Germany's Former Nazi Judges

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The case of Wolfgang Immerwahr Fraenkel, state prosecutor in the German Federal Republic, exposed as a “hanging judge” under the Nazi dictatorship, recently dramatized the perennial German problem of where the line must be drawn in giving public employment to men who compromised themselves in the period of Hitler’s rule. The damaging facts about Fraenkel were brought to light by the Soviet Zone administration, which had access to the archives of the former Supreme Court in Leipzig, which was more and more degraded into a tool of Nazi terrorism.

This source of information was, to put it mildly, not above reproach. A pose of virtuous horror over Nazi crimes comes with singularly bad grace from the spokesman of a regime that has carried on the most infamous Nazi traditions, that decorates its police officers for murdering children trying to escape from Ulbricht’s penitentiary, that has made the Berlin Wall a name of infamy throughout the civilized world, that has cultivated in its own courts precisely the same kind of political “justice” as had been parceled out by Fraenkel and some other ex-Nazi jurists who found places for themselves in the Federal Republic, that numbers the noncriminals it has sent to concentration camps and prisons in tens if not in hundreds of thousands.

It is to the credit of public opinion in West Germany that the general reaction to the exposure of Fraenkel was not that of “the pot calling the kettle black,” but rather of shocked embarrassment, accompanied by a good deal of discussion as to how the Fraenkel appointment had been possible and what weaknesses in the German conception and administration of justice were reflected in this appointment.
The basic charge against Fraenkel was that, as a member of the prosecution staff before the Leipzig supreme court, he had demanded in eighteen cases that death be substituted for a milder penalty decreed by a lower court. In eighteen other cases, in which the defense pleaded for commutation of a death sentence, Fraenkel invariably opposed it.

Many of Fraenkel's recommendations were made in connection with acts of theft committed during the darkness and confusion of air raids. An exceptionally flagrant example of ruthlessness was his insistence on execution of an almost feeble-minded worker in Kiel, named August Volker, who had stolen a purse with about twelve marks in it. Volker had no record of previous convictions, but Fraenkel wrote off his life with the comment that he was "a citizen of little value."

A leading German newspaper, the Munich Süddeutsche Zeitung, published on its front page an article by one of its staff writers, Ernst Mueller-Meiningen Jr., strongly condemning the record of Fraenkel and pointing out that he was not the only jurist with a sanguinary record from the Hitler period who had been given high position in the present Federal Supreme Court in Karlsruhe. Asking why former state prosecutors became judges and why former members of the prosecution staff became state prosecutors in the new Supreme Court, Mr. Mueller-Meiningen sees the answer in the existence of a kind of mutual-assistance spirit among jurists who had formerly been connected with the Leipzig Supreme Court. Mueller-Meiningen ends his indictment:

The case of Fraenkel is shocking: the careerist who takes such a fatal risk; the atmosphere in which something of this kind can occur; the deplorable fact that probably more than a decade must pass until that generation of judges and prosecutors is no more active, from whose ranks such incidents arise.

Germans with whom I discussed the case when it broke last summer were inclined to assign responsibility to two other causes, besides the corporate spirit of men who had been associated with the same tribunal. As a Frankfurt editor said to me:

There is too much respect for judicial seniority, for the possession of doctor's degrees and other formal proofs of qualification, and too little consideration for the fact that some eminent jurists blackened their moral and professional reputations by becoming accomplices of political terror and covering up acts of vengeance and persecution with the authority of supposedly legal verdicts.

Another cause was the prevalence in German legal theory in this century of what is called Rechtspositivismus, the view that any law, however outrageous from the standpoint of moral law and natural right, has full validity and must be implemented. Such a conception served admirably the purposes of Hitler's tyranny. Die Zeit, a leading German political and cultural weekly published in Hamburg, discussed at some length, in its issue of July 13, 1962, a decision of the Karlsruhe Supreme Court, rejecting a claim for compensation by a peasant who had been sterilized under Nazi laws, which were promptly repealed after Hitler's fall.

This decision of the court was based on such arguments as the "good intentions" of the law, the practice of sterilization in the legal systems of some other countries, and, notably, on the contention that the law had been in conformity with "conceptions prevalent at the time." Calling for "a little imagination, a little boldness—and a little more respect for natural right," Die Zeit used this decision as a basis for recalling an eloquent repudiation of Rechts-
positivismus by Gustav Radbruch in 1947:

Legal theory must learn again from the thousand-year-old common wisdom of classical thought, of the Christian Middle Ages, of the age of the Enlightenment that there is a higher justice than the law, a natural right, a divine right of reason, in short a supra-legal right, in whose judgment injustice remains injustice, even if it is shaped in the form of law.

This problem of dealing with judges and prosecutors who slipped through holes in the selective process and whose presence discredits the existing rule of law does not lend itself to easy and simple solutions. For the independence of the judiciary carries as an implication that judges may not be removed except for some definite offense.

That a serious effort was made to deal with this possible scandal is evident from a clause in a law on the judiciary which the Bundestag passed on June 14, 1961:

A judge or prosecutor who in the time from September 1, 1939 until May 9, 1945 has taken part in criminal proceedings as judge or state prosecutor may on his own initiative be retired ahead of the normal time.

A time limit was set for taking advantage of this offer: June 30, 1962. Anyone who remained in office after that date ran the risk of disciplinary proceedings which could end in his dismissal from the state service without pension rights. A hundred and forty-three judges and prosecutors accepted this offer; but the desired purge of all who had been implicated in participation in the ruthless Nazi wartime “justice” was not achieved. Some judges against whom there was no damaging evidence took advantage of the early retirement possibility. Others who were really objectionable, like Fraenkel, decided to brazen it out, in the hope that incriminating evidence would not be found.

In some cases judges who resigned did so more from fear of harassment and subsequent pressure than from a sense of guilt. Die Zeit published an anonymous article by a man who entered his judicial career in 1932, on the eve of the Nazi seizure of power, who declared that he had done his best to administer justice conscientiously and that persons in his position were no more guilty than other Germans who carried on their normal professions during the Nazi period. He referred especially to the members of the Reichstag who abdicated their responsibility as legislators by voting for Hitler’s Enabling Act.

Nazi Germany was a thoroughly totalitarian society, and only those who lived under it, or under its fellow-totalitarian system, Communism, can understand how difficult it was for its subjects to avoid some kind of identification with one or another of its innumerable branch organizations. A West Berlin journalist whom I met last summer—rather a left-winger in his sympathies and completely free from Nazi or strongly nationalist sympathies—remarked that he had joined the Hitler Youth mainly because he wanted to learn gliding, but soon dropped out because he forgot to pay dues or attend meetings. Lawyers and other professional men were organized along guild lines and under Nazi sponsorship. The former free trade unions were suppressed and as a substitute a Labor Front was set up under Nazi leadership.

It was difficult to lead a normal active life without being under strong pressure to make at least an occasional gesture of conformity. For the vast majority of the German people this conformity was skin-deep and proved, at worst, that the in-
dividual concerned did not possess the highest quality of moral courage. In the atmosphere of espionage and terror even a failure to return a Nazi salute or the standardized greeting “Heil Hitler” could bring unpleasant consequences. It was a fault of the early phase of the occupation, especially in the American Zone, that this kind of conformity was too frequently and too severely punished. The psychological result was that German public feeling, which could have been aroused against the crimes of the Nazi “big shots” and hard-core fanatics, was often diverted to sympathy with “little people,” who were often merely trying to save their skins and their jobs.

Efforts to whip up alarm over the alleged revival of Nazism, supposedly substantiated by the occasional cropping up of a former active Nazi in public administration, overlook a point that was well put to me by a famous German scientist of unimpeachable anti-Nazi sentiments: “What some former Nazis try to save is not the ideas of Hitler, but their jobs, their chance to earn a living.”

I have traveled extensively in Germany since the end of the war, especially in the last few years, and have met and talked with individual Germans—many in the informality of mountain-hiking expeditions—and I have yet to discover any evidence of organized, deep-seated Nazi sympathy. Whatever nostalgic hangover of the Hitler period there may be is emphatically not to be found among a younger generation that has grown up completely without Nazi influence.

Dr. Walther Strauss, State Secretary in the Ministry of Justice, is a deeply religious evangelical churchman, a veteran state official, who lived in the shadow of the Nazi terror. He once remarked to me in a conversation in the Ministry of Justice in Bonn that, so far as he could see, the chief difference between Nazi and Communist terror was that it was easier to bribe yourself out under the Nazis. And he went on to draw a convincing contrast between the aftermaths, in Germany, of the two great wars of the century:

It is now seventeen years since the end of World War II. Seventeen years after World War I, in 1935, Hitler was entrenched in power, with a machine of terror and propaganda strong enough to crush and intimidate all opposition. You can see for yourself how different the situation is today. Bonn is not Weimar. During the existence of the Weimar Republic we had twenty-one changes of Cabinet, weak and shifting administrations because of a multiplicity of parties, of which two of the biggest, the Nazis and the Communists, were out to destroy free institutions altogether.

Up to 1962 we have had only one Chancellor, Konrad Adenauer. Instead of a score of quarreling, bickering political groups we have in our parliament only three parties, the CDU, the Social Democrats and the Free Democrats. And, however these parties may differ among themselves, all are dead-set against any return to Hitlerism. And of course our economic position is entirely different. Now we have work for all, we even have to import hundreds of thousands of foreign laborers, and general prosperity. In the years of Hitler’s rise to power, 1930-1933, there was mass unemployment and acute economic distress.

Now we have a younger generation that has grown up entirely without Nazi influence; if it remembers the last years of privation, of bombings and terror it is certainly not with enthusiasm. Every year that passes makes us safer against any return to the totalitarian frenzy.

The question as to who was and who was not formally a Nazi Party member and as to the degree of an individual’s commit-
ment becomes less important with the passing of time. The German Federal Government and the government of the Länder (states) have made a sincere effort to prevent any organized revival of Nazi sentiment and also to bring to justice persons who can be convicted of personal responsibility for acts of mass murder and outrageous inhumanity in the treatment of prisoners in concentration camps.

Whereas the Weimar Republic to some extent dug its own grave by doctrinaire unwillingness to take action against avowed enemies of free institutions and the rule of law, the present German Government has taken legal action to forbid the functioning both of the Communist Party and of the neo-Nazi Socialist Reich Party. Occasional incidents of anti-Semitic hoodlumism are promptly prosecuted.

After the First World War the Allied powers tried to institute prosecutions of so-called German war criminals. This attempt foundered on the resistance of German public opinion. There was a general feeling that both sides had considerably changed the former rules of war, that German submarine warfare was no more inhuman, although more spectacular, than the undernourishment of the civilian population through a blockade which went beyond all previous precedents in what was treated as contraband.

After the Second World War, however, most if not all Germans recognized that Hitlerite terrorism had gone far beyond what might be considered the normal ruthlessness of military operations. In the first years of occupation the victorious powers reserved for themselves the trial and punishment of alleged war criminals. Most of the surviving identifiable leaders of the Nazi regime were put on trial and executed or sentenced to long terms of imprisonment. All together some five thousand persons were convicted under this "victors' justice." Many of these were persons who, on their records, deserved little or no sympathy, even though more impartial tribunals might have been preferable. In this as in other phases of the occupation, there were excesses, notably in the attempt to fix a stigma of collective guilt on whole groups, such as diplomats and businessmen, who could not be proved collectively guilty of any atrocious crimes.

Later the German courts took over and also imposed sentences on over five thousand persons who were brought to trial. Some of the most horrible mass extermination crimes were committed outside the frontiers of Germany, in Poland, the Baltic States and the Ukraine. A central office, representing the state Justice Ministries, has been functioning for years at Ludwigsburg, near Stuttgart, for the purpose of assembling evidence that would lead to the arrest and prosecution of those responsible. Despite considerable handicaps—the lapse of time before the German courts could take over, the confusion in the last phase of the war, in which some of the guilty were killed and others enjoyed the opportunity to disappear—a good many persons were brought to trial, with attendant publicity, and a number of cases are still being built up, although the statute of limitations (twenty years in the case of such a major crime as murder) will bring about the end of the trials, at the latest, by 1965.

A spokesman for the Ludwigsburg office told me that it was in possession of practically all the facts that were brought out in the Eichmann trial in Israel. Incidentally, this trial was fully reported in the press and through radio and television in the Federal Republic, and the general reaction was that, whatever the legality of Eichmann's abduction, a man so clearly responsible for mass murder on such a scale got nothing but his deserts.

There are now about 32,000 Jews in
Germany, the largest single community being about 6,000 in West Berlin. It is an aging group in the population, with many living on pensions and restitution payments. H. G. Van Dam, President of the Central Council of Jews in Germany, with headquarters in Düsseldorf, told me that the Jews have no complaints about the attitude of the Federal Government or of the three major political parties.

There are some publications—the Soldaten Zeitung, the Reichsruf and the Deutscher Reichsruf— which cater to anti-Semitic feeling by such devices as playing up Jewish names and exaggerating the amount of compensation paid to Jews. But there is nothing like the blatant, violent anti-Semitic sheets which were hawked on every street corner during the twenties and thirties. Three Jews, Jacob Altmayer, Jeannette Wolff and Peter Blockstein, have been elected to the Bundestag; another, Herbert Weichmann, is Finance Minister in the Free State of Hamburg.

In the opinion of Mr. Van Dam and other students of the question, German reaction toward the small and inconspicuous Jewish remnant that still lives in the country falls into three categories. The majority of Germans are indifferent. At one extreme is a group, made up especially of young people, who are keenly conscious of the Nazi crimes against the Jews. There have been pilgrimages to the unmarked grave of Anne Frank; a few young Germans have gone to Israel for reconstruction work. The Diary of Anne Frank was widely shown in Germany, both as a play and as a film. At the other extreme there is a substratum of anti-Semitic feeling, but not on a scale that disturbs the lives of the Jews who still live in Germany. The German Government has paid out about $4 billion in supplies of machinery and equipment to Israel and in restitution and damage payments to individual Jews.

The case of Wolfgang Fraenkel, analyzed in some detail at the beginning of this article, is by no means isolated. Der Spiegel, a brash critical gadfly among German magazines, has attacked a number of other jurists who have held or now hold positions in the German judicial system. Among these are Ernst Kanter, a hanging judge under the Nazis who in 1958 was appointed Senate President at the Federal Supreme Court in Karlsruhe; Werner Rohde, prosecutor before a special court in Prague during the Nazi occupation, later associated with the Department of Justice in Schleswig-Holstein; Rehder-Knoespel, former chief prosecutor in Prague, later a senior public prosecutor in Mannheim.

In short, while there have been mistakes of taste and judgment in appointing a few seriously compromised ex-Nazis to posts in public service, while an occasional Fraenkel will no doubt crop up in the future as in the past, Germany's recovery from the Nazi disease has been more rapid and complete than might have been expected. In this connection the fairly speedy abandonment of punitive and revengeful occupation measures (such as the dismantling of German industries), the acceptance of Germany as an equal partner in international military, economic and political organizations, and the sense of a common interest with the Western powers in resisting the advance of communism have been important factors. And, as the German author, commentator and Russian expert Klaus Mehnert said to me: "People do change and have changed. The Germans could not lose two wars, go through a nihilistic revolution, see a part of their countrymen taken over forcibly by Communism without being impelled to think along new lines."