamburg, 1933), 46.

8 Wolfgang Siebert, 'Vom Wesen des Rechtsmissbrauchs: Über die konkrete Gestalt der Rechte', in Georg Dahm, Ernst Rudolf Huber, Karl Larenz, Karl Michaelis, Friedrich Schaffstein, and Wolfgang Siebert (eds), *Grundfragen der neuen Rechtswissenschaft* (Berlin, 1935), 189-224, 209.

9 Georg Dahm, 'Der Methodenstreit in der heutigen Strafrechtswissenschaft', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 57 (1938), 225-94.

10 Hans Welzel, *Naturalismus und Wertphilosophie im Strafrecht: Untersuchungen über die ideologischen Grundlagen der Strafrechtswissenschaft* (Mannheim-Berlin-Leipzig, 1935), 73.

11 Georg Dahm, 'Das Ermessen des Richters im nationalsozialistischen Strafrecht', in Roland Freisler (ed), *Deutsches Strafrecht: Strafrecht, Strafrechtspolitik, Strafprozeß, Zeitschrift der Akademie für Deutsches Recht*, Neue Folge, vol. 1 (Berlin, 1934), 87-96, 90.

12 Wolf, *Das Rechtsideal des nationalsozialistischen Staates*, 348.

The tremendous effort infused into this ideological verbiage was meant to reduce the deficit in legitimacy that came about as a result of the abandonment of all of the legal standards of western civilization: freedom, human dignity, equality before the law as well as the equivalent guarantees and court procedures that were, as it was said, "contrary and repulsive to our own German way of looking at the world."[13] Since the age of Enlightenment, academic law had taken upon itself the task of delineating the boundaries between punishable and non-punishable acts. The law professors of the Third Reich strove, in contrast, to "abolish recognition of the law and to set aside the predictability of the law's effects and consequences."[14]

The polemic of National Socialist academic law aligned itself primarily against the state-constitutional foundations of criminal law, above all, against the principle of "no penalty without law" *(nulla poena sine lege)* and all of its implications: the prohibition of ex post facto laws *(Rückwirkungsverbot)*, the prohibition of analogy, the certainty of law as well as an impartial legal system's monopoly of punishment; to place a system of sanctions next to a system of criminal law undermines every basic right to justice. All of these components were soon destroyed in the Third Reich. The prohibition of ex post facto law was nullified first with the law that covered death by hanging and implementation of the death penalty ("Lex van der Lubbe"),[15] and more than twenty laws and edicts from the Nazi era retroactively implemented a punitive sentence.[16] In regard to "protective custody" (*Schutzhaft*), which the police alone could decide, a penal option was created that existed alongside criminal law. The prohibition of analogy, which had already been hollowed out by the "creative interpretations" propagated by academic law, was formally abrogated in June 1935. Thereafter, according to section two of the criminal code, it was declared that "those who have committed an act declared punishable by the law, or who have earned punishment according to the principles of the law and popular sentiment" are subject to punishment.[17]

13 Eberhart Finke, *Liberalismus im Strafverfahrensrecht* (Bonn, 1936), 18.

14 Heinrich Henkel, *Strafrichter und Gesetz im neuen Staat: Die geistigen Grundlagen* (Hamburg, 1934), 37.

15 From March 29, 1933, RGBl. 1933 I, 151.

16 Wolfgang Naucke, 'Die Aufhebung des strafrechtlichen Analogieverbots 1935', in Institut für Zeitgeschichte (ed), *NS-Recht in historischer Perspektive* (München, 1981), 71-108.

17 From June 28, 1935, RGBl. 1935 I, 839.

Legislation

Just as the assiduous effort to gain legitimacy for a system of injustice could hardly be called academic law, the same could be said of the laws that pertained to criminal justice. In the formal sense they were not even laws, but rather mere administrative decrees. They were also not really laws in substance, given that they often intentionally left the definition of what was punishable and non-punishable vague. In essence, they were "anti-normative norms" that only provided judges with approximate guidelines while also lending a degree of legitimacy to their decisions, even after the decisions long since ceased to agree with the wording of the "law". The act of legislating passed over to the government by the "Law to Remove the Distress of the People and the State", the so-called Enabling Act *(Ermächtigungsgesetz)* of March 24, 1933.[18] The emergency decree for the protection of the people and state, the so-called Reichstag Fire Decree *(Reichstagsbrandverordnung)*, issued on February 28, 1933,[19] not only suspended basic rights, but also included several criminal provisions. For these, a special court jurisdiction was created on March 21, which would only grow in importance in the years that followed. The twenty-six special courts *(Sondergerichte)* – one for every superior regional court district (*OLG-Bezirk*) – were usually manned by three career judges who were usually deputized by the regional courts. The procedures at these special courts corresponded largely with conservative desires for reform, especially in regard to reducing the rights of the accused and strengthening the state prosecutor. An order opening a criminal trial or pre-trial investigations were unheard of. Judges had to issue arrest warrants requested by the state prosecutor without examining the requests, the defence could not submit a motion to hear evidence, the range of acceptable evidence was set at the court's own discretion. The accused had no legal means to appeal court decisions which took immediate effect. The short trials that were made possible by these reforms fulfilled the express desire to "eliminate formalism" in criminal proceedings. By the beginning of the war, the special courts – their number having multiplied in the meantime – had become the standard authority on criminal proceedings. All of the penal provisions written after 1938 stipulated their jurisdiction. In the words of a department head in the ministry of justice, Wilhelm Crone, the "special court was the fastest and toughest tool for quickly obliterating criminal elements *(Gangsternaturen)* – temporarily or for good – from within the national community."[20]

18 RGBl. 1933 I, 141.

19 Ibid., 63.

20 Quoted in Werner Johe, *Die gleichgeschaltete Justiz: Organisation des Rechtswesens und Politisierung der Rechtssprechung 1933-1945* (Hamburg, 1967), 91.

The special courts were of even greater importance in occupied regions, especially in the east. With the provision for criminal justice against Poles and Jews in the territories incorporated into the Reich, passed on December 4, 1941,[21] the special courts received their very own legal foundation. The standard punishment was the death penalty, and it was to be imposed against Jews and Poles for basically every regulation that was violated. Only in the "case of minor offences" was the fitting punishment deemed to be a term in a "penal camp," that is, a concentration camp. Individual criminal offences were composed as sweeping clauses whereby Poles and Jews could also be punished when their actions "deserved punishment due to state necessities in the territories incorporated into the Reich." Criminal proceedings were shaped "in accordance with the dutiful discretion" of the judge and state prosecutor, who could deviate from all rules of procedure "in instances where this led to a swift and firm conclusion of the case."

The Courts

In the face of such vague laws, the courts may as well have ceased to exist, unless they used their new-found freedom at the expense of the accused. To get a better idea of how the criminal justice system – and not just the special courts – operated at the time, the case of the Polish youth Walerjan Wróbel, documented by Christoph U. Schminck-Gustavus, serves as a good example.[22]

After his family's farm had been razed to the ground and his parents and siblings went missing, the fifteen-year-old Walerjan Wróbel was picked up by the German police and reported, supposedly of his own free will, for a labour assignment in Germany. Set to work as a farm labourer in Bremen-Lesum, he suffered from hard work, ill-treatment, and isolation – initially, he did not know a single word of German – but above all, he suffered from homesickness. So he set out by foot on the nine-hundred-kilometre journey back home, but was soon picked up, cautioned, and returned to his place of work. There, the idea occurred to him to set fire to a barn, for which he would certainly be punished, and returned to Poland to serve his "sentence". Even for a fifteen-year-old, he was still very childish. The fire was quickly discovered before it could cause any damage. Walerjan also helped to put the fire out. Naturally, he was not returned to Poland, but rather, as stated in his

21 RGBl. 1941 I, 759, all quotes following in this paragraph.

22 Christoph U. Schminck-Gustavus, *Das Heimweh des Walerjan Wróbel: Ein Sondergerichtsverfahren 1941/42* (Berlin, 1986).

indictment, he was charged by the special court in Bremen under the decree aimed at enemies of the people *(Volksschädlingsverordnung)* together with the criminal justice provisions against Poles.

The sentence[23] shows how the judges juggled the different statutory provisions of the law, only to let them all fall to the wayside in the end: first of all, the purpose and inner logic of the two laws (that were ultimately used to sentence Wróbel) prevented them from being used in combination. The "enemies of the people" decree related to Germans who betrayed their own kind, not to "foreign races *(Fremdvölkische)*. In accordance with this decree, a "serious act of arson" was defined as setting on fire a house inhabited by people, and it carried the death sentence, but only if it "harmed the resilience *(Widerstandskraft)* of the German people." Wróbel was not a German citizen, but a Pole, and he attempted to burn down a barn, not a house, so he was only guilty of simple arson. However, because Wróbel assumed that he would be deported, the judge concluded that Wróbel had assumed the house would burn down as well. Had Wróbel actually wanted to burn the house down, he would have been guilty of attempting a serious act of arson, and since the barn was so far away from the house that it was unlikely to catch fire, his act of arson would have been further defined as an ineffectual attempt. However, in his sentence, it was simply stated that Wróbel had "deliberately attempted to burn down a building that served as a place where people lived." This is not what he had done, and the simple arson that he had carried out could not have undermined the German people's resilience. However, according to the judgment rendered on July 8, 1942, the resilience of the German people "was harmed even when it was in danger of being harmed." Though the anti-Polish criminal justice provision was not yet in effect at the time of the crime, and it was not endowed with retroactive force, according to the judge, the sentence did not stand in conflict with the law in this case. Finally, the law concerning charges brought against minors *(Jugendgerichtsgesetz)* forbade imposing the death sentence against youths (Wróbel had just turned sixteen at the time of the trial), but here too, the judge did not see Wróbel's age as a hindrance: "The defendant might in fact be a minor according to the law … but since he is Polish, this law is not in effect. The law concerning charges brought against minors was created with Germans in mind, with the intention of reforming them through education so as to transform them into decent members of society." This conclusion was new and had no basis in the law concerning charges brought against minors. Walerjan Wróbel was guillotined in Hamburg on August 25, 1942.

23 Schminck-Gustavus, *Walerjan Wróbel*, 73-5, all quotes following in this paragraph.

Any suggestion that this decision was based on five distortions of the law which were necessary for the judge to arrive at the death penalty would lie within the confines of legal standards dismissed by jurists at that time as "normative" or "Jewish-liberal." The laws that were cited were not written for the purpose of being interpreted restrictively and protecting those who had not been deliberately included under the law. Rather, the thrust of those laws was to kill people like Wróbel for the sake of deterrence, and in this case, laws were cited merely as a formality, to dress the procedure in a cloak of legitimacy.

The Judicial System and the Police

Following the Reichstag Fire Decree,[24] issued four weeks after Hitler became chancellor, which curtailed all of basic constitutional rights, lawyers quickly closed ranks behind the idea that questions of individual liberty were a matter to be decided by the police, "and that it should be decided in the form of protective custody, a procedure that is not tied to any legal premises or any time constraints and which does not have to be reviewed by a judge."[25] The police also reserved the right to incarcerate people in concentration camps who had been convicted in court and who had served their sentences, and to arrest people in courtrooms, upon their release by judges. Even in the Reichstag fire trial, which received significant attention from international observers, the four defendants who were acquitted were immediately led off to a concentration camp. As a result of these practices, judges saw their authority undermined, and the Ministry of Justice protested frequently, but not so much on grounds of principle, but rather on grounds of how these practices were carried out. The judiciary recognized the primacy of the police without demur. Already in May 1933, the Minister of Justice ordered that all prisoners arrested for political crimes were to be reported to the Gestapo four weeks before their release[26] so that the Gestapo could incarcerate them in a concentration camp. Subsequently, this requirement to report to the Gestapo was extended to include Jehovah's Witnesses who were to be re-

24 Verordnung des Reichspräsidenten zum Schutz von Volk und Staat from February 28, 1933, RGBl. 1933 I, 83.

25 Eduard Kern, 'Die Grenzen der richterlichen Unabhängigkeit', *Archiv für Rechts- und Sozialphilosophie*, 27/3 (April 1934), 309-18, 309.

26 Quoted in Dietmut Majer, *Fremdvölkische im Dritten Reich: Ein Beitrag zur nationalsozialistischen Rechtssetzung und Rechtspraxis in Verwaltung und Justiz unter besonderer Berücksichtigung der eingegliederten Ostgebiete und des Generalgouvernements* (Boppard am Rhein, 1981), 649.

leased, as well as those who had been sentenced under the Blood Protection Law *(Blutschutzgesetz)* and so-called "asocials".[27] At the outbreak of war, and no later than when Otto Thierack, president of the People's Court, became Minister of Justice, the judiciary also formally recognized the right of the police and the SS to "correct" sentences that they considered to be too mild "by recourse to special police treatment."[28] Application of the criminal justice provision against Poles in the judicial procedures of the special courts in occupied Poland soon revealed that the difference between a judiciary bound to justice and law when compared to the Nazi terror unleashed by the Gestapo and the Sicherheitsdienst (SD) of the SS was fast disappearing. There certainly was no rivalry, especially since both had the same agenda. At a meeting held on September 18, 1942 between the Ministry of Justice Thierack and the "Reichsführer-SS and head of the German police," Heinrich Himmler, the former surrendered all authority to the Reichsführer-SS on questions concerning criminal justice for Poles, Soviet Russians, Jews and Gypsies.[29] Thierack justified this move in a letter to Martin Bormann: "I take it as given that the judiciary can only contribute to a limited extent to wiping out members of these peoples. The judiciary has shown little reservation about meting out very tough sentences against such people, but this is not enough."[30]

Not long thereafter, with the Thirteenth decree of the Reich Citizenship Law, what was already long in practice was written into law: "Criminal offences committed by Jews will be handled by the police. Criminal justice provisions against Poles are no longer applicable to Jews as from December 12, 1941."[31]

Had the Third Reich lasted much longer, similarly-worded provisions would have been enacted for Poles, Russians, and other so-called "foreign races." The "law concerning the treatment of strangers to the community *(Gemeinschaftsfremder)*" that was written by the Interior Ministry was an all-encompassing law that dealt with asocials, those who were regarded as refusing to work *(Arbeitsverweigerer)*, petty criminals, and those who opposed the system, which granted power to hand out punishments not only to the judiciary but also to the police, and was near enactment.[32] However, it would

27 Majer, *Fremdvölkische*, 649.

28 Also see Ilse Staff, *Justiz im Dritten Reich*, second edition (Frankfurt am Main, 1978), 106-7, for a copy of the protocol of the meeting on September 18, 1942.

29 Bundesarchiv (BArch) R 3001/24064 Bl. 35a-37.

30 Archiv des Instituts für Zeitgeschichte, IfZ MA 1563/7 (NG 558).

31 Decree from July 1, 1943, RGBl. 1943 I, 372.

32 A draft of this law can be found in Sarah Schädler, *"Justizkrise"und "Justizreform" im Nationalsozialismus: Das Reichsjustizministerium unter Reichsjustizminister Thierack (1942-1945)* (Tübingen, 2009), 343-5.

not have made much of a difference, given that criminal justice or anything resembling criminal justice hardly existed anymore. During the twelve years that the Nazis were in power, criminal justice was replaced step by step with a ritual that included charges, a judge's bench, legal language, and the citing of case law, but in reality, only bore a slight resemblance to actual legal proceedings. This was meant to give the impression that everything was done legally; thus the outside world was fobbed off with a semblance of legitimacy, while those working the system could do so with a clear conscience.

"The murderer's knife was hidden under the robe of the judge."[33] This short phrase, delivered in 1947 against leading lawyers and judges of the Third Reich, was used by an American military court in Nuremberg in summing up the criminal justice system of the Third Reich.

Nonetheless, not a single judge from the People's Court, the regular courts *(ordentliche Gerichte)*, the special courts, war courts, or, not least, the drumhead courts martial that terrorized a war-weary population in the spring of 1945 was held accountable by the Federal Republic of Germany. And nearly fifty years had passed when, on November 16, 1995, the highest authority in criminal cases, the Federal Court of Justice of Germany *(Bundesgerichtshof)*, spoke of a "perversion of the legal order that was more difficult to imagine."[34] It also did not hesitate to identify as "blood judges" *(Blutrichter)* the criminal judges of the Third Reich, those who had presided over the regular courts, military justice, and the special courts. Why it took half a century to produce this verdict is another story.

33 Quoted in Zentraljustizamt für die Britische Zone (ed), *Das Nürnberger Juristenurteil* (Hamburg, 1948), 43.

34 *Neue Juristische Wochenschrift* (NJW) 1996, 857, with remarks by Otto Gritschneder, NJW 1996, 1239.