
KEYNOTE SPEECH

A Legal View of Iconoclasm. New Ideologies and Overturning Existing Legal Orders: Legal Iconoclasm in Germany

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Slightly metaphorically, this article deals with the subsequent waves of dramatically different ideologies and their impact on existing value-systems. The transition from one prevalent legal system to another, laden with central notions at variance with the previous one, destroys the old order to build up a new order. An example is taken from the modern history of Germany: starting from the Weimar Republic, through to the Third Reich with its Nazi-ideology, to the division into the democratic Federal Republic and the socialist-communist German Democratic Republic and their reunion in 1990. This article depicts the strategies put into place to accomplish and implement subsequent iconoclasm, and sketches successes and failures. Each iconoclasm finds its origins in the previous legal system and leaves its traces in the next one.

Legal Iconoclasm

Iconoclasm is of all times. Sometimes on religious grounds: among many other examples, the Calvinistic fury in the sixteenth century in a number of western European states. Sometimes for political reasons: for example, the Cultural Revolution initiated by Mao Ze Dong in 1966 to regain his prominent position in China (Dikötter, 2016). But how does one connect iconoclasm with law? It seems an oxymoron: law as a stable regulatory system in society on the one hand, and the furore of revolutionary movements overturning and destroying the societal status quo on the other. Still, there are instances in which an existing legal system is exposed

to a sudden and revolutionary new ideology. The traditional concepts prevailing in such a legal system are thrown overboard, new and extreme forms of interpretation of existing law change it beyond recognition, novel methodology creates layers of unheard statutes and decrees, *Rechtshonoratioren* (Max Weber) are replaced or brought into line, while existing structures in the judiciary, in the universities, in the legal professions are torn down, and make room for the influx of representatives of the new order. Such a sudden change may be called, possibly somewhat metaphorically, *legal iconoclasm*.

We propose here to illustrate such a legal iconoclasm with the dramatic developments in post-Weimar Germany, where the Nazi-ideology took over and overhauled the legal system by destroying existing structures. In legislation, codified law was confronted with a radical ideology, giving rise to novel ways of interpretation by judges and administrators. In the words of Bernd Rüthers (b. 1930), a courageous academic who wrote a groundbreaking book in 1968 on ‘The Unlimited Interpretation’:

It concerned the gap between the codified civil law system, rooted in liberal-individualistic values, and the new political ideas of national-socialism that required enforcement and bringing society into line, ideas that suddenly had become the all-encompassing ideology. (Rüthers 1968 [2017]: 5)

But not only civil law was involved: the new ideology concerned the entire legal system, turning the rule of law into the totalitarian rule of terror. Such revolutionary change involved not only the legislator, but also the universities, the judiciary, the lawyers, the police; in short, every participant in the creation, the study and administration of law, including the citizens – the population as well.

Over a century ago, in 1920, the Programme of the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP) set down 25 ominous demands. I mention here only a few here that are relevant for our topic.

Item 4 stated: ‘Only a person who belongs to the people can be a citizen. A person can only belong to the people if of German blood [. . .]. No Jew can therefore belong to the people.’

Item 5 added: ‘Non-citizens can only live as guests in Germany and are subject to aliens law.’

Item 19 declared: ‘We demand the replacement of Roman law, that serves the materialistic world order, by a German common law.’

And *Item 24* stated that the Party embraced a ‘positive Christianity’, which meant:

It fights the Jewish-materialistic spirit within and without us and is convinced that an enduring recovery for our people can only be achieved from within on the basis of the maxim: common good before self-interest. (*Gemeinnutz vor Eigennutz*)

Thirteen years later, with the *Machtübernahme* (‘takeover’), this Party Programme was put into its ugly practice.

One may wonder why, of all topics, Roman law was targeted. Its impact upon German law was already diminished with the introduction, in 1900, of the new civil code (BGB), which succeeded the fragmented and diverse laws and codes of the manifold not yet united German states, where Roman law served as a common fallback system for unsolved questions and provided a conceptual framework. The BGB itself, however, was geared upon many notions of Roman law. The attack upon Roman law can therefore be seen as a disguised charge against the BGB, imbued as it was with unwelcome Justinian contents. Roman law was individualistic, abstract and materialistic, had insufficiently absorbed northern European, German concepts (Stuckart 1935: 16) and collided with central themes of Nazi-ideology. Wilhelm Stuckart (1902–1953) considered Roman law as ‘*das Recht des Rassenmischmaschs des römischen Weltreichs*’ that was ‘*verjudet*’ and had integrated ‘*nur noch wenige nordrassischen Bestandteile*’. He was co-author of the authoritative manual to the *Blutschutzgesetz* and State Secretary in the Ministry of Internal Affairs. In the denazification process after the war, this *Schreibtischmörder* (‘Desk murderer’) was ranked in 1949 as just a *Mitläufer* (a ‘follower’) and could continue his career. One feature of Roman law was its division between public and private law, whereas Nazi doctrine aimed at a fusion of both domains. The slogan *Gemeinnutz vor Eigennutz* (‘The common good before the individual good’) represented this idea. All things human were both political and public, all citizens were thus deprived of any private life.

Throughout the Nazi rhetoric, terms such as ‘individualistic’, ‘materialistic’, ‘abstract’, are code words for: Jewish. A second reason for the attack upon Roman law was the fact that its study was conducted to a considerable degree by Jewish scholars: ‘*das Judentum hat sich der Romanistik bemächtigt*’ (Lange 1934: 1493 ff).

Iconoclastic Strategies

We will now attempt to describe the strategies involved in this iconoclastic event. They concern the following areas: purification of the law departments of the German universities and reform of the curriculum; selection procedures in the judiciary; and reform of the judicial organization, Nazi-legislation and application.

Reorganization of the Law Departments and the Curricula

A few months after the *Machtübernahme* (‘takeover’), on 7 April 1933, the Jewish and other ‘untrustworthy’ (‘democratic’) law professors were ‘dechaired’. This expulsion was formally settled in 1935 by an *Emeritierungsgesetz* (a massive retirement procedure): 120 out of a total of 378 law professors were sent packing. They were substituted through a *Reichs-Habilitationsordnung* by mostly young and fiery Nazi-adepts (Müller 2018: 89). Quite a number of the dismissed academics emigrated, many to the USA and the UK, some to the Netherlands. Behind this

purification and politicization of the universities, together with a reform of the law curriculum, stood the goal of creating a shortcut towards the ideological internalization of all participants in the business of law. The (in)famous Carl Schmitt (1888–1985), a brilliant mind whose works are still discussed today, decreed in 1934:

The whole German law of to-day shall be governed exclusively and without exception by the spirit of National Socialism. An interpretation shall be an interpretation in the sense of National Socialism. (Schmitt 1934: 713)

Three Prussian law faculties were selected by the ministry in 1935 as political ‘*Stosstruppen*’, legal ‘storm troops’ at the borders of the Reich: Kiel, Königsberg and Breslau. Later, after the occupation of France, Strasbourg University was added; the rector of this new *Frontuniversität* was Hans Dölle (1893–1980), again labelled a ‘*Mitläufer*’, whose career continued steeply upwards after the war. He was appointed Director of the blossoming Max Planck Institute for private international law and comparative law in Hamburg, and was even elected member of the Board of the whole Max Planck *Gesellschaft*.

I nearly ruined my budding career when, as a youngish assistant at the Amsterdam Centre for Foreign Law and Private International Law, I ventured to remark in a short book announcement, published in 1968, that the eminent professor Dölle had been ‘not wholly flawless’ during the Third Reich. This rather mild and timid comment provoked instant reactions by the board of the Max Planck Institute, demanding immediate public withdrawal of this slightly damaging qualification. I offered instead to corroborate, by giving selected quotations from Dölle’s writings, the basis for my appreciation. This caused an interesting exchange of views, recorded by me much later, in 2004, in a German *Festschrift* (Jessurun d’Oliveira 2004: 387–402). It still took some debate by the learned editors of the *Festschrift* whether or not to publish my contribution. In 1968, it was still dangerous to refer to the less savoury track record during the Third Reich of illustrious reinstated postwar professors. (Even in 1986, when I applied for a post at the European University Institute, a representative of the Hamburg Max Planck Institute, a member of the selection committee, took a negative view on my nomination.)

A reform of the law curriculum was undertaken in the same vein as the purification of the law departments. In January 1935 a Regulation was issued by the *Reichserziehungsministerium* in order to transform the curriculum into a vehicle for the Nazi ideology (Frassek 1994: 564–591). The groundwork for the regulation was laid at a conference of the BNSDJ (*Bund Nationalsozialistischer Deutscher Juristen*) in December 1934, attended by 170 professors, chaired by Carl Schmitt, and by *Reichsrechtsführer* and *Reichsminister* Hans Frank (1900–1946) and Roland Freisler (1893–1945), later the president of the infamous *Volksgerichte*. Hans Frank was appointed by Hitler in 1939 as ruler over the *General-Gouvernement Polen*, and sentenced to death by hanging at the Nuremberg trial (Sands 2016). Elements in the ‘Nazification’ of German law studies were, for example, the abolition of the distinction between public and private law, and the battle against the impact of the Roman *Pandektensystem* (‘plural system’) that had inspired

the civil law code of 1900. Instead of following, in the various courses, the order and sequence of the topics of the BGB, students would now study problem-oriented courses on Family, Family inheritance, Contract and Tort, Products and Money. Furthermore, they would be imbued with lectures on People and State, People and Race, Genealogy (*Sippenforschung*) and Farmers. Especially important lectures in indoctrination would be adorned by an asterisk in the announcements, coveted by many scholars.

This battle against the BGB was not easily won. The civil code still existed as such and had to be studied and applied, although in line with Nazi ideology. Total reform is not something that is achieved overnight. Conservative tendencies among teachers resisted the ideological overhaul. In this way, two rival systems lived as uneasy bed-fellows until the end of the Reich. The Academy for German Law, presided by Hans Frank, represented the more conservative forces, its clout diminished by his appointment as dictator in the occupied Polish territories, the *General-Gouvernement*, whereas the Kiel department of law, including those hardcore dignitaries who were placed in other universities, such as Strasbourg, sided with the Nazi-government. In 1939, a position paper, drafted by Karl Larenz (1903–1993), a young professor of civil law and jurisprudence in Kiel (successor to the ousted Jewish-Lutheran philosopher Edmund Husserl), took issue with the conservative draft curriculum developed by the Academy (Frassek 1994: 586). In his writings he endorsed Items 4 and 5 of the NSDAP-Program, and followed the racist Nazi ideology. After the war he was confronted with an interdiction to teach, but was reinstated in 1949 in Kiel and moved to Munich in 1960.

Illustrative of the cleft between the abstract-liberal ideology of the BGB and the living, concrete Nazi philosophy, is a passage in the Kiel document in which it is put forward that the traditional abstractions neglected essential distinctions and were therefore only ‘forms’.

In this way the concept of the person is stripped of essential distinctions such as race, nation, profession etc. It coincides with the concept of human beings at large and pretends, in this abstract generality, to be the foundation of the whole legal system.

The implication being that the ‘person’ of the BGB includes Jews, whereas the Nazi lore excludes them: ‘persons’ are Aryan Germans. (By the way: the ‘essential distinctions’ are an echo of the *Wesensschau* (‘phenomenal essence’), part of the phenomenological philosophy of Husserl, Larenz’s Jewish predecessor.) The objective behind the reform of the law faculties and their curriculum was to put into place a shortcut to educate fresh lawyers, brainwashed in the Nazi ideology, rather than to re-educate the existing *Rechtshonoratioren*.

Reforms of the Judiciary and the Professional Lawyers

The Nazis lost no time in purging the judiciary from ‘unreliable’ judges. On 1 April 1933, a law was issued concerning the reinstatement of the professional civil servant

system (*Gesetz zur Wiederherstellung des Berufsbeamtentum*) which allowed the dismissal of Jews, social democrats and other politically unreliable judges and civil servants. This resulted in the dismissal, in Prussia alone, of 643 Jewish judges. Only a limited number of Social Democrats had found their way into the very conservative judiciary, many were recruited from the *Deutschnationale Volkspartei*; after its dissolution, in 1933, a substantial number of its members joined the kindred NSDAP. At the *Reichsgericht* ('Court of Justice'), consisting of 122 judges, only one 'unreliable' Social Democrat was to be found, and he had to resign. With this law, the independence and impartiality of the judiciary had come to an end. The *Richterbund*, the association of judges, confirmed this sad turn by collectively joining, a month later, the *Nationalsozialistische Richterbund*. In a telegram to *Reichsjuristenführer* Hans Frank, the Board declared its submission to the leadership of Reichskanzler Adolf Hitler (Müller 2018: 49 ff). As they had followed, until 1918, the Emperor, they now were prepared to follow the Führer, in the one-party State. No love was lost with the Weimar Republic and its parliamentary, republican system.

Not only was the existing judicial organization subjected to the Nazi regime, but new, special courts were established to deal with oppositional forces. One of these was the bloodthirsty *Volksgesichtshof* ('People's Court'). By 1934, the revolutionary *Volksgesichtshof* was founded, with limited jurisdiction and consisting, next to professional judges, of a majority of Nazi laymen. In a few years the *Volksgesichtshof* saw a spectacular expansion, both in its jurisdiction for far more crimes than before, but also in numbers of personnel and status. It was furthermore upgraded to being an 'ordinary court'. Especially under the former State Secretary Freisler as president, a party member since 1923, the *Volksgesichtshof* exercised terroristic justice. According to statistics, between 1937 and mid-1944 the court dealt with more than 14,000 cases, and handed out more than 5000 death sentences. The revolutionary tribunal celebrated its finest hour in the mass trials against the persons involved in the failed attack on Hitler on 20 July 1944, and many others: in the last period of its existence, it was responsible for another 2000 death sentences (Müller 2018: 178 ff).

There were acquittals. But these did not mark the end of the prosecution and persecution of members of the public. In 1941, the ministry, in the person of State Secretary Professor Franz Schlegelberger (1876–1970), allowed the public prosecution to introduce extraordinary appeals against final judgements if it considered the punishment to be too moderate (for opponents) or too harsh (for Nazis). Even the SS were allowed the right to interfere with punishments thought to be too lenient. Furthermore, the Ministry of Justice had already, since 1934, acquired the right to stop any unwelcome proceedings.

It is important to notice that there existed in Nazi Germany two parallel systems of dealing with the opposition and other disagreeable parts of the population: the so-called judicial system and the discretionary powers of the various police organizations, among them the notorious *Gestapo*. These had a deadly weapon in their hands: the so-called *Schutzhaft* ('protective custody'). Since the state of emergency was

declared in 1933, after the *Reichstag* fire, abolishing all fundamental freedoms, any person could be subjected to 'protective confinement' as the measure was euphemistically called, without any access to any court. Persons acquitted by courts could be arrested on the spot and put in confinement for unlimited periods, i.e. in concentration camps. Even without interference by any court, the *Gestapo* could arrest anyone. *Schutzhaft* meant death in most cases. Victor Klemperer (1881–1960), the German Jewish-Protestant philologist, described these and many more buzzwords brilliantly in his *Lingua Tertii Imperii* (LTI) (Klemperer 1947). A schizoid system in which a sham legality within a court organization was upheld, next to unlimited powers granted to the *Gestapo* without any access to the courts, characterized the Nazi terror state.

Already in 1941 Ernst Fraenkel (1898–1975) had described this phenomenon as the dual state:

within the oppressive prerogative State with its arbitrariness and unfettered violence, there simultaneously still subsisted the normative state, trying to safeguard a legal order as before, and operating in the daily life of large parts of the population. Still, this normative State was dependent on the whims of the prerogative State, represented by the Führer and never sure of its boundaries. (Fraenkel 1941)

What about the lawyers? This profession, accessible and open as it was after its liberation in the Weimar era from its former status as 'officials of the State', consisted of a considerable number of Jews. In Berlin, 60% of its members were Jewish. Contrary to the judiciary, the majority of the lawyers had supported the Weimar republic. In April 1933, a *Rechtsanwaltsgesetz* ('Lawyers' Bill') allowed the dismissal of Jewish and other politically unreliable lawyers. This resulted, as a start, in the dismissal of 1500 lawyers, mostly Jewish. It continued with all sorts of discrimination and harassment by the organs of the lawyers' association. Nevertheless, there were still 1753 practising Jewish lawyers in 1938, about 10% of the total number. The 5th Regulation to the *Reichsbürgergesetz* ('Reich Citizens Act') of that same year dealt with them, and demoted a tiny number of them to 'consultants' who were allowed only Jewish clients.

The position of lawyers changed gradually. Together with the public prosecution and the judiciary, they were warriors at the forefront of the law. To serve the interests of individuals was not the first and foremost task of lawyers anymore; their limits were to be found in the duties towards the nation's community. This overriding concern could even lead to the incrimination by the lawyer of his own clients in criminal cases. In the end, lawyers were to be controlled in the same way as civil servants; after all, had they not taken an oath of loyalty to the Führer? To vote 'No' in the *Anschluss* referendum of Austria yielded a *Berufsverbot* ('disbarment') for the lawyer concerned. The same occurred for a lawyer who was sloppy in using the Nazi salute. Finally, the control of the lawyers was brought formally in line with that of civil servants: their own disciplinary councils were replaced by the civil servants' boards (Müller 2018: 77). The independent liberal profession had become an '*Organ der*

Rechtspflege', a concept that would linger on until today. Paragraph 1 of the 1959 *Bundesrechtsanwaltsordnung* states:

The lawyer is an independent organ of the administration of justice. Although now again formally independent, he/she is nevertheless obliged to keep the common good in mind, even sometimes contrary to the interests of his/her clients. A split full of tensions, as was demonstrated especially in the '*bleierne Zeit*'.

Civil servants, instructed to be politically neutral in the Weimar Republic underwent, at this time, the same ideological turn as teachers, lawyers and judges. They were considered to be charged with political functions, and to be loyal not only in applying the laws, but first and foremost to the Führer. After purification of Jews and unreliable persons, the new corps was admonished in the *Beamtengesetz* (1937), 'to dedicate themselves unreservedly for the National Socialist state and to be led fully in their behaviour by the fact that the NSDAP is, in unbreakable alliance with the nation, the bearer of the German idea of the state'. Together with the notion that there is no division between the private and the public sphere (fundamental rights, such as the right to a private life, were abolished), less than total devotion could lead to immediate dismissal. Neglects of duty included, for example, buying goods in Jewish shops, not owning a Swastika flag at home, or voting 'no' at the referendum on the Austrian *Anschluss*. Although the ballot was officially still free and secret, in reality this freedom found its natural limits in the special status of the civil servant in the Nazi state (Müller 2018: 108).

Ideological Transformation of the Substance of the Legal System

So far, we have shown the personal and organizational machinery put into place for performing the iconoclasm on the legal order of the Weimar Republic. It is now time to indicate a number of revolutionary changes in that legal system itself, brought about by the drastic ideological turn the Nazis introduced. The scope of this essay does not allow for more than a sketchy picture.

- (a) Most legal concepts are inspired by notions about values. One of these pervading notions or ideas is that of human dignity, or dignity as humans. There was a time when slaves were not labelled as human beings but as things; property. Nowadays, nearly all humans are included; that is, they are legal persons endowed with legal capacity.

In article 1 of the BGB, as the Nazis found it, the individual formal category of legal persons included all humans. Of course, there were exceptions and limitations in their legal capacity. Minors were not fully capable of performing transactions, and when foreign elements were involved, private international law provided guidelines and rules as to whether German law applied or not, or established a special regime for foreigners.

The Nazi program changed all this. It introduced a purportedly specific German idea of law, reducing legal capacity and restricting the status of 'legal

person' to those who belonged racially to the German nation. As the young Kiel professor and protagonist Karl Larenz put it: 'Decisive for the legal status of the individual is not anymore his being a human being, but his concrete existence as a member of the community' (Rüthers 1968 [2017]: 329). Race was the keyword. Whoever was not included in this racial notion of the German people's community, especially a Jewish person, is just a guest and is subjected to aliens' law, as Larenz echoed the 1920 NSDAP Program (Rüthers 1968 [2017]: 330). This racial restriction was not enacted into the BGB; it was the revolutionary external guiding principle to the construction, or rather the demolition of the BGB.

Far-reaching consequences were the result of this racialization of the civil code, of which the text remained unaltered. One of these effects concerned the right to marry. Already before the Nuremberg Laws were decreed in 1935, Registrars of Marriages refused to perform marriages between Jewish and non-Jewish persons, the so-called *Mischehen* ('Mixed marriages'). Although this impediment was not to be found in the civil code, it was nevertheless clear from one of the most central principles of the new German State, that of protecting the purity of the German nation, that such mixed marriages were thoroughly immoral. To invoke the letter of the law was 'a typical example of Jewish-liberal ideas about law and morality' (Müller 2018: 118). The *Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre* decreed in 1935: 'Marriages between Jews and citizens of German or cognate blood are prohibited. Marriages concluded in spite of this prohibition are void, even if concluded abroad in order to elude this Act.'

Interestingly, the question arose whether such marriages, concluded before 1933, could be annulled on the initiative of the *Staatsanwalt* ('District Attorney') or of one of the parties. Even in 1936, the *Reichsgericht* denied the distinction between marriages by partners of the same race and *Mischehen* in this respect (Rüthers 1968 [2017]: 403): '*Es gilt auch heute nicht zweierlei Recht für Ehen zwischen rassegleichen und für Mischehen und erst recht nicht für den deutschblütigen Partner einer Mischehe und für den jüdischen.*' But, in the same year, marriage was already defined by the *Reichsgericht* as: the 'fundamental cell of the nation's life' and therefore open to restrictions and barriers. The courts came up with a ground for annulment mentioned in the BGB: error concerning personal qualities of the partner. Was Jewishness such a personal quality? Several courts dared to confirm this. The difficulty that such an error could, according to the civil code, only be invoked for six months after the discovery of the mistake, was easily overcome. Awareness of the essential quality of race was supposed to exist as from January 1933, and in this way the short six-month period was extended for quite a number of cases.

Eventually the BGB was altered in 1938 by the new Marriage Act: the courts now landed on the firm ground of positive law. This sequence shows the doubts of the regime about the limits of interpretation: *faute de mieux* the courts resorted to a farfetched and bizarre stretching of the concept of personal quality – previously used for errors about the sex or too close family ties – and the ensuing uneasiness and bad conscience resulted in alleviating legislation.

(My parents married in Germany in September 1932, just a few months before the *Machtübernahme*. It was also a *mariage mixte* in the sense of a union between persons of different nationalities. In those days the (German) wife was automatically bestowed with the husband's (Dutch) nationality, losing her native nationality. Until the end of the Third Reich, the Nazi regime oscillated about the fate of mixed marriages: punishing the Jew, or showing benevolence towards the 'Arian' partner. The latter view prevailed.)

In countries other than Germany, a problem of private international law arose: how to handle the German prohibition when a German national was involved? The Hague Convention 1902 (*Convention pour régler les conflits de lois en matière de mariage*) proved a complicating factor. It allowed only religious prohibitions not racial ones (Wiarda 1975: 389–408).

- (b) A second reconceptualization concerns the institution of contract. The autonomy of the parties to agree to enter into a contract – a tenet of the millennia old liberal-individualistic view of the power of persons – was not acceptable to the ideology of the Nazis: due to the vanishing distinction between public and private law, partners to a contract were at the same time servants to the nation and the state, participants in a community, subjected to the maxim of *Gemeinnutz vor Eigennutz* ('The common good before the individual good'). The inroads for this drastic change were formed by what used to be exceptions to the freedom of contract: transactions were void if contrary to public policy (par. 138 BGB) or contrary to the duty of performing according to good faith and customs (par. 242 BGB). Instead of exceptions, these restrictions were now inflated as general elements integrated into the concept of contract itself. In this way contracts had to fit into what was seen as the general interest, however defined. Through these *Generalklauseln*, contracts could be rescinded or altered to fit ideas about their use for the community. This path was paved by the measures and court cases concerning the hyperinflation in 1922–1923 where contracts were modified in order to mitigate the effects of the crash.
- (c) Criminal law was subjected to the Nazi doctrine as well. Especially in Kiel, young scholars then in their early thirties, such as Georg Dahm (1904–1963) and Friedrich Schaffstein (1905–2001), were keen to develop a specific Nazi criminal law system (Ambos 2019: 87). In 1933, this pair wrote a 50-page blueprint (Dahm and Schaffstein 1933), followed up by a host of implementing papers. Since the time of the enlightenment, the *adagium nullum crimen, nulla poena sine lege praevia* ('no crime, no punishment without previous legislation') forms one of the central tenets of modern criminal justice. The maxim originated in the works of Anselm von Feuerbach (1775–1833) and had taken roots in many constitutions and penal codes. The principle, for instance, is enshrined in article 7 of the European Convention on Human Rights. See as an example of its application: EcrHR 14 January 2020 (Chodorkovsky and Lebedev vs Russia (2)):

The offence of which the applicants had been charged had therefore been extensively and unforeseeably construed to their detriment. They could not have foreseen that their entering into the oil sale transaction in question could have constituted misappropriation or embezzlement [...] The Court concluded that there had been a breach of art. 7.

A specific behaviour has to be described in the law in force at the time of the commission of the act with a concomitant level of punishment. One of the elements contained in this principle is the prohibition of retroactivity. If one is unaware of the criminality of an act, because at the time of the deed it has not yet found its way to the criminal code, it is not fair to put a person into the dock on the basis of a later idea of the legislator or judiciary.

Implied in this prohibition of retroactivity is the prohibition of analogous interpretation of existing crimes. If one stretches the construction of the criminal code too far, one introduces a matter-of-fact retroactive criminal law. Teleological construction sometimes does the same trick. Teleological

construction, looking at the aims of a provision, may widen the scope of the words of the criminal code, and analogy may play a role in this type of interpretation as well.

Nevertheless, courts are normally very reluctant to resort to these types of construction in criminal law because of the danger of unforeseeability (*lex praevia*). Verdicts are supposed to tell what the law meant from its beginning, so formally there is no retroactivity; nevertheless, persons are subjected to a wider construction of the law than they could expect and that did not exist at the time of the commission of the act.

This central tenet of the German criminal code (par. 2) (1871), considered by the NSDAP to be the '*Magna Charta des Verbrechenrechts*', was stricken down in 1935 and replaced by a new provision:

Will be punished the person who commits an act that the Criminal Code deems punishable, or that deserves punishment according to the basic notions of a Criminal Statute and according to the healthy ideas of the people. If no provision directly applicable to the act, then the act will be punished according to that law of which the basic notion is best suited to deal with it.

Clearly the old maxim was now replaced by a new motto: *nullum crimen sine poena* (Schmitt 1934). In other words: clubs are trumps. Any act or omission was now liable to be considered as criminal and the whole population was, in fact, outlawed.

This unfettering development was enhanced by another spectacular shift. Previously, the liberal idea prevailed that it was the commitment of an act that was punishable; the new ideology focused however on the will of the accused (*Tatstrafrecht vs. Willensstrafrecht*). According to Roland Freisler 'not the act but the will will be punished'. This change of perspective did not only lead to the development of a typology of offenders, but also to intrusive thought control and punishment not of criminal acts, but of behaviour and lifestyle at large: *Lebensführungsschuld*. The slightest preparation for an offence was already grounds for heavy sanctions. Sheer existence became punishable at random. People were *zoia politica* to the extreme, the private sphere was abolished.

Finally, the structure of the sources of law was drastically altered. Parliament had been done away with, and the primary source had become the *gesundes Volksempfinden* ('healthy public mood') in a one-party state, where the Führer was the ultimate and totalitarian diviner of this sentiment. His decrees *ad hoc* were law, in consonance with the hypothetical will of the German people's community. The *trias politica* was dissolved and replaced by a party-monocracy with a totalitarian leader.

The outcome of all these elements was capricious arbitrariness, in other words: non-law, or simply injustice. Although the previous legal order, with the BGB and the Penal Code was not formally replaced *in toto* by the new system, it was unrecognizably restructured in the light of the Nazi ideology, which in itself was in many respects undefinable and contradictory (Lepsius 2003: 19–410). The icon of the previous liberal-individualistic structure of the *Rechtsstaat* was shattered and replaced by a totalitarian state structure where the purified German *Volk* was supposed to speak through the mouth of a Pythian Führer and where fundamental rights were outlawed.

Sediments

Just as iconoclastic furies have their take-off run, they have their extended landings as well: *ex nihilo nihil*. An all-encompassing *Umwertung aller Werte* ('Revaluation of all values'), even lasting only a couple of years, does not evaporate in a few days. Full purification and reinstatement of previous organizations and institutions, ousting of tainted persons and recruitment of personnel above reproach, cannot be achieved: too-large sections of the population had been involved to various degrees. It is simply not possible to dismiss or incarcerate a considerable part of the population without disrupting the whole society. It was therefore to be expected that at least some features of the iconoclastic Nazi-fury would remain for an extended period.

At the collapse of the Third Reich in 1945, defeated Germany was confronted with control by the victorious Allies in four zones. Eventually two States arose out of the ashes: the *Bundesrepublik* and the *GDR*. Their territories being defined by the advances of the respective armies and ensuing negotiations. It is challenging to find out in which different ways the dark legacy continued its influence over the two successor states. Both were dominated by the forces of the occupation: the *Ostzone* developed into the *GDR* and the rest of the territory was construed as the *FRG*; Berlin was split up and governed by the four victorious powers.

Federal Republic of Germany (FRG)

The FRG came only gradually into being. In 1949, a fundamental document, drafted by a Parliamentary Council consisting of a considerable number of members who had resisted or fled Nazism, was ratified by the occupying powers. This *Grundgesetz* ('Constitutional document') although not dictated by the Western Allies, turned out to be a strong reaction against the previous periods (Möllers 2019). It represented a determined return to a democratic rule of law: article 20:

Die BRD ist ein demokratischer und sozialer Rechtsstaat.

It is, moreover, a republican state (article 28). No return to any *Kaiserreich* or *Führerreich*. Interestingly, although the document contains rules on how to change it (and many articles have indeed been changed, for better or worse in the 70 years of its existence), some rules and principles were not allowed to be varied or stricken, including of course the provision that prohibits these changes. This prohibition concerns the fundamental rights clauses and the structure of the FRG as based on the sovereignty of the people (article 79(3) GG). Ideologically important is article 1 GG in which the abhorrence of the previous period is demonstrated:

Human dignity is inviolable. To honour and protect this dignity is the commitment of all state powers.

A statement sounding as impressive as it is difficult to put into daily practice. Still, individual persons all have become humans again, with concomitant human rights.

A new institution, the *Bundesverfassungsgericht* (Federal Constitutional Court), with a large jurisdiction, is erected to watch over the primacy of the constitutional guarantees: all state organs are bound to execute their judicial, administrative and legislative tasks in conformity with the norms of the *Grundgesetz* (article 73ff GG). The surviving *Bundesgericht* had lost much of its authority, due to its leaning backwards to Nazism; the fresh *Bundesverfassungsgericht* could be equipped with younger and uninfected judges and plays an important part in building a democratic post-Nazi Germany. The appointment of its members is effected by political organs – *Bundestag* and *Bundesrat* – but requires a qualified majority of two-thirds of the votes, thereby ensuring a strong non-partisan mandate by these representative organs.

Interestingly, the final article of the *Grundgesetz* tells us that it loses its binding force on the day that a constitution enters into force ‘that has been decided by the German people in free decision’ (article 146 GG). It shows that the *Grundgesetz* was initially considered as a provisional document, to be followed by a fully-fledged constitution, supported by the whole German nation, including the population of the GDR. As the *Wiedervereinigung* chose another route – accession by referendum of the individual *Länder* of the GDR to the *Grundgesetz* – this article has become moot, or it could eventually be used as basis to merge Germany in a federal European Union.

The ambitions of the *Grundgesetz* were high. But the task to put them into practice was, certainly, in the early years, far from easy. The civil service, the judiciary, the universities were still overwhelmingly staffed by tainted officials. Thorough and comprehensive purification would lead to a standstill of public life as Nazism had penetrated the whole society. Therefore, many officials, however imbued by the lore of the Third Reich, kept their positions, quite a number after superficial de-Nazification procedures (*Persilscheine*).

One example concerned the handling of Nazi crimes in the FRG. In the second half of the 1960s, an Act was introduced to streamline the numerous laws on misdemeanours. In an auxiliary Act, a former Nazi, a senior bureaucrat in the Ministry of Justice, Eduard Dreher (1907–1996), changed this new provision of the Criminal Code, with the effect that accomplices to serious crimes were not only no longer dependent on the personal situation and motives of the prime accused, but that their deeds were obligatorily to be treated on the same footing as attempts. This implied that prosecution for their acts/attempts was barred as from, ultimately, May 1960. This sneaky provision, representing a huge amnesty for Nazi criminals, concocted by a high official and former (?) Nazi, was upheld by the *Bundesgerichtshof* (‘Federal Court of Justice’) (BGH 20 May 1969, 55 Str. 658/68). Parliament could have stopped this ‘cold amnesty’, but refrained from doing so, presumably in tune with the general inclination at the time to keep silent about the Nazi-past. Thus, a number of prosecutions, already under way, against members of the *Reichssicherheitshauptamt* (‘Reich Main Security Office’) disappeared into thin air (Schirach 2011).

Many Nazis – small and big fish – thus escaped trial and received their *Persilschein* without much ado, and after the beginning of the Cold War interest in wholesale cleansing waned. This stagnant state of affairs created in the 1970s the terrorist actions of the *Rote Armee Fraktion* (RAF), directed against not only capitalism, but also against the persistent influence and presence of Nazis in high places. An example is Kurt Georg Kiesinger (1904–1988), former NSDAP member (1933–1945), who, ‘persilized’ after the war, even rose to the office of Federal Chancellor (1966–1969). The GDR supported the actions of the RAF, as the socialist state considered the FRG as a capitalist consumer society still riddled with Nazis.

It took a second generation of university teachers before criticism of the survival or reinstatement of Nazis in academia could be vented: those whose ambitions and careers immediately after the war depended on the benevolence of these survivors kept silent or even defended their bosses and predecessors. The second generation, however, felt free to distance itself from the tainted shareholders of the past and could voice its criticism in a more detached way; one example being Bernd Rütters’ (1968 [2017]) previously mentioned *Habilitationsschrift*.

Remnants of Nazi-lore also survived the regime change. The NPD, born in 1964, demonstrated an essential similarity with National Socialism, according to the *Bundesverfassungsgericht* in 2017. The party reinstated the idea of the homogeneous national society (*Volksgemeinschaft*) as an ethnic/racist concept, excluding Jews, Muslims, homosexuals, etc. Given the 5% threshold, the party was never represented in the *Bundestag*, but grew after reunification in the eastern part of the FRG. Although violating the *Grundgesetz* the NPD was not prohibited and dissolved because, according to the *Bundesverfassungsgericht*, given its small electorate, it could not possibly achieve the realization of its program (BVerfG 17 January 2017, BvB 1/13).

German Democratic Republic

The establishment of the FRG was followed by that of the GDR. Its first constitution, in 1949, was not imitating the model of the other states of the *Ostblock*, derived from the Stalinist Constitution of the USSR (1936), but fell back, with some variations, on the bourgeois Constitution of the Weimar Republic. It was conceived as a constitution for both Germanies, and had therefore to be palatable for the FRG as well. It proved to stick in its own throat. The GDR considered itself the true successor of the previous Reich, and the FRG as an impostor state that was destined to be reunited with the real and legitimate Germany.

This constitution was unreal on both sides, and had no practical effect whatsoever – neither in persuading the FRG to join the GDR, nor in reflecting the development of the GDR into a one-party state with the Central Committee of the *Sozialistische Einheitspartei Deutschlands* (SED) as mouthpiece of the dictatorship of the proletariat. There was not much difference between the Third Reich in this respect, with the Führer as ultimate interpreter of the *vox populi*. The 1949 Constitution soon appeared to be irrelevant. No constitutional review existed and administrative courts

were abolished. Human rights provisions were disaffected. As in Nazi Germany, persons were defined by their being political persons, part of the dictatorship of the people. How could they come up against their own decisions? Persons were merely part and organs of the State; private life was suspicious.

A comparison between Nazi Germany and the GDR is both legitimate and informative. As German law historian Michael Stolleis (b. 1941) puts it: 'The comparison, as a matter of course allowed and particularly fruitful, historiographically, may well lead to the discovery of structural similarities between authoritarian systems with "closed ideologies" and their view on the instrumentality of the law' (Stolleis 2009: 39). Law did not exist in the GDR as an instrument to curtail the power of the State, and under which the state had subordinated itself, but was considered as an excellent tool to enforce the ideas of the State, i.e. the Central Committee of the SED. This view implied a bipolar system: on the one hand, the norm that every state organ and person was bound by positive law; on the other, that the Central Committee stood above the law and could decree as it saw fit. Like the Nazi State, the GDR was a *Doppelstaat* (Fraenkel 1941), a dual State: the rule of law was systematically put aside or contradicted by measures and new directives emanating from the sovereignty of the people, exercised by the Central Committee of the SED. In this way, the State, the Party, was *legibus solutus*.

Divination of the State's will was tricky and dangerous, especially after the Babelsberg Conference of early April 1958. There, the Stalinist leader Walter Ulbricht (1893–1973) curbed all liberal tendencies and decreed that deviations from the party line – Revisionism and Dogmatism – would not be tolerated anymore. No more criticism was allowed in Universities, in courtrooms, or within the bureaucracy. Citizens could have no voice as they were held to have given their voice to the Central Committee. Ulbricht's keynote speech had a chilling effect throughout the country and the legal system, especially in doing away with administrative law and administrative courts. Citizens were left with the lame right to bring complaints (Brunner 1975: 104). This absence of legal protection against the state lasted for 20 years. The concept of a socialist rule of law was primarily used as a weapon against the bourgeois rule of law in the FRG (Sieveking 1975: 127).

Generally, the room for legal scholarship was small, especially in the postwar years. Some universities in the eastern parts of Germany disappeared *sur place* into foreign countries: Königsberg (Kaliningrad), Posen (Poznan) and Breslau (Wroclaw). Only Berlin, Halle, Jena and Leipzig survived. As for their staff, the '*Brechung des Bildungsmonopols der Bourgeoisie*' and dismissal of all '*faschistische und militaristische Elemente*' led, without any legal constraints, to the disappearance of nearly all pre-1945 personnel, already heavily mutilated in the Third Reich. Reliable Party-members filled the vacancies. New curricula were developed, students were disciplined, controlled and threatened with expulsion when not inclined to serve the cause of the proletariat of workers and farmers.

Dialectic materialism and Historical materialism were now essential elements in the education and brainwashing of new cohorts of lawyers. Of course, the division of powers had evaporated: all law was politicized. Universities were not autonomous in

their teaching and research but were disciplined by the supervision and censorship of the state. Publications needed the imprimatur of the Ministry (Stolleis 2009: 63).

The administration was served by a new organization, the *Deutsche Akademie für Staats-und Rechtswissenschaft 'Walter Ulbricht'* in Potsdam-Babelsberg. There, the 'civil' service, more than decimated after the collapse of the Third Reich, had to be built up and educated in the Communist lore. The judiciary learned its trade there as well, and was taught to be dependent and instrumental. Hilde Benjamin (1902–1989) – sister-in-law of the famous intellectual Walter Benjamin (1892–1940) – acted in several show trials as President of the Court (*'die Rote Freisler'*), and then again as Minister of Justice. Although the Criminal Code of 1968 paid lip service to the independence of the judiciary, it added that the latter was responsible for the way its members discharged their duties to the representatives of the people who had elected them.

Lawyers were at first thoroughly purged, and were included in 1958 into collectives, subject to the directives of the Minister of Justice. As any remedy against State actions was non-existent, their number was reduced to some 500. The judiciary was set to initiate negotiations between the parties, and made defence attorneys superfluous; courts only had limited jurisdiction, and enterprises (VEBs) had their own devices for dealing with conflicts. The bar had become more or less irrelevant and was, as *Organ der Rechtspflege*, supposed to contribute to the socialist rule of law (Wissen 1968: 162–163; Brunner 1975: 201).

The distinction between public and private had no meaning anymore in the GDR; every person was in fact an official and carried the duty to work for the attainment of the socialist society. The central function of the family was seen as the nest where the development of socialist personalities had to take place. No wonder that everyone was supposed to spy on everyone else, even within families. The *Staatssicherheit, Stasi*, was paramount and omnipresent. It turned out, after the fall of the Berlin Wall, that there existed some 6 million files (on a population of some 16 million) at the *Stasi* headquarters.

Totalitarian states are apt at and keen on purging unwanted elements. At the time of the Moscow 'Doctors' Plot' in the early 1950s, the GDR witnessed the escape of prominent Jewish communists, and indeed a member of the Central Committee urged for cleansing public life of Jews, as 'enemies of the State' (Judt 2005: 184). Jews were erased from the past as well: concentration camps had supposedly been populated by fighters against fascism only, without any mention of the massive racist component of the persecution and extinction. As British historian Tony Judt (b. 1948) noticed: 'In GDR school texts, Hitler was presented as a tool of monopoly capitalists who seized territory and started wars in pursuit of the interests of big business' (Judt, 2005: 823).

For 'monopoly capitalists' read: Zionism. Antisemitism was – and still is – never far away in Eastern Germany, as the attack on the synagogue in Halle on 9 October 2019 (*Yom Kippur*) suggests.

In all these respects the iconoclasm under National Socialist rule was translated into socialist structures of the GDR. Although the content of the ideology differed,

especially concerning private property, most features showed similarity and likenesses. Iconoclasm rolled on into the GDR: an authoritarian, totalitarian one-party State where division of powers was absent and the State was not subjected to the rule of law (notwithstanding the constitutional abolition of the death penalty, secret executions took place); where all persons were first and foremost officials working for the benefit of this socialist state and supposed to think in the same way; where the judiciary was instrumental to the State's objectives, and fundamental rights turned out to be fundamental obligations. A scary similarity in structures with Nazi Germany. As historian Heinrich August Winkler (b. 1938) described it:

In both dictatorships that were present in 20th century Germany, the claim of the whole person and the structures and methods of domination that were derived from this claim were totalitarian. (Winkler 2010: 635)

This is the central difference with the *Bundesrepublik*, where institutions returned to a democratic mould, although the denazification of its society turned out, certainly in the decades after the war, to be insufficient and less intensive than purification in the GDR after reunification in 1990.

Concluding Remarks

What about the situation after reunification? How do the two societies and their institutions finally blend? Both states consider themselves as the legitimate successor state of the Weimar Republic, and even of the old mythical German Reich, skipping the third one. New iconoclasm occurred, this time mostly from the West to the East, for which there is unfortunately no room to describe in this article.

New lords, new laws; abrupt regime changes, with radical and even extreme ideologies, demonstrate iconoclastic features. They overhaul existing ways of thinking and instil existing institutions and organizations with the new creed; non-believers are replaced by followers of the new gospel, and the faint of heart are sometimes terrorized or threatened to get in line.

Although they seem to burst out suddenly, legal iconoclasm has its warming-up period in which already some foothold in the population can be noticed. Antisemitism, for instance, was a steady feature in Germany under whatever regime: the Imperial, the Weimar Republic, the Third Reich, and still afterwards in the FRG and GDR up to the present (Ahrendt 1951; Jessurun d'Oliveira 2021). Ideas about a homogeneous people, based on ethnic and racist concepts survive under these successive regimes. Authoritarian ideas about leadership are never far away. But as nineteenth century French journalist and politician Émile de Girardin (1802–1881) once said: '*On peut tout faire avec une baïonnette, sauf s'asseoir dessus.*' ('One may do anything with a bayonet, except sit on it.')

These iconoclasm never fully achieve their aims, because they fail to conquer the minds of active and passive *résistants* of all sorts. Institutions cling to their past. Sudden regime changes have both their prehistory and their aftermath: elements

are taken from the previous state of affairs and their ideas subsist afterwards as an undercurrent in the next phase of existence of states, ready to be taken over or to be revived. This is not a German specialty, but is now being witnessed all over Europe. New outbursts of nationalism, a resurgence of ethnic definitions of the nation, a backing away from the European Union, nostalgia for a past that never existed, xenophobia, resistance against persons determined as ‘others’ in various aspects, a tendency towards authoritarian solutions and being disaffected with democratic institutions, such as the separation of powers, all this is rampant over present-day Europe. Shall we then witness a new legal iconoclasm, away from democracy and the rule of law?

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