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A century of penal legislation in Germany

Development and trends

Originalbeitrag erschienen in:
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**Old Ways and New Needs in Criminal Legislation**

Documentation of a German-Icelandic Colloquium on the Development of Penal Law in General and Economic Crime in Particular

Sonderdruck/Reprint

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*A Century of Penal Legislation in Germany: Development and Trends*
I. STARTING-POINT: THE IMPERIAL PENAL CODE OF 1871

When I decided to speak about "a century" of penal legislation in Germany, it was not simply because 100 years are a "round number" but for substantive reasons: since it is now a little more than a century that our criminal law - though with a lot of intermediate modifications and even substantial reforms - is governed by the same codification. I am referring to the "Penal Code for the German Empire" of May 15, 1871.²

This code obviously had its own antecedents, the most important of which was the "Constitutio Criminalis Carolina" (CCC) of 1532 by Emperor Charles V. Though this so-called "Carolina" was a milestone at first place in German history since, for the first time, it provided a unitary and long lasting code for the entire "Holy Roman Empire of German Nation" (as it was called at the time), it also exerted influence beyond its boundaries. Yet, it was unable to prevent further legal divergence amongst the various German territorial states (such as Austria, Bavaria, Saxony and - later on in particular - Prussia). For since it could only lay a claim to subsidiary application by virtue of its so-called "salvatory clause", it had nothing other than its intrinsic

I am indebted to Mr. Thomas Lindner for his preparatory work in collecting and sorting through the comprehensive material and to Mr. Brian Duffet for his assistance in translating a German draft into English.

¹ "Strafgesetzbuch für das Deutsche Reich", commonly called "Reichsstrafgesetzbuch" (RStGB), nowadays "Strafgesetzbuch" (StGB). For its foundations see Schubert, Die Quellen zum StGB von 1870/71, in: Goltdammer's Archiv für Strafrecht (GA) 1982, pp. 191-218.
authority with which to counter the absolutist aspirations of the various rulers who believed in the necessity of demonstrating their own particularistic criminal policy as well.\(^2\) Hence, there was still a need for the national movement, which began in the nineteenth century, in order for a second unitary criminal code finally to be brought into force for the German empire after its establishment in 1870/71.

This (second) Imperial Penal Code was not really a genuinely new product, but merely an adaptation of the penal code enacted by the North German Federation in 1870, which, in turn, was largely based on the Prussian Penal Code of 1851. The latter, again, had been open to the influence both of the French Code pénal of 1810 and of Feuerbach's enlightened Bavarian Penal Code of 1813. Hence, the resulting Imperial Penal Code of 1871 was still completely dominated by the ideas of the liberal "Rechtsstaat" of the nineteenth century: As far as punishment was concerned, the key idea was that of a general prevention by retribution for the act committed, whereas reference was scarcely made to special prevention aimed at the particular offender.\(^3\)

Since, thus, the Imperial Penal Code brought a preceding development to a conclusion rather than to open a future development, it was soon claimed that it had already been "out of date at the time of its

\(^2\) Nevertheless, this intrinsic authority of the CCC, which was directed at preventing judicial arbitrariness and which only wanted punishment to be imposed "for the love of justice and for the common good" (Art.104), was strong enough for it to operate as a subsidiary legal source in various particular territories until the imperial legislation of 1870/71 and even to serve as a model where territorial states undertook their own codifications. For further detail on the origin and significance of the CCC see Radbruch's introduction to "Die Peinliche Gerichtsordnung Kaiser Karls V.", 5th ed. (by A. Kaufmann), 1980; Eb. Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege, 3rd ed. 1965, pp. 131 ss. and on occasion of the 450th anniversary of the Carolina in 1982 - the collections by Landau/Schroeder (eds.), Strafrecht, Strafprozeß und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina, 1984, and by Schroeder (ed.), Die Carolina, 1986. As to the influence of the Carolina beyond the German borders see, in particular, Langbein, The Constitutio Criminalis Carolina in Comparative Perspective: An Anglo-American View, in: Landau/Schroeder, op.cit. at 215-225, and Bulatov, Die Peinliche Gerichtsordnung Karls V., in: Schroeder, op.cit. at 205-230.

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birth". Nevertheless, it proved to be stable enough for its basic structure to be able to last until the beginning of the seventies of this century. Although its face had meanwhile undergone changes of a more or less substantial kind as a result of more than 70 amendments, the General Part of the Penal Code was replaced with a completely new codification only with effect from January 1, 1975, whereas numerous provisions in the Special Part still continue in force today even if there have, to some extent, been profound changes.

It is obvious that this development can only be traced in a very cursory manner in this context. This will be done in the following steps. First there will be a short chronology of the main reform movements (II), with special attention subsequently being paid to those reforms that were primarily aimed at humanization and reinforcement of the notion of so-called resocialization (III); a further section will be devoted to efforts at decriminalization on the one hand (IV) and to various instances of new criminalization on the other (V); and finally we will take a brief look into the future (VI).

II. MAIN REFORM STEPS

1. Until the End of the Weimar Republic (1933)

The need for a reform of the Imperial Penal Code of 1871 soon became evident in the light of further refinements of criminal law theory as well as because of the increasing consideration being given to the empirical social sciences: So, in particular, it had been F. v. Liszt who, in his famous "Marburg programme" of 1882, had called for a reform of the criminal law sanctions system to be oriented towards special prevention in the sense of either reforming or deterring the

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4 See Entwurf eines Strafgesetzbuches (E 1962), Bundestagsdrucksache IV/650, 1962, p.93.

5 For details going beyond the examples that follow - see Jescheck LK (supra note 3), Einleitung, annot. 48 ss., and also the tabular summary in Dreher/Tröndle, StGB, 44th ed. 1988, pp. LVII-LXXI.


7 In addition to the individual references that follow, there is a comprehensive survey of reform literature (now barely manageable in magnitude) in Eser, in: Schönke/Schröder, Strafgesetzbuch-Kommentar, 19th ed. 1978, Einführung (at the end), with supplements in the 23rd ed. 1988.
However, it took another thirty years, until the 26th Conference of the German Jurists' Day in 1902, before an urgent call for a total reform of the Penal Code was made. At any rate, this was the starting signal for various official reform drafts which were, however, first of all preceded by an act of perhaps typically German thoroughness: on the instructions of the Imperial Ministry of Justice a committee of leading criminal law scholars was commissioned to prepare a comprehensive comparative law survey. The result, a "Comparative Restatement of German and Foreign Criminal Law", was submitted in 16 volumes between 1905 and 1909 - undoubtedly still an exemplary achievement, which, however, turned out to be rather sterile in terms of reform. Nevertheless, it was able to inspire the "Pre-Draft of a German Penal Code" (1909) - a draft, however, which, with its main emphasis being placed on culpability and retribution as the determining principles of the criminal law, still largely remained embedded in the ideology of the "classical school". As a result, it drew a response from the circle surrounding the "sociological school" - including F. v. Liszt and J. Goldschmidt - in the form of a "Counter-draft to the Pre-Draft of a German Penal Code" (1911). This draft led, in turn, to the official drafts of 1913 and 1919, which after all contained proposals with good future prospects such as conditional parole, protective supervision for juvenile offenders and probation assistance.

A basically new orientation, however, only became apparent in 1922 with the draft by Gustav Radbruch, who, as a professor of criminal law, legal philosopher, social democratic politician and as minister of justice at the time, combined both the intellectual ability and the political energy to present a truly modern conception. However, his draft broke too many traditional taboos - particularly through abolition of capital punishment and special treatment for so-called conscientious offenders ("Überzeugungstäter") - to be acceptable to the legislator of that time. By the time this draft finally reached parliament in 1927 it had already lost its cutting edge. Moreover, repeated dissolutions of the Reichstag prevented its final enactment. Hence, as described by Jescheck, it is fairly true to say that "criminal law reform in the Weimar Republic went down with the Republic itself".

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9 Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teil, 3rd ed. 1978, p.78. The "Amtliche Entwurf eines Allgemeinen Deutschen Strafgesetzbuches" (including the reasons given for the Draft) (2nd Part, 1925, pp. 1 ss.) also portrays the history of
The Weimar Republic's inability to bring about a total revision does not, however, mean that it did not succeed in bringing in essential and lasting improvements in some areas at least, such as the deregistering of served sentences (1920), the development of a special juvenile criminal law (1923) and the fines legislation aimed at suppressing short-term prison sentences (1921-1924). In other words, all these reform steps were primarily aimed at special prevention.

2. Under National Socialist Rule

Although this totalitarian regime was eventually to depart to an increasing extent from the established safeguards of a "Rechtsstaat" governed by rule of law, it initially even profited from the preliminary work done during the Weimar Republic. This applies in particular to the introduction of the long-planned "dual-track system" of punishments on the one hand and non-punitive "measures of security and rehabilitation" on the other - an innovation that has, in the meantime, proved to be lasting. The same is true of mitigation of punishment in cases of diminished capacity (today § 21 StGB), of the introduction of a special offence of total intoxication (now § 323a StGB) as well as of the further development of juvenile criminal law by separating the system of sanctions from those for adults and by modernizing it in terms of special prevention (1943).

In other respects, however, numerous changes in the criminal law were introduced by Nazi legislation. They were characterized, above all, by the most extreme severity in general deterrence, in particular by unrestrained extension of capital punishment. Most of those innovations had to be abolished again after the collapse of the Third Reich: In this context, above all reference must be made to the measure involving castration of dangerous sexual offenders as well as to criminal liability by analogy.

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reform until the mid twenties. See further Eb. Schmidt, Einführung (supra note 2), pp. 394 ss.
10 For further detail see Jescheck LK (supra note 3), Einleitung, annot. 49.
11 See the present §§ 38-45b StGB on the one hand and §§ 61-72 StGB on the other. On the "dual-track system" generally and for its antecedents see Tröndle LK (supra note 3), 10th ed. 1978, prenote 8 to § 38.
12 On this development see further Schaffstein, Jugendarfriedrecht, 9th ed. 1987, pp. 25 ss.
13 See further Eb. Schmidt, Einführung (supra note 2), pp. 430 ss.; Rüping, Grundriß der Strafrechtsgeschichte, 1981, pp. 94 ss., and just recently Schubert et.al. (eds.).
On the other hand, the Nazi regime neither turned out to be more effective as far as the reform of the criminal code as a whole was concerned. Clearly, this was for other reasons than those that had previously prevailed. Whereas until the end of the Weimar Republic the criminal law experts had been ahead of the politicians in their penal policy ideas, for the NS-rulers the criminal law draft of 1936 was not radical enough. Besides, they believed they would be in a much better position to accomplish their political objectives by a case to case legislation than by carrying out a comprehensive codification, which would, at the same time, have meant submission to an irksome self-restraint on their freedom of action.\textsuperscript{14}

3. \textbf{Since World War II.}

It can come as no surprise that after the division of the German Empire into different occupation zones as well as during the first founding phase of the Federal Republic of Germany (1949) the initial matter of concern could only be to get rid of the worst excesses of the Nazi era and to carry out particularly urgent changes. Apart from the constitutional abolition of capital punishment (1949)\textsuperscript{15} special mention must - inter alia\textsuperscript{16} - be made of the introduction of revocation of driver's licence as a measure of criminal law (1952)\textsuperscript{17} as well as of probation for adult offenders (1953).\textsuperscript{18} The further development of juvenile criminal law is also noteworthy: under certain conditions "young adults" up to the age of 21 were to be subjected to its provisions as well.\textsuperscript{19}

When then - after an interval of more than 15 years - work on a total reform of the criminal law was finally resumed in 1953, it began, once again, with a comprehensive survey of German and foreign criminal law: from 1954 onwards seven volumes of "Materials on Criminal Law

\textsuperscript{14} See \textit{Eb. Schmidt}, Einführung (supra note 2), pp. 449 ss.

\textsuperscript{15} By Art. 102 of the Grundgesetz (Basic Law) of the Federal Republic of Germany of 23.5.1949 (Bundesgesetzblatt = BGBI. I 1).

\textsuperscript{16} For further details see \textit{Jescheck LK} (supra note 3) Einleitung, annot. 53 ss.

\textsuperscript{17} By the (first) Gesetz zur Sicherung des Straßenverkehrs of 19.12.1952 (BGBI. I 832); now §§ 69-69b StGB.

\textsuperscript{18} By the 3rd Strafrechtsänderungsgesetz (=StÄG) of 4.8.1953 (BGBI. I 735); now §§ 56-58 StGB.

\textsuperscript{19} See \textit{Schaffstein} (supra note 12), pp. 30 ss., 45 ss.
Reform" were produced. With this as a basis, the Federal Minister of Justice set up the "Grand Criminal Law Commission" which comprised practitioners and politicians as well as theorists and which produced a number of different drafts until 1959. When the official "Draft of a Penal Code" (E 1962),\textsuperscript{20} submitted by the Government, finally reached the Federal Assembly (Bundestag), its prospects of adoption were soon reduced to a minimum. However distinguished the Draft 1962 may have been for the comprehensiveness and exactitude of its formulation of the general prerequisites for criminal liability and for the precision with which the offences were defined, it still lacked a modern criminal policy conception particularly with regard to its sanction system. It is true that account was supposed to be taken of special prevention through an ample system of measures of rehabilitation and security; nevertheless, the Draft 1962 was essentially based on a notion of punishment that was primarily conceived in terms of retribution for wrongfulness and culpability. Accordingly, penal servitude (Zuchthaus) - felt to be particularly stigmatizing - was retained; so, too, were short sentences of imprisonment, which, in terms of rehabilitation, must rather be seen as detrimental. Furthermore, probation was intended to be ruled out in cases where the offender's culpability or where general deterrence called for his imprisonment. To sum up: instead of there being a genuinely new movement towards fundamental change in criminal policy, the Grand Criminal Law Commission confined itself - in a more conservative spirit - to filling the gaps in the old criminal code, to clearing up misinterpretations and to converting established judge-made law into statutory form. Thus, even members of the Grand Criminal Law Commission - especially like JESCHECK - had to admit that this reform work "lagged behind the demands of modern criminal policy" and had therefore rightly been criticized.\textsuperscript{21} This also seemed to have an increasingly paralyzing effect on the "Special Committee on Criminal Law Reform" which in the interim had been set up by the Bundestag.\textsuperscript{22}

In this atmosphere of resignation it was important in terms of a revival of the reform spirit that the initiative should have been taken by a

\textsuperscript{20} Supra note 4.

\textsuperscript{21} Jescheck, Lehrbuch (supra note 9), 1st ed. 1969, p.75, with further references to critical comments.

\textsuperscript{22} Further details on the work of these reform bodies (with source references) are to be found in Jescheck, Strafrechtsreform in Deutschland, in: Schweizerische Zeitschrift für Strafrecht (= SchwZStrR) 91 (1975), pp. 1-44, 6 s., and also in LK (supra note 3) Einleitung, annot. 71 ss.
private working group consisting, initially, of 14 German and Swiss criminal law scholars and criminologists. In an uncompromising and courageously experimental spirit they produced an "Alternative Draft of a Penal Code" (AE), the General Part of which was published for the first time in 1966 and which was soon followed by other drafts concerning certain areas of the Special Part as well.\(^{23}\) Whereas the AE rather tended towards self-imposed restraint in regard to the general elements of the offence (as the more doctrinal prerequisites for punishability), it was primarily concerned with a consistent adjustment of the sanction system to the notion of rehabilitation as well as with a deliberate restriction of criminal law to socially harmful conduct. Admittedly, the AE adhered - corresponding in this respect with the E 1962 - to the principle of culpability and also to the dual-track system of punishments and measures; however, culpability was no longer conceived of as the "reason" for punishment but simply as the "limit" to punishment, within which a penalty was to be meted out in accordance with the criteria of rehabilitation and deterrence. The support given to uniform imprisonment and to total abandonment of short-term imprisonment of less than six months follows the same line. The introduction of a "social therapy institution" must be highlighted as being characteristic of the AE's system of measures.\(^{24}\)

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23 The following drafts were produced: Alternativ-Entwurf eines Strafgesetzbuches, Allgemeiner Teil, 1966, 2nd ed. 1969; Besonderer Teil: Politisches Strafrecht, 1968; Besonderer Teil: Sexualdelikte/Straftaten gegen Ehe, Familie und Personenstand/Straftaten gegen den religiösen Frieden und die Totenruhe, 1968; Besonderer Teil: Straftaten gegen die Person, 1st (demie-)Vol., 1970; Besonderer Teil: Straftaten gegen die Person, 2nd (demie-)Vol., 1971; Besonderer Teil: Straftaten gegen die Wirtschaft, 1977. See further: Entwurf eines Gesetzes gegen Ladendiebstahl (AE-GLD), 1974; Entwurf eines Gesetzes zur Regelung der Betriebsjustiz (AE-BJG), 1975; Alternativ-Entwurf eines Strafvollzugsgesetzes, 1973. For some years now this working group - which has grown in size and changed in composition - has been striving for corresponding adaptations of procedural law; see the following publications: Alternativ-Entwurf/Novelle zur Strafprozeßordnung, 1980; AE-Novelle zur Strafprozeßordnung: Strafverfahren mit nichtöffentlicher Hauptverhandlung, 1980; Reform der Hauptverhandlung, 1985. See also infra note 96.

24 On the creed of these so-called "alternative professors" - as they were immediately dubbed - see the contributions in Baumann (ed.), Programm für ein neues Strafgesetzbuch, 1968; Baumann (ed.), Mißlingt die Strafrechtsreform? 1969; also Roxin, Zur Entwicklung der Kriminalpolitik seit den Alternativ-Entwürfen, in: Juristische Arbeitsblätter 1980, pp. 545-552. In regard to criticism of the AE see, in particular, the papers read at the conference of criminal law teachers, held in Münster in 1967, Gallas, Kaufmann, Jescheck, and Grünwald (with a report of the discussion by Friedrichs), published in: Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 80 (1968), pp. 1-135.
In order to accomplish a complete breakthrough for the reform of our Criminal law, yet another condition certainly had to be fulfilled in addition to this professorial initiative, namely, political forcefulness. In this connection, there were two factors that turned out to be useful for further reform. One was that the FDP (liberal) parliamentary group - numerically small but otherwise strongly reform-oriented at the time - came out in favour of the Alternative Draft and adopted it as a formal parliamentary bill in the deliberations of the Special Committee on Criminal Law Reform. The other aspect was that - with the formation of the grand coalition between the CDU/CSU and the SPD - GUSTAV HEINEMANN, who later took office as Federal President, before that had become Minister of Justice and that through his efforts criminal law reform received new backing: deeply inspired by a humanism in the light of which the defects and injustices of the old criminal code must have seemed abhorrent, he made every effort - as did his social democratic successors in office - to see to it that at least a number of partial reforms were put through. This new strategy of a "reform by installments" is another point of a more procedural nature that deserves attention: By departing from the German tradition of utmost comprehensiveness and systematization in codification, the German parliament now rather followed the English model of step-by-step legislation, and this turned out as blessing. There are two reasons for this: on the one hand because the hectic pace of modern parliamentary life does not leave parliamentarians with much time and energy for comprehensive codifications, and on the other hand because smaller partial reforms are more readily adaptable to the course of social change. In this respect the experience of criminal law reform in Germany may also serve as an interesting lesson in the general history of legislation.

This reform in partial steps - apart from the more marginal changes relating to recording and listening devices (1967) and from the restrictive reformulation of offences against state security (1968) - became apparent, above all, in the long called-for decriminalization of certain "petty offences" through their degradation to "Ordnungswidrig-

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25 For further detail on these surrounding political conditions see Eser, Politics of Criminal Law Reform: Germany, in: American Journal of Comparative Law 21 (1973), pp. 245-262, 247 s.

26 Gesetz zum strafrechtlichen Schutz gegen den Mißbrauch von Tonaufnahme- und Abhörgeräten of 22.12.1967 (BGBl. I 1360); now in § 201 StGB.

27 8th StÄG of 25.6.1968 (BGBl. I 741).
keiten" as mere regulatory offences (1968). The main elements of reform are, however, to be found in the so-called "Criminal Law Reform Acts", of which so far five have been passed.

Even though they entered into force at different times the first two Criminal Law Reform Acts, passed in 1969, must be regarded as a single unit insofar as they comprise a comprehensive reform of the General Part.

The First Criminal Law Reform Act (1. StrRG) had the sole task of giving precedence and effect - without further delay - to the most pressing demands for reform. The most important of these were: the structuring of the sanctions in a manner more favourable to rehabilitation by introducing a uniform type of deprivation of liberty in order to replace penal servitude and imprisonment; the curbing of short terms of imprisonment; the linking of safety measures to the principle of proportionality; and also the restricting of so-called "Ehrenstrafen" by deprivation of certain rights and honors. Furthermore, in the Special Part, the offences of adultery and of ordinary male homosexuality were, inter alia, abolished; offences of kidnapping and abduction were reformulated, and the rigid casuistry of aggravated theft was replaced with a more flexible technique of enumerating so-called regular examples ("Regelbeispiele").

The Second Criminal Law Reform Act (2. StrRG), which entered into force only on January 1, 1975 after several delays that had become necessary for the purpose of adjustment to provisions subsequently needed, finally ushered in a complete reform of the General Part, which was from then on also expressly referred to as such and which had been completely transformed as well in regard to the arrangement and numbering of the sanctions concerned. Even if numerous changes - especially within the domain of the general prerequisites of punishabil-
ity - were confined to corrections of wording or systematic transpositions, the Second Criminal Law Reform Act also brought about a considerable number of changes of substantive weight: for instance, in the field of international criminal law, there was a return to the territorial principle (§ 3); further, statutory form was given to mistake of law (§ 17) - already recognized by the courts\(^{33}\) - as well as to justifying necessity (§ 34), which the courts had previously developed in the form of mere "extra-statutory necessity".\(^{34}\) Also, the earlier "coercing necessity" was combined with (non-justifying) "necessity through exposure to danger" in form of "excusing necessity" (§ 35). Of much greater importance in this Act, however, are the innovations in the system of sanctions: for instance, the minimum of imprisonment was raised to one month (§ 38) - what means that below that minimum only fines may instead be imposed; the fines system was remodelled on the basis of the Scandinavian day-fine system (§ 40); probationary warning - i.e. with punishment reserved - was introduced (§§ 59-59c); police supervision was replaced with new provisions on the supervision of conduct (§§ 68-68g); the original merely occasional provision for siphoning off the benefits acquired from wrongful acts gave way to a generalization of forfeiture (§§ 73-73d); and last but not least, the "social therapy institution" (§ 65) was introduced - although its actual establishment was first repeatedly postponed and finally almost completely given up.\(^{35}\)

If we compare the content of these reforms with the original drafts - E 1962 and the AE - we find that the effort to reach a compromise clearly comes to light, for neither of these drafts was completely successful. Still, we can say that the more doctrinal side of the crime, relating to the general prerequisites for criminal liability, was more oriented towards the E 1962 whereas on the sanction side the proposals of the AE more strongly prevailed.\(^{36}\)

In contrast to the General Part, which was completely renewed substantially in one reforming thrust, the Special Part was only reformed in partial areas. Reforms were carried out, inter alia, within

\(^{33}\) Cf. the landmark case of the Federal Supreme Court in: Entscheidungen des Bundesgerichtshofs in Strafsachen (= BGHSt) 2, p.194 (1952).

\(^{34}\) So already by the Imperial Court in: Entscheidungen des Reichsgerichts in Strafsachen (= RGSt) 61, p.242 (1927).

\(^{35}\) See infra note 56. Individual references to the relevant reform literature in Eser, in: Schönke/Schröder (supra note 29), Einführung, annot. 8.

\(^{36}\) See Jescheck (supra note 22), SchwZStrR 91, p.11.
the complex of offences concerning breach of the peace and demonstrations (1970);\textsuperscript{37} the new law of sexual offences replaced the earlier so-called crimes of indecency,\textsuperscript{38} and - above all - the law relating to abortion was reshaped amid much contention (1974).\textsuperscript{39} Finally, the Introductory Act to the Penal Code (EGStGB) of 1974\textsuperscript{40} brought about a certain general revision that was not only confined to necessary adjustments of the Special Part to the General Part but also involved more extensive reforms. These reforms did not only take the form of specific changes but also resulted, to some extent, from the rearrangement or new regulation of whole complexes of offences. Of primary significance, however, was the fact that in the light of continuing decriminalization the Introductory Act abolished the section on petty criminal offences (Übertretungen); and insofar as these offences were not downgraded to (non-criminal) regulatory offences (as was the case, for example, with "gross public nuisance" by virtue of § 118 of the Regulatory Offences Act) or, exceptionally, upgraded to minor criminal offences (as was the case, for example, with pilfering food, which was turned into a criminal offence under § 248a StGB prosecutable upon application by the victim only), they were repealed without replacement.\textsuperscript{41} That this reform in the seventies, however, was not yet the end of the reform of the Special Part but that further changes are to be expected in stages, is already demonstrated by the fact that since the official re-publication of the Penal Code in 1975 there have been nearly thirty - more or less extensive - amendments to the criminal law.\textsuperscript{42} In this regard, reference needs only be made at this point to the instances of new criminalization within the fields of environmental and economic criminal law. To the extent that general trends are visible in these changes, we shall have to return to them in the sections that follow.

\textsuperscript{37} 3rd StrRG of 20.5.1970 (BGBl. I 505).
\textsuperscript{38} 4th StrRG of 23.11.1973 (BGBl. I 1725).
\textsuperscript{39} 5th StrRG of 18.6.1974 (BGBl. I 1297). On these reform steps see further IV. below.
\textsuperscript{40} Einführungsgesetz zum Strafgesetzbuch of 2.3.1974 (BGBl. I 469).
\textsuperscript{41} See further Göhler, Das Einführungsgesetz zum Strafgesetzbuch, in: Neue Juristische Wochenschrift (= NJW) 1974, pp. 825-836. See also IV. below.
\textsuperscript{42} See the individual references (with details on the relevant reform literature) in Eser, in: Schönke/Schröder (supra note 29), Einführung, annot. 9. See also the tabular synopsis in Dreher/Tröndle (supra note 5), pp. LXV-LXVII.
4. The Loss of Unity in the German Criminal Law

This review of the history of reform in Germany would certainly be incomplete in an important respect if no reference was made to the loss of unity in the criminal law of the two German states. Although the unity of the German Reich as one state practically came to an end with the establishment of the Federal Republic of Germany and of the German Democratic Republic in 1949, the unity of the criminal law - in spite of numerous divergent partial changes - remained intact until 1968 on the basis of the Imperial Criminal Code of 1871, which formally remained in force. Notwithstanding many years of intensive preparation, the GDR only succeeded in 1968 in introducing a completely new criminal code. Although it would undoubtedly be tempting for us to follow and compare subsequent developments on both sides, we shall have to confine ourselves here - for reasons of space - to the development of the criminal law in the Federal Republic of Germany.

III. Humanization and Resocialization

If one were to attempt to infer certain basic trends from the variety of individual changes, reference would have to be made to humanization as the prime, and probably also the most important, objective. Even if there has to be punishment - and despite all discussions on various forms of "diversion", there can hardly be any doubt about the need for punishment in future as well, it must surely not be for its own sake but only to prevent criminal offences in future. However, even this le-
Legitimate preventive end cannot justify every means: even the convicted criminal remains a human being and his human dignity must accordingly be respected. Consequently, punishment must not be aimed at "eliminating" the offender but - on the contrary - at the best possible reintegration of the offender in society. Hence punishment should not impede the very result it is supposed to produce, namely, the offender's social reintegration. Even if this objective did not accord with an international trend anyway, it would amount to a constitutional imperative; for, according to Art.20 paragr.1 Basic Law, the Federal Republic of Germany considers itself not only a "Rechts-staat", i.e. a state governed by "rule of law" and - as should meanwhile be emphasized - its full judicial control, but also a "Sozialstaat", i.e. a state committed to social justice and, as such, aware of its social responsibility for delinquents as well. In these terms the offender increasingly became the focus of attention during the reform of the criminal law - at any rate this was the case in regard to the sanctions system. Even if this may not have happened without regrettable compromises being made, one could hardly deny the legislator's good intentions in shaping the system of sanctions in a manner as minimally destructive as was unavoidably necessary and as favourable to social reintegration as was feasible.

Seen in this light, the abolition of capital punishment is not only explicable in terms of a humanitarian reaction to the most dreadful abuses of the Nazi era but also follows from the principle of social reintegration; for, if this principle is flatly rejected anywhere, then indeed under circumstances where the offender, by physically eliminating him, is deprived from the very outset of any chance of resocialization, which our Federal Constitutional Court considers as an essential part of human dignity.

As far as imprisonment is concerned, in view of their large scale impact both the suppression of short-term prison sentences, in favour of fining, and the probationary suspension of imprisonment certainly have had a far greater significance. Whereas in 1882 prison sentences were still imposed and executed in 76,8% of all cases of conviction, the number of fines in 1925 - following the previously mentioned fining legislation of 1921-1924 - rose to 65%, and the number of immediate prison sentences dropped accordingly to 35%. In 1955, i.e. shortly after the introduction of probationary suspension of imprisonment (1953), this percentage diminished further to 19% whilst the number of fines went up only slightly to 70,6% and, moreover, 10,4% of the prison sentences imposed were probationally suspended. When, finally, the Criminal Law Reform Acts of 1969/1975 raised the minimum term of imprisonment to one month and further relaxed the provisions on probationary suspension of imprisonment - so that in exceptional cases even prison sentences up to two years would be covered - the number of fines rose to 83,2% in 1976 whereas immediate imprisonment was imposed in only 6,2% of all cases.49

Yet even where an immediate sentence has initially been imposed the offender is left with the chance of "probationary suspension of the remainder of (his) sentence" (§ 57 StGB). Where there is a positive social prognosis conditional release of this kind is imperative at the latest after two-thirds of the sentence imposed have been served and, in exceptional cases, even after half of the sentence had been served. This is supposed to give an offender the opportunity of earning remission of the remainder of his sentence in liberty, whereby his reintegration in society can be supported by the imposition of conditions (Auflagen) and of instructions (Weisungen) or by placing him under the supervision and guidance of a probation officer. Already in 1978 use was being made of this rehabilitative measure on federal average in 28,7% of all sentences executed.50 Initially, however, conditional release was applied only to cases where a determinate prison sentence had been imposed; for life imprisonment the only possibility was a pardon, which, indeed, was granted on average after about 20 years.51 Since 1981 however, "lifers" have also been able to enjoy premature

49 On these figures see the statistics and source references in Kaiser, Kriminologie (supra note 45), pp. 902 s.
50 Further details see Kaiser (supra note 45), pp. 931 ss.
conditional release (§ 57a StGB). A decision of the Federal Constitutional Court had given the impetus towards this step: according to this landmark case, for constitutional reasons and for the preservation of human dignity an offender who has been sentenced to life imprisonment must also have a concrete and realistic chance of regaining his liberty so that he is not deprived of all hope in this respect.

On the other hand, there have also been certain counterdevelopments aiming at a "reform of the reform": The first victim has been the "social therapy institution", conceived, at the time, with much penalistic enthusiasm. Here an opportunity for appropriate treatment was intended above all for dangerous offenders with serious socialization deficiencies and, at the same time, with sufficient intelligence and will-power to take part in social therapy. Tests carried out in a number of model institutions had produced quite encouraging results; however, after the general establishment of these institutions had repeatedly been postponed, the relevant provision was ultimately removed from the Criminal Code entirely at the end of 1984; instead, it continued to exist merely within the framework of a so-called "executional model" (Vollzugslösung).

In spite of small setbacks of this kind there can be no doubt that the notion of reformation and resocialization has succeeded, on a wide front, in cutting through traditional retributive thinking. Even if, on the other hand, references are occasionally made in international discussion to a "departure from the treatment ideology", this may, at most, have the effect of rendering the principle of social reintegration by rehabilitation a more relative one, but by no means of suspending it.

54 See above II.3. on the Alternativ-Entwurf and the 2nd StrRG. For further details see Stree, in: Schönke/Schröder, StGB, 21st ed. 1982, § 65 annot. 1 ss.
55 See Dünkel, Legalbewährung nach sozialtherapeutischer Behandlung, 1980; Gaertner (ed.), Sozialtherapie, 1982; Jescheck (supra note 51), SchwZStrR 100, pp. 6 ss.
IV. **DECRIMINALIZATION**

Another trend that criminal law reform in the Federal Republic shares with other countries follows from recognizing the fact that criminal law does not constitute the only means of social control and, moreover, that it should only be employed as an ultima ratio. In various ways account has already been taken of these efforts at decriminalization.

On a wide front decriminalization has above all been effected through the abolition of *petty criminal offences* ("Übertretungen")\(^{59}\) - mainly through their being downgraded to mere "*Ordnungswidrigkeiten*" - and partly also through complete abandonment of punishment, as in the cases of begging and vagrancy.\(^{60}\) The development of such *regulatory offences* as a category of non-criminal infractions, distinguishable from criminal offences, had already been made possible by the enactment of the Regulatory Offences Act (OWiG) in 1952.\(^{61}\) However, greater improvements confining the criminal law only occurred with the conversion of less serious traffic offences into regulatory offences:\(^{62}\) as a result of the greater increase in motorized transport the number of traffic offences had gone up immensely. Consequently, the substance of wrongdoing as signified by the criminal prohibition was about to get lost in the mass of violations that occurred. Since the number of people punished for such violations was very large, the population no longer evaluated traffic violations as being criminal but rather taking them into account as an unavoidable risk when using the roads.\(^{63}\) Since these traffic violations are now no longer punishable with a criminal sanction but merely with a "regulatory fine" of a disciplinary nature ("Geldbuße"), a strict separation from more dangerous and, thus, truly criminal traffic offences has been achieved. The practical importance of this differentiation can also be demonstrated by its procedural consequences: Whereas with criminal offences, the public prosecutor is obliged to prosecute on account of the principle of mandatory prosecution (§ 152

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\(^{59}\) In correspondence with the French trichotomy of "crimes", "déits" and "contraventions", petty criminal offences were comparable to "contraventions" and constituted the third category of "Übertretungen" in addition to "Verbrechen" (crimes) and "Vergehen" (délits).

\(^{60}\) Further details see Eser, in: Schönke/Schröder, StGB, 23rd ed. 1988, § 12 annot. 19.

\(^{61}\) Further Göhler, Ordnungswidrigkeitengesetz, 8th ed. 1987, Einleitung, annot. 1 ss.

\(^{62}\) By virtue of Art. 3 of the EGOWiG of 1968: see supra note 28.

\(^{63}\) See Roos, Entkriminalisierungstendenzen im Besonderen Teil des Strafrechts, 1981, pp. 64 ss.
of the Criminal Procedure Code/StPO: somehow misleading so-called "Legalitätsprinzip"), the prosecution of regulatory offences is governed by the so-called "Opporuitätatsprinzip", according to which prosecution lies at the discretion of the prosecuting authorities (§ 47 OWiG). Furthermore, compared with criminal proceedings, the preliminary investigation and the procedure for imposition of a regulatory fine have been significantly simplified.\(^{64}\) Insofar as the former "petty criminal offences" were either completely abolished or at any rate downgraded to regulatory offences,\(^ {65}\) this development ultimately reached its first climax through the Second Criminal Law Reform Act of 1969 in conjunction with the Introductory Act to the Penal Code, enacted in 1974. This distinction drawn between criminal offences and non-criminal regulatory offences in the meantime can be considered as generally accepted by the population as well.\(^ {66}\)

In addition to these instances of gradual decriminalization, that cover a wide area but mostly lead to a mere downgrading of offences, there have certainly also been some genuine reductions of criminal law. This counts, for example, for the former so-called offences against morality and decency ("Sittlichkeitsdelikte"). After the remarkable change of attitude with regard to marriage and family and also sexual morality in general, the values of traditional criminal law had lost their backing within society.\(^ {67}\) In face of more and more increasing reform demands in this area,\(^ {68}\) Parliament initially reacted by carrying out a partial reform through the First Criminal Law Reform Act (1969):\(^ {69}\) Thus the criminal offences of adultery, of bestiality, and of procuring extramarital intercourse by false pretenses were repealed without replacement; furthermore sodomy (in form of sexual acts between adult men) only remained punishable to the extent that they are performed when

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\(^{64}\) See further Göhler (supra note 61), particularly on §§ 46, 47.

\(^{65}\) Consequently, today, there is only a dichotomy between "Verbrechen" and "Vergehen" (§ 12 StGB). See further Eser, in: Schönke/Schröder (supra note 29), § 12 annot. 2-4, 15 ss.

\(^{66}\) Roos (supra note 63), p.70; Jescheck (supra note 51), SchwZStrR 100, p.12. On this whole subject see also Eser (supra note 25), pp. 250 ss., with a view at developments in the GDR.


\(^{69}\) See supra II.3. on the 1st StrRG.
exploiting a relationship of dependence or when acting on a commercial basis. The real reform, however, only occurred when the Fourth Criminal Law Reform Act was passed (1973).\textsuperscript{70} This reform was guided by the notion that the criminal law was (only) to "maintain external order in social conduct" and that criminal penalties should only be provided where individual or public legal interests meriting protection might be assailed and could not adequately be protected other than by penal sanctions.\textsuperscript{71} Accordingly, the concepts of "indecency" and of an "indecent act" were first replaced with the new concept of a "sexual act" (§ 184c StGB) in order to demonstrate its independence from purely moral notions of sexuality. In addition, crimes that had previously been classified as felonies (Verbrechen) were - with few exceptions - downgraded to misdemeanors (Vergehen). Also, sexual relations within marriage were, as far as possible, not supposed to be brought within the ambit of the criminal law; for this reason, the offences of rape and of coercion (§§ 177-179 StGB) were confined to extra-marital sexual acts - thereby not foreseeing, however, that in the meantime we would get a strong public movement towards criminalizing "rape within marriage" as well.\textsuperscript{72} As regards homosexuality between males, the protected age was reduced to 18 years, and the exploitation of a dependent relationship - which had been retained by the First Criminal Law Reform Act - was abolished, as was also the criminal liability of young male prostitutes (§ 175 StGB). Prostitution, pimping (Zuhälterei) and exhibitionism were largely decriminalized (§§ 180a, 181a, 183 StGB). Further, the dissemination of "soft pornography" was released from control in circumstances where there is no special need for youth protection (§ 184 StGB).\textsuperscript{73} On the whole, we are no longer concerned today with criminal law enforcement of a particular "morality" but rather with the protection of "sexual self-determination" - as now also indicated by the official title of the 13th chapter of the Penal Code, which deals with these offences.

With regard to abortion, too, the international wave of liberalization did not come to a halt at the German borders. Admittedly, in course of fluctuating developments, the Federal Parliament ultimately did not go

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\textsuperscript{70} See supra note 38.

\textsuperscript{71} See \textit{Roos} (supra note 63), pp. 112 s.


\textsuperscript{73} For details see \textit{Lenckner's review in: Schönek/Schröder}, StGB, 20th ed. 1980, pre-note to § 174.
quite as far as some of the neighbouring countries, such as Austria and France, did. Initially, the governing social-liberal coalition, following the "period model" proposed by the AE, gave parliamentary effect to an exemption from punishment for an abortion carried out during the first three months of pregnancy. This solution, however, upon a constitutional action brought by the then CDU/CSU opposition, was by the Federal Constitutional Court declared to be incompatible with the "basic right to life" (Art.2 GG), which is also enjoyed by the embryo. Therefore, the only room left was for a so-called "indication model" (§§ 218-219d StGB), according to which abortion is punishable on principle, yet while widely giving exemptions from punishability on the basis of broadly conceived medico-social "indications", and - as additional requirements - provided that certain counselling and procedural duties are complied with. Furthermore, even where there is no (justifying) indication present, the pregnant woman is conceded a personal exemption from punishment until the end of the 22nd week provided that she has previously received counselling. This means that for the pregnant woman the decriminalization intended by the reform has been largely achieved - and for some critics it has even gone too far. Whether, however, a lasting solution has yet been found must be open to doubt in view of continuing political controversies.

In similar terms, developments concerning so-called demonstration offences - to quote yet another example of an area in which decriminalization has taken place - also followed a zigzag course to a certain degree. Here, the motive for reform aspirations lay in the political awareness that had been growing in wide sections of the population since the mid-sixties. This awareness also sought expression in the political awareness that had been growing in wide sections of the population since the mid-sixties. This awareness also sought expression to an ever

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74 § 105 AE - Straftaten gegen die Person, 1st (demi-)Vol. (supra note 23).
75 Supra note 38.
77 15th StÄG of 18.5.1975 (BGBI. I 1213).
79 Eser (supra note 78), pp. 380 ss.; Jescheck (supra note 51) pp. 16 ss.; Roos (supra note 63), pp. 160 ss. For this reason the Max Planck Institute for Foreign and International Criminal Law in Freiburg has undertaken a broadly based comparative and criminological investigation, the first results of which - containing national reports on the European countries - have just been published by Eser/Koch (eds.), Schwangerschaftsabbruch im internationalen Vergleich, Teilband 1: Europa, 1988; vol.2, containing reports on extra-European countries, is expected to appear in fall 1989.
greater and increasingly emphatic extent in demonstrations and in other publicly effective campaigns. Even law-abiding citizens could come into conflict with the still very strictly conceived offences of resistance to law enforcement personnel, of unlawful assembly, and of breach of the public peace. The courts, too, had increasing difficulties in finding a tolerable borderline between the legitimate exercise of freedom of speech and assembly on the one hand and criminal acts of violence on the other. As the offences in question still largely embodied the relics of a way of thinking which was oriented towards state authoritarianism, some were repealed and others were downgraded to regulatory offences or otherwise restricted by the Third Criminal Law Reform Act of 1970. Consequently, in the case of breach of the public peace (§§ 125, 125a StGB), only those persons who themselves took an active part in violence as perpetrators, accessories or inciters or who acted as "agitators" were criminally liable, with the result that mere "fellow-travellers" at a non-peaceful demonstration remained exempt from punishment. Since, however, there was a steady increase in the incidence of violence at demonstrations during the seventies, Parliament saw the need for a certain reorientation in criminal policy in an amendment passed in 1976 in order to counteract, in advance, the backing, the steering and the threatening of certain acts of violence. In pursuance of this regressive tendency, so-called "passive arming" and the wearing of masks at processions and assemblies held in the open air was declared to be a regulatory offence by another amendment passed in 1985 (§ 29 sec. 1 of the Assemblies Act), and the presence of passively armed or masked persons in a non-peaceful crowd was also made a punishable offence under certain conditions (§ 125 sec. 2 StGB). Another step in a policy of "getting more tough" was taken by the "Terrorism Act" of 1986 through significantly widening the circle of those offences the pursuance of which can constitute


83 Gesetz zur Änderung des StGB und des Versammlungsgesetzes of 18.7.1985 (BGBl. I 1511). For details, particularly with regard to "breach of the peace", see Lenckner, in: Schönke/Schröder, 23rd ed. 1988, § 125 annot. 1 ss.
the "formation of a terrorist organization" (§ 129a StGB) and thus may open the door to broader procedural powers for the prosecution.⁸⁴ As regards this ultimately fiercely controversial "reform of the reform", the question still remains as to whether it will be of a lasting nature.⁸⁵

This survey by way of some examples would, however, be incomplete in an important respect if there were no reference to particular instances of decriminalization by way of procedural measures. In the sphere of petty crimes, the possibilities of terminating proceedings had already been extended by the Introductory Act to the Criminal Code of 1974, and the principle of mandatory prosecution was curtailed in favour of the principle of discretionary prosecution (§§ 153, 153a StPO). Accordingly, in a shop-lifting case or in other cases involving minor property offences a public prosecutor can terminate proceedings of his own accord and without prior consent of the court (§ 153 sec. 1 StPO). Additional power is given to public prosecutors by way of a provisional dispensation of the indictment (§ 153a sec. 1 StPO) in cases of minimal guilt and by the imposition of conditions and instructions to be complied with by the accused (for instance, restitution for damage done or payment of a sum of money to a non-profit-making institution). This reform step, however, has not been quite as unproblematic: even though the consent both of the court - which is hardly ever refused - and of the accused is required, public prosecutors have nevertheless been granted a quasi-judicial sanctioning power here. Despite these misgivings from the "Rechtsstaat" point of view, however, this mode of

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⁸⁵ This also applies to the currently highly controversial question as to whether, and to what extent, demonstrations, sit-in blockades and other similar activities disrupting traffic are capable of being covered by the provision on "coercion" (§ 240 StGB) - an offence probably foreign to most of other countries. Though not to allround satisfaction, however, in a recent judgement the Federal Constitutional Court (BVerfGE 73, pp. 206-261, 1987 = NJW 1987, pp. 43-52) at least to some part has clarified that a sit-in blockade can constitute "coercion", but not necessarily so because even if considered as application of "force" this is not automatically "reprehensible" in the meaning of § 240 sec.2 StGB but only on weighing the proportionality of the purpose and means of the individual case (for further details see Eser, in: Schönke/Schröder, 23rd ed. 1988, § 240 annot. 26-29). This rather friendly approach of the Federal Constitutional Court towards freedom of demonstration, however, was substantially hampered by a recent decision of the Federal Supreme Court when declaring the - eventually quite understandable - final goals of demonstrations as irrelevant, what runs up to comprehending any traffic blocking sit-in as a crime of "coercion" (Bundesgerichtshof, in: NJW 1988, pp. 1739-1742).
proceeding has probably developed into one of the most important instruments of decriminalization in practical terms.86

V. NEW INSTANCES OF CRIMINALIZATION

Criminal law reform is not a one-way road leading exclusively to decriminalization. Changes in social conditions and in public awareness can indeed also lead to penalization of conduct that so far were either not sanctioned at all or, at the most, as regulatory offence. Telling examples can also be cited in regard to this counter-development.

The alarming increase in 
hostage-taking and aircraft hijacking
led, in 1971, to the separate penalization87 of attacks on air traffic (§ 316c StGB), of extortionate kidnapping (§ 239a StGB) and of hostage-taking (§ 239b StGB). Similarly, the criminalization of "forming a terrorist association" (§ 129a StGB) was a reply to the spread of acts of terrorism during the seventies.88

The reform of the 
environmental criminal law
is also indebted to a process of change in society and particularly to the fact that, in the light of progressive air and water pollution, the attitude towards the need to protect natural living conditions has changed significantly, or has to be so changed where this is not yet the case. Previously, provision had indeed also been made for criminal penalties and regulatory fines as an annex to provisions under administrative law for the protection of the environment. However, in order to strengthen their outward impact, the most important relevant provisions were collected together - in some cases with substantial changes and extensions - and inserted


88 Apart from tightening up certain provisions of substantive law, this "Gesetz zur Änderung des Strafgesetzbuchs, der Strafprozeßordnung, des Gerichtsverfassungsge setzes und der Bundesrechtanwaltsordnung" (Act to Amend the Criminal Code, the Criminal Procedure Code, the Court Constitution Act and the Federal Lawyers Regulations) of 18.8.1976 (BGBl. I 2181) - also known as the "Anti-Terrorist Act" - introduced numerous procedural restrictions affecting the possibilities of defence. See, for example, Dahs, Das "Anti-Terroristengesetz" - eine Niederlage für den Rechtsstaat, in: NJW 1976, pp. 2145-2151. See also supra text to note 84.
by the amending legislation on environmental protection of 1980 in the Special Part of the Criminal Code (§§ 324-330d StGB). As the atomic reactor accident in Chernobyl and the Sandoz disaster in Basel have strikingly shown, there will have to be an awareness, particularly in regard to the protection of the environment, that the preservation of conditions essential to human life will not be possible for present and future generations if no provision is made for international protection.

In the area of economic crime, as in the similar case of environmental protection, the "classical" property offences also no longer proved to be adequate. As a result, the special offences of subsidy fraud (§ 264 StGB) and credit fraud (§ 265a StGB) were introduced by the "First Act to Combat Economic Crime" passed in 1976. These two offences are distinguishable - as "offences of endangerment" - from the general offence of fraud (§ 263 StGB): Whereas the latter is construed as a "damage offence", with these new offences criminal liability already arises where false statements are made without there being any need to furnish proof - frequently a difficult task - of damage to property or of an intent to cause such damage. As part of this reform step the bankruptcy offences were also brought back into the Penal Code (§§ 283-283d StGB) and the offences of profiteering were combined in a unified criminal offence (§ 302a StGB). These substantive legal provisions were also supported by accompanying organizational measures. Since the prosecution and adjudication of the frequently highly complex economic offences presuppose special expertise, specialized public prosecution departments were established to deal with economic crim-


90 At present there is another comparative law and criminological research project being conducted by the Max Planck Institute in Freiburg, dealing with the special role to be played - both nationally and transnationally - by the criminal law: see Albrecht/Heine/Meinberg, Umweltschutz durch Strafrecht? in: ZStW 96 (1984), pp. 943-998. - Since the present German law is considered to be not efficient enough, the Deutsche Juristentag as one of the most influential and largest assemblies of German lawyers has selected the protection of the environment by penal as one of its main subjects of its 1988 meeting: cf. the preparatory memorandum by Heine/Meinberg, Empfehlen sich Änderungen im strafrechtlichen Umweltschutz, insbesondere in Verbindung mit dem Verwaltungsrecht?, Gutachten für den 57. DJT, 1988; see also Meurer, Umweltschutz durch Strafrecht?, in: NJW 1988, pp. 2065-2071.

91 Erstes Gesetz zur Bekämpfung der Wirtschaftskriminalität (1. WiKG) of 29.7.1976 (BGBl. I 2034).
inal matters and so-called "Economic Crime Chambers" were establish-
ed in the courts (§ 74c of the Court Constitution Act). In the mean-
time, a second reform step has followed the first: in the "Second Act to
Combat Economic Crime" of 1986, certain abuses relating to Euro-
cheque and capital investment transactions were made criminal of-
ences (§§ 152a, 264a StGB) and new offences were also introduced as
protective measures against computer crimes (§§ 202a, 263a StGB).
However, as all these highly complex offences show, it will be difficult
for Parliament to keep abreast with criminal inventiveness in the ex-
ploration of new technologies.

VI. FUTURE OUTLOOK

The history of criminal law is the history of its never-ending reform. This is not to be understood as resignation but rather as a task to be
accomplished - with willingness to abandon what is antiquated and
with determination to face new challenges without ever giving up the
struggle for more justice and humanity.

In these terms there is still quite a lot to be done. Reference may be
made at this juncture to just a few of the most pressing items on the
agenda for which optimum solutions have probably not been found in
any country of the world. So in particular, modern medicine and bio-
technology, though certainly bestowing many benefits, have also been
accompanied by a number of consequential problems that still await an
adequate solution, such as, for example, the problem of humane aid in
dying or of preserving genetic integrity against manipulatory inter-

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92 For details concerning this 1. WiKG see Müller-Emmert/Maier, in: NJW 1976, pp. 1657-1664.
94 See Stammberger (supra note 3), p.11; Jescheck (supra note 51), SchwZStrR 100, pp. 26 ss.; Rogall, Stillstand oder Fortschritt in der Strafrechtsreform? in: ZRP 1982, pp. 124-131. Particularly interesting as an approval of law reforms by the politicians themselves see the re- and previews by Engelhard (FDP), Helmrich (CDU), Vomdran (CSU), Dauthler-Gmelin (SPD), and Günther (Die Grünen) in: ZRP 1987, pp. 105-122.
ference.\textsuperscript{95} Also, as far as "petty offences" are concerned, the search for decriminalizing modes of treatment will have to continue.\textsuperscript{96} Similarly, the sanctioning system, which is still largely focused on fines and imprisonment, would have to be extended through socially more constructive measures such as, for instance, reparation obligations or community service.\textsuperscript{97} With this kind of compensatory dimension, one "subject of interaction" within the context of crime - until recently almost forgotten in the atmosphere of one-sided concern for the offender - would also receive greater satisfaction: the victim of the crime.\textsuperscript{98}

It must be obvious that national narrowness can only be disadvantageous, and knowledge of foreign experience only advantageous, for finding a solution to these problems. Therefore, comparative law and international co-operation are now more necessary than ever.\textsuperscript{99}

\textsuperscript{95} As far as the first complex is concerned, an "Alternativ-Entwurf eines Gesetzes über Sterbehilfe" (Alternative Draft for an Act on Aid in Dying) has just been brought out (1986) by the "alternative professors" (see supra note 24); for details see Eser, Freiheit zum Sterben - Kein Recht auf Tötung, in: JZ 1986, pp. 786-795. As regards the avenues open to the criminal law in the field of modern human genetics see Eser, Strafrechtliche Schutzaspekte im Bereich der Humangenetik, in: Braun/Mieth/Steigleder (eds.), Ethische und rechtliche Fragen der Gentechnologie und der Reproduktionsmedizin, 1987, pp. 120-149. In view of the international importance of these problems it is to be welcomed that one of the sections of the next AIDP Congress - due for Vienna in 1989 - will be dealing with the subject of "Criminal Law and Modern Biomedical Techniques"; see to this the comment by Eser/Lahti, in: ZStW 98 (1986), pp. 800-809, and the forthcoming collection of the reports delivered at a preparatory international colloque in Freiburg 1987, in: Revue Internationale de Droit Pénal, Vol. 59 (1988), nos. 3-4, pp. 549-1371.

\textsuperscript{96} See, for example, the Alternative Draft on shoplifting and on disciplinary measures at work (Betriebsjustiz), supra note 23.

\textsuperscript{97} For a comprehensive treatment of this subject see the comparative investigation by Jescheck (ed.), Die Freiheitsstrafe und ihre Surrogate im deutschen und ausländischen Recht, 3 volumes, 1984.


\textsuperscript{99} In pursuance of this goal the Max Planck Institute for Foreign and International Criminal Law in Freiburg has started a regular survey on the legislation, judicature and literature on criminal matters in Europe, published by Eser/Huber (eds.), Strafrechtsentwicklung in Europa 1982-1984 (1986), and two volumes on 1984-1986 (1988).