

A Brief Introduction

I IDEOLOGICAL APPROACH

German criminal law is heavily doctrine-driven, much more so than is the case under the approach taken by English criminal law or, for that matter, the criminal law of many common law systems. Whilst it is true that parliamentary law-making has gained a lot of ground, especially in recent decades, the latter have traditionally relied on a judge-based development on a case-by-case basis. Because their law had to be tailored for use by lay people as fact-finders in the criminal process, be they jurors or lay magistrates, a high emphasis was put on remaining as close as possible to what judges like to call 'common sense'. The well-known English case¹ on the effects of voluntary intoxication on the mens rea of the accused, *DPP v Majewski*, is a good example of this attitude:

A number of distinguished academic writers support this contention on the ground of logic. As I understand it, the argument runs like this. Intention, whether special or basic (or whatever fancy name you choose to give it), is still intention. If voluntary intoxication by drink or drugs can, as it admittedly can, negative the special or specific intention necessary for the commission of crimes such as murder and theft, how can you justify in strict logic the view that it cannot negative a basic intention, e.g. the intention to commit offences such as assault and unlawful wounding? *The answer is that in strict logic this view cannot be justified. But this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic.* There is no case in the 19th century when the courts were relaxing the harshness of the law in relation to the effect of drunkenness on criminal liability in which the courts ever went so far as to suggest that drunkenness, short of drunkenness producing insanity, could ever exculpate a man from any offence other than one which required some special or specific intent to be proved. [Emphasis added.]

Nothing could in principle be further from the truth under German law. German law has widely subscribed to the use of historical and teleological interpretation, which includes the application of public policy arguments like the one used by the court in the *Majewski* case, but such a bare-faced rejection of the appeal of logic would be an alien thought to any German judge, let alone academic. Despite the fact that the development of German criminal law, too, has increasingly come under the influence of judicial reasoning about legal principles, especially if it happens at the levels of the Bundesgerichtshof (BGH) or Bundesverfassungsgericht (BVerfG) or, as far as a lot of the procedural law is concerned, the European Court

¹ *DPP v Majewski* [1977] AC 443, repeated in *R v Powell and another*; *R v English* [1999] AC 1.

of Human Rights (ECtHR), there is still a discernible impact of and reliance on academic writing, mainly based on the German legal commentary culture. German academics and practitioners have over the centuries produced large and intricate commentaries on the different codified laws, and handbooks on practice and procedure. Only the latter can be equated with common law publications such as *Archbold* or *Stone's Justice Manual*. Big multi-volume commentaries on specific codes, such as, for example, the *Leipziger Kommentar zum Strafgesetzbuch*, or the *Löwe-Rosenberg* on the Criminal Procedure Code, as much as one-volume works such as the *Schönke/Schröder* or *Tröndle/Fischer* on the Criminal Code, as well as the *Meyer-Goßner* or the *Karlsruher Kommentar* on the *Strafprozeßordnung*, written by respected academics, seasoned judges and practitioners through many editions, do not just digest the development of literature and jurisprudence, but they also analyse them and criticise the arguments put forward by the writers and judges and, if they happen to disagree with them, set out their own view of how things should be done, something hardly ever found, for example, in *Archbold*. It is no rarity to find a court change its long-standing jurisprudence on a certain topic because the logic behind the arguments of renowned academic writers, often made in such commentaries, convinces the judges that their previous views were wrong.

The fact that German law is to a large extent based on the more or less strict application of logic and well-developed methods of interpretation is also a function of the German academics' attitude to the judicial process: they do not see academia as the mere handmaiden of the judges, but as their guiding light. To their minds, judicial practice should follow abstract reasoning rather than adhere to a casuistic approach that favours justice in the individual case over systemic coherence to the major and overarching legal principles across the board.² The German approach, to use a simplistic description, is thus deductive in nature, as opposed to the more inductive one of the common law, and it runs counter to the inclination of laymen who have been said to be 'likely to prefer warm confusion to cool consistency'.³ I hasten to add that in some areas of German law, notably labour and employment law, large sections are almost wholly judge-made because the Government has for some reason or other not taken up the burden of providing for proper codification. Very often, Parliament will in its acts codify a long-standing and proven judicial tradition and to that extent there is, of course, a judicial influence on codified law-making, too.

The function and view of the trial and its effect on legal reasoning in the sphere of substantive law are markedly different. This begins with the nature and structure of the German criminal process, on which a few words must be said. German criminal proceedings are by their nature not a contest between parties, but an objective, judge-led inquiry into the material truth of the facts underlying a criminal charge. Equality of arms is not a principle that would apply to a similar

² This is another typical area of divergence between common and civil law systems, as has been shown by Mirjan Damaska in his seminal work *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, New Haven and London, 1986).

³ Damaska, *ibid.*, 28.

extent as it does in adversarial systems. From the German point of view, the prosecution, on the one hand, has no individual rights of fair trial; it has powers and duties, with the consequence that the prosecution cannot argue a violation of the right to equality of arms because the system is not adversarial, but the court *itself* is under a duty to find the truth. The defence on the other hand has no duties, only rights, yet it may suffer if it does not exercise them properly, as is the case under the well-known common law ‘save-it-or-waive-it’ principle relating to grounds of appeal, which appears to find more and more favour with German courts, too, especially in connection with § 238 (2) StPO. The defence is seen as being by definition inferior in power and facilities to the prosecution, so from a German point of view equality of arms is a principle that protects the defence, but not the prosecution. Any idea of changing the law, for example by introducing probative burdens of proof on the defence or reading down the requirements the prosecution has to prove in order to make it easier for the prosecution to bring its case, would have no equivalent in German doctrine, and indeed would be seen as constitutionally questionable. Difficulties of the prosecution to prove its case cannot lead to an abridgment of the defence’s position by interpreting down the threshold of certain offence requirements.

II SOURCES OF CRIMINAL LAW AND HIERARCHY OF NORMS

German law follows, in principle, the strict application of the maxim *nullum crimen, nulla poena sine lege*. As far as the criminal liability of a person is concerned, the maxim is augmented by the adjective *scripta*, ie, the law must be a written law, and Article 103(2) of the *Grundgesetz* (Basic Law—hereinafter GG) makes it clear that criminal liability must be based on a full act of Parliament; mere secondary governmental instruments and regulations will not normally suffice, unless the act of Parliament refers to those in order to demarcate the conduct which it criminalises. Such laws are called *Blankettgesetze*, or ‘blanket acts’, because they themselves do not contain (all) the elements of the offence but refer to other legislation for that purpose.

Yet recent German history after the Second World War and the 1990 Unification Treaty appears to have accepted one category of law that would stand outside the requirements of Article 103(2) GG: the demands of natural justice or natural law. After the abject failure of the post-war German judiciary to address the gross abuse of the formal legal process from 1933 to 1945, this issue arose again when the courts of the unified Germany after 1990 had to deal with the murders committed by GDR border guards, and with the orders given by their superiors in the military and political chain of command. This time, everyone was bent on not repeating the mistakes made after the Third Reich. The thinking behind this approach is based on the so-called ‘Radbruch formula’, after the German philosopher Gustav Radbruch (1878–1949), who analysed the relationship between positive law and natural law using the example of the Nazi regime’s legislation.

The formula states that formally valid positive normal law prevails over substantive concepts of justice, even if it is unjust and irrational. This primacy ends when there are breaches of principles of justice, of intolerable proportions, which are in turn defined as instances where the positive law explicitly and systematically neglects its goal of pursuing the aims of justice, and when the principle of equality is ignored on purpose. In short, the German courts held that former East German soldiers and judges were bound to interpret the socialist law in the light of the liberal spirit of fundamental concepts of human rights over the commands of the written law.

The courts in these cases used considerations of natural justice to establish the liability of the defendants by debunking positivistic rules of justification based on GDR law, whereas the much more common application of these ideas occurs in arguments which are to the benefit of the accused. This approach to the primacy of natural justice over positive law had been taken in the last century with the famous decision by the Reichsgericht in the 'Abortion Case', when the Supreme Court of the German Reich accepted in 1927 that a pregnancy could be terminated if otherwise there would be a grave danger to the mother's health or life. At the time, German law had no provision to this effect, and the Reichsgericht 'invented' the so-called '*übergesetzlicher Notstand*' (supra-legal state of necessity) from the commands of natural justice. The decision was the basis on which § 34 StGB on necessity was finally modelled. For the offence of abortion, it can also be found explicitly in § 218a(2) StGB.

Natural justice, from the German point of view, should be seen as a kind of safety-valve in a legal system tending towards a positivistic approach, as far as the usual primacy of the written law is concerned. One might compare it to the function that the principles of equity jurisprudence have had as a corrective to the stricter rules of the common law in English legal history. It is difficult to place natural justice firmly into a hierarchy of laws, as it applies in different shapes and forms at any level of the German legal system. It permeates the law as a guiding principle of interpretation. It would not be unfair to say, however, that the principle of natural justice has the force of influencing the application even of the highest-ranking legal rules at the constitutional level. Looking at it that way, one can make the statement that it represents the top tier in the hierarchy of laws.

The more tangible sources of criminal law begin with the next rung down on the ladder, the constitution and international law. These two we must mention together because at least in some cases there is an overlap or exchange of hierarchical position between them. The ground rule is that the constitution is the supreme law of the land. International law must be ratified and implemented by a domestic act of legislation and normally takes the rank of simple federal law except for generally accepted rules of international law, which under Article 25 GG rank between the *Grundgesetz* and simple federal law and do not, as a matter of principle, require domestic implementation. Yet care should be taken not to interpret Article 25 GG as meaning that criminal liability can be established on the basis of international customary law, even if it has the quality of *jus cogens*. The tension

between Article 25 GG and the above-mentioned Article 103(2) GG must be resolved in favour of the latter, meaning that criminal liability always requires implementation by domestic law.

The *Grundgesetz* and international law can trade places in the hierarchy when we look at the supranational effect of European law: even the lowest category of self-executing and binding European law takes precedence over the constitution. This had, however, been disputed by the BVerfG for some time when the court at first claimed the final word on the applicability of EC legislation as long as it conflicted with German constitutional law and especially the fundamental civil rights therein, but then moved on to accepting that the European law had reached a level of protection that made such control superfluous unless the complainant showed good cause that the degree of protection on the European level had slipped below that of the *Grundgesetz*. Similar problems arise when Germany has to abide by resolutions of the UN Security Council adopted under the powers of Chapter VII of the UN Charter.

At the next level down, to which the Criminal Code belongs, we have the simple federal legislation, both parliamentary and to some extent derivative governmental instruments, as long as there is an act of Parliament authorising the government to fill in the conditions of criminal liability. Federal law, which these days contains the vast bulk of criminal law applicable in all the member states of the Federation, outranks the law of those states, even their constitutional law. At the very bottom there is the municipal law, which may in restricted cases be made the basis of minor regulatory offences, *Ordnungswidrigkeiten*, which no longer count as proper criminal offences.

Judicial case law, as should have become clear by now, can never be the basis of creating new criminal offences; in this respect the laws in Germany and in England and Wales have converged substantially after the 2006 decision by the House of Lords in *Jones*,⁴ where it was held that the courts could no longer create new offences based on their traditional common law powers, and that it was for Parliament to do so.

III PRINCIPLES OF INTERPRETATION AND THE ROLE OF PRECEDENT

German criminal law, as with any area of German law, knows of and applies five methods of interpretation, which to some extent vary from the approach taken in England and Wales. They are, in their supposed order of application:

- Literal
- Grammatical
- Systematic
- Historical
- Teleological

⁴ [2006] UKHL 16.

Courts will usually start by interpreting any provision literally. If that does not result in a clear picture, the expression in question will be looked at in its grammatical context. Should the exercise remain unsatisfactory, the rule will then be placed in its systematic context, ie, how does it fit together with other rules or provisions using the same wording? The next step is the question of what problem the law was meant to address in its historical development; this is akin to the English ‘mischief rule’. Finally, and more or less anathema for many common lawyers of the old school, the court will ask what aim the legislator intended to achieve by making that particular rule, ie, what was the *telos* of the lawgiver, hence the name teleological. This sequence is, of course, only a sequence in theory, as German courts will regularly base their decisions on a combination of these arguments, each corroborating the others.

German courts are not bound by a doctrine of *stare decisis*, such as is found, for example, in the UK. However, for pragmatic reasons lower level courts will as a rule not deviate from the settled jurisprudence of the superior courts of their districts and the federal courts. This is done to avoid pushing the parties into an appeal the outcome of which is practically clear. Yet any judge at the lowest court is free to disregard the jurisprudence of the highest courts of the land, even that of the BVerfG, unless the latter’s decision in question has the force of an act of Parliament or the appellate decision is binding because it determines an appeal in a specific case—yet in the next case, even if identical on the facts, the judge is no longer bound.

IV THE TRIPARTITE STRUCTURE OF OFFENCES—AN OVERVIEW

In this overview of basic concepts, we need to take a brief look at the tripartite structure of German criminal law. The StGB is divided into a General Part (*Allgemeiner Teil*) applicable to all offences, and a Special Part (*Besonderer Teil*), containing the individual offences. Further offences can be found in special legislation, but as a rule the General Part applies to these too. Each offence, based on this two-fold division, is subject to three stages of examination, hence the name ‘tripartite structure’ (*dreistufiger Verbrechensaufbau*):

- *Tatbestand* = Offence description or (loosely translated) actus reus (*objektiver Tatbestand*) plus mens rea (*subjektiver Tatbestand*);
- *Rechtswidrigkeit* = the general element of unlawfulness and the absence of justificatory defences;
- *Schuld* = the general element of blameworthiness or guilt and the absence of excusatory defences.

The *objektiver Tatbestand* contains the objective elements of offences, similar to the actus reus as understood in the common law. The element of unlawfulness is not a general element of the actus reus, but a separate and distinct category; its absence therefore, unlike under English law in some cases, does not negate

the *objektiver Tatbestand*. In connection with offences requiring intention, the *objektiver Tatbestand* is made out if and when the elements listed in it have been fulfilled. With offences based on negligence the general elements of the *objektiver Tatbestand* are augmented by the requirement of a violation of a duty of care and the foreseeability of the result. Negligence is only a basis of liability if the law expressly provides for it: § 15 StGB. Simple negligence, unlike in English law, can be sufficient, unless the law requires a higher degree of negligence.

The *subjektiver Tatbestand* only refers to forms of intent. Negligence in its subjective form is commonly seen as a matter for the third tier, *Schuld*, or guilt. An honest mistake of fact eliminates intent. The *subjektiver Tatbestand* does not normally encompass such issues as intoxication or insanity; these belong to the general element of *Schuld*.

The general element of unlawfulness, *Rechtswidrigkeit*, is in the normal course of events made out if the *Tatbestand* has been infringed (*Tatbestandsmäßigkeit indiziert Rechtswidrigkeit*), unless a justificatory defence eliminates it. Potential justificatory defences are self-defence, necessity, superior orders, citizen's arrest, etc.

The law assumes *Schuld* with young adult and adult offenders, but requires the court to establish the individual maturity of juveniles. The law requires the court to establish the individual maturity of young adults in order to decide whether juvenile law is to be applied. Potential excusatory defences include insanity, diminished responsibility, duress, excessive self-defence, provocation and crimes of passion and unavoidable mistake of law.

Finally, the law recognises categories outside the tripartite structure, such as *Strafausschließungsgründe*, ie, reasons that eliminate the need for punishment (eg, withdrawal from attempts) and *objektive Bedingungen der Strafbarkeit*, ie, factors that must be present before liability is triggered, but that do not form part of the tripartite structure and are thus not subject to the mens rea requirements. In both cases, mistakes are usually irrelevant.

V VERBRECHEN AND VERGEHEN

An important distinction is the one between *Verbrechen* (equivalent to the old UK category of felonies) and *Vergehen* (akin to misdemeanours). The definition is provided by § 12 StGB, which states that a *Verbrechen* is any offence with a minimum sentence of one year's imprisonment, whereas a *Vergehen* is one punishable by fine or with a minimum sentence below one year's imprisonment. Note that the reference to minimum sentences is an abstract one, referring to the sentencing frames set by the provisions on the individual offences, and does not relate to the sentence in the case at hand.

§ 12(3) StGB furthermore clarifies that the effects of any extenuating or aggravating circumstances arising from the General Part or specific sentencing provisions based on such circumstances are irrelevant for the purposes of the

classification. For example, murder under § 212 StGB with its minimum sentence of five years is a *Verbrechen*, murder under mitigating circumstances (mainly provocation) according to the old⁵ § 213 StGB was punishable with imprisonment from six months to five years; despite this it remained a *Verbrechen*, as it was a mere sentencing qualification to § 212 StGB. There is a third category, the lowest one, which is called *Ordnungswidrigkeiten* and which arose out of the previous French classification of the *contraventions*; however, these are no longer considered criminal offences proper and are regulated by their own code, the *Ordnungswidrigkeitengesetz* or OWiG, which only refers to the StGB inasmuch as the OWiG does not make specific provision for general principles.

The most important consequences of the dichotomy between *Verbrechen* and *Vergehen* in the substantive criminal law lie in the treatment of attempts and of attempts at participation. § 23 StGB provides that attempted *Verbrechen* always trigger criminal liability, whereas the same can be said for *Vergehen* only if the law expressly provides for this consequence. A good example in this context of how important it is to recognise the proper substance of, and relationship between, offences is § 216 StGB (*Tötung auf Verlangen*), the offence of mercy killing or killing at the request of the victim: the sentencing frame is six months to five years and one might be tempted to say that it is a mere privileged qualification of § 212 StGB, and as such its attempt is always punishable. However, § 216(2) StGB explicitly provides for attempt liability, which is an indicator that § 216 StGB is a wholly separate and not a derivative offence. § 30 StGB allows for punishment only in cases of incitement (ie, in the meaning of an attempted but fruitless act of abetting) or conspiracy⁶ if the offence that is the object of that attempted participation or conspiracy is a *Verbrechen*.

VI A BRIEF OVERVIEW OF THE DEVELOPMENT OF THE CRIMINAL CODE⁷

The Criminal Code of the German Reich in its original form of 1871 was to a large extent based on the 1851 Prussian Criminal Code, but has since been amended numerous times.

The first major change after the Second World War was brought about by the first and second Criminal Law (Reform) Acts of 1969 and 1975, which introduced an entirely new General Part and reformed the law of sanctions and sentencing in an unprecedented manner. They did away with the offences of adultery and

⁵ The minimum sentence is now one year.

⁶ This is a loose utilisation of the common law concept, as the substance of the offence differs in common and civil law systems. However, *conspiracy* as a general term neatly catches the actual facts and actions of the offenders. As long as one bears that in mind, there is little harm in using the word in the German context.

⁷ For more information on the development, including further reading, see Schönke-Schröder/Eser, *Strafgesetzbuch, Kommentar*, 27th edn, 2006, Einführung.

homosexuality. The highly controversial fifth Criminal Law (Reform) Act of 1974 saw a complete reformulation of the law of abortion. A first attempt at incorporating the piecemeal reforms was made by the Criminal Code (Introduction) Act of 1974, which also took the step of de-criminalising the previous offence category of *Übertretungen* mentioned above and made them into *Ordnungswidrigkeiten*. The sixth Criminal Law (Reform) Act of 1998 amended the law of the Special Part; it was promulgated on the same date as the Tackling of Sexual and Dangerous Offences Act of 1998. After this last major reform in 1998, it was re-published as a coherent whole in 1998, yet there have been more reforms since then.

Another major aspect was the German re-unification of 1990, which made it necessary to provide for transitional regulations as to how the law in force until that date in the former GDR and now the five new East German member states of the Federation was to be adapted to the West German standard. This was done in the annex of the Treaty of Unification and in an amendment of the Criminal Code (Introduction) Act.

Recent reforms include the Code of International Criminal Law of 2002 and, in the law of sanctions and sentencing, the law of 2004 on the subsequent imposition of incapacitation orders after a previous conviction. As opposed to the attempts at a grand reform early in the second half of the last century, criminal law reforms these days are mostly based on policy issues of the day and are often rushed through without proper consultation. Generally, the tendency is for more drastic and punitive laws. In this respect, German criminal law policy resembles that of the UK to a large extent.