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THE STRUGGLE BETWEEN EQUITY AND STABILITY IN THE LAW OF POST-WAR GERMANY*

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In the short period of a few decades Germany has presented profound changes in her political organization, social ideals, creeds, and philosophies. These shifts, in their turn, have found their expressions in the law of Germany. Without many alterations in the letter of the codes and statutes, the spirit of the German law has changed, and consequently the actual solutions of innumerable single problems of everyday occurrence have been affected. The transformations which have taken place under our very eyes make Germany an excellent example for demonstrating the connections between law and social ideals and policies.

Thus the German development may be used to illustrate some of the eternal issues, issues as they arise everywhere. In discussing this we are in the sphere of Comparative Law. Comparative Law, however, is more than a description of foreign institutions. It is the application of foreign experiences to our own needs and problems. Yet, there may be a division of labor between the author and his readers; and I shall confine my remarks to description and an attempt to interpret what has happened in Germany.

If we look back to pre-war Germany, we find it a highly industrialized capitalistic country. There have been many discussions on the question of what constitutes the essence of the capitalistic system of economic organization. It is not characterized by the existence of great fortunes, nor even by what has been called the profit-motive. Both existed long ago in pre-capitalistic periods, in ancient Rome as well as in the Middle Ages and in the Orient. What is essential is the rationalization of all

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economic activities, the careful planning of every economic enterprise. No capitalistic system was possible before the invention of modern accounting. Balancing of the possible chances of gain and loss of each single transaction, and careful calculating for the future are among the essential features of modern capitalism.

In order to exist, capitalism needs a high degree of social stability. For the law, this means that it must be clear, stable, and predictable. Sanctity of contractual obligations is the very core of any capitalistic law. Businessmen will hesitate to make long-range plans, or to undertake obligations; people will not be inclined to make investments, if the fulfillment of promises, the exact, literal fulfillment, is not legally sanctioned and rigidly enforced. It is a corollary that these rules are as little as possible tampered with by legislatures. Each interference with the existing law is looked upon as an unpredictable disturbance of existing expectations, likely to impair the willingness to enter upon new undertakings, to make new investments. Hence, it is thought that government interference may easily obstruct economic expansion, upon which all progress of human civilization is thought to depend. This ideal is one-sided, like all such social ideals. It looks exclusively to the interests of business and the advantages which are expected to ensue for the community at large from its flourishing state. There is, of course, another side to the picture, of which we shall have to treat shortly.

In Germany, as almost everywhere in the pre-war world, the capitalistic ideal prevailed. It found its expression in the law of the country. Clarity and predictability were secured through codification, which essentially means that everybody, by consulting the book, would be able to find out how an eventual future litigation would be decided, and, consequently, to pattern his own contracts accordingly in order to minimize litigation. Where, however, litigation turns out to be unavoidable, the courts should be bound to decide on clear, stable, predictable lines.

This spirit may be found throughout the pre-war law of Germany. We find it in the strict enforcement of contracts, in the principle that nothing relieves a promisor of his liability which does not amount to an actual physical impossibility, such as an accidental destruction of the subject-matter of the contract which could by no means be prevented by the promisor. We find it in the generous protection of *bona fide* purchasers of moveables and even of land. Under this system an owner may lose his title, but the legal order regards it as more important to encourage confidence in the security and indestructibility of dealings. We find the capitalistic spirit in the carefully worked out system of mortgages and other securities resulting in a practically infeasible protection of investors. Throughout, we find that the legal rules and institutions tend to protect the creditors, *i.e.*, investors, frequently working hardship upon individual debtors. But it is thought better that the rules be clear than that they meet the equities of each individual case and thereby lose their pre-

dictability and ease of application. Procedure was swift, the execution laws were rigidly enforced. In criminal law, the fundamental maxim was: no punishment without a definite basis in the written law. Everybody should know clearly what conduct is or is not allowed, even at the risk of some skilful crook being able to slip through the meshes of the law. In the judicial method, conceptualism prevailed, the method which regards legal thought as a sort of mathematics. It is excellently suited for rendering the law stable and predictable.

Yet, the capitalistic spirit never reigned in Germany absolutely. There were other, restraining forces in the country. Economic freedom, that indispensable basis of individualistic capitalism, was an innovation of the 19th century. Before that time, a system of strict, absolutistic regulations of all activities had prevailed. While the political system of absolute monarchy was reigning during the 18th century everywhere on the European continent, it had assumed a peculiar form in Prussia and Austria. While French and other kings frequently used their almost unlimited powers in their own egoistic interest and in the interest of a small privileged group, Joseph II. of Austria and the Fredericks of Prussia conceived of their powers as a trust for the people. These "enlightened", "benevolent" despots, as they were called, knew that the welfare of the people was the only justification of the existence of any government at all, but they distrusted the ability of the people to govern themselves. Their maxim was: everything for the people, nothing by the people. For carrying out their philanthropic plans, they established a hierarchy of government officials, whom they sought to instill with the spirit of looking on power as a social trust. The ideal of these "bureaucrats" was to keep aloof from the struggle of the economic and other groups, to remain impartial arbiters who would balance the interests of the various partisan groups in the interest of all. As a matter of fact, the reality lagged behind the ideal. The members of the civil service, recruited almost exclusively from the aristocracy and the higher bourgeois groups, were easily inclined to identify the interests of these groups with those of the community. Nevertheless, the ideal existed, and exerted considerable influence. Observing the consequences of the newly granted economic freedom, the officials soon found out that it imperiled the welfare of certain social groups, especially of the workers. They tried to check that danger, partly out of their desire for social justice, partly in order to prevent the working classes from becoming a discontented, revolutionary element. They were motivated furthermore by the fear of a serious decline in the state of health of an important group of the population, which sent a large number of recruits to the army, an institution which was always dear to the hearts of Prussian kings and bureaucrats. Thus we find Bismarck himself advocating and actually carrying through legislation for the protection of the working classes. Beginning with the 1880's, we find an ever increasing flood of so-called "social legislation", especially laws on max-

imum working hours, laws restricting labor of women and children, regulations of safety appliances, laws on special courts for labor disputes, and especially on social insurance, such as compulsory health and old age insurance, and workmen's compensation laws.

Such legislation was not exclusively promoted by the benevolence and insight of the government, but it was also largely due to the political pressure of labor, which had forged the Social-Democratic party as an increasingly powerful political instrument. The result of both forces, *viz.*, government initiative and pressure by labor itself, was a steadily increasing amount of legislative and administrative interference with the freedom of economic activity.

When, after the War, the Empire broke down and power fell, as an unexpected gift, into the hands of the Socialist and Catholic parties, the amount of such legislation swelled to an unprecedented extent. Shop-councils were established. Laws were enacted forbidding an employer to fire his employees without "just cause". Most important of all the innovations was the establishment of a compulsory system of collective bargaining. Agreements arrived at by a labor union and an employers' association were binding on all the employees of the employers in question, and could be made, by government decree, binding even upon outside employers. The employers, within a short time, adapted themselves to the new conditions. They organized themselves on analogous lines with the labor unions and, by and large, satisfactory arrangements were worked out between the organizations of both sides.

These arrangements were satisfactory to employers and employees, but not always satisfactory to the other classes of the population: consumers, farmers, small businessmen and craftsmen, and especially to those, mostly older people, who lived on the income from their savings.

This group had been suffering ever since the Industrial Revolution and the advent of modern capitalism. The capitalistic spirit, as I have said, is rationalistic, requiring continuous accounting, calculating, computing figures, long-range planning. But it also requires quick decisions, continuous observation of a fluctuating market, and instant adaptation to its changes and to the progress of techniques and machinery. Finally, it favors the big factories, the big banks, the big department stores and chains, at the expense of the little craftsman, the town banker, and the small storekeeper. It requires all of them either to give up the old ways of life, or to be swallowed up by the giant Capitalism. To give up the old ways of life was exactly what most of them least wanted to do. They felt themselves the keepers of great traditions, full of historical and personal reminiscences and great sentimental values. They worked hard. Why should they live differently from the manner in which their fathers and grandfathers had lived? Why should they give up their good old customs? How could they be expected to follow a market, the intricacies of which they could not understand? How could they keep abreast of

all the new inventions, how distinguish the good from the bad? How could they apply all the new complicated types of credit transactions, which frequently enough led to their ruin and disaster? They had adapted themselves as well as they could. In the pre-war period they had a government which understood their predicament and did much to protect them. Now, in the first years after the War, the Defeat, and the Revolution, life became more difficult from day to day, and actually intolerable, when the inflation destroyed all old savings and investments. For the middle classes, inflation was a catastrophe; to industry, however, it did little harm. Quite the contrary, inflation was the "shot in the arm", a stimulus to business, at least so long as it did not get out of control, as it happened to do in the fall of 1923. Small harm was done to labor, also, whose power was strong enough to obtain sliding wage scales which adapted wages automatically to the rising cost of living. Finally wage scales were changed from day to day, and the rising wages and prices, in their turn, accelerated the devaluation of the mark. Germans became millionaires and billionaires. This all sounded wonderful. Yet, a billion would scarcely buy a roll or a street-car ride. The inflation proceeded in geometrical progression. What sold for a billion yesterday, was priced at two billions today and four tomorrow. As soon as one had money, one was only too eager to spend it. Yet, goods were rare, shops did not open before noon, when the new dollar-rate was published. At the end, in November, 1923, the dollar was worth 4200 billions of marks,—and the middle classes were ruined.

Yet, at this moment, they won their first great victory. Debtors had been paying their debts in worthless money. He who, before the war, had invested in a mortgage or some other security 10,000 or 100,000 marks in beautiful gold coin, received a slip of paper upon which the imprint read 10,000 or 100,000 marks, and for which he could buy a fraction of a crumb of a slice of bread. This again was wonderful, for debtors. The country rid itself of all debts,—and besides, of all savings and investments. Investors appealed to the courts demanding additional payments which would give them the actual amount of bargaining power of their original investments. Their demands were rejected by the courts, who could not do otherwise under the letter of the law. They appealed to the legislature in vain; for those groups which profited from the inflation were represented more strongly. At last they organized for propaganda, and on November 28, 1923, they had their great epochal success. The supreme court of Germany, the Reichsgericht, held that a debtor was not discharged through paying his debt in devaluated paper money.¹ It decreed that an additional payment was to be made. The amount of this payment was to depend upon the circumstances of each individual case.

¹The decision is published in 107 Entscheidungen des Reichsgerichts in Zivilsachen (=RGZ) 78.

The Reichsgericht pronounced that the inflation was a national disaster which, like the War, was to be borne by all groups of the population. Each debtor had to "revalorize", as it was expressed, his debt, to such an extent as appeared equitable to the court under all the circumstances of each individual case, especially with respect to the extent to which each of the parties had been able to preserve his estate during the inflation.

This new attitude of the courts was a legal revolution. For the first time, the courts overrode the written law. Besides, instead of establishing some clear-cut general rules, they resorted to individual equity. Under the maxim laid down by the Reichsgericht, the courts had to inquire into the most complicated aspects, yea, into the most intimate details of the financial situation of each party. It was impossible to foresee what decision would be reached in any given case. A flood of litigation ensued. More than three and a half millions of revalorization cases came up for judicial determination. How many more millions of cases were settled out of court, through the mediation of the lawyers, has never been ascertained. For the lawyers, at any rate, the revalorization period was a bonanza. For German law, it was the beginning of a new epoch. This was spectacularly demonstrated by an event which shortly followed the great decision of November 28, 1923.

The debtors, naturally, had become alarmed and tried to undo the effects of the new attitude of the courts. Conforming to the wishes of the interested groups, the government prepared a bill intended to fix revalorization generally at 10-15 *per cent.* of the gold value of the original debt. Some doubts were expressed whether such a law would be constitutional. However, it seemed almost certain that the easy requirement for a constitutional amendment—a two-thirds majority of the legislature—would be obtained. In this situation, one day the papers published a resolution of the "Association of Supreme Court Judges". The German Supreme Court is a rather large body. It has more than a hundred judges, who sit in several divisions of five to seven members each. These judges established for themselves a social club, where they could gather for friendly chats. In January, 1924, the presiding officers of this club published a resolution which was so unusual and which became of such far-reaching importance that I shall quote here verbatim its most significant passages:²

"According to the newspapers", so the manifesto said, "the government is considering to prohibit the revalorization of mortgages and possibly of other debts. The undersigned members of the board of the Association of Supreme Court Judges feel that they would fail in their duty if they would not caution the government against such a measure.

² See 1924 Juristische Wochenschrift 90.

"One cannot say that the Supreme Court has rashly or inconsiderately abandoned the maxim 'A Mark is a Mark'. When, however, the Supreme Court, after a most careful consideration of all the pros and cons, has finally reached a decision, then it is entitled to expect that its opinion will not be reversed by a peremptory order of the legislature.

"The Court's decision is founded upon the great principle of good faith which dominates the entire body of our law. It is based, furthermore, on the insight that any further enforcement of the slogan 'A Mark is a Mark' would result in the utmost injustice, unworthy of a state of laws. The same insight forms the basis of the Court's opinion as to the measure of revalorization, namely of the rule that a creditor cannot obtain the full gold value of his claim, and that the consequences of the inflation must be apportioned equitably between creditor and debtor. . . .

"The idea of good faith is higher than any single law. No legal order can be worthy of its name without this principle. Therefore, the legislature cannot be allowed to frustrate through a peremptory decree a result required by good faith.

"It has already been discussed in public whether the measure intended by the government would not be invalid, either because it would be a violation of good faith, and therefore immoral, or because it were to be regarded as an expropriation without compensation. There is a serious danger that the courts, especially the Supreme Court, might look upon such a measure in one of these ways. . . .

"The undersigned members of the board of the Association of Supreme Court Judges hope that the picture they have drawn of the present state of the minds of the Judges of the Supreme Court will be taken into due consideration."

This manifesto was a sensation. That judges would speak in such language through the medium of a private club, would be unheard of in this country. In Germany, even the idea of any sort of judicial control of legislation was unusual. The courts, it is true, asserted repeatedly their power to pass on the constitutionality of statutes. As a matter of fact, during the entire period of the Weimar Republic, two federal statutes only were held to be unconstitutional by the Reichsgericht.³ After all, as already mentioned, it was almost as easy to amend the constitution as it was to enact an ordinary statute. However, in their manifesto, the Supreme Court judges went beyond the scope of constitutional control and asserted their power to hold invalid a statute even on extra-constitutional grounds, *viz.*, when in their opinion it was contrary to the Higher Law,

³ See Radin, *The Judicial Review of Statutes in Continental Europe* (1935) 41 W. Va. L. Q. 112, 127-128.

to the principle of good faith. We are reminded of Lord Coke's language in *Dr. Bonham's Case*.⁴ What was of the greatest importance, however, was the recognition of a Higher Law as a living force, and in particular the establishment of the principle of individual equity as the guiding star for the courts.

In the actual issue the manifesto had its desired effect. Revalorization of mortgages and certain other investments was finally decreed on a normal level of 25 *per cent.* of the gold value, which, however, could be increased or lowered by the courts according to the equities of the case. For other sorts of claims, the extent of revalorization was left entirely to the courts.⁵

It was a great victory of the middle classes and of an ideal of law different from that of capitalism. Individual equity had won over general rules, fair adjustment over rigidity, unpredictable judicial discretion over predictability. This is exactly the sort of law which is favored by a traditionalistic middle-class society. It is that type of law which we find throughout the pre-capitalistic world, in ancient Greece, in the Middle Ages. It is the law as it is conceived in ancient Jewish and in medieval Christian ethics, as we find it with King Solomon, in the New Testament, and in St. Thomas Aquinas. It is that type of law which prefers to give each man half, rather than give one man all and nothing to the other. It takes up each case on its individual merits; it looks to the minds of the parties, to their conscience rather than to external facts.

Of course, the change in Germany did not come quite as suddenly as may appear from what has been written here. Social developments never do emerge suddenly and without preparation. I must, necessarily, simplify. Yet, we must be aware that things are more complicated than I can indicate them here. We must keep in mind that no social phenomenon can be traced to just one cause and that in the social fabric everything is connected with everything. Thus, the turn in German legal thought had its antecedents, in the practice of the courts as well as in the writings of the jurists. The soil was prepared. The new tendencies had grown for years.⁶ The inflation incident brought them to the full light of the day and the consequences were far-reaching. In a question of vital importance the legislature had failed to protect an important group of the populace. The judges, being mostly recruited from that very group, became conscious of their powers and it became apparent that they favored increasingly the ideal of individual equity. Accustomed, however,

⁴ (1610) 8 Rep. 118a.

⁵ Revalorization Act (*Aufwertungsgesetz*) of July 16, 1925, *Reichsgesetzblatt* 1925, part I, page 117; as to the legal effects of the German inflation see also Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924* (1934) 33 Mich. L. Rev. 171; an excellent critical summary in German is Arthur Nussbaum's *Die Bilanz der Aufwertungstheorie*. Stuttgart 1929.

⁶ The reader may be referred to the author's article, *Comparative Law and Conflict of Laws in Germany* (1935) 2 U. of Chi. L. Rev. 232.

to always looking to statutes and codes, they found a provision which could be used excellently for their purpose.

There is a section in the Civil Code, Section 242, which provides that contracts are to be fulfilled "in good faith". This provision has a long tradition which can be traced back to the classical Roman law of the 1st century of our era. It has an almost literal counterpart in Article 1134 of the French Civil Code of 1804. Down to the 1920's, it played a rather insignificant role. When I was in law school, shortly after the War, I was still taught that resorting to Section 242 was bad legal taste, that lawyers had better stick to those provisions of the written law which contained more definite rules. Now, Section 242 came to the foreground; indeed, it was praised as the "Royal section of the Code". It was pronounced, that all other provisions of the law ought to be read and applied in the light of the principle of good faith, which was said to permeate the entire body of German law. It actually influenced the everyday work of the courts in innumerable respects.

I can state no more than a few significant examples. It influenced the doctrine of impossibility. A promise was held discharged not only when performance had become physically impossible, but also when it had become so onerous that the promisee would act "unconscionably" in compelling the promisor to perform under the changed circumstances.⁷ While under the Code definite periods are provided for the running of the statute of limitations, it was now held that a creditor might be barred from suing his debtor even before the statutory period expired. It was held to be sufficient that, by long inactivity, he had created for the debtor the impression that he would not proceed against him. How long such inactivity was to last, depended on the peculiar circumstances of each individual case.⁸ The new equity was applied to other fields of the law, *e. g.*, to the law of corporations. Minority stockholders were held to be entitled to stop the execution of a majority vote if the majority had unconscionably disregarded the interests of the minority.⁹ In the field of taxation, it was provided that one could no longer avoid paying taxes by using ingenious new transactions which were not taxable under the strict letter of the law. The line between tax avoidance and tax evasion was obliterated.¹⁰ In criminal law, a new defense was established. The Criminal Code provides that an act otherwise punishable shall not be punished where it has

⁷ See especially 107 RGZ 156.

⁸ This doctrine was especially applied to suits for revalorization of debts devaluated through the inflation; see especially 110 RGZ 133, 118 RGZ 375; as to other claims see 111 RGZ 192, 114 RGZ 360, furthermore RG in 1929 *Juristische Wochenschrift* (=J. W.) 2143; RG in 1929 *Deutsche Juristenzeitung* 1615; *Oberlandesgericht Cologne* in 1933 J. W. 1268. Quite recently, the *Reichsgericht* has warned the courts against too generous an application of the new doctrine. The terms used in this new decision (144 RGZ 22) almost amount to a repudiation of the doctrine of laches.

⁹ RG in 1932 J. W. 718, 1647, and 1933 J. W. 1021; 107 RGZ 72, 202.

¹⁰ *Reichsabgabenordnung* §§4 and 5 (now §§9 and 10).

been committed in self-defence or in necessary defence of others.¹¹ Now, it was generally said that an act otherwise punishable was not to be punished when it was committed in order to preserve any other interest of a socially greater value than that invaded by the act of the accused.¹² How the courts would work out this balancing of the interests in an individual case could hardly be predicted.

These few examples must suffice to show the far-reaching importance of the new judicial method. Yet, the courts were not unmindful of the dangers of the new approach. After all, the judges had been trained under the old school, and were unable to relinquish suddenly all their traditions. The results were sound in many respects. A compromise was being worked out, a rather satisfactory compromise, an attempt to reconcile the two great principles of predictability and individual equity. But this development was interrupted by the National-Socialist Revolution. From then on, the emphasis shifted to the principle of equity to such an extent that, together with an excess of government interference, it now seriously endangers the economic structure of the country and completely extinguishes individual security and freedom.

To comprehend this, it is necessary to understand the dominant forces of the National-Socialist movement. In this country, National-Socialism, or Fascism generally, is widely looked upon as an attempt of the capitalistic classes to stop the progress of labor. Though there is some truth in such an interpretation, it is incomplete. At its core, National-Socialism is a rebellion of the middle-classes against capitalism, of traditionalism against change and rationalization, of emotion against reason. It is a desperate attempt to stem the tide. It is significant that it reached its first zenith during the inflation. It declined during the following period of prosperity. It grew again and finally seized the power when the new depression again struck most seriously against the impoverished middle classes.

Yet, these classes would never have been able to seize the supreme power, if they had not found allies, allies of a rather heterogeneous kind. Their most important ally was a small yet resolute group of desperate adventurers, of professional soldiers, of those who after four and a half years of a hazardous life in the trenches were unable to adjust themselves to the civilian life. Most of them had been reserve-officers, commissioned or non-commissioned. They were commanders of men, conquerors in enemy country. They came back and were—nobodies. They banded together, formed fighting battalions, fought against communists and Poles in the numerous riots and rebellions of the first post-war years. The government needed and used them and they became a power with which to be reckoned. But finally, peace reigned even in defeated Germany. Their hour came again with the depression. They joined the leaderless middle classes, or rather, they made themselves the leaders.

¹¹ Criminal Code §§53, 54.

¹² 61 RG St. 242, 62 RG St. 137, RG in 1932 J. W. 2810.

They, in turn, were joined by big business which thought it could use the unwieldy movement for its own purposes. The new ally was gladly accepted, and the friendship was publicly celebrated with a great festival. Yet, the speeches made at this very occasion showed what each part thought of the other. Each hoped he could use the other for his own ends and then, after the seizure of power, throw him out. The capitalists were to be disappointed. In order to seize power, the movement had to make propaganda. It had to attempt to reach those classes against, or even without whom, no revolution could succeed, the laboring classes. Great promises were made and they could not be entirely forgotten. Besides, the backbone of the rank and file of the party and its militant organizations, the Storm-troops and Special Guards, were young peasants and middle-class people. Their demands count. And finally, the militant adventurers were not able to run the complicated machinery of a modern state. They had to resort to the help of the old bureaucrats, who now thought to be in a position to reestablish the old Prussian tradition of bureaucratic supremacy, of society governed by a group of impartial, benevolent umpires and by the army. National-Socialism is a complicated conglomeration of many heterogeneous forces.

All these forces play their rôles in the law of National-Socialist Germany. Most significant for the character of this law are the numerous measures which stabilize the omnipotence of the government and annihilate the rights and liberties of the individual. At any moment, the individual, his property, his freedom, and his life, may be sacrificed to some end which the dominating group may, at one time or another, establish as the supreme goal of the nation. Equally significant is the abolition of all democratic checks and controls, with the consequence that the government and its officers can interfere with the life, liberty, and property of the individual in unchecked arbitrariness. Most of the provisions by which these powers of the government were established are quite well known in this country.¹³

There is, however, a further side of the National-Socialist law which, though of no less significance, seems to be less well known here. I mean those numerous features of the Private and Criminal Law of the Third Reich which, exaggerating the earlier tendencies described before, have substituted an arbitrary uncertainty for legal stability and predictability. This development may be illustrated by reference to a few statutory enactments:

The first is an Act of December 13, 1934, for the Prevention of the Abusive Enforcement of Judgments.¹⁴ It reads as follows:

“The Cabinet of the Reich has resolved on making the following law which is promulgated herewith:

¹³ The entire development of German law under the National-Socialist regime has been critically described by Loewenstein, *Law in the Third Reich* (1936) 45 Yale L. J. 779.

¹⁴ RGBl. 1934, part I, p. 1234.

"In order to stop abuses in the enforcement of judgments, especially of judgments entitling a landlord to eject a tenant, it is ordered as follows:

"On the motion of the debtor, the court may permanently or temporarily enjoin a creditor from enforcing a judgment if it appears that, all the circumstances taken into consideration, the enforcement of the judgment would be so harsh as to hurt grossly the sound feelings of the people."

Since no creditor can know beforehand whether the eventual enforcement of his judgment will "grossly hurt the sound feelings of the people", he will be more than hesitant to resort to the courts at all. Another law, of June 28, 1935, has abolished the binding force of all precedents from the pre-National-Socialist era.¹⁵ A new start shall be made. How a problem will be decided, nobody can know, even if there has been a clear line of precedents before 1934.

A third fundamental statute deals with the criminal law. It enables the courts to "Create New Law by Analogous Application of Penal Laws".¹⁶ Its text is as follows: "If it appears that a person has committed an act which, though not declared to be punishable by any provision of the law, deserves punishment according to the sound feelings of the people, the court, in order that justice might triumph, shall examine whether the act can be subsumed under the general idea of some penal law." Here again, we find the "sound feeling of the people" as the decisive criterion. These are the principal enactments, *i.e.*, governmental decrees,¹⁷ which are intended to enforce the new spirit of the National-Socialist law.

The innumerable instances and possibilities of government interference with individual freedom and with all and every field of human activity, economic and cultural, are well known in this country. Here I need only state a few of those which may not be generally known and which are significant for the spirit of the present German law. It becomes apparent for instance, in the new law on "Hereditary Farms" of September 29, 1935.¹⁸ It has found a certain publicity in this country. In particular, it has been described in detail in a symposium in the *Iowa Law Review*.¹⁹ Its essential feature is the prohibition of any sale or partition of all middle-sized farms. It does not affect such small holdings as are not sufficient to provide their owners with a living, and it does not affect the big landed estates. All "peasant" farms, however, have been rendered inalienable, unmortgageable, and indivisible, nor can they be disposed of

¹⁵ RGBI. 1935, part I, p. 844.

¹⁶ Law of June 28, 1935; RGBI. 1935, part I, p. 839.

¹⁷ Under the law of March 24, 1933, RGBI. 1933, part I, page 141, "statutes" as well as constitutional amendments are made by the Cabinet, whose members hold their offices at the pleasure of the "Leader".

¹⁸ RGBI. 1935, part I, p. 685.

¹⁹ Kaden, *The Peasant Inheritance Law* (1935) 20 *Iowa L. Rev.* 350.

by will. Upon the owner's death they pass undivided to the youngest, or in other parts of the country, to the oldest son. The farmers have greeted this law with mixed feelings. It gives them security, but at the price of cutting them off from the credit market. Besides, there is another provision in the statute. On the ground of mismanagement, a farmer may be removed from the management of his own farm.²⁰ Property, especially the soil, is a social trust which must be used for the common good. An analogous provision exists as to industrial and commercial enterprises. In the terminology of the basic Law on Labor Relations, of January 20, 1934,²¹ an employer is the "leader" of his enterprise, the employees are his "suitsors". These words are deliberately taken from the medieval relation between a feudal lord and his vassals. Just as lord and vassal owed each other reciprocal faith, so the leader of the enterprise and his suitsors are united in the higher unit of the shop, where they owe each other mutual respect and comradeship. He who violates these duties, leader or suitor, may be removed from his place. Quite recently, for instance, a factory owner was removed from the leadership of his own business because he had persistently refused to embellish a dreary workshop. Under many aspects, such a drastic measure may appear to be quite justified, but its potentiality does certainly not work for economic stability and foreseeability.

However, there are counteracting forces: the interests of big business without or against which not even National-Socialism can govern; there are the traditions of the bar and the judiciary; and finally the very desire that the will of the Leader be literally carried out, is an inducement for the courts to abide more closely by the letter of his commands. Yet altogether, the situation is one of insecurity and instability, not only in the legal field, and the evil results of the general political instability are increased by the legal insecurity.

This instability and the unlimited possibilities of government arbitrariness are the dominating characteristics of the law of the Third Reich. To check, nay, to exclude arbitrariness, however, is the very task for which mankind has been struggling for centuries and for which it has developed the great institution of the Law. It is the very purpose of the law to make life bearable, to make society possible, through security. Yet, security and stability may also be exaggerated, rigidity may destroy justice, and liberty, safeguarded as it is by the law, may be abused. Restrictions of liberty are indispensable in the very interest of its preservation. It is *the* task of every law to find the right compromise, a compromise which must be different at each time and each place, which must never lose sight, however, of the fundamental truth, that justice must not be sacrificed to stability, that freedom should no more be surrendered to security than to arbitrariness.

²⁰ §15.

²¹ RGBl. 1934, part I, p. 45.