

The West German Statute of Limitations

ON MAY 8 of this year, unless the law is changed, the statute of limitations for all crimes, including murder, committed during the period of Hitler's National Socialist regime will come into effect in the *Bundesrepublik*. The statutory limit in West Germany for the prosecution of felonies which may be punished by a sentence of life imprisonment (no death penalty exists in the *Bundesrepublik*) runs for 20 years as it has for major crimes since the adoption of the Criminal Code of 1871. This is usual practice on the continent of Europe, although in England and the United States murder and a few other crimes, such as bigamy, may always be prosecuted. In this country only the State of New Mexico has a statute of limitations for murder (it runs for ten years); in all the rest of the American states, however, murder may always be prosecuted.

The law of 1871 was continued under the new Constitution adopted in 1949

while the country was still under occupation and the reaffirmation of the provision of the pre-Hitler criminal codes of both the Weimar and Wilhelminian periods was not owing to chance. The new Constitution or Basic Law, as it was called, also did away with the death penalty: the founders of the new state to be had witnessed more than enough of legal and illegal killings; the power of the state was henceforth to be whittled down as far as possible where it could do violence to the citizen. The West Germans wanted a society where the state exists for the benefit of the individual and not, as under Hitler, the individual for the state.

After the collapse of National Socialism the victorious powers, and later the German courts, had an enormous job on their hands in dealing with Nazi criminals. The Military Tribunals of the Western allies tried more than 5,000 cases and sentenced some 800 to death, of whom more than

half were eventually executed. Trials were held throughout the countries the Reich had occupied, including those behind the iron curtain—Rudolf Hoess the commandant of Auschwitz was executed in Poland, other Nazi hangmen and their helpers were tried in countries of both the West and East. Not all the sentences were for acts still held to be crimes after war passions had cooled. The sentence of Field Marshall Kesselring, for example, who was condemned by a British court in Venice, was first commuted to life imprisonment and then was annulled when his responsibility for the Ardeatine massacre was later reassessed. Such instances occurred in a sizeable number of cases, especially in those involving German military leaders. Of another kind, however, were the incontestable Nazi crimes committed on a scale never possible before: Genocide, though it was no twentieth-century innovation, was brought to new heights of efficiency then for no other period had the technological skills to produce the beltline factories that could murder and cremate thousands of people a day for months on end.

The German courts which directly after the defeat of the Reich had only secondary jurisdiction over such crimes—the Allies reserving to themselves the conduct of trials of major criminals—nevertheless found 5,445 Nazi criminals guilty and sentenced 12 of them to death before the death penalty was abolished. It became clear, however, during the many trials that were held after the *Bundesrepublik* became a sovereign state, and as in the course of each new trial new defendants were involved when witnesses implicated them or they implicated themselves, that many men who had taken part in the exterminations were still at large either in West Germany or outside its borders. Therefore, in 1958 a Center was established in Ludwigsburg whose purpose it

was to screen every piece of evidence that came to hand to discover the names and whereabouts of Nazi criminals who were still at large. Mainly through this Center German judges have been provided with the names of men who are still wanted and it is sufficient under German law for a judge merely to note such a name for the statute of limitations to be interrupted and to run for an additional 20 years. Thus it is not true that if Martin Bormann, who was sentenced to death *in absentia* by the Nuremberg Tribunal, were to appear after May 8 he would go free under German law. His name and those of other specialists in the apparatus of extermination such as Hans Eisele, Josef Mengele, Gerhard Bohne, Heinrich Mueller, and hundreds more have been duly inscribed on judicial blotters; assuming no other jurisdiction took over first they would be tried under German law any time they are found. As a result of the researches of the Ludwigsburg Center and of other investigatory bodies, 750 cases involving thousands of persons are still to be tried before German courts—enough to keep the courts busy for four years.

Nevertheless the approach of the May 8 deadline has set off both in and outside the *Bundesrepublik* a storm of protest. The Minister of Justice, Ewald Bucher, has declared that in his opinion the law cannot be changed without an amendment to the Constitution, a view which is contested by others who maintain that no more than a vote of the *Bundestag* is needed. The *Bundestag* which has three times, the last in 1960, decided against prolonging the statute of limitations has called on the Justice department to ask the Ludwigsburg Center to intensify its investigations and review the complete file of documentary material on acts of murder committed during the Nazi period from German and all other sources and to report

by March 1. The *Bundestag* will then review together with the Federal government the question of extending the statute of limitations. The German government has called on everyone who has additional information about any Nazi criminals in any country of the world to supply their names. As a result of the accelerated search names have been forthcoming from the Berlin Document Center, still under American control, the *Centre de Documentation Juive* in Paris, from Norway, from the Wiener Library in London, and from at least one individual in the Soviet Union.

None of this subdues the hue and cry. The governments of the countries behind the Iron Curtain, for which everything has its higher political purposes, have from the beginning accused the West German government of being the historical continuation of the Hitler regime. They take a self-righteous satisfaction in releasing information from their captured files on anyone whose denunciation would in any way embarrass the *Bundesrepublik* and confirm the Communist propaganda thesis. Often the files in their possession have produced a dossier on which the West German government has acted; such information is sometimes true but it is not designed for a judicial purpose. The iron-curtain countries have their own highly placed former Nazis and Iron Guardists who immediately changed the color of their shirts; when official accusations are brought forward they are made entirely for political maneuver. If the East Zone Communists had wanted justice they could have had it sooner without waiting for a politically opportune time. May 8 will paradoxically, if the statute of limitations is not prolonged, very likely produce more documents from the East than if the criminals might still be legally punished.

Not for the first time are the Germans

on the long horns of a dilemma. Those who oppose a change in the law say, among other things, that they have had enough of retroactive law, of laws designed to fit political occasions, under National Socialism. They say too that it is highly unlikely that many unknown perpetrators of crimes are still at large—people who have not been tried or whose names remain unlisted. The Ministry of Justice has pointed out that 90 per cent of the cases tried by German authorities were heard before 1953; after the subsequent trials and the additional names on the blotters of those still being sought, not many Nazi murderers could now possibly escape prosecution should they be discovered; not enough to justify the tactic of changing the law in the fashion of the Nazis.

One may suspect that the real reason behind the disinclination to prolong the law is that the Germans, although overwhelmingly anti-Nazi, are tired of the subject, tired of the denunciations of Germans and non-Germans, and would greatly prefer to put the past behind them, to forget it whenever possible. As it is, they say, the trials will go on for at least another four years with the cases already scheduled to be heard; is there to be no end to this dark chapter of their history? Furthermore, the arguments go: Who else besides Germans has ever been tried? Who ever stood before a court because of the destruction of the undefended city of Dresden, where more than a hundred thousand non-combatants were killed in a single night; or for the rape and plunder of German cities by the Soviet army; or for Hiroshima and Nagasaki?

The critics of such views look at the matter with an inward and outward eye. For one thing, they point out, these were no ordinary crimes: six million human beings done to death in extermination camps,

pseudo-scientific experiments designed only to torture or kill the victims; Einsatz squads organized to hunt down and "cleanse" Europe of the Jew; transports organized in which people traveled without food and water so that cadavers tumbled out of the freight cars when they arrived at whatever terrible destination they had been shipped to; no statute of limitations should exist to prevent the trial of a single one of the men who committed crimes such as these. Furthermore, the argument about the one-sidedness of the punishments for war crimes does not apply in these cases. People who are being sought now are not those who committed alleged war crimes but those who took part in calculated mass murder. It may be true that allied nationals were guilty of heinous crimes, that the decision to bombard population centers was an atrocity both of those who gave the orders and of those who carried them out, and the same thing was true when allied commandos were told to act like criminals and did. Morally, no doubt, such men on the allied side should have been tried too. But in a world where war still exists, no heads of victorious states and no victorious generals who have been fighting against a criminal regime can be tried for having won their war or for overstepping the blurred boundaries between legality and illegality in some of the methods they used. In any event the discussion in the case of the statute of limitations has little to do with matters that might be called reprisals, or means, however savage, of conducting total war—it has to do with crimes that are considered such throughout the civilized and uncivilized worlds. To make it impossible to prosecute even a small number of murderers who might be able to reappear with legal immunity in Germany because no judicial action had been taken is grotesque.

It seems to this writer that the argu-

ments of the latter group are well founded. These were certainly no ordinary crimes and the trial of even a lost handful of those who committed them should not be prevented. Retroactive law and such legal shenanigans as were practiced by the Nazis were devices against the innocent, against people who had offended no law but only "the healthy sense of the Volk," or were believed in some sly way to be damaging the Party and State. But murder, especially mass murder, is not in this category—to make possible the prosecution of anyone who has committed it does not endanger or weaken the structure of law. Practical considerations, as the Bonn Foreign Office has undoubtedly informed the Government, are not to be ignored either. In the same issue of the Bonn *Bulletin* from which I have taken some of the figures given here, are headlines about the common fate of the free world, the necessity of thinking of the whole western community. Stubbornly going their own way in a matter that has left the entire civilized community aghast is not likely to further such high purposes.

The Germans had a long way to go before they got rid of their pariah status. Thanks to men like Konrad Adenauer, Ernst Reuter, Ludwig Erhard, Theodor Heuss, Kurt Schumacher, those who revolted on July 20, 1944, and thousands like them, as well as the universal revulsion, once the facts were known, of the German people themselves against the regime that had ruled them, West Germany has gradually been welcomed both as an ally and friend of the other peoples of Europe and the West. The German state has voluntarily made amends that were open to it to Israel and to individual victims of the Nazi period. Thousands of Germans have volunteered to work on behalf of reconciliation and it is likely that less antisemitism exists in Germany than in any country of

the world outside of Israel. But always behind the scenes other forces are evident. An insignificant core still exists of old and new Nazis who, under no nationalist disguise, have been able to muster enough votes to keep a party on the slate in Germany, but who nevertheless manage to publish a few insignificant newspapers and to remind people that Hitler too started from small beginnings. Other states and peoples as well as Germans are violently allergic to such manifestations even when they seem to have been diluted to legalistic argumentation; the time is past, as no one knows better than the Bonn government and the German intellectuals, when the country can pursue its own self-regarding policies without concerning itself with the reactions of foreigners. Germany has a valid case for reunification, for the adjudication of her claims for territories that have been German for centuries and were taken from her as ruthlessly as Hitler took land from his neighbors. None of these legitimate German goals may be secured without the help of others and while the foreign policy of states is not made by moral sentiments they nevertheless play their role in democratic states where public opinion is heard from.

Nevertheless the case against changing

the law is a strong one. Under the West German Constitution, where, as under the American Constitution, every citizen is equal before the law, prolonging the statute of limitations must affect anyone suspected of murder; not only former Nazis. Thus what has long been regarded on the Continent as a basic principle of justice would be changed largely in response to foreign pressure. What effect is this likely to have on the new German democracy? And if the *Bundestag* votes to prolong the statute and the courts hold the act unconstitutional what then? Won't Germany's image before the world be as tarnished as if the attempt had never been made to change the law? Furthermore, any remaining major criminals are still subject to trial; only minor culprits, and not many of those, would possibly be affected by an amendment of the statute.

It is a repetition of history worth noting that it is almost as hard to be a conscientious and well-regarded German in the post-Hitler world as it was to be a conscientious and well-regarded Jew in Germany in 1933.

—E.D.

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