The Restoration of Justice in Hesse, 1945-1949

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Abstract

This study deals with the reconstruction of the administration of justice in Hesse during the Allied military occupation of Germany. (1945-1949). The argument is analysed through two main elements: the restoration of judicial institutions and the denazification of judicial personnel. It is argued that the significance of the institutional element took precedence over the personnel element, since the denazification programme in the U.S. occupation zone was abandoned when it proved impractical. The evidence presented in this work is based on archival research, government documents, eye-witness acccounts, and secondary sources.

Résumé

Cette étude analyse la reconstruction de l' organisation du système juridique à Hesse sous l'occupation militaire des Alliés (1945-1949). L'argument est élaboré à partir de deux éléments principaux: la reconstruction des institutions du système juridique et la dénazification du personnel judiciaire. L'étude soutient que l'élément institutionnel prit le pas sur le facteur humain comme démontré par l'abandon du programme de dénazification dans la zone d'occupation américaine que ne s'est pas avéré fonctionnel. L'évidence historique provient de recherches archivales, de documents gouvernementaux, de comptes-rendus des témoins, et de sources secondaires.

Contents

Introduction

The purpose of this study is to examine the restoration of the administration of justice in postwar Hesse, a new *Land* in the US occupation zone, during the postwar Allied military occupation of Germany (1945-1949). The unconditional surrender of the National Socialist regime reduced Germany to being merely a geographical entity[1] at the beginning of the occupation, when the jurisdictions of governmental institutions had ceased to function as a consequence of the unconditional surrender. Supreme authority was vested in the Allied occupation powers[2] until the Federal Republic of Germany was established. Germany was governed by the Allied military government comprising the four occupation powers at the national level, and separate military government administrations that represented the four occupation powers in their respective occupation zones. The Allied aims for the postwar reconstruction of Germany were to be implemented by these separate military government administrations in each zone. German administrations of justice were reconstructed within the restored *Länder*, or states, of the US zone[3], in keeping with the Potsdam Protocol principle of the decentralisation of the German

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[1] Elmar M. Hucko, ed., *The Democratic Tradition: Four German Constitutions* (Leamington Spa: Berg, 1987), p.62.

[2] John H. Herz, "Denazification and Related Policies", *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* (Westport: Greenwood Press, 1982), p.24.

[3] Michael Stolleis, "Rechtsordnung und Justizpolitik: 1945-1949", *Europäische Rechtsordnung in Geschichte und Gegenwart: Festschrift für Helmut Coing*, ed. Norbert Horn, Vol. 1 (Munich: C.H.Beck'sche Verlagsbuchhandlung, 1982), p.396.

political structure and the development of local responsibility that was believed to be conducive to democratisation[4]. *Land* Hesse was created at the beginning of the occupation, formed out of former *Land* Hesse on the right bank of the Rhine[5] and parts of the Prussian provinces of Kurhesse and Nassau[6].

The reconstruction of postwar Germany took place under the military government administrations at the national, zonal and *Land* levels that exercised supreme executive, legislative and judicial power at these levels. Since the jurisdiction of the US military government was limited to one of the four zones, the task of the postwar reconstruction of German government and its affiliated institutions was limited to the *Land* level, while policymaking for the national level was dependent upon the cooperation of the other three occupation powers[7]. Policies for the reconstruction of justice and other tasks to be implemented in the individual *Länder* of the US zone were drafted at the national level under the auspices of the Allied Control Council, while the US military government was functioning at the zonal and *Land* levels. The reconstruction of the administration of justice in the US zone took place under the supervision of the US military government, which established a Military Government Office in each *Land* within

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[4] Karl Loewenstein, "Law and the Legislative Process in Occupied Germany", *Yale Law Journal* Vol. 57 (1948), p.1022.

[5] The territories on the left bank of the Rhine were integrated into the French occupation zone.

[6] Wolf-Arno Kropat. *Hessen in der Stunde Null, 1945-1947: Politik, Wirtschaft und Bildungswesen in Dokumenten* (Wiesbaden: Historische Kommission für Nassau, 1979), p.20.

[7] Harold Zink, "American Occupation Policies in Germany", *Review of Politics* Vol. 9 (July 1947), p.285.

its zone of occupation. The process of the reconstruction of German *Land* governments and judicial organisations in the US zone began upon the creation of the *Länder*. Common measures for the US zone as a whole were later introduced by representatives of the re-established *Länder* governments and representatives of the zonal US military government, while the German governments at the *Land* level in the US zone were substituted for the national government[8]. The *Länder* of the western zones were incorporated into a federal system of government in September 1949 when the Federal Republic of Germany was created[9], and the functions and powers of the *Land* judicial organisations were affirmed in the federal constitution.

The tasks of the postwar reconstruction were undertaken in the period of the transition from the National Socialist totalitarian *Unrechtsstaat* to the restoration of constitutional government, or a *Rechtsstaat*. The function of the administration of justice in a state is to promote an orderly social life as an institution of the state. This is accomplished by applying the laws enacted by the government of the state, which organises and governs the judicial organisation of the state in accordance with its interests[10]. In this respect, the laws enacted by the political power in a democratic state are to serve two functions that cannot be separated while they operate simultaneously: 1) by safeguarding the social order as a state institution; 2) to serve as a moral authority by fulfilling the interests of justice. This second function

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[8] *Ibid.*, p.291.

[9] Hucko, *The Democratic Tradition*, p.63.

[10] Georg-August Zinn, "Administration of Justice in Germany", *Annals of the American Academy of Political and Social Science* Vol. 260 (November 1948), p.32.

was negated during the National Socialist regime in the interest of extending the first, and thereby corrupted the nature of the law[11]. These two functions underlay the reconstruction of the administration of justice and the re-establishment of the supremacy of the rule of law.

These two functions are based on the principle of the rule of law, which can be characterised by five general concepts. Firstly, the government of the state cannot exercise arbitrary power over the individual. An individual can only be subject to legal proceedings in the event of a distinct breach of the law[12]. A constitutional government is therefore to safeguard civil rights that are embodied in the constitution of the state[13]. Secondly, a government based on the rule of law maintains the concept of legal equality. Every individual in the state is subject to one body of law in the state that is administered by the law courts[14]. Thirdly, the general principles of the constitution, such as the rights of individuals, are maintained in judicial decisions made in individual cases brought before the law courts[15]. Fourthly, the principle of judicial independence is inexorably bound to the concept of the *Rechtsstaat*[16]. The

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[11] Helmut Coing, "Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze", *Süddeutsche Juristenzeitung* (1947), p.61.

[12] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan & Co., 1960), p.188.

[13] Walter Clement, "Der Vorbehalt des Gesetzes, insbesondere bei öffentlichen Leistungen und öffentlichen Einrichtungen" (Diss.: Eberhard-Karls-Universität, 1987), p.27.

[14] Dicey, *Introduction to the Study of the Law*, p.193.

[15] *Ibid.*, pp.195, 203.

[16] Dieter Simon, *Die Unabhängigkeit des Richters* (Darmstadt: Wissenschafliche Buchgesellschaft, 1975), p.9.

judge is to be responsible only to the law, and is not to be subject to any outside influences. Fifthly, the executive, legislative and judicial powers of the state are divided, thus preventing the government, the legislature and the judicial organisation from overstepping their assigned jurisdiction[17]. This is to prevent the arbitrary abuse of the power of the state, as was the case in the National Socialist regime, in which a centralised dictatorship was created through the concentration of legislative, executive and judicial power into one body. The judicial organisation of a constitutional government functions independently of the state executive. Individual courts make decisions on the application of the law in cases that lie within the jurisdiction of the appropriate court in the judicial organisation, depending on the content of every case. In the case of postwar Germany, this included the criminal, civil, labour, administrative courts, and their respective appellate courts. Each of these judicial organisations was to be governed by laws providing for their constitution and responsibilities[18].

The restoration of a *Rechtsstaat* in postwar Germany further required three additional elements: restoring the material preconditions of a judicial organisation and eliminating National Socialist influences from German law; restoring the judiciary that would apply these material preconditions of the rule of law; restoring the independence of the *Land* judicial organisations that would be permanently

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[17] Dicey, *Introduction to the Study of the Law*, p.337.

[18] The exercise of these responsibilities differentiates the judicial organisation from the additional elements of the administration of justice, such as the police force, the civil service organisation within the Ministry of Justice, and the penal administration, which fulfil separate functions and lie outside the scope of this work.

administered by German authorities without being subject to the supervision of the occupation powers. The first of these preconditions required the establishment of a fully functional administration of justice. This entailed restoring: a judicial organisation, consisting of the ordinary law courts and specialised courts with a system of appeals courts to provide an extensive guarantee of legal recourse; the maintenance of the principle of judicial independence in order to ensure the courts were free from executive control; the body of law that was to be applied on the basis of the general concepts of the rule of law to maintain the observance of the principles of justice. The second precondition required the acceptance of the *Rechtsstaat*. The third precondition was lifting the US military government supervisory control over the restored *Land* judicial organisation, when these preconditions were fulfilled at the end of the military occupation. Increasingly greater responsibility was transferred from the military government to the German authorities during the occupation, until the full-fledged independence of the German state and its affiliated institutions was attained.

The first part of this work provides a background overview of the administration of justice in the National Socialist regime. German institutions were subordinated to the National Socialist *Gleichschaltung* ("synchronisation"), by which a totalitarian state was established by legalising the complete ordering of state and society under the guidance, supervision and direction of the NSDAP, without being hindered by parliamentary opposition or being subject to public opinion[19]. It has been argued that the greatest impact of the National Socialist programme on German institutions was made upon the judicial organisation, since

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[19] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.734.

basic rights that were guaranteed by the Weimar constitution were rendered meaningless before the German courts of the National Socialist regime[20]. Since an independent judicial organisation could impede the authoritarian power of the National Socialist regime, the administration of justice was politicised to serve the interests of the regime[21]. The *Rechtsstaat* was thus destroyed, and the administration of justice was turned into an instrument of policy to fulfil the goals of National Socialism[22]. Statutes were enacted to introduce a new conception of the law that was based on the political ideology of the regime. The independent authority of the judicial organisation was thus systematically undermined as the arbitrary rule of the dictatorship took precedence over the rule of law[23]. The authority over administration of justice was also completely transferred from the *Länder* to the *Reich* government, and was thus *gleichgeschaltet* (synchronised), or integrated, into the apparatus of the National Socialist regime[24].

The second part of this work shall discuss the wartime preparations for military government in postwar Germany. Military planning agencies prepared guides to be used by

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[20] Eli E. Nobleman, "American Military Government Courts in Germany", *American Journal of International Law* Vol. 40 (1946), p.804.

[21] Rotberg, H.E. "Entpolitisierung der Rechtspflege", *Deutsche Rechts-Zeitschrift* (April 1947), p.107.

[22] Hodo von Hodenberg, "Zur Anwendung des Kontrollratsgesetz Nr.10 durch deutsche Gesetze", *Süddeutsche Juristenzeitung* (1947), p.113.

[23] Eduard Kern, "Die Stunde der Justiz", *Deutsche Rechts-Zeitschrift* (April 1947), pp.105-106.

[24] Wolfgang Friedmann, *The Allied Military Government of Germany* (London: Stevens & Sons, 1947), p.3.

military civil affairs units that would initiate the first stage of the military government administration, while political policy was prepared at the governmental and international levels. These preparations opened the way for the occupation objectives for postwar Germany that outlined the purposes of the Allied military government in Germany. Whereas the political planning set forth the general principles for the restoration of justice in postwar Germany, the military planning drafted the initial measures for the implementation of these principles.

The third part of this work shall trace the development of the postwar restoration of the German judicial organisation in Hesse during the military occupation. This involved restoring a Ministry of Justice and a judicial organisation in each *Land* of the US occupation zone. A series of military government enactments at the outset of the occupation set forth the principles for the organisation and responsibilities of the German administration of justice. The objectives of the occupation powers were proclaimed through statements issued by the military government at the national and the zonal levels in the form of proclamations, directives and laws governing occupation policy. The National Socialist judicial organisation and its corruptions of the German administration of justice were abolished. A provisional extraterritorial military government judicial organisation was established to maintain the security and interests of the occupation powers. A German judicial organisation was restored under the leading authority of the *Land* Ministry of Justice, which resumed its functions in accordance with the provisions of German and occupation law. The restoration of justice in occupied Germany involved abolishing German laws and courts that were unacceptable in a democratic constitutional state, and restoring responsibility to the reconstructed German judicial organisation that operated under the supervision of

the US military government exercising supreme authority to ensure compliance with the occupation objectives.

The fourth and last part of this work deals with the human element of the reconstruction of justice - the reinstatement of judicial personnel who were to staff the administration of justice during its reconstruction. This entailed the policies governing the denazification of judicial personnel. The concept of denazification was considered one of the preconditions for the postwar rehabilitation of Germany[25], which entailed the unusual situation of prosecuting individuals on the basis of their membership in a formerly legal political party, the NSDAP, or their activity in this party or its affiliated organisations[26]. Former members of the NSDAP and its affiliated organisations were judged on the basis of presumptive guilt - membership was considered evidence of adherence to the National Socialist regime. The basic objective of the denazification programme in all professions was to attempt to determine who was a former National Socialist, and to prevent them from occupying positions of influence[27]. The US military occupation authorities, and then German authorities operating under the supervision of the US military government, established elaborate regulations for dealing with individuals who had served as jurists under the National Socialist regime, as with members of all other professions. Judgment was based on schematic

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[25] Wolfgang Benz, "Die Entnazifizierung der Richter", *Justiz Alltag im Dritten Reich* (Frankfurt-am-Main: Fischer Tagebuch Verlag, 1988), p.115.

[26] Richard Schmid, "Denazification: A German Critique", *American Perspective* Vol. 2 (1948), pp.238-239.

[27] John Gimbel, *A German Community under American Occupation: Marburg, 1945-1952*, (Stanford: Stanford University Press, 1961), p.139.

categories of presumptive guilt. German jurists in the National Socialist regime were dealt with as an anonymous block of individuals. The experience of the denazification in Hesse demonstrated the same problems and difficulties that were evident in the US zone as a whole. A thorough denazification of the judicial personnel that was envisaged at the beginning of the occupation was not fulfilled, since the approach to implementing this objective proved impractical.

Notes on Sources

The study of Germany during the postwar military occupation has become a self-contained field of historical research. Many works have dealt with the role of Germany in the Cold War, while the study of legal history in this period of German history is relatively new. Earlier works have not presented an account of the abolition of National Socialist law through the Allied Control Council, the individual occupation powers, and the restored German parliaments. Research on the operation of the superficially denazified postwar administration of justice has been negligible[28].

Articles in legal journals such as the *Süddeutsche Juristenzeitung* provide overviews of the legal developments in the separate occupation zones and *Länder*[29]. There has been one study of the restoration of the judicial institutions in the British zone, "Der Wiederaufbau der Justiz in Nordwestdeutschland: 1945-1949" (Königstein, 1979)

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[28] Michael Stolleis, "Rechtsordnung und Justizpolitik: 1945-1949", p.383.

[29] *Das Besatzungsregime auf dem Gebiet dem Rechtspflege,* (Tübingen: Institut für Besatzungsfragen Tübingen, 15. November 1949), p.47.

by Joachim R. Wenzlau. This study also deals with the personnel reconstruction of the judicial organisation in the British occupation zone. The problem of judicial personnel reconstruction has been treated in part by Martin Broszat in ""Siegerjustiz oder strafrechtliche 'Selbstreinigung'?" in *Vierteljahrshefte für Zeitgeschichte* Vol. 29, (1981), pp.477ff. and Ingo Müller in *Hitler's Justice: The Courts of the Third Reich* (Cambridge, Mass.: Harvard University Press, 1991). These studies concentrate on the shortcomings of the denazification of postwar jurists. There have been several studies of the denazification. Two early works dealt with this problem in the US zone: "The Denazification Program in the United States Zone" (Diss.: Harvard, 1950) by William E. Griffith, and *US Denazification Policy in Germany: 1944-1950* (Historical Division: Office of the High Commissioner for Germany, 1952) by John G. Kormann. The first comprehensive summary of denazification policy in postwar Germany was the published dissertation by Justus Fürstenau: *Entnazifizierung: Ein Kapitel deutscher Nachkriegspolitik* (Darmstadt: Luchterhand Verlag, 1969). Three works have hitherto been devoted to the study of this problem at the *Land* level: *Politische Säuberung unter französischer Besatzung: Die Entnazifizierung in Württemberg-Hohenzollern* (Stuttgart, 1981) by Klaus-Dietmar Henke and *Die Entnazifizierung in Baden, 1945-1949: Konzeptionen und Praxis der "Epuration" am Beispiel eines Landes der französischen Besatzungszone* (Stuttgart: W.Kohlhammer Verlag, 1991) by Richard Grohnert examining the experience of the denazification in the French zone, and *Entnazifizierung in Bayern, Säuberung und Rehabilitation unter amerikanischer Besatzung* (Frankfurt-am-Main: Fischer Verlag, 1972) by Lutz Niethammer analysing denazification policy in Bavaria. There has been no study undertaken specifically in the field of denazification policy regarding the legal profession at the *Land* level other than *Ich habe nur dem Recht gedient: Die 'Renazifizierung' der Schleswig-*

Holsteinischen Justiz nach 1945 (Baden-Baden: Nomos Verlagsgesellschaft, 1993) by Klaus-Detlev Godau-Schüttke, which deals with the personnel reconstruction of the judiciary in Schleswig-Holstein during and after the military occupation.

Research on the history of postwar Hesse has been negligible. *Hessen in der Stunde Null* by Wolf Arno-Kropat represents the first essential basis for a political history of Hesse from 1945 to 1948, providing a collection of documents and surveys of various subjects. *Hessen 1945-1950* by Walter Mühlhausen provides a study of the reconstitution of the *Land* government in postwar Hesse[30].

This work is the first attempt to examine the reconstruction of the administration of justice in Hesse during the immediate postwar period. The published evidence for this work has been drawn from secondary sources dealing with postwar Germany, particularly those dealing with the US zone and Hesse, and primary sources dealing with the reconstruction of the administration of justice in the US zone. The most specific details dealing with this subject in Hesse have been drawn from the files consulted at the Bundesarchiv in Koblenz and the Hessisches Hauptstaatsarchiv in Wiesbaden, and the *Gesetz- und Verordnungsblatt für Hessen*. Individual denazification records are not readily open to private researchers, since access to personal files is restricted by law. Individuals who are mentioned in this work have been anonymised for this reason.

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[30] Walter Mühlhausen, *Hessen 1945-1950: Zur politischen Geschichte eines Landes in der Besatzungszeit* (Frankfurt-am-Main: Insel Verlag, 1985), pp.9-10.

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Law and Justice in National Socialist Germany

Introduction

The NSDAP reorganised the political order and the administration of justice in Germany in order to establish its hegemony over the state, and to reorganise society on the basis of National Socialist conceptions of the state. According to the constitution of Weimar Germany, the elected *Reichstag* was the legislature; the government subject to the confidence of the elected representatives in the *Reichstag* represented the executive; and the administration of justice was operated by independent courts that were subject only to the law. These formerly independent state functions were united to implement the will of the *Führer*[31]. The essence of National Socialist political theory was based on unity and integration under the executive authority of the state. The executive was to be unimpeded by checks upon the authority served by legislative assemblies as in any constitutional state. In turn, the state as a unified entity without internal dissensions impeding its progress was itself dependent on the existence of a leader. The unified executive was to consist of the leader of the state and the NSDAP acting as the vanguard of the nation. Unity of the state under the authority of a dictatorship was to be achieved through the *Gleichschaltung* process, or political "synchronisation". The purpose of this process was to remove all conflicting social and political forces that could impair the domination of the unified executive[32]. In order to achieve this purpose, the elements of a constitutional

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[31] Friedrich Roetter, *Might is Right* (London, Quality Press, 1939), pp.131-132.

[32] J. Walter Jones, *The Nazi Conception of Law* (Oxford: Oxford University Press, 1939), pp.5-6, 8-9.

government, including the separation of powers, judicial control of the administration, judicial independence, the fundamental rights of citizens, the impartiality of the civil service, and all other security provided by the constitution against arbitrary actions by the legislative, the executive, and the judicial branches of the government upon the individual were eliminated[33]. The regime accrued extended powers through legislation to establish a dictatorship and supplant the principles of the *Rechtsstaat* - a constitutional government subject to the rule of law. German law befitting a *Rechtsstaat* was incompatible with National Socialist ideology, and was therefore destroyed in the path of the National Socialist "revolution".

Constitutional government in Germany was subverted through superficially legal means. Although the Weimar constitution was not formally abolished, it was placed in abeyance through National Socialist legislation. Subsequent enactments institutionalised the establishment of a dictatorship. The provisions of the "*Reichstag* Fire Decree" of 28 February 1933 suspended fundamental individual rights on the basis of Article 48 of the Weimar Constitution[34]. Rather than being in force for the duration of a state of emergency, as provided by Article 48, this decree remained in force for the duration of the National Socialist regime. The basis of this decree allowed for the political power of the *Führer* to become the basic law of the regime, by which the authority of the judicial organisation and the civil

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[33] Karl Loewenstein, *Hitler's Germany: The Nazi Background to War* (New York: Macmillan, 1944), p.126.

[34] "Verordnung des Reichspräsidenten zum Schutz von Volk und Staat", 28 February 1933, *Reichsgesetzblatt* I 1933, p.83.

service were circumvented[35]. This decree also opened the way to additional legislation that was directed at political offences, and thereby suppressing all potential opposition to the regime. All political gatherings and demonstrations could be dissolved, and all political newspapers and other such publications were banned. The circulation of political publications was made illegal. Anyone who received an illegal political publication and did not submit it to the police or report whoever circulated such publications were subject to prosecution[36]. Subverting the authority of the constitution and suppressing political opposition facilitated the creation of a dictatorship, which was established through legislation. The principle of the separation of state powers was subverted by the Enabling Act of 24 March 1933 that allowed the NSDAP to suspend the legislative procedure prescribed by the constitution, and allowed for the national government to enact legislation that could deviate from the constitution[37]. Whereas the constitutionality of legislation in the Weimar Republic was ensured by parliamentary proceedings and the law conforming to the principles of the constitution[38], the Enabling Act empowered the NSDAP government to rule by decree and

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[35] Karl Dietrich Bracher, *The German Dictatorship: The Origins, Structure and Effects of National Socialism*, trans. Jean Steinberg (New York: Praeger, 1971), pp.350-351.

[36] "Verordnung des Reichspresidenten zum Schutze des deutschen Volkes. Vom 4. Februar 1933", *Reichsgesetzblatt* I 1933, pp.35-40.

[37] "Gesetz zum Behebung der Not von Volk und Reich", 24 March 1933, *Reichsgesetzblatt* I 1933, p.141.

[38] Lothar Gruchmann, "Rechtssystem und nationalsozialistische Justizpolitik", *Das Dritte Reich: Herrschaftsstruktur und Geschichte*, eds. Martin Broszat and Horst Möller (München: Verlag C.H. Beck, 1983), p.96.

contravene the principles of constitutional government with impunity. Subsequent legislation established the NSDAP dictatorship by ordering the dissolution and prohibition of political parties other than the NSDAP[39], making the state and the NSDAP one and the same[40], and concentrating political leadership into the hands of the *Führer* by combining the offices of *Reich* President with *Führer* and *Reich* Chancellor[41]. Hitler was hereafter designated as "*Führer* and *Reich* Chancellor", by which he commanded supreme political authority. Whereas the office of *Reich* Chancellor was subject to the limitations associated with governmental office, his position as *Führer* representing the will of the nation overrode all other authority[42]. The concentration of central political authority was extended further through the dissolution of the *Länder* legislatures, and absorbing their functions into the national government administration[43].

The reorganisation of the political order was used to promote the interests of the National Socialist regime in

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[39] "Gesetz gegen die Neubildung von Parteien vom 14. Juli 1933", *Reichsgesetzblatt* I 1933, p.479.

[40] "Gesetz zur Sicherung der Einheit von Partei und Staat vom 1. Dezember 1933", *Reichsgesetzblatt* I 1933, p.1016.

[41] "Gesetz über das Staatsoberhaupt des deutschen Reichs vom 1. August 1934", *Reichsgesetzblatt* I 1934, p.747.

[42] Hans Buchheim *et al.*, "The SS - Instrument of Domination", Martin Broszat, *et al.*, *Anatomy of the SS State*, trans. Richard Barry (London: Collins, 1968), pp.127-128.

[43] "Vorläufiges Gesetz zur Gleichschaltung der Länder mit dem Reich. Vom 31. März 1933", *Reichsgesetzblatt* I 1933, pp.153-154; "Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich. Vom 7. April 1933", *Reichsgesetzblatt* 1933 I p.173; "Gesetz zum Neuaufbau des Reichs. Vom 30. Januar 1934", *Reichsgesetzblatt* I 1934, p.75.

the administration of justice. Since the precepts of the rule of law were incompatible with these interests, the National Socialist regime used its political authority to introduce a new conception of justice through a series of legislative enactments. The National Socialist conception of justice was to be administered through the judicial organisation that was hitherto in existence upon the establishment of the regime, and National Socialist extraordinary courts that served the direct purpose of upholding the interests of the regime. The new conception of state and law resulted in the subjugation of German society to the National Socialist regime, and undermining the independence of the administration of justice through its subordination to the political authority of the state[44]. All spheres of the law were to be interpreted in accordance with the spirit of National Socialism[45]. Whereas civil law was not modified in so far as it did not directly affect the interests of the state[46], the administration of criminal justice was characterised by an increasing "politicisation", which the regime eventually turned into an instrument of terror through judicial and extra-judicial measures[47].

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[44] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E.A. Schils (New York: Oxford University Press, 1941), p.40.

[45] Carl Schmitt, "Der Weg des deutschen Juristen", *Deutsche Juristen-Zeitung* (1934), p.695.

[46] Werner Johe, *Die gleichgeschaltete Justiz: Organisation des Rechtswesens und Politisierung der Rechtsprechung 1933-1945 dargestellt am Beispiel des Oberlandesgerichtsbezirks Hamburg* (Frankfurt-am-Main: Europäische Verlagsanstalt, 1967), p.29.

[47] Klaus Marxen, "Strafjustiz im Nationalsozialismus: Vorschläge für eine Erweiterung der historischen Perspektive", *Justizalltags im Dritten Reich* (Frankfurt-am-Main: Fischer Taschenbuch Verlag, 1988), p.101.

The Basis of National Socialist Justice

National Socialist legal theory was based on point 19 of the NSDAP programme of 1920, demanding the institution of a so-called German law to replace the basis of Roman law which supposedly reflected "a materialist world order"[48]. Hence, an entirely new conception of justice in Germany was to be created that was based on National Socialist ideology[49]. The National Socialists objected to legal principles governing the constitutional rule of law, such as equality before the law, or actions considered crimes were to be declared as such by a law[50]. According to National Socialist ideology, the fundamental values of the law were the protection of the national community (*Volksgemeinschaft*) and "safeguarding the life of the nation"[51]. This interpretation of the law was illustrated through Hitler's expression of contempt for the judiciary and "juridical scruples" which in his view hindered the exigencies of "national survival": "I shan't let myself be hampered by juridical scruples. Only necessity has legal force."[52]

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[48] Lawrence Preuss, "Germanic Law Versus Roman Law in National Socialist Legal Theory", *Journal of Comparative Legislative and International Law* Vol. 16 (1934), p.269.

[49] Loewenstein, "Law in the Third Reich", *Yale Law Journal* Vol. 45 (1936), p.785.

[50] Jeremy Noakes and Geoffrey Pridham, *Documents on Nazism: 1919-1945* (New York: Viking Press, 1974), pp.265-266.

[51] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus* Vol.1 (Stuttgart: Deutsche Verlags-Anstalt, 1968), p.209.

[52] Hugh R. Trevor-Roper, *Hitler's Secret Conversations: 1941-1944* (New York: Octagon, 1972), p.247.

National Socialist legal theory postulated that the law of "necessity" arose from the *Volk* (nation) as the source of the law. The primary function of the law was thereby to uphold and protect the *Volksgemeinschaft*[53]. The *Volksgemeinschaft* was to be protected by the state serving as the instrument of applying the law. The *Volk* was represented by the NSDAP for the purpose of its leadership, which was responsible for articulating its desires and defending its interests. As the representative of the will of the *Volk*, the NSDAP was also responsible for promulgating the law and ruling the state[54]. In order to implement the will of the *Volk*, the NSDAP instituted the leadership principle (*Führerprinzip*), by which all authority emanated from Hitler who was responsible only to the *Volk* as the supreme embodiment of its will[55]. According to National Socialist ideology, all the political power of the "German race" was united in the hand of the *Führer*, and therefore all law was derived from this source[56]. The will of the *Führer* as the ultimate source of the law was issued through governmental statutes, ordinances or edicts[57].

The interpretation of the law and the administration of justice were subjugated to National Socialist ideology. In contrast to the traditional administration of justice by

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[53] Hans Frank, *Nationalsozialistisches Handbuch für Recht und Gesetzgebung* (Munich: Zentralverlag der NSDAP, 1935), pp.3-6.

[54] Johe, *Die gleichgeschaltete Justiz*, pp.3-6.

[55] Dennis Leroy Anderson, *The Academy for German Law: 1933-1945* (New York: Garland Publishing, 1987), p.18

[56] Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-1944* (New York: Oxford University Press, 1944), p.447.

[57] Loewenstein, *Hitler's Germany*, p.120.

which a judgment was to be based on deductive reasoning from the evidence of a case presented as fact, and the interpretation of recorded statutes with a reasonable sense of objectivity, justice in National Socialist Germany could also be administered in accordance with unwritten laws. The legality of Hitler's will as unwritten law, which in fact represented the interests of the NSDAP, ostensibly emanated from the interests of the nation. Hitler disclosed his purposes for the law in a speech to the *Reichstag* upon the enactment of the "Enabling Law", stating that the government of the "National Revolution" had a duty to protect the nation from elements that consciously and intentionally acted against the interests of the nation. Equality before the law was only to be granted to those who supported the national interest and "did not fail to support the Government while the centre of legal concern was the nation rather than the individual."[58] National Socialist legislation abolished the principle of *nulla crimen sine lege* that had governed the administration of justice before the National Socialist regime was established, by which an individual could only be prosecuted for an act considered illegal according to the provisions of a law prescribing a penalty for criminal actions[59]. The retroactive sanction of the murders of SA leaders as enemies of the state on 30 June and 1 and 2 July 1934[60] demonstrated the arbitrariness with which the interests of the regime could be pursued. These criminal actions were legalised retroactively since the political leadership considered them "necessary for the

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[58] Noakes and Pridham, *Documents on Nazism*, pp.269-270.

[59] Jerome Hall, "Nulla Poena Sine Lege", *Yale Law Journal* Vol. 47 (December 1937), p.165.

[60] "Reichsgesetz über die Staatsnotwehr", 3 July 1934, *Reichsgesetzblatt* I 1934, p.529.

self-defence of the State."[61] The principle of *nulla poena sine lege* was officially suspended through the "Law to Change the Criminal Code of 28 June 1935" which introduced a new conception of the administration of justice. Judges were obliged to impose penalties according to "healthy popular emotions" (*gesundes Volksempfinden*), rather than "merely" according to the provisions of the law as it was written[62]. Actions could therefore be considered offences against the state according to this analogy, rather than strictly according to the facts of the case, and thus enabling National Socialist ideology to be applied as law[63]. This law subverted the spirit and method of interpreting criminal law by empowering judges to pass a judgment and impose a penalty for an action that was not defined as criminal according to recorded statutes[64]. Any action that violated the so-called "healthy popular emotions" was to be prosecuted, although there were no specific legal provisions to deal with such "violations". Since the leadership of the regime determined what those "emotions" were supposed to be, the arbitrariness of the leadership as the embodiment of the nation was made a principle of law[65]. Criminal law was thus marked by the

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[61] Noakes and Pridham, *Documents on Nazism*, p.217.

[62] Art. 2, "Gesetz zur Änderung des Strafgesetzbuchs. Vom 28. Juni 1935", *Reichsgesetzblatt* I 1935, p.839.

[63] W. Ward Fearnside, "Three Innovations of National Socialist Jurisprudence", *Journal of Central European Affairs* Vol. 16 (1956-1957), pp.150-151.

[64] *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10* (Green Series) Military Tribunal III, pp.44-45.

[65] Bracher, *The German Dictatorship*, p.363; Arno A. Herzberg, "The Situation of the Lawyer in Germany", *American Bar Association Journal* Vol. 27 (1941), p.295.

severity of its application and the scope of political offences. In contrast to the "liberalistic" notion that criminals deserved humanitarian treatment, the regime emphasised meting out harsh sentences[66]. This in itself was a perversion of justice, for it has been argued that "the most extreme justice is the greatest injustice."[67] Defendants in criminal cases were to be considered enemies of the state[68]. All criminal actions were considered offences against the nation, thus transforming the administration of criminal justice into a political instrument[69].

Legislation intended for the implementation of ideological goals, such as preserving the "Aryan" race as a focal point of National Socialism, was put into practice with anti-Semitic legislation[70]. The most notorious of this type of legislation were the Nuremberg Laws of 15 September 1935 that defined citizenship according to racial and civil qualifications[71]. The principle of equality of all individuals before the law was thus substituted with the

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[66] Loewenstein, "Law in the Third Reich", p.790.

[67] Hugh Thomson Kerr, ed., *A Compend of Luther's Theology* (London: Student Christian Movement, 1943), p.197.

[68] Otto Kirchheimer, "Criminal Law in National-Socialist Germany", *Studies in Philosophy and Social Science*, ed. Max Horkheimer (Munich: Kosel-Verlag, 1970), p.444.

[69] Werner Johe, *Die Gleichgeschaltete Justiz*, pp.17-18.

[70] Karl Loewenstein, "Law in the Third Reich", p.797.

[71] "Reichsbürgergesetz. Vom 15. September 1935", *Reichsgesetzblatt* I 1935, p.1146; "Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre. Vom 15. September 1935", *Reichsgesetzblatt* I 1935, pp.1146-1147.

notion of racial homogeneity[72]. A widespread example of not affording Jews the protection of the law followed the so-called *Kristallnacht* of 8 November 1938. Those who took part in this anti-Jewish pogrom were not brought to trial for their actions[73]. Jews were denied the right to claim legal compensation for the destruction or damage of their property during this time[74]. A series of laws and ordinances blocked Jews from various occupations[75], made their property subject to state control, limited their freedom of movement, eliminated claims to public assistance, and prohibited their access to cultural activities and education[76].

The meaning of the civil law procedure was changed from the protection of the individual to "the protection of the 'way of life of the German nation.'"[77] The greatest decline of the former principles of civil law was marked by practices for the expropriation of property, mainly without compensation; completely depriving Jews of the rights of civil law[78] since the principle of equality before the law

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[72] Otto Kirchheimer, "The Legal Order of National Socialism", *Studies in Philosophy and Social Science*, Vol. 9 (1941), p.456.

[73] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.71.

[74] "Vierzehnte Verordnung zur Durchführung und Ergänzung des Gesetzes über den Ausgleich bürgerlich-rechtlicher Ansprüche. Vom 18. März 1939", *Reichsgesetzblatt* I 1939, p.614.

[75] Roetter, *Might is Right*, p.147.

[76] *Ibid.*, pp.148-149.

[77] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.308.

[78] *Ibid.*, p.67.

was re-defined on the basis of race[79]; and the undermining of the rights of property and the disposal of assets[80]. Although wide areas of civil law remained unchanged[81], some parts of the application of civil law changed in accordance with the conceptions of the National Socialist state. For example, the revised marriage law forbade marriage between German citizens or persons of "related blood" and those with "foreign blood" as defined by the "Law for the Protection of German Blood and Honour" of 15 September 1935 in order to preserve "national health" (*Volksgesundheit*)[82]. Other examples of National Socialist influences in civil law included legislation on hereditary farms and inheritance. The law on hereditary farms set forth provisions for the organisation of agricultural life, and racial qualifications for farmers[83]. The law on testaments set forth that the manner of disposing bequeathed property would be annulled if the person leaving the inheritance contravened healthy popular emotions[84].

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[79] Diemut Majer, *Grundlagen des nationalsozialistischen Rechtssystems: Führerprinzip, Sonderrecht, Einheitspartei* (Stuttgart: Verlag W. Kohlhammer, 1987), pp.164-165.

[80] Wagner and Weinkauff, *Die Deutsche Justiz*, p.67.

[81] *Ibid.*, p.66.

[82] Section 1, Art. 4, Art. 5, "Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreich und im übrigen Rechtsgebiet. Vom 6. Juli 1938", *Reichsgesetzblatt* I 1938, p.807.

[83] "Reichserbhofgesetz. Vom 29. September 1933", *Reichsgesetzblatt* I 1933, pp.685-692.

[84] Art. 48(2), "Gesetz über die Errichtung von Testamenten und Erbverträgen. Vom 31. Juli 1938", *Reichsgesetzblatt* I 1938, p.979.

The conclusive attempt to perpetuate the National Socialist reconstruction of the law was to be undertaken by the Academy of German Law (*Akademie für Deutsches Recht*). The purpose of this institution was to develop a conception of justice in accordance with National Socialist ideology[85]. The Academy was to participate in legal education and research while working in close cooperation with the NSDAP and state legal agencies[86]. Hans Frank, the President of the Academy[87], believed the Academy of Germany could contribute to creating an authoritarian *Rechtsstaat* based on National Socialist legal principles representing the interests of the *Volksgemeinschaft*[88]. The Academy was composed of an increasing number of committees that were to undertake the various tasks of the Academy, such as developing ideas to lay the groundwork for the National Socialist reorganisation of all of the existing law and its codifications. In practice, its influence was neglible[89]. The Academy failed to produce a proposed National Law Code (*Volksgesetzbuch*) that would have replaced the civil code[90], and the proposals that were drafted by the Academy's various committees were not applied in the administration of justice[91]. These

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[85] Art. 2, "Gesetz über die Akademie für Deutsches Recht vom 11. Juli 1934"; Art. 1, "Satzung der Akademie für Deutsches Recht", *Reichsgesetzblatt* I 1934, p.605.

[86] Anderson, *Academy for German Law*, pp.44-46.

[87] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.56.

[88] Anderson, *Academy for German Law*, p.530.

[89] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.110.

[90] *Ibid.*, p.66.

[91] *Ibid.*, p.110.

efforts to formulate an administration of justice based on National Socialist principles of law were subordinated to the arbitrariness of the authoritarian *Führerstaat*[92]. Hence, the administration of justice in National Socialist Germany was permeated with legislative and extra-legal abuses of the law, rather than wholly restructured.

The Coordination and Function of the Administration of Justice

The transfer of judicial sovereignty from the *Länder* to the *Reich* was the most incisive change of the judicial organisation in National Socialist Germany[93]. The administration of justice in Germany was organised among the German *Länder* during the Weimar period, and was subsequently transferred to the jurisdiction of the national government as part of the National Socialist *Gleichschaltung*, and thus brought under the control of the regime. Administrative matters concerning the administration of justice were concentrated in the *Reich* Ministry of Justice. Policies concerning judicial personnel and administration in the various *Länder* were thus unified[94] at the national level. In

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[92] Anderson, *Academy for German Law* pp.539-540.

[93] Loewenstein, *Hitler's Germany*, p.121.

[94] "Erstes Gesetz zur Überleitung der Rechtspflege auf das Reich. Vom 16. Februar 1934", *Reichsgesetzblatt* I 1934, p.91; "Zweites Gesetz zur Überleitung der Rechtspflege auf das Reich. Vom 5. Dezember 1934", *Reichsgesetzblatt* I 1934, pp.1214-1215; "Verordnung zur Überleitung der Rechtspflege auf das Reich. Vom 20. Dezember 1934", *Reichsgesetzblatt* I 1934, p.1267; ""Drittes Gesetz zur Überleitung der Rechtspflege auf das Reich. Vom 24. Januar 1935", *Reichsgesetzblatt* I 1935, pp.68-69; "Verordnung zur Durchführung des Dritten Gesetzes zur Überleitung der

contrast to the pre-1933 situation when judges were either appointed by the responsible *Land* Minister or Minister-President, or were elected to office in Hamburg and Bremen, the *Reich* Minister of Justice recommended candidates for judicial office who were appointed to office by Hitler[95]. The unification of judicial organisations also opened the way for state interference in court proceedings throughout Germany. The state was empowered with interfering in pending court procedures by allowing the *Reich* President to halt criminal proceedings and grant reprieves[96].

Legal practice in accordance with the precepts of National Socialist ideology was reinforced through the organisations of jurists. Associations of jurists were reorganised to ensure their conformity to the National Socialist regime. All jurists were compelled to join the German Legal Front (*Rechtsfront*) that was founded on 1 June 1933, consisting of organisations involved in promoting and protecting the law as an instrument for organising all German jurists[97]. The leading element of this broad organisation was the *Bund Nationalsozialistischer deutscher Juristen*[98] (BNSDJ), integrating all professional judicial

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Rechtspflege auf das Reich. Vom 18. März 1935", *Reichsgesetzblatt* I 1935, p.381.

[95] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.239.

[96] Art. 2, "Erstes Gesetz zur Überleitung der Rechtspflege auf das Reich", 16 February 1934, *Reichsgesetzblatt* I 1934, p.91.

[97] Wilhelm Heuber, "Der Bund Nationalsozialistischer deutscher Juristen und die deutsche Rechtsfront", *NS Handbuch*, pp.1566-1571 *passim*.

[98] This organisation was later known as the National Socialist League for the Maintenance of the Law (*Nationalsozialistischer Rechtswahrerbund*) in 1936 when it

organisations to "unite and cleanse the entire German legal profession in order to fulfil the promise of the Party Program in returning Germany to a governance of indigenous racial law."[99] Jurists who did not join this organisation faced the risk of being considered an enemy of the regime[100]. The dissolution of the former judicial associations and their incorporation into this organisation gave the National Socialist regime a completely free hand to supervise, train, and "align" the judiciary with the appropriate political orientation, or National Socialist *Weltanschauung*[101]. The training work of this organisation was not particularly successful. This consisted of strictly compulsory attendance of lectures that were generally sketchy. On the other hand, its supervision and spying functions placed jurists in danger[102] of being under suspicion of disloyalty to the regime. Most jurists joined the BNSDJ as a substitute to belonging to the dissolved former professional organisations, since it appeared, at least at the beginning, to be a means to avoid taking the political action of joining the NSDAP, and to avoid further demands or pressures without making any thoroughgoing commitment to the regime[103]. On the other hand, their membership in professional

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was expanded to include judges and all other legal personnel. Kenneth C.H. Willig, "The Bar in the Third Reich", *American Journal of Legal History* Vol.20 (1976), p.3.

[99] *Ibid.*, p.3.

[100] *Trials of War Criminals*, p.97.

[101] Wagner and Weinkauf, *Die Deutsche Justiz und der Nationalsozialismus*, p.106.

[102] *Ibid.*, p.107.

[103] *Ibid.*

organisations made them subject to the jurisdiction of "honour courts". These courts adjudicated in matters concerning professional offences, and breaches of National Socialist principles that were penalised as professional offences. For example, an honour court expelled a lawyer from the profession for having refused to give the "voluntary" Hitler salute[104]. Jurists who were members of the NSDAP were also subject to the jurisdiction of the NSDAP party courts[105]. These courts were responsible for maintaining discipline among the members of the NSDAP and its affiliated organisations. The members of these organisations were responsible for upholding their duties toward *Führer*, nation and state, and were to be tried for any violation of these duties[106].

The standards for the admission of lawyers and their conduct in the profession were also redefined on the basis of National Socialist legislation. The "Law Concerning the Admission of Lawyers" promulgated on 7 April 1933 contained the provisions of the "Civil Service Law", including the so-called "Aryan clause" that excluded "non-Aryans" from practicing law. Anyone who had participated in communist activities was likewise barred from appointment[107]. Newly-appointed lawyers were to swear an oath of allegiance to Hitler in the execution of their duties[108]. Their supervision

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[104] Roetter, *Might is Right*, p.219.

[105] *Ibid.*, pp.218-219.

[106] "Gesetz zur Sicherung der Einheit von Partei und Staat", 1 December 1933, *Reichsgesetzblatt* I 1933, p.1016.

[107] "Gesetz über die Zulassung zur Rechtsanwaltschaft. Vom 7. April 1933", *Reichsgesetzblatt* I 1933, p.188.

[108] Art. 19, "Zweites Gesetz zur Änderung der Rechtsanwaltsordnung. Vom 13. Dezember 1935", *Reichsgesetzblatt* I 1935, p.1471.

was reinforced by establishing probationary periods for new lawyers for at least one year, or up to several years in exceptional cases at the discretion of the *Reich* Minister of Justice. The decision for the appointment of lawyers rested with the *Reich* Minister of Justice in agreement with the *Reichsführer* of the *Bund Nationalsozialistischer Deutscher Juristen*[109]. In practice, this meant admission to the Bar Association became a privelege granted by the state to loyal supporters of the government, rather than a right earned by an individual based on the results of the bar examination[110]. Lawyers were hereafter made subject to discipline and supervision for political reliability in the practice of the profession[111]. Honour courts were established in every local bar association chamber (*Rechtsanwaltskammer*) to adjudicate in offences against the discharge of duties. Potential penalties included warnings, reproaches, monetary fines up to RM 5000, or expulsion from the profession[112].

The National Socialist regime brought pressure to bear upon the administration of justice in its functions as well as its organisation. Although the independence of the judiciary was not formally abolished, the tenure of judicial office was directly influenced by political considerations. National Socialist civil service legislation pressured judges to join the NSDAP or one its affiliated organisations in order to demonstrate loyalty to the regime. The preponderance of political considerations contravened the practice of maintaining the impartiality of court

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[109] *Ibid.*, pp.1470-1471.

[110] Loewenstein, "Law in the Third Reich", p.806.

[111] *Ibid.*, pp.805-806.

[112] "Reichs-Rechtsanwaltsordnung", *Reichsgesetzblatt* I 1936, pp.113-114.

proceedings by redefining the principle of judicial independence. This principle hitherto meant that judges were subject solely to the force of the law in pronouncing judgments, and were guaranteed the permanent security of their office. They could not be removed from office or transferred on the basis of pronouncing judgments that did not contravene the law[113]. Judicial independence was henceforth to serve as a vessel of the National Socialist conception of the law and the state, rather than following the constitutional principle of the separation of the law and the state[114]. In practice, this meant the role of judges was to be reduced to safeguarding the ideology of the regime and carrying out its orders[115]. Judges remained subject to the criminal code provision on the perversion of the course of justice (Art. 336) if they did not administer justice according to the spirit of National Socialism, i.e. if they did not deviate from former principles of justice by applying the law on the basis of "healthy popular emotions"[116]. The tenure of judicial office was also dependent on political reliability by obliging judges to defend the government and its policies without reservations,

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[113] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.22.

[114] Dieter Simon, "Waren die NS-Richter 'unabhängige Richter' im Sinne des § 1 GVG?", *Justizalltag im Dritten Reich*, eds. Bernhard Diestelkamp, Michael Stolleis (Frankfurt-am-Main: Fischer Taschenbuch Verlag, 1988), p.14.

[115] Gerhard F. Kramer, "The Influence of National Socialism on Courts of Justice and the Police", *The Third Reich* (London: Weidenfeld & Nicolson, 1955), p.624.

[116] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.221; Lühr, "Darf der Richter gegen das Gesetz entscheiden?", *Deutsche Richterzeitung* (1934), p.35.

thus ensuring their conformity in applying National Socialist ideology in the administration of justice. Political reliability became a condition for a civil service appointment, which in practice was more important than the technical qualifications[117]. Non-conformists and other such unsuitable jurists were initially expelled from the judiciary under the provisions of the "Law for the Reconstruction of the Professional Civil Service" of 7 April 1933[118]. Individuals who did not demonstrate loyalty to the government or lacked the appropriate political predispositions or heritage, such as members of leftist political parties or "non-Aryans", were to be dismissed from government service[119]. This law was a direct affront to the principle of judicial independence[120], but this was irrelevant in view of the conception of the state that the National Socialist regime intended to establish. The extent of the implementation of this law was demonstrated in a statement made by the Prussian Minister of Justice on 18 February 1934: only 374 judges in Berlin remained in their positions by this time out of the former 1034[121]. The law of 7 April 1933 was later extended by the "German Civil Service Law" of 26 January 1937[122]. This law stated that civil

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[117] Loewenstein, "Dictatorship and the German Constitution", *University of Chicago Law Review* (1937), pp.566-567.

[118] "Gesetz zur Wiederherstellung des Berufsbeamtentums. Vom 7. April 1933", *Reichsgesetzblatt* I 1933, pp.175-177.

[119] *Ibid.* Art. 3(1), Art. 4, p.175.

[120] Wrobel, *Verurteilt zur Demokratie: Justiz und Justizpolitik in Deutschland 1945-1949* (Heidelberg: Decker & Müller, 1989), p.14.

[121] Roetter, *Might is Right*, p.183.

[122] "Deutsches Beamtengesetz", 26 January 1937, *Reichsgesetzblatt* I 1937, pp.41-70.

servants who did not demonstrate sufficient guarantees of supporting the National Socialist state were to be dismissed[123]. It was thus no longer sufficient to belong to the NSRB[124] to allay suspicion of disloyalty to the regime. Civil servants were also responsible for observing occurrences within the civil service that could be considered offensive to the NSDAP, and report such occurrences through the official channels[125]. The appointment of new judges who were loyal to National Socialism was to be approved by a representative of the *Führer*[126].

Judges were to apply the law in accordance with political considerations, rather than being guided solely by their responsibility to the law, and thereby exercise the will of the state in order to demonstrate their political reliability[127]. They were obliged to follow National Socialist legal theory under the new judicial oath of office introduced on 20 August 1934[128]. Judges hereafter swore loyalty and obedience to the *Führer* and to adhere to the law, which in practice meant exercising the will of the

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[123] Art. 71, *Ibid.*, p.52.

[124] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.122.

[125] Art. 42, "Deutsches Beamtengesetz", p.47.

[126] "Erlass des Führers und Reichkanzlers über die Ernennung der Beamten und die Beendigung des Beamtenverhältnisses", 10 July 1937, *Reichsgesetzblatt* I 1937, pp.769-770.

[127] Loewenstein, "Law in the Third Reich", p.805.

[128] The introduction of this new form of oath followed the creation of the office of *Führer* on 2 August 1934, combining the offices of *Reich* President and Chancellor as part of the process of Hitler accumulating greater governmental power. Hans Buchheim, *et al.*, *Anatomy of the SS State*, p.128.

Führer as the representives of the *Führer* in the administration of justice[129]. The role of the judge was to administer the law as a representative of the National Socialist state in order to uphold the interests of the nation[130]. Judges were to act as followers of the *Führer*, and thereby apply the law with the internal conviction of the political will of the nation and the state leadership in protecting the security of the nation, as if Hitler himself were hearing the case[131]. Judicial independence was to be understood as being rooted in National Socialism and loyalty to the *Führer* as the supreme judge, which meant that judges could not act upon their conscience in contradiction to the healthy popular emotions, the NSDAP programme, and the announcements of the *Führer* in addition to the law[132]. Judges remained formally independent by being bound solely to the law in so far as they adhered to the values of the *Volksgemeinschaft*, i.e. the will of the *Führer*. Judges were thus obliged to pronounce sentences on the basis of the law as it was written, as well as according to vague National Socialist legal theory that was based on emotions rather than facts, which were unfamiliar to most judges[133]. Whether or not they were convinced National Socialists, the regime continually viewed judges with suspicion about whether they

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[129] Friedrich Roetter, "The Impact of Nazi Law", *Wisconsin Law Review* (July 1945), pp.535-536.

[130] Roland Freisler, "Recht, Richter und Gesetz", *Deutsche Justiz* (1933), p.695.

[131] Majer, *Grundlagen des nationalsozialistischen Rechtssystems*, p.101.

[132] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.75.

[133] *Ibid.*, p.93.

conformed to the National Socialist standards in the administration of justice[134].

Political considerations distorted the role of the lawyer. The National Socialist conception of the law dictated that a lawyer take the interests of the state into account, rather than the interests of the client[135]. Before the National Socialist regime was established, the office of the public prosecutor (*Staatsanwaltschaft*) was responsible for examining witnesses and defendants, to determine how an offender had violated the law according to the statutes, and to determine the appropriate penalty to be administered[136]. As was the case with judges, public prosecutors in the National Socialist regime were also to be turned into servants of the state whose first interest was loyalty to the *Führer* and his will as the embodiment of the law[137]. The public prosecutors seldom played an active role in the court proceedings since the judges anticipated their questions[138].

The role of defence counsel was also undermined in court proceedings that had lost their former impartiality. Although the defence counsellors could at least ensure that the defendant underwent the proper course of the court proceedings[139], they were responsible for defending the

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[134] *Ibid.*, p.94.

[135] Loewenstein, "Law in the Third Reich", p.806.

[136] Roper, Edith and Clara Leiser, *Skeleton of Justice* (New York: E.P. Dutton & Co., 1941), p.81.

[137] Roetter, "Impact of Nazi Law", p.542.

[138] Roper, *Skeleton of Justice*, p.81.

[139] Dietrich Güstrow, *Tödlicher Alltag. Strafverteidiger im Dritten Reich* (Berlin: Siedler Verlag, 1981), p.260.

interests of the state before those of the defendant[140]. They were always faced with the danger of being called to account for their remarks during the court proceedings in political cases[141]. Rather than attempt to influence the trial proceedings solely with factual arguments, the defence was to also emphasise personal factors. In one such example, the defence counsel attempted to undermine the evidence presented by the plaintiff, a member of the NSDAP, by questioning his loyalty to the NSDAP. The defence argued that since this individual had told neighbours that he wanted his son to join the *Wehrmacht* rather than the Waffen SS, the élite military corps of the NSDAP, his loyalty was too suspect for his evidence to have any credibility[142]. The defence counsel could otherwise attempt to plead for a reduced sentence on the basis of the defendant's upright personality, such as the client not having previous convictions and having a respectable work record[143], or on the basis of what the court considered the defendant's genuine repentance[144]. The mercy of the court could be acquired on the basis of the defendant's demonstrated support for the National Socialist regime, such as early membership in the NSDAP[145].

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[140] Roper, *Skeleton of Justice*, pp.83-85; Roetter, *Might is Right*, p.216.

[141] Hubert Schorn, *Der Richter im Dritten Reich: Geschichte und Dokumente* (Frankfurt-am-Main: Klostermann, 1959), p.117.

[142] Richard Grunberger, *The Twelve Year Reich: A Social History of Nazi Germany, 1933-1945* (New York: Holt, Rinehart & Winston, 1971), pp.110-111.

[143] Güstrow, *Tödlicher Alltag*, pp.20, 92-93.

[144] *Ibid.*, p.65.

[145] *Ibid.*, p.47.

Criminal law was applied with increasing severity and frequency from the beginning of the National Socialist regime, and reached the culminating point of extreme severity during the Second World War when it took on the character of an instrument of terror and annihilation[146]. The brutality with which the law could be applied was characterised by the number of offences that were punishable by death during the regime, which was raised from three to forty-six[147]. The criminal courts were charged with the task of securing the power of the state on the home front during the Second World War[148], which in practice meant upholding the interests of the regime by using the force of the law and addressing wartime exigencies. A defendant in criminal cases could only be allowed defence counsel in certain types of cases, such as at a main hearing before an *Oberlandesgericht* or a *Landgericht*, if the defendant was deaf or mute, or if the severity or complexity of the case made the participation of defence counsel necessary, either for the entire course of the proceedings or in part[149]. Defence counsel was no longer ordinarily permitted to serve in trials before an *Amtsgericht* in the interest of sparing personnel[150] who could be made available for the war effort.

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[146] Weinkauff and Wagner, *Die Deutsche Justiz und der Nationalsozialismus*, p.65.

[147] *Ibid.*, p.364.

[148] Wrobel, *Verurteilt zur Demokratie*, p.58.

[149] Section 3, Art. 20, Art. 21, "Verordnung über Maßnahmen auf dem Gebiete der Gerichtsverfassung und der Rechtspflege. Vom 1. September 1939", *Reichsgesetzblatt* I 1939, p.1660.

[150] Lothar Gruchmann, *Justiz im Dritten Reich 1933-1940: Anpassung und Unterwerfung in der Ära Gürtner* (München: R. Oldenbourg Verlag, 1988), p.1069.

This law also simplified court proceedings in order to raise the efficiency of the courts[151] by accelerating the proceedings. Jury courts, which were hitherto staffed with reliable jurors appointed by the NSDAP executive or its representatives, were abolished altogether in the interest of sparing personnel for the war effort[152]. The functions of jurors were hereafter assumed by the judges[153]. Legislation was enacted for the purpose of prosecuting offences specifically relating to wartime conditions. Anyone who destroyed or hoarded vital raw materials, finished products or money was to be imprisoned, or sentenced to death in serious cases[154]. The courts were to pronounce sentences of imprisonment or death in serious cases of exploiting air raid conditions to commit a crime or a misdemeanour; the death sentence for cases of arson, or other serious crimes that undermined the defence effort; imprisonment for criminal actions committed while exploiting wartime conditions, or the death sentence when these actions were deemed especially reprehensible according to healthy popular emotions[155]. Individuals normally subject to the ordinary judicial organisation could be subject to trial in a military court if they took part in a criminal offence in which an individual subject to military court jurisdiction

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[151] *Ibid.*, p.974.

[152] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.228.

[153] Section 3, Art. 13, "Verodnung über Maßnahmen auf dem Gebiete der Gerichtsverfassung und der Rechtspflege. Vom 1. September 1939", *Reichsgesetzblatt* I 1939, p.1659.

[154] Section 1, Art. 1, "Kriegswirtschaftsverordnung. Vom 4. September 1939" *Reichsgesetzblatt* I 1939, p.1609.

[155] "Verordnung gegen Volksschädlinge. Vom 5. September 1939", *Reichsgesetzblatt* I 1939, p.1679.

was also implicated[156]. The *Führer* or the supreme commander of the *Wehrmacht* could order court proceedings to be resumed after a court had passed a verdict[157]. Anyone who endangered national defence, such as by destroying, abandoning or damaging weaponry or equipment, or damaged the work of an important enterprise that was necessary for this purpose, was to be sentenced to from six months to life imprisonment, or face the death sentence in serious cases. Whoever participated in or supported a pacifist organisation, had contact with a prisoner-of-war in a manner that violated healthy popular emotions, or was involved in collecting or transmitting news on military affairs was to be imprisoned[158].

The guarantee of judicial independence was abolished altogether upon the outbreak of the Second World War[159]. The government decreed that all civil servants could be transferred to another office or kept out of retirement whenever it was deemed necessary[160]. Hitler later declared himself "supreme judge" on 26 April 1942, claiming the ultimate authority to supervise the administration of

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[156] "Gesetz zur Änderung von Vorschriften des allgemeinen Strafverfahrens, des Wehrmachtstrafverfahrens und des Strafgesetzbuchs vom 16. September 1939", *Reichsgesetzblatt* I 1939, p.1841.

[157] *Ibid.*, p.1843.

[158] "Verordnung zur Ergänzung der Strafvorschriften zum Schutz der Wehrkraft des Deutschen Volkes. Vom 25. November 1939", *Reichsgesetzblatt* I 1939, p.2319.

[159] Weinkauff and Wagner, *Die Deutsche Justiz und der Nationalsozialismus*, p.124.

[160] "Verordnung über Maßnahmen auf dem Gebiete des Beamtenrechts. Vom 1. September 1939", *Reichsgesetzblatt* I 1939, pp.1603-1604.

justice. Rather than administer justice solely according to the letter of the law, judges were made responsible for administering justice as representatives of the interests of the nation. Judges would be removed from office if they did not "recognise the needs of the hour"[161]. The *Reichstag* thereupon passed a resolution stating that the *Führer* was unconditionally empowered to use whatever means to urge every German, including every soldier and every judge, to fulfil their duties that would enable the nation to achieve victory. Any violation of these duties would be met with the unconditional removal from office, rank, or position[162]. This opened the way for unlimited state interference in the functions of the judiciary. Even the formality of judicial independence was eradicated[163], for the will of the people as expressed through the *Führer* overrode the provisions of legislation in order to uphold the interests of the nation in all circumstances. This declaration also served to indicate that a considerable number of judges to this date did not conform to Hitler's will in the administration of justice[164]. Although relatively few judges were dismissed on the basis of the resolution of 26 April 1942 due to the wartime personnel shortages, it raised the uncertainty of the individual judge's tenure of office[165]. Hitler issued a special decree on 20 August 1942 that authorised Otto

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[161] "Die Rede des Führers vor dem Reichstag", *Völkischer Beobachter*, 27 April 1942.

[162] "Beschluß des Großdeutschen Reichstags vom 26. April 1942", *Reichsgesetzblatt* I 1942, p.247.

[163] Hans Julius Wolff, "Criminal Justice in Germany", *Michigan Law Review* Vol. 42 (1944), pp.1068-1069.

[164] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.365.

[165] *Ibid.*, p.219.

Thierack, the *Reich* Minister of Justice, to deviate from existing laws and construct a National Socialist administration of justice that would further "bring the administration of justice into conformity with the needs of the regime."[166]

The primacy of law in the administration of justice had become practically redundant as the exigencies of state security surpassed knowledge of the law and its application. The new height of the regime's interference in the administration of justice that was reached by Hitler's *Reichstag* speech of 26 April 1942 culminated in "Judges' Letters"[167]. These were documents sent to judges and prosecutors after 7 September 1942, in which Thierack presented what he considered exemplary court decisions[168], followed by an evaluation statement that either criticised or praised the decision[169]. Judges were expected to become more familiar with the National Socialist conception of administering justice by following such examples, and pass suitable sentences accordingly[170]. Since these court decisions were publicised, judges were made aware that their

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[166] *Trials of War Criminals*, p.51; "Erlaß des Führers über besondere Vollmachten des Reichsministers der Justiz. Vom 20. August 1942", *Reichsgesetzblatt* I 1942, p.535.

[167] Heinz Boberach ed., *Richterbriefe: Dokumente zur Beeinflussung der deutschen Rechtsprechung 1942-1944* (Boppard am Rhein: Harald Boldt Verlag, 1975), p.485.

[168] *Trials of War Criminals*, p.53; Boberach, *Richterbriefe: Dokumente zur Beeinflussung der deutschen Rechtsprechung*, pp.1-3

[169] Ilse Staff, ed., *Justiz im Dritten Reich: Eine Dokumentation* (Frankfurt-am-Main: Fischer Bücherei, 1964), p.72.

[170] *Ibid.*, pp.69-70.

decisions could be publicly reprimanded for not being in accordance with the National Socialist conception of the law. They would also face the worse possibility that the Ministry of Justice would make them out to be "politically unreliable"[171]. "Lawyers' Letters" were introduced on 1 October 1944, which followed the same purpose as the "Judges' Letters". Lawyers were instructed to comply with the priority of upholding the interests of the nation over those of the individual. This especially applied to defence counsels[172]. Their purpose was to familiarise lawyers with court decisions in cases pertaining to wartime necessities, and thereby save time by dispensing with unnecessary work from pending court cases, such as matters relating to counter-objections, appeals, and legal remedies[173].

The administration of justice was supervised to ensure its functions conformed to the demands of the regime, and court decisions could be rescinded in view of this purpose. Hitler always regarded the judiciary of the ordinary law courts with suspicion, and depended on "law-enforcement" organisations that would not be restricted by laws or regulations for the regular judicial process. The judiciary and the Bar Association were continually supervised by the *Geheime Staatspolizei* (*Gestapo*) and the *Sicherheitsdienst* (SD) to ensure that the disposition of cases were politically acceptable according to the standards of National Socialist justice[174]. The purpose of the SD as the

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[171] *Ibid.*, p.72.

[172] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.166.

[173] Boberach, *Richterbriefe: Dokumente zur Beeinflussung der deutschen Rechtsprechung*, p.401.

[174] *Trials of War Criminals*, p.19.

intelligence branch of the SS[175] was to investigate developments on the relations between various spheres of public life and the state[176], while the *Gestapo* dealt with more specific political police matters[177]. The *Gestapo* initially investigated anti-state activities in Prussia, and later throughout Germany as the separate *Land* political police forces were consolidated under the control of the *Gestapo* headquarters in Berlin[178]. In turn, the *Gestapo* was incorporated into the SS, which assumed control over all police matters in Germany[179]. The purpose of the political police was to function as an instrument for suppressing political opposition to the state, as well as "correcting" the administration of justice in these matters that were not openly expounded in the law[180]. Acting as a state agency that was independent of the rules of the civil administration[181], the *Gestapo* held the authority to circumvent judicial decisions by arresting individuals and sending them to concentration camps or special *Gestapo* prisons without trial for an indefinite period of time[182]. Pastor Niemöller for example, and others like him who opposed the regime, were brought to a concentration camp immediately after having

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[175] Hans Buchheim, *Anatomy of the SS State*, pp.291-292.

[176] *Ibid.*, p.167.

[177] *Ibid.*, p.146.

[178] *Ibid.*, pp.152-153.

[179] *Ibid.*, pp.159-160.

[180] Gruchmann, *Justiz im Dritten Reich*, pp.583-584.

[181] Buchheim, *Anatomy of the SS State*, p.156.

[182] Bracher, *The German Dictatorship*, p.364.

been acquitted by an ordinary law court[183]. Defendants who received sentences that the political authorities considered "too mild" were transferred to the custody of the *Gestapo*. This practice of "correcting" court decisions took place with increasing frequency after the beginning of the Second World War[184]. Since "outright" acquittals commonly resulted in the subsequent arrest of the accused by the *Gestapo*, judges and lawyers in the ordinary judicial organisation would sometimes protect the accused by "agreeing" to sentences of imprisonment that were essentially unlawful. However, taking this course of action would be beneficial for the accused, since the accused would be incarcerated in a judicature prison rather than in a concentration camp[185]. Another form of what could be considered judicial resistance was to pronounce appropriate sentences, while promoting one's loyalty to the regime by disguising the verdicts with National Socialist platitudes[186]. While fair trials and independent judgments were not guaranteed by law, and were solely contingent upon the personality of the individual

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[183] Friedmann, *The Allied Military Government in Germany*, pp.10-11. Documented examples of court judgements that were "corrected" by the state police are cited in: Martin Broszat, "Zur Perversion der Strafjustiz im Dritten Reich", *Vierteljahrshefte für Zeitgeschichte* Vol. 6 (1958), pp.390-445.

[184] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, pp.125, 197.

[185] Martin Broszat, *Der Staat Hitlers: Grundlegung und Entwicklung seiner inneren Verfassung* (München: Deutscher Taschenbuch Verlag, 1969), pp.414-415; Heinrich Herrfahrdt, "Der Streit um den Positivismus in den gegenwärtigen deutschen Rechtswissenschaft", *Deutsche-Rechtszeitschrift* (1949), p.33.

[186] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.174.

judge[187], there were judges who did not accept the precepts of National Socialism in the administration of justice. The SD reported in October 1942 that virtually all judges were to be reproached for not pronouncing judgments that concurred with the prevailing political circumstances. It was therefore considered necessary for the political police to obstruct judicial independence[188]. Both the police and the administration of criminal justice were responsible for maintaining the security of the internal national order (*Volksordnung*), and the common basis of their activity was political correctness. Whereas both institutions were to fulfil the same objective, the criminal courts often pronounced judgments that the political police considered inadequate in view of political necessities. As a result, the police counteracted these judgments with increasing frequency[189]. Hence, the judiciary was responsible for administering justice according to the National Socialist perspective. This was ensured by the political police to compensate for the shortcomings of the judiciary. In contrast to the former practice of judicial independence, judges remained independent in so far as they were aware of the National Socialist spirit of the law, and administered justice accordingly.

Administrative and Labour Courts

The subjugation of the administration of justice to the National Socialist regime affected the specialised branches

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[187] *Ibid.*, p.364.

[188] Peter Schneider, ed., "Rechtssicherheit und richterliche Unabhängigkeit aus der Sicht des SD", *Vierteljahrshefte für Zeitgeschichte* Vol. 4 (1956), p.409.

[189] *Ibid.*, p.416.

of the administration of justice as well as the ordinary law courts. Since the National Socialist *Gleichschaltung* was to encompass all branches of the German state and society, individual rights and individuals in positions of authority such as judges were overshadowed by the authority of the regime, which sought to impose its conceptions of state and society upon judicial institutions. As a consequence, the functions of the labour and administrative judicial organisations were re-oriented toward serving the state, rather than serving to protect the interests of individuals in labour disputes and grievances lodged by individuals against the state.

The concept of the law as a state institution for the protection of individual interests conflicted with the National Socialist regimentation of state and society, and therefore could not be maintained. The responsibility of the administrative courts, which were responsible for the judicial protection of civil rights, inevitably conflicted with the National Socialist regime. The judges were to be guided by their acceptance of the "national order" and public interests as defined by the state leadership, rather than the rights of the individual and the separation of state and society. Since it was presumed that the *Führer* and his following were united, conflicts of interest between state and society were theoretically "abolished". Hence, their continued existence was acceptable in so far as the administrative court judges adjudicated in accordance with the National Socialist conceptions of state and society[190]. These courts therefore remained in place, while relinquishing certain types of cases, such as examining arrests by the *Gestapo* or so-called "political cases" that

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[190] Michael Stolleis, "Die Verwaltungsgerichtsbarkeit im Nazionalsozialismus", *Justizalltag im Dritten Reich* (Frankfurt-am-Main: Fischer Taschenbuch Verlag, 1988), p.26-27.

were "understood" to be outside of their jurisdiction, and emphasising that what was to be considered the common good outweighed individual rights[191]. The "Prussian Law Concerning the *Gestapo*" of 10 February 1936 expressed that its orders could not be reviewed by administrative courts[192]. The right of the individual to protection under the law was increasingly undermined as governmental and police actions were frequently exempted from review by a law court. Legal review was eliminated from state matters that National Socialist leaders determined were "political"[193]. Administrative court jurisdiction was therefore adjusted to the new situation - the protection of the individual under the law was displaced by the extended political power of the regime over the individual[194].

The functions of the labour courts were also redefined in accordance with the conceptions of National Socialist state. Labour relations were reorganised to represent the "'old Germanic community' of leader and follower", rather than the liberal philosophy based on individual and collective contracts governing employer-employee relations. Employers and employees were to compose a "community" working jointly for the interest of the nation - the National Socialist state - rather than being organised as business and labour, which both held political power that could represent potential resistance[195] to the state. The

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[191] Stolleis, *Ibid.*, pp.28-29.

[192] Hans Buchheim, *Anatomy of the SS State*, pp.154-155; Roetter, "The Impact of Nazi Law", pp.534-535.

[193] Bracher, *The German Dictatorship*, p.364.

[194] Stolleis, "Die Verwaltungsgerichtsbarkeit im Nationalsozialismus", pp.30-31.

[195] Frieda Wunderlich, *German Labor Courts* (Chapel Hill: University of North Carolina Press, 1946), pp.137-138.

reorganisation of labour relations made the labour courts practically redundant. Wage agreements could no longer be concluded after the trade unions were dissolved on 2 May 1933, and industrial actions were proscribed. Disputes in industrial relations were transferred to state labour trustees[196]. Labour was recast in a new conception, by which labour was a social duty rather than an individual right[197]. A labour trustee appointed by the *Reich* Minister of Labour was entrusted with dealing with labour relations in every enterprise[198]. A German Labour Front (*Deutsche Arbeitsfront*) was established to replace the trade unions[199].

The system of labour courts were later effectively eliminated through the "Law for the Organisation of Labour" of 20 January 1934, or National Socialist "Labour Charter"[200]. The previous decrees that regulated employer-employee relations, such as collective agreements, arbitration, the Works Council Law, and Section 152 of the Industrial Code guaranteeing freedom of organisation, were displaced by this law. Democratic employee representation was abolished, and the organisation of labour was shifted to individual enterprises in which the employer and employees were redefined as the leader and the followers. This community within the enterprise (*Betriebsgemeinschaft*) was to further the interests of the enterprise, and thereby the

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196 Andreas Kranig, "Treue gegen Fürsorge: Arbeitsrichter unter dem Nationalsozialismus", *Justizalltag im Dritten Reich* (Frankfurt-am-Main: Fischer Taschenbuch Verlag, 1988), p.64.

197 Loewenstein, "Law in the Third Reich", p.800.

198 "Gesetz über Treuhänder der Arbeit vom 19. Mai 1933", *Reichsgesetzblatt* I 1933, p.285.

199 Wunderlich, *German Labor Courts*, p.138.

200 "Gesetz zur Ordnung der nationalen Arbeit. Vom 20. Januar 1934", *Reichsgesetzblatt* I 1934, pp.45-56.

nation[201]. The common interests within the enterprise were maintained by social honour courts, which prosecuted violations of the rights and duties of the followers and the leader. They were to safeguard the social honour, fulfilling the responsibility of duty to the enterprise community, that was to govern relations between the leader and the followers of every enterprise[202]. Labour disputes could be adjudicated by the amended labour courts law of 10 April 1934[203]. However, the labour courts could no longer deal with disputes regarding: the freedom of coalition, collective agreements, works councils, economic organisations, and strikes and lockouts, since these types of disputes were obsolete. The labour courts henceforth basically dealt with disputes between individual employers and employees, or between two workers[204]. The division of jurisdiction between the labour and the social honour courts depended on the intention of a violation. The social honour courts held jurisdiction in examples of disputes involving wages, working hours, or inadequate housing conditions if these types of cases resulted from "unsocial motives, abuse of authority, and malicious intent." On the other hand, the labour courts maintained jurisdiction over cases involving "honest differences of opinion" or "underpayment made in good faith". Consistently paying wages below the rates according to the collective rules, irregular payment and neglecting to pay insurance fees were considered "malicious

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[201] Wunderlich, *German Labor Courts*, p.138.

[202] *Ibid.*, p.172.

[203] "Arbeitsgerichtsgesetz", 10 April 1934, *Reichsgesetzblatt* I 1934, pp.319-340.

[204] Wunderlich, *German Labor Courts*, p.156.

exploitation of labor with abuse of authority, unless the employer was unable to pay."[205] In addition to limiting the jurisdiction of the labour courts, and the National Socialist measures for purging and "synchronising" the administration of justice, the lay representatives and the judges in the labour courts were replaced with individuals who were loyal adherents to the regime[206].

The National Socialist Extraordinary Courts

Cases directly concerning opposition to the National Socialist regime were removed from the jurisdiction of the ordinary law courts. The most significant aspect of the administration of justice in National Socialist Germany was the suppression of actual or alleged hostility to the regime. New state institutions were created for this purpose, which circumvented the judicial organisation. Article 105 of the Weimar Constitution, guaranteeing free access to the ordinary law courts and prohibited extraordinary courts[207], was abrogated as part of the process of subordinating the judicial organisation to political exigencies. Extraordinary courts were established to deal with alleged offences committed against the National Socialist regime. The jurisdiction over such offences was held by extraordinary courts: the "People's Court" (*Volksgerichtshof*) and the special courts (*Sondergerichte*). These extraordinary courts adjudicated in these types of cases while the ordinary law courts remained in place. Whereas law courts in a *Rechtsstaat* served as a check upon

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[205] *Ibid.*, p.175.

[206] Kranig, "Arbeitsrichter unter dem Nationalsozialismus", p.66.

[207] Hucko, *The Democratic Tradition*, p.173.

arbitrary actions of the executive in the interest of upholding justice, their authority was undermined in the interest of political expediency[208]. The political leadership relied upon these courts to satisfactorily meet its demands in the adjudication of what it considered to be political cases[209].

Cases of treason were initially in the jurisdiction of the Supreme Court (*Reichsgericht*)[210] until these cases were transferred to a "People's Court" (*Volksgerichtshof*). The *Volksgerichtshof* was established on 26 April 1934 to try all cases of high treason and treason and attacks against the state and members of the national or *Land* governments[211]. The external cause for establishing this court was Hitler's dissatisfaction with the outcome of the *Reichstag* fire trial. Hitler had hoped to exploit this trial to demonstrate the existence of a Communist conspiracy[212], but most of the Communist defendants in the trial were acquitted[213]. The underlying purpose of this court was to suppress political opposition to the regime and familiarise German society with the concept of National Socialist justice. Rather than prosecute defendants for their actions, the court convicted them on the basis of their attitudes toward National Socialism. A defendant who did not demonstrate support for

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[208] Fraenkel, *The Dual State*, p.40.

[209] Gruchmann, *Justiz im Dritten Reich*, p.1132.

[210] Noakes and Pridham, *Documents on Nazism*, p.269.

[211] "Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens. Vom 24. April 1934", *Reichsgesetzblatt* I 1934, pp.341-348.

[212] William Sweet, "The Volksgerichtshof: 1934-1945", *Journal of Modern History* Vol.46 (1974), p.315.

[213] Schorn, *Der Richter im Dritten Reich*, p.102.

the regime was considered a traitor[214]. The *Reich* Chancellor appointed the members of this court, which consisted of two professional judges who were screened for their loyalty to the regime, and two or three lay assessors serving as judges who possessed special knowledge about the "defence against subversive activities" or were "intimately connected with the political trends of the nation". The President of the Court, one of the two presiding judges, was to approve the defence counsel. The evidence presented by the defence could be refused, and the decisions of the court could not be appealed. According to Heinrich Parrisus, a senior prosecutor of the *Volksgerichtshof*, the purpose of this court "was not to dispense impartial justice 'but to annihilate the enemies of National Socialism.'"[215] In practice, the purpose of this court was to terrorise public opinion through severe penalties, secret proceedings, and the abrogation of most of the rights of the accused, who was not allowed to choose defence counsel[216]. The President of the court selected the defence counsellors, who were invariably politically reliable members of the NSDAP[217].

Whereas the *Volksgerichtshof* dealt with the most outstanding actions of opposition to the regime, the *Sondergerichte* heard cases of various types of real or apparent opposition. The *Sondergerichte*, composed of three judges and defence counsel appointed by the court, were

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[214] Roper, *Skeleton of Justice*, pp.94-95.

[215] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (Cambridge, Mass.: Harvard University Press, 1991), p.142.

[216] Loewenstein, *Hitler's Germany*, p.122.

[217] Schorn, *Der Richter im Dritten Reich*, p.116.

initially set up in each *Oberlandesgericht* district[218]. In general, the jurisdiction of these courts extended to all actions considered hostile to the NSDAP, the government, and later the continuation of the Second World War[219]. Their initial jurisdiction extended over all offences committed under the conditions of the "*Reichstag* Fire Decree" and the "Decree to Protect the Government of the National Socialist Revolution from Treacherous Attacks" of 21 March 1933. Its judgments could not be appealed[220]. The jurisdiction of these courts was defined by a series of legislative enactments dealing with political offences. These courts were responsible for adjudicating acts of political violence, which were subject to up to fifteen years or life imprisonment, or the death penalty[221]. Their jurisdiction over political offences[222] was widely extended by the "Law of 20 December 1934 against Insidious Attacks upon the State and Party and for the Protection of the Party Uniform". Anyone who made a false statement offending the welfare of the national government and the esteem in which it was held, the political leadership, or the NSDAP or any of its affiliated organisations, was subject to imprisonment

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[218] "Verordnung der Reichsregierung über die Bildung von Sondergerichten. Vom 21. März 1933", *Reichsgesetzblatt* I 1933, pp.136-137.

[219] *Trials of War Criminals*, p.18.

[220] "Verordnung der Reichsregierung über die Bildung von Sondergerichten", 21 March 1933, *Reichsgesetzblatt* I 1933, pp.136-137.

[221] "Gesetz zur Abwehr politische Gewalttaten. Vom 4. April 1933", *Reichsgesetzblatt* I 1933, p.162.

[222] 460/533, Wiesbaden. 3234 - IV a/4 877/43. Betrifft: Entlastung der Sondergerichte. 5 July 1943.

ranging from three months to two years[223]. Instigating revolt or arousing alarm or terror among the population, or causing difficulties for the *Reich* abroad would be penalised with imprisonment ranging from three years to life, or the death penalty in exceptional cases[224]. Their jurisdiction in dealing with political offences was extended by the "Law for the Guarantee of Peace Based on Law" of 13 October 1933, which prescribed the death penalty, or imprisonment for up to fifteen years or for life for anyone who either attempted to kill or sanctioned killing a judge, public prosecutor, police authority, or any other state official out of political motives[225].

Their jurisdiction was later extended to criminal as well as political offences by the ordinance of 20 November 1938. These courts were authorised to deal with any act that the public prosecutor believed aroused the public, or if the gravity or baseness of the crime called for immediate prosecution by the *Sondergerichte*. These cases were removed from the jurisdiction of the *Schwurgerichte* (*Landgerichte* with a jury) and the *Amtsgerichte*[226]. Hence, the administration of justice on the basis of "healthy popular emotions" in criminal cases was extended, and consequently further undermined the function of the ordinary law courts.

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[223] Art. 1, "Gesetz gegen heimtückliche Angriffe auf Staat und Partei und zum Schutz der Parteiuniformen. Vom 20. Dezember 1934", *Reichsgesetzblatt* I 1934, pp.1269.

[224] Art. 3(2), "Gesetz gegen heimtückliche Angriffe auf Staat und Partei und zum Schutz der Parteiuniformen. Vom 20. Dezember 1934", *Reichsgesetzblatt* I 1934, pp.1270.

[225] "Gesetz zur Gewährleistung des Rechtsfriedens. Vom 13. Oktober 1933", *Reichsgesetzblatt* I 1933, pp.723-724.

[226] "Verordnung über die Erweiterung der Zuständigkeit der Sondergerichte. Vom 20. November 1938", *Reichsgesetzblatt* I 1938, p.1632.

After the beginning of the Second World War, these courts could be established in every *Landgericht* district, and assumed jurisdiction over all cases that were presumed to seriously endanger public order and security[227]. The *Reich* Minister of Justice Otto Thierack explained that these courts were initially established at this time with jurisdiction over such cases to serve as "sharp weapons of the state leadership (*Staatsführung*) for sentencing political criminal offences" or "'summary courts-martial of the home front'"[228]. Upon the beginning of the Second World War, their jurisdiction was extended through the ordinances of 1 September 1939[229] and 5 December 1939[230]. An ordinance of 21 February 1940 extended their jurisdiction in dealing with all offences that the prosecuting authorities considered necessary for immediate adjudication by these courts. The decision was based on acts that were severe or reprehensible; aroused popular indignation; endangered public order and security; or contravened the enactments relating to the implementation of the Four Year Plan[231]. The

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[227] Section 3, Art. 18, Art. 19, "Verordnung über Maßnahmen auf dem Gebiete der Gerichtsverfassung und der Rechtspflege. Vom 1. September 1939", *Reichsgesetzblatt* I 1939, pp.1659, 1660.

[228] 460/533, Wiesbaden. 3234 - IV a/4 877/43. Betrifft: Entlastung der Sondergerichte. 5 July 1943.

[229] Art. 4, "Verordnung über außerordentliche Rundfunkmaßnahmen. Vom 1. September 1939", *Reichsgesetzblatt* I 1939, p.1683; Section 1, Art. 19, Art. 20(1), "Verordnung über Maßnahmen auf dem Gebiete der Gerichtsverfassung und der Rechtspflege. Vom 1. September 1939", *Reichsgesetzblatt* I 1939, p.1660.

[230] Art. 3, "Verordnung gegen Gewaltverbrecher. Vom 5. Dezember 1939", *Reichsgesetzblatt* I 1939, p.2378.

[231] Art. 14, "Verordnung über die Zuständigkeit der Strafgerichte, die Sondergerichte und sonstige

wartime ordinances extended the jurisdiction of the *Sonderichte* with the power of imposing the death sentence in additional offences. These offences included: intentionally circulating news from foreign radio broadcasts that endangered the defence effort[232]; civilians plundering evacuated buildings and areas[233]; all violent crimes, and armed assaults and threats[234]. The increasing number of death sentences, especially after the beginning of the war, indicated the severity with which the law was applied. The number of death sentences passed by all law courts were as follows[235]:

1933-1939: 664
1940: 250
1941: 1292
1942: 3641
1943: 5336
1944: 4264

Strafverfahrensrechtliche Vorschriften. Vom 21. Februar 1940", *Reichsgesetzblatt* I 1940, p.405.

[232] The penalty for listening to foreign radio broadcasts would be a term of imprisonment (Art. 1). Circulating news of the these broadcasts would also be penalised with imprisonment, unless the case was considered particularly serious (Art. 2). "Verordnung über außerordentliche Rundfunkmaßnahmen. Vom 1. 9.1939", *Reichsgesetzblatt* I 1939 p.1683.

[233] Art. 1(2), "Verordnung gegen Volksschädlinge", *Reichsgesetzblatt* I 1939, p.1679.

[234] "Verordnung gegen Gewaltverbrecher. Vom 5. Dezember 1939", *Reichsgesetzblatt* I 1939, p.2378.

[235] Gruchmann, "Rechtssystem und nationalsozialistische Justizpolitik", p.100.

These courts were able to function flexibly and rapidly, not being required to conduct a pre-trial investigation or to open a trial by determining that the charges introduced by the prosecution were justifiable. The extent of the evidence to be considered was to be decided by the court itself[236], and the defence attorneys could not question the proof of the charges. Verdicts were enforceable immediately, and there was no right of appeal[237]. The characteristics of the *Sondergerichte* thus violated the legal principle of the due process of the law, and fulfilled the desire of the National Socialist authorities for pronouncing harsh sentences rapidly. In practice, this signified intimidating the public through arbitrary psychological terror, operating like the courts of the Inquisition[238]. The number of these courts was greatly increased as the workload of these courts increased an extraordinary extent during the war, as their jurisdiction extended over all significant criminal cases. The sentencing by the *Sondergerichte* had a strong deterrent effect during the first years of their operation since their rapid and severe sentencing was feared. As a result, the emphasis on the administration of criminal justice was transferred from the ordinary law courts (*Amtsgerichte* and *Landgerichte*) to the *Sondergerichte* in the course of their development, to the extent that they became considered a special part of the administration of criminal justice, and the ordinary criminal courts correspondingly lost their significance to a great extent as the jurisdiction of the *Sondergerichte* was

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[236] Cases to be presented before the ordinary judicial organisation were initially handled by the office of the public prosecutor.

[237] Müller, *Hitler's Justice*, p.153.

[238] Werner Johe, *Die gleichgeschaltete Justiz*, p.107.

extended. Some criminal courts had hardly any work, while the *Sondergerichte* were constantly excessively burdened with cases that threatened to slow down the rate of adjudication. The initial deterrent effect of the *Sondergerichte* thereby became diluted as they were responsible for hearing relatively insignificant minor offences, such as illegal animal slaughter or illegal fishing by foreigners, etc.. The extension of their jurisdiction and the increase in the number of these courts resulted in various difficulties. Many of their judgments were not uniformly consistent. For example, a case of theft of weaving materials was considered an act offensive to the nation (*Volksschädlingstat*) was sentenced with four years in prison, while a very similar case heard by another chamber at the same *Sondergericht* was sentenced with eight months imprisonment. Many judges who were drawn from the ordinary law courts to serve in the *Sondergerichte* lacked the suitable qualifications - especially political qualifications - that their judges possessed during the early years of their operation. A great number of the judges serving with a *Sondergericht* by July 1943 were never members of the NSDAP. In addition to the types of cases that were to be heard by these courts, the one essential difference in contrast to the ordinary administration of criminal justice was that there was no right to appeal their decisions[239].

The primary purpose of the National Socialist extraordinary courts was to apply the law in cases in which the state had a direct interest, rather than actually administer justice. The former principles of justice were suspended in their adjudication of political offences that were removed from the jurisdiction of the ordinary courts that were not completely entrusted with this function. The

[239] 460/533, Wiesbaden. 3234 - IV a/4 877/43. Betrifft: Entlastung der Sondergerichte. 5 July 1943.

extraordinary courts represented how the National Socialist regime intended justice to be administered according to the unwritten law of National Socialist justice - all real or apparent opposition to the National Socialist regime was not be tolerated. Any resistance was considered a political offence that contravened the National Socialist conception of justice, by which all individuals who contravened the demands of the regime were subject to prosecution.

Conclusion

The National Socialist regime reorganised the political order and the administration of justice in order to bring society under its complete control. As a consequence, the precepts of the rule of law were relinquished to serve this purpose. The purpose of the law in National Socialist Germany was re-defined in accordance with the conceptions of the regime, and was used to advance the demands of the regime, rather than the common interests of state and society. Justice according to the rule of law in a liberal-democratic society is based on the relative objectivity of existing laws that are to govern a society of individuals equally, and protect their interests as well as those of the state. This notion of the rule of law contradicted the ideology of the National Socialist regime, which re-defined the society of National Socialist Germany as a national community that was united by virtue of "race", and the common interests of the individuals in this national community were expressed through the will of the political leadership of the regime. Hence, the application of the law was to be directed toward the interests of the regime, while the interests of individuals were secondary to this purpose. The principal purpose of National Socialist justice was to bring pressure to bear upon society to ensure its conformity to the regime. As a result of such intimidation, individuals

the duty of suppressing opposition to the regime[240]. Jurists who were engaged in the administration of justice at the time of the National Socialist takeover, and the subsequent jurists who entered into its service were compelled to function in accordance with the demands of the regime and its conception of the law.

Whether jurists had any actual commitment to the National Socialist regime depended on the individual. There were few jurists who were members of the NSDAP or its affiliated organisations before 1933. Of the 7000 judges in Prussia for example, only 30 were members of the NSDAP before January 1933[241]. On the other hand, the changed political situation led to a dramatic increase within a short period of time. Over fifty-four percent of judges and prosecutors were members of the NSDAP by 1938, and over ninety-percent by 1945[242]. It is to be considered whether they genuinely accepted the precepts of National Socialism or were merely safeguarding their interests by joining the NSDAP. Individuals who were employed in the civil service were never officially required to become members of the NSDAP[243], and membership in the NSDAP or one of its affiliated organisations was not a prerequisite for joining the civil service until after 28 February 1939[244]. Individuals who joined the NSDAP could thus have been

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[240] *Ibid.*, p.345.

[241] Hans Wrobel, *Verurteilt zur Demokratie*, p.8.

[242] *Ibid.*, p.20.

[243] 501/1199, Wiesbaden. Office of the Military Government for Germany (Denazification) HIT/Ij, APO 633. Subject: "Criteria for Membership in the NSDAP", 24 January 1947.

[244] Art. 2, "Verordnung über die Vorbildung und die Laufbahnen der deutsche Beamten. Vom 28. Februar 1939", *Reichsgesetzblatt* I 1939, p.371.

prompted by opportunism[245] rather than the outright force. Joining the NSDAP also followed personal considerations, such as being dependent upon financial or professional considerations in the interest of acquiring employment or promotion[246], as well as merely maintaining one's livelihood by allaying suspicion of disloyalty to the state. There were also other factors that brought pressure to bear upon the judiciary to demonstrate loyalty to the regime, whether or not membership in the NSDAP could be considered an accurate indication of political allegiance. Terror and self-preservation hindered open opposition to the regime. Resistance and the potential to stage a putsch required organisation and instruments of power, which were held by the military rather than the judiciary[247]. Resistance by the judiciary against the state was therefore limited to actions within the administration of justice.

It has been argued that most judges preserved their independence even though they were members of the NSDAP, and many judgments demonstrated that they followed their conscience through passive resistance in the dispensation of justice[248]. No evidence has been uncovered of judges who were imprisoned in a concentration camp on account of their sentencing, or of any similar case that affected public prosecutors[249]. However, judges were forcibly transferred to new duties for not having sentenced according to the spirit

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[245] 501/1199, Wiesbaden. Office of the Military Government for Germany (Denazification) HIT/Ij, APO 633. Subject: "Criteria for Membership in the NSDAP", 24 January 1947.

[246] Schorn, *Der Richter im Dritten Reich*, p.41.

[247] Wrobel, *Verurteilt zur Demokratie*, p.79.

[248] Schorn, *Der Richter im Dritten Reich*, p.40.

[249] Wrobel, *Verurteilt zur Demokratie*, p.79.

of National Socialism[250]. There were many lawyers who were determined to preserve the law in the face of the injustice of the regime[251], as well as judges who resisted the regime at great personal risk[252]. It cannot be surmised that all criminal court judges were "National Socialist 'blood judges'"[253]. Since the body of law was permeated rather than completely recast with National Socialist conceptions, everyday court business continued to carry on along with the political interference in the administration of justice, such as in trivial criminal cases and in wide areas of civil law. The worst examples of the National Socialist administration of justice - cases of excessively severe sentences that made a mockery of justice, such as those passed by the *Volksgerichtshof* - were represented by the so-called "political" cases. Judges had to apply the law, and in some cases interpreted the law restrictively in order to avoid passing unjust sentences, or at least mitigate the severity[254]. Instances of what the authorities considered overly mild judgments took place in both the the *Sondergerichte* as well as the ordinary criminal courts[255]. On the other hand, it cannot be denied that judges and prosecutors exercised a dangerous authority over defendants in view of the draconian sentences that were imposed during

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[250] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.233.

[251] Güstrow, *Tödlicher Alltag*, p.14.

[252] *Ingo Müller*, Hitler's Justice, *p.192*.

[253] Gruchmann, "Rechtssystem und nationalsozialistische Justizpolitik", p.101.

[254] *Ibid*.

[255] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.365.

the National Socialist regime[256]. The administration of criminal justice in spheres of National Socialist policy terrorised the population through alarmingly harsh sentences that were imposed with increasingly barbaric severity during the Second World War[257].

Whether or not German jurists, either quantitatively as a whole or qualitatively individually, could be considered implicated with the National Socialist regime was to be determined after the end of the Second World War, when the administration of justice was to be reconstructed with jurists who could be entrusted with resuming their functions. The collapse of the National Socialist regime and its institutions opened the questions of how the effects of the "synchronisation", or "nazification", of the administration of justice were to be eliminated, and the elements of the *Rechtsstaat* were to be restored. The reconstruction of the *Rechtsstaat* entailed the tasks of restoring the judicial institutions that were in place prior to the establishment of the National Socialist regime, and the more complex matter of staffing the postwar administration of justice.

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[256] *Ibid.*, p.364.

[257] *Ibid.*, p.175.

Planning for Military Government and the Postwar Restoration of Justice

Introduction

Planning for the restoration of justice in postwar Germany began during the Second World War. This took place in the context of the Allied war aim of destroying the National Socialist regime. Political representatives of Allied governments and Allied military planning staffs drafted plans and policies for the reconstruction of postwar Germany. US planning for the postwar Germany took place in US government departments that prepared political policy, while military civil affairs personnel drafted plans for the nonmilitary aspects of the administration of territories that would be occupied by Allied military forces. The main principles guiding the planning of policy for the reconstruction of justice in Germany included: abolishing the NSDAP, eradicating National Socialist legislation, removing National Socialists from the judicial organisation, and restoring the administration of justice that was in place before the National Socialist regime was established. The political objectives and military civil affairs plans for the reconstruction of Germany that were drafted during the Second World War later formed the basis of policies that were to be implemented during the postwar Allied military occupation.

Political Planning for Postwar Germany

Political planning for the postwar occupation of Germany during the Second World War took place within and between the governments of the "Big Three" Allied nations - the United States, the United Kingdom and the Soviet Union. Their leaders and the foreign ministers of the three major Allies discussed postwar political planning for Germany

while they met to discuss the coordination of military strategy. The first concrete progress on the question of planning for postwar Germany took place at the Moscow Conference of Foreign Ministers (18 October - 1 November 1943). On 23 October 1943, the US Secretary of State Cordell Hull presented policy proposals for discussion in a draft memorandum produced by the US State Department entitled "The Political Reorganization of Germany". This memorandum included these principal goals: empowering the United Nations with supreme authority in Germany; establishing an Inter-Allied Control Commission to supervise the terms of the surrender; placing Germany under occupation by the military forces of the Big Three Allies; removing all Nazi officials and eliminating all vestiges of National Socialism[258]. Since the purpose of this meeting was to prepare the agenda for the subsequent Teheran Conference of the heads of state of the Big Three Allies, the foreign ministers did not attempt to reach any formal decisions concerning post-surrender planning. The Foreign Ministers only confirmed that their governments would act jointly in matters pertaining to the defeat of Germany and its Allies and post-surrender policymaking[259].

The discussion of this document was merely informal. Cordell Hull later stated before the US Congress that arriving at a complete and rapid understanding on matters arising from post-hostilities planning required further study of possible recommendations for dealing with non-military problems relating to the administration of enemy territories. The most practical instrument for this task would be an inter-governmental commission to advise the

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[258] *Foreign Relations of the United States, Diplomatic Papers, 1943*, Vol. 1: *General* (Washington: U.S. Government Printing Office, 1963), pp.720-723.

[259] *Ibid.*, pp.755-756.

governments of the Big Three Allies[260]. The combined instrument for inter-Allied post-surrender planning for postwar Germany was to be coordinated by the European Advisory Commission (EAC) that was established in the Moscow Protocol of 1 November 1943. The EAC was charged with the task of making joint recommendations for the surrender terms that the Allies would impose on the European Axis states, and the control arrangements that would ensure the execution of those terms[261]. The US government would provide technical advice to the US representative on the EAC, John G. Winant, the US Ambassador to London. The source of this advice was the Working Security Committee (WSC)[262], a subcommittee operating within the State, War and Navy Departments that was established on 21 December 1943, to coordinate their views and draft instructions for Ambassador Winant by supplying him with background studies, policy recommendations and directives[263].

The EAC began its deliberations on 14 January 1944 and eventually produced the general terms through which Allied postwar objectives in Germany would be implemented. These

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[260] Hajo Holborn, *American Military Government: Its Organization and Policies* (Buffalo: William S. Hein, 1975), p.22.

[261] *Ibid.*, pp.756-757.

[262] See Harley Notter, *Postwar Foreign Policy Preparation: 1939-1945* (Westport: Greenwood Press, 1975), pp.69, 96, 124-133 *passim* for the development of the various U.S. State Department postwar policy planning committees.

[263] Philip E. Mosely, "The Occupation of Germany: New Light on How the Zones were Drawn", *Foreign Affairs* Vol. 28 (July 1950), pp.583-585; Edwin J. Hayward, "Coordination of Military and Civil Affairs Planning", *Annals of the American Academy of Political and Social Science*, Vol. 267, (1950), pp.24-25.

terms were set forth in three key documents. On 25 July 1944, the EAC adopted a draft instrument for the terms of the unconditional surrender of Germany[264]. On 14 November 1944, the EAC set forth further agreements for the implementation of these terms. Germany and Berlin were to be divided into occupation zones allocated to the US, the UK, and the Soviet Union[265]. Supreme authority would be exercised through the Allied control machinery composed of representatives of these three occupation powers "acting jointly in matters affecting Germany as a whole"[266], and upon instructions from their governments in their respective zones of occupation[267]. These documents provided the terms that later formed the basis of the Allied military occupation of Germany, but Allied policies that were to be carried out during the occupation were not yet established.

Although the EAC formulated plans for the problems immediately arising from the surrender that required the most urgent consideration, it did not reach any agreement on specific policies that would be carried into effect through the Allied administration of Germany[268]. For example, the WSC issued a memorandum to Ambassador Winant on 16 September 1944 that set forth general military and political policies to be implemented during the Allied occupation of Germany. In the sphere of justice: the key laws and decrees that established the political structure of National Socialism

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[264] *Foreign Relations of the United States, Diplomatic Papers: The Conferences of Malta and Yalta* (Washington: U.S. Government Printing Office, 1965), pp.113-118.

[265] *Ibid.*, pp.118-123.

[266] *Ibid.*, p.124.

[267] *Ibid.*

[268] Holborn, *American Military Government*, p.44.

and the implementation of its ideology and objectives were to be abolished; the Supreme Allied Authority was to suspend all discriminatory German laws and would take action to annul such laws; extraordinary National Socialist courts were to be abolished; National Socialist personnel were to be removed from the German administration of justice, which was to be restored to operation as rapidly as possible[269]. However, the agreements on the surrender terms, the zones of occupation and control machinery were to be concluded before this memorandum could be discussed by the EAC[270]. Although Ambassador Winant and his staff produced several policy directives dealing with substantive issues concerning the occupation and the military government in postwar Germany[271], the EAC was not responsible for formulating such policy since its purpose was to draft plans, rather than function as an intergovernmental decision-making body[272]. The WSC received papers from Ambassador Winant dealing with major postwar policy questions, but discussion in the US government on the substance of these policy recommendations was delayed until August 1944[273]. The political planning organisation for relaying US government plans to the international level and inter-Allied postwar planning was in

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[269] *Foreign Relations of the United States: The Conference at Quebec, 1944* (Washington D.C.: U.S. Government Printing Office, 1971), pp.77-80.

[270] *Ibid.*, p.77.

[271] Paul J. Hammond, "Directives for the Occupation of Germany: The Washington Controversy", *American Civil-Military Decisions* (Birmingham: University of Alabama Press, 1963), ed. Harold Stein, p.339.

[272] Holborn, *American Military Government*, p.26.

[273] Hammond, "Directives for the Occupation of Germany", pp.357-358, 340.

place by late 1943, while the policy-*making* rather than planning machinery was established thereafter. There was also a lack of systematic coordination between the development of foreign policy and military planning[274]. While planning at the governmental level formulated political policies for postwar Germany, military planners drafted instructions for dealing with civil affairs during the occupation of Germany.

Military Planning for the Postwar Occupation of Germany

The office of the Chief of Staff to the Allied Supreme Commander (COSSAC) organised the initial military planning for the postwar occupation of Germany. A Posthostilities Planning Section was formed under COSSAC to determine the responsibilities of the Commander-in-Chief during the interval between the end of hostilities and the institution of the civil administration in the occupied areas. Planning for post-hostilities civil affairs functions in the occupied territories that had begun under COSSAC was absorbed into the newly-organised Supreme Headquarters, Allied Expeditionary Force (SHAEF) - the combined British-American military operations command staff that superseded COSSAC in January 1944[275]. Military civil affairs planners drafted studies concerning the occupation of Germany without

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[274] Ray S. Cline, *United States Army in World War II; The War Department; Washington Command Post: The Operations Division* (Washington D.C.: Office of the Chief of Military History, Department of the Army, 1951), p.325; U.S. Army, European Command, Historical Division, *Planning for the Occupation of Germany* (Frankfurt-am-Main: Office of the Chief Historian, 1947), pp.32-33.

[275] Oliver J. Frederiksen, *The American Military Occupation of Germany: 1945-1953*, (Historical Division Headquarters, U.S. Army, Europe, 1953), p.1

coordination with governmental agencies in the US and the UK that were charged with the same function[276]. Whereas Allied political planning for postwar Germany at this time was undertaken by the EAC[277], military planning for civil affairs was charged to a "German Country Unit" that was established in March 1944 as a "Special Staff" subsidiary of the SHAEF (G-5) Civil Affairs Division[278]. Since instructions regarding policies to be applied in occupied Germany were not dispatched from the political policymakers to the military planning authorities, the German Country Unit took precedence in the planning for the non-military aspects of the occupation of Germany[279]. This unit produced a *Handbook for Military Government in Germany: Prior to Defeat or Surrender*, published in its final draft in December 1944[280]. This *Handbook* was to serve as a comprehensive military

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[276] Forrest C. Pogue, *United States Army in World War II: The European Theater of Operations: The Supreme Command* (Washington D.C.: Office of the Chief of Military History, Department of the Army, 1954), p.339.

[277] Harold Zink, *The United States in Germany: 1944-1955* (New York: Van Nostrand, 1957), p.21.

[278] F.S.V. Donnison, *Civil Affairs and Military Government: North-West Europe, 1944-1946* (London: Her Majesty's Stationery Office, 1961), pp.8-15 *passim*.

[279] Zink, *The United States in Germany: 1944-1955*, p.20.

[280] There was a total of six editions of the *Handbook* amid controversy regarding the severity of denazification procedures, particularly President Roosevelt's intervention and insistence that the provisions of the *Handbook* were too lenient. Jill Jones, "Eradicating Nazism from the British Zone of Germany: Early Policy and Practice", *German History* Vol. 8 (1990), p.153.

government manual for Germany by providing advice and direction to the civil affairs units[281].

Civil affairs planning for the occupation of Germany became increasingly pressing at this time, since the plans and organisation for the military government of Germany were to be completed before D-Day in order for the military government personnel to become familiar with their mission[282]. General Eisenhower, the Supreme Commander of SHAEF, therefore requested the preparation of guidance for civil affairs planning. The Combined Civil Affairs Division (CCAD), a civil affairs planning subcommittee of the U.K.-US Combined Chiefs of Staff (CCS)[283], formulated a directive for military government administration during the pre-surrender period entitled "Combined Directive for Military Government in Germany Prior to Defeat or Surrender", or CCS 551[284]. This directive was dispatched to General Eisenhower by the CCS on 28 April 1944 while combined Allied military government policies prior to the surrender of Germany had not been forwarded from the EAC or G-5 of SHAEF[285]. CCS 551 addressed the general conditions of military government administration assuming supreme authority in Germany occupied by SHAEF forces. The SHAEF Commander was to be vested with supreme legislative, executive and judicial authority in all occupied territories, and was charged with three main tasks

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[281] Earl F. Ziemke, *The U.S. Army in the Occupation of Germany: 1944-1946* (Washington D.C.: Center of Military History, United States Army, 1975), pp.80-81.

[282] Holborn, *American Military Government*, p.33.

[283] Pogue, *The European Theater of Operations; The Supreme Command*, pp.77, 80.

[284] *Ibid.*, p.347.

[285] Holborn, *American Military Government*, pp.33, 135-139.

while serving in this capacity: 1) abolishing the NSDAP and its affiliated organisations; 2) eliminating National Socialist laws and courts from the German administration of justice; 3) ensuring that no National Socialist of importance or member of the German General Staff was either retained in or appointed to any position of authority[286]. These objectives represented the essence of military government denazification planning[287]. This directive also provided guidance on the administration of justice in Allied-occupied Germany. The SHAEF commander was authorised to establish military courts to maintain law and order in the occupied territories. These courts would be established in accordance with appropriate regulations concerning their jurisdiction. National Socialist personnel would be removed from the German courts. The functions of the German courts would be suspended until they could be re-opened under pre-determined regulations and measures for their supervision and control were introduced. Extraordinary National Socialist courts were to be abolished permanently along with National Socialist laws[288]. While CCS 551 defined military government policy, definitive guidance for the application of military government legal functions were outlined in military government manuals: the *Handbook for Military Government*, and the *Technical Manual for Legal and Prison Officers*.

The *Handbook for Military Government in Germany* provided instructions for various military government operations that would be undertaken upon the occupation of German territory by SHAEF forces prior to Germany's surrender or defeat. Measures pertaining to legal objectives

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[286] Donnison, *Civil Affairs and Military Government, North-West Europe*, p.359.

[287] Holborn, *American Military Government*, pp.36-37.

[288] *Ibid.*, pp.136-137.

included general instructions for the eradication of National Socialist influences from the German administration of justice, the restoration of law and order, and safeguarding the interests of the Allied forces and the United Nations[289]. The terms in the *Handbook* regarding the staffing of German institutions called for the removal of all active National Socialists or sympathisers, or any individual deemed likely to oppose Allied interests and principles from government or civil service offices without exceptions for administrative convenience or expediency. They were to be substituted with non-National Socialists, or military government personnel as a temporary measure if suitable German personnel could not be found. German public officials who belonged to National Socialist organisations were to be automatically removed from office. All reinstated German personnel would be screened through questionnaires (*Fragebogen*) providing detailed and specific information concerning their participation in the activities of the NSDAP or its affiliated organisations, which would be verified by other sources of information such as military government counter-intelligence, NSDAP and police records, and informers[290].

The purposes of the military government were to be proclaimed through military government legislation. German legislation containing NSDAP doctrines were to be abolished, while German laws that would not conflict with military government policies and legislation would be maintained[291]. This *Handbook* provided the military government with the initial proclamation, laws and ordinances that were to be

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[289] *Handbook for Military Government in Germany: Prior to Defeat or Surrender* (Office of the Chief of Staff: Supreme Headquarters, Allied Expeditionary Force, December 1944), para. 562.

[290] *Ibid.*, para. 287.

[291] *Ibid.*, para. 78.

promulgated by the SHAEF military commanders upon the occupation of any area. The legislative measures dealing with the administration of justice in SHAEF-occupied Germany included SHAEF Military Government Proclamation No.1 on "Establishment of Military Government"; SHAEF Military Government Law No.1 on "Abrogation of Nazi Law"; SHAEF Military Government Law No.2 on "German Courts"; SHAEF Military Government Law No.6 on "Dispensation by Act of Military Government with Necessity of Compliance with German Law"; SHAEF Military Government Ordinance No.1 on "Crimes and Offences"; SHAEF Military Government Ordinance No.2 on "Military Government Courts"[292].

Military government courts would be established as soon as was practicable to enforce military government legislation and to protect the interests of the Allied forces and the United Nations[293]. The German courts would be suspended upon the occupation of enemy territory. The judicial organisation in this territory was to be reorganised as soon as possible upon the establishment of the military government in the area[294]. German courts would be re-opened at the discretion of Army Group Commanders, and would be subject to military government regulation, supervision and control[295]. The military government was to exercise the following powers over the German judicial organisation: 1) the power to dismiss any German judge; 2) the right to attend any court session; 3) the power to review the decisions of the German courts; 4) the power to nullify, suspend or modify sentences rendered by these courts; 5) the power to assume jurisdiction over any class

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[292] *Ibid.*, paras. 81, 145.

[293] *Ibid.*, paras. 82, 86.

[294] *Ibid.*, para. 542.

[295] *Ibid.*, para. 84.

of cases or particular cases for the military government courts[296]. All National Socialist special courts, such as the People's Court, would be abolished[297].

This *Handbook* was supplemented by the SHAEF *Technical Manual for Legal and Prison Officers*. Whereas the *Handbook* was to provide information and guidance for military government detachments in SHAEF-occupied Germany, these technical manuals were to be used by specialist officers[298]. The *Technical Manual* restated the principles set in the *Handbook*, provided terms for the procedures of the conduct of trials in the military government courts in occupied Germany, and directions for re-opening German courts[299]. This *Manual* set forth policies for the denazification of justice, such as preventing the application of discriminatory laws and reorganising the German administration of justice to eliminate National Socialist elements and doctrines. Legislation was to be enacted by the SHAEF in occupied Germany for the implementation of these measures, which would in turn be promulgated by the SHAEF Army Group commanders[300]. All German courts in the occupied territories

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[296] *Ibid.*, para. 543.

[297] *Ibid.*, para. 85.

[298] *Ibid.*, paras. 1, 3.

[299] Document II "Chapter V, Legal, from German Handbook, Document XII "Military Government Instructions to Legal Officers and M.G.O's", *Military Government, Germany: Technical Manual for Legal and Prison Officers* Supreme Headquarters, Allied Expeditionary Force, G-5, 1944.

[300] Document I "Military Government - Germany, Supreme Commander's Area of Control, Legal and Prison Policy", clauses 1,2, *Technical Manual for Legal and Prison Officers*.

were to be closed, and all National Socialist personnel were to be eliminated from the administration of justice. Military courts were to be established in the occupied territory as soon as would be practicable in order to maintain order and the security of the Allied forces. National Socialist courts would be abolished, and all other German courts would be closed. The German courts would remain closed until the military government secured judicial personnel who could be relied upon to administer justice without National Socialist principles and doctrines, in conformity with the objectives of the military government. Jurisdiction over cases affecting the interests of the military government would be withdrawn from the German courts and assumed by the military government courts[301].

These *Handbooks* for use by the SHAEF military government detachments in occupied Germany outlined military government policy and functions, while the long-term Allied political policy for postwar Germany remained forthcoming. The military government detachments were to establish "an adequate system for the administration of justice" in the territories under SHAEF control as the occupation progressed on the basis of this SHAEF Directive, and the two *Handbooks*. This system was to provide for the promulgation of military government legislation (proclamations, ordinances, etc.), and the establishment and operation of military government courts. Effective control over the German courts was to be established through the presidents and prosecutors of the German regional appeals courts (*Landgerichte*). The effective control of the German administration of justice by the *Reich* Minister of Justice in Berlin would be progressively

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[301] Document I, clauses 2, 3, 6, 7, 8, *Technical Manual for Legal and Prison Officers,*

terminated in proportion to the territories occupied by SHAEF troops[302].

The provisions contained in these *Handbooks* were implemented during the Allied invasion of western Germany. The administration of justice in the territories occupied by the Allied forces was established by the military government detachments that began to operate in western Germany, following the SHAEF tactical forces advancing into Germany[303]. SHAEF forces under General Eisenhower's command entered western Germany in September 1944. General Eisenhower issued an interim directive to the 21st and 12th Army Groups on 10 September 1944 ordering Field Marshal Montgomery and General Bradley to establish military government as soon as they had occupied German territory, and empowering army group commanders to enforce the terms of surrender, take the necessary steps to establish order, and eliminate traces of National Socialism[304]. Military planning for the occupation Germany prevailed until Allied political policy on postwar Germany was established in 1945.

The Establishment of the Allied Occupation Objectives

The initial occupation directives were supplemented by policy deliberations at the international level[305]. Whereas the EAC documents laid the basis for the Allied military

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302 Z45F 11/3-1/24 RG 260 OMGUS, Koblenz. Annex XV Administration of Justice. 1945/3.

303 Joseph R. Starr, *U.S. Military Government in Germany: Operations during the Rhineland Campaign* (Karlsruhe: U.S. Army Historical Division, European Command, 1950), p.3.

304 Pogue, *Supreme Command*, p.356.

305 Hammond, "Directives for the Occupation of Germany", pp.376-377.

occupation of postwar Germany, questions concerning Allied objectives for the occupation remained unresolved. The political leaders of the Big Three Allies set forth the basis for the postwar occupation of Germany at the Yalta Conference (3-11 February 1945). They agreed to the surrender plans for Germany formulated by the EAC, and proclaimed the broad postwar aims of disarmament, demilitarisation and denazification. These aims were to be implemented by the Allied military government of four occupation powers. They were to be represented in an Allied Control Council coordinating uniform policies for Germany as a whole. Germany would be partitioned into separate zones of occupation, which would be governed by the military governments of the Big Three Allies and of France[306].

Representatives of the US War, Navy, State and Treasury Departments, and the Foreign Economic Administrator, which composed the Informal Policy Committee on Germany[307], set forth policy instructions for the military government in the US occupation zone. This committee held its first meeting on 15 April 1945 and prepared a summary of US policy for Germany in the initial post-defeat period. The committee drafted a summary of policies regarding the military government of Germany, which served as the basis for a directive to the Commander in Chief of the United States Forces of Occupation. This directive, JCS 1067, was completed on 26 April and sent to the US Joint Chiefs of Staff (JCS), and was then sent to the Commander in Chief, US Forces in Germany, General Eisenhower, to provide guidance

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[306] *Foreign Relations of the United States: The Conferences at Malta and Yalta*, pp.968-975.

[307] Holborn, *American Military Government*, pp.41-42.

for the US military government[308]. This directive was to succeed CCS 551 as a policy statement in providing guidance for the US military governor in occupied Germany and the military government civil affairs operations in the occupied territories, addressing short-term objectives of a military nature immediately following the surrender until long-term policies were determined[309]. It remained the basic policy directive for the US military government until common Allied policies were established for Germany as a whole[310]. General Eisenhower was ordered to dissolve the NSDAP and its affiliated organisations and institutions, and to abrogate all laws, decrees and regulations purporting to establish the political structure of National Socialist regime. All members of the NSDAP who had been more than nominal participants in its activities, all active supporters of National Socialism and militarism, and all individuals considered hostile to the Allied occupation were to be removed and excluded from public office and positions of importance in quasi-public and private enterprises that had been under the direction of the state, the NSDAP, or its affiliated organisations. They were not be retained in office in the interest of administrative necessity, expediency or convenience[311]. All extraordinary courts such

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[308] Velma Hastings Cassidy, "American Policy in Occupied Areas", *Department of State Bulletin*, vol.15 (1946), pp.291-292.

[309] Hammond, "Directives for the Occupation of Germany", pp.328, 362, 372, 390.

[310] Leonhard Krieger, "The Inter-Regnum in Germany: March-August 1945", *Political Science Quarterly*, vol.64 (1949), p.517.

[311] "Military Government of Germany: Directive to the Commander in Chief of the United States Forces of Occupation Regarding the Military Government of Germany", *Department of State Bulletin*, vol.13 (21 October 1945): 598-599.

as the *Volksgerichthof* and the *Sondergerichte* were to be abolished immediately, while all German criminal, civil and administrative courts would be closed until all vestiges of National Socialism and National Socialist personnel were eliminated[312].

The Second World War in Europe ended with the unconditional military surrender of National Socialist Germany on 7 May 1945[313]. This military surrender instrument was followed by the "Berlin Declarations" of 5 June 1945 that proclaimed the military and political surrender of Germany. The 5 June Declarations established the structure of a joint Allied military government administration in Germany, which included the forces under SHAEF command and those of the Soviet Union. The Allied military government superseded the German government through the unconditional surrender, and Allied control machinery was to remain the provisional political and administrative structure of Germany for the duration of the occupation. The first declaration proclaimed that the four occupation powers assumed supreme authority in Germany, and presented the terms of the unconditional surrender. In summary, Germany's resources were to be subordinated to the disposal of the Allied occupation authorities, and various measures would be taken to ensure the complete disarmament, demilitarisation and denazification of Germany[314]. The second declaration outlined the boundaries of the Allied occupation zones in

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[312] *Ibid.*, p.600.

[313] "Act of Military Surrender", *Enactments and Approved Papers of the Control Council and Coordinating Committee for Year 1945* (Legal Division, Office of Military Government for Germany (U.S.)), pp.6-7.

[314] *Documents on Germany: 1944-1961* (New York: Greenwood Press, 1968), pp.12-16.

Germany and Berlin. Each zone would be placed under the authority of a commander-in-chief of the respective occupation power governing the zone. An Inter-Allied Governing Authority consisting of the four Allied military commanders in Berlin would jointly direct the administration of Berlin[315]. The third declaration defined the Allied control machinery in Germany. In summary, the commanders-in-chief of the four occupation zones held supreme authority in their respective zones. Their authority was subject only to their own governments and to an Allied Control Council. The four commanders composed the Allied Control Council and would act in concert in matters affecting Germany as a whole. A Coordinating Committee, composed of the deputies of the four commanders, was responsible for advising the Control Council, administering the execution of its decisions, transmitting these decisions to appropriate German agencies, and supervising the activities of these agencies. A Control Staff consisting of twelve separate directorates, would function as the provisional administration of Germany. The administration of Berlin would be under the direct authority of an Inter-Allied Governing Authority that would be subject to the direction of the Control Council. This control machinery would be maintained for the duration of the Allied military occupation when Germany would carry out the basic requirements of the unconditional surrender[316]. The task of the reconstruction of justice in Germany as a whole was charged to the Legal Directorate of the Control Council that would prepare legislation for approval and enactment by the Control Council or the Coordinating Committee[317]. The Legal

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[315] *Ibid.*, pp.18-19.

[316] *Ibid.*, pp.19-20.

[317] *Enactments and Approved Papers of the Control Council and Coordinating Committee* 1945, vol.1, p.125.

Directorate consisted of the Directors of the Legal Divisions representing each of the four occupation zones, subcommittees performing various functions, such as a Committee on the Reopening of German Courts, and Working Parties on the German Criminal Code and on the Repeal of National Socialist Laws[318].

Having announced their plans for the military occupation and control of postwar Germany, it was necessary for the Allies to establish the practical characteristics of their administration[319]. Allied political policy-makers set forth the objectives of the postwar reconstruction of Germany at the Potsdam Conference (17 July - 2 August 1945). The Potsdam Protocol affirmed the Allied aims that were proclaimed at the Yalta Conference, and set forth the objectives to be implemented in postwar Germany by the occupation powers. The US delegation at Potsdam introduced the provisions outlined in JCS 1067, which formed the basis of discussions on major policies at this conference. The representatives of the Big Three Allies produced the "Proposed Agreement on the Political and Economic Principles to Govern the Treatment of Germany in the Initial Control Period", or the Potsdam Protocol, which outlined uniform policy provisions for postwar Germany concerning problems that were to be dealt with to meet the general objectives of the postwar occupation, including political and economic controls, disarmament, demilitarisation and denazification to be fulfilled jointly under the supreme authority of the

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[318] Eli E. Nobleman, "Quadripartite Military Government Organization and Operations in Germany", *American Journal of International Law*, Vol. 41 (July 1946), pp.652-653.

[319] Herbert Feis, *Between War and Peace: The Potsdam Conference* (Princeton: Princeton University Press, 1960), p.52.

four occupation powers[320]. These occupation objectives were to be implemented under the authority of the Allied Control Council. The Allied Control Council was empowered with enacting legislation to implement these objectives. Allied military governments were to be established in the separate zones of occupation. The Commander-in-Chief of each occupation zone would exercise supreme authority in accordance with directives received from his own government and implement Allied Control Council policy decisions in his respective occupation zones[321].

The Potsdam Protocol provided the Control Council with a charter for its functions for the implementation of the joint political reconstruction, supplementing the terms of the Yalta Protocol and the Declarations of 5 June 1945[322]. Among the occupation objectives set forth in the Potsdam Protocol were terms for the reconstruction of the administration of justice in occupied Germany. Occupation objectives pertaining to the denazification of Germany included: the elimination of the NSDAP and its affiliated organisations; dissolving National Socialist institutions; preventing National Socialist activity and propaganda; abolishing National Socialist laws; arresting war criminals, National Socialist leaders as well as the leading officials in National Socialist organisations and institutions, and bringing them to justice; removing "all members of the NSDAP who had been more than nominal participants in activities[323]

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[320] *Foreign Relations of the United States, Diplomatic Papers: The Conference of Berlin (The Potsdam Conference)*: 1945, Vol. 2 (Washington D.C.: U.S. Government Printing Office, 1960), pp.1502-1505.

[321] *Ibid.*, pp.775-778.

[322] *Ibid.*, p.750.

[323] JCS 1067 defined "more than nominal participants" as individuals who: 1) had held offices in the NSDAP or its

from public, semi-public or important private positions of responsibility and replacing them with individuals deemed capable of assisting in the development of democratic institutions."[324] The objective for the restoration of justice in Germany was to re-establish the rule of law. This included calling for the abrogation of all National Socialist laws, with the additional provision that no form of legal discrimination would be tolerated, and for the reconstruction of a democratic administration of justice[325].

The reconstruction of postwar Germany was to be undertaken under the authority of the Allied Control Council, enacting legislation for Germany as a whole for the various tasks of the reconstruction based on the principles set forth in the Potsdam Protocol. These four zones were in fact treated entirely separately by the Control Council, as if they were separate states, as their respective administrations were the exclusive concern of the occupation power[326]. The US military government was originally organised as the US Group, Control Council (USGCC), which absorbed the

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affiliated organisations; 2) authorised or actively participated in National Socialist crimes or racial persecutions and discriminations; 3) were "avowed believers" in National Socialism or its racial and militaristic ideologies; 4) had "voluntarily given substantial or material support or political assistance of any kind" to the NSDAP or National Socialist officials and its leaders. "Military Government of Germany: Directive to the Commander-in-Chief of the United States Forces of Occupation", *U.S. Department of State Bulletin* Vol. 13 (21 October 1945), pp.598-599.

[324] *Foreign Relations of the United States ,Diplomatic Papers: The Conference of Berlin*, 1945 Vol. 2, pp.1502-1503.

[325] *Ibid.*, p.1503.

[326] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.995.

US element of the German Country Unit in August 1944 to prepare for the future operations of the Allied Control Council[327]. This would involve two purposes: serving as a US planning agency for the occupation of Germany, prior to the actual occupation; serving as the top-level US military government headquarters in Germany[328]. On 30 August 1945, Proclamation No.1 of the Allied Control Council proclaimed that the Control Council was established and assumed "supreme authority in matters affecting Germany as a whole" as was stated in the Declaration of 5 June 1945. Any orders issued under the authority of the Commanders-in-Chief in their zones of occupation to date remained in force[329]. The Allied Control Council, the Coordinating Committee consisting of their deputies, and the twelve directorates of the Control Staff were established in August 1945[330].

Conclusion

The Allied war aim of destroying the National Socialist regime in the sphere of the administration of justice was to be accomplished by abolishing the laws and courts that had contributed to supporting the regime, and restoring a

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[327] Oliver J. Fredericksen, *The American Military Occupation of Germany: 1945-1953*, (Karlsruhe: Historical Division, Hqs. USAEUR, 1953) p.31; Ziemke, *U.S. Army in the Occupation of Germany: 1944-1946*, pp.93-94.

[328] Zink, *United States in Germany: 1944-1955*, p.26.

[329] "Proclamation No.1: Establishing the Control Council", *Official Gazette of the Control Council for Germany*, No.1 (29 October 1945), pp.4-5.

[330] *Monthly Report of the Military Governor, U.S. Zone*, 20 September, 1945, No.2.

judicial organisation with an independent judiciary[331]. SHAEF military civil affairs units took precedence in wartime planning for eliminating National Socialist influences in the German administration of justice. Their plans were adopted by political authorities as general principles of Allied policy that were to be implemented under the authority of a military government administration in postwar Germany. Long-term policies for the various tasks of the reconstruction of postwar Germany were concluded at the Potsdam Conference of the Big Three Allies. The various tasks of the reconstruction were to be administered by the Allied Control Council that would operate as the provisional national government of Germany, and direct joint occupation objectives through the military government administrations governing the occupation zones under their control. The provisions presented in CCS 551 and the *Handbook* defined military government responsibilities in the SHAEF occupied territories until Allied government policymakers issued additional directives that would supersede them[332].

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[331] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.751.

[332] Pogue, *Allied Military Government*, pp.353-354.

The Reconstruction of a Postwar Administration of Justice

Introduction

The objective of reconstructing the German administration of justice was an integral part of the transition from the National Socialist dictatorship to a *Rechtsstaat* - a state based on the concepts of equality before the law and the protection of the individual from arbitrary and oppressive actions of the state and its officials[333]. German political and judicial institutions ceased to function at the end of the Second World War, when the unconditional surrender and collapse of the National Socialist regime created a political vacuum that was filled by the supreme authority of the Allied occupation powers. These institutions were restored during the postwar military occupation under the auspices of the occupation powers. The development of these institutions in the US occupation zone took place at the *Land* level, where decentralised German political and administrative structures were created[334] at the outset of the occupation. The establishment of a constitutional state with an administration of justice based on the precepts of the rule of law entailed a twofold problem: the negative task of eradicating National Socialist legislation, and determining the methods to be applied by the occupation authorities in the process of reconstructing the German administration of justice. The Allied military governments assumed the responsibilities of governmental functions and established a provisional administration of

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[333] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.733.

[334] Lucius D. Clay, *Decision in Germany* (Garden City: Doubleday & Company, 1950), p.17.

justice with their own laws and courts. The US military government authorities initially provided the sole source of law and political authority in what became *Land* Hesse, until German *Länder* governments were restored in the US zone. Whereas the US military government purged National Socialist influences from the administration of justice and supervised the process of its reconstruction, the *Länder* governments continued the work of the reconstruction by enacting laws to be applied by each independent *Land* administration of justice. The occupation powers set forth the functions of the German administration of justice during the postwar reconstruction. The collapse of the German government essentially removed the basis of state sovereignty, and consequently eliminated the jurisdiction of the German judicial organisation[335]. Since the unconditional surrender eliminated all German governmental institutions, the occupation powers set forth the extent of the jurisdiction of the German courts. The measures for implementing the reconstruction of justice and eradicating the influences of National Socialism were expressed through the enactment of both Allied Control Council and military government legislation. German court jurisdiction was widened during the occupation through either the amendment of occupation law, or administrative revision of categories of cases that were withdrawn from the jurisdiction of the German courts[336].

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[335] Helmut von Weber, "Der Einfluß der Militärstrafgerichtsbarkeit der Besatzungsmacht auf die deutsche Strafgerichtsbarkeit", *Süddeutsche Juristenzeitung* (1947), p.65.

[336] Z45F 11/5-2/1, Koblenz. Provenance: OMGUS, LD. Legal Division History.

The Introduction of Occupation Law

The abolition of the National Socialist administration of justice began immediately upon the Allied invasion of western Germany in September 1944. The SHAEF military forces imposed a standstill of justice[337] upon their advance into Germany. The SHAEF military government detachments introduced the initial basis for a provisional military administration of justice in Germany on the basis of five key documents introduced on 18 September 1944, which went into force immediately upon the occupation of Germany by SHAEF forces[338]: SHAEF Proclamation No.1, SHAEF Military Government Law No.1 on "Abrogation of Nazi Law", SHAEF Military Government Law No.2 on "German Courts", SHAEF Military Government Ordinance No.1 on "Crimes and Offenses" and SHAEF Military Government Ordinance No.2 on "Military Government Courts"[339]. Proclamation No.1 set the basis for the Allied war aim of destroying the National Socialist regime, declaring the establishment of the military government in Germany and vesting the SHAEF Supreme Commander General Eisenhower with supreme executive, legislative, and judicial powers within the occupied territories as the Military Governor. The military government pledged to overthrow the National Socialist regime, and to eliminate its oppressive laws and NSDAP

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[337] Heinz Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit durch die Besatzungsmächte" (Diss.: Eberhards-Karls-Universität zu Tübingen, 1952), p.10.

[338] Eli E. Nobleman, "American Military Government Courts in Germany", *American Journal of International Law* Vol. 40 (1946), p.804.

[339] Eli E. Nobleman, "The Administration of Justice in the United States Zone in Germany", *Federal Bar Journal* Vol. 8 (October 1946), p.70.

institutions. Military government courts were to be established to maintain the law in the occupied territories[340]. All German courts were suspended at the outset of the occupation since they could not be trusted after "six years of war and twelve years of National Socialism had reduced the German judiciary to such a feeble and corrupt state."[341] The US Military Government Courts administered justice[342] in their place. These SHAEF legislative enactments that set the basis of occupation law were retained in the US zone after the zonal military government administrations were established in the summer of 1945, and remained in force for the duration of the military occupation.

The process of eliminating the influences of National Socialism in the body of German law began with Military Government Law No.1. This law ordered the abolition of nine fundamental National Socialist enactments that contributed to maintaining the policies and doctrines of the NSDAP, in order to restore the rule of justice and equality before the law. This law also prohibited the application of whatever other laws that would perpetuate injustice or inequality, or was applied in accordance with National Socialist doctrines, such as sentencing for offences determined by analogy[343]. Its adjoining Regulation (No.1) nullified the ordinances and

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[340] *Military Government Gazette, Germany, United States Zone*, Issue A, 1 June 1946, p.1.

[341] Eli E. Nobleman, "Military Government Courts: Law and Justice in the American Zone of Germany", *American Bar Association Journal* Vol. 33 (1947), p.851.

[342] "Proclamation No.1", *Military Government Gazette*, Issue A, p.1; Starr, *Operations During the Rhineland Campaign*, pp.30-31.

[343] "Law No.1: Abrogation of Nazi Law", *Military Government Gazette*, Issue A, 1 June 1946, pp.3-4.

regulations that were issued for the execution of the enactments abolished in Law No.1[344].

In terms of the actual application of German law, Military Government Law No.2 ordered the temporary suspension of all German ordinary law courts, the administrative courts, and the labour courts until the US military government directed when and to what extent the criminal and civil courts should resume their operation, subject to whatever conditions the occupation authorities considered necessary. The normal jurisdiction of the German administration of justice was suspended until further notice, while cases or groups of cases were removed from the jurisdiction of the German courts and were to be assumed by the US military government courts. The extraordinary National Socialist courts, the *Volksgerichthof* and the *Sondergerichte*, were permanently abolished. Additional terms were set forth governing the functions of the ordinary German courts when they would be re-opened. The military government claimed the power to dismiss any German judge or prosecuting attorney, or disbar any lawyer or notary from practice, and to supervise the proceedings of and to review, modify or commute the decisions of German courts[345].

This power to commute or modify sentences represented the greatest form of intervention into the independence of the German administration of justice[346]. The initial legal basis for the intervention of the occupation power in the

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[344] "Regulation Under Law No.1", *Military Government Gazette, Germany, United States Zone*, Issue A, 1 June 1946, pp.5-7.

[345] "Law No.2: German Courts", *Military Government Gazette* Issue A, 1 June 1946, pp.7-10.

[346] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", p.25.

German administration of justice was imposed[347] to ensure that the German judicial organisation complied with the policies of the occupation power[348]. Military Government Ordinance No.1 set forth a series of 43 offences against the military government that could be tried by military government courts, and defined how one could be considered an accessory to criminal actions[349]. Military Government Ordinance No.2 established Military Government Courts, and provided for their jurisdiction, powers of sentence and composition, and the rights of the accused appearing before these courts, the trial record and the rules of the trial proceedings[350]. Military Government Law No.6 of 4 October 1944 on "Dispensation by Act of Military Government with Necessity of Compliance with German Law" empowered the military government with undertaking all actions on its own authority, making all such actions legal and effective, superseding all existing requirements under German law[351], and thus establishing the jurisdiction of the military government as the supreme source of legislative and judicial authority in occupied Germany.

The SHAEF military government detachments issued instructions for the application of criminal law by German

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[347] *Das Besatzungsregime auf dem Gebiet der Rechtspflege*, p.5.

[348] *Ibid.*, pp.27-28.

[349] "Ordinance No.1: Crimes and Offences", *Military Government Gazette*, Issue A (1 June 1946), pp.57-60.

[350] "Ordinance No.2: Military Government Courts", *Military Government Gazette* Issue A (1 June 1946), pp.60-63.

[351] "Law No.6: Dispensation by Act of Military Government with Necessity of Compliance with German Law", *Military Government Gazette* Issue A (1 June 1946), p.19.

judges[352] prior to the re-opening of the German courts. These included instructions for judges: to obey and enforce all military government proclamations, laws, ordinances, notices and regulations; to bring whatever matters that could be of concern to the military government to the military government authorities, including matters having political or military significance, or were likely to affect public order; to comply with the existing German law, and all instructions and regulations concerning the administration of the courts; to observe the limitations on the jurisdiction of the German courts imposed under Art. 6 of Military Government Law No.2[353], and any other additional sections of the German Criminal Code that required the prior authorisation of the military government; not to pass unduly harsh sentences. The judges were also instructed that their authority to act in their official capacity was entirely provisional, and they and other court personnel were subject to review at any time. Any attempt to perpetuate the lawlessness and abuses of the National Socialist regime or

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[352] von Weber, "Die Bedeutung der 'Allgemeinen Anweisung an Richter' Nr. 1", *Süddeutsche Juristenzeitung* (1946), p. 238.

[353] The limitations on the jurisdiction of the German courts as imposed by Military Government Law No.2 included cases involving: the military forces of the United Nations, or individuals either serving with or accompanying them; the United Nations or any national thereof; German law that was suspended or abrogated by the military government; any order of the Allied forces, any enactment of the military government, or "the construction or validity of any such order or enactment"; matters in which jurisdiction was assumed by a military government court; any case or groups of cases maintained under the exclusive jurisdiction of the military government courts; monetary claims against the German government or any legal entity that existed under public law. Law No.2, Art. 6, para. 10, *Military Government Gazette* Issue A, 1 June 1946, p.9.

to perpetuate National Socialist ideology would be severely punished[354].

These instructions thus set forth the new standards for the postwar administration of justice. The primary purpose of these instructions was to maintain the application of German law in accordance with the standards that were in place prior to modifications of the law and practices in the administration of justice, especially preventing the pronouncement of cruel or excessive penalties, that were introduced in the National Socialist regime[355]. Whereas the initial military government and Allied legislation regarding the application of German law forbade the application of National Socialist principles, the individual judge was responsible for upholding the abolition of National Socialist legislation when pronouncing judgments, and to abide by the restrictions on German court jurisdiction.

The Allied occupation of Germany had a twofold effect on the German administration of justice: 1) the institution of a foreign court jurisdiction operating alongside the German judicial organisation, and the limitation of the jurisdiction of the latter; 2) the control of the German administration of justice that allowed for intervention in the activity of the German judicial organisation. The extent of the supreme authority of the occupation power determined the extent of its court jurisdiction, or judicial power, and thereby limited the jurisdiction of the German judicial organisation. Occupation court jurisdiction was exercised

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[354] Z45F 117/56-7/7, Koblenz. Legal Form IJ 1 LA 9, Military Government - Germany, Supreme Commander's Area of Control, Instructions to Judges No.1.

[355] von Weber, "Die Bedeutung der 'Allgemeinen Anweisung an Richter' Nr. 1", pp. 238-239.

separately in the western occupation zones by military government courts established by the occupation powers[356].

Until all aspects of National Socialism were eliminated from the German administration of justice, the responsibilities of German judicial personnel and the extent of German court jurisdiction were limited under the predominance of Allied occupation law[357]. The military government followed the principle that "the law of the occupied territory at the time of the occupation continues in effect as amended, annulled, suspended or modified by military government legislation or by legislative action of competent German authorities acting in the exercise of power conferred upon them by Military Government"[358]. This was an effect of an accepted principle of international law, by which every military occupation power introduced its law and formed a "*cordon judiciaire*" around itself[359], setting forth a body of law that remained separate from the law of the occupied territory.

The SHAEF legislation that was retained in the US zone formed the basis of occupation law, which was later

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[356] *Das Besatzungsregime auf dem Gebiet der Rechtspflege*, p.4.

[357] Joachim Reinhold Wenzlau, *Der Wiederaufbau der Justiz in Nordwestdeutschland: 1945 bis 1949* (Königstein: Athenäum, 1979) p.53.

[358] Nobleman, "Administration of Justice in the United States Zone of Germany", p.74.

[359] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", p.11.

The Hague Conventions circumscribe extensive legislative powers to the occupant, which may be applied to ensure the safety of the occupation troops and the welfare of the civilian population. Paul L. Weiden, "The Impact of Occupation on German Law", *Wisconsin Law Review* (1947), pp.334-335.

supplemented by Control Council legislation that governed Germany as a whole. The Allied occupation powers extended their jurisdiction in the administration of justice as a consequence of their exercise of supreme authority in Germany, and to prosecute the goals of the occupation. The jurisdiction of the Allied occupation powers therefore extended beyond their direct interests[360]. Whereas the US military government courts applied the jurisdiction of occupation law to maintain the interests of the military government in the occupied territory, these courts also applied German criminal law until German court jurisdiction was restored[361] to its normal extent. Certain restrictions were thus imposed upon the jurisdiction of the German judicial organisation in view of these circumstances. In principle, the extent of the jurisdiction of the military government courts was unlimited. They were responsible for the prosecution of all individuals in the occupied territory according to the provisions of the law of war, occupation law, or German criminal law that would normally fall under the jurisdiction of the German courts. In contrast, the extent of the jurisdiction of the German courts was limited in view of the provisions of Ordinance No.2 and Law No.2[362].

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[360] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", pp.11, 14.

See Eli E. Nobleman, "American Military Government Courts in Germany with Special Reference to Historic Practice and their Role in the Democratization of the German People" (Diss.: New York University, 1950), pp.2-13 *passim* for a discussion of the establishment of occupation courts on the basis of international law.

[361] von Weber, "Der Einfluß der Militärstrafgerichtsbarkeit der Besatzungsmacht", p.65.

[362] *Ibid.*, p.66.

The US Military Government Provisional Administration of Justice

Legislative reform followed the political background of the occupation, in which the military government constituted the sole and supreme political and legal authority in occupied Germany. The initial legal measures enacted under the authority of the Control Council or the US military government in the form of proclamations, laws and ordinances served as temporary expedients for the administration of justice in occupied Germany where the German judicial organisation and political authority had temporarily ceased to exist. A provisional administration of justice based on the system of military government courts began to operate in occupied Germany in September 1944[363] to maintain order and the security of the Allied troops[364] in the wake of battlefield conditions and the legal vacuum created by the initial military government legislation[365]. Until German courts were re-opened, these courts appropriated the functions of the German administration of justice and upheld the law[366] in the occupied territories. The military government courts were established at the outset of the

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[363] Nobleman, "American Military Government Courts in Germany", *American Journal of International Law*, p.803.

[364] Document I, para. 3, *Technical Manual for Legal and Prison Officers*.

[365] The military government courts in SHAEF-occupied Germany had tried 16 000 cases by 7 May 1945. Eli E. Nobleman, "American Military Government Courts in Germany", *American Academy of Political and Social Science*, Vol. 269 (1950), p.90.

[366] Nobleman, "American Military Government Courts", *Annals of the American Academy*, p.88.

occupation as an emergency measure[367], operating with a set of laws, and judicial organisation and trial procedure to guide them as defined by Ordinance No.2. All offenders violating military government legislation were brought to trial, regardless of how slight the charge, and faced severe sentences[368]. Justice was to be administered by the US military government legal officers exercising the following responsibilities: 1) preventing the operation of National Socialist laws; 2) reorganising the German system of justice; 3) promulgating military government legislation; 4) establishing and operating military government courts to maintain law and order in the occupied territories[369]. The military government courts initially assumed complete responsibility for adjudicating criminal cases involving Germans and other civilians[370]. These courts would not deal with civil cases[371], which were reserved for trial in the German criminal courts whenever conditions would allow for them to re-open[372].

The cases brought before a military government court were based on the nature of the offence and the extent of the court's jurisdiction. US Military Government Summary Courts adjudicated minor offences, with the power to impose sentences of up to one year's imprisonment, a fine of up to

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[367] Clay, *Decision in Germany*, p.247;

[368] Joseph R. Starr, *Denazification, Occupation and Control of Germany, March-July 1945* (Salisbury: Documentary Publications, 1977), p.118.

[369] Starr, *Operations During the Rhineland Campaign*, p.65.

[370] *Ibid.*, p.68.

[371] Nobleman, "Administration of Justice", p.91.

[372] Starr, *Operations During the Rhineland Campaign*, pp.68-69.

a thousand dollars, or both. More serious offences, such as counterfeiting or bribery, were brought before an Intermediate Court that could impose sentences of up to ten years' imprisonment, fines of up to ten thousand dollars, or both. The most serious offences, such as murder, looting, sabotage and espionage were tried by a General Court, which could impose fines of an unlimited amount or the death sentence[373]. These courts dealt with cases involving United Nations nationals[374], US civilians, and Germans who had violated any US military government or Control Council law, ordinance or decree[375].

The US military government courts were regarded as the most important instruments for shaping relations between the German population and the occupation forces. They were to enforce the authority claimed by military government legislation, and to exemplify the difference between National Socialism and democracy by giving fair and impartial trials to all those standing accused before them. The first military government courts were set up during the Rhineland campaign. The first Summary and Intermediate Courts in Germany began to operate in Kornelimünster in September and October 1944[376]. There were about three hundred and forty-three military government courts in operation from the beginning of the occupation, which had tried over

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[373] "Ordinance No.2: Military Government Courts", *Military Government Gazette* Issue A (1 June 1946), pp.60-63.

[374] The term "United Nations" was defined in Military Government Law No.3, in which 47 nations were cited. Hans Neidhard, "Die Rechtspflege in der Gesetzgebung der amerikanischen Zone", *Deutsche Rechts-Zeitschrift* (1946), p.84.

[375] Dexter L. Freeman, *Hesse: A New German State* (Frankfurt-am-Main: Druck und Verlaghaus, 1948), p.135.

[376] Ziemke, *U.S. Army in the Occupation of Germany*, p.144.

fifteen thousand cases by July 1945, over two-thirds of which dealt with minor offences against the occupation, such as curfew and travel restrictions[377].

The jurisdiction of the US military government courts extended to all violations of military government enactments, German law that remained in force, and the laws and usage of war. Hence, the extent of their jurisdiction was practically unlimited. These courts held jurisdiction over all persons in the occupied territories, including German and foreign civilians other than Soviet citizens in the US zone[378], and held concurrent jurisdiction with Courts Martial and Military Commissions over civilians serving with the US military who were subject to military law. United Nations nationals and liberated prisoners of war were subject to their respective service laws[379]. The US military government courts could try cases of offences cited in the German Criminal Code, and were limited to the extent of their powers rather than German law[380].

The military government courts in Hesse during the spring and summer of 1945 dealt mainly with cases arising from movement restrictions, curfew violations, theft of US military property, and the illegal possession of firearms[381]. By September 1945, most of the cases coming before the

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[377] *Report of the Military Government for Germany, U.S. Zone*, 20 August 1945, No.1.

[378] Nobleman, "American Military Government Courts", *American Journal of International Law*, p.808.

[379] *Ibid.*, p.807

[380] *Ibid.*, p.806.

[381] Military Government detachments ordered the surrender of all firearms and ammunition once they were established in a German town. Starr, *Operations During the Rhineland Campaign*, p.33.

general and the intermediate courts throughout the US zone involved unlawful possession of firearms and falsification of the denazification *Fragebogen*. Summary military government courts in September 1945 dealt with the following types of cases: curfew violations and travel restrictions (25 percent), illegal firearms possession (6 percent), theft (12 percent), unlawful possession of Allied property (5 percent), cases of false statements (2 percent), and "cases involving acts to the prejudice of the good order of the interests of the Allied Forces" (25 percent)[382]. Other offences arising from the current circumstances were dealt with under the sweeping charge of maintaining law and order in a period of civil unrest where a battlefield and forced labour had been shortly beforehand: "conduct prejudicial to the good order of Military Government", by which the military government courts could administer justice in cases that were not specifically governed by an existing statute. This especially applied to displaced persons - individuals who had been taken to Germany during the war against their will - who were often guilty of committing serious crimes after they were liberated[383]. The unarmed or ill-equipped German police were virtually powerless against armed bands of displaced persons who were subject to the jurisdiction of the US military government courts. It was reported to the bishopric of Limburg-an-der-Lahn that about ten thousand displaced persons from eastern Europe residing in the local *Landgerichtsbezirk* seriously threatened peace and order and public security with frightening forms of criminality, such as many cases of armed robbery in which some people were

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[382] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3.

[383] Freeman, *Hesse: A New German State*, pp.38; problem of DPs: 39-40, 20, 23.

wounded or killed[384]. Representative of this problem was that the first twelve death sentences handed down by the military government courts in Hesse were imposed on displaced persons who had committed armed robberies and murders[385].

Specific legal objectives were set forth for promoting a democratic administration of justice and to guide US military government legal officers in the execution of their duties. In summary, these objectives were: 1) restoring and maintaining law and order; 2) assuring the equality of justice under the law for all; 3) reorganising the German judicial system according to the principles of democracy[386].

It has been argued that the military government courts also had a signal effect for democratisation by providing Germans with practical demonstrations of the application of justice in accordance with the law, the maintenance of the protection of civil rights, and the institution of judicial independence[387]. The military government courts: 1) afforded Germans a place where they could witness the work of the occupation power, either as participants in the court proceedings, witnesses or spectators; 2) Germans of all classes of society came into direct contact with the

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[384] 463/945, Wiesbaden. Betr.: "Kriminalität der in Lagern zurückgebliebenen Ostarbeiter", 27. November 1945.

[385] Freeman, *Hesse: A New German State*, pp.38; problem of DPs: 39-40, 20, 23.

[386] Nobleman, "Administration of Justice in the United States Zone of Germany", pp.72-73.

[387] Eli E. Nobleman. "American Military Government Courts in Germany", *Annals of the American Academy*, p.87. It has been argued that the military government courts served as an example for restoring democracy in Germany by promoting impartiality during the court proceedings in determining the facts of a case. Nobleman, "American Military Government Courts", *American Journal of International Law*, p.804.

military government in these courts; 3) these courts allowed Germans to test the meaning and significance of the protection of newly acquired democratic rights and safeguards[388].

The military government courts functioned throughout the occupation, serving the interests of the military government in occupied Germany before and during the restoration of the German judicial organisation in each of the *Länder* of the US zone. In addition to prosecuting offences against the interests of the Allied forces and administering justice under the terms of military government laws in occupied Germany, the responsibility of the military government courts also extended to assuming German court jurisdiction to maintain peace and order in the German territory under military government administration. This included the responsibility for prosecuting criminal offences that did not directly affect the interests of the Allied forces, such as offences against the lives and property of German citizens, for as long as the German criminal courts were closed. The exercise of court jurisdiction was therefore divided between the German and the US military government judicial organisations. The military government courts held a wider jurisdiction than the German courts that were re-opened by this time, assuming responsibility for cases that would fall under German court jurisdiction in normal circumstances[389]. Further legislative measures enacted in the US occupation zone concerning the

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[388] Nobleman, "American Military Government Courts", *Annals of the American Academy*, p.95.

[389] Foreign court jurisdiction in Germany having no legal meaning was considered a principle of German law. The effects of military court jurisdiction upon the competence of German courts signified an exception to this principle. von Weber, "Der Einfluß der Militärstrafgerichtsbarkeit der Besatzungsmacht", p.70.

administration of justice mainly dealt with defining the jurisdiction of the US military government courts[390]. The US military government judicial organisation that was established in the US occupation zone thus functioned as an institution of the military occupation, while the permanent German judicial organisations that were established at the *Land* level in the US zone followed the creation of the *Länder*.

The Creation of *Land* Hesse

US military forces first entered Hesse on 22 March 1945 at Nierstein on the east bank of the Rhine[391]. The advance continued with further inland exploitation of this military bridgehead that was established by the next day and other bridgeheads along the Rhine. The German garrison at Darmstadt, the first major city in Hesse to fall to Allied control, surrendered on 24 March 1945[392]. Wiesbaden and Frankfurt-am-Main capitulated on 28 March, then Fulda on 2 April and Kassel on 4 April[393]. The first phase of the military occupation of what would become the new *Land* Hesse after the surrender was thus completed by early April 1945. The *Oberlandesgericht* in Frankfurt-am-Main and the subordinate courts over which it exercised appellate jurisdiction officially ceased to operate on 29 March 1945

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[390] Loewenstein, "Law and the Legislative Process in Occupied Germany", pp.1001-1002.

[391] Charles B. MacDonald, *United States Army in World War II, The European Theater of Operations: The Last Offensive* (Washington D.C.: Office of the Chief of Military History, 1973), p.270.

[392] *Ibid.*, pp.272, 279.

[393] *Ibid.*, pp.293,373, 378.

as Military Government Law No.2 went into effect[394]. The first US military government detachment in Hesse arrived in Darmstadt on 26 March[395]. Military government detachments were established across Hesse by the end of April 1945, which included the legal officers who were responsible for the administration of justice in the occupied territories. Military government units assumed the various functions of administration in a state of virtual anarchy ensuing from the disintegration of local German government, since its officials had fled before the Allied military advance, along with the German troops, and had often taken the public records[396].

German administrations at the *Regierungsbezirk* level were initially established by military government detachments in Hesse in April 1945[397]. The work of establishing the military government headquarters for Hesse began in Wiesbaden in mid-July 1945. The headquarters would exercise governmental jurisdiction roughly corresponding to

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[394] Erhard Zimmer, *Studien zu Frankfurter Geschichte herausgegeben vom Frankfurter Verein für Geschichte und Landeskunde: Die Geschichte des Oberlandesgerichts in Frankfurt-am-Main* (Frankfurt-am-Main: Waldemar Kramer, 1976), p.87.

[395] Freeman, *Hesse: A New German State*, p.19.

[396] *Ibid.*, pp.24, 27; Starr, *Operations during the Rhineland Campaign*, p.22.

[397] Conrad F. Latour and Thilo Vogelsang, *Okkupation und Wiederaufbau: Die Tätigkeit der Militärregierung in der amerikanischen Besatzungszone, 1944-1947* (Stuttgart: Deutsche Verlags-Anstalt, 1973), p.97; Karlheinz Müller, *Preußischer Adler und Hessischer Löwe: Hundert Jahre Wiesbadener Regierung 1866-1966, Dokumente der Zeit aus den Akten* (Wiesbaden: Verlag Kultur und Wissen, 1966), pp.330, 337-339.

both the former *Regierungsbezirk* government in Kassel and the former *Land* Hesse government in Darmstadt[398].

In accordance with the policy of decentralising the German political and economic structure and to encourage the development of local democratic responsibility, the US military government authorities re-established *Land*, *Regierungsbezirk*, and local governments throughout the US zone in the summer of 1945. *Land* governments were established with capitals in Munich for Bavaria, Stuttgart for northern Württemberg-Baden [the southern halves were included in the French occupation zone], Darmstadt for Hessen-Nassau, and Marburg for Hesse. The military government authorised the provisional German governments at Darmstadt and Marburg to organise single ministries to deal with the affairs of both *Länder* wherever necessary[399].

German authorities had planned to form the state of Greater Hesse by incorporating the former territories and governments of *Land* Hesse with Darmstadt as its capital, and the Prussian province of Hessen-Nassau that had consisted of two regional governments (*Regierungsbezirke*) centered in Wiesbaden and Kassel[400]. The organisation of the new *Land* Hesse was initiated following discussions in late June 1945 between Walter L. Dorn, a member of the Office of Strategic Services, and Gerhard Anschütz, a constitutional lawyer who had produced plans for a united greater Hesse in 1919-1920. These plans had been officially submitted to a *Länder* conference in 1928, but had been blocked by Prussia's

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[398] Freeman, *Hesse: A New German State*, p.48.

[399] *Report of the Military Government for Germany, U.S. Zone*, 20 August 1945, No.1, pp.1-2.

[400] Wolf-Arno Kropat, *Hessen in der Stunde Null, 1945-1947*, p.19; Freeman, *Hesse: A New German State*, pp.49-50.

opposition[401]. The territories of former *Land* Hesse on the right bank of the Rhine and parts of the Prussian provinces of Kurhessen and Nassau were combined to form a single and cohesive new *Land* that was to be called *Groß-Hessen*[402], or Greater Hesse. Study and discussion between military government and German officials had determined that this consolidation would not violate the local historical integrity and traditions, and would form a basic economic, political and geographical unit. The formation of this new state would also establish a basic unit in a future federal system of government, while the former *Land* Hesse was considered too small to require or support a *Land* government, as was Nassau, which had been included in the US occupation zone. This development also marked a step toward accomplishing the US military government objective to decentralise the governmental structure of Germany, and eliminating the predominance of Prussia, which had hitherto prevented the federalisation of Germany[403].

Pressing administrative tasks made it necessary to form local governments in the US zone before parliamentary

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[401] Latour, Volgelsang, *Okkupation und Wiederaufbau*, pp.98-99.

[402] Loewenstein, "Political Reconstruction in Germany, Zonal and Interzonal", *Change and Crisis in European Government*, ed. James Kerr Pollock (New York: Rinehart & Company, 1949), p.30; *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3.

[403] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3; James K. Pollock and James H. Meisel, *Germany under Occupation: Illustrative Materials and Documents* (Ann Arbor: George Wahr Publishing, 1947), pp.118-119.

assemblies could be elected[404]. The US zone was subdivided into three *Länder* that were formed under US Military Government Proclamation No.2 of 19 September 1945, constituting the territories of Bavaria, Württemberg-Baden and the new *Land* of Greater Hesse[405]. Each of these *Länder* was established as the highest German administrative unit in the US zone[406]. Proclamation No.2 marked a new stage in the legislative development of postwar German self-government, opening the way for the reconstitution of *Land* administrations exercising legislative and executive powers under the authority of the respective *Land* US military government, as well as under the limitations imposed by the US military government at the zonal level and the Control Council[407] at the national level. The jurisdiction of German legislative authority was restricted by the US military government, which in turn would transfer legislation to be applied by the German judicial organisation. Proclamation No.2 assigned full legislative, executive and judicial powers to the separate *Land* governments, subject to the authority of the US military government, and subject to the provision that the exercise of these powers would not conflict with actions taken by the Control Council or by any central German authority established by the Control Council,

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[404] Justus Fürstenau, *Entnazifizierung: Ein Kapitel deutscher Nachkriegspolitik* (Darmstadt: Luchterhand Verlag, 1969), p.53.

[405] "Proclamation No.2", *Military Government Gazette*, Issue A, 1 June 1946, pp.2-3.

[406] Bernard Diestelkamp, "Rechts- und verfassungsgeschichtliche Probleme zur Frühgeschichte der Bundesrepublik Deutschland", *Juristische Schulung* (1980), p.793.

[407] J. von Elmenau, "Aufbau und Tätigkeit des Länderrats der U.S.-Zone", *Deutsche Rechts-Zeitschrift* (1946), p.113.

either before or after the promulgation of this Proclamation[408]. The US military government would supervise the various tasks of the postwar reconstruction in the separate *Länder* of the US zone[409]. All military government laws and ordinances that were introduced from the beginning of the occupation remained in force in three *Länder*[410]. The governments of the *Länder* would represent the reconstruction of justice[411] hereafter, insofar as the powers conferred upon the *Land* governments would enable them to enact measures for this purpose.

The supreme authority of the US military government administration was subdivided among the newly created *Länder*[412]. The military government of the US zone was divided into regional *Land* military government administrations on 1 October 1945 when the USGCC was redesignated as a policymaking rather than a planning organisation - the Office of the Military Government, United States (OMGUS)[413], composed of staffs organised in divisions serving various functions of the occupation, and coordinating their work with the Allied Control Council[414]. OMGUS thus coordinated

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[408] "Proclamation No.2", Art. 3, *Military Government Gazette*, Issue A, 1 June 1946, pp.2-3.

[409] Clay, *Decision in Germany*, p.55.

[410] "Staat und Verwaltung", *Süddeutsche Juristenzeitung* (1946), p.18.

[411] Wrobel, *Verurteilt zur Demokratie*, p.111.

[412] "Staat und Verwaltung", *Süddeutsche Juristenzeitung* (1946), p.18.

[413] Frederiksen, *American Military Occupation of Germany*, p.31;

[414] *Foreign Relations of the United States: The Conference of Berlin*, pp.1500-1501.

its functions with the Control Council, and operated in the US occupation zone in coordination with regional *Land* military government offices in Bavaria, Baden-Württemberg, and Hesse, which received its instructions from the central OMGUS office in Berlin, and in turn transmitted orders to the German *Land* governments[415]. The Director of the Legal Division of the Office of the Military Government for Germany (US) in Berlin was responsible for policy and the supervision of legal affairs in the US zone[416]. While this division functioned at the national level as an element of the Control Council, its organisation and related functions were duplicated in the *Land* Military Government Office for Hesse[417]. An Office of Military Government for Greater Hesse was established in Wiesbaden on 8 October 1945 under the command of Lieutenant-Colonel James R. Newman, replacing the military government detachment for Hesse (the E-5 military government detachment). The *Land* military government for Hesse would guide the creation of responsible German self-government in this new *Land* upon finding suitable and trained personnel to staff the new *Land* government[418]. The Civil Administration branch of the military government chose the qualified German personnel to compose a rump cabinet of this new government[419], which was appointed and sworn into office on 16 October 1945 by Lieutenant-Colonel Newman, the Director of the *Land* Office of the Military Government. Professor Karl Geiler was sworn in as the Minister-

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[415] Zink, *The United States in Germany: 1944-1955*, pp.35-36.

[416] Nobleman, "Administration of Justice in the United States Zone of Germany", p.75.

[417] Freeman, *Hesse: A New German State*, p.134.

[418] *Ibid.*, pp.49-50.

[419] *Ibid.*, pp.50-51.

President[420] of the newly established *Land* Greater Hesse. The basic organisation of the government was completed on 1 November 1945, consisting of a cabinet of eight ministers, headed by the Minister-President and his Deputy[421]. The authority of the German civil administration at the *Land* level was emphasised by granting them full legislative, executive and judicial powers, which were subject only to the supervision of the US military government, while the *Land* Minister-President was responsible to the Director of the *Land* Office of the Military Government[422].

A skeletal government was thus formed for this new *Land* under the supervision of the regional military government, which held provisional governmental authority until a full-fledged constitutional government was formed. The validity of *Land* legislation at this stage depended on the approval and promulgation by the *Land* Minister-President. Existing German law was to remain in force until it was repealed or suspended by new legislation enacted either by the Allied Control Council or the US military government[423]. The provisional *Land* government enacted the provisional constitution of Greater Hesse on 22 November 1945. This provisional constitution essentially described the *Land* government as it operated at this time[424], and maintained

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[420] Adolf Arndt, "Die staats- und verwaltungsrechtliche Entwicklung in Groß-Hessen", *Deutsche Rechts-Zeitschrift* (1946), p.183.

[421] Kropat, *Hessen in der Stunde Null*, p.28; Freeman, *Hesse: A New German State*, pp.50-51.

[422] *Monthly Report of the Military Governor, U.S. Zone*, 20 December 1945, No.5.

[423] "Proclamation No.2", *Military Government Gazette* Issue A, 1 June 1946, pp.2-3.

[424] J.F.J. Gillen, *State and Local Government in West Germany, 1945-1953* (Bad Godesberg-Mehlem: Historical

that the extent of its governmental jurisdiction was limited by the Office of the Military Government for Greater Hesse[425]. Before a *Land* constitution was in place and it was possible to establish a permanent legislative process, governmental powers were to be exercised solely by the Minister-President of the *Land*, who was appointed by the US *Land* military government[426]. The *Land* Minister-Presidents promulgated the approved laws in their respective *Länder* by decree[427], subject to the approval of the US military government[428].

The task of bringing the state machinery to function at this time was left to the Minister-Presidents and their cabinets to meet the demands of the occupation power "to fashion an emergency roof over the collapsed house".[429] The Director of the *Land* military government office examined all

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Division, Office of the U.S. High Commissioner for Germany, 1953), p.48; "Staatsgrundgesetz des Staates GroB-Hessen vom 22. November 1945", *Gesetz und Verordnungsblatt für Groß-Hessen* (1945), pp.23-26.

[425] Arndt, "Die staats- und verwaltungsrechtliche Entwicklung in Groß-Hessen", p.185

[426] Clay, *Decision in Germany*, p.86.

[427] "Proclamation No.2", Art. 3(2), *Military Government Gazette* Issue A, 1 June 1946: "Until such time as it is possible to establish democratic institutions it will be sufficient for the validity of state legislation that it be approved and promulaged by the Minister President."

[428] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.1012; "Staatsgrundgesetz des Landes Groß-Hessen vom 22. November 1945" [Preliminary Constitution], Art. 9, *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.23.

[429] Loewenstein. "Law and the Legislative Process in Occupied Germany", p.1017.

Land legislation to determine whether any provision thereof conflicted with military government policies or would have any substantial effect outside the area of its limited application. Having examined the legislation, the Director could either approve, suspend or repeal the legislation, or refer the matter to a higher authority - the zonal US military government command in Frankfurt-am-Main, or the national military government headquarters in Berlin if the matter was doubtful[430].

The most significant legislation by decree during this period of provisional government was reconstructing the political-administrative machinery of the *Land* in order to restore the status of the self-governing political entities[431]. Such legislation included: providing for the elections in the townships (*Gemeinde*)[432] and the structure of their organisation[433], the organisation of the county (*Landkreis*) structure[434] and the election of the representative bodies and officials[435], then ending with the law for the election of the constitutional convention[436] that

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[430] *Ibid.*, p.1014;

[431] *Ibid.*, p.1017.

[432] "Gemeindewahlgesetz vom 15. Dezember 1945", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.7-9.

[433] "Grosshessische Gemeindeordnung vom 21. Dezember 1945", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.1-11.

[434] "Kreisordnung für das Land Hessen: Gesetz vom 24. Januar 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.101-106.

[435] "Kreiswahlgesetz vom 7. März 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.73-75.

[436] "Gesetz betr. den Volksentscheid über die Verfassung des Landes Hessen", *Gesetz- und Verordnungsblatt für das Land*

would take up the task of drafting a new *Land* constitution to replace the provisional one of 22 November 1945, and the election of a *Land* parliament[437] that would replace the provisional government that was appointed by the military government.

The provisional government of Hesse set forth its goals upon its formation. One of its primary objectives was to lay the foundations of this new *Land* on the principles of democracy and the rule of law. The basis of the new *Land* was thus in complete contrast to the nature of the National Socialist state, in which forcible interventions in all spheres of society were possible in the absence of democratic controls. Hesse was to be a *Rechtsstaat* with its own state authority that was founded upon and limited by a system of laws. The legal foundations of this new *Land* were to be established upon the restoration of the security of the law, equality before the law, and the fair dispensation of justice. These principles were to be ensured by a free and independent judiciary, the restoration of the principles of civil rights, and an incorruptible civil service[438]. The endeavour to put these principles into practice began with the reconstruction of the legal institutions of the state, and the promulgation of the appropriate legislation to direct the implementation of these principles.

Groß-Hessen (1946), p.177, amended by "Gesetz zur Abänderung des Gesetzes betr. den Volksentscheid über die Verfassung des Landes Hessen vom 30. Oktober 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.188.

[437] "Wahlgesetz für den Landtag des Landes Hessen vom 14. Oktober 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.177-180.

[438] 501/927, Wiesbaden. "Programmatische Erklärung der Grosshessischen Staatsregierung", 23/11/1945.

Allied Control Council Measures for the Restoration of Justice

The Control Council measures for the reconstruction of justice in Germany essentially confirmed those hitherto introduced by the military government in the US zone. Legislative reforms continued at the national, or Control Council level adopted on a quadripartite basis that were to be carried out in the four occupation zones by the respective military governments. This took place concurrently with the development of political life and the judicial organisation at the zonal and *Land* levels. Control Council laws dealing with the abolition of National Socialist laws, and the liquidation of National Socialist institutions and extraordinary courts were drafted in the summer of 1945, supplementing the general laws and orders that were issued by the US military government in the previous months. The Control Council Legal Division made studies to determine the extent of further legislation[439].

Control Council Law No.1 of 20 September 1945 was the first Control Council measure for the denazification of German law at the national level. This law was enacted in accordance with the Potsdam Protocol provision on the abolition of National Socialist legislation, and substantially dealt with the same content as Military Government Law No.1 in abrogating National Socialist legislation that related to the establishment of the political structure of the National Socialist regime[440]. Any legislation of a political nature enacted after 30 January 1933 was automatically repealed. Any person applying or

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[439] *Report of the Military Government for Germany, U.S. Zone*, 20 August 1945, No.1.

[440] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.732.

attempting to apply future German enactments that favoured any person with National Socialist connections or discriminated against any person on the basis of race, nationality, religious beliefs or opposition to the NSDAP or its doctrines would be subject to criminal prosecution[441]. Military Government Law No.1 and Control Council Law No.1 therefore included such a general "suspending clause" that prohibited the German courts from applying discriminatory provisions in any German law, or at least for as long as the German judiciary remained under military government supervision[442]. The German courts thus assumed the responsibility for applying German law in view of the standards set by the general suspending clauses introduced by military government legislation[443]. Whereas the application of National Socialist principles in the law was expressly forbidden since the beginning of the occupation, the Control Council remained engaged in the lengthy and continuing task of repealing specific enactments within the body of German law[444].

Specific National Socialist laws were abolished through Control Council legislation, which superseded zone legislation issued by the zone commanders and German

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[441] "Law No.1: Repealing of Nazi Laws", *Official Gazette of the Control Council for Germany* No.1 (29 October 1945), pp.6-8.

[442] Loewenstein, "Law and the Legislative Process in Occupied Germany". pp.734-735.

[443] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Provenance OMGUS: LD/AJ Br. Folder Title: Denazification of Judges and Prosecutors. Subject: "Denazification of Judges and Prosecutors in the German Ordinary Courts", 4 June 1947.

[444] *Monthly Report of the Military Governor, U.S. Zone*, 30 June 1947, No.24.

enactments[445], thus extending the initial SHAEF military government legislation to the four occupation zones. Military Government Law No.5 of 4 October 1945 on the "Dissolution of Nazi Party", by which the NSDAP, fifty-two of its affiliated organisations, and eight paramilitary organisations, such as the SA, the SS and the SD, were abolished and declared illegal[446], was extended by Control Council Law No.2 of 10 October 1945 on "Providing for the Termination and Liquidation of the Nazi Organizations" in Germany as a whole. This law abolished the NSDAP and sixty-two of its affiliated organisations and outlawed their reconstitution[447].

The Control Council set forth the basis for a democratic administration of justice under Allied Control Council Proclamation No.3 of 20 October 1945 on "Fundamental Principles of Judicial Reform". This Proclamation called for: the restoration of equality before the law; restoring the rights of the accused; restoring judicial independence - setting forth that judges were declared free from executive control and responsible only to the law; prohibiting the practice of administering justice on the basis of crime "by analogy" and so-called "sound popular emotions"; abolishing the National Socialist courts such as the *Volksgericht* and the *Sondergerichte;* quashing sentences on individuals

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[445] Loewenstein, "Political Reconstruction in Germany", p.33.

[446] "Law No.5: Dissolution of the Nazi Party", *Military Government Gazette*, Issue A, 1 June 1946, p.17-19.

[447] "Law No.2: Providing for the Termination and Liquidation of the Nazi Organisations", *Official Gazette of the Control Council for Germany* No.1 (29 October 1945), pp.19-21.

convicted under the National Socialist regime on political, racial or religious grounds[448].

In accordance with this Proclamation, Allied Control Council Law No.4 of 30 October 1945 on the "Reorganization of the German Judicial System" re-established the constitution and responsibilities of the ordinary law courts. This law re-established the jurisdiction of the German courts as it had operated during the Weimar period according to the Law Concerning the Structure of the Judiciary of 27 January 1877 in the version of 22 March 1924[449]. The district courts (*Amtsgerichte*[450]), regional appellate courts (*Landgerichte*[451]), and the supreme courts of

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[448] "Proclamation No.3: Fundamental Principles of Judicial Reform", *Official Gazette of the Control Council* No.1 (29 October 1945), p.22-23.

[449] Art. 1, "Law No.4: Reorganization of the German Judicial System", *Official Gazette of the Control Council for Germany* No.2 (30 November 1945), p.26.

[450] The traditional jurisdictional powers of the *Amtsgericht* included civil litigation matters in which the disputed amount did not exceed the value of 1500 *Reichmarks*, and "over certain other matters, regardless of the amount involved, such as disputes between landlord and tenant [...] and claims for support between husband and wife." It served as a court of first instance in criminal matters, while its jurisdiction to impose penalty "was limited to sentences of imprisonment not in excess of five years." Nobleman, "Administration of Justice", p.92.

[451] The *Landgericht* had civil jurisdiction in all matters in which the amount in controversy exceeded 1500 *Reichmarks*, in cases that the *Amtsgericht* did not have any jurisdiction, and had appellate jurisdiction over disputed matters arising from the *Amtsgericht*. Its jurisdiction in criminal cases extended to all matters outside the power of sentence under the jurisdiction of the *Amtsgericht*. *Ibid.*

appeal (*Oberlandesgerichte*[452]) were to be restored in each *Land* and to maintain their specified jurisdiction in all criminal and civil cases involving German citizens and appellate jurisdiction in these cases. Hence, the responsibilities of the German courts were generally to be defined in accordance with the legal situation that was in place before 30 January 1933. However, aligning the responsibilities of the German courts in accordance with this law remained at the discretion of the occupation power[453]. The occupation power was empowered with withdrawing selected criminal and civil cases from the jurisdiction of the German courts, in addition to separating its interests from the jurisdiction of the German judicial organisation. The jurisdiction of the German courts was extended to all criminal and civil cases, except for: 1) criminal offences committed against the Allied occupation forces; 2) citizens of Allied nations and their property; 3) attempts directed toward re-establishing the National Socialist regime and the activity of National Socialist organisations; 4) criminal cases involving military or civilian personnel who were citizens of Allied nations[454]. The military government courts

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[452] The *Oberlandesgericht* held appellate jurisdiction over decisions made by the *Landgericht* in both criminal and civil matters. Whereas the *Landgericht* heard appeals from the *Amtsgericht* in criminal cases on the facts and the law, the *Oberlandesgericht* reviewed appeals only on matters of law. In addition, the *Oberlandesgericht* exercised supervisory administrative power over every *Landgericht* in the area under its jurisdiction, while the *Landgericht* exercised this power over every *Amtsgericht* under its appellate jurisdiction. *Ibid.*

[453] Adolf Schönke, "Einige Fragen der Verfassung der Strafgerichte", *Süddeutsche Juristenzeitung* (1946), p.63.

[454] Art. 3, "Law No.4: Reorganization of the German Judicial System", *Official Gazette of the Control Council for Germany* No.2 (30 November 1945), p.26.

could also exercise jurisdiction in civil cases, if a case involved an amount exceeding the value of RM 2000, which Control Council Law No.4 set forth to be the greatest amount that could be handled by an *Amtsgericht* in civil cases[455]. The prosecution of offences was to be left to the jurisdiction of the German courts when the nature of the offence did not compromise the security of the Allied Forces[456].

US military government and Control Council legislation defined the power of the US military government to supervise the work of the re-opened German courts, and limited the jurisdiction of the German courts while the US military government courts were in place. Military Government Law No.2 applicable in the US occupation zone and the US occupation sector in Berlin, and Control Council Law No.4 of 30 October 1945 applying in Germany as a whole set forth the original basis for matters that lay outside the jurisdiction of the German judicial organisation[457]. These mainly involved two types of cases: 1) cases involving crimes and offences committed by individuals that would normally be subject to trial in a German court; 2) criminal cases involving offences against occupation law. Cases involving the occupation forces, or any of the United Nations or nationals

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[455] Art. 2, "Law No.4: Reorganization of the German Judicial System", *Official Gazette of the Control Council for Germany* No.2 (30 November 1945), p.26; "Rechtspflege: Gerichtsverfassung", *Süddeutsche Juristenzeitung* (1946), p.19.

[456] Art. 3(e), "Law No.4: Reorganization of the German Judicial System", *Official Gazette of the Control Council*, p.27.

[457] Kurt Kleinrahm, "Rechtsnatur und Rechtswirkungen der Beschränkungen deutscher Gerichtsbarkeit durch das Besatzungsreçht", *Deutscher Rechts-Zeitschrift* (1948), p.232.

thereof either serving with or accompanying occupation personnel, were excluded from the jurisdiction of German courts[458]. Limitations were thus imposed upon the jurisdiction of the German courts in criminal and civil cases, depending on the status of the parties involved in the offence or dispute. The rule of law lacked the element of the full restoration of judicial independence[459]. Judicial independence was restricted in order to ensure that the judiciary complied with the concepts of the rule of law in the administration of justice. Military Government Law No.2 allowed for far-reaching intervention in judicial independence that affected the normal operation and internal affairs of the German administration of justice, at the same time as judicial independence was to be promoted with the precondition that German judges complied with the objectives of the military occupation powers[460]. The occupation powers maintained unlimited power of supervision over the German courts, such as the power to remove a judge from office and to examine judgments by the German courts, which effectively limited the German judicial independence set forth under Proclamation No.3.

The activity of an independent judiciary was the most important element in reinforcing law and justice in postwar Germany, which was to fulfil the spirit and precepts of a *Rechtsstaat* upon the establishment of the state institutions. The dispensation of justice that was restored in Germany served these ideals, although under a different

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[458] Neidhard, "Die Rechtspflege in der Gesetzgebung der amerikanischen Zone", p.84.

[459] Friedmann, *Allied Military Government of Germany*, pp.174-175.

[460] Heinrich Röhreke, "Die Besatzungsgewalt auf dem Gebiete der Rechtspflege", Diss.: Eberhard-Karls-Universität zu Tübingen, 1950, p.44.

form of law that was introduced under the occupation regime, in which the application of Control Council and zonal military government law was predominant over German law[461]. The principle of judicial independence, the freedom of a judge to administer justice without interference from executive control, was therefore one of the main occupation objectives in the sphere of the legal reconstruction[462]. It was therefore the avowed policy of the US military government to foster the independence of the German judiciary by allowing the courts the freedom of interpretation and application of the law, and to limit the controls instituted by the military government to "the minimum consistent with the accomplishment of the aims of the occupation."[463] The policy of the US military government was to avoid interfering in the operation of the German courts, except in cases where serious interests of the occupation authorities were involved[464]. In stark contrast to the National Socialist administration of justice, the restoration of judicial independence implied that judges were to remain pclitically neutral and impartial in the discharge of their functions[465]. Whereas the government enacted legislation, judges were to pronounce judgments

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[461] 1126/33, Wiesbaden. "Radio-Rede [Geiler] über Deutschland als Rechtsstaat" (n.d.).

[462] Karl Loewenstein, "Justice", *Governing Postwar Germany*, ed. Edward H. Litchfield (Ithaca: Cornell University Press, 1950), p.250.

[463] Freeman, *Hesse: A New German State*, p.134.

[464] *Monthly Report of the Military Governor, U.S. Zone*, 20 November 1945, No.4.

[465] H.E. Rotberg, "Entpolitisierung der Rechtspflege", *Deutsche Rechts-Zeitschrift* (1947), p.107.

strictly in accordance with the impartiality of the law, and thereby preserve the rule of law[466].

Control Council Proclamation No.3 and Control Council Law No.4 set forth the fundamental principles of reform that were to govern the restoration of justice in Germany as a whole, and the principles for the reconstruction of the German judicial organisation through which these principles were to be implemented[467]. The implementation of Control Council Law No.4 bringing the jurisdiction of the German courts into conformity with its terms remained at the discretion of the military government of each zone[468]. This opened the way for divergencies in the implementation of this law in the four occupation zones, which was further complicated by the fact that the coordination of divergent decisions among the various courts of appeal either in an occupation zone or in Germany as a whole was lacking due to the absence of a supreme court, such as the *Reichsgericht*, since the terms of the Potsdam Protocol on decentralisation did not allow for central German administrations to be re-established[469].

The Reconstruction of a *Land* Judicial Organisation

A new judicial organisation was to be established in the newly created *Land* Hesse after all German courts were

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[466] Dicey, *Introduction to the Study of the Law*, p.xxv.

[467] *Monthly Report of the Military Governor, U.S. Zone*, 20 December 1945, No.5.

[468] *Enactments and Approved Papers*, Vol. 1, 1945, pp.173-175.

[469] Karl Loewenstein, "Reconstruction of the Administration of Justice in American-occupied Germany", *Harvard Law Review* Vol. 61 (1947-1948), p.422.

closed[470]. Re-opening German courts as soon as possible became a pressing task as the military government judicial organisation became overburdened with cases[471]. The first *Amtsgerichte* and *Landgerichte* began to operate throughout Germany at the end of May and early June 1945 in order to help alleviate the work-load of the military government courts[472]. The next major step in restoring the German administration of justice was the reconstruction of a permanent judicial organisation in each *Land*.

The restoration of a German judicial organisation in the territory of what was to become *Land Groß-Hessen* began with the re-opening of the first *Amtsgerichte* in Limburg on 4 June 1945, and in Wiesbaden on 11 June 1945[473]. The military government instructed the leading judges of the *Amtsgericht* (*aufsichtsführende Richter*) to open the court, recommend judicial personnel to be reinstated by the military government, and to adhere to stated responsibilities that were subject to certain limitations. They were to hear criminal cases that dated from before and after the beginning of the military occupation to the time that the court was re-opened. Jurisdiction in criminal matters was restricted in certain cases, such as some of

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[470] Zimmer, *Die Geschichte des Oberlandesgerichts in Frankfurt-am-Main*, p.88.

[471] Latour and Vogelsang, *Okkupation und Wiederaufbau*, p.78.

[472] Starr, *Denazification, Occupation and Control of Germany, March-July, 1945*, pp.121-122.

[473] Eckart G. Franz, Hans Hubert Hofmann, and Meinhard Schaab, *Gerichtsorganisation in Baden-Württemberg, Bayern und Hessen im 19. und 20. Jahrhundert* (Hannover: Akademie für Raumforschung und Landesplanung, 1989) p.184.

those outlined in Instructions to Judges No.1[474] and offences of a political character, unless the prior approval of the military government was provided, as well as certain types of civil cases. The courts were otherwise to handle matters that affected the maintenance of public order, and strictly adhere to all military government proclamations, laws, ordinances, notices and regulations. All matters of interest to the military government, such as violations against military government regulations, cases of political or military significance, and cases affecting public order, as well as all other matters handled by the court were to be reported to the military government on a weekly basis. Any attempt at continuing the lawlessness and arbitrariness of the National Socialist regime or the maintenance of the National Socialist *Weltanschauung* in the administration of justice was to be penalised most severely[475].

The US military government issued instructions to the newly appointed *Landgericht* president in Frankfurt-am-Main on 28 July 1945, directing that he select personnel for this court and subordinate *Amtsgerichte* in this area of jurisdiction (*Landgerichtsbezirk*). The judges in every court were to be provided with a copy of the Instructions to Judges No.1 and the instructions for *Amtsrichter*, and were to become familiar with the guidelines and regulations issued by the military government. The *Landgericht* president was to exercise supervision and disciplinary authority in accordance with German law at his discretion, subject to military government instructions, over all judicial personnel in this area of jurisdiction, until this authority

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[474] Z45f 117/56-7/7, Koblenz. Legal Form IJ 1. Military Government - Germany; Supreme Commander's Area of Control; Instructions to Judges No.1.

[475] 460/568, Wiesbaden. Militärregierung - Deutschland; Kontroll-Gebiet des Obersten Befehlshabers. Dienstanweisung für Amtsrichter, 9 July 1945; Der aufsichtsführende Richter. Dienstanweisung Nr.1, 31 August 1945.

would be assumed by the president of an *Oberlandesgericht*[476]. The *Landgericht* president directed the reorganisation of the judicial organisation at this time by providing recommendations to the local government regarding: which *Amtsgerichte* were to resume functioning, the allocation of the required judicial personnel for these courts, the distribution of court business to be dealt with by these courts, the staff required for the *Landgericht* in Frankfurt-am-Main, and the distribution of court business to be heard by this court after it would be re-opened[477].

By August 1945, military government legal officers had re-opened German courts at the *Amtsgericht* level in most communities of the US zone, dealing with lesser criminal and civil cases, as well as a number of *Landgerichte* with jurisdiction over broader areas and over more serious criminal and civil cases[478]. Military government detachments re-opened additional German courts throughout September 1945. The first *Landgericht* in what had become *Land* Greater Hesse was opened in Frankfurt-am-Main on 18 October 1945[479]. Civil litigation had begun to be heard in August 1945, while criminal cases constituted most of the courts' business[480].

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[476] 460/568, Wiesbaden. Betrifft: "Berichte an die Militärregierung", 28 July 1945.

[477] 460/568, Wiesbaden. The *Landgericht* president, Frankfurt-am-Main, to the Military Government Legal Department at Frankfurt-am-Main, 6 August 1945.

[478] *Monthly Report of the Military Governor, U.S. Zone*, 20 August 1945, No.1.

[479] "Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen", *Deutsche Rechts-Zeitschrift* (1946), p.120.

[480] *Monthly Report of the Military Governor, U.S. Zone*, 20 September 1945, No.2.

Over two-thirds of the courts scheduled to re-open in Hesse were in operation by the time the Ministry of Justice began to operate at the end of October 1945[481]. Seventy-nine *Amtsgerichte* and seven *Landgerichte* were functioning in Hesse by 21 December 1945, making the reorganisation of the structure of the judicial organisation in Hesse virtually complete[482]. By the end of December 1945, ninety-eight percent of the *Amtsgerichte* and all eight *Landgerichte* in Hesse were open, leaving the *Oberlandesgericht* in Frankfurt-am-Main as the only remaining high court to be opened[483].

While the first German courts were opened as a matter of expediency, a permanent *Land* judicial organisation was to be re-established as part of restoring the German state institutions. The long-term occupation objective of restoring responsibility to German judicial authority was to be served by what could be considered a blueprint for the structure of the German judicial organisations in the *Länder* of the US zone. The structure of the postwar administration of justice in each *Land* was outlined in the "Plan for the Administration of Justice in the United States Zone", which was issued in October 1945 by the Control Council Legal Division and forwarded to the Regional Military Government

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Minor cases that were transferred to German courts as they re-opened in the summer and autumn of 1945 included black market, curfew and traffic violations. Z45F 11/5-2/1. OMGUS, LD. "Legal Division History", Koblenz.

[481] Franz, Hofmann, Schaab, *Gerichtsorganisation*, p.184.

[482] 501/831 Wiesbaden. "Office of Military Government for Greater Hesse: Progress Report of Land Greater Hesse 1945", 21 December 1945.

[483] 8/189-3/1, RG260 OMGUS, Wiesbaden. OMGH Historical Division. Monthly Historical Report, December 1945, Land Greater Hesse.

headquarters for implementation[484] in Hesse, Württemberg-Baden and Bavaria[485]. The purpose of this Plan was to set forth provisions for the establishment of a system of an administration of justice operated by German authorities in the US zone on the basis of: the Potsdam Protocol provision of reorganising the administration of justice in accordance with the principles of democracy and equality before the law; the policy of the military government to establish and to maintain the independence of the German administration of justice; the German authorities assuming responsibility for the establishment and functions of the German administration of justice while under the supervision of the military government[486]. The implementation of the provisions of the Plan rested with authority of the *Land* Ministers of Justice. In so far as was possible, the former provisions governing the judicial organisation and the administration of court jurisdiction under German law that remained applicable were to be taken into account along with the principles of the Plan[487]. New legislative developments would be applied by the postwar German judicial organisation that was defined under this Plan[488].

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[484] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3.

[485] "Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen", p.120.

[486] 463/929, Wiesbaden. "Headquarters, U.S. Forces, European Theater. Plan für die Justizverwaltung, amerikanische Zone", 4. Oktober 1945.

[487] 463/929, Wiesbaden. "General Akten über Verfassung", 5. November 1945.

[488] The policy of reconstructing seperate judicial organisations in each *Land* following the reconstruction of the *Länder* and their governments in the U.S. occupation zone was established in contrast to the British and the Soviet

The Plan set forth that a Minister of Justice was to function as the leading administrator of the administration of justice in each *Land*[489], exercising the duties that were formerly performed by the *Reich* Minister of Justice for Germany as a whole[490]. These duties included: supervising the functions of all judicial personnel; handling administrative matters concerning the judicial organisation, such as the appointment of personnel to the courts; organising all of the practical functions of their office, such as transactions with the military government; recommendations

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occupation zones. Rather than set up a Ministry of Justice operating within each *Land* government at the beginning of the occupation, a Central Justice Office (*Zentral Justizamt*) was established for the British zone on 1 October 1946 to deal with legislative and personnel functions. The judicial organisation in the Soviet occupation zone was also centralised at the zonal level. The newly-created *Land* administrations included justice sections, which were directed by the superstructure of a German Central Administration for Justice (*Deutsche Zentralverwaltung für Justiz*). Bernhard Diestelkamp and Susanne Jung, "Die Justiz in den Westzonen und der frühen Bundesrepublik" *Aus Politik und Zeitgeschichte* Vol. 13 (24 March 1989), pp.19-20. The development of independent *Land* administrations in the U.S. zone also took place earlier than in the Soviet, French and British zones. Lia Härtel, ed., *Der Länderrat des amerikanischen Besatzungsgebietes* (Stuttgart, Köln: W. Kohlhammer Verlag, 1951), p.xxi. This political development may have opened the way for the *Länder* of the U.S. zone to assume the responsibility for administering their individual judicial organisations at an early stage, rather than for the judicial organisation to be organised and administered at the zonal level.

[489] 463/929 Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[490] *Monthly Report of the Military Governor, U.S. Zone*, 20 November 1945, No.4.

for legislation; the opening and functions of the courts[491]. The power of the Minister of Justice to appoint judicial personnel and judicial independence as defined in this Plan was provisional, since the military government retained the power to appoint or dismiss any judge under the terms of Military Government Law No.2. In the interest of maintaining judicial independence[492], the Plan also set forth that the Minister of Justice was prohibited from intervening in the judicial functions of judges[493]. Disciplinary courts for all judicial personnel were to be established at the *Landgerichte* and one *Oberlandesgericht* in each *Land*. Disciplinary court jurisdiction was to be handled by the disciplinary chambers of the *Landgerichte*, and the disciplinary senate at the *Oberlandesgericht* for Hesse in Frankfurt-am-Main, consisting of three judges with jurisdiction over court presidents, vice-presidents, the judges of the *Oberlandesgericht* and the general state prosecutor. Appeals from the disciplinary chambers would be presented to the appellate courts (*Rechtsmittelgerichte*). Their jurisdiction extended over all other civil servants, as well as prosecutors, notaries and legal advisors. Appeals against decisions of the disciplinary senate would be transferred to a larger senate consisting of five judges. Until local professional associations of lawyers and notaries were re-established, the *Landgericht* presidents were responsible for supervising the professional conduct of

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[491] 463/929 Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[492] Neidhard, "Die Rechtspflege in der Gesetzgebung der amerikanischen Zone", p.85.

[493] 463/929 Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

lawyers and notaries, and held the authority of imposing disciplinary measures[494].

The Plan set forth that the traditional jurisdictions of the German courts were to be maintained, and provided a structure for the reorganisation of the judicial system in each *Land*. Five *Oberlandesgerichte*, appeals courts of the second instance, were to be opened in the three *Länder* of the US zone, exercising appellate jurisdiction over the *Landgerichte*, appeals courts of the first instance, which were to exercise appellate jurisdiction over the *Amtsgerichte*, or county courts. One *Oberlandesgericht* was to be established for the newly formed *Land* of Hesse, operating in the former *Oberlandesgericht* for Frankfurt-am-Main, with adjoining seats occupied by a Vice-President in Darmstadt and Kassel[495]. Eight *Landgerichte* were to be set up in Frankfurt-am-Main, Wiesbaden, Darmstadt, Gießen, Limburg, Hanau, Marburg and Kassel. Seventy-one *Amtsgerichte* and twenty-five *Amtsgericht* branch offices were to be re-opened, along with nine additional locations in which the *Amtsgerichte* were to be in session[496]. The *Landgerichte* were to hold appellate jurisdiction over these *Amtsgerichte* in their appropriate areas of jurisdiction, or *Landgerichtbezirke*. Public prosecutors' offices were to be

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[494] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[495] Steidle, Hermann, "Der Plan für den Aufbau des Rechtspflegewesens in der amerikanischen Zone", *Süddeutsche Juristenzeitung* (1946), pp.14-15.

[496] "Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen", p.120.

established at the location of the *Oberlandesgericht* and the *Landgerichte*[497].

The jurisdiction and functions of the German courts were established by German law, with certain modifications arising from Military Government Law No.2 (Art. 6 on the limitations of German court jurisdiction), Military Government Instructions to Judges No.1, the organisational provisions of the Plan, and whatever other directives enacted by the military government[498]. The jurisdiction of the *Amtsgerichte* as criminal courts of the first instance was reduced to convictions of prison sentences to the maximum of five years, or penitentiary sentences of up to two years. In civil cases, they were to act as the courts of first instance in which the value of the disputes did not exceed RM 1500[499]. Court jurisdiction was regulated by Art. 23 of the *Gerichtsverfassungsgesetz* of 27 January 1877. The *Landgerichte* were defined as courts of the first instance in criminal cases that superseded the jurisdiction of the *Amtsgerichte*, depending on the extent of the potential penalties that could be imposed by the court, as well as acting as the appeals courts over the decisions of the *Amtsgerichte*. As civil courts, the *Landgerichte* were to deal with all civil and commercial cases of the first instance that lay outside the jurisdiction of the *Amtsgerichte*, as

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[497] "Justizverwaltungsnachrichten: Großhessen", *Süddeutsche Juristenzieitung* (1946), p.18.

[498] 463/929 Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[499] This amount was later raised to 2000 RM in accordance with Control Council Law No.4 Art. 2.. Neidhard, "Die Rechtspflege in der Gesetzgebung der amerikanischen Zone", p.85; 8/189-3/18 RG 260 OMGUS. APO 758. Subject: "Administration of Justice", 28 December 1945.

well as serving as the appeal authority over these lower courts. Modifications were made to the appeals courts by abolishing parts of the *Gerichtsverfassungsgesetz* of 1877. The Plan abolished the division of chambers for civil and criminal matters in the *Landgericht* and the *Oberlandesgericht* senates, and prohibited the creation of special chambers for civil and criminal matters. The greatest difference was the reform of the *Oberlandesgericht*. This court was made responsible for hearing criminal as well as civil appeals cases from the *Landgericht*, thus making the *Oberlandesgericht* strictly a supreme appeals court taking the place of the former *Reichsgericht* that functioned at the national level[500]. The local military government detachment in each *Land* supervised the functions of these courts[501].

The operation of the postwar German judicial organisation at the *Land*[502] level was directed by the newly established *Land* Ministry of Justice[503], assuming the authority that was formerly exercised by the *Reich* Ministry of Justice[504] at the national level. The transfer of direct

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[500] Steidle, "Der Plan für den Aufbau des Rechtspflegewesens in der amerikanischen Zone", pp.14-15.

[501] 463/929 Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[502] Nobleman, "Administration of Justice", p.91.

[503] Stolleis, "Rechtsordnung und Justizpolitik: 1945-1949", p.396.

[504] Clay, *Decision in Germany*, p.248.

Apart from Control Council enactments regarding the reform of justice in Germany, the restoration of the German administration of justice was organised differently in the four occupation zones. *Land* Ministries of Justice were established in the U.S. and French zones as the leading authority of the administration of justice at the *Land* level, the administrations of justice in the British and the

responsibility for the judicial organisation to the *Land* Minister of Justice also represented the first step in the restoration of judicial sovereignty[505]. The Minister of Justice was to function as the leading authority of the *Land* administration of justice, whose powers and responsibilities were outlined in the Plan[506]. The Minister was charged with handling the administrative affairs of the judicial organisation, the operation of the courts, and the appointment of judges, subject to the approval of the military government, and was also responsible for disciplinary supervision of legal personnel, submitting monthly reports to the *Land* Military Government Office on the operations of the courts[507]. The US military government instructed the Minister-President of Hesse to establish a *Land* Ministry of Justice on 15 October 1945, in which the *Land* Minister of Justice was correspondingly charged with the supervision of the functions of this Ministry, subject to the supervision and approval of the military government. These functions included the exercise of administrative control over judicial and administrative personnel, and the temporary appointment of personnel[508].

Soviet zones were established at the zonal level. Friedmann, *Allied Military Government of Germany*, pp.170-171; Wrobel, *Verurteilt zur Demokratie*, pp.111-119.

[505] Loewenstein, "Reconstruction of the Administration of Justice", p.428;

[506] RG 260 OMGUS, 17/210-2/6, Wiesbaden. APO 758. Subject: "Administration of Justice, Land Greater Hesse", 20 November 1945.

[507] Loewenstein, "Reconstruction of the Administration of Justice", p.429.

[508] 502/919, Wiesbaden. Office of the Military Government for Greater Hesse. "Organisationsheft Nr.2", 14. Oktober 1945.

Whereas the Plan provided for the reorganisation of the system of the ordinary law courts, additional measures were introduced for the other branches of the administration of justice. The *Land* Minister of Justice was to assign matters concerning Rhine navigation to the jurisdiction of the appropriate *Amtsgerichte*, subject to the prior approval of the military government. Labour courts were not to be re-opened for the time being. The functions of the labour courts as established in the provisions of the labour courts law were to be assumed by the *Amtsgerichte* and *Landgerichte* as would be required[509]. Since the Plan did not include provisions for courts to review administrative and labour disputes or constitutional controversies, these separate branches of the judicial organisation and their functions in each *Land* of the US zone were developed separately[510]. These further developments of the *Land* judicial organisation would take place upon the reconstitution of the permanent *Land* government that would succeed the provisional government.

The Establishment of the *Länderrat*

The reconstruction of German political life in the US zone began at the *Land* level. Governmental jurisdiction in the US zone was divided between the military government and the reconstituted German government at the *Land* level. It soon became apparent after the creation of the *Länder* in the US zone that certain governmental functions that were formerly exercised by the government at the national level,

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[509] 463/929 Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[510] Georg-August Zinn, "Administration of Justice in Germany", *Annals of the American Academy of Political and Social Science* Vol. 260 (November 1948), p.35.

such as administrative services, exceeded the scope of the *Land* governments, while other functions required coordination on a zonal basis[511]. In order to coordinate the reconstruction work in the three *Länder*, a *Länderrat* was created in Stuttgart on 5 October 1945 under the auspices of the US military government to represent the common interests of the *Länder* of the US zone, and to coordinate the interests between these *Länder* and the regional offices of the US military government[512]. General Lucius D. Clay, the deputy military governor of the US zone, opened the first meeting of the *Länderrat* on 17 October 1945, in which he stated that the *Länderrat* was to serve as a provisional central authority of the US zone to coordinate legislation where uniformity in the zone was necessary. However, it was not to serve as a legislature or an executive for the US zone[513]. The joint responsibility possessed by the representatives of the three *Länder* was to facilitate the decision-making for the various tasks of the zonal reconstruction by coordinating their common interests, which would otherwise be undertaken by a national government[514]. Although the *Länderrat* did not possess legislative power, uniform legislation for the three *Länder* of the US zone was drafted in the *Länderrat* and promulgated by each *Land*

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511 Heinz Guradze, "The Laenderrat: Landmark of German Reconstruction", *Western Political Quarterly*, Vol. 3 (June 1950), p.191.

512 Pollock and Meisel, *Germany under Occupation*, pp. 126-127; *Monthly Report of the Military Governor, U.S. Zone*, May 1948, No.35.

513 Ziemke, *U.S. Army in the Occupation of Germany*, p.404.

514 von Elmenau, "Aufbau und Tätigkeit des Länderrats der U.S.-Zone", p.113.

Minister-President until full-fledged *Land* legislatures were established following the adoption of *Land* constitutions[515].

The *Länderrat* consisted of the Minister-Presidents of Hesse, Württemberg-Baden and Bavaria serving to coordinate discussion and policymaking on matters of common concern to these three *Länder*. The Minister-Presidents were assisted by a staff of German functional experts, and a permanent secretariat in Stuttgart serving as a steering committee preparing the agenda of matters for discussion[516]. The *Länderrat* was a new legislative authority for the *Länder* of the US zone in the absence of a central German government. The representatives of the German *Land* governments at the *Länderrat* worked under the supervision of US military government officials of the Regional Government Coordinating Office (RGCO) that was directly responsible to the US Deputy Military Governor[517], while the *Land* military government directors supervised the work of the German officials at the *Land* level[518]. The representatives of the RGCO held a twofold function: conveying military government policy to the German authorities either at the various *Länderrat* committees they attended, or through the secretariat, and to inform OMGUS and the *Land* military government offices about the work of the committees[519]. The *Länderrat* was not vested with

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[515] *Monthly Report of the Military Governor, U.S. Zone*, February 1949, No.44.

[516] Velma Hastings Cassidy, "The Beginning of Self-government in the American Zone of Germany", *Department of State Bulletin* Vol. 16 (1947), pp.231-232; Pollock and Meisel, *Germany under Occupation*, pp.128-135.

[517] *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8; Pollock and Meisel, *Germany under Occupation*, pp.127-128.

[518] Clay, *Decision in Germany*, p.61.

[519] Guradze, "Laenderrat", p.195.

executive authority, as its decisions were to be promulgated as legislation in each *Land* by the Minister-President, which remained subject to the approval of the *Land* military government to ensure that legislation conformed to military government policy[520]. The adoption of legislative measures by the *Länderrat* thus served in practice as uniform legislation for the US occupation zone while its decisions and those of the individual Minister-Presidents were promulgated separately by the Minister-President of each *Land*[521]. Legislation that would be applied on a zonal basis could emanate from either of two sources of authority. Proposals for *Länderrat* legislation were to be submitted to the Regional Government Coordinating Office, and then sent to the OMGUS headquarters in Berlin with its recommendations for approval, along with simultaneous notification to the *Land* military government offices. They could also be drafted by US military government authorities and sent to the *Länderrat* for consideration as legislation in the *Länder* of the US zone[522].

In the interest of maintaining unity of legislation in the US zone, legal matters of common concern to the *Länder* were dealt with by a *Länderrat* Legal Committee, composed of the Ministers of Justice of the *Länder* formed on 4 December 1945. The purpose of this committee was to examine and approve new legislation proposed by the *Land* governments, as well as examine proposed amendments to existing legislation, such as to remove National Socialist influences, before

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[520] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, pp.210-211.

[521] *Monthly Report of the Military Governor, U.S. Zone*, February 1949, No.44.

[522] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.1004;

forwarding the legislation to the *Länderrat*[523]. The Ministers of Justice deemed it important to enact uniform legislation in the three *Länder*, and thus maintain continuity with German *Reichsrecht*, or national law. It was also desirable to avoid duplication of work at the separate ministries, and the military government simultaneously. The committee planned to discuss all important matters pertaining to the re-establishment of independent German legislation and the judiciary. Subjects of discussion at this time were the transfer of cases to German courts when German legislation would cover all the crimes that were being handled by the military government courts, the trial of war criminals in German courts, and the drafting of a uniform German denazification law that would emphasise the individual examination of former National Socialists[524]. The legal committee functioned as one of the *Länderrat* technical committees[525], with the Minister of Justice for Greater Hesse acting as the chairman. This committee drafted and issued all legislation within the *Länderrat* machinery in which roughly sixty permanent or semi-permanent committees handled various functions[526]. All *Länderrat* decisions were forwarded to the Regional Government Coordination Office, and in turn transferred to the OMGUS headquarters in Berlin for review and approval[527], unless the legislation was approved on the

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[523] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.88.

[524] Z1/1213 Koblenz. "Report on the meeting of the three Ministries of Justice of Württemberg-Baden, Bayern and Groß-Hessen." DR.H./1a, 18/12/46.

[525] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.726, note.10.

[526] *Ibid.*, p.1005.

[527] von Elmenau, "Aufbau und Tätigkeit des Länderrats der U.S.-Zone", p.116.

spot by the military governor who was present at the monthly meetings. Laws adopted by the *Länderrat* could be rejected by the US military government if they did not serve to fulfil a basic occupation objective, or violated democratic principles[528]. Every law that was drafted in the *Länderrat* and was approved by the military government would be promulgated by the individual Minister-President for the respective *Land*[529] until *Land* constitutions were adopted and state parliaments were formed.

The Reconstruction of a German Constitutional Government in Hesse

The provisional *Land* government of Hesse had initially been installed until a permanent *Land* constitution would form the basis of the state, such as establishing a free and independent judiciary and placing limitations upon the exercise of governmental power. The authority of the *Land* US military government was to be limited to that of exercising supervisory control over the German constitutional *Land* government[530]. The relationship between the US military government and the newly constituted *Land* governments was established under the terms of a new policy directive promulgated on 30 September 1946 that defined the powers retained by the military government, and the relations between the *Land* US military government offices and the German *Land* civil governments. US occupation policy required

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[528] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.1006.

[529] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.88.

[530] *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8.

increasing German self-government, which was brought about through the elections of *Länder* governments and the adoption of the *Land* constitutions. Although constitutional government was established in each *Land*, the *Land* governments did not become fully independent since certain powers remained reserved to the military government[531]. The military government maintained its exercise of its supreme authority to accomplish its objectives, and could therefore intervene in the activity of the *Land* government[532]. The military government proclamations, laws, enactments, orders and instructions remained in force. Occupation objectives were to be maintained by means of observation, inspection, reporting and advising, and the military government courts. The intervention of the US military government in the functions of the *Land* government was to be limited to disapproval of economic, social, political and governmental activity that the military government considered clearly violating the objectives of the occupation, or removing public officials whose public activities violated these objectives[533].

The new *Land* constitutions of the three *Länder* in the US occupation zone determined the separation of executive, legislative, and judicial powers that were hitherto assumed by the military government under the terms of the

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[531] 502/1895, Wiesbaden. OMG for Germany (US) Office of the Military Governor. APO 742. AG 010.1 (CA). Subject: "Relationship between the Military and Civil Government (US Zone) Subsequent to Adoption of Land Constitutions", 30 September 1946.

[532] Clay, *Decision in Germany*, p.89.

[533] 502/1895 Wiesbaden. OMG for Germany (US) Office of the Military Governor. APO 742. AG 010.1 (CA). Subject: "Relationship between the Military and Civil Government (US Zone) Subsequent to Adoption of Land Constitutions", 30 September 1946.

unconditional surrender, by which these powers were vested in the military government. The Civil Affairs Division of the US military government formulated a programme for the drafting and adoption of *Land* constitutions in January 1946, directing each Minister-President to appoint a *Land* constitutional commission to research necessary material to be placed at the disposal of elected constitutional assemblies that would draft and approve the new constitution for each *Land*, which would then be reviewed by the US military government[534] for the final approval prior to the promulgation by the elected *Landtag*. Delegates from all the *Land* political parties were elected on 30 June 1946 to form a constitutional commission to draft a new *Land* constitution[535], which was later to be approved in a referendum[536]. The commissions in the three *Länder* completed their work in October 1946, and were subsequently reviewed and approved by the military government and the US State and War Departments[537]. The constitution was officially adopted by the constitutional commission with a vote of eighty-two to six with two abstentions[538], then ratified by a referendum

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[534] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No.7.

[535] *Monthly Report of the Military Governor, U.S. Zone*, 20 July 1946, No.12.
The seats won by the various parties in Hesse were as follows: CDU/CSU 35; SPD 42; LDP/DVP/FDP 6; KPD 7.

[536] Arndt, "Die staats- und verwaltungsrechtliche Entwicklung in Groß-Hessen", p.186.

[537] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16; Clay, *Decision in Germany*, p.89.

[538] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

in Hesse on 1 December 1946[539]. The new *Land* parliament was elected on the basis of this referendum on the same day[540]. The *Land* constitution organised the future political life of the state[541] (*Staatsleben*), conferring the freedom of full legislative powers upon the *Land* government, maintaining the principle of the separation of these powers[542], and establishing parliamentary government by which legislative power was assigned to the *Landtag* (parliament) and to the people[543]. The adoption of the *Land* constitution marked a transition toward the establishment of a permanent *Land* executive and legislature. The responsibility for promulgating *Länderrat* legislation in each *Land* was conferred upon the elected *Landtag* (state parliament), provided that it was not rejected by the US military government[544]. The primary function of the military

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[539] Kropat, *Hessen in der Stunde Null*, p.121.

[540] Clay, *Decision in Germany*, p.90.
The name of the state was changed from "Greater Hesse" to "Hesse" at this time upon the adoption of the constitution, since "Greater Hesse" was considered too reminiscent of the National Socialist "Greater Germany" (Groß-Deutschland), Walter Mühlhausen, *Hessen 1945-1950: Zur politischen Geschichte eienes Landes in der Besatzungszeit* (FRankfurt-am-Main: Insel Verlag, 1985), p.41.

[541] Dieter Gosewinkel, *Adolf Arnt: Die Wiederbegründung des Rechtsstaats aus dem Geist der Sozialdemokratie, 1945-1961* (Bonn: Verlag J.H.W. Dietz Nachf., 1991), p.97.

[542] Adolf Arndt, "Status and Development of Constitutional Law in Germany", *Annals of the American Academy of Political and Social Science* (July 1948) Vol. 258, p.5.

[543] "Verfassung des Landes Hessen", VI. "Die Gesetzgebung" Arts. 116-125, *passim*, *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.237.

[544] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.88.

government regarding the legislative process in the US zone was to review the enactments of the German *Land* legislatures (*Landtage*), which possessed broad legislative authority in local and regional matters[545]. In the interest of US policy-makers to maintain the maximum decentralisation as postulated in the Potsdam Protocol, governmental authority was concentrated at the *Land* level in accordance with the *Land* constitutions. The *Land* governments therefore superseded the *Länderrat* that had no direct executive authority[546], serving only the legislative function of drafting laws that would be implemented by the *Land* governments.

The *Land* constitution set forth new terms governing the judicial organisation. National Socialist perversions of law and justice were outlawed. There was to be no punishment other than on the basis of law; no individual would be deprived of their right to a trial, and would only be tried by a regularly appointed judge; all extraordinary courts were expressly forbidden. The legislative authority would be expressed through the courts. Judges were declared to be independent, and were subject solely to the authority of the law[547]. A Supreme Constitutional Court (*Staatsgerichtshof*) was to be established and charged with the task of defending the provisions of the constitution[548]. The *Staatsgerichtshof*

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[545] Zink, *The United States in Germany: 1944-1955*, p.307.

[546] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.1010.

[547] "Verfassung des Landes Hessen", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), VII. "Die Rechtspflege", Art. 126, p.237.

[548] Gosewinkel, *Adolf Arndt: Die Wiederbegrüundung des Rechtsstaats aus dem Geist der Sozialdemokratie*, p.134.

was to judge the constitutionality of legislation, the violation of fundamental rights, the integrity of popular elections, and cases involving constitutional disputes arising from the constitution or laws[549]. This court was also empowered with removing judges from office upon the request of the *Landtag*, if the judges did not exercise the functions of their office in accordance with "the spirit of democracy and social understanding"[550]. The terms of the Plan for the Administration of Justice and the US military government directives for the implementation of this Plan in Hesse were rescinded on 21 July 1947. The *Länder* constitutions laid the basis for a reorganisation of the German judicial organisations that corresponded to the principles of democracy, justice according to the law, and equality before the law for all citizens[551].

The Plan for the Administration of Justice had hitherto served as the basis for the reconstruction of German court jurisdiction prior to the adoption of the *Land* constitutions, and had since become obsolete. The establishment and implementation of the German administration of justice hereafter became the responsibility of German authorities, while remaining subject to the existing Control Council, US military government and German legislation and regulations dealing with the administration of justice, such as the receipt of

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549 "Verfassung des Landes Hessen", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), VIII. "Der Staatsgerichtshof", Art. 131, p.238.

550 *Ibid.*, VII. "Die Rechtspflege", Art. 127, p.237.

551 Z1/1283, Koblenz. Amt der Militärregierung für Hessen, Büro des Direktors, APO 633, Recht 312, EA/jh, Wiesbaden, 21.7.1947. "Betr.: Rechtsprechung"; Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Office of Military Governor APO 742. "Subject: Administration of Justice", 13 June 1947.

monthly reports on the operations of the German courts. The *Land* government was also free to modify the provisions of the Plan in whole or in part at its discretion[552]. The Minister of Justice questioned whether changes to the current *Land* judicial organisation were desirable at this time, two years after the collapse of the National Socialist regime and the redrawing of the *Land* boundaries. Changes up to this time always dealt with considerations of expediency and pressing demands of the moment. Potential changes to be considered at this time included: whether the locations of the *Landgerichte* and the *Landgerichtbezirke* and the *Amtsgerichtsbezirke* that were introduced upon the formation of Hesse corresponded to the present situation or whether modifications were necessary, and whether the opening of new courts was desirable or necessary[553]. The Plan effectively became redundant, but the *Land* government supplemented its original provisions that remained in effect[554]. New terms were introduced for selecting judges in accordance with Art. 127 of the constitution of Hesse[555], and setting forth the

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[552] Z1/1283, Koblenz. Amt der Militärregierung für Hessen, Büro des Direktors, APO 633, Recht 312, EA/jh, Wiesbaden, 21.7.1947. "Betr.: Rechtsprechung"; Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Office of Military Governor APO 742. "Subject: Administration of Justice", 13 June 1947.

[553] 463/929, Wiesbaden. 3200 - Ia 1195, Betr.: "Sitz und Bezirk der Gerichte; Einteilung der Amts- und Landgerichtebezirke; Wiederöffnung von Voll- und Zweigsgerichten", 29 May 1947.

[554] "Die Gesetzgebung der Länder (amerikanische Zone): Hessen", *Süddeutsche Juristenzeitung* (1946), p.564.

[555] "Verordnung über die Weitergeltung des Rechtspflege-Aufbauplans vom 14. April 1948"; "Anlage zur Verordnung über die Weitergeltung des Rechtspflege-Aufbauplans vom 14. April 1948", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), p.71.

terms for the permanent appointment of judges[556] that replaced the provision for temporary appointments set forth in the Plan[557]. New provisions were also introduced for the formation of disciplinary courts at the *Landgerichte* and the *Oberlandesgericht* for the institution of disciplinary proceedings against jurists[558].

The institution of constitutional government in Hesse thus led to greater independence from the direct influence of the US military government, and led to a greater responsibility for the judiciary to serve as a safeguard against arbitrary actions exercised by the state. Questions involving constitutional matters were handled by a constitutional court that was established to serve as a check upon public authority and legislation enacted by the *Land* government. The government of Hesse adopted the *Land* Constitutional Court Law on 12 December 1947 that would serve to defend the principles of the constitution. Professional judges and lay members were appointed to this court by the *Landtag*. The court was responsible for hearing cases against members of the government or the permanent judiciary. The law prescribed procedures by which the court was to protect the constitution, determine the constitutionality of laws and implementing regulations, and mediate in jurisdictional conflicts between the separate

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[556] "Verfassung des Landes Hessen", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), VII. "Die Rechtspflege", Art. 127, p.237.

[557] 458/1021, Wiesbaden. 2052 - Ib 2163. "Runderlass Über die Dienstbezeichnung der richterlichen Beamten", 9 September 1947.

[558] "Verordnung über die Weitergeltung des Rechtspflege-Aufbauplans vom 14. April 1948"; "Anlage zur Verordnung über die Weitergeltung des Rechtspflege-Aufbauplans vom 14. April 1948", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), p.71.

levels of government. Any individual or administrative authority could take a case to the court if it involved a matter that violated one of the basic rights in the constitution[559]. The jurisdiction of the constitutional court also extended to: cases of impeaching members of the *Land* government for violating the constitution; cases involving the constitutionality of *Land* legislation; maintaining the integrity of elections to the legislature; cases of judges accused of professional neglect by acting contrary to the constitution. Unlike the constitutional courts of the other *Länder*, only the constitutional court in Hesse allowed for an individual to bring a case before the court if their fundamental rights were violated[560]. This reform of the *Land* administration of justice represented a major innovation that entrenched the protection of civil rights set forth in the constitution. The establishment of the constitutional court mitigated the ordinary courts claiming the right to judge the constitutionality of governmental enactments. This had been one of the most dangerous features of the administration of justice in the Weimar Republic. Reactionary judges used this claim to sabotage progressive measures, citing their right of judicial independence[561].

Administrative Courts

A system of administrative courts would provide a judicial safeguard to affirm the division of the

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[559] "Gesetz über den Staatsgerichtshof vom 12. Dezember 1947", *Gesetz- und Verordnungsblatt für das Land Hessen* 1948, pp.3-8; *Monthly Report of the Military Governor, U.S. Zone*, December 1947, No.30.

[560] Zinn, "Administration of Justice in Germany", p.36.

[561] Friedmann, *The Allied Military Government of Germany*, pp.82-83, 10.

legislative, executive and judicial powers of the state, maintaining the ideal of the *Rechtsstaat* by preventing the exercise of arbitrary action by the state authorities. The role of these courts was to adjudicate in controversies concerning rights of an individual that were affected by an act committed by a public authority, thus contributing to safeguarding the rule of law by providing for the defence of the constitutional rights of the individual, while acting independently of governmental control, as were the ordinary law courts[562]. At the national level, Control Council Law No.36 of 10 October 1946 on "Administrative Courts" recommended that administrative courts be re-established throughout Germany and in Berlin. The terms of the structure, jurisdiction and procedure of these courts were left to the discretion of the respective Allied military government zone commanders and the Allied Kommandatura in Berlin, in so far as the legislation guiding these courts did not conflict with Control Council legislation and policy. National Socialist legislation regarding the administrative courts was abolished upon the enactment of this law[563].

Control Council Law No.36 confirmed the existing reform of the administrative courts that had already been re-opened in the US occupation zone, where the US military government pressed for a rapid restoration of the administrative courts[564]. The *Länderrat* worked in coordination with

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[562] Loewenstein, "Justice", p.239.

[563] "Law No.36: Administrative Courts", *Official Gazette of the Control Council* No.11 (31 October 1946), p.183; *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

[564] Wilhelm Bauer, "Wierderaufbau der Verwaltungsrechtspflege", *Süddeutsche Juristenzeitung* (1946), p.150.

instructions from the US military government to create a uniform regulation for the procedures and jurisdiction of the administrative courts in the three *Länder* of the US zone, essentially following the pattern of administrative justice that was established before 1933[565]. A panel of German jurists convened in Heidelberg in September 1945 to draft proposed legislation for the procedures and jurisdiction of the system of administrative courts in the US zone[566]. It was necessary to reorganise the system of administrative courts to achieve uniformity in the three *Länder*, and to restore their significance in the administration of justice. The NSDAP considered the administrative courts to be in a position to hinder its arbitrary rule, and therefore limited the responsibility of these courts. As a consequence, the legal authority of the administrative courts to protect the rights of individuals and public bodies was almost completely eliminated. The restoration of protection against unlawful actions of the state authorities thus became an important task in view of the past circumstances, in addition to the standardisation of the law[567] governing the structure and responsibility of the administrative courts in each of the three *Länder*.

The primary goal for the initial development of the administrative courts was to achieve the complete separation of the administrative courts from the administration and the personal legal position of the individual judges, as well as establishing a two-tiered system of administrative courts by which appeals from the first instance could be heard at a

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[565] Loewenstein, "Justice", p.240.

[566] *Monthly Reports of the Military Governor, U.S. Zone*, 20 October 1945, No.3.

[567] Bauer, "Wiederaufbau der Verwaltungsrechtspflege", p.149.

higher level[568]. The revision of the Administrative Code was completed on 17 September 1945, removing all traces of National Socialist ideology[569], and was referred to the *Länder* governments for comment[570]. The text of this new Administrative Code was approved and adopted by the Legal Committee of the *Länderrat* on 24 April 1946[571], and was then to be promulgated by the Minister-President of each *Land*, with the appropriate adjustment for the local conditions[572].

The *Land* military government ordered the administrative courts in Hesse to be re-opened according to the terms of the *Länderrat* law enacted on 6 August 1946. These courts were to be re-established in each *Land* of the US zone, and were to conform with the legislation and policies of the US military government and the Control Council[573]. The government of Hesse decreed that administrative courts in Hesse in Wiesbaden, Kassel and Darmstadt, and an administrative court serving as a special senate at the *Oberlandesgericht* in Frankfurt-am-Main, were scheduled to open on 1 September 1946[574]. The *Oberlandesgericht* heard

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[568] *Ibid.*, p.152.

[569] Clay, *Decision in Germany*, p.248.

[570] *Monthly Reports of the Military Governor, U.S. Zone*, 20 November 1945.

[571] "Die Gesetzgebung der Länder: Verwaltungsrechtspflege", *Süddeutsche Juristenzeitung* (1946), p.130.

[572] Loewenstein, "Reconstruction of the Administration of Justice", p.427.

[573] 501/1892, Wiesbaden. Subject: "Reopening of Administrative Courts in Land Greater Hesse", 25.9.1946. Tgb: Nr.M845/46, Ku/St.

[574] 1126/11, Wiesbaden. "Verordunung über die Wiedereinführung der Verwaltungsgerichtsbarkeit", 16. August 1946.

appeals from these courts for the time being[575]. All administrative courts in Hesse were re-opened on 15 October 1946[576]. The administrative courts in the *Länder* of the US zone were regulated uniformly for the first time[577] since their introduction in the nineteenth century[578]. The conclusive provisions on their composition, responsibilities and procedures were later set forth in the *Land* law on administrative courts promulgated on 31 October 1946[579].

US military government Administrative Courts Officers were instructed to educate the people of the US occupation zone on the availability of administrative courts for the redress of complaints and grievances against decrees of German governmental agencies or officials, and for "the protection of the citizen against arbitrary use and abuse of power by the German government."[580] The *Land* government decreed that the organisation of the administrative courts in Hesse was to consist of an administrative appeals court in Kassel and three administrative courts situated in

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[575] 1126/11, Wiesbaden. "Begründung zu dem Entwurf einer Verordnung über die Wiedereinführung der Verwaltungsgerichtsbarkeit".

[576] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

[577] "Die Gesetzgebung der Länder: Verwaltungsrechtspflege", p.131.

[578] Klaus Mehnert and Heinrich Schulte, eds. *Deutschland-Jahrbuch 1949* (Essen: West-Verlag, 1949), p.33.

[579] "Gesetz über die Verwaltungsgerichtsbarkeit vom 31. Oktober 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.194-203.

[580] *Monthly Report of the Military Governor, U.S. Zone*, 31 January 1947, No.19.

Darmstadt, Kassel and Wiesbaden[581]. The Supreme Administrative Court of Hesse was established in June 1947, thus completing the restoration of the system of procedural and administrative justice in Hesse, which the Office of the Military Government for Greater Hesse Civil Administration experts considered to be stronger than ever before[582]. The central element of the reform of these courts lay in the extension of their jurisdiction. The administrative court judicial organisation was made responsible for ensuring the protection of rights in all disputes concerning public law outside of constitutional law[583]. The principle of all incriminating administrative actions being subject to legal action was only implemented in a few of the German *Länder* in the nineteenth century. The introduction of these courts throughout western Germany, the complete organisational separation of the jurisdiction of the administrative courts from the state, and the absolute judicial independence of these courts were thus later considered significant developments of the constitutional law in the Federal Republic of Germany[584].

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[581] "Der Gesetzgebung der Länder (amerikanische Zone): Hessen", *Süddeutsche Juristenzeitung* (1947), p.222; "Erste Ausführungs des Gesetzes über die Verwaltungsgerichtsbarkeit vom 26. Februar 1947", *Staats-Anzeiger für das Land Hessen*, p.117.

[582] Freeman, *Hesse: A New German State*, p.69.

[583] Günther Edelmann, "Der Einfluß des Besatzungsrechts auf das deutsche Staatsrecht der Übergangszeit (1945-1949), p.46.

[584] Diestelkamp, "Die Justiz in den Westzonen", p.20.

Labour Courts

Labour disputes in Germany prior to the National Socialist takeover were dealt with by a system of labour courts that had been established under the Labour Courts Law of 23 December 1926[585]. New regulations governing the settlement of disputes by the labour courts were introduced under Control Council legislation. The regulation of labour relations was restored under Control Council Law No.40 of 30 November 1946 on "Repeal of the Law of January 20, 1934 on 'The Organization of National Labor'", which abolished this National Socialist law and all other related enactments and ordinances pertaining to its application[586]. This law was later supplemented by Control Council Law No.56 of 30 June 1947 on the "Repeal of the Law of 23 March 1934, on the Regulation of Labor in Public Administrations and Enterprises", which likewise abolished this law and all its related enactments[587]. The restoration of an independent labour court organisation was not urgent after the unconditional surrender since organised labour had disintegrated[588], and therefore the functions of these courts in the US zone were provisionally assumed by the

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585 "Arbeitsgerichtsgesetz vom 23. Dezember 1926", *Reichsgesetzblatt* I 1926, pp.507-524.

586 "Law No.40: Repeal of the Law of 20 January 1934 on 'The Organization of National Labor'", *Official Gazette of the Control Council for Germany* No.12 (30 November 1947), p.229.

587 "Law No.56: Repeal of the Law of 23 March, on the Regulation of Labour in Public Administrations and Enterprises", *Official Gazette of the Control Council for Germany* No.16 (31 July 1947), p.287.

588 Loewenstein, "Justice", p.242.

Amtsgerichte[589] until further measures were implemented to establish the permanent labour judicial organisation.

The vacuum of legislative authority regulating labour relations was replaced by economic legislation issued by the Control Council, which generally set forth uniform quadripartite principles or standards of labour regulations for Germany as a whole, while the execution and implementation of these regulations were charged to the *Land* labour authorities under the general supervision of the zonal military government[590]. Examples included establishing common wage policies in the four zones, allowing trade unions to negotiate wage adjustments with employers and employers' associations, subject to Control Council policies, and the labour offices that were made responsible for authorising any changes in the wage rates[591]. Uniform provisions were likewise to be introduced for the regulation of working hours[592]. A series of Control Council enactments advanced the democratisation and self-government within the organisation of labour, such as making provisions for the creation of federations of democratically-organised trade unions uniting each branch of industry[593]. The principle of

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[589] 458/1014, Wiesbaden. 7650. III 1299. Betr.: "Arbeitsgerichtliche Streitigkeiten", 30 September 1946.

[590] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.755.

[591] "Directive No.14: Wage Policy" 12 October 1945, *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp.40-41.

[592] "Directive No.26: Regulation of Working Hours" 26 January 1946, *Official Gazette of the Control Council for Germany* No.5 (31 March 1946), pp.115-116.

[593] "Directive No.31: Principles Concerning the Establishment of Federations of Trade Unions", 3 June 1946, *Official*

democratic self-government was reinforced by attaching advisory councils, composed of representatives of workers and employees (*Arbeiter und Angestellten*) and employers, to the Labour Offices established at the *Land* level to advise them on all matters within their jurisdiction[594]. Works councils (*Betriebsräte*) were to be elected to represent and protect the professional, economic and social interests of the workers and employees in every enterprise[595]. Labour disputes between employees and employers were to be settled through arbitration agencies[596] and labour courts[597].

Labour courts were established under the terms of the Control Council Law No.21 on "German Labor Courts" of 30 March 1946, which extended the terms of the Plan for the Administration of Justice for the US zone[598]. Pending labour matters were to be handled in the German ordinary law courts

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Gazette of the Control Council for Germany No.8 (1 July 1946), pp.160-161.

[594] "Directive No.29: Establishment of Advisory Committees (Beratungsausschüsse) at the Labor Offices", 17 May 1946, *Official Gazette of the Control Council for Germany* No.7 (31 May 1946), p.152.

[595] "Law No.22: Works Councils", 10 April 1946, *Official Gazette of the Control Council for Germany* No.6 (30 April 1946), pp.133-135.

[596] "Law No.35: Conciliation and Arbitration Machinery in Labor Conflicts", 20 August 1946, *Official Gazette of the Control Council for Germany* No.10 (31 August 1946), pp.174-177.

[597] "Law No.21: German Labour Courts", 30 March 1946, *Official Gazette of the Control Council for Germany* No.5 (31 March 1946), pp.124-127.

[598] "Rechtspflege: Gerichtsverfassung", *Süddeutsche Jursitenzeitung* (1946), p.19.

under the interpretation of this law[599] until the labour courts were established. This law called for the re-establishment of the system of German labour courts in each of the four occupation zones, and provided the terms for the composition, responsibility and jurisdiction of local and appellate labour courts in certain kinds of disputes: 1) those arising out of a collective agreement or relative to the presence of non-existence of such an agreement; 2) disputes concerning working conditions, including safety and health measures; 3) disputes concerning the interpretation of agreements concluded between works councils. The judges in these courts were to be selected by panels of representatives drawn from management and labour unions. The provisions of the German Labour Courts Law of 23 December 1926 did not contradict those of the Control Council law in any way, and therefore would continue to be in force[600].

The new German labour courts law was reviewed and approved by the *Länderrat*. Measures for its implementation were instituted thereafter, providing for labour courts of first and second instance to be administered under the Labour Minister of each *Land*, with assessors from labour and employer organisations. The US military government approved the draft German law in September 1946, subject to the inclusion of certain terms of Control Council Laws No.21 and No.22 that were incorporated into the final draft[601]. The provisions of this new Labour Court Law would be applied in its original form through the *Land* judicial organisation,

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[599] RG 260 OMGUS. 8/188-2/5. APO 633. Subject: "Weekly Summary Report for Legal Division from 25 August to 31 August 1946", 30 August 1946.

[600] Z1/674 Koblenz. "Stellungnahme der Unterschusses Arbeitsrecht vom 5.7.1946".

[601] *Monthly Report of the Military Governor, U.S. Zone*, 31 December 1946, No.18.

with the exception that they were henceforth to operate under the supervision of each *Land* Ministry of Labour, which was not to exercise any form of influence on the decisions of these courts[602]. The terms of the new German labour courts law were based on the terms of the original labour courts law, except for provisions that were imposed by Control Council Law No.21 that eliminated National Socialist features in the procedures, jurisdiction and organisation under the provisions of the existing law[603]. Law No.21 also allowed for the appointment of lay judges in the courts of the first instance[604]. Twelve labour courts in Hesse (Darmstadt, Frankfurt-am-Main, Fulda, Gießen, Hanau, Hersfeld, Kassel, Limburg, Marburg, Offenbach, Wetzlar, Wiesbaden) were re-opened thereafter on 30 September 1946, along with the labour appeals court (*Landesarbeitsgericht*) in Frankfurt-am-Main[605], which were placed under the jurisdiction of the *Land* Ministry for Labour and Welfare[606]. The labour courts law went into force on 27 August 1947[607] setting forth their composition, responsibilities and

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602 "Rechtspflege: Gerichtsverfassung", *Süddeutsche Juristenzeitung* (1946), p.19.

603 Taylor Cole, "The Role of the Labor Courts in Western Germany", *The Journal of Politics* Vol. 18 (1956), p.480.

604 "Die Gesetzgebung der Länder (amerikanische Zone): Hessen", *Süddeutsche Juristenzeitung* (1948), p.344.

605 458/1014, Wiesbaden. 7650. III 1299. Betr.: Arbeitsgerichtliche Streitigkeiten", 30 September 1946.

606 Arndt, "Die staats- und verwaltungsrechtliche Entwicklung in Groß-Hessen", p.187.

607 "Gesetz vom 30. März 1948 zur Änderung des Arbeitsgerichtsgesetzes vom 27. August 1947", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), p.57.

procedures that were officially published on 30 March 1948[608].

The reconstruction of the labour judicial organisation represented an important aspect of the democratisation of German society. In addition to eliminating National Socialist influences, the restoration of the labour courts along with organised labour reinforced the role of individual responsibility in the postwar social order. Just as the military government courts set an example for the administration of justice when the operation all German courts were suspended, it may be argued that the labour courts, like the courts in the other branches of the German administration of justice, set forth first-hand examples of the impartial settlement of disputes under the law. Considering that the labour force comprises the majority of the population, it may be surmised that the settling of labour disputes in accordance with labour legislation administered by independent judges fostered confidence in the postwar administration of justice.

The Restoration of the Bar Association

The legal profession, like other occupational groups in National Socialist Germany, had been organised into a part of the governmental structure[609]. At the beginning of the occupation, local associations of lawyers could be formed on a free and democratic basis, subject to the prior approval of the military government. However, they were not to

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[608] "Arbeitsgerichtsgesetz vom 27. August 1947 in der Fassung vom 30. März 1947 in der Fassung vom 30. März 1948", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), pp.57-64.

[609] John B. Holt, "Corporative Occupational Organization and Democracy in Germany", *Public Administration Review* Vol. 8 (1948), p.34.

exercise any judicial functions. Their main purposes were to provide mutual assistance among their members, opening and maintaining legal libraries, forming legislative committees for the drafting of corresponding recommendations to the military government, and generally supporting the law courts in the endeavour to re-establish a high level of non-political justice in the administration of justice[610]. Until provisions for the restoration of a bar association were set forth, the reinstatement of lawyers to practice was subject to denazification regulations and the approval of the local military government detachment, the local *Landgericht* president, and the *Land* Minister of Justice[611]. The Law on the Organisation of the Bar, or "Lawyers' Code", re-established the terms for the admission of lawyers to the Bar Association and the organisation and functions of the Bar. This new law was drafted by the US Legal Advisor of the Office of Military Government for Germany, Professor Karl Loewenstein, in consultation with prominent German lawyers[612]. The law was then reviewed at the *Länderrat*[613] where it was approved by the Ministers of Justice and their delegates[614]. The *Länderrat* Legal Committee approved a draft

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[610] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

[611] 462/1308, Wiesbaden. Subject: Admission to the Bar, 12 November 1945.

[612] 1126/11, Wiesbaden. "Abschrift" (n.d.).

[613] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

[614] Z45F 17/56-3/7 RG 260/OMGUS, Koblenz. Provenance OMGUS LD, LA Br., Folder Title: LA 91 The German Government, German Courts. Subject: Draft of the New Law on the Reconstruction of the German Bar (*Rechtsanwaltsordnung*) 10 June 1946 KL/nf.

of this law on 23 July 1946[615]. The Deputy Military Governor gave his official approval of this law on 6 October 1946[616].

The law went into force in three *Länder* of the US zone on 1 December 1946. The Chamber of Attorneys, or bar association, was restored in accordance with the terms of the original law enacted on 1 July 1878 in the version that was in place on 30 January 1933[617]. Technical innovations that were introduced under the National Socialist regime were retained, and the self-government of the bar was extended[618]. The new law retained the internship in office (*anwaltschaftliche Probedienst*) of a year, or six months in special cases, that was introduced in the *Reichsrechtsanwaltsordnung* of 21 February 1936[619]. The Lawyers' Code set forth that a Chamber of Attorneys was to be established in every *Oberlandesgericht* district, where it would be permanently situated[620]. Annual elections were to be held for the members of the bar to choose a nine member Governing Board (*Vorstand*). Apart from administrative functions, the Board possessed disciplinary powers over the members in the event of professional misconduct.

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615 1126/11, Wiesbaden. "Abschrift" (n.d.).

616 *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

617 "Gemeinsame Gesetzgebung der Länder", *Süddeutsche Juristenzeitung* (1947), p.223.

618 Loewenstein, "Reconstruction of the Administration of Justice", p.457.

619 "Gemeinsame Gesetzgegung der Länder: Stand vom 14.3.47", *Süddeutsche Juristenzeitung* (1947), p.223.

620 "Rechtsanwaltsordnung 1946 vom 6. November 1946", Arts.41(1), (2), *Bayerisches Gesetz- und Verordnungsblatt* (30 December 1946), p.374.

Disciplinary courts were re-established to deal with violations of professional duties. The Governing Board would serve as the court of first instance in deciding such cases. Appeals were to be transferred to a court of appeals consisting of four practicing lawyers elected by the members of the bar, along with three judges of the *Oberlandesgericht* appointed by its president[621]. Every lawyer admitted to practice was to become a member of the Chamber of Attorneys and had to serve in a governmental office for up to a year within three years of the admission. The latter provision would serve to help relieve the shortage of judges and prosecutors in the German courts[622]. Lawyers who were unjustly persecuted under the National Socialist regime could clear their records. Any lawyer who had been sentenced by a Disciplinary Court of Honour after 5 March 1933 could request the case to be reviewed in order to annul the sentence, if the regulations and standards of judgments in the case were not valid before 5 March 1933[623]. The transitional provisions included terms for the reinstatement of lawyers according to the existing regulations. All lawyers who were not admitted to practice after 9 May 1945 could not resume their practice until they were officially readmitted to the bar association, unless the military government disapproved their re-admittance[624].

Further provisions specifically addressed the circumstances of the time. The law included penalties to

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[621] *Ibid.*, Arts.41-103 *passim*, pp.374-379.

[622] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

[623] "Rechtsanwaltsordnung 1946", Art. 6 Übergangsbestimmungen, *Bayerisches Gesetz und Verordnungsblatt*, p.380.

[624] *Ibid.*, Art. 4 Übergangsbestimmungen, p.379.

deter disbarred lawyers from resuming their practice. This clause particularly applied to disqualified former National Socialists[625]. The US military government drafted and inserted a clause into this revised *Rechtsanwaltsordnung*, instructing practicing lawyers to act against abuses of the law[626]. This clause stated that if a member of the bar became conscious of any official action or inaction that implied the danger of perversion of the law, or contradicted the principle of the equality of all before the law as set forth in Art. 2 of Control Council Law No.1, the Governing Board of the Bar Association(*Vorstand der Rechtsanwaltskammer*) was to be informed immediately. In turn, the latter was to investigate the matter and make a report to the Minister of Justice if the public interest required further measures, who in turn would notify the military government. This obligation to report the offence was to take precedence over the attorney's requirement of confidentiality[627].

Reform of German Law at the *Land* Level

The regulations governing criminal law and procedure in the US zone reverted to those that were in force in Weimar Germany[628]. On the other hand, emergency legislation was enacted for the administration of criminal justice in Hesse due to the increase of crime and the shortage of judicial

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[625] Loewenstein, "Reconstruction of the Administration of Justice", p.441.

[626] *Ibid.*

[627] "Rechtsanwaltsordnung 1946", Art. 28(a), *Bayerisches Gesetz und Verordnungsblatt* 1946, p.373.

[628] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.1018.

personnel[629]. The significant amount of criminal cases and the limited number of judges and re-opened courts throughout Germany at this time required a simplification and acceleration of the proceedings in criminal cases. The revised accelerated proceedings of the criminal procedure (*Strafprozeßordnung*) §212 StPO, §18-20 of the Ordinance of 21 February 1940 was therefore retained in all four occupation zones[630]. An emergency ordinance was enacted in Hesse on 23 May 1946 allowing for the office of the public prosecutor to abstain from attending a main hearing before an *Amtsgericht*, provided that the sentence could not be expected to be more than two years in prison. This ordinance was only to remain in force from 1 March 1946 to 31 December 1947[631]. The *Land* government also introduced expedited court proceedings for the prosecution of curfew violations and the failure to produce registration identification. With the consent of the accused, an *Amtsgericht* was to pronounce decisions in such cases immediately without the usual procedure of instituting the prosecution, the participation of the public prosecutor, or the protection of a period of delay. The procedure in such cases would be applied in accordance with the existing legislation governing court procedures[632]. This ordinance was later extended for all

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[629] "Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen", p.120.

[630] Mehnert and Schulte, *Deutschland Jahrbuch*, p.98.

[631] "Verordung über vorübergehende Maßnahmen in der Strafrechtspflege" vom 23.5.1946, *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.164.

[632] "Verordnung über das Sofortverfahren in Strafsachen vom 4. April 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.99.

misdemeanours[633]. The accused in these proceedings could request to appear before an *Amtsgericht* on the same day that the files were presented[634].

The most notable achievement regarding the reform of the law was the revised *Strafrechtspflegeordnung*, or Code of Criminal Procedure that was sent to the Minister-Presidents in February 1946[635]. This was the only case of military government legislation being imposed upon the *Land* governments. Without any previous consultation, the Minister-Presidents of the *Länder* were ordered to enact the revised text of the code of criminal procedure that was drafted by military government officials at the Control Council Legal Division. This example of dictated legislation was justified by the need for re-opening German courts to administer criminal justice according to democratic principles[636]. Technical improvements were introduced into the new code, such as substantially strengthening the rights afforded to the accused, and divesting the police authorities of their former power to enact legislation and adjudicate in certain offences[637].

The US military government recognised the authority of the *Landrat* (equivalent of a county government) and the *Oberbürgermeister* (mayor) to enact police ordinances to the

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633 "Zweite Durchführungsverordnung vom 12. 6. 1946 zur Verordnung über das Sofortverfahren in Strafsachen", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946) p.164.

634 "Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen", p.120.

635 *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8.

636 Loewenstein, "Law and the Legislative Process in Occupied Germany". pp.1012-1013.

637 *Ibid.*, pp.1018-1019.

extent that this authority had existed in German law before the NSDAP came to power, which would extend the responsibilities of the German police and judicial organisation, and would further relieve the military government courts of dealing with minor cases[638]. Certain types of minor infractions had been handled by the police under Weimar, and this was extended and abused in the National Socialist regime[639]. As a result, functions involving the administration of criminal justice were to be removed from the jurisdiction of the police in order to prevent the potential arbitrary abuse of these functions. The military government thus ordered the former legislative and judicial power of the German police to be eliminated from *Land* law and legal procedures in order to prevent excessive exercise of police control over the civil population[640]. All existing laws, ordinances or other legislative enactments conferring upon the police the power to legislate or promulgate enactments with the force of law, or to adjudicate criminal offences, issue penal orders, or impose penalties for the violation of any laws, were to be repealed. The former legislative powers of the police were transferred to the exclusive control of civil legislative authorities, including the *Bürgermeister* and *Oberbürgermeister*, *Landräte*, *Regierungspräsidenten*, Minister-Presidents, and Ministers of the Interior. The former judicial power was to be reverted to the *Amtsgerichte*, or any other administrative agency selected or

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[638] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3.

[639] Loewenstein, "Law and the Legislative Process in Occupied Germany:, pp.1018-1019.

[640] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No.7.

created for this purpose[641]. Infractions against police ordinances in Hesse became governed by the Law of 16 May 1946. Cases of violations against police ordinances were henceforth to be brought before an *Amtsgericht*[642].

A new criminal code was introduced in Hesse by the Law of 21 February 1946 consisting of two parts: 1) the *Strafgerichtsverfassungsgesetz*, adjusted from the Judicature Act of 1877 (*Gerichtsverfassungsgesetz*) by the *Land* in conformity to Control Council and US military government legislation in matters regarding criminal justice, and 2) the Code of Criminal Procedure (*Strafprozessordnung 1946*) common for the three *Länder*. The code was subsequently amended in line with local requirements in each *Land*[643]. This code introduced regulations for German court proceedings, which supplemented the provisional criminal code that comprised the occupation law and the provisions of German law that remained unaffected by occupation law. Criminal jurisdiction was to be exercised by *Amtsgerichte* through a judge or a jury court, by the *Strafkammer* (division of the court for criminal matters) of the *Landgerichte*, and by the *Oberlandesgericht* serving as the appeals court of the highest instance. The formation of the *Schöffengerichte* (jury courts at the *Amtsgericht* level) and of the *Schwurgerichte* (jury courts at the *Landgericht* level) would take place upon the instruction of the Minister of

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641 RG 260 OMGUS, 17/210-2/6, Wiesbaden. APO 633. Subject: "Change of Existing Laws of the Länder to Deprive the German Police of their Legislative Powers and their Authority to Adjudicate Offences", 21 January 1946.

642 "Gesetz zur Überleitung des Strafverfügungsrechts der Polizeibehörden auf die Gerichte von 16. Mai 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.164.

643 Loewenstein, "Law and the Legislative Process in Occupied Germany", pp.1018-1019.

Justice[644]. This new criminal code otherwise reaffirmed the principles of the German criminal code that was in place before 30 January 1933, subject to amendments that were deemed necessary for adjusting its provisions to the prevailing conditions in Hesse[645]. The *Strafrechtspflegeordnung* of 1946 consisting of the new *Strafgerichtsverfassungsgesetz* and *Strafprozeßordnung* went into force on 1 March 1946. Wartime provisions for the administration of criminal justice were abolished[646]. Procedural regulations in subsidiary criminal laws would remain in force in so far as they did not contradict the *Strafrechtspflegeordnung*, the implementation law, or the laws of the military government. The *Strafrechtspflegeordnung* was to be applied in accordance

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[644] "Gemeinsame Gesetzgebung der Länder", *Süddeutsche Juristenzeitung* (1946), p.17.

[645] RG 260 OMGUS, 17/210-3/3, Wiesbaden. APO 633. Subject: Enactment of German Codes for Administration. 11 February 1946.

[646] "1. Section III of the Ordinance on Measures in the Field of the Legal Constitution and of the Administration of Justice of 1 September 1939" (*Reichsgesetzblatt* I p.1658); 2. "The Law for the Change of Regulations of the General Criminal Procedure, of the *Wehrmacht* Criminal Procedure and of the Resolution on Criminal Law of 16 September 1939" (*Reichsgesetzblatt* I. p.1841); 3. "The Ordinance on the Responsibility of the Criminal Courts, of the Special Courts and other Regulations on Criminal Proceedings of 21 February 1940 (*Reichsgesetzblatt* I p.405); 4. "The Ordinance on further Simplification of the Administration of Criminal Justice of 13 August 1942" (*Reichsgesetzblatt* I p.508);"5."The Decree for the Further Adjustment of the Administration of Criminal Justice to the Requirements of Total War of 13 December 1944" (*Reichsgesetzblatt* I p.339). "Einführungsgesetz zur Strafrechtspflegeordnung 1946 vom 21. Februar 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* 1946, p.13.

with the goals and regulations of the laws of the military government - especially with Proclamation No.3 and the Plan for the Administration of Justice in the US Zone. The leading authority of the administration of justice was the Minister of Justice, and the *Oberlandesgericht* replaced the functions of the *Reichsgericht*[647].

The Reform of German Law at the National Level

The re-opened German courts administered justice according to German law that remained in force unless aspects of the law or individual laws were repealed or suspended through an enactment of the Allied Control Council, the US military government, or a *Land* government[648]. The first Allied Control Council measures in the autumn of 1945 abolished the most notorious examples of National Socialist legislation. The problem of staging a thorough reform of the body of German law was to find all examples of National Socialist legislation that would have to be abolished. This would have required enormous legal research in examining individual German laws for National Socialist content, since the total output of legislative enactments that were published in the official law gazette of the Third *Reich* (the *Reichsgesetzblatt*) alone reached five figures. The initial military government legislative enactments followed the narrow range of legal objectives outlined in the Potsdam Protocol, but would not suffice to bring about a comprehensive reform of the body of German law[649]. Detailed

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[647] *Ibid.*, pp.13-14.

[648] "Proclamation No.2" Art. 2, *Military Government Gazette* Issue A, 1 June 1946, pp.2-3.

[649] Loewenstein, "Law and the Legislative Process in Occupied Germany", pp.736-737.

planning for the denazification of German law only began after the occupation had begun[650], and was implemented in an unsystematic piecemeal manner while the German *Land* governments in the US zone enacted the postwar body of legislation and National Socialist legislation remained in force until it was expressly abolished.

The Control Council Legal Division considered three approaches for reforming the body of German law. The most convenient, or simple, approach was a wholesale repeal of all legislation that was enacted after 30 January 1933. However, this was not practical since this would have removed the technical innovations that would also serve the purposes of the occupation authorities and postwar German governments[651]. For example, the law on juvenile courts of 1943 was maintained, with modifications introduced by the military government in 1945[652]. The denazification of German law was therefore to be limited to eliminating the "political" legislation of the regime, but there remained the question of how it was to be carried out. A second approach was to examine each legislative topic and every enactment within the body of German law for National Socialist content. This approach was accepted by the Control Council, but new difficulties arose with regard to the replacing of the repealed National Socialist legislation or provisions within the affected legislation with new, more appropriate modifications. The basic question was whether

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[650] Z45F 11/5-2/1, Koblenz. RG 260 OMGUS, LD. Folder Title: Legal Division History. "Interview with Dr. Karl Loewenstein."

[651] Loewenstein, "Law and the Legislative Process in Occupied Germany", pp.736-737.

[652] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.

these new modifications were to be drawn from the pre-1933 body of German law, if any existed, or whether new improvements of technique or substance were to be introduced. If new legislation was to be introduced, the next question was which party, the German authorities or the occupation power, would introduce the new legislation? The Control Council Legal Division concluded that it would examine individual laws for possible revision. The Ministries of Justice of the *Länder* in the US zone lacked the required manpower for this task, and there was no single German agency to operate in the legislative field for Germany as a whole. Legal unity in Germany could not be achieved since there was also no machinery for coordinating the legislation of the seventeen German *Länder*[653]. Hence, military government lawyers undertook the task of the denazification of individual legislative subjects to be dealt with either at the Control Council or the zonal military government level. They selected subjects at random without actually determining which subjects were appropriate for either Control Council or zonal legislation[654].

The occupation objective of the denazification of German law was thus dealt with systematically at the national level after the Allied Control Council established a quadripartite German Law Revision Committee, which held its first meeting on 21 March 1946[655]. The purpose of this committee was to carry out the spirit and letter of Control Council Law No.1 and Military Government Law No.1. The committee was responsible for examining German legislation in order to make recommendations to the Legal Division for

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[653] Loewenstein, "Law and the Legislative Process in Occupied Germany", pp.737-738.

[654] *Ibid.*, pp.738-739.

[655] *Ibid.*, p.739.

the elimination of National Socialist legislation, and for the substitution of appropriate provisions where necessary[656]. The new legislative reform programme was extended from the previously formulated occupation policies, which would contribute to the greater Potsdam protocol objectives of decentralisation, democratisation and demilitarisation by stigmatising all provisions relating to the NSDAP in all spheres of the law, with representatives of the four occupation powers each dealing with separate fields of law[657], and to formulate new provisions to compensate for gaps in the legal structure that could be created following the necessary repeals[658]. The US military government enlisted the assistance of the Ministries of Justice of the *Länder* in preparing the denazification and demilitarisation of German legislation in various fields by requesting them to provide lists of National Socialist enactments. These lists were also to include recommendations for repealing legislation or provisions thereof by the Control Council, as well as recommending which should remain in force[659]. In turn, the *Land* Ministers of Justice would form their own legislative

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[656] Elmer Plischke, "Denazification Law and Procedure", *American Journal of International Law*, Vol. 14 (October 1947), p.811.

[657] Lowenstein, "Law in Occupied Germany", pp.739-740.

[658] *Monthly Report of the Military Governor, U.S. Zone*, 20 April 1946, No.9.

[659] Z45F 17/56-3/7 RG 260/OMGUS, Koblenz. Provenance: OMGUS LD, LA Br., Folder Title: LA 91 The German Government, German Courts. Subject: Reform of German Law, APO 633, U.S. Army, 9 August 1946; request presented to Minister of Justice for Greater Hesse. Subject: Reform of German Law, APO 154, U.S. Army, 7 August 1946; request presented to Minister of Justice for Württemberg-Baden. Subject: Reform of German Law, APO 170, U.S. Army, 6 August 1946.

reform committees, which would be joined by law professors in the US zone and German legal experts. The Legal Division of the US headquarters in Berlin retained general direction and supervision of the legislative reform work through the German Law Revision Section of the Legislation Branch that was established by the midsummer of 1946. In practice, this plan proved unworkable since the completion of the legislative reform programme would have taken several years of cooperation among the four occupation powers, whose representatives disagreed over political and social divergences, while their work would be dispersed among several German sub-agencies in the four occupation zones, rather than implemented under the authority of a central Ministry of Justice or a national parliamentary body coordinating legislative reform. This approach was also beyond the capacities of the quadripartite legal staffs, since a thorough examination of German legislation and the replacement of unsuitable provisions required expert knowledge on virtually all aspects of German life[660]. A new plan for legislative reform was developed at the Control Council during 1947, by which the entire body of law was to be analyzed to determine whether individual enactments would require complete repeal outright, or partial abrogation or amendment[661].

Examples of partial abrogation and amendment included hitherto purging the most flagrant National Socialist alterations to the criminal code. Sixteen additional laws and auxiliary enactments of substantive and procedural content and related enactments were abolished under Control Council Law No.11 of 30 January 1946 on the "Repealing of

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[660] *Ibid.*

[661] *Ibid.*, p.740-41.

Certain Provisions of the Criminal Code"[662]. Law No.11 also included repealing provisions pertaining to treason and high treason (sections 80 to 94 of the Criminal Code), which could theoretically later be used by a future German government to prosecute Germans who were presently cooperating with the Allied authorities[663] when a national court would be re-established. Apart from the abolition of National Socialist legislation and its principles under the provisions of Military Government Law No.1, Control Council Proclamation No.3 and Control Council Laws No.1 and No.11, the Criminal Code essentially remained unchanged[664]. The Criminal Law Committee of the Legal Directorate of the Control Council continued its deliberations of the German Criminal Code and its supplementary laws, and sought the opinions of the *Land* governments and of German experts on criminal law to contribute to the reform of German criminal law. The *Land* Ministers of Justice were also to be advised that the Control Council did not intend to undertake a thorough reform of German criminal law, but that further reform was to be limited to provisions that were expressions of National Socialist or militarist ideologies[665]. In turn, the Minister of Justice requested the leading authorities in

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[662] "Law No.11: Repealing of Certain Provisions of the German Criminal Law", 30 January 1946, *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp.55-57.

[663] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No.7.

[664] "Zur Auswirkung der Gesetzgebung der Besatzungsmächte auf das deutsche Strafgesetzbuch", *Süddeutsche Juristenzeitung* (1946), p.121.

[665] Z1/1230, Koblenz. Office of Military Government for Germany (US), Legal Division APO 742, 27 September 1946. "Subject: Revision of German Criminal Code".

the judicial organisation to report experiences with the 1946 Code of Criminal Procedure, and whether any regulations required amendment; whether Control Council Law No.11 had thoroughly eliminated the National Socialist conceptions from criminal law; whether additional regulations that could be considered typically National Socialist should be subject to revision; proposals for detailed reforms of criminal law that were deemed necessary regarding the elimination of the National Socialist body of thought[666]. Control Council Law No.11 was later further supplemented by Control Council Law No.55 of 20 June 1947 on "Repeal of Certain Provisions of Criminal Legislation" that abolished an additional sixteen criminal enactments, or parts thereof[667]. These enactments followed the concentration of the Control Council on repealing statutes of a political nature in the body of criminal law after the initial outright abolition of the most notorious National Socialist statutes under Control Council Law No.1[668].

Whereas German criminal law and procedure had been practically amended beyond recognition under the National Socialist regime, civil law, which governs private relations, proved to be the least affected[669]. German

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[666] 463/929, Wiesbaden. Der Minister der Justiz, 1030 - Ia 1126, 19 June 1946. An den Herrn Oberlandesgerichtspräsidenten in Frankfurt/Main, sämtliche Herren Landesgerichtspräsidenten, Oberstaatsanwälte, Generalstaatsanwalt in Frankfurt/Main, Amtsgerichtspräsidenten in Frankfurt/Main.

[667] "Law No.55: Repeal of Certain Provisions of Criminal Legislation", 20 June 1947, *Official Gazette of the Control Council for Germany* No.16 (31 July 1947), pp.284-286.

[668] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.752.

[669] *Ibid.*, p.735; Bernhard Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung: 1945 bis 1955". *Westdeutschland*

civil law that was in force after the collapse of the National Socialist regime thus remained virtually unchanged[670], apart from the repeal of National Socialist provisions. The Control Council set forth an important reform in the field of civil law by introducing a new Marriage Law under the provisions of Control Council Law No.16 of 1 March 1946[671], in response to receiving a great number of petitions for divorce that were sent to the German courts. This Control Council enactment substantially represented a compromise between the second and third approaches for the denazification of the law, which did not call for outright abolition but required partial reform. For example, Section 55 of the 1938 statute on marriage was retained to allow for divorce on the grounds of incompatibility, which had not been recognised under the Civil Code of 1900. This technical improvement was retained after deleting the National Socialist content[672] that was incompatible with Law No.16 (Art. 79, para. 2)[673]. Divorce cases were by far the most common type of civil case in Hesse[674]. These cases represented approximately eighty-five

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1945-1955: Unterwerfung, Kontrolle, Integration, ed. Ludolf Herbst, (München: R.Oldenbourg Verlag, 1986), p.98.

[670] Mehnert and Schulte, *Deutschland Jahrbuch 1949*, p.88.

[671] "Law No.16: Marriage Law", 1 March 1946, *Official Gazette of the Control Council for Germany* No.4 (28 February 1946), pp.77-94.

[672] Loewenstein, "Law and the Legislative Process in Occupied Germany", fn.50 pp.737-738, p.753.

[673] Max Eisenberg, "Zur Gültigkeit der Durchführungsbestimmungen zum Ehegesetz 38", *Süddeutsche Juristenzeitung* (1946), p.79.

[674] Freeman, *Hesse: A New German State*, p.135.

to ninety percent of civil cases before the *Landgerichte* by November 1946[675]. These cases continued to be entered at a rate of almost 20 a day by the late summer and autumn of 1947[676]. There were 1 831 divorce cases in Hesse per 100 000 people in 1947, in comparison to 48.6 in 1937 within the same approximate area[677] in pre-1945 Germany. Another example of reforming civil law that had been permeated with National Socialist ideology was deleting statutory provisions from the rules of succession. Law No.37 of 30 October 1946 on the "Repeal of Certain Statutory Provisions Relating to Successions"[678] law abrogated Art. 48, para. 2 of the law on testaments of 31 July 1938 (*Reichsgesetzblatt* I 1938, p.973) that had allowed the modification of testaments by the courts in the public interest, or "healthy popular emotions", which in practice meant exercising discrimination against disfavoured individuals[679]. One of the last substantial negative measures for reforming German civil law by removing National Socialist norms was repealing the National Socialist hereditary farm legislation under Control Council Law No.45 of 20 February 1947 on the "Repeal of

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[675] Z45 F 17/56-3/7 RG 260/OMGUS, Koblenz. AJ 015.2, 18 November 1946 HMR/f, Subject: Report on Inspection of German Courts in Greater Hesse from 28 October to 4 November 1946.

[676] Freeman, *Hesse: A New German State*, p.135.

[677] Mehnert and Schulte, *Deutschland-Jahrbuch 1949*, p.88.

[678] "Law No.37: Repeal of Certain Statutory Provisions Relating to Successions", 30 October 1946, *Official Gazette of the Control Council* No.11 (31 October 1946), p.220.

[679] Wilhelm Meiss, "Zur Frage der Weitergeltung des § 48 Abs. 2 des Testamentgesetzes und der Erbregelungsverordnung vom 4. Oktober 1944", *Süddeutsche Juristenzeitung* (1946), p.66.

Legislation on Hereditary Farms and Enactment of Other Provisions Regulating Agricultural Forest Lands"[680]. This measure was followed by further Control Council legislation that permanently abolished the former National Socialist interference in cultural and spiritual life. Two other National Socialist laws were repealed under Control Council Law No.60 of 24 December 1947 on "Repealing Nazi Legislation on Motion Pictures", which abrogated the law of 14 July 1933 establishing a Provisional Film Chamber, and the Motion Pictures Law of 16 February 1934[681] that empowered the Propaganda Ministry with the authority to censor of German and imported motion pictures. The repeal also extended to all the supplementary laws, ordinances and decrees[682]. Control Council Law No.62 on "Repealing certain Laws, Ordinances and Decrees Promulgated by the Nazi Government concerning Churches" of 20 March 1948 repealed two laws and one decree[683] that had given the state greater power over the churches than had ever been exercised in Germany[684]. This was

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[680] Law No.45: Repeal of Legislation on Hereditary Farms and Enactment of other Provisions Regulating Agricultural Forest Lands", 20 February 1947, *Official Gaztte of the Control Council for Germany* No.14 (31 May 1947), pp.256-261.

[681] "Law No.60: Repealing Nazi Legislation on Motion Pictures", 24 December 1947, *Official Gazette of the Control Council for Germany* No.18 (31 January 1948), p.296.

[682] *Monthly Report of the Military Governor, U.S. Zone*, December 1947, No.30.

[683] Law No.62: Repealing certain Laws, Ordinances, and Decrees Promulgated by the Nazi Government concerning Churches", 20 March 1948, *Official Gazette of the Control Council for Germany* No.19 (31 August 1948), p.104.

[684] *Monthly Report of the Military Governor, U.S. Zone*, February 1948, No.32.

the last Control Council measure on the repeal of National Socialist legislation.

Increasing political paralysis hindered the progress of the Control Council[685] toward the settlement of major problems, such as the establishment of economic unity, the creation of a central German government, and measures for the reconstruction of a national German administration of justice, apart from the negative task of repealing National Socialist legislation. It may be argued therefore that any further progress in restoring justice could only be made by the zonal authorities that operated independently at their level of jurisdiction, while the operation of the Control Council as the governing body for Germany as a whole was deteriorating, as demonstrated by the lack of progress in its decision-making. The Control Council completely ceased to function after 20 March 1948 when the Soviet representatives in the Control Council closed its last meeting[686], and did not return to join the delegations of the western occupation powers in further deliberations. Further measures for legislative reform in the US zone would thus be relegated to the US occupation and German authorities at the zonal and the *Land* levels, which took place after the operations of the Control Council were suspended. While the Control Council led the way in eliminating National Socialist influences from German law and issuing the principles for the restoration of justice in Germany, German authorities in the US zone produced their own reforms under the supervision of the US military government.

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[685] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.753; Clay, *Decision in Germany*, pp.154-155.

[686] *Monthly Report of the Military Governor, U.S. Zone*, March 1948, No.33.

Transfer of Responsibility to the German Judicial Organisation

The military government supervised the functions of the German courts in order to prevent misuse or abuse of judicial responsibilities after twelve years of National Socialism. The supervision of the German courts therefore composed an integral part of the administration of justice in the US zone. This was to ensure that: the German courts would confine themselves to their assigned jurisdiction; they would not disseminate propaganda against the military government; they would not apply National Socialist laws and concepts of jurisprudence; the administration of justice would be kept free from any form of discrimination; justice would be administered according to military government laws[687].

At the beginning of the occupation, the German courts in each *Landgericht* district submitted weekly reports on their functions to the military government. This practice was later extended to a monthly basis[688]. In view of the US military government's objective to promote democratic principles in the administration of justice without impairing the independence of the courts, the supervision of the work of the German courts would be exercised most effectively by the Minister of Justice[689]. The Minister of Justice was responsible for preparing monthly reports to the military government that were submitted to the Chief Legal

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[687] Loewenstein, "Reconstruction of the Administration of Justice", pp.438-439.

[688] 460/568, Wiesbaden. 313a E-Bl. 19. Betr.: Wochen und Monatsberichte, 16 February 1946.

[689] Z1/1289, Koblenz. Office of Military Government for Germany (US), Legal Division APO 742, 3 June 1946.

Officer of the *Land* military government office. These reports consolidated all information pertaining to the courts, the offices of the public prosecutor, and the personnel thereof in each *Oberlandesgericht* district[690]. The independence of the German courts was thus limited by the military government, although the military government could not actually interfere in their functions. Direct interference by the military government in a case pending before a German court was possible, but was not "ordinarily" permissible before possible revisions were made under German law. The military government could only exercise its power directly in reversing or revising a decision in the event of a flagrant violation of military government policy. Routine supervision entailed military government legal officers making unannounced visits to German courts to observe the proceedings, regularly inspecting the court registers and case files to determine the accuracy of the monthly reports required from the courts that were submitted to the *Land* Military Government Office by the Minister of Justice, and periodically investigating cases in which the public prosecutor had failed to act in order to determine whether cases were dropped for justifiable reasons[691]. Although the military government machinery at the *Land* level for this purpose was insufficient due to the lack of trained personnel[692], the military government was encouraged by the fact that these "spot checks" at the courts and the offices of the public prosecutors in Hesse did not reveal any

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[690] 460/570, Wiesbaden. US Military Government for Germany; Instructions to Military Government; General. 1 January 1946.

[691] Loewenstein, "Reconstruction of the Administration of Justice", p.439.

[692] Z45F 11/5-2/1, Koblenz. OMGUS, LD. Legal History. Interview with Dr. Karl Loewenstein.

irregularities[693]. The shortcomings of the military government supervision of the German courts were also compensated by the work of the *Land* Ministers of Justice, who were noted to be "first-rate people" and "convinced anti-Nazis"[694]. By the end of January 1946, the restoration of the German judicial organisation was reported to have reached the stage where the *Land* Ministers of Justice could assume direct responsibility for the operation of the German courts. Many types of cases that had been handled by the military government courts to this time would be transferred to the German courts, with the exception of cases involving the illegal possession of firearms[695]. An increasing amount of cases was also transferred from the military government courts when practically all German courts were re-opened. The work of the German courts was also expedited by merging courts and referring cases to them without the prior approval of the *Land* Military Government Headquarters[696]. The reconstructed administration of justice in Hesse was thus brought to function, but there remained military government restrictions.

All ordinary law courts in Hesse were reconstituted by 23 May 1946 with the opening of the *Oberlandesgericht* for Hesse that assumed the appellate jurisdictions of the former pre-war *Oberlandesgerichte* in Darmstadt and Kassel[697]. The

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[693] Freeman, *Hesse: A New German State*, p.135.

[694] Z45F 11/5-2/1, Koblenz. OMGUS, LD. Legal History. "Interview with Dr. Karl Loewenstein."

[695] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No.7.

[696] *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8.

[697] Franz, Hofmann, Schaab, *Gerichtorganisation*, p.184.

supreme court in the *Land* that would hear appeals from the *Landgerichte* in criminal and civil cases was thus re-opened[698]. However, there remained restrictions on the normal extent of the responsibility of the *Land* judicial organisation since the US military government maintained supreme judicial authority under occupation law. The complete restoration of the *Land* judicial organisation was followed by measures regulating the operation of military government courts as the jurisdictional limitations of the German courts were gradually extended, thus establishing greater judicial responsibility while the German judicial organisation operated alongside the military government courts. The first jurisdictional limitations on the operation of the German courts were imposed under Military Government Law No.2, which forbade German courts to deal with any case that involved offences "against any order of the Allied forces, or any enactment of the US military government, or involving the construction or validity of any such order or enactment."[699] The prosecution of violations of Military Government laws, regulations and orders was brought before military government courts, or before German courts whenever it was authorised by the Theater Commander[700].

The German courts were thus responsible for adhering to the terms of military government enactments and to apply the law to the extent of their jurisdiction under occupation law. However, German judges were reluctant to apply military

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[698] "Verordnung über die Errichtung eines Oberlandesgerichts für Groß-Hessen vom 23. Mai 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.137-138.

[699] "Law No.2: German Courts", Art. 6, para. 10(d), *Military Government Gazette* Issue A, 1 June 1946, p.9.

[700] Nobleman, "Administration of Justice in the United States Zone of Germany", p.77.

government or Control Council legislation, since they believed they had no authority to do so under a literal interpretation of Article VI(10) of Military Government Law No.2, which stated that German courts could not exercise jurisdiction over certain classes of cases unless they were expressly authorised to do so by the military government[701].

Problems regarding the administration and supervision of the German judicial system were addressed by the enactment of additional military government legislation[702] regulating the relation between the military government courts and the German judicial organisation. The first permitted overlapping of the jurisdictions of the two judicial organisations was allowing for UN nationals to serve as witnesses testifying in German courts, and thus providing evidence for a trial as in any normally functioning court. Court cases involving witnesses who were US nationals previously could only be heard in military government courts, even if the offence was being tried under German law. Regulation No.2 under Military Government Law No.2 of 5 July 1946 on "Testimony in German Courts by Persons Subject to United States Military Law and by Persons Associated with the United States Office of Military Government" allowed for United Nations nationals, and military and civilian personnel serving with the US armed forces or associated with the military government, to appear as witnesses in German courts to testify at a trial upon the written request of the president of a German court to the appropriate military government or commanding officer. The approval was subject to the conditions that: the testimony did not affect a matter that was classified or prejudicial to the interests of the military government or of the US

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701 Loewenstein, "Reconstruction of the Administration of Justice", p.423.

702 Nobleman, "Administration of Justice", p.96.

armed forces; the evidence of the testimony sought, such as copies of official papers or reports of inquiries, would not be requested or furnished in connection with the testimony. A German court also could not issue subpoenas requiring the attendance of witnesses defined by this regulation, or hold a US witness in contempt of court, either military or civilian, but could make a written request to the superior officer that disciplinary action be taken[703] against military personnel.

Restoring the everyday functions of the German judicial organisation continued by widening its jurisdiction. This included dealing with questions regarding the jurisdiction of the German courts, such as the exclusion of German courts from "construing", i.e. interpreting any military government enactment, and thereby falling under military government jurisdiction, as according to Art. 6 of Military Government Law No.2, and denying the German courts exercising jurisdiction in all cases involving a United Nations national[704]. These questions were addressed by Amendment No.2 to Military Government Law No.2 of 9 September 1946[705]. This new amendment was to harmonise the provisions of Art. 6 of Military Government Law No.2 and of Art. 3 of Control

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[703] "Regulation No. 2 under Military Government Law No.2: Testimony in German Courts by Persons Subject to United States Military Law and by Persons Associated with the United States Office of Military Government", *Military Government Gazette, Germany, United States Zone*, Issue B, 1 December 1946, pp.3-4; *Monthly Report of the Military Governor, U.S. Zone*, 20 August 1946, No.13.

[704] Loewenstein, "Reconstruction of the Administration of Justice", pp.421-422.

[705] "Amendment No. 2 to Military Government Law No. 2: Limitations Upon the Jurisdiction of German Courts", *Military Government Gazette, Germany, United States Zone*, Issue B, 1 December 1946, pp.1-3.

Council Law No.4, both of which established limitations on the jurisdiction of German courts. However, some of the terms of Military Government Law No.2 were not consistent with the Control Council Law, and some of its provisions were obsolete. The purpose of this amendment was to embody modifications of policy; consolidate and review certain instructions that were issued by the military government regarding the jurisdiction of the German courts; repeal Amendment No.1 to Military Government Law No.2 of 2 March 1946[706]. German courts could be empowered with assuming jurisdiction in a range of cases when expressly authorized to do so "by Control Council or Military Government law, ordinance, or regulation, or by order of the Military Government Director of the appropriate *Land*."[707] This measure provided for the possibility of the German courts to apply military government law, as well as opening the way for the transfer of cases from the US military government to German courts. Subject to the prior authorisation by the appropriate authority, the German courts could hear cases involving the validity of orders issued by the Allied forces, or Control Council or Military Government enactments; cases over which jurisdiction was assumed by a military government court, or were withdrawn from the jurisdiction of the German courts; monetary claims against a German government or any legal entity in existence under public law[708]. The German courts could assume jurisdiction in criminal cases that involved any member of the United

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[706] Z45F 17/56-3/7 RG 260/OMGUS, Koblenz. Office of Military Government for Germany (US), Office of the Military Governor, APO 742, AG 010 (LD), 2 October 1946.

[707] Art. 1, "Amendment No.2 to Military Government Law No.2: Limitations Upon the Jurisdiction of German Courts", *Military Government Gazette* Issue B, 1 December 1946, p.1.

[708] *Ibid.*, p.2.

Nations, UN armed forces, individuals serving with them, individuals accompanying them, or UN nationals; UN nationals with the status of displaced persons; offences committed against the citizens of Allied nations or their property; attempts directed toward re-establishing the National Socialist regime or the activity of National Socialist organisations[709]. The military government courts maintained exclusive civil jurisdiction over cases involving disputes arising from the ownership or operation of automobiles by US nationals in the US zone[710], while civil cases that could be transferred to the German courts included those affecting any member of the United Nations; the UN armed forces; individuals serving with these forces or the Allied administration of Germany, or individuals accompanying them; cases *against* UN nationals who did not hold the status of one of the aforementioned categories of persons[711].

A considerable number of cases brought before Military Government and German courts at this time involved displaced persons in Germany. Most of them were United Nations nationals, and therefore the legal status of these cases needed to be clarified. The provisions of this amendment set forth that the German courts did not have the legal authority to try these cases, unless the military government issued its expressed approval. Cases involving United Nations nationals were to be exempted from the jurisdiction

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[709] *Ibid.*, p.2.

[710] Military Government Ordinance No.6 of 21 May 1946 originally set forth the terms for the composition and functions of a military government court exercising the sole jurisdiction in such cases. *Monthly Report of the Military Governor, U.S. Zone*, 20 June 1946, No.11; "Ordinance No.6: Military Government Court for Civil Actions", *Military Government Gazette*, Issue A, 1 June 1946, pp.73-78 *passim*.

[711] Art. 1, "Amendment No.2 to Military Government Law No.2: Limitations Upon the Jurisdiction of German Courts", *Military Government Gazette* Issue B, 1 December 1946, p.1.

of the German courts if the case involved a party in a criminal or civil case who was serving with the military forces of the United Nations, held an official position or was performing official functions in the Allied administration of Germany, or was a dependent accompanying such an individual[712]. On the other hand, German court jurisdiction was extended to civil cases involving all other United Nations nationals and stateless persons who were considered displaced persons[713]. Although the principle of allowing United Nations nationals to appear before the courts of the conquered nation was inconsistent with the principle of the extraterritoriality of the occupying force, allowing such cases to be handled by the German courts followed the exigencies of the situation[714] - to help stem litigation coming before military government courts by transferring them to the German courts. The German courts also acquired the expressed authorisation to apply the Control Council Law No.16 of 20 February 1946, the "Marriage Law". The provisions and interpretation of the first amendment of Military Government Law No.2 had specified that German courts could not exercise jurisdiction in cases under Control Council Law No.16 in which a UN national was a party[715]. This first amendment was hereby repealed[716]. The

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[712] Neidhard, "Die Gerichtsbarkeit der deutschen Gerichte und der Besatzungsgerichte in der amerikanischen Zone", pp.183-184.

[713] Z1/1255 Koblenz. "Betr.: Erweiterte deutsche Gerichtsbarkeit", 13. Januar 1947.

[714] Loewenstein, "Reconstruction of the Administration of Justice", p.425.

[715] "Amendment No. 1 to Military Government Law No. 2", *Military Government Gazette, Germany, United States Zone*, Issue A, 1 June 1946, p.10.

[716] Art. 2, "Amendment No.2 to Military Government Law No.2: Limitations Upon the Jurisdiction of German Courts", *Military Government Gazette* Issue B, 1 December 1946, p.2.

imposition of death sentences by German courts required the consent of the *Land* Military Government Director or the Deputy Military Governor of the US zone, unless the execution was expressly prohibited by the US military government within thirty days after the sentence was pronounced[717].

This amendment to Military Government Law No.2 made it possible for German criminal courts to adjudicate over members of the Allied military forces, which theoretically extended German court jurisdiction into the sphere of Allied jurisdiction. According to Control Council Law No.4 however, the German courts could not exercise criminal jurisdiction in cases that were committed against the Allied occupation forces (Art. 3a), or in criminal offences involving military occupation personnel or UN citizens (Art. 3c). On the other hand, German courts could adjudicate in such cases if the nature of the offence did not affect the security of the Allied forces (Art. 3e). The withdrawal of competence in cases involving UN nationals from the jurisdiction of the German courts, including those considered displaced persons, was considerably wider[718]. The limitation of German court jurisdiction was considerably wider for criminal than civil cases, since the removal of civil cases from their jurisdiction was not as specific as for criminal cases[719]. In

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[717] Art. 3, "Amendment No.2 to Military Government Law No.2: Limitations Upon the Jurisdiction of German Courts", *Military Government Gazette* Issue B, 1 December 1946, pp.2-3; *Monthly Report of the Military Governor, U.S. Zone*, 20 September 1946, No.15.

[718] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", p.15.

[719] *Ibid.*, pp.18-19.

short, the second amendment to Military Government Law No.2 provided for the US military government retaining jurisdiction over cases involving UN nationals, unless these cases were allowed to be heard in a German court, as well as all cases involving UN nationals who were considered displaced persons, and criminal matters concerning the direct interests of the US military forces. Military Government Ordinance No.8 on military tribunals for security violations of 10 November 1946 retained the jurisdiction of the military government in protecting these direct interests, stating that individuals who committed acts prejudicial to the security or interests of the US Forces would be tried by a military court appointed by the European Theatre Commander. This Ordinance would not affect the application of Military Government Ordinances 1 and 2, which remained in force[720]. Cases involving theft or similar offences committed by German civilians in the employ of the US Forces were to be brought to trial before military government courts since they directly affected US interests, even though the German courts could properly exercise jurisdiction over such cases[721]. German judges were to respect and concur with the letter and spirit of military government laws and ordinances. They were also responsible for determining whether the German courts or the military government courts could exercise jurisdiction over cases upon examining the status of the affected parties in each case[722].

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[720] 463/1118 Wiesbaden. 9180 - Ia 2283. U.S. Zone Ordinance No. 8: Military Tribunal for Security Violations, 29 November 1946.

[721] *Monthly Report of the Military Governor, U.S. Zone*, 30 November 1946, No.17.

[722] 463/929, Wiesbaden. 3120 - IIa 881, Betr.: "Die Zuständigkeit der deutschen Gerichte", 17 June 1947.

The limitations on the jurisdiction of the German judicial organisations were not to affect the work of the judiciary in pronouncing judgments. The US military government set forth that the independence of the German judiciary was to be fostered while military government controls of the German administration of justice were in place. The exercise of these controls was to be limited to a minimum extent that was consistent with protecting the occupation forces, accomplishing the aims of the occupation, as well as eliminating undue US military government interference in the German administration of justice. The US military governor ordered that these objectives were charged to the *Land* military government office. The inspection of records, registers, calendars and files of the *Landgerichte*, *Amtsgerichte* and other subordinate courts would only be done by military government legal officers upon the request of or after clearance with the *Land* military government office. Verbal or written instructions to judges, prosecutors and other judicial personnel, and the removal of cases from German to military government courts required prior clearance by the *Land* military government office. Suspending any official in the German administration of justice required the prior authorisation of the *Land* military government office. Any supervisory action concerning the German courts could not be taken by Germans or displaced persons employed by the US military government, except by order of and in the presence of military government officers. In the event that action was urgently required to prevent a flagrant violation of military government policies, measures would be taken by subordinate offices of the military government. A report would be immediately forwarded to the *Land* military government office[723].

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[723] Z45F 17/56-3/7, Koblenz. RG 260/OMGUS, OMGUS LD, LA Br.. LA 91, The German Government, the German Courts, 015 (AG), 20 November 1946, Subject: Supervision of German Courts.

In keeping with the safeguarding of the interests of the occupation forces, German judges and prosecutors were instructed to report cases of a political nature or involving the interests of the military government. Such notification was initially left to the discretion of the individual German official, which was more closely regulated after March 1947 when new regulations defined categories of such cases more precisely, such as cases involving United Nations nationals and offences against Control Council and Military Government laws. These cases were to be reported to the Chief Legal Officer of the *Land*, and thus served the purpose of improving the information about the work of the German courts as reported in the monthly court reports submitted by the Minister of Justice to the *Land* Military Government Office while reducing the level of direct supervisory activity by the military government[724]. However, the machinery of supervision was undermined by a shortage of American lawyers who were familiar with German law and procedure. Only three military government officials in Greater Hesse, one of whom was not familiar with German law and the language, were charged with supervising about one hundred courts employing about four hundred judicial personnel who were working through about 12 000 criminal and 25 000 civil cases per month. In practice, this meant that supervisory control was limited to field inspectors visiting every *Amtsgericht* twice a year and every *Landgericht* three times a year at irregular intervals, while the inspection of

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[724] Loewenstein, "Reconstruction of the Administration of Justice", pp.438-440.

files and records was limited to irregular "spot-checking". Barring the official limitations on the jurisdiction of the German courts and the examination of the court reports, these courts maintained *de facto* independence in their everyday operations since they were not greatly affected by the military government power of court supervision[725]. The responsibility for enforcing an impartial and fair administration of justice thus fell to the Minister of Justice as the chief administrator of the *Land* judicial organisation[726].

Whereas the military government and the *Land* judicial organisation held the responsibility of ensuring the standards of the postwar administration of justice, this was further reinforced through the involvement of wider public scrutiny. Public opinion with the benefit of a free press could act as a safeguard against abuses of judicial authority[727]. Free public opinion could serve as an instrument of democratic control in a sovereign state, controlling all public affairs, just as control of the government is exercised by parliament, and control of the state administration is exercised by the judiciary[728].

A permanent safeguard against potential abuses of the application of the law was introduced with the restoration of jury courts, in which professional judges determined a sentence in coordination with lay jurors drawn from the public who would evaluate cases with the equivalent power of the magistrate on the judicial bench along with the judges

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[725] *Ibid.*, p.440.

[726] *Ibid.*, pp.440-441.

[727] *Ibid.*, p.440.

[728] 1126/33, Wiesbaden. "Radio-Rede [Geiler] über Deutschland als Rechtsstaat" (n.d.).

presiding over the case. The Minister of Justice for Hesse issued ordinances for the future locations of the jury courts throughout Hesse on 22 October 1946[729] and 25 April 1947[730]. On 17 April 1947, an ordinance on the creation of these courts set forth the provisions for their composition and functions based on the appropriate articles of the criminal code. Jury courts were to be formed at the *Amtsgerichte* (*Schöffengerichte*) consisting of one judge and two jurors, and the *Landgerichte* (*Schwurgerichte*) consisting of two judges, including the presiding judge, and seven jurors. The decisions pronounced by these courts could be appealed to the *Oberlandesgericht*. The proceedings of these courts were to take place as they would without the jury. The *Schwurgerichte* were solely responsible for cases involving: wilful criminal actions that resulted in death, robbery, extortion, and perjury, while the *Schöffengerichte* dealt with criminal cases that were presented to the *Amtsgerichte*, if the action could warrant imprisonment in a prison or a penitentiary for more than a year, as well as other cases, such as those involving negligent action or slander. The jurors in the jury courts at both levels were to be selected by political parties, trade unions, and the mayors of the local districts in order for the jurors to be appropriately representative of the local population and professions. It was also prescribed that no more than three-fourths of either of the two genders could be represented[731]. Some of the *Schöffengerichte* and *Schwurgerichte* in Hesse

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[729] 458/1014, Wiesbaden. 3222 - II 511/45, Runderlaß Betr.: "Die Bildung von Schöffengerichtsbezirken", 22 October 1946.

[730] 458/1015, Wiesbaden. 3220 - Ia 548, Betr.: "Bildung von Schöffengerichten, Erlaß vom 22.10.1946", 25 April 1947.

[731] "Anordnung über die Bildung von Schöffengerichten und Schwurgerichten vom 17. April 1947", *Gesetz- und Verordnungsblatt für das Land Hessen* (1947), pp.49-51.

were established on 1 November 1947, and other jury courts in Hesse were to be re-established on 1 January 1948[732]. It was argued that the participation of laymen in judicial proceedings, which were eliminated in the National Socialist regime, hereafter allowed for a decisive influence in the administration of criminal justice[733].

In the event of a flagrant violation of military government policies by a German court, the military government could intervene directly by either reversing or revising the court judgment. In practice, such intervention in the judgments of German courts seldom occurred in the US zone[734]. An example of an intervention by the military government took place in the French zone, where Heinrich Tillesen was tried for the murder of the Centre Party Reichstag deputy Matthias Erzberger in 1921. Tillesen had been acquitted under an amnesty declared by Hitler on 21 March 1933, and the *Landgericht* in Offenburg upheld this acquittal on 29 November 1946[735]. Although the basis for the amnesty had been repealed by Control Council Law No.1[736], the court defended its decision on the grounds that the

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[732] 458/1015, Wiesbaden. Betr.: "Bildung der Schöffengerichte und Schwurgerichte", 30 October 1947.

[733] Z1/1282, Koblenz. "Wieder Geschorene und Schöffen", Nr. 46588, *Frankfurter Rundschau* Nr.132, 11.11.47.

[734] *Das Besatzungsregime auf dem Gebiet der Rechtspflege*, pp.28-29; Heinrich Röhreke, "Die Besatzungsgewalt auf den Gebiete der Rechtspflege", p.44.

[735] Mehnert and Schulte, *Deutschland-Jahrbuch 1949*, p.104.

[736] Martin Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung': Aspekte der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit 1945-1949?" *Vierteljahrshefte für Zeitgeschichte* Vol. 29 (1981), pp.497-499.

perpetrator had committed the murder out of "excessive patriotism". The French occupation authorities quashed the verdict, removed the judge from office, rearrested Tillesen, and referred the case for a new trial by the *Landgericht* at Konstanz[737], which sentenced Tillesen to fifteen years' imprisonment[738]. The case may be made that the judge in the first trial was insensitive to postwar standards for the administration of justice, and it was argued that this example of a miscarriage of justice was possibly a consequence of the tradition of legal positivism in the German legal environment.

According to legal positivism, the law is a manifestation of the authority of the state, recorded in codes and statutes, that is interpreted by the judiciary in separate cases, in contrast to law based on a system of precedents, as in common law[739]. The law is interpreted solely according to how it is recorded, without questioning the validity of its intrinsic justice by consciously reasoning with the values of democracy and morality[740]. Legal positivism allegedly made the German judiciary defenceless against laws containing arbitrary or illegal content, for judges considered themselves bound by the principle "law is law", just as "orders are orders" for soldiers. This meant that the judge served the value of upholding the law of the

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[737] Loewenstein, "Reconstruction of the Administration of Justice", p.434-435.

[738] Wolfgang Benz, "Die Entnazifizierung der Richter", *Justizalltag im Dritten Reich*, eds. Bernhard Diestelkamp and Michael Stolleis (Frankfurt-am-Main: Fischer Taschenbuch Verlag, 1988), p.114.

[739] Noakes and Pridham, *Documents on Nazism*, pp.226-227.

[740] Loewenstein, "Justice", pp.252-254.

state, without upholding the principles of justice[741], or discerning the discrepancy between positive law promulgated by the legislature of the state and the principles of "natural law" that is not set forth in definitive provisions holding legal force. Although judges are bound to the laws that are enacted by the executive authority of the state, their obedience to the law is not be compared to soldiers subject to military orders. A judge is obliged to decide what is just. The correct decision is to be made within the context of the standards of the law and justice. A judge who applied laws that contravened the principles of justice also contravened the responsibilities of judicial office, and served merely as an extension of the executive authority[742]. This indictment applied especially to the judges who took part in the trials conducted by the *Sondergerichte* and the *Volksgerichtshof*, as well as the judges of the ordinary law courts who protected their personal interests by conforming to the standards of the National Socialist administration of justice.

After the end of the Second World War, German courts began to deviate from the trend of employing legal positivism by considering the concept of natural law in making their judgments[743]. This method of reasoning by a law court was applied by the Wiesbaden *Amtsgericht* in a judgment pronounced on 13 November 1945. The plaintiff in this case

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[741] Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", *Süddeutsche Juristenzeitung* (1946), pp.105, 107.

[742] Helmut Coing, "Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze", *Süddeutsche Juristenzeitung* (1946), pp.61-62.

[743] Edgar Bodenheimer, "Significant Developments in German Legal Philosophy since 1945", *American Journal of Comparative Law* Vol. 3 (1954), pp.380,387.

demanded the restitution of property that was expropriated from her parents, who had perished in a concentration camp. The *Amtsgericht* ruled that a restitution complaint was only justifiable if the plaintiff and other related legal heirs were the owners of the property. In this case, this property was formerly owned by Jews, and was confiscated under the force of National Socialist legislation. Laws dealing with property on the basis of race were presently abolished under military government legislation, but there was no defined approach for dealing with the consequences of such laws that were previously in force. The court therefore deliberated that there were rights of individuals according to the lessons of natural law, which the state cannot rescind through its legislation. This includes the right to private property. Hence, the laws declaring Jewish property forfeit contravened natural law, and were therefore invalid, or unjust, from the time they were enacted. It followed that the finance office that had held this property was not authorised to dispose of expropriated Jewish property, since it did not hold the property with the consent of the rightful owner from whom it was expropriated[744].

All German law courts were entrusted with administering the law independently. The task of the military government overseeing the restoration of the postwar German judicial organisation and the German courts of appeal served the function of the highest legal authority holding the power to revise dubious court decisions, and ensuring the appropriate application of the law. The function of hearing appeals from the lower courts became increasingly important in the occupation, since the re-opened German courts in the US zone passed conspicuously mild sentences that did not reflect the objective meaning and purpose of sentencing in accordance

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[744] Heinz Kleine, "Wiedergutmachungsrecht", *Süddeutsche Juristenzeitung* (1946), p.36.

with the facts of the case. This recurring problem, which was said to have reached crisis proportions, was considered a symptom of the reaction to the past, when excessively severe penalties were imposed by the courts of the National Socialist regime[745]. Whereas the military government could intervene in decisions of the German courts to prevent violations of Control Council or military government enactments or the principles of a democratic administration of justice, the German appeals courts decided the final decisions considering errors in the application of the law or the use of judicial discretion[746].

Greater responsibility conferred upon the *Land* judicial organisation

The restoration of constitutional government led to the *Land* governments and the judicial organisations acquiring greater freedom of action. Indirect government by the US military government ended following the promulgation of US Military Government Proclamation No.4[747] of 1 March 1947. This new Proclamation superseded Proclamation No.2 that had initially established the *Länder* in view of the changed conditions and set forth the new US occupation aims at this stage of the military occupation. Proclamation No.4 stated that complete legislative, executive and judicial power existed in the *Länder* of the US occupation zone exercised by the *Länder* governments in accordance with the *Land*

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[745] Adolf Arnt, "Das Strafmaß", *Süddeutsche Juristenzeitung* (1946), p.30.

[746] 8/216-1/12, RG OMGUS 260, Wiesbaden. APO 633. [letter to] Mr. ----- ----- -----, 15 June 1949.

[747] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.727.

constitutions. The authority of the *Land* governments as defined in the *Land* constitutions remained subject to certain reservations: international agreements involving the US, Allied Control Council legislation, and powers reserved to the US military government in order to execute basic policies of the occupation[748], such as disallowing the *Land* legislatures from dealing with subjects concerning Germany as a whole[749]. The approval and adoption of the *Land* constitution thus extended the jurisdiction of the legislative power of the *Land* government, which was given official sanction under Proclamation No.4[750]. Proclamation No.2 had initially defined the power of the military government and the Minister-President acting under its authority. The power of approving and promulgating legislation was conferred upon the *Land* Minister-President until democratic institutions were established, while the legislative, executive and judicial powers of each *Land* were subject to the authority of the military government[751]. Military government jurisdiction was substantially reduced by Proclamation No.4 to three fields: international agreements to which the US was a party, four-power legislation, and powers reserved to the US military government to implement the basic policies of the occupation, which continued unchanged from Proclamation

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[748] *Germany 1947-1949: The Story in Documents* (Washington D.C.: U.S. Government Printing Office, 1950), pp.157-158.

[749] Arndt, "Status and Development of Constitutional Law in Germany", p.6.

[750] *Monthly Report of the Military Governor, U.S. Zone*, 31 March 1947, No.21; Z1/218 Koblenz. Office of the Military Governor APO 742. "Subject: Revision of MGR Title 5, Section B, 'German Legislation'", AG 010.6 (LD), 1 March 1947.

[751] "Proclamation No.2", Art. 3, *Military Government Gazette, Germany, United States Zone* Issue A 1 June 1946, p.3

No.2[752]. New legislation adopted by the *Länderrat* hereafter would be subject to the prior examination of a Military Government Review Board established under General Order No.30 of 4 April 1947, in order to ensure compliance with Proclamation No.4[753]. Proclamation No.4 also led to greater autonomy for the German administration of justice. The military government exercised its control over the German courts through supervision, guidance and regular inspections to ensure that the administration of justice was carried out in accordance with Allied occupation policy[754].

Conferring greater responsibility to the *Land* legislative and judicial authorities in the US occupation zone was fully endorsed by the new Joint Chiefs of Staff Directive of 11 July 1947. This new policy directive superseded JCS 1067 that had set forth policies for the initial post-defeat period, and marked the second phase of the reconstruction by reflecting the development of the new situation in Germany since 1945, instructing the military government to take measures to establish stable political and economic conditions in Germany that would contribute to European recovery[755]. The directive reaffirmed the objective of establishing democracy in Germany, and recognised the re-establishment of German self-government and German governmental agencies assuming direct responsibility with

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[752] *Monthly Report of the Military Governor, U.S. Zone*, 31 March 1947, No.21.

[753] *Monthly Report of the Military Governor, U.S. Zone*, 30 April 1947, No.22.

[754] Z45F 11/5-2/1, Koblenz. OMGUS, LD. Legal Division History.

[755] "Military Government of Germany: Text of Directive to Commander-in-Chief of U.S. Forces of Occupation, Regarding the Military Government of Germany, 11 July 1947", *U.S. Department of State Bulletin*, Vol. 17 (1947), p.186.

legislative, executive and judicial powers, while maintaining military security and the purposes of the occupation. All powers and political life were to be established in the *Länder* before a central German government was formed[756]. The supervision of the German courts was to be maintained in order to enforce the compliance with the principles expressed in Proclamation No.3, and the provisions of Control Council and US military government legislation. The independence of the restored German judiciary was to be fostered by allowing the courts the freedom to interpret and apply the law, and by reducing the military government control measures to "the minimum consistent with the accomplishment of the aims of the occupation."[757]

No mention of reform of the law was made in this new Directive, since it may have been believed that either the task was considered complete, or that it was no longer important, or that legislative reform was no longer considered a function of the US military government[758]. The power of the military government to disapprove German legislation was maintained if such legislation conflicted with the legislation or policies of the military government[759]. A further concession to German self-government was made in relation to this directive when the validity of

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[756] "Third Session of the Council of Foreign Ministers, New York City, November 4 - December 12: Preliminary Plans for Peace Settlements with Germany and Austria", *U.S. Department of State Bulletin* Vol. 16 (1947), p.186

[757] *Ibid.*, p.188.

[758] Loewenstein, "Law and the Legislative Process in Occupied Germany", pp.731-732.

[759] "Preliminary Plans for Peace Settlements with Germany and Austria", *U.S. Department of State Bulletin* Vol. 16 (1947), p.188.

Land legislation was no longer dependent on the approval by the military government[760]. The principle of the extraterritoriality of the military government was maintained while allowing for a progressive number of cases to be handled by German courts, stating: "You may extend the jurisdiction of the German courts to all cases which do not involve the interests of Military Government or persons under the protective care of Military Government"[761]. This would also serve to reduce the case load of the military government courts by transferring them to the German courts.

Although an increase in criminal cases and a shortage of prosecutors led to a large backlog of cases, the German courts in Hesse accelerated their work through the dockets by December 1946. The courts disposed of the current monthly scheduled cases, and began to work through the backlog of criminal cases for the first time since the beginning of the occupation[762]. Correspondingly, the greatest reduction of cases handled by the military government courts was in Hesse, where the military government courts tried 5457 cases in July 1947, then 1144 cases in September 1947[763]. The improvement of the performance of the German courts in Hesse was particularly impressive by September 1947, when the courts dealt with a twenty-five percent increase of

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[760] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.1015.

[761] "Preliminary Plans for Peace Settlements with Germany and Austria", *U.S. Department of State Bulletin* Vol. 16 (1947), p.188.

[762] Freeman, *Hesse: A New German State*, p.135; RG 260 OMGUS, 8/188-2/5, Wiesbaden. APO 633. "Weekly Summary Report of Legal Division from 30 June 1946 to 28 December 1946", 20 December 1946.

[763] *Monthly Report of the Military Governor, U.S. Zone*, 30 September 1947, No.27.

additional cases over the preceding month, and a hundred percent increase over September 1946. The acceleration of the denazification of jurists and the employment of refugee lawyers made more personnel available, which consequently enabled the courts to plan their cases more expeditiously[764]. Meanwhile, the rate of offences committed in Hesse to be tried commensurated to the increasing number of cases of theft and black market activity[765], and groups of minor cases that continued to be transferred from the US military government to the German courts. On 7 April 1947, the German courts were authorised to exercise jurisdiction over cases involving offences against Control Council Law No. 50 on "Punishment of the Theft of Unlawful Use of Rationed Foodstuffs, Goods and Rationing Documents", committed by individuals who were not exempted from German court jurisdiction under Section 10(a) of Military Government Law No.2[766]. An administrative directive to the German administration of justice on 26 July 1947 authorised the transfer of additional categories of minor cases that had hitherto been in the jurisdiction of the military government courts[767]. These cases included theft or illegal possession of property belonging to a UN national or government under the value of twenty-five dollars, illegally crossing the

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[764] *Ibid.*

[765] *Monthly Report of the Military Governor, U.S. Zone*, 1 October 1947, No.28.

[766] 17/211-2/3, RG260 OMGUS, Wiesbaden. "Military Government, Germany; Regulation No.3 Under Military Government Law No.2, as amended".

[767] 463/929, Wiesbaden. 3120 - IIIa 1992. Betr.: "Deutsche Gerichtsbarkeit bei Verfehlungen gegen die Kennkartenpflicht, bei unerlaubten Grenzübertritt und bei bestimmten Fällen des Diebstahls zum Nachteil der Vereinten Nationen", 22 August 1947.

border of Germany or the US zone by individuals or of property, and failing to produce proper identification. The German courts could not exercise jurisdiction if the affected individuals in these cases fell outside German court jurisdiction, as was set forth in Art. 6, para. 10 of Military Government Law No.2. They were to transfer these cases to a military government court if such cases affected the security of the Allied military forces or the interests of the military government. The German courts were otherwise to apply either military government law, such as Military Government Law No.161 regarding cases of unauthorised movement of persons or property across the boundaries of Germany or the US zone, or German law in trying these cases[768]. By the end of 1947, the German courts handled most of the cases involving unauthorised border crossings, and theft or illegal possession of US property under a certain value[769].

German court jurisdiction in criminal and civil cases arising from disputes dealing with Rhine navigation was re[established under Military Government Law No.9 and Military Government Ordinance No.16 of 11 July 1947. Law No.9 designated German courts in Mannheim and Wiesbaden as having jurisdiction over shipping in Württemberg-Baden and Hesse respectively, handling both civil and criminal cases. The functions, jurisdiction and procedure of these courts were established in accordance with the revised Rhine Navigation Act of 1868, the Convention of Mannheim, as it

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[768] 463/929, Wiesbaden. Betr.: "Zuständigkeit deutsche Gerichte", 26 July 1947; 17/211-2/3; RG 260/OMGUS, Wiesbaden. Subject: "Jurisdiction of German Courts", 26 July 1947; "Allgemeine Ermächtigung gemäß Art. VI, Abs. 10 des Militärregierungsgesetzes Nr. 2", *Gesetz- und Verordnungsblatt für das Land Hessen* (1947), pp.99-100.

[769] Freeman, *Hesse: A New German State*, p.137.

was amended prior to 14 November 1936, specifically repealing the National Socialist law of 30 January 1937 concerning procedure in Inland Navigation cases. Depending on the location of the court of first instance, appeals could be conveyed to the Karlsruhe Branch of the *Oberlandesgericht* in Stuttgart or the *Oberlandesgericht* of Hesse in Frankfurt-am-Main. Ordinance No.16 provided for the establishment of military government courts in Mannheim and Wiesbaden to hear cases involving occupation interests or UN personnel[770]. The *Amtsgericht* in Wiesbaden was designated as the Rhine navigation court for Hesse. The functions and jurisdiction of this court were determined by Law No. 9 and the existing German legislation governing such cases[771]. The jurisdiction of military government courts regarding US dependents and UN nationals in Germany was also clarified under Amendment No.2 to Ordinance No.2 (Military Government Courts), effective 22 July 1947, confirming that the military government courts would deal with violations of army circulars, rulings and orders, rather than courts-martial. Amendment No.1 to Ordinance No.1 (Crimes and Offences) established the maximum penalties for such violations at no more than five years' imprisonment or a fine more than RM 10 000, or a dollar equivalent. The penalty was otherwise not to be more severe than a court-martial sentence for similar offences[772]. Due to the heavy case-load in the military government courts and the shortage of experienced military government court personnel to act as

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[770] *Monthly Report of the Military Governor, U.S. Zone*, 31 July 1947, No.25.

[771] 458/1015, Wiesbaden. 3206 - Ia 2147. Betr.: "Rheinschiffahrtsgerichte", 5 September 1947.

[772] *Monthly Report of the Military Governor, U.S. Zone*, 31 July 1947, No.25.

judges and prosecutors, a directive of 16 July 1947 ordered a twenty-five percent reduction of the number of cases handled monthly by 1 November 1947. This would be accomplished by turning cases of a minor nature over to the German courts, and by dismissing charges when the offence was considered trivial or inconsequential or when the evidence to obtain a conviction was clearly insufficient[773]. Transferring certain types of cases to the German courts, which proved capable to handle an increasingly larger case-load, and dropping trivial cases resulted in a forty percent decrease in the number of cases in October 1947 in comparison to the number of cases tried by the summary courts in June 1947[774].

The case-load of the military government courts continued to decrease in early 1948, largely due to the transfer of cases to the German courts[775]. On 23 January 1948, the jurisdiction of the German courts was extended to deal with cases involving the theft or illegal possession of property of UN nationals or governments valued at up to one hundred dollars[776]. The German courts performed satisfactorily in the trial of such cases, and further minor cases were transferred to the German courts to further relieve the case-load burden on the military government courts[777]. On 27 April 1948, the German courts in Hesse were

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[773] *Ibid.*

[774] *Monthly Report of the Military Governor, U.S. Zone,* October 1947, No.28.

[775] *Monthly Report of the Military Governor, U.S. Zone,* February 1948, No.32.

[776] 463/929, Wiesbaden. 3120 - IVa 257. Betr.: "Zuständigkeit der deutschen Gerichte", 23 January 1948.

[777] RG 260 OMGUS, 8/189-3/3. Subject: "1948 Historical Report of Legal Division, OMG Hessen".

also empowered with hearing cases involving UN nationals and displaced persons considered UN nationals in cases concerning misdemeanours as defined under §§ 407 of the *Strafprozeßordnung*[778], unless they were members of UN military forces or dependents accompanying them. The accused in these proceedings could file objections with a local military government court that would deal with the case[779]. This was later extended on 24 August 1948 to encompass crimes as well as misdemeanours (*Übertretungen und Vergehen*) committed by such individuals that lay within the jurisdiction of the *Amtsgerichte* (section 407 of the *Strafprozeßordnung*). If the accused demanded a main hearing (*Hauptverhandlung* as defined in section 411 of the *Strafprozeßordnung*), the case would be immediately transferred to a military government court. It was emphasised that a German court in such cases could not impose a penalty amounting to more than 3000 DM, or the length of imprisonment stated in Art. 407, Part II of the *Strafprozeßordnung*[780]. These measures brought the exercise of the German courts in such cases to a much wider scope under German law, except that the maximum fine that a German court could impose in these proceedings could not exceed the amount that could be imposed by a military government

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[778] Types of cases that lay within the jurisdiction of an *Amtsgericht*.

[779] 463/929, Wiesbaden. 3120 - IVa 1626. Betr.: "Zuständigkeit der deutschen Gerichte", 27 April 1948; 8/213-1/18, RG 260 OMGUS, Wiesbaden. APO 633. Legal 015. Subject: "Jurisdiction of German Courts", 12 June 1948.

[780] 463/929, Wiesbaden. 3120 - IVa 3927. Betr.: "Zuständigkeit der deutschen Gerichte Strafbefehle gegen Angehörige der Vereinten Nationen oder Staatenlose, die als Verschleppte einer der Vereinten Nationen gelten", 14 September 1948; 8/217-1/5 RG 260 OMGUS, Wiesbaden. Subject: "Jurisdiction of German Courts", 24 August 1948.

summary court. The review of such cases by the military government legal division up to the end of 1948 demonstrated satisfactory results by the German courts, and no judgments in such cases were suspended[781].

Further enactments were introduced for cases that were hitherto reserved for trial in the military government courts. On 22 June 1948, the US military governor approved a plan providing for the participation of German authorities in the arrest and extradition of suspected German war criminals and German nationals accused of common crime in the US zone. Requests for the extradition of both classes of cases would be scrutinised by the military government, then unless it was rejected, would be forwarded to the Minister-President of the appropriate *Land* who would forward the results of the investigation together with his recommendations to the military government. Cases involving suspected war criminals would be returned to the military government authorities, who would then make the final disposition of the case in view of the Minister-President's report. Cases involving common crimes would be returned to the Military Government Extradition Board for final disposition[782]. The Minister-President would order the arrest of the accused after the extradition request was approved. The jurisdiction of the German courts was further extended on 1 August 1948 under Regulation No.4 of Military Government Law No.2. German courts were henceforth empowered with the authority to deal with cases of claims arising after 8 May 1945 against a German governmental or legal entity, provided that the matter did not involve the Allied Forces, claims against the German *Reich*, unless specifically

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[781] 260 OMGUS, 8/189-3/3. Subject: "1948 Historical Report of Legal Division, OMG Hessen".

[782] *Monthly Report of the Military Governor, U.S. Zone*, June 1948, No.36.

authorised, or payments from assets that were held prior to 8 May 1945[783]. The German labour courts were also allowed to accept cases involving monetary claims filed against the German government, provided that the cause of the case took place after 8 May 1945, as well as allowing employees at all levels of the German government to seek redress in the labour courts[784]. The German courts were later granted jurisdiction over cases involving all violations of Military Government Law No.53 on "Foreign Exchange Control", except when such cases involved the possession of Military Payment Certificates, and when such cases involved individuals over whom the German courts could not assert or exercise jurisdiction as defined by Military Government Law No.2, unless they were expressly authorised to do so by the military government. The latter types of cases would remain within the jurisdiction of the military government courts[785].

The Reorganisation of the Military Government Judicial Organisation

The transfer of greater responsibility from the military government to the German courts was followed by an improvement in the procedure of the military government judicial organisation. The reform of the US military

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783 "Ausführungsverordnung Nr.4 zum Militärregierungsgesetz Nr.2 (geänderte Fassung)", *Gesetz- und Verordnungsblatt für das Land Hessen* 1948, p.57.

784 *Monthly Report of the Military Governor, U.S. Zone*, July 1948, No.37.

785 "Allgemeine Ermächtigung gemäß Art. VI Abs. 10 des Militärregierungsgesetzes Nr. 2", *Beilage Nr.8 zum "Gesetz- und Verordnungsblatt für das Land Hessen" vom 27. September 1948*; 463/929, Wiesbaden. "Allgemeine Ermächtigung gemäß Art. VI Abs. 10 des Militärregierungsgesetzes Nr. 2", 19 September 1948.

government criminal courts took place upon the initiative of General Clay, the US military governor. General Clay appointed an Administration of Justice Review Board in August 1947 to conduct periodic examinations of the military government courts in their handling of criminal justice[786]. The military government judicial organisation was examined by William Clark, a former federal judge of the United States Third Circuit Court of Appeals, after January 1948. Clark made recommendations for the reorganisation of the judicial system that led to the institution of a new system in the US occupation zone[787]. Fundamental principles to be adhered to by military government courts were extended further under Military Government Ordinance No.23 of 7 January 1948 on the "Relief from Unlawful Restraint on Personal Liberty"[788]. Every individual indicted before military government courts in the US zone was formally accorded the fullest extent of the right of the protection of *habeas corpus* - the right to secure speedy judicial determination of the legality of the restraint of personal liberty - under this ordinance. The ordinance gave any individual detained or confined by the military government the right to apply for a judicial hearing to determine the legality of the confinement[789]. The military government

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[786] Clay, *Decision in Germany*, p.247.

[787] Zink, *United States in Germany: 1944-1955*, p.309.

[788] *Monthly Report of the Military Governor, U.S. Zone*, January 1948, No.31; "Ordinance No.23: Relief from Unlawful Restraints of Personal Liberty", *Military Government Gazette, Germany, United States Area of Control*, Issue H, 16 January 1948, pp.7-14.

[789] Art. 4, "Ordinance No.23: Relief from Unlawful Restraints of Personal Liberty", *Military Government Gazette, Germany, United States Area of Control*, Issue H, 16 January 1948, pp.8-9; *Monthly Report of the Military Governor, U.S. Zone*, February 1949, No.44.

judicial system was also re-organised at this stage of the occupation. It was no longer necessary for it to be maintained as an emergency measure as when the German judicial organisations in the US zone were restored, and in view of the problems encountered with the operation of the military government courts. Military Government Ordinance No.2 that had established the military government courts in Germany had not established an integrated system. Every military government court was an individual unit responsible to the *Land* Director of the Military Government in the *Land* where it was located. This resulted in a lack of uniformity in the separate *Länder*. All military government court personnel were appointed and supervised by the *Land* Directors through their Chief Legal Officers. The same individual who was responsible for appointing prosecutors and judges was also responsible for reviewing the appeal of all cases in the area. There was also no regular appellate procedure. The system was also weakened by the fact that a number of the judges and prosecutors did not have legal training and experience[790]. Although all criminal cases that were tried by these courts were reviewed at the *Land* Offices of the Military Government, and all major cases were also reviewed by the OMGUS Legal Division in Berlin, the dispensation of justice was considered excessively dependent on the capacity of the individual judge. Although sentencing was fair for the most part, uniformity of sentencing was lacking and there were cases of undue punishment[791]. As a result, the OMGUS Legal Division made plans to convert the military government court organisation into an integrated

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[790] Nobleman, "American Military Government Courts in Germany", *Annals of the American Academy*, p.92.

[791] Clay, *Decision in Germany*, p.247.

and completely civilianised system that would eliminate existing injustices[792].

The US military government established a new military government judicial organisation in the US zone on 18 August 1948 as increasingly more categories of criminal cases were restored to the German courts, which culminated in a new arrangement between the German and the US military government courts. The new system, which would only handle cases involving occupation personnel and matters directly relating to the military government[793], was brought into effect under Military Government Ordinances Nos.31, 32 and 33. An integrated, zone-wide court system was established as a separate unit of OMGUS, completely separated from the *Land* Military Government Offices. An Office of the Chief Attorney was created within OMGUS in order to separate the prosecution from the judicial function, consisting of a chief attorney and district attorneys. The system also included a regular appellate procedure[794], in contrast to the previous system in which appeals were heard through administrative reviews by military government officials, rather than allowing for judicial appeal from judges' decisions[795]. The composition and jurisdiction of these courts were set forth in Ordinance No.31. The United States Area of Control was divided into eleven judicial districts[796]

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[792] Nobleman, "American Military Government Courts", *Annals of the American Academy*, p.92.

[793] Zink, *United States in Germany: 1944-1955*, p.309.

[794] Nobleman, "American Military Government Courts in Germany", *Annals of the American Academy*, pp.92-93.

[795] *Report on Germany: September 21, 1949 - July 31, 1952* (Office of the High Commissioner for Germany, 1952), p.146.

[796] There were five judicial districts established in Bavaria, two in both Württemberg-Baden and Hesse, and one in Bremen and in the U.S. sector of Berlin. There were one or

with a district court established for each judicial district. Each of these courts consisted of one or more district judges and one or more magistrates with jurisdiction over all criminal and civil cases, along with a district attorney and one or more assistant district attorneys. The court could impose sentences of up to ten years' imprisonment or death, or a fine of up to ten thousand dollars. Appellate jurisdiction was held by the Court of Appeal at Nürnberg, consisting of a Chief Justice and six Associate Justices, and the Chief Attorney acting for the prosecution. This court served as the highest judicial authority of the entire US Area of Control. The fourth and fifth judicial district courts maintained both civil and criminal jurisdiction as Rhine Navigation Courts. Each district court exercised exclusive civil jurisdiction over US personnel in cases involving automobiles, the collection of damages and penalties for breaches of contracts, and their function as Rhine navigation courts. The criminal jurisdiction of these courts extended to all persons in the US Area of Control, including all non-German civilians, including those serving with or accompanying the US occupation forces, who could be tried for offences against applicable Control Council or US military government legislation or German law. All judges, magistrates and lawyers in these courts were trained and experienced

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more district judges and magistrates within each district. The jurisdiction of the magistrate corresponded roughly to the jurisdiction of the summary military government court, while the district judge had jurisdiction corresponding to the intermediate military government court. The district court, composed of three district judges or two district judges and a magistrate, corresponded to the general military goverment court. The district courts assumed the jurisdiction that was previously exercised by the military government court for civil actions. *Monthly Report of the Military Governor, U.S. Zone*, August 1948, No.38.

jurists. All cases pending before the former military government courts that were established under Ordinance No.2, Ordinance No.6 or Ordinance No.16 were transferred to these district courts. Their functions were hereafter governed by the regulations for the proceedings of the district courts[797]. Separate ordinances governed the procedures of these courts in criminal[798] and civil[799] cases. Jurisdiction over civil cases were hereby divided between the military government and German courts. The military government courts and German courts exercised exclusive jurisdiction over cases involving UN or German persons respectively, and shared jurisdiction over cases involving both types of persons[800]. A Board of Review was established in the US zone on 10 August 1948 as part of the judicial reorganisation to deal with civil cases concerning the restitution of property. These cases were to be dealt with according to the terms of Military Government Law No.59 on "Restitution of Identifiable Property"[801], which was to

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797 "Ordinance No.31: Code of Criminal Procedure for United States Military Government Courts for Germany", *Military Government Gazette, Germany, United States Area of Control* Issue K, 1 September 1948, pp.35-44.

798 "Ordinance No.32: Code of Criminal Procedure for United States Military Government Courts for Germany", *Military Government Gazette, Germany, United States Area of Control* Issue K, 1 September 1948, pp.44-55.

799 "Ordinance No.33: Code of Civil Procedure for United States Military Government Courts for Germany", *Military Government Gazette, Germany, United States Area of Control* Issue K, 1 September 1948, pp.55-60.

800 Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", pp.20-21.

801 "Law No.59: Restitution of Identifiable Property", *Military Government Gazette, Germany, United States Area of Control* Issue G (10 November 1947), pp.1-25.

govern the procedures for the restitution of property that was wrongfully seized from their owners between 30 January 1933 and 8 May 1945 "for reasons of race, religion, nationality, ideology or political opposition to National Socialism."[802] The property would be restored to the former owner or to a successor[803]. This Board was empowered with reviewing judgments pronounced by the civil division of an *Oberlandesgericht*, if the decision of the German court violated Law No.59, and either affirm or modify the decision of the court in whole or in part, or remand the case in whole or in part to the German court that had previously heard the case[804]. In practice, this represented the most significant aspect of the limitation of German civil law, since this matter concerned numerous cases and large amounts[805].

These technical improvements to the US military government judicial organisation were complemented with an important reform in the procedure for appointing German judges in Hesse. The *Landtag* enacted a law on the selection of judges on 13 August 1948, which confirmed Art. 127 of the constitution of Hesse. The appointment of judges was no longer determined by the Minister of Justice alone, but in accordance with a committee consisting of the presidents of

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[802] Art. 1, "Law No.59: Restitution of Identifiable Property", *Military Government Gazette, Germany, United States Area of Control* Issue G (10 November 1947), pp.1-25.

[803] *Ibid.*.

[804] "Regulation No.4 under Military Govenment Law No.59: Establishment of Board of Review", *Gesetz- und Verordnungsblatt für Verordnungsblatt für das Land Hessen* (1948), 3 September 1948, pp.58-61.

[805] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", p.20.

the highest courts in the *Land* and a number of representatives from the *Land* parliament[806].

The Military Government Court of Appeal convened in Nürnberg on 10 September 1948. These new US military government courts in Bavaria, Württemberg-Baden and Hesse were officially opened on 25, 26 and 27 October 1948[807]. The original military government courts in Hesse ceased to operate on 26 October 1948. The new system of military government courts in Hesse, comprising of districts III and IV with district seats in Marburg and Frankfurt-am-Main, exercised the same criminal and civil jurisdiction as the former military government courts, and also held civil jurisdiction in collecting fines and forfeitures. They were removed from the supervision of the *Land* military government for Hesse and hereafter operated under the authority of the OMGUS Legal Division[808]. The new procedure of this judicial organisation was a significant improvement over the previous system. The Court of Appeals provided greater protection for the rights of the accused, and it ensured the uniformity of the military government administration of justice[809].

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[806] "Gesetz zur Ausführung der Artikel 127 und 128 der Verfassung (Richterwahlgesetz) vom 13. August 1948", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), pp.95-96.

[807] *Monthly Report of the Military Governor, U.S. Zone*, October 1948, No.40.

[808] RG 260 OMGUS, 8/189-3/3. Subject: "1948 Historical Report of Legal Division, OMG Hessen".

[809] Herbert Brauer, "Die Neurordnung der Strafrechtspflege in Verfahren vor den Gerichten der amerikanischen Militärregierung", *Neue Juristische Wochenschrift* (1949), p.131.

Towards the Conclusion of the Military Occupation

The German judicial organisation gained increasingly greater responsibility from the beginning of the occupation, but complete independence would only be restored when all military government controls were lifted. While the Potsdam Protocol had established a blueprint for the reconstruction of Germany, diplomatic discussions on the "German Problem" among the occupation powers at the international level led to the development of a new political framework for western Germany. The failure of the London Conference of the four occupation powers in December 1947 ended expectations that agreement to form a central German government could be reached between the western Allies and the Soviet government[810]. The western Allies therefore developed separate plans for the creation of a West German state. Legal developments in western Germany would be integrated into the structure of this new state, in which a German federal government would be restored at the national level. The apex of the reconstruction of a West German state would be drafting a federal constitution, followed by the formation of a German national government.

The three military governors of the western occupation zones conferred with the Minister-Presidents of the western German states on 1 July 1948 and called upon them to form a national German government[811]. A Parliamentary Council consisting of sixty-five delegates from the elected *Land* parliaments convened at Bonn on 1 September 1948 to draft a

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[810] Elmer Plischke, *The Allied High Commission for Germany* (Bad Godesberg-Mehlem: Historical Division, Office of the High Commissioner for Germany, 1953), p.4.

[811] *Germany 1947-1949*, pp.275-276.

Basic Law for the future West German state[812], which laid the basis for the constitution of the Federal Republic of Germany. The adoption of the Basic Law for the Federal Republic of Germany, the establishment of federal judicial institutions and the federal government ended the initial phase of the restoration of justice in western Germany[813]. The Basic Law (*Grundgesetz*), or "Bonn Constitution", ratified the work of the reconstruction of the administration of justice in western Germany. It affirmed the restoration of constitutional government in the western German *Länder*[814], and set forth governmental powers at the national level. The creation of a national German government on the foundation of the western *Länder* and a federal constitution necessitated re-defining the relations between the occupation powers and the national government[815]. This was brought about by drafting an Occupation Statute, which defined the authority of the western occupation powers subsequent to the creation of the Federal Republic of Germany[816].

The western Allies introduced the Occupation Statute as a partial substitute for a formal peace treaty between Germany and the Allies, as it became evident that the conclusion of such a settlement could not be reached in the course of diplomatic negotiations with the Soviet Union. The

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[812] Elmer Plischke, *The Allied High Commission for Germany*, p.14.

[813] Press and Information Office of the Federal Government, "The Administration of Justice", *Germany Reports* (Wiesbaden: Franz Steiner, 1966), pp.287-288.

[814] Diestelkamp, "Justiz in den Westzonen", p.20.

[815] Zink, *The United States in Germany: 1944-1955*, pp.44-45.

[816] Elmer Plischke, *The Allied High Commission for Germany*, p.26.

purpose of this settlement was to introduce a new relation between the occupation powers and the German authorities[817]. The Federal Republic of Germany and the participating *Länder* were afforded full legislative, executive and judicial powers in accordance with the Basic Law and their respective constitutions. These powers were subject only to the limitations prescribed in the Occupation Statute[818]. The occupation powers reserved control over certain fields in order to ensure that the basic purposes of the occupation were accomplished. These fields were: disarmament and demilitarisation; economic controls in the Ruhr; economic questions regarding restitution, reparations, decartelisation, deconcentration, non-discrimination in trade, and foreign economic interests and economic claims against Germany; foreign affairs questions, such as international agreements in which Germany was a party; displaced persons and refugees; security and prestige of the Allied forces; adherence to the Basic Law and the *Land* constitutions; foreign trade and exchange controls; control over internal action concerning national self-subsistence; control over persons sentenced and imprisoned under the authority of occupation courts[819]. The military government administrations in the western occupation zones were to be replaced by an Allied High Commission for Germany, consisting of three High Commissioners representing each of the western occupation powers. They were to ensure the

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[817] Friedrich Klein, "Das Besatzungsstatut für Deutschland", *Süddeutsche Juristenzeitung* (1949), p.737.

[818] Art. 1, "The Occupation Statute", *Official Gazette of the Allied High Commission for Germany* No.1 (23 September 1949), p.13.

[819] Art. 2, "The Occupation Statute", *Official Gazette of the Allied High Commission for Germany* No.1 (23 September 1949), pp.13-14.

implementation of occupation objectives in the new West German state according to the provisions of the Occupation Statute[820].

The Basic Law, or federal constitution, set forth that justice in the Federal Republic of Germany held equal status with the legislative and executive powers[821], although these powers served as separate organs representing the totality of state sovereignty (Art. 20, para. 2): "All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs."[822] The rule of law was given practical expression under Art. 19, para. 4, stating that the rights of an individual affected by an act of the public authority is given the right of redress through the courts, and Art. 20 para. 3: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice."[823] Hence, judicial office in the Federal Republic of Germany, which was restored following the collapse of the National Socialist regime that had demonstrated consistent disregard for law and justice, was granted a position in the federal constitution that judicial office never before possessed in Germany. All of public life was made subject to the control of the law courts[824]. The maintenance of the new standard of justice was set forth in Art. 123, stating that all law that

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[820] Elmer Plischke, *The Allied High Commission for Germany*, pp.46-47, 197-206.

[821] Diestelkamp, "Justiz in den Westzonen", p.20.

[822] Hucko, *The Democratic Tradition*, p.201.

[823] *Ibid.*

[824] Rudolf Wassermann, "Richteramt und politisches System", *Revue d'Allemagne* (1973) Vol.5, pp.903-904.

was in force prior to the formation of the West German government remained in force in so far as it did not contravene the principles of the federal constitution[825]. The responsibility for the administration of justice in the Federal Republic of Germany remained under the jurisdiction of the individual *Länder*. Appeals could be forwarded to the appellate courts at the national level[826]. Provisions concerning the administration of justice were stated under a separate section of the Basic Law under Articles 92-104[827]. All judges were guaranteed independence and were to be subject only to the law (Art. 97). They were subject to impeachment in the event of a violation of the constitution (Art. 98)[828]. Other safeguards against abuses of the law included provisions for the legal protection of the individual, such as outlawing extraordinary courts (Art. 101, para. 1)[829], retroactive laws (Art. 103, para. 3), and double jeopardy (Art. 103, para. 3)[830]. In accordance with the federal principle, the appointment of judges at the *Land* level remained under the jurisdiction of the *Länder* (Art. 98 para. 4). The traditional judicial organisation of lower and intermediary courts also remained under *Land* jurisdiction, while the highest courts in the new Federal Republic of Germany were placed under the federal jurisdiction, and served as the courts of final instance in cases of appeal

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[825] Hucko, *The Democratic Tradition*, p.258.

[826] Arnold Brecht, "Re-establishing German Government", *Annals of the American Academy of Political and Social Science* Vol. 267 (January 1950), p.38.

[827] Hucko, *The Democratic Tradition*, pp.235-240.

[828] *Ibid.*, pp.237-238.

[829] *Ibid.*, p.239.

[830] *Ibid.*, p.239.

arising from the application of *Land* law (Art. 99)[831]. A Federal Constitutional Court was to be established to protect the constitution by ensuring that the legislature, executive and judiciary adhered to the provisions of the Basic Law, and a Supreme Federal Court was to ensure the uniform administration of justice[832]. The restoration of legal jurisdiction at the national level also served to provide unity to the administration of justice in Germany[833], which had hitherto been divided between the occupation zones and among the *Länder* of the same zone[834].

The Basic Law and the Occupation Statute went into force simultaneously on 21 September 1949. This marked the creation of the Federal Republic of Germany[835], and the end of the military occupation[836]. Allied control in Germany was

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[831] *Ibid.*, p.238.

[832] "The Administration of Justice", *Germany Reports*, p.288.

[833] Unity of the administration of justice in western Germany was hitherto limited to the German High Court of Judicature for the Combined Economic Area, or the British-American Bizone, which held jurisdiction in legal matters in the economic sphere in keeping with maintaining legislative as well as economic unity in the Bizone. Proclamation No.8 of 9 February 1948 provided for the establishment of the German High Court with jurisdiction over disputes regarding the interpretation of bizonal economic legislation, and holding appelate jurisdiction over such cases arising from the ordinary courts in the individual *Länder* of the bizone. *Monthly Report of the Military Governor, U.S. Zone*, February 1948, No.32; "Proclamation No. 8: Establishment of a German High Court for the Combined Economic Area", *Military Government Gazette* Issue I (16 March 1948), pp.6-10.

[834] Zinn, "Administration of Justice in Germany", p.42.

[835] Elmer Plischke, *The Allied High Commission for Germany*, pp.16-17.

[836] *Ibid.*, p.60.

hereafter exercised by Allied civilian authorities. Although the occupying powers retained supreme authority in Germany, this authority that was exercised through the Allied High Commission was restricted to the provisions of the Occupation Statute[837]. The previous disposition of governmental powers was dissolved in view of the division of responsibilities between the *Länder*, the federal government, and the occupation powers. Whereas the *Länder* retained their power of legislation under the terms of the federal constitution, the unification of the western *Länder* in the newly established federal state led to the dissolution of the *Länderrat* and the assumption of its legislative functions by the West German government[838].

Since court jurisdiction is a product of state sovereignty[839], foreign jurisdiction over the German courts was to be lifted when the Federal Republic of Germany was proclaimed a sovereign state with full-fledged state authority. The newly established national German authorities regained the power of self-government and sovereignty in the administration of justice, except for certain judicial powers in the fields reserved to the western occupation powers[840]. Although the Occupation Statute did not contain any specific regulations regarding the jurisdiction and

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[837] *Foreign Relations of the United States, 1949*: Vol. III, *Council of Foreign Ministers; Germany and Austria* (Washington: United States Government Printing Office, 1974), p.321.

[838] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, pp.84-87, 96

[839] von Weber, "Der Einfluß der Militärgerichtsbarkeit der Besatzungsmacht", p.65.

[840] Loewenstein, "Justice", p.237.

independence of the German administration of justice[841], its enactment led to the full restoration of the judicial authority of the German courts[842] in practice. The supervision of judicial activities became inadmissible as political sovereignty was restored, thus negating the authority of the military government to intervene in the decisions of German courts that had previously been an official limitation of the independence of the German judiciary. Since the Occupation Statute presented general terms for the new political status of Germany, which were more of a political than a juridical nature, the extent of the limitations of German court jurisdiction was to be redressed through new legislation[843].

The Allied High Commission enacted legislation to clarify the delineation between Allied and German judicial responsibility[844]. The right to withdraw a case from German jurisdiction (*evocatio*) that was imposed under Military Government Law No.2 was nullified under the Occupation Statute, and was superseded by HICOG (Office of the High Commissioner for Germany) Law No.13 of 25 November 1949 on "Judicial Powers in the Reserved Fields"[845]. This law defined the new relation between the prerogative of Allied

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[841] Klein, "Das Besatzungsstatut für Deutschland", p.752.

[842] Hellmut von Weber, "Das Ende der AAR Nr. 1", *Deutsche Rechts-Zeitschrift* (1950), p.217.

[843] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", pp.38-39.

[844] Elmer Plischke, *The West German Federal Government* (Bad Godesberg-Mehlem: Historical Division, Office of the High Commissioner for Germany, 1952), p.127.

[845] Broszat, "Siegerjustiz oder Strafrechtliche 'Selbstreinugung'", p.540; Plischke, *Allied High Commission for Germany*, p.72.

occupation law that was necessitated by the enactment of the Occupation Statute[846], aligning the legal jurisdiction of the western occupation powers in conformity with its principles[847]. Except when expressly authorised, German court jurisdiction was only excluded in cases affecting: the Allied forces, the Allied High Commission or persons accompanying them or their property; enactments of the occupation authorities. Allied authorities could only intervene in the functions of the German courts in cases that directly involved the interests of the occupation, which were specified in the terms of this law and by the reserved fields cited in Art. 2 of the Occupation Statute. Such intervention was limited to: inspecting court records in cases relating to occupation interests; withdrawing cases directly affecting occupation personnel or matters from a German court, or suspending court decisions in such cases. Cases directly affecting occupation personnel or matters were assumed by an occupation court that could either confirm, nullify or modify a decision made by a German court in such cases, or transfer the case to a German court for trial or retrial. The Allied enactments in the western occupation zones that were hitherto imposed on the German administration of justice under occupation law, such as Control Council Law No.4 and Military Government Law No.2, were hereby repealed[848].

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[846] Heinrich Röhreke, "Die Rechtsentwicklung in der Bundesrepublik Deutschland", *Deutsche Rechts-Zeitschrift* (1950), pp.34-35.

[847] Breuning, "Die Beschränkung der deutschen Gerichtsbarkeit", p.125.

[848] "Law No.13: Judicial Powers in the Reserved Fields", *Official Gazette of the Allied High Commission for Germany* No.6 (9 December 1949), pp.54-58.

The newly established jurisdiction of the occupation courts was confined to cases affecting persons defined according to the reserved fields, which were limited primarily to offences to the security of occupation interests[849]. These offences included: espionage, sabotage, or armed assault against the Allied forces; theft or unauthorised possession of property belonging to the Allied forces; or any act that was prejudicial to the security of the Allied forces[850]. In conformity to what could be considered the natural law of occupation, members of the Allied forces or persons officially connected with the Allied High Commission and their dependents were still officially excluded from the German courts in criminal matters and civil affairs, thus leaving certain formal restrictions on German judicial sovereignty emanating from the occupation[851]. On the other hand, the power of the occupation authority to nullify decisions of the German courts in matters that remained within the scope of their jurisdiction, i.e. matters in relations between Germans, the power to remove jurists from office, and the power to supervise the German judicial organisation were rescinded[852], thus fully restoring the principle of judicial independence in the German administration of justice. The US High Commissioner issued a subsequent directive on 28 December

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[849] Loewenstein, "Justice", p.244.

[850] "Law No.14: Offenses against the Interests of the Occupation", *Official Gazette of the Allied High Commission for Germany* No.6 (9 December 1949) pp.59-63.

[851] Loewenstein, "Justice", p.244.

[852] Röhreke, "Die Rechtsentwicklung in der Bundesrepublik Deutchland", p.36.

1949[853], and the *Land* Commissioner for Hesse issued two additional directives on 3 January 1950 that set forth the new jurisdiction of the German courts. The first directive extended the jurisdiction of the German courts to cases involving: all citizens of the US, the U.K., and France, and all displaced persons, regardless of their citizenship. The exceptions stipulated in Art 1(b) of Law No.13[854] remained in force. The directives for Hesse transferred criminal court jurisdiction to the German courts according to the terms of Law No.13 and the Directive of 28 December 1949[855].

Law No.13 set forth the new status governing the division of jurisdiction between the German and the Allied occupation courts, which remained in place for the remainder of the Allied civilian occupation. Except for criminal jurisdiction over members of the Allied armed forces and their dependents, all jurisdiction was transferred to the German courts[856]. All remaining enactments that were issued by the Allied occupation authorities in Germany during the military and civilian occupation periods, including Allied High Commission Law No.13 and Law No.14, were repealed when the "Convention on Relations between the Three Powers and the Federal Republic of Germany" of 26 May 1952 and the "Protocol on the Termination of the Occupation Regime in the

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[853] 463/929, Wiesbaden. APO 757. "Direktive: Gemäss Gesetz Nr. 13 der allierter Hohen Kommission", 28 December 1949.

[854] Criminal offences committed against persons or property of any person affiliated with the Allied forces or the Allied High Commission.

[855] 463/929, Wiesbaden. 3120 - IVa 141. Betr.: "Deutsche Strafgerichtsbarkeit nach dem Gesetz Nr.13 der Allierten Hoher Kommission", 9 January 1950.

[856] *Report on Germany: September 21, 1949 - July 31, 1952* (Office of the U.S. High Commissioner for Germany, 1952), p.148.

Federal Republic of Germany" of 23 October 1954 went into force[857] on 5 May 1955. The Allied High Commission and the Offices of the *Land* Commissioners in the Federal Republic of Germany were abolished forthwith[858].

Conclusion

The restoration of justice was developed gradually in view of the circumstances since there was no structured approach or tested formula[859] for achieving this objective. The process of restoring justice in Germany began with closing the administration of justice, and legislating National Socialist laws and influences out of existence. The German judicial organisations in the US zone began to operate under the supervision of the *Land* Ministry of Justice and the US military government. The constitution and functions of the *Land* administration of justice in the US zone were regulated under the "Plan for the Administration of Justice". They were further defined by Allied Control Council and US military government legislation, such as Control Council Proclamation No.3 setting forth the principles for the postwar administration of justice, and Control Council Law No.4 and Military Government Law No.2 setting forth regulations for the composition of the German courts and their jurisdictions. The next phase of the

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[857] "Law No. A-37: Depriving of Effect and Repealing Certain Occupation Enactments", *Official Gazette of the Allied High Commission for Germany* No.126 (5 May 1955), pp.3267-3270.

[858] "Proclamation Revoking the Occupation Statute and Abolishing the Allied High Commission and the Offices of the Land Commissioners", *Official Gazette of the Allied High Commission for Germany* No.126 (5 May 1955), p.3272.

[859] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.995.

restoration of justice after re-opening the German courts at the *Land* level was to restore the normal conditions of the administration of justice, such as extending the jurisdiction of the German courts and lifting the supervision of the German courts, thus fully restoring judicial independence. The restoration of the German administration of justice was guided under Allied military government legislation[860], beginning with a standstill of justice, followed by the subsequent reconstitution of the German judicial organisation and the restoration of its functions. The conditions allowing for the reconstruction of a German judicial organisation in what became *Land* Hesse and the application of denazified German law by the reconstructed judicial organisation was introduced by Allied and US military government legislation, and *Land* legislation suited to local conditions. Allied military government legislation set forth uniform principles for the administration of justice in Germany, while US military government and German *Land* legislation prescribed the law to be applied by the German judicial organisation at the *Land* level in the US zone. The greatest deficiency of the legal reconstruction was the absence of a superior court that would coordinate the divergent legal practices of the three *Länder* that had been endowed with quasi-statehood[861]. Further progress on the national level was made on the unification of the postwar legal situation, in which several different legislative bodies had not coordinated their efforts in

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[860] Herbert Ruscheweyh, "Die Entwicklung der hanseatischen Justiz nach der Kapitulation bis zur Errichtung des Zentral-Justizamtes", *Festschrift für Wilhelm Kiesselbach* (Hamburg: Gesetz und Recht Verlag, 1947), p.39.

[861] Loewenstein, "Reconstruction of the Administration of Justice", p.466.

establishing a common legal system[862], while the *Oberlandesgericht* in Frankfurt-am-Main functioned as the supreme appeal court until 1950, when the Federal Supreme Court assumed appellate jurisdiction at the national level[863]. The courts at both levels were bound to adhere to the provisions of the federal constitution.

The *Land* administration of justice in Hesse thus formed part of the judicial organisation of the constitutional state at the national level. The division of jurisdiction between the military government and the German judicial organisation was gradually narrowed as a greater number of cases were transferred to the German courts. Safeguards against future violations of the interpretation and application of the law by judges were introduced into German law, while the US military government focused on restoring responsibility to the German judges who would operate within the postwar judicial organisation. The attempt at neutralising National Socialist influences regarding the human element of the legal reconstruction, or the denazification of the legal profession, took place at the same time as the institutional restoration of the law and the reconstruction of a fully functional German administration of justice.

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[862] Loewenstein, "Justice", p.260.

[863] Klaus Moritz and Ernst Noam, *NS-Verbrechen vor Gericht: 1945-1955* (Wiesbaden: Kommission für die Geschichte der Juden in Hessen, 1978), p.355, fn.122.

The Personnel Reconstruction and Dealing with the Past

Introduction

The denazification of the administration of justice consisted of two main elements forming the basis of a rule of law: firstly, the material reconstruction with respect to the institutional reconstruction of a German judicial organisation and reform of the law that had contributed the basis of the National Socialist regime; secondly, the human element of the denazification of justice - the question of undertaking the personnel reconstruction for the restored postwar judicial organisation with jurists who would administer justice following a denazified body of law brought forth in each *Land* in the US occupation zone. The latter entailed eliminating National Socialist concepts and practices from the body of German law, and removing from office personnel from the legal profession who could be considered former National Socialists - those who were considered to have aided and abetted the National Socialist regime in destroying the *Rechtsstaat* by having taken part in administering justice according to the National Socialist conception of the law. Many of the jurists in the new *Land* of postwar Hesse would be drawn from the ranks of the judiciary who had survived the National Socialist regime and the Second World War, and had not been expelled from the profession for political reasons. They would be subjected to the procedure of the denazification process as with members of other professions, as well specific measures for the denazification of the legal profession. Denazifying the legal profession also faced the common problems that were encountered in the application of the denazification programme, such as how tangible evidence could be produced to determine whether a candidate for reinstatement in the postwar administration of justice could be considered politically compromised. The administration of the

denazification programme in the three *Länder* of the US zone was divided into two main phases: the implementation of the programme by the US military government, then by German authorities. In both cases, the purpose of the programme was to remove individuals from positions of responsibility. The primary criterion for this consideration was their former membership in the NSDAP or its affiliated organisations.

The denazification was considered the most pressing and vital task of the US military government field detachments from the beginning of the occupation until March 1946. The responsibility for the implementation of this task was transferred to German civil authorities under the supervision of the US military government[864], when the military government considered the German local institutions to have been sufficiently revived to allow for German participation in the denazification[865]. The denazification of personnel in Hesse, as in the other *Länder* of the US zone, was initially handled by the US military government in accordance with political policy, as stated in the Potsdam Protocol and JCS 1067, and various military government denazification directives. German governmental authorities in the *Länder* of the US occupation zone later assumed the task of denazification, which had been granted the authority to enact denazification legislation that superseded the military government legislation. The German denazification programme was administered separately in each *Land* of the US occupation zone following the terms of the Law for Liberation from National Socialism and Militarism. In both cases, individuals were defined theoretically as former

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[864] *Monthly Report of the Military Governor, U.S. Zone*, 20 March, No.8.

[865] John Gimbel, *A German Community under American Occupation: Marburg, 1945-1952* (Stanford: Stanford University Press, 1961), p.3.

National Socialists according to the terms of the denazification directives and laws. Although the Law for Liberation did not call for wholesale removals from office, as dismissals were to be based on more specific categories of alleged political implication, the attempt to judge all members of the NSDAP and its affiliated organisations was maintained. The removal or reinstatement of jurists after the collapse of the National Socialist regime was based on an individual's political record that was considered a part of the qualification for judicial office. As a result, jurists were brought to account on the basis of their former political affiliation, regardless of their actions and conduct in office, without considering their motives for having joined a National Socialist organisation, or evaluating an individual's guilt according to their conduct in the National Socialist regime[866].

The First Phase of the Denazification

Military Government Law No.5 on the "Dissolution of the Nazi Party" that was introduced upon the entry of SHAEF forces into Germany provided the general order for the outright abolition of the NSDAP and its affiliated organisations, listing fifty-two organisations that were to be dissolved immediately, including the *NS-Rechtswahrerbund*, and eight para-military organisations, such as the *SS* and the *SA* were slated for abolition at a later date. All organisations listed in this law and their activities were declared illegal[867]. The removal of jurists implicated with these National Socialist organisations also took effect

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[866] Fürstenau, *Entnazifizierung*, p.60.

[867] "Law No.5: Dissolution of the Nazi Party", *Military Government Gazette* Issue A, 1 June 1946, pp.17-19; Starr, *Operations During the Rhineland Campaign*, p.78.

immediately upon the Allied occupation of Germany. US denazification policy during the Allied invasion of western Germany was governed by the terms of JCS 1067 and SHAEF military government legislation. Instructions for the implementation of SHAEF policy were included in the *Handbook for Military Government in Germany*[868] by including lists of incumbents of enumerated offices (*Beamtenstellungen*) who were employed on or after 30 January 1933, and were to be automatically excluded from continuing in or being admitted into public service. This *Handbook*, JCS 1067, and SHAEF legislation served as key documents representing the various functions and powers of the military government during the Allied invasion of Germany while the military government held supreme power as declared under SHAEF Proclamation No.1[869]. All jurists in the occupied territories upon the entry of SHAEF troops in Germany were dismissed from their positions by virtue of SHAEF Proclamation No.1 and Military Government Law No.2. All German courts were closed, and all jurists could only be reinstated in office with the consent of the military government[870]. Their reinstatement was to be made in accordance with the existing denazification provisions.

Difficulties and adverse publicity over the denazification of the local administration in Aachen[871] led

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[868] Starr, *Operations During the Rhineland Campaign*, p.49.

[869] *Ibid.*, p.58.

[870] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Provenance: OMGUS: LD/AJ Br. Folder Title: Denazification of Judges and Prosecutors. "Subject: Denazfication of Judges and Prosecutors in the German Ordinary Courts", 4 June 1947.

[871] Lutz Niethammer, *Entnazifizierung in Bayern: Säuberung und Rehabilitierung unter amerikanischer Besatzung* (Frankfurt-am-Main: S. Fischer Verlag, 1972), p.65.

to a new SHAEF directive issued on 9 November 1944, which called for the dismissal of individuals from public office who had joined the NSDAP before 30 January 1933[872]. Instructions concerning denazification according to the terms of this directive instituted the revision of policy transmitted to SHAEF by the Combined Chiefs of Staff, ordering the removal of "ardent Nazis" and "active Nazi sympathizers" from office. Even those who had been retained, as was formerly permissible under the terms of previous directives "on the grounds of expediency or administrative necessity", were to be dismissed. However, problems arose involving the interpretation of these terms and their application in practice[873] by the military government in the field when suitable replacements for dismissed personnel who were not politically compromised could not be found. For example, the examination of 150 *Fragebogen* submitted by jurists in Kurhessen revealed only twenty-five prospects for appointment, of which each was then subject to an interview and an investigation[874]. Locating trained and competent substitutes who were "free from Nazi taint" was one of the greatest obstacles to implementing an "immediate and peremptory Denazification."[875] Another difficulty was that neither JCS 1067, nor the *Handbook*, which was to be used by

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[872] John Gimbel, "American Denazification and Local Politics, 1945-1949: A Case Study in Marburg", *American Political Science Review* Vol. 54 (1960), p.85.

[873] Starr, *Operations During the Rhineland Campaign*, pp.40-41.

[874] Starr, *Denazification, Occupation and Control of Germany, March-July, 1945* (Salisbury: Documentary Publications, 1977), p.46.

[875] Elmer Plischke, "Denazification Law and Procedure", *American Journal of International Law* Vol. 41 (October 1947), p.817.

military government officers for "direction" and "guidance", provided a specific definition of what constituted an "active Nazi"[876]. The earlier CCS 551 also did not provide military government officers in the field with definitions of what constituted an "active Nazi" or an "ardent sympathizer", and simply ordered that they were to be removed from office immediately[877]. Until clearer definitions and instructions were available, military government officers attempted to fulfil the task of reconstructing German administration to the best of their ability and found pragmatic solutions, which often led to different results that diverged from the official denazification policy. Most military government detachment commanders were more concerned with restoring a functional local administration than with ideological or judicial hairsplitting, and soon found in many cases that nominal, or lower level, membership in the NSDAP was no certain criterion for one's political viewpoint[878]. In practice, the matter of removal from office or reinstatement at the initial stage of the occupation[879]

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[876] Latour, Vogelsang, *Okkupation und Wiederaufbau*, p.51.

[877] Starr, *Operations During the Rhineland Campaign*, p.77.

[878] Latour, Volgelsang, *Okkupation und Wiederaufbau*, pp.51-52.

[879] The initial work of the military government immediately following combat conditions was concentrated on emergency or negative tasks, such as securing shelter for the local population or denazification as part of the problem of arresting individuals who could represent a military danger to the occupation forces, before the various functions of reconstruction were exercised following the restoration of order and stability in the occupied areas. Starr, *Operations During the Rhineland Campaign*, pp.59-60. It may be argued that the military government did not undertake reconstruction activities until after combat conditions, when Germans among the local population were required to

was predominantly left to the discretion of the military government officer handling the denazification of the particular case[880] who decided whether a candidate for reinstatement could be considered trustworthy rather than invariably determining the guilt of the individual for having been associated with the NSDAP, mechanically determined according to NSDAP membership or the date of the individual's entry into the NSDAP or one of its affiliated organisations. The military government officers in the field were responsible for restoring order at the local level, which required the stop-gap measure of relying on the cooperation of the German administrative officials. This task was considered a greater priority than finding qualified individuals as defined by denazification directives. The dismissal of all officials on the basis of former NSDAP membership would have meant that administration would have ceased, rather than being re-established as quickly as possible, as was intended by military government detachments[881].

Until July 1945, the military government detachments were under the immediate jurisdiction of SHAEF tactical commands that exercised the privilege of interpreting and revising directives that were issued by the military government headquarters. While policy demanded that German personnel be screened for their political record, tactical commanders demanded that German personnel be reinstated to help restore a functioning administration to help maintain military supply lines and provide the local population with

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assist the military government in the implementation of these functions.

[880] Loewenstein, "Reconstruction of the Administration of Justice", pp.448,455.

[881] Starr, *Operations During the Rhineland Campaign*, p.79.

basic necessities to prevent local civilians from interfering with military operations[882]. Military government commanders in the field were more interested in "'getting things done'" than in engaging in the tearing down that JCS 1067 required[883]. The ambiguous initial SHAEF denazification directives, leaving military government officers to operate without precise guidance on the meaning of the term "active Nazi", also led to various interpretations in the field, thus resulting in the denazification procedure varying in nearly every *Landkreis*[884]. Army group headquarters, following the pattern of operating autonomously that was established during the war, improvised by issuing their own denazification directives. In turn, the armies, which were self-sufficient to a marked degree, also formulated their own directives that were sent to the corps and division levels. As a consequence, the US military government detachments were operating under at least four different denazification directives during the summer of 1945[885]. In these chaotic conditions, some military government detachments removed all individuals who had any connection with the NSDAP and its affiliated organisations, while

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[882] Elmer Plischke, "Denazifying the Reich", *Review of Politics*, Vol. 9 (1947), pp.166-168; Gimbel, *A German Community under American Occupation*, p.33.

[883] William E. Griffith, "Denazification in the United States Zone in Germany", *Annals of the American Academy of Political and Social Science*, Vol. 269 (1950), p.68.

[884] Freeman, *Hesse: A New German State*, p.28.

[885] Harold Zink, "The American Denazification Program in Germany", *Journal of Central European Affairs*, Vol. 6 (October 1946), pp.233-234; Zink, *United States in Germany: 1944-1955*, p.157; Joseph, R. Starr, *Denazification, Occupation and Control of Germany, March-July 1945*, p.36.

others allowed notorious National Socialists to retain their positions[886].

Uniformity was established by a new directive issued on 7 July 1945, replacing the previous patchwork of denazification regulations by providing a list of 136 mandatory removal categories and stating that membership in the NSDAP before 1 May 1937, or holding office in certain affiliated organisations would be considered as having been "active". Membership before this date was therefore to be "cause for mandatory removal or exclusion from 'positions of importance in quasi-public and private enterprises' [...] and from positions of 'more than minor importance' in public affairs."[887] The removal categories were drafted by the Public Safety Branch of SHAEF, providing terms for the automatic arrest of top-level National Socialists and militarists, and the arrest and screening of others through questionnaires (*Fragebogen*) indicating an individual's personal history, including questions concerning any former connection to the NSDAP or its affiliated organisations[888].

The jurists included in the automatic arrest categories were the leading civil servants of the *Reich* Ministry of Justice, the members of the *Reichsgericht* and the *Volksgerichtshof*, the presidents and prosecutors of the *Oberlandesgerichte*, and the members of the *Sondergerichte*[889].

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[886] "Final Report on Foreign Aid of the House Select Committee on Foreign Aid", 1 May 1948, 80th Congress, 2nd Session, 6 January - 31 December 1948, *House Reports* Vol. 6 No.1845 (Washington: U.S. Government Printing Office, 1948), p.128.

[887] Griffith, "Denazification in the United States Zone in Germany", p.69.

[888] *Ibid.*, p.68.

[889] Rudolf Wassermann, *Auch die Justiz kann aus der Geschichte nicht aussteigen: Studien zur Justizgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1990), p.188.

Every *Fragebogen* was investigated by a Special Branch Section of the Public Safety Division of the local US military government detachment in close cooperation with the Counter Intelligence Corps[890], in so far as resources allowed[891]. The information provided in the *Fragebogen* was verified with all available evidence, such as the records of the German police, the civil service and the NSDAP. Falsification of answers would result in prosecution in a military government court and imprisonment for two to five years or longer[892]. Following the examination of the *Fragebogen*, individuals were classified into one of four categories: 1) Non-Employment Mandatory, 2) Employment Discretionary (No Adverse Recommendation), 3) No Evidence of Nazi Activity, 4) Evidence of Anti-Nazi Activity[893]. New appointments were not to be made before this so-called "vetting" or screening was completed, except for those who were reinstated before the denazification was underway under the present terms, and would continue at their positions pending their "vetting"[894]. Like all other applicants for

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[890] *Foreign Relations of the United States, Diplomatic Papers*, Vol. 1: *The Conference of Berlin*, p.497.

[891] There were deficiencies in the system in this respect, such as the possibility of establishing one's innocence: bribing "reliable" Germans employed by the U.S. military government to undertake investigations to assist the Special Branches and Counterintelligence; purchasing black market certificates stating a suspect was a "fellow prisoner" in a concentration camp; one's colleagues vouching for one's innocence. Julian Bach jr., *America's Germany: An Account of the Occupation* (New York: Random House, 1946), pp.171-172.

[892] Plischke, "Denazification Law and Procedure", p.815.

[893] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1945, No.16.

[894] Zink, "The American Denazification Program", pp.237-238.

other forms of employment, candidates for legal office had to submit the *Fragebogen* as well as a second *Fragebogen* for the legal profession covering education, professional activities and membership in political, official and professional societies and organisations[895]. However, this approach merely served to draw a professional and political portrayal of the individual based on an accumulation of elementary facts. This specialised questionnaire did not reveal how a jurist had behaved in office or the decisions that the individual had been involved in, such as in cases of a political nature in which the law was used as an instrument in the exercise of political power in a totalitarian state; whether the individual had represented National Socialist officials or appeared before party courts; or whether the individual's moral and intellectual attitudes indicated subservience or support for the National Socialist regime[896].

Such questions regarding the denazification were addressed by German authorities. A group of political leaders in Marburg formed a political committee (*Staatspolitischer Ausschuß*) at the beginning of the occupation in order to play an active role in the postwar reconstruction[897]. The committee chairman reported to the military government in June 1945 that anti-National Socialist Germans knew who was politically implicated but they were not given the opportunity to testify against them.

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[895] 460/645, Wiesbaden. "Special Questionnaire for Judges, Judicial Officials, Public Prosecutors and Amtsanwälte", 1 August 1945.

[896] Loewenstein, "Reconstruction of the Administration Justice", p.448.

[897] Gimbel, *A German Community under American Occupation*, p.67.

In August 1945, a committee member reported that he and his colleagues did not understand why the military government implicitly assumed that all Germans were National Socialists until they could prove otherwise. This committee produced a report for the *Oberbürgermeister* (mayor) of Marburg in November 1945 that asserted that the military government denazification demonstrated a misunderstanding of the National Socialist regime. The method of denazification according to a questionnaire and a prescribed scheme was carried out on the presumption of pre-determined guilt rather than innocence. Fixing a date for determining an individual's political implication did not allow for individual consideration of every case, and it did not allow for the possibility that a member of the NSDAP was not necessarily a National Socialist[898]. Adopting another method of denazification would address this criticism of the military government's methods when the task of denazification would be organised differently, and the discharge of this task would be more effective if it were transferred to German authorities who had a greater understanding of the local conditions and circumstances of the time[899]. This flaw in the denazification programme was admitted by Professor Karl Loewenstein, the Legal Advisor in the Office of Military Government for Germany, who reported that substantial scrutiny of personal factors was actually physically impossible for "overworked and unsophisticated" military government officials[900]. Nevertheless, the standard based on date of entry remained in place.

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[898] *Ibid.*, pp.80, 148, 83-84.

[899] *Ibid.*, p.3.

[900] Loewenstein, "Reconstruction of the Administration of Justice", pp.419, 448.

Military government authorities believed that an individual's support for the National Socialist regime could be determined by membership in a National Socialist organisation, and the earlier the date of entry the greater the conviction. However, it could also be contended that an early member's enthusiasm could have dissipated but they did not risk leaving the organisation[901]. The only defensible date put to use was therefore considered to be 1 May 1937, after which officials could be coerced to join under the Public Officials Act, and therefore those who joined after this date were exempted from the automatic removal and exclusion categories[902]. The 1 May 1937 date thus also served the purpose of extending the actual number of experienced candidates who were available and willing to serve in the restored administration of justice, as the denazification programme that was to drive out the influences of twelve years of National Socialist *Gleichschaltung* created serious personnel shortages in the professional fields[903]. On the other hand, removal and suspension from office on the basis of membership in the NSDAP or an affiliated organisation, irrespective of the date of entry, often led to cases of injustice when one's former service to the National Socialist regime did not follow political motives. Judgment on the basis of entry into the NSDAP or an affiliated organisation, rather than providing evidence of politically oriented chargeable actions[904] conducted while in office, often served merely to indicate the lack of courage to avoid

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[901] Loewenstein, "Justice", p.247.

[902] *Ibid.*

[903] Freeman, *Hesse: A New German State*, p.35.

[904] Chargeable actions is defined here as actions that would be subject to prosecution in law courts in ordinary circumstances.

taking membership or unwillingness to jeopardise one's career or position[905].

The ideal situation for the restoration of justice was to reinstate jurists who had absolutely no association with the National Socialist regime[906] - not having been a member of the NSDAP or any of its affiliated organisations. The task of reorganising the German judiciary was charged to the Military Government Legal Officers in each area of local government (*Landkreis* and *Stadtkreis*). They made provisional appointments of jurists for the local judicial positions, and notified the Legal Division of the Regional Military Government Office for the approval of these appointments[907]. The establishment of the judicial organisation in Hesse followed the earlier re-opening of German courts prior to the promulgation of Proclamation No.2 that established the boundaries of the *Länder* of the US zone. The US Military Government emphasised re-opening the *Amtsgerichte*, or county courts functioning at the lowest level, and the *Landgerichte*, the appeals courts, during the early stage of the occupation due to the difficulty expected in finding qualified personnel for the Ministry of Justice and the *Oberlandesgerichte*[908] - the supreme courts of appeal. Military government legal officers accordingly sought to obtain the services of trained lawyers and retired judges without connections to the NSDAP or its affiliated organisations, and authorised them to re-open the first *Amtsgerichte*, subject to the approval of the Regional Legal

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[905] Alvin Johnson (foreword; anonymous author), "Denazification", *Social Research* Vol. 14 (1947), pp.67-68.

[906] Diestelkamp, "Die Justiz in den Westzonen", p.21.

[907] Nobleman, "Administration of Justice", p.94.

[908] *Ibid.*, p.93.

Division, which was then followed by the re-opening of the *Landgerichte*[909]. The military government detachment in Frankfurt-am-Main instructed the leading judge of the local *Amtsgericht* and the local *Landgericht* president in July 1945 to select the necessary judicial personnel from the numbers that performed similar duties in the past. Their reinstatement would be subject to approval by the military government[910]. The *Landgericht* president was to select the staffs for the *Landgericht* and the subordinate *Amtsgerichte*, and the lawyers and notaries in this area of jurisdiction (*Landgerichtsbezirk*). They would then be reinstated if their appointment was approved by the military government[911] on the basis of the denazification regulations[912]. The local military government detachments applied this procedure in the other re-opened German courts in Hesse[913]. The presidents of the *Amtsgericht* and *Landgericht* in Frankfurt-am-Main both initially selected jurists who were not members of the NSDAP. However, it soon became necessary to rely on specialised clerks and judicial officials who were former members. As far as it was possible to do so, the *Landgericht* president selected individuals for appointment who had not

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[909] *Ibid.*

[910] 460/568, Wiesbaden. Dienstanweisung für Amtsrichter, 9 July 1945; Betrifft: "Berichte an die Militärregierung", 28 July 1945.

[911] 460/568, Wiesbaden. Betrifft: "Berichte an die Militärregierung", 28 July 1945.

[912] 460/569, Wiesbaden. "The President of the Landgericht to Military Government, Legal Department, Frankfurt-am-Main", 10 September 1945.

[913] 462/1308, Wiesbaden. APO 756. Subject: Permission to practice law, 26 October 1945; Bescheinigung, Dem Rechtsanwalt Dr. E----- R-----, 6 November 1945.

joined the NSDAP before 1 May 1937. Some of the judges and lawyers selected had been members of the NSDAP as early as 1933 and as late as 1940. The *Landgericht* president offered his personal guarantee that they were not National Socialists beyond any doubt on the basis of their basic convictions. It was said that their entry into the NSDAP was merely a formality, since they feared grave disadvantages if they refused to join[914]. Although the military government conveyed this freedom of action to German authorities at the higher levels of the judicial organisation, there was suspicion on the part of the military government concerning "class solidarity of the judiciary", which could have resulted in jurists resisting the denazification process by saving former colleagues from disbarment. On the other hand, the members of the judicial profession could determine who had supported the regime since they had the advantage of first-hand experience[915].

Uniform regulations for the reinstatement of judicial personnel for the *Land* judicial organisations in the US zone were set forth in the Plan for the Administration of Justice. The appointment of judicial personnel was henceforth charged to the *Land* Minister of Justice as the administrative superior of the judicial organisations in the newly created *Länder* of the US zone. Each *Land* Minister of Justice was made responsible for the appointment of judges[916], and required the approval of the military

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[914] 460/568, Wiesbaden. The *Landgericht* president, Frankfurt-am-Main, to the Military Government Legal Department at Frankfurt-am-Main, 6 August 1945.

[915] Loewenstein, "Reconstruction of the Administration of Justice", p.449.

[916] Arndt, "Die staats- und verwaltungsrechtliche Entwicklung in Groß-Hessen", p.186.

government to appoint or remove judges from office[917]. *Landgericht* presidents were to select lawyers, notaries and lay judges in their office or practice in the courts in their jurisdiction, or *Landgerichtsbezirke*. Their appointments were subject to the prior approval of the military government[918]. The Minister of Justice was responsible for the appointment of all judicial personnel, including those selected by the *Landgericht* presidents and leading public prosecutors (*Oberstaatsanwälte*) in Hesse[919]. The military government retained the function of screening and approving all applicants on the basis of the individual *Fragebogen* and denazification regulations[920] prior to their reinstatement in whatever position in the *Land* judicial organisation[921].

Disbarring legal personnel from practice was initially governed by the necessity to comply with denazification directives, irrespective of the availability of personnel.

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[917] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4 Oktober 1945.

[918] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4 Oktober 1945; 460/645, Wiesbaden. Betrifft: "Fortzahlung von Gehältern und Lohnen an noch nicht beschäftigte der Justizbehörden", 20 September 1945.

[919] 463/1118, Wiesbaden. - Az: 2010 - I 22 -. "Rundverfügung über den Verkehr mit der Militärregierung und die Einstellung von Beamten, Angestellten usw. vom 7. Januar 1946", 7 January 1946

[920] 460/645, Wiesbaden. Betr.: "Denazifizierung", 16 November 1945.

[921] 462/1301, Wiesbaden. Office of the Military Government for Greater Hesse, APO 758. Subject: "Judicial Officials and Employees; Land Greater Hesse", 2 January 1946.

Rather than emphasising the investigation of an individual's political record prior to removal from office, as was the practice for the denazification of personnel engaged in public office and in private industry in the British occupation zone, the policy in the US zone was to carry out wide-sweeping dismissals with the review of individual cases after dismissal[922]. Exceptions were made after 7 August 1945, when a Denazification Board was ordered to be established to review appeals of persons who were considered more than "nominal Nazis", but were needed in essential functions while replacements for them were not available[923]. However, this could be considered an emergency measure, for the pace of the denazification of personnel was not relaxed at this early stage of the occupation when the screening of legal personnel was progressing, but the legal reconstruction was hampered by the fact that there was a lack of Germans who were considered anti-National Socialists, although they were qualified to serve as judges or other court personnel[924]. Court backlogs increased at a considerable rate as a result of the removal of judicial officials, time-consuming statistical inquiries, the reorganisation of the judicial organisation, and the number of criminal and civil cases to be heard. These conditions resulted in the urgent necessity for judges and other judicial personnel to be reinstated to handle the increased work-load[925]. Scarcely more than half of the lawyers in several cities in Hesse were considered

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[922] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3.

[923] *Ibid.*

[924] *Monthly Report of the Military Governor, U.S. Zone*, 20 September 1945, No.2.

[925] 458/670, Wiesbaden. Subject: "Employment of officials for the Amtsgericht", 17 September 1945.

eligible to retain their right to practice solely on the basis of their political record by the time Law No.8 was promulgated[926] on 26 September 1945[927]. The first decree specifically addressing the denazification of the legal profession was Article IV of the Control Council Law No.4 of 30 October 1945 on the "Reorganization of the Judicial System". The Allied denazification policy provided in the Potsdam Protocol was re-stated in this law, stipulating that: "to effect the reorganization of the judicial system, all former members of the Nazi party who have been more than nominal participants in its activities and all other persons who directly followed the punitive practices of the Hitler regime must be dismissed from appointments as judges and prosecutors and will not be admitted to these appointments."[928]

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[926] Freeman, *Hesse: A New German State*, p.35.

[927] "Law No. 8: Prohibition of Employment of Members of Nazi Party in Positions in Business other than Ordinary Labor and for other Purposes", *Military Government Gazette*, Issue A, 1 June 1946, pp.20-21.

This law extended the denazification to private enterprise in order to eradicate National Socialist economic power and influence in addition to public and administrative life (Plischke, "Denazification Law and Procedure", p.816), restricting the employment of former members of the NSDAP or one of its affiliated organisations to ordinary labour (*Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3), by which the implicated individual would not be allowed to act in supervisory or managerial capacity. Lawyers and notaries were not affected by this law since their offices did not qualify as business enterprises in the meaning of Law No.8. RG 260 17/210-3/6, Wiesbaden. APO 633. Subject: "Law No.8", 16 February 1946.

[928] Art. 4, "Law No.4: Reorganisation of the German Judicial System", *Official Gazette of the Control Council for Germany* No.2 (30 November 1945), p.27.

Although it could not be denied that the key positions in National Socialist organisations and offices at the highest levels could only have been held by ardent National Socialists, there remained the problem of determining who was a nominal National Socialist among the lower ranks of the judiciary. For example, an *Amtsrichter* or president of a *Landgericht* could have been an ardent National Socialist, while a judge in an *Oberlandesgericht* could have been a "'nominal' Nazi"[929]. The evidence could not be established by evaluating individual cases on the sole basis of the date of entry into the NSDAP or an affiliated organisation. Moreover, jurists were generally treated with greater suspicion than members of other professions. Although the denazification directive of 7 July 1945 applied to the personnel of the German administration of justice, the standards that applied to judges and prosecutors were more rigid in comparison to other civil service personnel. Although individuals who joined the NSDAP on or after 1 May 1937 fell into the category of "discretionary - no adverse recommendation", the unwritten practice was to exclude such applicants for judicial or prosecuting positions from appointment or reinstatement until December 1945[930] by which time over two-hundred and fifty judges and lawyers were interviewed[931]. One of the greatest obstacles to achieving an immediate and thorough denazification in all fields was securing trained and competent substitutes who were

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[929] Loewenstein, "Reconstruction of the Administration of Justice", pp.445-446.

[930] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. "Subject: Denazification of Judges and Prosecutors in the German Ordinary Courts", 4 June 1947.

[931] 501/831 Wiesbaden. "Office of Military Government for Greater Hesse: Progress Report of Land Greater Hesse 1945", 21 December 1945.

considered "free from Nazi taint" to take charge of essential functions[932]. The task of taking over the functions of removed personnel became burdensome for the reinstated German jurists. The US military governor reported in November 1945 that approximately eighty percent of the judges in the US occupation zone who were in office at the time of the surrender had been members of the NSDAP or in its affiliated organisations, and had been dismissed from office in keeping with denazification directives. As a result, personnel shortages delayed the normal functioning of the German courts, and in some cases judges who had been cleared of National Socialist connections worked in several courts and handled various criminal and civil cases[933]. In addition to the personnel shortage, many of the remaining judicial personnel who were considered "politically acceptable" were of "relatively advanced age."[934] The US military government reported in June 1947 that it soon became apparent from the outset of the occupation that maintaining rigid standards for the denazification of jurists would make the re-establishment of a German judicial organisation absolutely impossible, since about eighty to ninety percent of German judges and prosecutors had been members of the NSDAP or its affiliated organisations. There were therefore two alternatives: either train politically acceptable laymen for judicial or prosecuting office within a few months, or re-admit former members of the NSDAP who could prove to have been only nominal members, and thereby

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[932] *Monthly Report of the Military Governor, U.S. Zone*, 20 August 1945, No.1.

[933] *Monthly Report of the Military Governor, U.S. Zone*, 20 November 1945, No.4.

[934] *Monthly Report of the Military Governor, U.S. Zone*, 20 December 1945, No.5.

apply the same standards to judges and prosecutors that applied to other German civil servants. The former approach was attempted in the Soviet zone, and was immediately rejected in the US zone, since continental law required years of study and post-graduate work. It thus became apparent that the latter alternative was the only logical one, and measures were taken in December 1945 to put it into effect. The Legal Division of OMGUS *verbally* (emphasis added) instructed the Legal Divisions of the *Land* military government offices to reinstate former NSDAP members who had joined on or after 1 May 1937, provided that the candidates had been classified by the special branches under the category of "discretionary - no adverse recommendations", and that they were acceptable to the *Land* Ministers of Justice[935].

The initial phase of the denazification was considered complete by the end of December 1945. The US military governor reported that the German civil government in the US occupation zone had effectively been purged of National Socialist control. Over 900 000 individuals had been investigated for "Nazi activity", and roughly 20 percent of these cases were classified as being "unfit to hold positions of responsibility."[936] The removal of individuals at this time was solely based on membership in a National

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[935] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Provenance: OMGUS: LD/AJ Br.. Folder Title: Denazification of Judges and Prosecutors. "Subject: Denazification of Judges and Prosecutors in the German Ordinary Courts", 4 June 1947.

[936] *Monthly Report of the Military Governor, U.S. Zone*, 20 January 1946, No.6. These numbers were extended to over a million individuals in January 1946, of which 260 000 were considered "active Nazis and militarists" who were removed or excluded from public employment or important positions in the economic, social and political life of the U.S. occupation zone. *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No.7.

Socialist organisation. It was virtually impossible to determine whether an individual had served or supported the NSDAP since the denazification programme, as set forth in JCS 1067, did not allow for the assistance of the German population[937]. The failure of the application of Law No.8 represented the most severe extension of the denazification, brought unnecessary interference with economic recovery and individual injustices[938]. These factors contributed to the decision to transfer the denazification to German authorities[939].

An attempt at correcting the deficiencies that were exposed in the experience of the initial denazification programme was the institution of a new comprehensive long-term programme, replacing the interim programme that was in place during the initial period of the military occupation[940]. The US military government Legal Division undertook a systematic study of the denazification for the first time in November 1945, and recommended the formation of a central planning agency for denazification. General Clay, the US deputy military governor, thereupon approved the creation of a Denazification Policy Board that was to review the subject and "'formulate a complete overall program for the denazification in the US zone with as much responsibility as possible placed on the German officials for the long range.'"[941] This new programme was to be drafted

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[937] Fürstenau, *Entnazifizierung*, p.29.

[938] Griffith, "Denazification in the United States Zone in Germany", p.69.

[939] Loewenstein, "Law and the Legislative Process in Occupied Germany", p.998.

[940] Plischke, "Denazification Law and Procedure", p.823.

[941] John Gimbel, *The American Occupation of Germany: Politics and the Military, 1945-1949* (Stanford: Stanford University

by a Denazification Policy Board that was appointed on 30 November 1945. The Board was charged with the responsibility of formulating a comprehensive denazification programme that would emphasise the greatest possible responsibility to be transferred to German officials, who would contribute to accomplishing the US and Allied war aim of creating "genuinely democratic institutions" in Germany[942]. The US military government also lacked sufficient personnel to complete the denazification programme[943].

A further step in the re-organisation of the denazification programme was taken on 16 December 1945 when Denazification Review Boards were established in each *Land*. These Boards were to accelerate the disposition of appeals, holding the final jurisdiction in the view of all reports dealing with individuals who might have been only "nominal" National Socialists[944]. Although these appeal boards could deviate from the reliance on categories of office, positions and membership in organisations that led to arbitrary results, their decisions were only final in mandatory removal cases in which an individual was removed solely on the basis of membership in the NSDAP prior to 1 May 1937. The appeal was also limited. Individuals affected by the denazification did not have the right to appeal, and the military government had the sole authority to determine

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Press, 1968), p.102; Charles Fahy, "The Lawyer in Military Government of Germany", *U.S. Department of State Bulletin*, Vol. 15 (1946), p.858.

[942] *Monthly Report of the Military Governor, U.S. Zone*, 20 January 1946, No.6.

[943] Karl Loewenstein, "Comment on Denazification", *Social Research* Vol. 14 (1947), pp.366-367.

[944] *Monthly Report of the Military Governor, U.S. Zone*, 20 January 1946, No.6.

whether an individual could be reinstated if "no adequately qualified or politically reliable substitute could be found."[945]

The Denazification Policy Board completed its report on 15 January 1946, which reviewed the basic weaknesses of the present denazification programme in detail, citing five major criticisms: 1) certain cases resulted in arbitrary consequences; 2) certain active National Socialists were not affected; 3) it lacked long-term projection; 4) it lacked participation by the Germans; 5) it lacked coordination with other OMGUS programmes. The Board based its recommendations on the relation between the denazification and the broader objectives of the occupation, with the basic objective being to prevent Germany from becoming a threat to future peace. Germans would have to participate in the denazification programme in order to prevent the creation of a group of martyrs and social outcasts that could be exploited by agitators, and thereby give the Germans the opportunity to be involved in pursuing the political objectives of the denazification programme[946].

The report of the Denazification Policy Board included a recommended programme of legislation that provided for an elaborate system of German administrative machinery that would operate under US military government supervision. Each *Land* Minister-President was to appoint a denazification minister with an adequate staff serving in the *Land* government. Denazification tribunals were to be established at the *Kreis* and *Land* levels. These tribunals would try cases of individuals who were to be classified into classes

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[945] John G. Kormann, *U.S. Denazification Policy in Germany: 1944-1950* (Historical Division, Office of the Executive Secretary; Office of the U.S. High Commissioner for Germany, 1952), p.43.

[946] Gimbel, *The American Occupation of Germany*, p.103.

of offenders on the basis of presumptive guilt. The recommended programme also followed earlier denazification legislation, including lists of ranks and organisations that were to be subject to trial proceedings, as well as stating that the German denazification law would include the substance of Law No.8, regardless of the German proposals[947] that were being developed at this time. The *Länder* governments of the US zone were working on a denazification law while the deliberations in the Denazification Policy Board were underway[948]. General Clay also instructed the *Länderrat* on 4 December 1945 to draft uniform guidelines for the denazification in the US zone by drafting a German denazification law.

A German draft of the law was completed in January 1946, while a US military government committee was charged with the same task. The main principles of the new denazification law were to consist of the following: the responsibility for denazification was to be handled by German authorities, functioning under US military government supervision; a minister for denazification was to be appointed in each *Land*; all individuals presumed to have been active National Socialists were to be registered; denazification tribunals, or *Spruchkammern*, were to be established and prosecutors were to be appointed to determine "the degree of National Socialism" of those presumed to be National Socialists; the accused would have the possibility of being heard, of exoneration, and of an appeal to an appellate tribunal; every accused would be

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[947] Kormann, *U.S. Denazification Policy in Germany*, pp.50-51.

[948] "Kabinett-Sitzung vom 6.12.1945", Wiesbaden, 1126/19; Hans Ehard, "Das Gesetz zur Befreiung von Nationalsozialismus und Militarismus", *Süddeutsche Juristenzeitung* (1946), p.7.

classified into a category, and specified sanctions would be provided for each category[949].

The last denazification enactment issued by Allied military government before the German denazification law in the US zone was Control Council Directive No.24 of 12 January 1946 on "Removal from Office and From Positions of Responsibility of Nazis and of Persons Hostile to Allied Purposes"[950], which reaffirmed the provisions of the US Denazification Directive of 7 July 1945[951]. The purpose of this new Directive was to establish a uniform denazification policy in the four occupation zones as envisaged in the Potsdam Protocol[952]. The terms of this Directive ordered the removal and exclusion of all individuals from public or semi-public office who were defined as having been "more than nominal participants" in the activities of the NSDAP,

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[949] Z1/1213, Koblenz. Headquarters, Office of Military Government Württember-Baden, Dr.H./hb Leg., 20 February 1946, "Report of the Meeting of the Länderrat - Committee on Denazification, 7-16 February 1946".

[950] "Directive No.24: Removal from Office and from Positions of Responsibility of Nazis and of Persons Hostile to Allied Purposes", *Official Gazette of the Control Council for Germany* No.5 (31 March 1946), pp.98-115.

[951] Plischke, "Denazification Law and Procedure", p.817; Kormann, *U.S. Denazification Policy in Germany*, p.48.

[952] Whereas the denazification was a prime objective in the U.S. zone, the British occupation authorities maintained that the denazification should not interfere with the postwar reconstruction, and was therefore relegated to a more secondary priority. The Soviet authorities exploited the denazification in their claim to foster social change, and the French made little effort on the whole. Kormann, *U.S. Denazification Policy in Germany*, pp.47-48; Carl J. Friedrich *et al.*, *American Experiences in Military Government in World War II* (New York: Rinehart & Company, 1948) pp.259-261.

and were thus considered active National Socialists, supporters of National Socialism or militarists[953]. They were to be considered as such on the basis of designated offices and positions. Ninety-nine categories of ranks and positions were listed as the basis for compulsory removal from office or employment, including all senior judges and public prosecutors who were employed or appointed at any time after 1 March 1933[954]. An additional list of twenty-two categories of persons provided for "discretionary removal", if an individual was more than a nominal participant in National Socialist activities[955]. The most significant category in this list consisted of allegedly nominal members of the NSDAP who joined after 1 May 1937. This date was a US contribution that was considered of questionable value, since it was completely arbitrary, and did not reflect the intricacies of personal situations under the National Socialist regime. Especially for those who were not civil servants[956].

Although Directive No.24 maintained the principle of presumptive guilt on the basis of official positions, this Directive provided an improvement over the terms of the former denazification legislation. The lists of offices initially presented in the *Handbook for Military Government* did not accurately reflect political affiliation with the National Socialist regime including practically all of the leading administrative positions, for which legal training was a traditional prerequisite, as well as ranking positions

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[953] "Directive No.24", Art. 2, *Official Gazette of the Control Council* No.5, pp.98-100.

[954] Art. 10, *Ibid.*, pp.102-112.

[955] Art. 12, *Ibid.*, pp.113-114.

[956] Friedmann, *Allied Military Government of Germany*, p.116.

in the various courts. Hence, this measure also affected those office-holders who had been appointed during the Weimar Republic. This error was remedied by Directive No.24, which limited the exclusion of public officials to those who had been appointed since 30 January 1933, and those who were incumbents on that date and had survived the subsequent successive political purges[957].

The US military government planning for a new denazification policy in early 1946 was based on Control Council Directive No.24 and Military Government Law No.8. The terms of these enactments were to serve as the framework for the task of denazification by German authorities, who were in the process of drafting a German denazification law in the *Länderrat* to be implemented in the three *Länder* of the US zone[958]. The Ministers of Justice of the US zone completed the draft denazification law for the three *Länder* on 22 December 1945, which was accepted by the *Land* governments then handed over to the military government for approval[959]. The German and the US military government authorities agreed that the German draft was to serve as the basis of the new denazification law, with modifications based on the provisions of the military government draft. Both the German and the military government authorities were bound by the provisions of Control Council Directive No.24[960]. The German proposals that were presented in this

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[957] Loewenstein, "Justice", p.247.

[958] Latour, Vogelsang, Okkupation und Wiederaufbau, p.137.

[959] Gimbel, American Occupation of Germany, p.104; Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.100.

[960] Z1/1213, Koblenz. Headquarters, Office of Military Government Württemberg-Baden, Dr.H./hb Leg., 20 February 1946, "Report of the Meeting of the Länderrat - Committee on Denazification, 7-16 February 1946".

draft were debated thereafter[961]. Points of variance emerged between the German draft denazification law and US military government approach to the denazification.

The provisional government of Hesse had set forth in November 1945 that a "*complete denazification*" had to be undertaken to cleanse the remnants of the former regime from all branches of the economy, the entire civil service, and all other spheres of society. Proceedings were to be instituted against individuals who had actively supported the National Socialist state, even if they were not members of the NSDAP. Such individuals were to be dealt with more severely than those who had been forced to become formal members of the NSDAP, although it was against their personal convictions[962]. The criterion of the denazification proceedings was thus to be focused on former actions, rather than formal membership. The German authorities at the *Länderrat* also objected to the date of 1 May 1937 for determining political implication, maintaining that when an individual joined the NSDAP or one of its affiliated organisations and the duration of membership was irrelevant. According to the German view, the criterion of setting a key date as well as membership constituted a much too superficial and misleading indication of guilt, since these criteria did not provide evidence for actions or individual circumstances in the National Socialist regime[963]. In contrast to US military government denazification proceedings, the German draft denazification law also did

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[961] Gimbel, *American Occupation of Germany*, p.104; Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.100.

[962] 501/927, Wiesbaden. "Programmatische Erklärung der Grosshessischen Staatsregierung", 23/11/45.

[963] Richard Schmid, "Denazification: A German Critique", *American Perspective* Vol. 2 (1948), p.237.

not include provisions for presumptive guilt or placing the burden of proof of innocence on the accused[964]. The German draft set forth that it was the public prosecutor who was responsible for proving the guilt of the accused. The extent of the prosecution was to be limited to the more important National Socialists, and political implication was to be limited to those who were known to have taken an active part in the National Socialist regime[965]. Whatever the reason why a jurist had joined the NSDAP or an affiliated organisation, it would be difficult to prove that they were guilty of criminal actions if they applied the laws of the National Socialist regime, which were the laws of the state. On the other hand, they could be judged on whether they had broken moral laws while they were involved in the National Socialist administration of justice[966]. Hence, the German authorities intended to call individuals to account on the basis of their former actions, rather than broadly applying the principle of presumptive guilt on the basis of membership in a National Socialist organisation. Their proposed denazification legislation was set on a judicial rather than a political basis, setting forth a series of crimes and acts following the example of a criminal code. However, the denazification law would declare that such past actions were to be prosecuted *following* the enactment of the

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[964] Johnson, "Denazification", p.71; Artur Sträter, "Denazification", *Annals of the American Academy of Political and Social Science*, Vol. 260 (1948), p.47.

[965] Kormann, *U.S. Denazification Policy in Germany*, p.52; Friedrich, "Denazification, 1944-1946", p.264.

[966] Tom Bower, *The Pledge Betrayed: America and Britain and the Denazification of Postwar Germany* (Garden City, New York: Doubleday & Co., 1982), p.145.

law, since the prosecution of these actions was not otherwise possible[967].

This initial draft "Law for the Liberation from National Socialism and Militarism" was rejected by the US military government authorities who believed that "it contravened their basic policy objectives in Germany"[968]. The German authorities did not accept the concept of removing individuals from office on the basis of broad categories, and recommended limiting the scope of the denazification to the most notorious former National Socialists[969]. The US military government authorities at the *Länderrat* also instructed the German authorities that the German denazification law was to include an appendix listing the categories of positions contained in Control Council Directive No.24[970]. These categories of positions were to serve as evidence for determining the degree of affiliation with the National Socialist regime in individual cases, rather than absolute criteria[971] of presumptive guilt. All former members of the National Socialist organisations were also to present themselves before denazification tribunals in which individuals were to prove their innocence[972]. Although the structure of the German draft denazification law was not changed, the US Military Government ordered substantial provisions to be introduced into the German

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[967] Johnson, "Denazification", p.70.

[968] Kormann, *U.S. Denazification Policy in Germany*, p.55.

[969] *Ibid.*

[970] Ehard, "Das Gesetz zur Befreiung von Nationalsozialismus und Militarismus", p.7.

[971] "Final Report on Foreign Aid", p.128.

[972] Gimbel, *American Occupation of Germany*, p.104.

draft denazification law. Tenure of membership, official position or rank in the NSDAP or its affiliated organisations justified the accusation of an individual being charged as a "Concerned Person". The charge was presumptive, rather than final, until the accused disproved the charge in proceedings before the denazification tribunal, which could then place the accused in the category of "Follower" or "Non-concerned". Anyone who was a member of the NSDAP or one of its affiliated organisations could not occupy a position of responsibility. The key date of 1 May 1937 was maintained, making anyone who joined the NSDAP or an affiliated organisation before this date to be charged automatically as a "Concerned Person"[973] on the basis of presumptive guilt.

The German-drafted Law for Liberation from National Socialism and Militarism was adopted under strong US military government pressure that disregarded the interests of the German policymakers[974]. This pressure was overwhelming since the new German denazification law was to be approved by the US military government[975]. The US military government maintained that since Control Council Directive No.24 was in force in Germany, it was also binding upon the administration of the US zone. Hence, the Law for Liberation was to conform to the provisions of this Directive accordingly[976]. The German *Land* governments were entrusted with continuing the work of implementing the objectives of

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[973] Schmid, "Denazification: A German Critique", pp.236-237.

[974] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.98; Niethammer, *Entnazifizierung in Bayern*, p.315.

[975] Härtel, *Der Länderrat des amerikanischen Besatzungsgebietes*, p.219.

[976] 1126/17, Wiesbaden. "Erklärung Bowie vom 13.2.46".

US and Allied denazification policy[977], which in effect restricted their freedom of policymaking action.

The members of the cabinet of Hesse were reluctant about applying such an extensive denazification law. They feared that its terms would bring about a breakdown of the administration and negative effects on the economic reconstruction. They especially criticised the fact that the law affected too many people. This could potentially bring about opposition to democracy among the larger number of nominal former members of the NSDAP who would be classified as "Followers"[978]. The members of the cabinet were particularly opposed to the automatic classifications under the draft denazification law and the attached appendix[979] of categories. In the face of military government pressure, the cabinet accepted the law in conjunction with the cabinets of Bavaria and Württemberg-Baden, and officially adopted the law on 5 March 1946[980]. The implementation of the Law for Liberation through German authorities would attempt to bring about a political cleansing on the basis of common principles and in accordance with legally organised proceedings, in which the decisive factor of every case would be subject to an individual examination of overall conduct (*Gesamtverhalten*) rather than external characteristics[981]. In addition to evaluating cases on an

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[977] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No.7.

[978] Mühlhausen, *Hessen 1945-1950*, p.315.

[979] 1126/19, Wiesbaden. "Beschluß-Protokoll über die Sitzung des Kabinetts am 21. Februar 1946".

[980] 1126/19, Wiesbaden. "Beschluß-Protokoll über die Sitzung der (sic) Kabinetts am 25. Februar 1946".

[981] 1126/17, Wiesbaden. "Erklärung des Ministerpräsidenten von Gross-Hessen Prof. Dr. Karl Geiler zu dem Gesetz zur

individual basis, this new Law for Liberation from National Socialism and Militarism was to attempt to address the mistakes of the US denazification policy[982], stressing judicial penalty for crimes with a scale of sanctions graded to the offence, while maintaining the military government mandatory removal categories[983]. Although the structure of the law followed the categories of presumptive guilt[984] in accordance with the guidelines provided by Control Council Directive No.24, judgment thereafter would also be based on the investigation of individual cases, in addition to the basis of holding a certain office or membership of certain organisations[985]. The Law for Liberation thus represented a compromise between the German and the US military government denazification approaches: treating cases on the basis of their merits, while maintaining the established principle of presumptive guilt on the basis of former membership.

The Second Phase of the Denazification: The Law for Liberation from National Socialism and Militarism

The *Land* governments assumed responsibility for applying the denazification programme in the US zone following the enactment of the Law for Liberation from

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Befreiung von Nationalsozialisms und Militarismus", 4. März 1946.

[982] Fürstenau, *Entnazifizierung*, p.62.

[983] Griffith, "Denazification in the United States Zone", p.70.

[984] Ehard, "Das Gesetz zur Befreiung von Nationalsozialismus und Militarismus", p.8.

[985] Dennis L. Bark and David R. Gress, *A History of West Germany*, Vol.1: *From Shadow to Substance 1945-1963* (Oxford: Blackwell Publishers, 1993), p.75.

National Socialism and Militarism[986]. The *Länder* Minister-Presidents adopted this law on behalf of their respective governments, which would be applied separately in each *Land* under the same terms[987]. German agencies would be established thereafter for the implementation of the Allied denazification policy[988]. This law would be put into practice beginning in June 1946[989] following the creation of a Ministry of Political Liberation in each *Land* that would enforce the law after the required tribunals and administrative and investigative machinery were established. The US military government would continue its denazification operations under the current directives, including Law No.8, which would remain in force until 1 June 1946[990], when the new denazification procedure would be introduced under the German Liberation Law. All US military government denazification directives were later rescinded on 14 June 1946, making German officials solely responsible for denazification operations under the supervision of the US military government[991].

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[986] "Final Report on Foreign Aid", p.128.

[987] *Monthly Report of the Military Government, U.S. Zone*, 20 March 1946, No.8.

[988] *Monthly Report of the Military Governor, U.S. Zone*, 20 February, No.7.

[989] Freeman, *Hesse: A New German State*, p.160.

[990] *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8.
Law No.8 was only formally repealed by the U.S. military government on 11 May 1948, after its effective operation ceased to function upon the promulgation of the German Liberation Law. *Monthly Report of the Military Governor, U.S. Zone*, May 1948, No.35.

[991] *Monthly Report of the Military Governor, U.S. Zone*, 20 July 1946, No.12.

The promulgation of the Liberation Law thus set forth two main objectives for the military government denazification officers: to reduce the number of cases to be processed before the programme would be handed to the German authorities, and to assist the German officials in establishing the administrative machinery through which the Liberation Law would be implemented. The preparation for this transfer of responsibility and ensuring the uniform application and administration of the law in the US occupation zone took place in a series of meetings between denazification officials from the three *Länder* and military government officials affiliated with the *Länderrat* in March 1946, such as establishing uniform procedures for registration through the *Meldebogen* (questionnaire)[992] that was to be filled out and submitted by every adult German[993], the investigation and evaluation of this form, the enforcement of sanctions, and the proceedings of the

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[992] *Monthly Report of the Military Governor, U.S. Zone*, 20 April 1946, No.9.

The *Meldebogen* was substantially the same as the earlier *Fragebogen*, except for slight differences in the form. A receipt was attached to the *Meldebogen* which had to be countersigned and presented to the local authorities, the police or civil administration office, before one could receive a ration card. In turn, these questionnaires were given to the public prosecutors for processing and evaluation. Kormann, *U.S. Denazification Policy in Germany*, p.68.

[993] "Durchführungsverordnung Nr. 1 vom 5. März 1946 zum Gesetz zur Befreiung von Nationalsozialismus und Militarismus von 5. März 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), pp.71-72.

The registration of all adult Germans in the U.S. occupation zone on Meldebogen forms was completed by 5 May 1946. *Monthly Report of the Military Governor, U.S. Zone*, 20 May 1946, No.10.

tribunals[994]. The military government would confine its responsibilities to inspecting and supervising the German authorities in the implementation of the Law for Liberation[995]. It may be argued that familiarity with the German political background and language could also allow for more realistic appeal against being accused of having taken part in upholding the National Socialist regime. Whether the new German denazification programme would be implemented more successfully than the US military government programme remained to be seen. Although the responsibility for the denazification was transferred to German authorities, the Law for Liberation retained the pattern of the initial denazification programme that required examining large numbers of individuals on the basis of presumptive guilt categories[996]. Thus, the main similarity between the German and the US military government administered denazification programmes lay in the fact that the Law for Liberation was designed to implement the Allied denazification policy, as it was expressed under the terms of Control Council Directive No.24. It provided for the creation of German tribunals composed of "anti-Nazis of long-standing" who would classify individuals appearing before the tribunals into specific categories of guilt, and impose sanctions to the extent of their responsibility in their association with the National Socialist regime[997].

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[994] *Monthly Report of the Military Governor, U.S. Zone*, 20 April 1946, No.9.

[995] *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8.

[996] Kormann, *U.S. Denazification Policy in Germany*, p.68.

[997] *Monthly Report of the Military Governor, U.S. Zone*, 20 March 1946, No.8.

The Law for Liberation was based on two primary insights: 1) it rejected the previously indiscriminate automatic removals from office that were based on the notion of collective guilt; 2) it reaffirmed that individuals rather than entire categories of individuals could be held accountable for their degree of cooperation with the National Socialist regime[998]. Being charged as a former National Socialist was defined according to former office, in addition to the date of membership. Hence, a more accurate, albeit theoretical, possibility of assessing the personal circumstances of one's level of activity in having contributed to supporting the regime was introduced. Individuals who were removed from office could be reinstated. The law stated that all who were responsible would be called to account, while being afforded the opportunity to vindicate themselves. The evidence for judgment would be based on individual responsibility and actual conduct as a whole. External appearances, such as membership in the NSDAP or its affiliated organisations, would not be considered decisive in view of other evidence. In certain cases, such as those possessing specialised knowledge, could be reinstated temporarily until they were replaced by another who was not politically implicated[999].

Unlike the automatic exclusion or removal from office denazification staged by the military government, specific penalties were set forth. Individuals were to be classified according to one of five categories: 1) Class I: "Major

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[998] Kurt P. Tauber, *Beyond Eagle and Swastika: German Nationalism since 1945* Vol.1 (Middletown: Wesleyan University Press, 1967), p.29.

[999] Arts. 1, 2, Section 1, Art. 60, Section 3, *Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946*, Erich Schullze, ed. (München: Biederstein Verlag, 1947), pp.4, 6, 59-60.

Offenders"; 2) Class II: "Offenders" (activists, militarists, and profiteers); 3) Class III: "Lesser Offenders"; 4) Class IV: "Followers"; 5) Class V: "Persons Exonerated". "Major Offenders" included those who were guilty of committing crimes out of political conviction, crimes against humanity or in violation of international law. They were to be punished by death or sanctions including up to fifteen years' imprisonment with hard labour, confiscation of property, and permanent exclusion from public office. "Offenders" were those who had supported and/or contributed to the service of National Socialism and the National Socialist regime, and would be subject to up to ten years' imprisonment and exclusion from public office. "Lesser Offenders" included early participants in the NSDAP who had withdrawn from the party, members of the Armed Forces, or individuals who otherwise would be considered "Offenders" but could merit milder penalties because of special circumstances and their character, and had proven themselves to be capable of fulfilling their duties as citizens of a peaceful and democratic state in a period of probation. They could be placed on probation for a period of up to three years and be required to report periodically to the police in their place of residence, and as civil servants could face retirement or demotion. "Followers" included those who were not more than nominal participants or insignificant supporters of National Socialism. They could be placed on probation or face restrictions of movement, or as civil servants face retirement or demotion, and be expected to pay a single or a series of contributions to funds for reparations. "Persons Exonerated" were those who showed a passive attitude and also actively resisted the National Socialist regime to the extent of their powers and suffered disadvantages as a result, in spite of their formal membership, candidacy or other external indication[1000].

[1000] Arts. 4-18, Section 1, *Ibid.*, pp.7-27.

All cases were adjudicated by denazification tribunals (*Spruchkammern*) that would determine the category in which the individual would be assigned, and impose the appropriate sanctions. Cases could be brought before a *Berufungskammer*, or appellate tribunal[1001]. The individual under scrutiny could also appear before the tribunal with defence counsel[1002]. Unlike in an ordinary law court, the burden of proof in the denazification procedure was borne by the individual under scrutiny[1003]. An appendix to the law was included upon the insistence of the US military government, which listed ranks, organisations and positions to be considered as incriminating evidence of National Socialist or militarist activity that would subject individuals to denazification proceedings[1004].

The most serious offenders in the legal profession were those considered to have been ardent National Socialists who had held high-ranking positions after 1 May 1937, based on the positions and offices listed in Control Council Directive No.24. An appendix was included with the Law for Liberation based on classifications set forth in Control Council Directive No.24, presenting an elaborate list of positions and judicial offices whose former incumbents were automatically named "Major Offenders", or "Offenders"[1005]. Class I included all the highest-ranking judicial and administrative officials of the courts at the national

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[1001] Art. 24, Section 2, *Ibid.*, p.29.

[1002] Art. 35, Section 2, *Ibid.*, pp.41-42.

[1003] Art. 34, Section 2, *Ibid.*, p.40.

[1004] *Kormann*, U.S. Denazification Policy in Germany, *p.68*.

[1005] Loewenstein, "Reconstruction of the Administration of Justice", p.450.

level, such as the *Reichsgericht*, all judges and prosecutors of the *Volksgericht*, the presidents of the *Oberlandesgerichte* appointed after 31 December 1938, and the prosecuting attorneys and lawyers appointed to the *Oberlandesgerichte* after 31 March 1933[1006]. Class II included all members of the NSDAP who had joined prior to May 1937[1007], the judges and prosecutors of the *Sondergerichte*, the presidents and chief prosecutors of the *Landgerichte*[1008].

Jurists who were "nominal members" of the NSDAP or an affiliated organisation and were readmitted to practice with the final approval of the military government maintained their practice. It was unnecessary for denazification proceedings to be initiated against them under the Law for Liberation, unless they would be classified in a category higher than "Follower", and there was evidence against them according to the results of an investigation[1009]. The relaxation of the unofficial policy of blocking politically implicated jurists from reinstatement later made it possible for all German courts to be re-opened by March 1946. The jurists who were reinstated following this change of the unofficial reinstatement policy possessed the complete confidence of the regional military government office and the *Land* Minister of Justice. The military government special branches applied the strictest possible standards for in the classification of judicial personnel, while decisions in all cases that were at all doubtful were

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[1006] Schullze, *Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946*, pp.80-81.

[1007] *Ibid.*, p.67.

[1008] *Ibid.*, pp.81-82.

[1009] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Subject: "Denazification of Judges and Prosecutors in the Ordinary German Courts", 4 June 1947.

postponed for judgment under the future German denazification procedures[1010].

Judicial personnel continued to be appointed by the *Land* Minister of Justice, while being subject to the denazification procedure set forth under the Law for Liberation. The eligibility of judicial personnel appointed by the Minister of Justice remained subject to the prior investigation and approval by the military government, which verified individual *Fragebogen* that were submitted until June 1946. These jurists were then made available for provisional appointment by the Ministry of Justice[1011]. Individuals who had hitherto been approved for reinstatement by the military government on the basis of the evaluation of their *Fragebogen* were to remain in their current office or occupation, until their cases were re-evaluated by a *Spruchkammer*[1012]. This also included the judicial personnel that were previously selected by the local *Landgericht* presidents to the *Amtsgerichte* affiliated with the appropriate *Landgerichtsbezirk*[1013]. In the interest of maintaining the independence of the administration of justice and to facilitate the implementation of the Plan for the Administration of Justice (US zone) in Hesse, the *Land*

[1010] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Subject: Denazification of Judges and Prosecutors in the German Ordinary Courts, 4 June 1947.

[1011] RG 260 OMGUS, 8/188-2/5. APO 633. Subject: "Weekly Summary Report for Legal Division from 11 to 17 August 1946", 16 August 1946.

[1012] 463/929, Wiesbaden. Betr.: "Weiterbeschäftigung der unter das Gesetz vom 5.3.1946 fallende Personen; Abschrift", 1050 - I 850, 17 May 1946.

[1013] 462/1301, Wiesbaden. Betr.: "Wiedereinstellung des Justizinspektors K----- und des Justizinspektors F-----, beide in Limburg/Lahn", 29 March 1946, 201 IE - 54 -.

Minister of Justice was delegated the sole authority within the *Land* government to appoint and remove officials within the judicial organisation[1014]. The appointments of jurists by the Minister of Justice were made permanent after the examination and judgment by a *Spruchkammer*[1015].

The power of the military government with regard to suspending and removing reinstated judicial officials was broadly defined as the right to remove officials whose actions were "in violation of the occupation objectives", or lacked the necessary positive political qualities "to assist in the development of democracy in Germany" and were considered "detrimental to the achievements of US Military Government objectives."[1016] The US military government insisted that appointments to certain key positions in the German administration of justice were to be kept clear of former members of the NSDAP. No such individual was to hold a position in the Ministry of Justice or an *Oberlandesgericht*, or serve as a president or a chief prosecutor at a *Landgericht*[1017]. This policy was to be followed by the German authorities themselves when the US

[1014] RG 260 OMGUS, 8/188-2/5, Wiesbaden. APO 633. Subject: "Weekly Summary Report for Legal Division from 18 to 24 August 1946", 23 August 1946.

[1015] 462/1301, Wiesbaden. Der Minister der Justiz, Ib AR 321/46. Herrn Landesgerichtspräsidenten in Limburg zu 201 IE - 64 -., 15 May 1946.

[1016] Z45F 17/199-3/40 RG 260 OMGUS, Koblenz. Provenance: OMGUS LD AJ Br.. Folder Title: File No.H(g) Justice Ministry matters - organisation and functions of Justice Ministry. Description and Denazification of German Administration of Justice. AGO 014.3, Subject: "Denazification of German Administration of Justice", 31 October 1947.

[1017] Z45F 17/199-3/40 RG 260 OMGUS, Koblenz. AGO 014.3. Subject: "Denazification of German Administration of Justice", 31 October 1947.

military government divested itself of its power to approve new appointments in the German administration of justice after 21 September 1946[1018], which was affirmed in November 1946 when the US military government set forth that German judges and judicial officials, up to and including the Minister of Justice, could be appointed without the prior approval of the US military government[1019]. All key appointments in the *Land* administration of justice were filled upon the appointment of the General Prosecutor (*Generalstaatsanwalt*) of the *Oberlandesgericht* in Frankfurt-am-Main in October 1946[1020]. The Minister of Justice maintained the function of approving appointments of all other judicial personnel. These included individuals who were reinstated on a temporary basis[1021], such as the jurists who were reinstated by the military government before the Law for Liberation went into force[1022] while the necessity for their services was pressing. They were to remain in office until the final status of their cases would be determined by a *Spruchkammer*[1023].

[1018] *Ibid.*

[1019] *Monthly Report of the Military Governor, U.S. Zone*, 30 November 1946, No.17.

[1020] RG 260 OMGUS, 8/188-2/5, Wiesbaden. APO 633. Subject: "Weekly Report of Legal Division for week ending 5 October 1946".

[1021] 462/1302, Wiesbaden. Betr.: "Wiederanstellung des Justizinspektors H----- F----- aus Gladenbach", 5 November 1946.

[1022] 501/42(1), Wiesbaden. APO 633. Subject: Request for Priority, 14 October 1947.

[1023] 460/545, Wiesbaden. 1050e - I 1060. Betr.: Genehmigung zur vorläufigen Weiterbeschäftigung nach Art. 60 des Gesetzes vom 5.3.1946, 2 October 1946; 501/42(1), Wiesbaden. APO 633. Subject: Request for Priority, 14 October 1947.

The integrity of the judicial profession as an aspect of implementing occupation policy was thus to be maintained by the *Land* Ministry of Justice, while fulfilling the terms of denazification policy. The *Spruchkammer* was to determine whether or not any civil servant was eligible for reinstatement into office, which depended on the sanctions that the *Spruchkammer* imposed on the individual. Whether or not the individual would be reinstated after being declared eligible for reinstatement rested with the appropriate appointing authority of the governmental agency, which was to observe two policies: the appointment or reinstatement of a civil servant had to possess positive political, liberal and moral qualities that would assist in the development of democracy in Germany; the appointment or reinstatement had to be subject to the employment preferences and priorities in favour of individuals who had been persecuted by the National Socialist regime and anti-National Socialists[1024].

In view of the experiences of German judges sabotaging democracy after 1919, it was particularly important to ensure those key positions in the German administration of justice were free from former National Socialists. The individuals selected for these key positions were responsible for maintaining the supervision of the German courts and check potential "reactionary, legalistic and anti-democratic tendencies"[1025]. The Minister of Justice was mindful at the outset of the denazification to prevent former National Socialists from re-entering the judicial organisation. The first individual in Hesse who presented

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[1024] 501/831 Wiesbaden. Abschrift: "Extracts from Title 2 Military Government Regulations, Eradication of Nazism and Militarism."

[1025] Z45F 11/5-2/1, Koblenz. OMGUS, LD. Legal Division History. "Interview with Dr. Karl Loewenstein."

himself to the Ministry of Justice for re-appointment as a judge after being cleared by a German denazification tribunal "was refused appointment by the Ministry on the grounds that not only cleared Nazis but instead non-Nazis were desired as personnel for the administration of justice."[1026] The Minister of Justice of Hesse reported to the US military government that he personally assumed the responsibility of verifying the political reliability of candidates for judicial office after they were cleared by a *Spruchkammer* before their appointment as judges or prosecutors. In addition to the problem of acquiring applicants with an adequate political record, the professional qualities of the available judicial personnel were not always exemplary, since they were either over-age or had been out of practice for years as a result of the Second World War. On the other hand, the Minister of Justice attempted to employ former judges and prosecutors who had to leave Germany as a result of their racial, religious or political persecution, and expressed the desire to return. There were three such judges among the staff of the Frankfurt-am-Main *Landgericht*. The Minister also attempted to employ well-qualified judges from outside of Hesse[1027].

The success of the personnel reconstruction thus remained subject to the professional and political qualities of the available applicants for judicial office. Their reinstatement was determined by the denazification tribunals in Hesse, which were supplemented by recommendations for personnel submitted to the *Land* Minister of Justice through

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[1026] RG 260 OMGUS. 8/188-2/5, Wiesbaden. APO 633. Subject: "Weekly Summary Report for Legal Division from 6 July to 13 July 1946", 12 July 1946.

[1027] Z45 F 17/56-3/7 RG 260/OMGUS, Koblenz. AJ 015.2 18 November 1946 HMR/f, Subject: Report on Inspection of German Court in Greater Hesse from 28 October to 4 November 1946.

the *Landgericht* presidents by the leading authorities of the subordinate *Amtsgerichte*[1028]. The decision for reinstatement was subject to further scrutiny by judicial officials and the final decision for reinstatement rested with the Minister of Justice.

The practice of evaluating jurists according to their political record based on former membership in National Socialist organisations severely hindered the personnel reconstruction of the judicial organisation, and there were insufficient numbers of jurists to replace those who were removed from office. Fifty percent of the regular positions in the administration of justice in Hesse that were accounted for in the last *Reich* budget remained vacant in August 1946[1029]. Removals from office had severely handicapped the administration of justice, and the replacements were "too few, too old, and too inefficient", which resulted in long delays in criminal prosecutions, and an increasingly large-scale backlog of cases in the criminal and the civil courts. In order to help alleviate the problem of the personnel shortage in the administration of justice that created a serious burden on the workload in lawyers' offices, especially due to time devoted to cases relating to the denazification[1030], the personnel office of the Ministry

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[1028] 462/1302, Wiesbaden. I M3. Betr.: Wiedereinstellung des Justizinspektors ----- in Wetzlar, 25 October 1946; I S2. Betr.: Wiedereinstellungsgesuch des Justizangestellten -----, 25 September 1946; IO. Betr.: "Anstellung des Justizinspektors -----, 22 July 1946.

[1029] RG 260. 8/188-2/5. APO 633, Wiesbaden. Subject: "Weekly Summary Report for Legal Division from 18 to 24 August 1946", 23 August 1946.

[1030] 501/831 Wiesbaden. I/St/Kö. Tageb. Nr. 20758/46. Betr.: "Juristische Hilfsarbeiter bei Rechtsanwälten", 13. Januar 1947; Der Vorstand der Anwaltskammer and der Herrn Minister für politische Befreiung, 26. Oktober 1946, Geschäftsnummer: 865.1196/46.

of Justice in Hesse proposed employing jurists (judges, lawyers and assessors) who were removed from office due to political implication to serve as legal assistants[1031]. Such individuals were permitted to be employed in clerical functions, in which they could not offer legal advice, sign letters or represent clients in court[1032], thus resigning them to the equivalent of "ordinary labour" since they were expressly forbidden to practice law[1033]. However, this measure did not remedy the problem of alleviating the shortage of court personnel. The personnel shortage was so acute that former National Socialist jurists had to be reinstated[1034]. This was considered absolutely necessary since the work-load was continually increasing, and coping with the existing load could only be handled by assigning greater numbers of court personnel to remedy the situation[1035].

The work of the denazification tribunals established by the Liberation Law was also hampered by the personnel shortage problem. In addition to the problem of finding candidates who were "known opponents of National Socialism

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[1031] 501/831 Wiesbaden. I/St/Kö. Betr. "Beschäftigung belastete Juristen als Hilfsarbeiter beim Anwälten", 7.2. 1947.

[1032] 501/831 Wiesbaden. "Betr.: "Beschäftigung von Juristen als Hilfsarbeiter bei Anwälten, datiert 7.2.47."

[1033] 501/831, Wiesbaden. IX 9140. Betr.: "Beschäftigung in 'gewöhnlicher Arbeit' gemäß Art. 58, 63 des Säuberungsgesetzes vom 5.3.46".

[1034] Loewenstein, "Reconstruction of the Administration of Justice", p.453.

[1035] 462/1302, Wiesbaden. Betr.: "Personalverhältnisse beim Amtsgericht in Biedenkopf", 15 November 1946.

and Militarism, personally beyond reproach, and fair and just" as the law prescribed[1036], the denazification authorities lacked legally trained personnel to serve with these tribunals[1037]. The presidents of the *Landgericht* and the *Amtsgericht* in Frankfurt-am-Main informed the Ministry for Political Liberation that judges could hardly be spared to serve in the *Spruchkammer*, in view of the extent of the foreseen time that the denazification proceedings would consume, and the judges who could fulfil this function were few (eight out of forty-one). Some of the total number of judges had come from other parts of Germany and were therefore unfamiliar with local conditions as was prescribed by the Law for Liberation[1038], while others were unavailable to serve, or they were ill-suited for the task owing to their age, ailments such as hearing loss, or health considerations, or they could be open to personal criticism due to events and circumstances in the past and therefore they could not be considered politically irreproachable. In spite of the fact that the number of the judges who could serve in the *Spruchkammer* was insufficient, since at least thirty would be required at the outset of the proceedings, those judges who could serve could not be spared to give all their time to this function since the law court staffs were completely insufficient, and others could not be spared at all since they were engaged in specialised areas of the

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[1036] Art. 28, Section 1, Schullze, *Gesetz zur Befreiung von Nationalsozialismus und Militarismus*, p.32.

[1037] Loewenstein, "Reconstruction of the Administration of Justice", pp.451-452; Gustav Stolper, *German Realities* (New York: Reynal & Hitchcock, 1948), p.60.

[1038] Art. 25, Section 1, Schullze, *Gesetz zur Befreiung von Nazionalsozialismus und Militarismus*, p.30.

law[1037]. The Minister of Justice instructed the authorities of the judicial organisation that judges and prosecutors were not to be assigned to the *Spruchkammer* if their appointment to serve in denazification proceedings would impede the work of the administration of justice. If judicial personnel could not be spared for these tasks, the appointment of other suitable personnel would be the responsibility of the local leading political administrators (the *Oberbürgermeister* and *Landräte*)[1038]. Although the Minister of Justice pledged to assist the denazification authorities in securing judges and other personnel for the denazification tribunals in return for providing priority to the clearance of judges and court personnel[1039], most of the qualified judges and lawyers were in fact unwilling to leave their practice to exercise the ungrateful function of working in these tribunals[1040]. Ninety-three percent of jurists in Hesse refused to participate in denazification functions[1041]. Jurists were thus compelled to serve as public prosecutors under an ordinance issued by the cabinet of

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[1037] 460/545, Wiesbaden. Betr.: Bildung von Kammern auf Grund des Gesetzes zur Befreiung vom Nazionalsozialismus und Militarismus vom 5.3.1946 im Landgerichtsbezirk Frankfurt-am-Main, 26 March 1946.

[1038] 463/929, Wiesbaden. Betr.: "Bildung vom Spruchkammer auf Grund des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus", 25 March 1946.

[1039] *Monthly Report of the Military Governor, U.S. Zone*, 20 July 1946, No.12.

[1040] Loewenstein, "Reconstruction of the Administration of Justice", pp.451-452.

[1041] Fürstenau, *Entnazifizierung*, p.182.

Hesse on 13 November 1946[1042]. Jurists who avoided serving in the denazification tribunals included lawyers who were victimised in the National Socialist regime since they were not National Socialists. It was argued that serving in this capacity conflicted with their desired autonomy, and that lawyers were to be made available to the greatest possible extent to serve the public as effective and suitable defenders in the denazification proceedings and its peculiarities[1043]. Jurists in Hesse serving as chairmen or prosecutors in the denazification tribunals repeatedly objected to having to take part in the functions of these tribunals. They declared they could not re-establish their legal practice while they were serving in the denazification tribunals. This thereby left them at a disadvantage to former National Socialist jurists who were classified as "Followers" or "Persons Exonerated" under the Liberation Law, and could continue practicing in the legal profession thereafter[1044]. Performing the function of prosecutor or judge was also likely to bring them into conflict with the local population or with the military government[1045].

In addition to the problem of staffing these tribunals, the US military government Special Branches that reviewed

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[1042] 501/892, Wiesbaden. IV/Be/Re/Tgb.Nr.. Betr.: "Verpflichtung zur Tätigkeit an einer Spruchkammer", 19.12.1946.

[1043] 501/843, Wiesbaden. Vorstand der Anwaltskammer Darmstadt, Darmstadt 3. Mai 1947. "Betr.: Dienstverplichtung von Rechtsanwälten".

[1044] 501/1586, Wiesbaden. "Betr.: Massnahmen zur Unterstützung der Juristen, die ihre Arbeitskraft der Durchführung des Gesetzes vom 5. März 1946 zur Verfügung stellen." 18 März 1946.

[1045] Johnson, "Denazification", p.73.

their decisions[1046] criticised their apparent tendency to pass excessively lenient sentences[1047]. On the other hand, German politicians claimed they understood the term "National Socialists and Militarists" much more realistically than the US military government, and reduced the numbers of individuals affected by the Law for Liberation in order to allow for greater numbers of necessary personnel to be reinstated in occupations that faced personnel shortages[1048].

This led to a conflict between the German authorities and the US military government over the rigour of the application of the denazification[1049]. The US deputy military governor General Clay harshly criticised the work of the denazification tribunals at the Fourteenth Meeting of the *Länderrat* on 5 November 1946, accusing the German authorities of lacking the political will and determination to mete out retribution to those deserving to be brought to justice. General Clay set forth that the Law for Liberation was designed as a basis for returning self-government, but the military government could not restore self-government to the German people if they proved unwilling to denazify their public life, as denazification was a "must" of US policy. The US military government would therefore pay special attention to the work of the denazification tribunals for the next sixty days, and set forth that no individual who had previously been removed from office by the military government could be reinstated on the basis of tribunal

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[1046] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.16.

[1047] Freeman, *Hesse: A New German State*, p.162.

[1048] Fürstenau, *Entnazifizierung*, pp.73-74.

[1049] *Ibid.*

findings without the prior approval of the military government[1050].

The military government in Hesse was under the impression that the public prosecutors in Hesse were not fully convinced of the justness of the Law for Liberation. Although there appeared to be unanimous acceptance of the need to prosecute the most notorious National Socialists as the real instigators, the public prosecutors rarely supported the policy that all minor officials of the NSDAP and its affiliated organisations were to be regarded as guilty of perpetuating National Socialism. The individuals staffing the *Spruchkammern* appeared to regard the Law for Liberation as an unnecessary evil, and therefore felt justified in passing what the military government considered lenient penalties[1051].

The US military government reported to the Minister for Political Liberation in Hesse that in spite of written communications from the military government denazification division and oral statements made at the *Länderrat* by OMGUS officials, a review of the work of the *Spruchkammern* in Hesse revealed that the sanctions they imposed lacked in severity. The *Spruchkammern* continued to classify individuals who had held rank in the NSDAP or affiliated organisations in Class IV, such as those who had held non-commissioned ranks in the SA. In contrast, the US military government maintained that such individuals had to be classified in Class III or higher, unless they had actively resisted and therefore could be placed in the Class V category. In other cases, the appellate tribunals

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[1050] Z1/65, Koblenz. "Regional Government Coordinating Office. Speech of Lt.Gen. Lucius D. Clay delivered at the Fourteenth Meeting of the Laenderrat. Stuttgart, 5 November 1946; *Monthly Report of the Military Governor, U.S. Zone*, 30 November 1946, No.17

[1051] 8/188-1/21 RG 260, OMGUS, Wiesbaden. APO 633, Subject: Weekly Summary Report, 15 November 1946.

generally tended to reduce verdicts. Judgments of cases that were disapproved by the US military government were ordered to be re-tried for corrective action following the submission of "Delinquency and Error" reports to the Ministry for Political Liberation[1052]. However, these objections overlooked the central problem that the denazification proceedings extended too widely[1053].

Hence, the problem did not lie with the trustworthiness of the German personnel charged with the responsibility of implementing the denazification programme. In spite of the US military government questioning how the Law for Liberation was being interpreted by the German denazification authorities, General Clay later gave his approval for the German denazification authorities to continue their functions on the basis of the results during the sixty days probation period[1054]. While both the German denazification authorities and the military government intended to implement the denazification programme, there remained the problem of the extent to which it was to be achieved, with the German authorities seeking to reduce its scope while the military government insisted on undiminished rigour[1055]. General Clay had insisted on the implementation of policy without consideration for the circumstances of necessity. However, such a resumption of responsibilities

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[1052] 501/831 Wiesbaden. Office of the Military Government for Greater Hesse (Denazification). HIT/di. APO 633. Subj.: "Comments on Last Weekly Period", 2 December 1946.

[1053] Clemens Vollnhals, ed. *Entnazifizierung: Politische Säuberung und Rehabilitierung in den vier Besatzungszonen 1945-1949* (München: Deutscher Taschenbuch Verlag, 1991), p.259.

[1054] *Monthly Report of the Military Governor, U.S. Zone*, 31 December 1946, No.18.

[1055] Gimbel, *American Occupation of Germany*, pp.105-106.

ran counter to military government policy of restoring responsibility to the German authorities, and the reduction of military government personnel also made such a resumption practically impossible[1056].

It became evident that due to personnel shortages, the denazification policy as envisaged at the beginning of the occupation could not be fulfilled. The force of sheer numbers of jurists who could be called upon to serve was found to be limited by the application of denazification policy. This would lead to a modification of the policy to allow for the availability of greater numbers of trained and qualified jurists to serve. In spite of the potential of the denazification in staging a political cleansing (Art. 22 of the Liberation Law) of German public life, the personnel shortage was a major problem that was exposed during the reconstruction of the administration of justice, and could not have been anticipated in the planning stage before the occupation had begun[1057]. The Minister of Justice of Hesse, Georg-August Zinn, reported on 26 February 1946 that there had been a total number of 583 judges, public prosecutors, and *Amtsanwälte*[1058] serving in the courts in Hesse before 1945, while only 235 were appointed by this time. Zinn estimated that there was an urgent need for about an additional 220 judges and prosecuting attorneys[1059]. Potential causes for this shortage include numbers of

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[1056] John Herz, "Fiasco of Denazification", *Political Science Quarterly*, Vol. 63 December 1948, p.573.

[1057] Latour and Vogelsang, *Okkupation und Wiederaufbau*, p.132.

[1058] Public prosecutors who dealt with cases at the *Amtsgericht* level.

[1059] Moritz and Noam, *NS-Verbrechen vor Gericht: 1945-1955*, p.18.

jurists who had been killed in the Second World War or were still interned in prisoner-of-war camps[1060]. An additional cause for the postwar shortage of trained lawyers may have originated before the war, when measures were taken to discourage university study and impose restrictions on the admission to the Bar Association[1061]. The shortage of jurists in Germany became evident during the Second World War as a result of decreased enrolment for the study of law[1062], among other causes, such as an increasingly greater number of jurists being enlisted for military service[1063]. In the example of the *Landgericht* in Frankfurt-am-Main and its subordinate *Amtsgerichte*, there were fifty judges employed at the *Landgericht* before 1 September 1939, twenty-six on 1 January 1943, and then twenty on 1 October 1943. There were sixty-one judges at the Frankfurt-am-Main *Amtsgericht* before 1 September 1946, and then twenty-five on 1 January 1943. At the other *Amtsgerichte*: six in Frankfurt-am-Main-Höchst, then two on 1 January 1943, then one on 1 October 1943; on these dates there were three in Homburg then two, then none; two in Usingen, then one, then two[1064]. Of the total number

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[1060] Diestelkamp, "Die Justiz in den Westzonen", p.23; Bernhard Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung: 1945-1955", *Westdeutschland 1945-1955: Unterwerfung, Kontrolle, Integration*, ed. Ludolf Herbst, (München: R.Oldenbourg Verlag, 1986), p.94.

[1061] Herzberg, "The Situation of the Lawyer in Germany", p.294.

[1062] Willig, "The Bar in the Third Reich", pp.6, 13.

[1063] Wagner and Weinkauff, *Die Deutsche Justiz und der Nationalsozialismus*, p.257.

[1064] 460/568, Wiesbaden. Der Langerichtspräsident, Frankfurt/Main, an die Militärregierung - Legal - Frankfurt/Main. 9 November 1945.

of judges who were previously engaged in the *Landgericht* at Frankfurt-am-Main and the *Amtsgericht* at Bad Homburg, there were reported cases of judges who were deceased, killed or missing, and there were many cases of individuals whose whereabouts were currently unknown, or they were presumed to be awaiting their denazification proceedings, in addition to those who were removed from office or were prisoners-of-war[1065]. It may be speculated that another possible cause that may have aggravated the shortage of jurists after the war was the low salaries. Judges in the higher income brackets did not retain more than RM 500 per month after taxes following the introduction of high income taxes[1066] under Control Council Law No.12 of 11 February 1946[1067]. The personnel shortages were also evident outside the public sphere. Lawyers who were eligible to work in private practice did not receive a fixed income and lost most of their earnings in taxes[1068].

The denazification "vintage principle" of political implication following enrollment in the NSDAP after 1 May 1937 may have theoretically widened the scope of judicial personnel made eligible for reinstatement, but in practice, it did not serve to alleviate the problem of finding the number of personnel required to staff the postwar administration of justice[1069]. The various causes for the

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[1065] 460/545, Wiesbaden. 105E -315. Betr.: Richtereinsatz (n.d.).

[1066] Loewenstein, "Reconstruction of the Administration of Justice", p.458.

[1067] "Law No.12: Amendment of Income Tax, Corporation Tax and Excess Profits Tax Laws", *Official Gazette of the Control Council for Germany* (No.4), 28 February 1946, pp.60-68.

[1068] Loewenstein, "Reconstruction of the Administration of Justice", p.458.

[1069] Diestelkamp, "Die Justiz in den Westzonen", p.22.

shortage of judicial personnel were not compensated through modifying denazification legislation. There was a lack of an adequate number of qualified judicial personnel who would staff the organisation of the administration of justice, irrespective of political record. All the courts authorised to function in the US occupation zone were formally open by 30 March 1946, but they proved unable to handle the existing cases on the dockets, in spite of the volume of total cases having been reduced by the curtailing of cases in the jurisdiction of the military government courts, and the cessation of business transactions that left less corporate business to be handled by the courts[1070]. Nevertheless, the shortage of jurists was so acute that politically implicated nominal National Socialists had to be reinstated if the courts were to continue to function[1071]. The implementation of the Liberation Law was overshadowed by the underlying problem of the acute personnel shortages in the legal profession. Whereas the Plan for the Administration of Justice in the US Zone required five hundred judges and sixty-nine public prosecutors in Hesse, the personnel shortage was marked by the fact that two-hundred and thirty-three judges, including assistant judges (*Hilfsrichter*), and fifty-three public prosecutors, including assistant public

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[1070] Loewenstein, "Reconstruction of the Administration of Justice", p.453.

[1071] Z45F 17/199-3/40 RG 260 OMGUS, Koblenz. Provenance: OMGUS LD AJ Br.. Folder Title: File No.H(g) Justice Ministry matters - organisation and functions of Justice Ministry. Description and Denazification of German Administration of Justice. AGO 014.3. Subject: "Denazification of German Administration of Justice", 31 October 1947.

prosecutors (*Hilfsstaatsanwälte*), were appointed after the *Oberlandesgericht* of Hesse was opened[1072].

There had been no urgency for re-opening the German courts in the initial phase of the denazification when the military government courts were handling all criminal cases. Only the German courts at the lowest level were authorised to be re-opened during the military operations in the Rhineland, following a careful investigation of each potential candidate for reinstatement[1073]. The future personnel shortage was envisaged early in the occupation soon after the first German courts were re-opened. The first judges who were reinstated were over-age to a great extent, and several of them among this small number of personnel could no longer work at their full capacity. The *Landgericht* president in Frankfurt-am-Main therefore recommended that the military government admit more judges as soon as possible while court business was increasing very quickly[1074]. In view of the numbers of available jurists present in September 1945 and the increase in court business, he advised that these numbers would be insufficient to staff the administration of justice. It was presumed that it would be necessary to rely on the qualified personnel who were members of the NSDAP before 1 May 1937, in so far as they were not politically implicated other than through simple party membership, or else the normal extent of court business would not be possible in the foreseeable

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[1072] "Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen", p.120.

[1073] Starr, *Operations During the Rhineland Campaign*, pp.65-66.

[1074] 460/568, Wiesbaden. The *Landgericht* president, Frankfurt-am-Main, to the Military Government Legal Department at Frankfurt-am-Main, 6 August 1945.

future[1075]. Finding the qualified personnel would become a more pressing consideration upon the implementation of the Plan for the Administration of Justice of the US zone, and when greater responsibility was transferred to the German courts. Hence, staffing an administration of justice to operate at the level of prewar conditions remained a problem.

In spite of the reduced jurisdiction of the German courts, the US and the British military government authorities chose to maintain politically implicated judges in office, rather than face chaos operating the administration of justice single-handedly[1076]. The re-admission of jurists was initially limited to individuals who were considered completely politically untainted with regard to their affiliation with the National Socialist past. In practice however, it became apparent that such a draconian denazification policy[1077] would not relieve the situation of the standstill of the administration of justice. This problem could be overcome either by rapidly training a new generation of jurists to meet the personnel requirement as soon as possible, as was attempted in the Soviet occupation zone[1078], or slacken the denazification

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[1075] 460/645, Wiesbaden. Betrifft: "Fortzahlung von Gehälten und Lohnen an noch nicht beschäftigte Bedienstete der Justizbehörden", 20 September 1945.

[1076] Bower, *The Pledge Betrayed: America and Britain and the Denazification of Postwar Germany*, pp.171,173-176.

[1077] It has been noted that U.S. denazification policy was pursued with "high moral standards and expectations", while the other three occupation powers were more practical. Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung", p.93.

[1078] The problem of serious shortages of jurists prevailed throughout Germany after the collapse of the National Socialist regime. This vacuum of qualified and employable

policy requirements to a more pragmatic level that would adjust the demand for qualified jurists to the available numbers at hand. Hence, the problem of the critical shortage of qualified jurists was addressed by relaxing the standards for the re-admission of former civil servants and judges as soon as possible became inevitable[1079]. The application of denazification policy was different in the US and the Soviet zones, but the cause for reinstating jurists without rehabilitation was the same: the reconstruction of the administration of justice was not possible without the necessary personnel[1080]. The only solution to the problem appeared to be reinstating many of the capable and qualified judges and prosecutors who were removed from office under the denazification programme. It became apparent that this would ultimately have to be done[1081].

The burden of the increased case-load became increasingly apparent in 1947, as various types of cases, such as unauthorised border crossings and theft or illegal possession of US property within a certain value, were transferred from the military government courts to the German courts. The case load was to be absorbed by staffs that were well below peace-time strength[1082], while the

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jurists was taken advantage of in the Soviet zone by staffing judicial positions with individuals who could be relied upon to serve as instruments of political policy. H.A. Himmelmann, "'Democratisation of Justice' in the Soviet Zone", *Contemporary Review* Vol. 176 (July 1949), p.31-32.

[1079] Diestelkamp, "Die Justiz in den Westzonen", pp.21-22.

[1080] Benz, "Die Entnazifizierung der Richter", p.124.

[1081] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Subject: "Removal of Nazi Laws and Removal of Nazis from the Judicial System", 17 January 1947.

[1082] Freeman, *Hesse: A New German State*, p.137;

German courts in Hesse at this time were handling about 2 000 criminal cases a month[1083]. This influx of cases could not be handled by staffs that were far below peacetime numbers, who were also ill-housed and poorly fed, and many of whom were over age[1084]. The problem of immediately securing sufficient legal personnel who were considered suitable for appointment, with regard to their professional qualifications *and* political record, led to the *Land* government instituting emergency measures to compensate for the shortfall of the required judicial personnel. In order to compensate for the shortage of suitable personnel, individuals holding the professional qualifications of a judge or a prosecutor, and were "politically suitable", were to be enlisted for compulsory service for a period of three to six months. An ordinance for this purpose was prepared in January 1946, and all presidents of the *Landgerichte* and *Amtsgerichte* were asked to provide lists of such individuals to be submitted to the Minister of Justice[1085]. This practice was then enacted as law. The *Land* government required all individuals with judicial qualifications to be at the disposal of the *Land* administration of justice. They were obliged to register with the president of the local *Landgericht* to serve as a judge or prosecutor for an

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There were 384 judges and prosecutors in Hesse in June 1947 who were formally cleared by the military government, but the administration of justice remained greatly handicapped by the shortage of personnel. Z45F 17/199-3/41 RG 260/OMGUS, Koblenz. Subject: "Denazification of Judges and Prosecutors in the German Ordinary Courts", 4 June 1947.

[1083] Freeman, *Hesse: A New German State*, p.137.

[1084] *Ibid.*

[1085] 460/639, Wiesbaden. 2200-1-240. Betr.: "Dienstverpflichtung der zum Richteramt befähigten Personen", 28 January 1946.

indefinite period at the discretion of the Minister of Justice. Jurists who were not civil servants, such as notaries and lawyers, could be enlisted to serve for a three month term, which could be repeated after a lapse of three months. This ordinance did not apply to those who presently held judicial office, or were ineligible to do so after 8 May 1945, and would remain in force for the duration of the emergency circumstances (*Notumstände*) that necessitated its promulgation[1086]. Nevertheless, these measures were not sufficient to compensate for the shortfall. In order to help temporarily alleviate the difficulties arising from the shortage of judges[1087], the Minister of Justice ordered that every *Amtsgericht* judge was to function simultaneously as a *Hilfsrichter* at the respective superior *Landgericht*[1088]. Additional judicial personnel were required as the workload of the courts increased. The criminal courts were hardly capable of coping with the influx of cases due to the shortage of judges, and due to an increased case-load after the military government transferred the power of the police to adjudicate in certain minor offences to the German courts[1089]. As of June 1947, the courts in the US occupation

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[1086] "Verordnung über Melde- und Dienstpflicht der zum Richteramt befähigten Personen vom 16. März 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.107; *Monthly Report of the Military Governor, U.S. Zone*, September 1946, No.14.

[1087] RG 260 OMGUS 8/188-2/5. APO 633. Subject: "Weekly Summary Report for Legal Division from 30 June to 5 July 1946", 5 July 1946.

[1088] 458/1014, Wiesbaden. 3110 - Ia 1031. Betr.: "Verwendung der Amtsrichter bei dem übergeordneten Landgericht", 6 June 1946.

[1089] Z45F 11/5-2/1, Koblenz. OMGUS, LD. Legal Division History. "Interview with Dr. Karl Loewenstein."

zone as a whole possessed approximately forty percent of the personnel they had employed in 1938[1090], while criminality in postwar Germany had increased between five hundred and six hundred percent in comparison to prewar years[1091]. The Office of the Military Government in Hesse reported in November 1947 that the German administration of justice still had to manage with staffs that were sixty percent of the prewar numbers, while crime incidents were much higher than normal due to the severe economic and social conditions, and the presence of a large migratory population. The German courts also had to absorb thousands of cases in violation of police ordinances that were formerly adjudicated by the police, which had been discontinued by the military government. The military government also established a trend of transferring groups of cases from the military government courts to the German courts, which could not be reversed[1092]. The *Land* Minister of Justice Georg-August Zinn stated on 8 March 1948 that there were four hundred judges in Hesse, in comparison to five-hundred and seventy-one in the same territory in 1939. Meanwhile, the level of criminality in Hesse had increased dramatically, from about 50 000 criminal cases in 1938 to 115 715 in 1947, and was marked by sharp increases in 1947 over the 1946 level[1093]. The *Länderrat* attempted to compensate for the shortage of jurists in the US zone by

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[1090] Loewenstein, "Reconstruction of the Administration of Justice", p.454.

[1091] Adolf Schönke, "Criminal Law and Criminality in Germany of Today", *Annals of the American Academy of Political and Social Science*, Vol. 260 (1948), p.140.

[1092] 8/213-1/18, RG 260 OMGUS, Wiesbaden. APO 633. Subject: "Proceedings in German Courts".

[1093] Zimmer, *Die Geschichte des Oberlandesgerichts in Frankfurt-am-Main*, p.91.

drafting a law on 8 April 1948 to allow for the appointment of refugee jurists from the *Sudetenland*[1094]. In contrast to the officials of the other *Länder*, officials in the Hesse Ministry of Justice had long favoured introducing this measure as a means to counter-balance the number of politically implicated individuals who were admitted as a result of personnel shortages. The main difficulties lay in evaluating their professional qualifications, and familiarising former Czech jurists with German legal practice[1095]. This law was promulgated in Hesse on 21 June 1948 and went into force on 1 July 1948, allowing for refugee jurists to resume their practice upon prior examination of their qualifications for office[1096]. In practice, these measures did not make a significant contribution to alleviating the personnel shortage. Although the sharply rising numbers of criminal cases were handled expeditiously, no semblance of normal conditions was achieved while judicial personnel who were waiting for their cases to be judged by the denazification tribunals were blocked from service[1097].

A shift in denazification policy for the legal profession thus took place to secure the additional required personnel, even if they were considered politically

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[1094] "Gemeinsame Gesetzgebung: Stand vom 9.4.1948; Richteramtsbefähigung umgesiedelter und heimatvertriebener Juristen", *Süddeutsche Juristenzeitung* (1948), p.220.

[1095] RG 260 OMGUS, 8/188-2/5, Wiesbaden. APO 633. Subject: "Weekly Summary Report for Legal Division from 1 September to 7 September 1946", 6 September 1946.

[1096] "Gesetz über Richteramtsbefähigung umgesiedelter und heimatvertriebener Juristen vom 21. Juni 1948", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), pp.79-80.

[1097] Loewenstein, "Reconstruction of the Administration of Justice", p.454.

implicated according to the initial denazification standards. In order to address this problem, the military government maintained the supervision of the operation of the German courts as a safeguard against potential abuses against the administration of justice. This was necessary in view of the fact that the adequate performance of the jurists reinstated under the military government or German authorities could not be guaranteed[1098]. Judicial independence was being restored to members of a judiciary in which there were few convinced democrats, and after a twelve year absence of democratic government[1099]. Since the military government did not make a thorough investigation of every jurist's professional record between 1933 and 1945, supervision of their work during the occupation indirectly compensated for this shortcoming. The reinstatement of jurists under the terms of the denazification, which was based on evidence regarding former political affiliation, would be supplemented with the evidence provided by the performance of their functions. Knowing that the numbers of anti- or non-National Socialist lawyers and judges had been exhausted by this time, the military government adopted a more "realistic" view of the situation based on expediency, and decided to reinstate jurists who were "nominal Nazis"[1100] while simultaneously intensifying the supervision and inspection of the German courts[1101]. Inspections of the operation of the German courts in Hesse did not reveal any

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[1098] Loewenstein, "Justice", pp.250-251.

[1099] Loewenstein, "Reconstruction of the Administration of Justice", pp.431, 433-434.

[1100] This was a common practice among the western Allies due to the shortage of trained personnel. Friedmann, *Allied Military Government of Germany*, p.174.

[1101] Freeman, *Hesse: A New German State*, p.137.

significant violation of military government policies or laws, and according to one Legal Division report, "the nominal Nazis presented a problem only in that 'they are scared and sometimes lean too heavily on Military Government in their hesitation to interpret the law freely and independently.'"[1102]

Toward a Re-evaluation of the Denazification Programme

Changes in the denazification policy allowed for greater numbers of jurists to be reinstated in understaffed courts. Modifications of the denazification policy made the standards in the US occupation zone increasingly lax as certain clauses of the Law for Liberation were amended to accelerate the denazification process[1103]. The modification of the Law for Liberation began with general amnesties, which resulted in great numbers of cases that did not undergo the denazification proceedings and were not verified through individual investigations[1104]. As it soon became apparent that the Law for Liberation extended too widely, the first amnesty, which became known as the "youth amnesty"[1105] was introduced on 8 July 1946 for all individuals who were born between 1 January 1919 and 5 March 1928, unless they were classified as Class I or II offenders under the Law for Liberation, or there was sufficient evidence to warrant their being classified into these

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[1102] *Ibid.*, p.137.

[1103] Gimbel, *American Occupation of Germany*, pp.159-162, 110.

[1104] Herz, "Fiasco of Denazification", pp.573-574.

[1105] Kormann, *U.S. Denazification Policy in Germany*, pp.95-96.

categories[1106]. In order to decrease the vast number of the remaining cases to be adjudicated, the US military government approved a *Länderrat* proposal in December 1946, which became known as the "Christmas amnesty", by which an amnesty was declared for former National Socialists in low income groups[1107]. This included those whose yearly taxable income did not exceed RM 3600 during either 1943 or 1945, and whose taxable property did not exceed RM 20 000 on 1 January 1945, and those who had a physical disability of fifty percent or more according to social welfare or pension legislation. This amnesty did not include those who were chargeable under the terms of Class I or II or the Law for Liberation[1108]. Of the 3 294 318 individuals who were affected by the Liberation Law, these two amnesties freed 1 861 483 of responsibility for the past (888 065 by the youth amnesty and 973 418 by the Christmas amnesty), thus reducing the denazification case-load by about seventy percent[1109]. This may have represented an improvement in the application of the denazification, but its weaknesses continued to be

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[1106] "Amnestie-Verordnung vom 6. August 1946 zum Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.173.

[1107] Kormann, *U.S. Denazification Policy in Germany*, pp.113-114.

[1108] "Verordnung vom 5.Februar 1947 zur Durchführung der Weinachtsamnestie zum Gesetz zur Befreiung von Nationalsozialismus und Militarismus von 5. März 1946", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), pp.22-23.

[1109] Knappstein, "Die versäumte Revolution: Wird das Experiment der 'Denazifizierung' gelingen?", *Die Wandlung* (1947) p.670.

evident, and the scope of the programme consequently continued to be reduced to accelerate its completion.

In addition to the problems involved in applying the provisions of the Law for Liberation, German public opinion indicated that the acceptance of the denazification programme gradually decreased[1110]. German satisfaction with the denazification proceedings sank rapidly from 57 percent in March 1946 to 32 percent in September 1947[1111]. Criticism of the denazification procedure was directed against its implementation on the basis of former NSDAP membership, rather than individual conduct in the National Socialist regime. For example, the executive committee of the Bar Association (*Anwaltskammer*) in Frankfurt-am-Main argued that many more suitable jurists would be able to serve in the administration of justice if their professional and personal suitability for reinstatement were judged by their personal respectability, rather than the decisive factor being external characteristics, such as the date of entry into the NSDAP[1112]. German scholars led the way in criticising the US military government denazification measures[1113] that were imposed onto the Law for Liberation, maintaining that the denazification should have been limited to the prosecution of "Major Offenders"[1114] in addition to prosecuting leading

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[1110] Vollnhals, *Entnazifizierung: Politische Säuberung und Rehabilitierung in den vier Besatzungszonen*, p.61.

[1111] Anna J. Merritt and Richard L. Merritt, eds.. *Public Opinion in Occupied Germany: The OMGUS Surveys 1945-1949* (Urbana, Illinois, 1970), p.304.

[1112] 460/639, Wiesbaden. Betr.: "Dienstverpflichtung der zum Richteramt befähigten Personen", 18 February 1946.

[1113] Kormann, *U.S. Denazification Policy in Germany, 1944-1950*, pp.119-120.

[1114] Only the individuals who were classified as "Major Offenders" were arraigned before the International Military

National Socialists. Their opinions were respected by both the US military government and the German population, and contributed to undermining the denazification programme[1115]. The German denazification authorities argued that the terms of the Liberation Law affected too many people, and that former National Socialists had already been blocked from occupying influential positions in German public life. US Military Government authorities who met with the German denazification authorities agreed that the Liberation Law should be modified, since the originally intended thoroughness of the denazification in the US zone had proven to be an overly unwieldy task[1116].

This view was also held by the political parties represented in the *Landtag* of Hesse, which presented a resolution on the denazification programme to the Minister-President, and requested that this resolution be in turn forwarded to the Director of the *Land* Military Government and to the US Military Governor for Germany. The *Landtag* set forth unanimously that the Law for Liberation was too extensive. As a result, too many individuals who were considered merely "Followers" were penalised with the prohibition to work and other measures, while those who were truly incriminated could avoid being brought to judgment rapidly, effectively and justly in the midst of a massive number of proceedings. The *Landtag* therefore requested that the US Military Government for Germany consent to amending the Law for Liberation to eliminate its existing

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Tribunal at Nuremberg. Michael H. Kater, "Problems of Political Reeducation in West Germany, 1945-1950", *Simon Wiesenthal Centre Annual* Vol. 4 (1984), p.100.

[1115] Kormann, *U.S. Denazification Policy in Germany: 1944-1950*, pp.119-120.

[1116] Fürstenau, *Entnazifizierung*, p.77.

shortcomings, and improve the implementation of the law by concentrating on prosecuting the National Socialists who were truly influential. Proposed amendments included: 1) the public prosecutor have the right to place ordinary members of the NSDAP and its affiliated organisations who joined after 30 January 1933 into the category of "Follower", irrespective of their former office or rank, if the results of an investigation so merited, and if they were not members of criminal organisations; 2) the prohibition for employment in the former cases be amended immediately[1117].

Whereas the amnesties reduced the case-load of the denazification tribunals, further amendments were introduced to concentrate the application of the denazification programme on individuals who were more seriously implicated with the National Socialist regime[1118], and thereby limit the number of pending cases. Because the adjudication of the remaining denazification cases would require many years[1119], the US military government requested the *Länderrat* in September 1947 to consider amending the Law for Liberation to accelerate the denazification process while maintaining its basic principles. This was to be accomplished by amending the Law for Liberation to allow the tribunals to concentrate on the more incriminated and influential former National Socialists[1120]. This was the second important amendment to the Law for Liberation, if the enactment of the two amnesties were to be considered to comprise the first amendment to the law. The Liberation Ministers of the US

[1117] 501/803, Wiesbaden. "Gemeinsame Entschliessung aller Fraktionen des Hessischen Landtages zur Frage der politischen Befreiung", 4. Juli 1947.

[1118] "Final Report on Foreign Aid", p.128.

[1119] Kormann, *U.S. Denazification Policy in Germany*, p.126.

[1120] *Ibid.*, p.127.

zone intended to institute this amendment to the law since November 1946, which was finally achieved after lengthy negotiations with the US military government. According to the prior regulations of the law, individuals were subjected to the ponderous normal denazification procedure even in cases in which all the participants agreed beforehand that nothing would transpire from the case other than a classification of "Follower"[1121]. The individual cases were not prioritised for trial by the *Spruchkammern* according to their severity. Three main points were recommended for the assessment of future cases: 1) the hitherto mandatory charges pressed by the public prosecutor in the categories of "Major Offender", "Offender" or "Lesser Offender" were to be discretionary, unless the individual was a member of an organisation found criminal by the International Military Tribunal, or there was no evidence of activity in the NSDAP other than membership; 2) individuals who could be classified and charged as "Followers" could be reinstated prior to appearing before a denazification tribunal; 3) the denazification tribunals were granted discretion in setting the length of time for probation for "Lesser Offenders", which had previously required a period of two years[1122].

General Clay approved measures proposed by the *Länderrat* for amending the Liberation Law on 3 October 1947, which were primarily designed to expedite denazification procedures of Class II cases in which there appeared to be no evidence warranting a higher classification than that of "Follower", and thereby allowing the public prosecutors and the denazification tribunals to concentrate their efforts on

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[1121] 501/26, Wiesbaden. "Die Änderung des Befreiungsgesetzes. Wichtiges Ziel: Beschleunigung des Verfahrens. Von Ministerialdirektor K.H. Knappstein (n.d.).

[1122] *Monthly Report of the Military Governor, U.S. Zone*, 30 September 1947, No.27.

more incriminated individuals. This downgrading was to be effected upon the results of an investigation providing the evidence that the respondent fell within the definition of "Follower" (Art. 12 of the Law for Liberation), and upon military government approval before the charge was submitted to a tribunal. Unless they had been members of organisations declared criminal by the International Military Tribunal[1123], these amendments made all individuals in Class II eligible for the charge of "Follower" if the evidence indicated they were nominal members of the NSDAP and there was no evidence of active participation[1124]. The military government recognised that German criticism of denazification policy was justifiable in some respects, such as modifying judgments on those who were to be automatically classified

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[1123] These were: the SD, the Gestapo, the SS, and the Leadership Corps of the NSDAP. Loewenstein, "Reconstruction of Justice", p.451.

Former members of the SS were to be judged according to the provisions of the Law for Liberation, that differentiated between active and nominal members. Individuals who joined after 31 December 1938, or had paid more than ten marks per month to the SS before this date, and therefore were to be classified in Class II. Those who joined *before* 31 December 1938 and (emphasis added) paid less than ten marks per month were not to be considered active supporters (*fördernde Mitglieder*) and were not to be classified in Class I or II. They were not considered full-fledged members of the SS since they were not entitled to the rights of the SS, such as the uniform, etc., and they were not responsible for fulfilling the duties of SS members. Hence, such individuals were not affected by the Law for Liberation. 462/1302, Wiesbaden. "Beglaubigte Abschrift. Der Minister für Wiederaufbau und politische Befreiung". M/Kn/Schoe/T.N. 6074/46. 20 June 1946.

[1124] 501/61, Wiesbaden. Office of the Military Govenment for Germany (US), Office of the Military Governor. AG 010.6 (IA). Subject: "Amendments to the Law for Liberation and Expedited Procedures Thereunder", 23 October 1947.

into Class II for having joined the NSDAP before 1 May 1937[1125]. Individuals were thus to be charged according to the evidence of the case at the discretion of the public prosecutor, rather than being summarily blocked from reinstatement until they were proven innocent. Apart from proceedings against individuals who were former members of these organisations, denazification trials of all individuals who were former members of the NSDAP or its affiliated organisations became mandatory based on guilt indicated by the evidence presented, thus eliminating the principle of presumptive guilt[1126].

This acceleration plan went into effect as an amendment to the Law for Liberation on 7 October 1947[1127]. Upon an investigation and ascertaining the evidence of the case, the public prosecutor could classify individuals as "Lesser Offenders" or "Followers", provided they were not members of organisations declared criminal by the International Military Tribunal. The public prosecutor could exercise discretion in classifying individuals as "Followers" in cases of nominal members of the NSDAP in which there was no evidence of active participation. These cases included: 1) ordinary members of the NSDAP who had joined in 1933; 2) those who joined the NSDAP after four years of service in the *Hitler Jugend*; 3) block wardens (*Blockwalter*) of the *Nationalsozialistische Volkswohlfahrt* who joined the NSDAP after 1933. Individuals who were classified as "Major offenders" or "Offenders" remained subject to the employment

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[1125] Herz, "Fiasco of Denazification", p.574.

[1126] Kormann, *U.S. Denazification Policy in Germany*, p.127.

[1127] "Gesetz vom 18. Oktober 1947 über die Abänderung einzelner Vorschriften des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), pp.91-92.

restriction, and could only be employed in ordinary labour[1128] as it was defined by the provisions of Military Government Law No.8[1129]. Individuals who could be charged as "Followers" were allowed to resume their former occupations[1130]. The denazification tribunals in Hesse were to be instructed by the Minister of Political Liberation that this amendment to the Law for Liberation affected all cases in which individuals were suspected to be Class II offenders, regardless of their office, rank or position they held in the NSDAP or its affiliated organisations. Their classification into Class IV could be effected upon the institution of proceedings by the local public prosecutor. The only groups of cases that were not to be processed in this accelerated procedure were those that were suspected to be in Class I or II, and cases of individuals who were members of organisations that were declared criminal by the International Military Tribunal, or cases of individuals in which there was evidence of specific actions committed beyond their position, rank or office[1131]. The Ministry for Political Liberation later instructed that the accelerated proceedings were to apply to *all* individuals who were classified as Class II offenders. The US military government

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[1128] 501/61, Wiesbaden. "Law of 7 October 1947: Amending certain provisions of the Law for Liberation from National Socialism and Militarism of 5 March 1946".

[1129] See footnote 927 for the definition of "ordinary labour".

[1130] 501/26, Wiesbaden. Die Änderung des Befreiungsgesetzes. Wichtiges Ziel: Beschleunigung des Verfahrens. Von Ministerialdirektor K.H. Knappstein (n.d.).

[1131] 501/1199, Wiesbaden. Office of the Military Government for Hesse ALY/di. Denazification Division. APO 633. Betr.: "Programm zur beschleunigten Erledigung der Entnazifizierung", 15 January 1948.

would only query the judgments of the *Spruchkammern* if individuals classified as Class II offenders downgraded to Class IV were subject to trial by the International Military Tribunal, or there was evidence that indicated they were guilty of criminal actions[1132].

These new provisions were to contribute to returning Germany to normal conditions by implementing a more prompt and efficient completion of the denazification programme in the US zone. General Clay hoped that the changes to the Law for Liberation would enable the denazification proceedings in the US zone to be concluded by 1 July 1948[1133]. The changes had a significant effect on reducing the existing case-load. The monthly numbers of cases adjudicated by the denazification tribunals tripled from November to December 1947. This revision allowed for the disposal of about two-thirds of Class II cases. As with the previous amnesties for specified types of cases, the public prosecutor did not always stage a thorough investigation to uncover incriminating evidence due to the pressure of the work-load, the unavailability of evidence, and local pressure[1134].

Planning continued for the further acceleration of the denazification proceedings, which became the most significant factor in the development of the denazification programme. In order to enable the public prosecutors and tribunals to concentrate their efforts on the more highly

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[1132] 501/1199, Wiesbaden. "Rundbrief an alle öffentlichen Kläger und Vorsitzenden der Spruch und Berufungskammern in Hessen", Betr.: Erweiterung des B-Verfahrens. Minister für politische Befreiung. Wiesbaden, 19. Januar 1948.

[1133] 501/1199, Wiesbaden. Office of Military Government for Hesse, Denazification Division. ALY/di, APO 633, U.S. Army, 15 January 1948, "Betreff: Programm zur beschleunigten Erledigung der Entnazifizierung".

[1134] Herz, "Fiasco of Denazification", pp.574-575.

incriminated and influential National Socialists, the local public prosecutors were to prepare a list of the pending cases of such individuals by 15 January 1948 and prepare a court calendar from this list, with a trial date set for each case. These cases were to be completed by 30 May 1948[1135]. The US military government sanctioned further revision of the Law for Liberation in response to criticisms set forth by Pastor Martin Niemöller and the Catholic Bishops of Mainz and Limburg[1136]. An amendment introduced on 28 March 1948 gave the public prosecutors complete discretion in filing charges against individuals who had not yet been tried. Pre-trial employment restrictions on individuals classified as Class II offenders were removed to allow them to return to all but the key positions in private industry and business. In order to prevent injustices, the tribunals were also to consider pre-trial restrictions (e.g., having served a period of probation or internment) under which individuals chargeable as "Lesser Offenders" or "Followers" had undergone as part of the penalty, such as a term of internment, when passing the sentence. The public prosecutor was henceforth also empowered with charging all individuals who were Class II offenders as Class IV without the prior approval of the US military government. This new amendment also affected Class II offenders who had been nominal members of organisations declared criminal by the International Military Tribunal. They could be re-classified into Class IV under the usual proceedings, provided that

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[1135] 8/217-1/5, RG 260 OMGUS, Wiesbaden. Subject: "Priority for Trials involving highly incriminated and influential Nazis, Militarists and Profiteers, 11 December 1947.

[1136] Jack Raymond, "U.S. Backs Easing of Denazification: Official in Hesse declares that some German demands are worthy of cceptance", *New York Times* (21 March 1948), p.26L+.

there was no evidence that they had knowledge of the criminal actions or intentions of these organisations while they were members of these organisations, or that they had committed criminal actions[1137]. Cases of individuals classified as "Followers" according to the Part B appendix of the Law for Liberation were processed by publicly posting their names on lists. The Class IV classification would be maintained if a denunciation was not lodged with the public prosecutor within a specified time. Individuals affected by this provision would receive a written summons instructing them to pay the penalty of a fine. These accelerated proceedings, known as the "*B-Verfahren*" (*beschleunigte Verfahren*)[1138], also included cases of individuals who were classified in Class III under the Law for Liberation, and could hereafter be downgraded to Class IV[1139]. Appeals for higher classifications were rare, and this procedure consequently became the main method of liquidating the denazification process[1140].

[1137] 501/26, Wiesbaden. Rundverfügung Nr.119, An alle öffentlichen Kläger und Vorsitzenden der Spruchkammer, Betr.: "Zweites Änderungsgesetz"; *Monthly Report of the Military Governor, U.S. Zone*, 1 March 1948, No.33.

[1138] "Einführung des B-Verfahrens", *Amtsblatt des Hessischen Ministeriums für politische Befreiung*, 15 August 1947 (No.22), pp.85-86.

[1139] 501/26, Wiesbaden. "Die Änderung des Befreiungsgesetzes. Wichtiges Ziel: Beschleunigung des Verfahrens. Von Ministerialdirektor K.H. Knappstein (n.d.); Kormann, pp.132-133; "Zweites Gesetz vom 9. April über die Abänderung einzelner Vorschriften des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946 (Zweites Änderungsgesetz)", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), p.49.

[1140] Herz, "Fiasco of Denazification", p.576.

A new system was introduced in April 1948 in response to the continuing pressure to promote a speedier expedition of processing cases. Unless there was sufficient evidence produced by an investigation to prove that an individual was to be classified in Class III or Class IV, applications could be made to modify the classification. Individuals affected by the Law for Liberation could be immediately classified as "Followers" according to the evidence of overall conduct during a probationary period, or if a misunderstanding in the classification resulted in penalties that caused the individual to incur personal or economic restrictions[1141]. These amendments to the Law for Liberation were also extended to released prisoners-of-war who took up residence in the US zone[1142]. The US military government would approve the downgrading of the charge against an individual instituted by the public prosecutor, unless the military government could present incriminating evidence from its files, or could establish that individuals in question had falsified their *Meldebogen* or had not disclosed incriminating evidence[1143]. The emphasis of the denazification trials was thus further shifted toward dealing with the most seriously incriminated individuals, or

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[1141] "Zweites Gesetz vom 9. April über die Abänderung einzelner Vorschriften des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946 (Zweites Änderungsgesetz)", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), p.19.

[1142] "Gesetz über die Anwendung des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus (Befreiungsgesetz) auf Heimkehrer vom 15. April 1948", *Gesetz- und Verordnungsblatt für das Land Hessen* (1948), p.65.

[1143] 501/26, Wiesbaden. "Die Änderung des Befreiungsgesetzes. Wichtiges Ziel: Beschleunigung des Verfahrens. Von Ministerialdirektor K.H. Knappstein (n.d.).

truly guilty parties, more rapidly and thoroughly[1144], rather than maintaining the original standard of attempting to adjudicate the entire adult German population of the US zone on original equal terms on a case by case basis. In view of the numbers of cases that were to be processed in Hesse, roughly 50 000 individuals, it was foreseen that the *B-Verfahren* would allow for the denazification proceedings to be concluded in the summer of 1948[1145].

The original standards were to be maintained for individuals occupying the leading positions in the administration of justice. US military government policy prescribed that only individuals who were "capable of assisting in the development of genuine democratic institutions in Germany" and could be relied upon to ensure "a correct solution to denazification problems" would be appointed as judges and prosecutors by virtue of "their moral and political qualities". This policy required that nominal National Socialists would be excluded from key positions in which the incumbents would exert an influence in developing personnel policies or exercise supervisory powers over personnel in the administration of justice. This policy also required that such individuals would also be excluded from positions in the *Oberlandesgerichte* where interpretation of German law was made in the last instance. In trials of National Socialist crimes against German law, the participation of judges and prosecutors who had had any affiliation with the NSDAP were to be excluded in such cases to maintain the impartiality of the proceedings. The Director of each *Land* Office of Military Government upheld this policy by instructing the local Minister-President that no individual who had been a member of the NSDAP, the SA,

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[1144] *Ibid.*

[1145] *Ibid.*

the NSKK or the NSFK would be appointed to hold the following positions: higher levels of the civil service in the Ministry of Justice, by which the incumbent would have the authority to issue orders in the name of the Minister-President or the Minister of Justice; as judges of or prosecutors before an *Oberlandesgericht*; as president of or chief prosecutor before a *Landgericht*; as senior judge of an *Amtsgericht* in cities with a population of more than a hundred thousand; no judge or prosecutor who had been a member of the aforementioned formations at any time could take part in the trial of cases involving "criminal offences against German law committed for the purpose of maintaining Nazi tyranny or militarism or in order to promote the realisation of Nazi ideology or tendencies." These provisions did not apply to individuals who were "contributing members" of the aforementioned formations, and members of the SA Reserve II[1146]. The president of the court was to be an individual who was not affected by the Law for Liberation. The administration of justice in Hesse agreed that only judges who were not affected by the Law for Liberation could adjudicate in the aforementioned criminal cases involving National Socialist crimes wherever possible. However, a departure from this policy was necessary due to the limited number of judges. It was not possible to find suitable substitutes due to the rigid policy in Hesse concerning positions at the *Oberlandesgericht* and other key positions that exhausted the limited number of judges who were not affected by the Law for Liberation. This problem was exacerbated by the illness of several judges in Gießen and Frankfurt-am-Main[1147]. In one such case, one judge had

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[1146] Z45F 17/199-3/40 RG 260 OMGUS, Koblenz. AG 014.5. Subject: "Denazification of German Administration of Justice".

[1147] Z45F 17/217-3/4 RG 260 OMGUS, Koblenz. B/L Office of Military Government for Germany (US) Administration of

been a member of the NSDAP while the other was a member of the SA, while two judges were former members of the SA in another such case[1148]. The nature of the political cases that were heard by former nominal members of the NSDAP were minor, and the president of the court was not affected by the Law for Liberation. The Legal Division of the Military Government Office for Hesse would also examine the decisions in these cases[1149].

Although the US military government had begun to approve the admission of nominal National Socialist jurists in 1946, since the re-opening of the German courts would otherwise have been made impossible, the US military government affirmed that key positions in the administration of justice in the US zone: the Ministries of Justice, the *Oberlandesgerichte*, and the presidents and the chief prosecutors of the *Landgerichte*, were not held by even nominal National Socialists[1150]. This amounted to over ten percent of the judges and prosecutors in the US zone[1151]. The

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Justice Branch. APO 742 US Army. Subject: Report Form Mg/Lg/10/F, 22 April 1948. Ka/gp. OMG for Hesse. Legal Division, APO 633. US Army. 29 April 1948.

[1148] Z45F 17/217-3/4 RG 260 OMGUS, Koblenz. OMG for Germany (US) Office of Military Governor APO 742. Subject: Report Form Mg/Leg/10/F. 22 April 1948.

[1149] Z45F 17/217-3/4 RG 260 OMGUS, Koblenz. B/L OMG for Germany (US) Administration of Justice Br.. APO 742 US Army. Subject: Report Form Mg/Lg/10/F, 22 April 1948. Ka/gp. OMG for Hesse. Legal Division, APO 633. US Army. 29 April 1948.

[1150] Z45F 17/199/40 RG 260 OMGUS, Koblenz. AGO 014.3. Subject: "Denazification of German Administration of Justice", 31 October 1947.

[1151] Z45F 17/217-3/4 RG 260 OMGUS, Koblenz. Memorandum. Subject: "Denazification of German Civil Service", 20 November 1947.

Land military government legal division in Hesse affirmed that there were no nominal National Socialists at the *Oberlandesgericht* in Hesse. This was made possible by appointing a number of individuals from outside Hesse, in contrast to the practice in other *Länder*: "the staffs of Oberlandesgerichte in other Laender, particularly Bavaria, are so limited, largely because appointments have been governed by local patriotism as well as by the desire to keep positions open for the former Nazi incumbents thereof."[1152] The legal division therefore recommended that maintaining the current standards and blocking even nominal former National Socialists from occupying key positions in the judicial organisation would ensure that any political doubtful judgments made by the lower courts would be revised, and would thereby exercise an educational influence upon the lower courts at a time when military government controls were relaxed and supervision by the military government was limited[1153]. The military government was also kept informed about reinstated officials and employees of the administration of justice in Hesse who were below the category of the upper level of the civil service (*höherer Dienst*), and were classified as "Followers" under the Law for Liberation[1154]. Although the military government policy at this time was to admit former members of the NSDAP to certain positions in the civil service, such as judges and prosecutors, who were classified by the *Spruchkammer* as either "Followers" or "Persons Exonerated", these individuals were not reinstated automatically. The German

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[1152] RG 260 OMGUS, 17/210-3/3, Wiesbaden. APO 633. Subject: "Personnel of German Courts", 27 February 1948.

[1153] *Ibid.*

[1154] Z45F 17/213-3/8 RG 260 OMGUS, Koblenz. "Former Nazis in Administration of Justice".

administration of justice considered the merits of each case and determined whether the individual was politically implicated[1155].

Corresponding consequences of accelerating the completion of the denazification programme followed for the legal profession that was encompassed in the scope of the denazification programme along with all other professions. Individual jurists were either subject to an amnesty, or were classified below Class I or II of the Liberation Law and were no longer subjected to the initial penalties instituted under the law. In addition to reducing the case load of the denazification tribunals by issuing amnesties for broad categories of individuals who were not classified into the top categories of the Law for Liberation, the severity of the penalties called for under the Law for Liberation were modified as the demand increased for accelerating trial proceedings following criticism in the US government on the cost of the military occupation and the need for rapid economic recovery of Germany[1156]. Industrial activity in western Germany in late 1947 had not reached thirty percent of 1938 levels, and representatives of the US government considered the continued depression of the German economy to be "the single most important retarding element in the rehabilitation of western Europe."[1157] A shift in US public opinion also played a role in the modification of the earlier denazification policy, which resulted from the cooling of relations with the Soviet Union and the

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[1155] Z45F 17/217-3/4 RG 260 OMGUS, Koblenz. Memorandum. Subject: "Denazification of German Civil Service", 20 November 1947.

[1156] Griffith, "Denazification in the United States Zone", pp.72-73.

[1157] "Final Report on Foreign Aid", p.8.

introduction of the Truman Doctrine on 12 March 1947, as well as the draining cost of the military occupation[1158]. The shift in world politics, the beginning of the Cold War, thus led to a new assessment of relations with western Germany, as a new rise of fascism was no longer considered a threat[1159]. It has been argued that the influence of US public opinion had a powerful impact on the formulation of US denazification policy[1160]. US denazification policy was more oriented towards the public opinion in the US than the social realities of the National Socialist regime, and was thereby one of the causes for the extremely schematised and extensive application of the denazification programme[1161]. In turn, the shift in the political climate and the corresponding force of public opinion contributed to the conclusion of the denazification programme.

The restoration of justice with personnel who were not implicated with the NSDAP *Unrechtsstaat* to any degree, as was envisaged by the occupation powers in the Potsdam Protocol, could not be fulfilled due to two main factors. Firstly, the original denazification programme was soon undermined through various revisions. The original strident denazification standards and procedures were relaxed in view of the impracticability of their application. Secondly, the subject of denazification became awkward in view of the wider context of the Cold War. The threat of fascism was

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[1158] Latour, Volgelsang, *Okkupation und Wiederaufbau*, p.143.

[1159] Moritz and Noam, *NS-Verbrechen vor Gericht: 1945-1955*, p.14.

[1160] Zink, *United States in Germany: 1944-1955*, pp.167-168.

[1161] Klaus-Dietmar Henke, "Die Grenzen der politischen Säuberung in Deutschland nach 1945", *Westdeutschland 1945-1955: Unterwerfung, Kontrolle, Integration*, Ludolf Herbst, ed. (München: R. Oldenbourg Verlag, 1986), p.130.

superseded by the fear of communism extending to western Europe, which led to discussions among the western Allies concerning the future integration of a West German state into a defensive alliance[1162]. The problems encountered in applying denazification policy and the change in the international circumstances led to the US government abandoning the original denazification programme.

The critical personnel shortage made it evident that the original denazification programme would prevent the restoration of a functioning judicial organisation[1163]. However, jurists were blocked from resuming their functions until after their denazification proceedings were concluded. The German denazification authorities agreed that the Liberation Law was extended too widely and that it affected too many people. The prohibition on employment was particularly criticised, since it imposed a lengthy penalty on hundreds of thousands of individuals who were suspected to be Class IV cases while the *Spruchkammer* could not deal with such cases rapidly enough[1164]. The House Select Committee on Foreign Aid of the US Congress reported in early 1948 that the rapid application of the US denazification policy was excessively ambitious. It had become evident that too many individuals were rigidly included into broad categorizations, which caused uncertainty that hampered the programmes for economic reconstruction and democratisation. It was also argued that the imposition of rigorous denazification standards

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[1162] Diestelkamp, "Justiz in den Westzonen", p.22.

[1163] *Ibid.*

[1164] 501/813, Wiesbaden. "Protokoll über die Sitzung des Denazifizierungs-Ausschusses beim Länderrat am 11./12. Februar in Wiesbaden: Hessische Vorschläge zur Überwindung der Denazifizierungskrise."

conflicted with the US military government objective of restoring responsibility to German authorities[1165]. The credibility of the denazification programme was undermined by focusing mainly on the formal criteria of membership in the NSDAP or one of its affiliated organisations, rather than evidence of an individual's conduct in the National Socialist regime, which inevitably led to injustices and errors. Both German and US authorities also believed that the expectations of the denazification created personnel shortages that obstructed the industrial and political recovery programme in Hesse[1166] while the abilities of skilled workers, technical experts and professionals were most needed for the postwar economic reconstruction[1167], regardless of their individual personality or political record that had hitherto been under suspicion while the denazification proceedings took place. Three predominant conditions were cited for mitigating the original denazification standards: granting German authorities greater responsibility for denazification; the chasm at the international level between the western Allies and the Soviet Union; bringing western Germany into making an important contribution to the economic recovery of western Europe. The changed situation provided opportunities for former National Socialists to return to influential positions in industry in western Germany, either because of the need for their technical and commercial abilities, or because higher production figures outweighed political considerations[1168]. In view of the inherent weaknesses of the

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[1165] "Final Report on Foreign Aid", pp.128-129.

[1166] Freeman, *Hesse: A New German State*, p.159.

[1167] *Ibid.*, p.161.

[1168] Drew Middleton, "Many ex-Nazis re-enter German Political Life", *New York Times* (17 October 1948), p.4E.

denazification programme and the changed international situation, the House Select Committee recommended that denazification proceedings in the US zone on all but "Major Offenders" and "Offenders" to be closed by 8 May 1948. A full amnesty was to be issued for all "Lesser Offenders" and "Followers" whose clearance proceedings had not been completed by this date[1169].

The discrediting of the denazification programme and its subsequent liquidation corresponded to alleviating the personnel shortage in the administration of justice. Four hundred and ninety judges were employed in the *Land* judicial organisation by the end of 1948, in comparison to three hundred and ninety-five in 1947 (24.1 percent), and a hundred sixty-seven prosecutors, in comparison to a hundred thirty-four in 1947 (24.7 percent). Although the increase in court personnel was far less to the increase of court business, the courts handled a fifty percent increase in cases. The numbers of civil service internships (*Referendare*) and clerical employees in the Ministry of Justice were also marked by increases: from 335 *Referendare* in 1947 to 390 in 1948 (16.5 percent), and from 2422 clerical employees in 1947 to 2750 in 1948 (11.9 percent)[1170]. Further guidelines were introduced for the reinstatement of judges and prosecutors that combined legislation with new regulations. New applicants would be considered if: 1) they had held a position in the judicial organisation in postwar Hesse; 2) they possessed the suitable professional qualifications and in so far as positions were open; 3) they were not seriously implicated under the Law for Liberation, with priority being granted to

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[1169] "Final Report on Foreign Aid", p.127.

[1170] RG 260 OMGUS 8/189-3/3, Wiesbaden. Subject: "1948 Historical Report of Legal Division, OMG Hessen".

those who were less implicated; 4) they were residents of Hesse; 5) they were not members of the NSDAP before 1 April 1933, or the *SS*, or were not officers of the *Waffen SS*; 6) they were not politically implicated refugees from east of the Oder-Neisse Line; 7) they passed an examination of their legal training if they were refugee jurists from Czechoslovakia; 8) they were political refugees from the Soviet zone and were granted political asylum in Hesse[1171]. The regulations for the reinstatement of jurists by this time were thus considerably more lenient than at the beginning of the occupation. Since this took place as the denazification programme was being concluded and the personnel shortage was no longer a severe impediment to the personnel reconstruction of the administration of justice, it may be inferred that the initial denazification regulations had been a primary cause for the shortage of these highly-specialised personnel.

The Conclusion of the Denazification Programme

The original denazification programme was effectively concluded in 1948[1172]. By 7 May 1948, the cases pending trial under the Law for Liberation were reduced to a relatively few highly incriminated and influential National Socialists. As a result, the military government would cease to review decisions of the denazification tribunals, except on an individual basis and in cases when the military government had new and substantial evidence that was not available to the tribunal when it tried the case, or in cases in which

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[1171] 458/1021, Wiesbaden. "Runderlaß wegen der Behandlung von Einstellungsgesuchen", 19 December 1948.

[1172] *Monthly Report of the Military Governor, U.S. Zone*, December 1948, No.42.

there had been a gross error[1173]. The military government supervision of the German denazification proceedings ended when the Special Branches of the *Land* Military Government Office in Hesse were ordered to be disbanded in October 1948. The *Land* Special Branches were to be replaced by an Office of the Denazification Advisor in the Office of the Military Government. This new office was to advise the Director of the *Land* Military Government on denazification matters, assemble reports on the activities of the German denazification authorities, transfer these reports to OMGUS, and to establish a connection with the German denazification ministries. The Office of the Military Government for Hesse itself was to be closed on 1 July 1949, while the Office of the Denazification Advisor was to continue to function thereafter[1174]. Although German authorities would continue to evaluate denazification cases, the functions of the denazification ministries in the three *Länder* would be turned over to the permanent *Land* ministries. The Ministry for Liberation in Hesse was to cease functioning on 31 March 1949, and its tasks were to be assumed by either the Ministry of Justice or of Labour or a combination of both[1175]. The *Landtag* of Hesse promulgated a law on the completion of the political liberation in Hesse on 8 July 1949. All individuals who were classified in Class III by a denazification or appeal tribunal were to be downgraded to Class IV by 31 December 1949. Those who had not yet been tried by 31 December 1949 were only to be brought before a

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[1173] 8/217-1/5, RG 260 OMGUS, Wiesbaden. Subject: "Military Government Policy in Denazification Matters", 7 May 1948.

[1174] 501/892, Wiesbaden. "Der Entnazifizierungsberater", Wiesbaden 23. Juni 1949.

[1175] *Monthly Report of the Military Governor, U.S. Zone*, 1 March 1949, No.45.

denazification tribunal if the case potentially warranted their being classified in Class I or II[1176]. This law was to attempt to remedy the unjust inequality of the denazification programme that was evident from the beginning of the programme. The denazification programme was considered to have been far too extensive, as was indicated by the amnesties that were introduced to reduce the number of cases. Hence, the public prosecutors were to concentrate on Class III cases in which there was a greater probability of prosecution[1177], unless they were hitherto downgraded. The law on the conclusion of the political liberation in Hesse went into force on 23 November 1949[1178]. This law effectively adjusted the conception of the implementation of the denazification programme to that that was initially proposed by the German policy-makers before the Law for Liberation was enacted, changing the application of denazification legislation toward emphasising the prosecution of former actions, while maintaining the application of categories within the legislation as an instrument of evaluating individual responsibility.

The reinstatement of former members of National Socialist organisations was practically completed after the conclusion of the denazification programme. All but up to 2 percent of the 34 percent of public officials in Hesse who had been removed from office were reinstated by 8 July

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[1176] 501/1204, Wiesbaden. "Gesetz über den Abschluß der politischen Befreiung in Hessen".

[1177] 501/1204, Wiesbaden. "Begründung zum Gesetz über den Abschluß der politischen Befreiung in Hessen".

[1178] 501/1072, Wiesbaden. Abwicklungsamt des ehemaligen Ministerium für politische Befreiung Ia - 05. Betr.: "Abschluss der politischen Befreiung im Lande Hessen", 25.11.49.

1949[1179]. By 27 October 1949, 3 222 922 individuals in Hesse had submitted a *Meldebogen*, of which 2 287 984 individuals were not affected by the Liberation Law. The following decisions were made for the 934 938 individuals who were affected by the law: 416 "Major Offenders"; 5350 "Offenders", or "Activists"; 28 208 "Lesser Offenders"; 133 722 "Followers"; 5279 "Persons Exonerated"; 663 273 amnesties. There remained 3157 *Spruchkammer* proceedings and 2749 appeals outstanding by this time[1180], a total of 532 undecided cases by 30 June 1950[1181] and 24 by 31 January 1954[1182]. It became common practice for former members of National Socialist organisations to fill positions according to their skills, regardless of their political records.

This was confirmed at the national level in May 1951, when the government of the Federal Republic of Germany promulgated a law that formally ended the denazification of civil servants. The legal status of individual civil servants who were affected by the denazification, having been either removed from office under the denazification or not yet reinstated, was determined by law to fulfil the provisions of Art. 131 of the federal constitution. This measure marked the final stroke to the development of civil service personnel reinstatement policy that had begun from

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[1179] Niethammer, *Entnazifizierung in Bayern*, p.531.

[1180] 501/892, Wiesbaden. M-Ia-05. "Betr.: Abwicklung des Ministeriums für politische Befreiung", 27. Oktober 1949.

[1181] 501/1212, Wiesbaden. Abwicklungsamt Ia-05. Betr.: "Statistische Angaben über die Arbeit auf Grund des Gesetzes zur Befreiung von Nationalsozialismus und Militarismus", 12. August 1950.

[1182] 501/247, Wiesbaden. Betr.: "Stand der Entnazifizierung im Lande Hessen am 31.1.1954", 25. Februar 1954.

the beginning of the military occupation[1183]. All those who were removed from office could make a legal claim for reinstatement, unless they were ruled by a *Spruchkammer* to be unfit for public service, or if they had been employed by the *Gestapo*[1184]. Hence, the goal of the denazification to permanently to block individuals from positions of influence, which was already in decline toward the end of the denazification programme[1185] was made virtually meaningless in the long-term[1186]. The termination of the denazification programme during the military occupation was a tacit admission that the programme of a massive political cleansing of a nation was not feasible[1187]. A positive aspect of the postwar reconstruction of German political life was that incorrigible National Socialists who were not prosecuted did not control the postwar democratic institutions, and adaptation to the new democratic way of life in postwar Germany took place. Resistance and sabotage which scarcely occurred[1188], since one's interests, even if an individual was a former National Socialist, were better served by adhering to the postwar system[1189].

[1183] Rudolf Wassermann, *Auch die Justiz kann aus der Geschichte nicht aussteigen*, p.187.

[1184] Klaus-Detlev Godau-Schüttke, *Ich habe nur dem Recht gedient: Die 'Renazifizierung' der Schleswig-Holsteinischen Justiz nach 1945* (Baden-Baden: Nomos Verlagsgesellschaft, 1993), p.22; Diestelkamp, "Justiz in den Westzonen", pp.27-28; Section 1, Art. 3, "Gesetz zur Regelung der Rechtsverhältnisse der unter Artikel 131 des Grundgesetzes fallenden Personen. Vom 11. Mai 1951", *Bundesgesetzblatt* I 1951, p.308.

[1185] Herz. "Fiasco of Denazification", p.592.

[1186] Latour, Vogelsang, *Okkupation und Wiederaufbau*, p.179.

[1187] Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung", p.94.

[1188] Bark and Gress, *A History of West Germany*, pp.80-81.

[1189] *Ibid.*, p.85.

The decline of enforcing the original denazification standards affected all occupations in each *Land* of the US zone. No particular consideration was given to bringing former National Socialist jurists to account for their actions. In one case toward the end of the denazification programme, a jurist who had obviously been heavily incriminated according to the original denazification standards, having joined the NSDAP in 1930, the SS in 1933, and the SD in 1937, and had held a high rank in the *Luftwaffe*, having held the position of *Oberstabsrichter* in a *Luftwaffe* military court (*Feldgericht*), was classified as a "Follower" and was penalised with a fine of RM 500. The evidence presented in this case indicated that this individual was an opportunist who had played a considerable role in the National Socialist regime, but judgments at this stage of the denazification were less severe in comparison to many previous cases[1190]. The interest in implementing the denazification programme had greatly diminished by this time. In other cases of lenient penalties, it may be argued that the tribunals, staffed by Germans who had the benefit of first-hand experience of the conditions of the National Socialist regime, could justify their decisions on the basis of taking personal circumstances of the individual case into account, considering evidence of individual conduct and extenuating circumstances under the National Socialist regime. In a case of overriding formal political guilt, a former judge who had been a member of the NSDAP from 1933 to

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[1190] 501/662, Wiesbaden. Ermittlungszentrtalle, CII - Schw./Ti. Betr.: "Rechtsanwalt -----, Wiesbaden", 25. Juni 1949.

1945 was classified by an appeal tribunal as a "Follower", downgraded from "Lesser Offender", since she had not held a leading position in the NSDAP or the RAD, and her activity in office did not reveal that she supported the National Socialist dictatorship[1191]. Taking individual circumstances into account as evidence was symptomatic of rejecting the concept of the presumptive collective guilt of the German people that was implied in the US military government denazification procedure, which some Germans considered "a convenient over-simplification and distortion of the circumstances."[1192] Judgment on the basis of NSDAP membership did not accurately reflect the complexities of living in National Socialist Germany, since the theory of collective guilt did not allow for discerning why individuals joined the NSDAP, and whether they necessarily conducted themselves as National Socialists if they had been members of the NSDAP[1193]. The denazification tribunal thereby passed judgment accordingly. For example, a judicial official (*Justizsekretär*) who had been a member of the NSDAP from 1 May 1933 was classified as a "Follower" and was penalised with a RM 540 fine since he joined under strong pressure by his superior, and did not incur any advantages as a result of his membership[1194]. On the other hand, it may be argued that the denazification tribunals made what could be

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[1191] 501/465, Wiesbaden. Der Berufungskammer Fulda. Ber. Reg. Nr.157/47. Aktenzeichen 1. Instanz Sch 27.

[1192] Schmid, "Denazification: A German Critique", p.233.

[1193] Edward N. Peterson, *The American Occcupation of Germany: Retreat to Victory*, (Detroit: Wayne State University Press, 1977), p.140; Stolper, *German Realities*, p.59; Sträter, "Denazification", p.47.

[1194] 462/1302, Wiesbaden. Der Spruchkammer Wetzlar; Aktenzeichen: We 15/14030 Fr. 2/46, 22 July 1946.

considered errors in their judgments. For example, a former judge of a *Sondergericht* who was not only presumptively incriminated by virtue of having held this office, but according to the available evidence, this judge was also personally involved in passing both death as well as prison sentences. This individual had been tried and classified in Class II in October 1946, and was later found to be in Class IV and penalised with a fine of RM 2000 by an appellate tribunal in Hesse in February 1947[1195]. In another example of what the *Land* legal branch considered, "a common variety of Hessian white-wash"[1196], a *Spruchkammer* classified a former NSDAP *Blockleiter* who joined the party in 1942, joined the NSKK in 1933 and served as assistant judge at a *Sondergericht* into Class IV and imposed a RM 100 fine. The *Spruchkammer* defended its judgment by stating that this individual joined the NSDAP upon being advised to do so by his superior. This individual was said to have attempted to resist National Socialist tendencies in his position as judge, and therefore incurred disciplinary punishment and professional disadvantage. This individual also served as an assessor at a *Sondergericht* for a year in 1941 against his wishes. These facts formally placed the subject in Class II according to the terms of the Law for Liberation. On the other hand, the testimonies of several witnesses who were jurists supported the subject's claims that he did not support National Socialism, and that he was thereby relegated to a less important position. The *Spruchkammer* classified this subject as a "Follower" on the basis of his

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[1195] 501/39, Wiesbaden. Office of the Military Government for Greater Hesse. Denazification Division. ALY/gh. APO 633. Subject: "Disapproval of Reinstatement", 14 April 1947.

[1196] 8/79-1/4, RG 260 OMGUS, Wiesbaden. Denazification Branch, Legal Division, Administration of Justice, 15 January 1947.

attitude and his economic circumstances[1197]. In another example, a former public prosecutor of the *Volksgerichtshof* was classified into Class IV[1198]. The denazification tribunals combined the tasks of denazification with rehabilitation in their judgments, by which it was tacitly assumed that the individual who was called to account could become reformed. This practice consequently led to imposing sentences that were more lenient than what could have been expected from a strict application of the law[1199]. This may have been symptomatic of the widespread trend of attempting to repress and forget the details of the National Socialist past[1200]. It was also argued from the German point of view that the US military government authorities imposed the principle of presumptive collective guilt onto the denazification procedure since they distrusted every German, and they did not consider the experience of the everyday reality of social life in the National Socialist regime in which one was subject to political pressure and terror[1201].

[1197] 8/79-1/4, RG 260 OMGUS, Wiesbaden. Attested Copy, Spruchkammer Fritzlar-Homberg, Case record sign: FH/O 196, 10 August 1946.

[1198] 501/38, Wiesbaden. Office of the Military Government for Greater Hesse. Denazification Division. ECS/ivi. APO 633. Subject: "Prosecutor before the German People's Court", 10 March 1947.

[1199] Vollnhals, *Entnazifizierung: Politische Säuberung und Rehabilitierung in den vier Besatzungszonen*, pp.259-260.

[1200] Herz, "Fiasco of Denazification", p.593.
The syndrome of suppressing and forgetting the past affected the administration of justice to a significant extent. The implication of judges with National Socialism and the role of justice in the National Socialist regime only gradually began to be debated during the 1970s. Diestelkamp, "Justiz in den Westzonen", p.23.

[1201] Schmid, "Denazification: A German Critique", p.239.

The implementation of the denazification programme was also undermined by cases of errors in judgment made by the tribunals, which was in part due to the quality of the denazification personnel, who were not carefully selected due to the urgency of the task of the denazification[1202]. In addition to the quality of the denazification tribunal personnel, they were intimidated by members of the local communities in which the denazification proceedings took place, and therefore imposed lenient judgments. Moreover, thorough investigations of individual cases were hindered by the fact that witnesses for the prosecution avoided fulfilling this function, or they were ostracised by members of their communities[1203]. Staging a thorough denazification at the local level was obstructed by what could be considered psychological and social impediments from the German point of view, since the denazification was to be carried out among neighbours and colleagues rather than by anonymous tribunals[1204]. The members of the *Spruchkammer* were wary of trying "Major Offenders" since they feared later reprisals from these influential individuals[1205]. Prosecutors tended to base their indictments on the content of the individual *Meldebogen*, and the tribunals tended to accept extenuating circumstances presented for the defence. As a result, the judgments made by the denazification tribunals were considerably more lax than those of the military

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[1202] 501/1212, Wiesbaden. Staatskanzlei, Abteilung Az LT/3c10/13. Drucksache I/382-. Betr.: "Geschäftsverkehr mit dem Landtag hier: Abschluß der Entnazifizierung; große Anfrage der Fraktion der BHE vom 7 März 1952", 13 März 1952.

[1203] Herz, "Fiasco of Denazification", p.572.

[1204] Henke, "Die Grenzen der politischen Säuberung in Deutschland nach 1945", p.130.

[1205] Delbert Clark, "Anti-Occupation Spirit Developing in Germany: Attack on U.S. denazification laws raise many questions of policy", *New York Times* (8 February 1948), p.4E.

government[1206]. In addition to the factor of errors made by the tribunals, the amendments to the denazification law significantly reduced the number of individuals to be examined by the tribunals. Much greater numbers of individuals were retained in their employment than would be expected from a strict application of the law[1207]. A US military government official revealed that approximately eighty-five percent of individuals who were removed from public service by the military government at the beginning of the denazification programme were later reinstated by German authorities[1208]. The most critical factor was that it became apparent that the original US denazification policy or barring all former members of National Socialist organisations could not be fulfilled without stultifying the normal functioning of the state. Less serious cases were dealt with as rapidly as possible to eliminate the vacuum that the denazification created in the workforce. Dealing with the serious cases (*grosse Fälle*), such as former members of the *Gestapo* and those who took part in the pogrom of November 1938, was postponed and were later tried by criminal courts. The "Law on the Conclusion of the Political Liberation in Hesse" of 30 November 1949 called for the continued examination of cases of individuals who could be considered Class I and II offenders on the basis of the

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[1206] Herz, "Fiasco of Denazification", p.572.

[1207] Friedmann, *Allied Military Government in Germany*, p.119.

[1208] "OMGUS-Kritik an der Säuberung: Rund 85 Prozent Betroffene wieder eingestellt", *Frankfurter Rundschau* (11 April, 1948).

evidence of former actions[1209]. Such cases included: the persecution of political opponents, murder or attempted murder of prisoners and political opponents, mistreatment or persecution of Jews, crimes against humanity, and serving as chairman (*Senatspräsident*) or a prosecutor at the *Volksgerichtshof*. All other denazification proceedings were abandoned[1210].

Hence, only the worst offenders under the Law for Liberation could remain permanently excluded from the administration of justice, while former nominal members of National Socialist organisations would not be affected in the long-term. Deciding whether individual jurists were to be reinstated and could be expected to perform their functions according to these standards remained at the discretion of the *Land* Minister of Justice. For example, a heavily implicated former jurist was not severely penalised under the denazification procedure, but was blocked from future reinstatement as a jurist since he did not possess the confidence of the Minister of Justice. He had been classified into Class III by a *Spruchkammer* in January 1948, which was upheld by an appeal tribunal in June 1948 that was then later modified to Class IV in February 1949. There was also evidence indicating that he had been a member and the first chairman of the youth group of the *Schutz und Trutzbund* from 1919 until its dissolution in 1923; he had been a member of the NSDAP from 1 May 1933; he had occupied a leading office in the NSRB as a *Gaufachgruppenwärter der*

[1209] "Gesetz über den Abschluß der politischen Befreiung in Hessen vom 30. November 1949", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1949), p.167.

[1210] 501/1212, Wiesbaden. Staatskanzlei Abteilung II Az LT/3c10/13. Drucksache I/382-. Betr.: Geschäftsverkehr mit dem Landtag hier: Abschluß der Fraktion der BHE vom 7. März 1952.

Rechtsanwälte, and had volunteered to serve with a unit of the SD, in which he was on friendly terms with a leading high official. His request for reinstatement was therefore refused by the Ministry of Justice because his former political conduct did not guarantee that he could serve in a manner conducive to the requirements of a democratic administration of justice[1211].

It has been argued that the denazification programme would only be successful if it served to eliminate, or at least contributed to eliminating, National Socialist psychology and attitudes. On the positive side, the National Socialist organisation and its political and economic power were liquidated, and the legal system that had perpetuated it was abolished[1212] during the military occupation. National Socialist ideology was virtually extinguished by the sheer force of the occupation, and perpetuating the ideology was no longer possible[1213] under these circumstances. The continuity of the personnel from the National Socialist to the postwar democratic system also did not threaten future political stability. The shocking experiences of the Second World War and the postwar period influenced the civil service and the judicial profession, as with the majority of the population, to adopt a positive attitude toward the new postwar political system. The acceptance of the transition from the monarchy to the republic in the Weimar period was marred by economic problems, while successes in solving social and economic problems in the Federal Republic of Germany sustained popular support for the new democratic

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[1211] 462/1308, Wiesbaden. IIb AE 4309. Betr.: Gesuch um Zulassung als Rechtsanwalt, 9 January 1950.

[1212] Plischke, "Denazifying the Reich", p.165.

[1213] Bark and Gress, *A History of West Germany*, p.86.

state[1214]. The question remained how effectively had the US military government fulfilled the United Nations' war aim of eradicating National Socialism from Germany, and achieved the long-range objectives of re-educating Germany according to democratic principles[1215].

Dealing with the Past and the Limitations of the Denazification Programme

The denazification programme eliminated National Socialist influences from postwar German institutions, but it did not succeed in dealing with all the injustices that were perpetrated during the National Socialist regime. Whereas dealing with every individual on an equal basis was not practical, there remained the question of dealing with actions committed under the regime that could be brought under scrutiny and the perpetrators brought to justice. Some of the injustices that were committed under the National Socialist regime were prosecuted outside the scope of the Law for Liberation, while other matters that could have been considered injustices and their perpetrators were not brought under consideration.

The experience of the administration of justice in the National Socialist regime had undermined trust in the administration of criminal justice. Severe penalties were imposed for acts that were not commonly considered criminal, or did not deserve such severe penalties. In other instances, crimes were not prosecuted due to political reasons. Confidence in the administration of justice could be restored if the principles of the *Rechtsstaat* were

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[1214] Diestelkamp, "Die Justiz in den Westzonen". p.23; "Kontinuität und Wandel in der Rechtsordnung", p.96.

[1215] *Report of the Military Government for Germany, U.S. Zone*, 20 August 1945, No.1.

restored in this sphere. This would involve prosecuting crimes that were committed under the National Socialist regime[1216]. Control Council Laws No.1 of 20 September 1945 and No.11 of 30 January 1946 rescinded the most notorious National Socialist laws. These laws contributed to the denazification of the law by prohibiting the further application of the National Socialist laws that they abolished, but there remained the question of dealing with the sentences that had been passed under these laws while they were in force[1217]. In principle, an action is subject to prosecution according to the law while the law is in force. This principle was set in Art. 8 of Military Government Law No.1 and Art. 116 of the Weimar Constitution, but was breached by Control Council Law No.10[1218] of 20 December 1945 on "Punishment of Persons Guilty of War Crimes"[1219]. The US military government prosecuted war criminals under the provisions of this law[1220].

The provisions of Law No.10 called for the prosecution of four types of crimes to be adjudicated by the International Military Tribunal: 1) crimes against peace; 2) war crimes; 3) crimes against humanity; 4) membership in or association with an organisation that the International

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[1216] Hodo von Hodenberg, "Zur Anwendung des Kontrollratsgesetzes Nr. 10 durch deutsche Gerichte", *Süddeutsche Juristenzeitung* (1947), p.113.

[1217] Müller, *Hitler's Justice*, pp.290-291.

[1218] Mehnert and Schulte, *Deutschland-Jahrbuch 1949*, p.103.

[1219] "Law No.10: Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity", *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp.50-55.

[1220] von Hodenberg, "Zur Anwendung des Kontrollratsgesetzes Nr.10 durch deutsche Gerichte", p.114.

Military Tribunal declared to be criminal[1221]. Crimes committed by Germans against Germans or against displaced persons were to be transferred to a German court, if so authorised by the respective occupation power[1222]. In view of the inherent problems associated with a retroactive application of the law by German courts, the US military government avoided granting the German judicial organisation the authority of a general application of Law No.10[1223], i.e. the legal justification for applying legislation enacted following the perpetration of the action. Such cases were later admitted to the German courts under special authorisation of the military government, as was provided for in para.10 of Military Government Law No.2[1224].

The most widespread discussion of the subject of prosecuting National Socialist crimes was how to deal with German informers who had denounced other Germans to National Socialist authorities, either out of loyalty to the regime, or in the interest of acquiring personal gain[1225]. The government of Hesse issued a query to the military government about the prosecution of such cases, which

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[1221] Art. 2 (1), "Law No.10: Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity", *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp.50-51.

[1222] Art. 3 (1d), "Law No.10: Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity", *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp.52-53.

[1223] Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung'", p.496.

[1224] 8/216-1/12 RG 260 OMGUS, Wiesbaden. APO 633. Subject: "Jurisdiction of German Courts", 2 March 1949.

[1225] Grunberger, *The Twelve Year Reich*, p.108-115.

responded with the following conclusions: 1) these types of cases could not be adjudicated by German courts since there was no German law that covered such cases, and therefore individuals who denounced others could not be charged with such an offence; 2) any law enacted by German authorities to make such actions open to prosecution would be retroactive in effect, and therefore would not be regarded favourably[1226]. The perpetration of malicious denunciations could theoretically come under Law No.10 that specifically included "'persecutions on political, racial or religious grounds'" in Art. 2(c), but the question remained whether the term "persecution" could be construed in such cases. Under German law, Art. 104 of the Criminal Code stated that denunciations were not open to prosecution if they pertained to a fact[1227]. Art. 164 of the Criminal Code only allowed for prosecution for *false* denunciation, while those based on fact, such as if the denounced individual had listened to forbidden foreign broadcasts, were not chargeable[1228]. Hence, if cases of denunciations that were reported by informers to the authorities were allegedly true, then there was no legal basis for prosecution under the existing German law. The informer in such a case could conceivably have been indicted on a charge of being an accomplice to murder or deprivation of freedom, but only if a new law was enacted to define the circumstances under which such an act would be made subject

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[1226] RG 260 OMGUS, 17/210-2/6, Wiesbaden. APO 633, Subject: "Denouncements", 20 January 1946.

[1227] Z45F 17/56-3/7 RG 260/OMGUS, Koblenz. Provenance: OMGUS LD, LA Br., Folder Title: La 91 The German Government, the German Courts. Memo: to Lt.Col. A.S. Brown, Legal Division; Subject: Alleged Violations of Control Council Law No.10, 4 March 1946.

[1228] Loewenstein, "Reconstruction of the Administration of Justice", pp.436-437.

to prosecution[1229].

Since the existing law did not allow for the criminal prosecution of indirect responsibility for the commitment of a crime, the Ministers of Justice of the US zone drafted a law to prosecute denunciations. This law would serve to carry out the denazification by prosecuting those who had willingly collaborated with the National Socialist regime at every level of society. Although the legal sanction of such a law would contradict the principle that criminal laws should not possess retroactive power, there was public demand for the prosecution of informers. This matter was not dealt with under the Law for Liberation from National Socialism and Militarism, since this law did not deal with criminal matters. The Ministers of Justice therefore recommended drafting a special criminal law for this purpose, which would be enclosed in the draft of the Law for the Punishment of National Socialist Crimes that was under discussion at this time. They proposed that whoever had directly or indirectly subjected another individual to political persecution as a result of a denunciation, either deliberately or through negligence, which caused serious consequences, particularly imprisonment in a concentration camp or death, would be sentenced to prison. Perpetrators in such cases who acted out of self-interest, vengeance, or other reprehensible motives would be sentenced to imprisonment in a penitentiary[1230].

These provisions were not introduced into any new German legislation. Since German legislation had to be approved by the military government, it may be surmised that the military government opposed the prosecution of denunciation cases since this would introduce a floodgate of

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[1229] Johnson, "Denazification", p.71.

[1230] Z1/1235A, Koblenz. "Besprechungsgegenstand: Gesetz zur Ahndung nationalsozialistischer Straftaten", Stuttgart 17. April 1946.

litigation. Such cases could still be prosecuted under Art. 2(c) of Law No.10, which specifically provided that prosecution of actions was possible "'whether or not in violation of the democratic laws of the country where perpetrated.'" Prosecution was technically possible under Law No.10. Art. 3(d) of Law No.10, provided that the tribunal that could be charged with prosecution of a case could be a German court in cases of crimes committed by Germans against other Germans, if prior authorisation for the prosecution was granted by the military government to a German court holding the appropriate jurisdiction[1231]. The US military government ordered that cases involving informers' denunciations would be authorised to be tried by German courts if the case revealed *prima facie* malicious intent by the informer, and "grave disadvantages were caused by the act of information to the person against whom it was directed."[1232] In practice, the US military government disapproved of overburdening the courts with minor cases that did not involve any principle of public interest or injustice. It was therefore ruled that the German courts would not be authorised to generally deal with denunciation cases under any circumstances, until appropriate legislation was enacted, since the individual courts would otherwise handle such cases with wide divergence in principle, and justice would have been jeopardised[1233]. Hence, the prosecution of informers was not authorised by the US military government. Either the volume of evidence on these

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[1231] Z45F 17/56-3/7 RG 260/OMGUS, Koblenz. OMGUS LD, LA Br.. La 91 The German Government, the German Courts. Memo: to Lt. Col. A.S. Brown, Legal Division; Subject: Alleged Violations of Control Council Law No.10, 4 March 1946.

[1232] *Ibid.*

[1233] *Ibid.*

informers would bring a proliferation of litigation, or such cases of "minor" criminals were considered low priority in view of other work faced by the understaffed courts, or on the principle that such cases could be disregarded in comparison to the more significant war criminal cases[1234]. The German courts in the British, French and Soviet zones were empowered with adjudicating denunciation cases on the terms of military government ordinances, and the courts in Berlin were empowered to hear such cases on the terms of Control Council Law No.10 and German law. Although such cases could not be prosecuted in the US zone according to Control Council Law No.10, these cases could be tried upon special application in exceptional cases insofar as they constituted a violation of German law[1235].

Although cases of denunciations conveying accurate information did not violate any specific provision of the Criminal Code and Control Council Law No.10, and these cases could not be heard by the German courts in the US zone, the *Oberlandesgericht* in Hesse set the precedent for such cases to be tried under civil law. This court ruled that an individual who denounced another for a political offence during the National Socialist regime had to know the possibility that such matters would be heard by an ordinary law court in an arbitrary manner, or possibly by the secret

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[1234] Loewenstein, "Reconstruction of the Administration of Justice", pp.436-437.

[1235] Richard Lange, "Zum Denunziantenproblem", *Süddeutsche Juristenzeitung* (1948), p.302.

Part I, Art. 5, para. 9 defined a "Major Offender" as one who had actively denounced an opponent of the National Socialist dictatorship out of self-interest or motivated by personal gain in cooperation with the *Gestapo, SS, SD,* or similar organisation, or had contributed to their persecution. Schullze, *Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946,* p.8.

state police. Hence, the denunciation to a public authority containing only accurate information could not be considered contrary to good morals in the conditions that were prevalent in the National Socialist regime, rather than under the government of law. This court therefore awarded damages to the plaintiff on the basis of para. 826 of the Civil Code. The *Land* military government legal division agreed that the action of such denunciators constituted tort even if they were not a criminal offence[1236].

The German Ministers of Justice in the US zone sponsored their own war crimes legislation through the *Länderrat* Legal Committee when authorisation for the German courts to apply Law No.10 was not forthcoming[1237]. The adjudication and prosecution of individuals implicated with war crimes remained within the jurisdiction of the military government. Military courts were established for this purpose[1238]. The Ministers of Justice in the *Länderrat* Legal Committee drafted laws dealing with crimes and injustices committed in the National Socialist regime. These included the "Law for the Punishment of National Socialist Crimes" of 29 May 1946[1239], and two other laws that dealt specifically with the redress of National Socialist injustice in the

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[1236] RG 260 OMGUS, 17/210-3/3, Wiesbaden. APO 655. Subject: "Reports of Important Trials", 5 November 1947.

[1237] Loewenstein, "Reconstruction of the Administration Justice", p.437.

[1238] "Ordinance No.7: Organization and Powers of Certain Military Tribunals" (18 October 1946), *Military Government Gazette* Issue B December 1946, pp.10-15.

[1239] "Gesetz zur Ahndung nationalsozialistischer Straftaten vom 29. Mai 1946", *Gesetz- und Verordnungsblatt für Groß-Hessen* (1946), p.136.

administration of criminal justice[1240]. The first law, the "Law for the Redress of National Socialist Injustice in the Administration of Criminal Justice" of 29 May 1946 that went into force on 15 June 1946, expressed that acts of political resistance against National Socialism and Militarism were not punishable. The provisions of this law called for the annulment of sentences passed according to National Socialist legislation, and justified previous acts of resistance against the National Socialist regime or the prosecution of total war[1241]. The courts were empowered with adjudicating cases that arose from crimes committed during the National Socialist regime involving political, racial or religious persecution that were not brought before a court prior to the occupation, and were considered criminal acts under German law prior to the enactment of National Socialist legislation that sanctioned actions that contradicted the principles of justice[1242]. The authority of this law was limited to the prosecution of actions that were sanctioned by National Socialist laws, enactments, and ordinances that were abolished under occupation law. The enactment of this law removed the obstacle of the legal justification of applying the law retroactively[1243].

[1240] "Gesetz zur Wiedergutmachung nationalsozialistischen Unrechts in der Strafrechtspflege vom 29. Mai 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946) pp.136-137; "Zweites Gesetz zur Wiedergutmachung nationalsozialistischen Unrechts in der Strafrechtspflege vom 13. November 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.223.

[1241] Neidhard, "Die Rechtspflege in der Gesetzgebung der amerikanischen Zone", p.119.

[1242] *Ibid.*

[1243] Broszat, "Siegerjustiz oder Strafrechtliche 'Selbstreinigung'", p.496.

The second law, the "Law for the Compensation of National Socialist Injustice in the Administration of Criminal Justice", went into force simultaneously and translated the terms of Proclamation No.3 into practice, overruling of judgments made by courts passing convictions according to National Socialist ideology, requiring sentences on persons convicted on political, racial or religious grounds to be quashed[1244]. This law thus re-established the principle of equality of all before the law[1245]. The "Second Law on the Compensation of National Socialist Injustice" of 13 November 1946 extended the provisions of the original law of 29 May 1946. Sentences pronounced by a *Sondergericht* between 31 January 1933 and 8 May 1945 that were not yet served, either in whole or in part, and were considered excessive in view of the act committed and the circumstances of the time were to be reduced to the appropriate extent of the penalty, or the sentence was to be suspended altogether. Such cases were to be reviewed by the *Landgericht* in the district where the *Sondergericht* was formerly located. Each case would be reviewed on the basis of the evidence and the appropriate provisions of the Code of Criminal Procedure (*Strafprozeßordnung*). Decisions on these cases could be appealed to the *Oberlandesgericht* if the reduction of a sentence was refused[1246].

[1244] Loewenstein, "Reconstruction of the Administration of Justice", p.437.

[1245] "Gemeinsame Gesetzgebung der 3 Länder", *Süddeutsche Juristenzeitung* (1946), p.101.

[1246] "Zweites Gesetz zur Wiedergutmachung nationalsozialistischen Unrechts in der Strafrechtspflege vom 13. November 1946", *Gesetz- und Verordnungsblatt für das Land Groß-Hessen* (1946), p.223.

Supplementary provisions were later added to these two laws on 16 August 1947. Regarding the "Law on the Punishment of National Socialist Crimes", court proceedings could be resumed after a final verdict was pronounced in cases in which the defendant was judged unjustly. These cases would be re-opened if the defendant was acquitted on grounds that were offensive to the equality of race, religion or political beliefs, or received a disproportionately lenient sentence during the National Socialist regime, or when a crime constituted the subject of the investigation. Proceedings in such cases could be re-opened until 31 December 1948[1247]. The application of these provisions was to follow those stated in the law. Regarding the "Law for the Compensation of National Socialist Injustice in the Administration of Criminal Justice", those who were convicted of crimes violating criminal law that was in force at the time of the offence, as well as the political actions that were considered criminal at the time, remained subject to the sentence until the case was re-opened[1248].

The German courts began a programme in the summer of 1946 for prosecuting cases of criminal actions committed between 1933 and 1945, instituting proceedings for political crimes or crimes against humanity involving actions that constituted offences under German criminal law. Such cases included trying individuals who had taken part in synagogue

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[1247] "Ergänzungsgesetz vom 16. August 1947 zum Gesetz zur Ahndung nationalsozialistischer Straftaten vom 15. Juni 1946", *Gesetz- und Verordnungsblatt für das Land Hessen* (1947), p.64.

[1248] "Ergänzungsgesetz vom 16. August 1947 zum 1. Gesetz zur Wiedergutmachung nationalsozialistischen Unrechts in der Strafrechtspflege vom 15. Juni 1946", *Gesetz- und Verordnungsblatt für das Land Hessen* (1947), p.64.

burnings and anti-Jewish riots shortly before the war[1249]. The first such cases were authorised by the military government in Hesse in August 1946, which involved the burning of the synagogue in Wiesbaden-Schierstein, the desecration and destruction of the synagogue in Nachheim, and the wrecking of Jewish homes and shops in that locality in November 1938[1250]. By November 1946, the Darmstadt *Landgericht* had dealt with approximately ten such cases of atrocities committed against Germans in 1938, while approximately twenty other similar cases were pending in Gießen and fifteen others in Wiesbaden[1251].

The most notable of such cases of political significance in Hesse was the trial of twenty-five physicians, nurses and administrative staffs of the Hadamar, Eichberg and Kalmenhof insane asylums, where about 20 000 Germans had been killed[1252] as part of the National Socialist euthanasia programme. Two of the physicians were sentenced to death, and nine other defendants were sentenced to prison for periods ranging between two and a half years to eight years for the head nurse. The remaining fourteen, mostly clerks in the administrative department, were acquitted[1253]. The Frankfurt-am-Main *Landgericht* justified the sentencing

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[1249] *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No.17.

[1250] RG 260, 8/188-2/5, Wiesbaden. APO 633. Subject: "Weekly Summary Report for Legal Division from 18 August to 24 August 1946", 23 August 1946.

[1251] Z45 F 17/56-3/7 RG 260/OMGUS, Koblenz. AJ 015.2 18 November 1946, Subject: "Report on Inspection of German Courts in Greater Hesse from 28 October to 4 November 1946".

[1252] Freeman, *Hesse: A New German State*, p.135.

[1253] *Monthly Report of the Military Governor, U.S. Zone*, 30 April 1947, No.22.

of the accused by arguing that the euthanasia order was not legally binding since the order was neither enacted as a law, nor signed by an appropriate governmental minister. Thus, the order did not have the force of law[1254], and therefore the accused were not forced to comply with the order.

The postwar judicial organisation adjudicated past offences to the extent that the law made it possible to do so. It was not considered justifiable to administer justice retroactively, while some actions that were illegal when they were committed were prosecuted. This mainly applied to what could be considered major cases. The justification for prosecuting individuals in the euthanasia trials was based on the principle that they were not following the direct orders of the state, and were therefore made responsible for their actions. The euthanasia orders did not have the status of law, since they were neither promulgated as law, nor passed as state legislation. This removed any possible defence that they merely functionaries "following orders", just as those who had taken part in organised violence, such as the anti-Jewish attacks. Whereas sentences passed under the National Socialist administration of justice were nullified, those who administered such justice were not prosecuted. There were no special measures taken against the jurists who had passed such sentences, since they were not considered to have been individually responsible for these injustices.

The effective prosecution of individual injustices was undermined by the denazification procedure that failed to differentiate separate actions committed by individuals from individual responsibility for the past. Failing to implement the original denazification programme did not solve the

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[1254] Broszat, "Siegerjustiz oder Strafrechtliche 'Selbstreinigung'", p.500.

problem of prosecuting individuals who were implicated with the National Socialist regime. Only the method of applying the denazification programme applying across a wide range of anonymous individuals was liquidated.

The criminal prosecution for judicial illegality in postwar Germany began with the Nuremberg Tribunal proceedings against the seventeen leading jurists of the National Socialist regime began on 17 February 1947[1255]. There remained the question of dealing with all other jurists who had taken part in the National Socialist administration of justice. It has been claimed that between two-thirds and three-quarters of the 15 000 judges and prosecutors who held office in the Federal Republic of Germany in 1950 were former National Socialists, and that some of them were likely to have taken part in judicial crimes[1256]. It has also been maintained that no member of the People's Court (*Volksgerichtshof*) or a Special Court (*Sondergericht*) or of the ordinary courts was called to account for administering "terror justice", or for their participation in judicial criminality under the National Socialist regime, either in the western occupation zones or in the Federal Republic of Germany[1257].

An example of such a case in Hesse was that of two former *Sondergericht* judges who had sentenced Werner

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[1255] Bernhard Diestelkamp, "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", *Justizalltag im Dritten Reich*, eds. Bernhard Diestelkamp and Michael Stolleis (Frankfurt-am-Main: Fischer Taschenbuch Verlag, 1988), p.134.

[1256] Theo Sommer, "The Nazis in the Judiciary", *The Politics of Western Germany* (New York: Frederick A. Prager, 1963) ed. Walter Stahl, pp.241-242.

[1257] Diestelkamp, "Die Justiz in den Westzonen", p.26; Diestelkamp, "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", pp.133, 145.

Höllander to death at the Kassel *Sondergericht* on 20 April 1943[1258] on the accusation of being a "dangerous habitual criminal" for having repeatedly broken the Nuremberg Law on the protection of "Aryan blood", having committed four cases of *Rassenschande* (sexual relations with a non-Aryan)[1259]. The two judges were tried by a jury court at the Kassel *Landgericht* that pronounced its judgment on 28 June 1950. The court ruled that the accused were being prosecuted for a perversion of the course of justice by having pronounced the death sentence for the alleged crimes committed according to the standard of National Socialist justice. However, although the accused were recognised to be "convinced and even fanatical National Socialists" who had both been members of the NSDAP since 1933[1260], they applied the law in practice at the time, which was not a perversion of the course of justice when the courts were obliged to apply National Socialist legislation[1261]. The court therefore ruled that the accused were to be acquitted since they had not broken the law according to the judicial basis of the case[1262]. In other words, the accused could not be prosecuted under the existing extent of the law. The court merely acknowledged that the accused were morally guilty for sentencing Höllander to death[1263], since the death sentence

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[1258] Ernst Noam and Wolf-Arno Kropat, eds., *Juden vor Gericht, 1933-1945: Dokumente aus hessischen Justizakten* (Wiesbaden: Kommission für die Geschichte der Juden in Hessen, 1975), pp.168-173.

[1259] Moritz, Noam, *NS-Verbrechen vor Gericht: 1945-1955*, pp.309-310.

[1260] *Ibid.*, p.315.

[1261] *Ibid.*, p.310.

[1262] *Ibid.*, p.315.

[1263] *Ibid.*, p.316.

was excessively severe in view of the facts of the case[1264], ruling that the accused should not have been judged a "dangerous habitual criminal" and therefore the death sentence they had passed was an error[1265]. The public prosecutor appealed this decision, which was brought before the *Oberlandesgericht* in Frankfurt-am-Main where the decision of the Kassel *Landgericht* jury court was quashed on 7 February 1951. The *Oberlandesgericht* ruled that the *Landgericht* had not considered prosecuting the accused for the charge of perversion of the course of justice on the basis of deliberately unobjective application of formal law[1266]. Since the Kassel *Landgericht* was said to have misjudged the definition of the perversion of the course of justice, the *Oberlandesgericht* returned the case for a new trial at the Kassel *Landgericht* jury court after 1 October 1951[1267]. The Kassel *Landgericht* pronounced its judgment on 28 March 1952, acquitting the two judges after maintaining its original decision and explaining that the court had made an error in the explanation of the facts of the case rather than in the conduct of the deliberations. The court ruled that the accused judges acted inhumanely in passing the death sentence in this case. Although the accused could be considered "convinced" National Socialists, they believed

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[1264] The penalty for extra-marital relations between Jews and German nationals or individuals of "related blood" was imprisonment in a jail (*Gefängnis*) or a prison for capital offenders (*Zuchthaus*). Art. 5(2), "Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre. Vom 15. September 1935", *Reichsgesetzblatt* I 1935, p.1147.

[1265] Mortiz, Noam, *NS-Verbrechen vor Gericht: 1945-1955*, pp.311-312.

[1266] *Ibid.*, pp.316-317.

[1267] *Ibid.*, p.318.

that they applied the existing law according to legal positivism. This convinced them that their decision corresponded to the law in spite of its implications. Hence, the court maintained that the accused did not *wilfully* [emphasis added] commit a perversion of the course of justice. Prosecuting this case as a crime against humanity, through the application of Control Council Law No.10, was also outside the jurisdiction of the court[1268]. The court thus ruled that the accused did not act illegally when they passed judgments according to the existing law that was valid at the time, and were acquitted since there lacked the evidence that would absolutely establish that they had wilfully acted illegally[1269].

Gustav Radbruch, a former Social Democratic Minister of Justice in the Weimar Republic, wrote that an instance of a perversion of justice was to be considered a criminal offence if the judge had consciously performed the act with "direct intent", but National Socialist justice had the status of the law and was thus given a cover of legality[1270]. Radbruch argued that the tradition of legal positivism in the German administration of justice effectively made the German judiciary defenceless against laws containing arbitrary and criminal content, regardless of the intrinsic value of justice[1271], and whether they intended to uphold the interests of the National Socialist regime. Legal positivism dictated that what was legal was automatically considered

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[1268] *Ibid.*, pp.321-324.

[1269] *Ibid.*, pp.326-327; Diestelkamp, "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", p.137.

[1270] Müller, *Hitler's Justice*, p.276.

[1271] Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", *Süddeutsche Juristenzeitung* (1946), p.107.

the legitimate embodiment of justice, without applying the ethical question of what was just[1272]. Judges who had applied National Socialist law to the disadvantage of individuals who acted against the regime were not called to account for their specific actions in having disregarded the principle of justice in applying the law, and that a "special criminal law" for bringing the judges of the National Socialist period to justice was not promulgated remained "a black mark in the history of postwar justice."[1273] It may be inferred that a law for the prosecution of perversions of justice during the National Socialist regime, which would have in effect extended the denazification to its original spirit, was not enacted since it would have probably compromised vast numbers of an entire generation of jurists who were reinstated into the denazified postwar administration of justice. The reason why jurists were not convicted for administering National Socialist justice in the German courts in West Germany was a result of the pattern of legal argumentation on the theoretical legality of administering justice in the National Socialist regime. These judges administered justice according to the basis of the law at the time. Theoretically, it could be argued that the independence of the judiciary in the National Socialist regime was endangered, but was never *formally* abolished, even though the *Reichstag* resolution of 26 April 1942 allowed for the possibility of unlimited interference in the functions of the judiciary. The judges were responsible for committing these actions since they maintained control over the sentencing, while operating within the context of circumstances beyond their control. Hence, the judge was

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[1272] Sommer, "The Nazis in the Judiciary", p.247.

[1273] Diestelkamp. "Die Justiz in den Westzonen", p.27; Ingo Müller, *Hitler's Justice*, p.283; Moritz, Noam, *NS-Verbrechen vor Gericht: 1945-1955*, pp.336-337.

responsible for passing sentences according to the legal standards of the time, in spite of the inhumane consequences of these sentences. Judges could only be justly prosecuted if they passed sentences that could be considered perversions of the administration of justice with direct intent[1274]. As a consequence, they had not violated any law, and could not be prosecuted for what could be construed as the violation of undefined ethical standards of natural law. However, an accurate evaluation of how individual jurists behaved in office would have required a thorough investigation of their professional records that could have revealed instances of resistance to the regime, as well as instances of conformity. Those who were trained in and experienced the National Socialist administration of justice were henceforth responsible for upholding the standards of the postwar system, whereby knowledge of the law and the rule of law took precedence over all other considerations.

The question remained to what extent could these jurists exercise a real or apparent threat to the new state? The denazification in the US zone was applied widely and bureaucratically for jurists as with members of other professions, and its results were just as unsatisfactory as in the other professions[1275]. In spite of the failure of the denazification to achieve a thorough reform of German public life to secure the postwar democracy, and the shortcomings of the denazification of the legal profession in Hesse and in the US occupation zone, the former practices of the National Socialist regime were eliminated from the administration of justice. The terms of the Liberation Law

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[1274] Diestelkamp, "Die Justiz in den Westzonen", p.27; "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", pp.140-145 *passim*.

[1275] Stolleis, "Rechtsordnung und Justizpolitik: 1945-1949", p.396.

absolved most of the legal profession from being brought to account for their role under the National Socialist regime, even if they were involved in cases of a political nature, and the implementation of the Liberation Law in practice confirmed their absolution. In spite of the shortcomings of the denazification programme, there were safeguards within the administration of justice to counteract potential abuses of judicial authority, such as the restored right to appeal lower court decisions and the administrative supervision of the courts exercised by the Ministry of Justice. Former members of the NSDAP and its affiliated organisations were reinstated in the judiciary, the Bar Association, and in all other functions of the administration of justice since permanently barring them from office was impossible. The postwar changes in the administration of justice prevented "politically unreliable" jurists abusing judicial office. In the final analysis, the future generations of jurists who had not had the experience of National Socialist antecedents would fully consummate the democratisation of the administration of justice[1276].

Conclusion

The US denazification programme lost its original impetus as a political purge and became increasingly narrower in scope, as indicated by the redrafting of denazification policy until it was abruptly abandoned[1277]. The denazification thus admittedly failed after it became apparent that the scope of the programme was much too broad

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[1276] Loewenstein, "Reconstruction of the Administration of Justice", pp.465-466.

[1277] Gimbel, *A German Community Under American Occupation*, p.2.

and was thus an impossible task to fulfill[1278]. The denazification programme entailed various problems once it was put into practice, and the application of the denazification in the US zone was criticised from various sources. Neither the US military government nor the German denazification authorities could arrive at a permanent solution to the problem of eliminating all politically implicated personnel as was envisaged in the Potsdam Protocol. It was not possible to permanently remove all such individuals from office, and it was not possible to change the attitudes of individuals other than to force a change of the system in which jurists were forced to adapt to the new situation. It also became evident that a permanent or legitimate definition of who was an actual National Socialist proved unworkable. An enormous amount of time and energy was spent on the denazification programme, but a smooth and just application of the programme for such large numbers in a short time "would have required supernatural powers of judgment and organization."[1279] US military government officers who were engaged in the denazification programme argued that the procedure should have begun with concentrating on prosecuting "Major Offenders" who sought public office, rather than dealing with allegedly implicated parties at all levels, spending a great amount of time clearing the "little men" from the dockets[1280]. The Minister of Political Liberation for Hesse criticised the Law for Liberation for the unsatisfactory results of the

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[1278] Joseph F. Napoli, "Denazification from an American's Viewpoint", *Annals of the American Academy of Political and Social Science* Vol. 264 (July 1949), p.121.

[1279] Gimbel, *A German Community under American Occupation*, p.7.

[1280] Clark, "Anti-Occupation Spirit Developing in Germany", p.4E.

denazification effort. Too many people were found formally incriminated under the law, and too many cases were to be disposed of to uncover the few guilty individuals, rather than utilising a process of instituting proceedings against the guilty and responsible parties. The deficiency of the denazification law in its original form was substantiated by the amnesties and the amendments to the denazification law itself[1281] that were introduced to reduce the case-load. From the viewpoint of the US military government on the other hand, there appeared to be no other procedure available to establish an individual's political antecedents, and thereby determine whether an individual was a former National Socialist, except by screening the entire population on a common basis through a bureaucratic procedure, in spite of its shortcomings[1282]. The effort to completely purge German political and social life through an excessively ambitious and ill-considered programme was marked by good, if not naive, intentions[1283]. The Control Council attempted to establish uniformity in denazification proceedings in the four occupation zones through Control Council Directive No.38 of 16 November 1946, which extended the provisions of the Law for Liberation to the other occupation zones[1284]. The

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[1281] 8/217-3/13, RG 260 OMGUS, Wiesbaden. APO 633. Subject: Monthly Report, 10 July 1948.

[1282] Loewenstein, "Comment on Denazification", p.366.

[1283] Bower, *The Pledge Betrayed: America and Britain and the Denazification of Postwar Germany*, pp.155-156.

[1284] 501/831, Wiesbaden. Office of Military Government for Greater Hesse (Denazification) APO 633. Betr.: "Ausfuerung d. Kontrollratgesetzes No.38", 23 November 1946.

It has been argued that Control Council Directives Nos. 24 and 38 were promulgated largely as a result of American pressure, and any serious effort to implement these directives in full was only made in the U.S. zone. Zink, *United States in Germany: 1944-1955*, p.166.

Law for Liberation was considered an implementation of Directive No.38 in the *Länder* of the US zone[1285]. In practice, the policy of the Soviet, British and French military governments was to follow the principle of expediency[1286]. The US military government authorities

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[1285] 501/37, Wiesbaden. Office of Military Government for Germany (US), Office of Military Governor, APO 742. AG 010 (CO). Subject: "Implementation of Control Council Directive No.38 in the U.S. Zone", 19 October 1946.

[1286] Loewenstein, "Political Reconstruction in Germany", p.34.

At the end of October 1945, the British occupation authorities led that way in reinstating former National Socialists into judicial office under the so-called piggy-back policy, allowing a jurist formally charged with having been a former member of the NSDAP, along with every jurist who was not charged with a guilty political record under the denazification procedure. This restriction was lifted in June 1946, allowing for any jurist to be considered for judicial appointment after having been through the denazification. Wenzlau, *Der Wiederaufbau der Justiz*, pp.103, 130.

The practice in the Soviet zone was to rapidly train people's judges and people's prosecutors, without consideration for the quality of education. These new jurists were to be adapted to the planned reorganisation of the administration of justice, in which the traditional professionalised handling of the law was considered unnecessary, or even a nuisance. The elimination of the legal and economic order was not intended in the western occupation zones, and therefore such a radical programme for training a new generation of jurists was inadmissible. Diestelkamp, "Die Justiz in den Westzonen", p.22; Georg-August Zinn, "Administration of Justice in Germany", p.39; Hilde Benjamin *et al.*, *Zur Geschichte der Rechtspflege in der DDR: 1945-1949* (Berlin: Staatsverlag der Deutschen Demokratischen Republik, 1976), pp.90-96 *passim*.

See Reinhard Grohnert, *Die Entnazifizierung in Baden, 1945-1949: Konkeptionen und Praxis der "Epuration" am Beispiel eines Landes der französischen Besatzungszone* (Stuttgart: W.Kohlhammer Verlag, 1991), pp.99-102 for the

undoubtedly pursued a denazification policy that was consistently more vigorous than that of the other occupation powers, having had attempted to screen the entire German population of the US zone to determine who were the National Socialists among them. The Soviet military government either liquidated the leading National Socialists or big "capitalists", or recruited them to Soviet agencies. The British military government concentrated on the criminal elements of the National Socialist regime, and attempted to salvage talent among the Germans to serve their purposes. The French military government did not concentrate on determining whether a German was a National Socialist, provided the individual willingly accepted their policy and programme[1287].

The denazification of members of all professions who would be entrusted with positions of responsibility involved five general problems. Firstly, who was to be removed from office? Was it possible to determine whether an individual was a genuine National Socialist by conviction, or merely an individual safeguarding personal interests? For example, remaining in one's position that entailed becoming a member of the NSDAP or of an affiliated organisation under the prevailing circumstances. Barring all such individuals from public offices according to automatic blacklisting would mean disposing of about one-fifth of the population who had been members of the NSDAP[1288], which in practice would mean barring eighty percent of the German judges due to their

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example of the denazification of jurists in French-occupied Baden.

[1287] "Final Report on Foreign Aid", p.128.

[1288] Michael Balfour and John Mair, *Four Power Control in Germany and Austria: 1945-1946*, ed. Arnold Toynbee (London: Oxford University Press, 1956), pp.171-172.

political records before German courts were reopened[1289]. Secondly, if certain broad categories could be defined under which individuals could be removed based on certain conditions, would it be possible to put these individuals through an accurate test to identify their guilt with complete and accurate justification? The numbers of the Allied personnel versed in the language and political conditions in Germany were limited, and therefore could not be completely relied upon to accurately identify the guilty parties. Who would be considered suitable for handling the denazification process if it was left to German authorities? For example, it would be practically impossible to employ judges for this function since they were required to be members of the NSDAP, while anti-Nazis could not be automatically accepted without prior screening, and the occupation authorities could not rely on them to provide evidence based on hearsay[1290]. Thirdly, since the great majority of individuals in senior administrative positions had been members of the NSDAP, either from conviction or as victims of circumstances, their automatic removal would make the postwar administration of justice more difficult. How would a sufficient number of suitable replacements be found?[1291] Fourthly, what would be done with the individuals removed from office? How would justice be served by imposing what could be considered fair penalties if they were guilty of offences related to their association with a National Socialist organisation? Establishing fairness in the process involved introducing a system proportionate to the offence

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[1289] Harol Zink, *American Military Government in Germany* (New York: MacMillan, 1947), p.125.

[1290] Balfour and Mair, *Four Power Control in Germany and Austria*, pp.171-172.

[1291] *Ibid.*

after guilt was determined. This would require considering each case following a law and scale of penalties, followed by establishing denazification machinery and collecting evidence on up to eight million people[1292]. Fifthly, could the denazification prevent recurring National Socialist sentiment of the individuals who were tried under the process after the penalty was served? Could individuals with important skills and abilities be able to exert a negative influence after the occupation? If they would have been induced to change their way of thinking, what would constitute proof of having acknowledged their guilt?[1293] The military government and later the German denazification authorities attempted to address these problems through legislation, which would undergo modifications in view of the difficulties encountered in the implementation of the denazification. The Allies were generally convinced that all German civil servants and judges were significantly implicated in having perpetuated the National Socialist *Unrechtsstaat*[1294]. Herein lay the problems that would arise following the expectations of a thorough denazification. The denazification was intended to serve as a political process in the form of a judicial purge, in which individuals residing in the US zone were to be prosecuted for the act of having joined the NSDAP or its affiliated organisations, which was declared an offence during the occupation, regardless of their conduct while they were members. After the collapse of the National Socialist regime, each individual was considered a National Socialist on the basis of having belonged to the NSDAP or one of its numerous

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[1292] *Ibid.*

[1293] *Ibid.*

[1294] Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung", p.93.

organisations, regardless of their convictions and actions[1295]. All former members were to be subject to screening by the US military government, and then to trial by the quasi-judicial German denazification courts that were to administer a retroactive law against alleged offenders among the entire adult population of the US zone. In retrospect, it became apparent that the standards set at the beginning of the occupation went beyond the limits of the attainable. It has been argued that the denazification programme could have been more successful if less had been attempted[1296], i.e. if the implementation of the programme was focused on the most conspicuous cases, rather than virtually the entire adult population.

Membership in the NSDAP or one of its affiliated organisations was not necessarily motivated by the acceptance of its tenets, and was otherwise pressured upon the legal profession by various laws and regulations enacted by the National Socialist regime. Jurists in the National Socialist regime either accepted National Socialism out of conviction, or they were compelled to conform and pretended to pledge allegiance to the regime to maintain their positions. The latter became *Mußnazis* who were not necessarily National Socialists since they were coerced to join the NSDAP or one of its affiliated organisations, and demonstrated loyalty to the National Socialist regime out of circumstance rather than conviction. Many individuals, whatever their occupation, joined the NSDAP out of fear or averting suspicion of being disloyal to the regime, and to maintain their means of livelihood, although they were

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[1295] Knappstein, "Die versäumte Revolution: Wird das Experiment der 'Denazifizierung gelingen?", p.668.

[1296] Earl F. Ziemke, *The U.S. Army in the Occupation of Germany*, pp.445-446.

politically indifferent[1297]. As a result of such pressures, the vast majority of the judiciary joined the NSDAP or demonstrated apparent allegiance to the regime by paying dues to National Socialist organisations. Apart from sheer opportunism, demonstrating allegiance to the National Socialist regime in this manner as concrete outward evidence of political conformity could thus be considered a form of "insurance policy against dismissal", and maintaining the possibility of continued promotion within the civil service. This was especially important for older members of the profession who needed to support families or whose tenures were at stake, while younger members entering the profession had virtually no chance of being promoted unless they held the requisite membership[1298]. In one example of political pressure, the Berlin *Gauleitung* (district office) of the NSDAP ordered that all law graduates were required to join the NSDAP or one of its affiliated organisations. One such individual therefore responded to this order by joining the *Reiter-SA* in October 1933 since this formation emphasised sport rather than the "political" element[1299]. In addition to those who joined the NSDAP or an affiliated organisation out of conviction or opportunism, members of the legal profession were intimidated to join in view of the circumstances.

The question of readmitting former members of the NSDAP into judicial office was undermined by the force of circumstance - the reconstruction of justice faced the critical problem of achieving operational efficiency with a

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[1297] Sträter, "Denazification", pp.45, 50.

[1298] Loewenstein, "Reconstruction of the Administration of Justice", pp.443-444; Sträter, "Denazification", p.50.

[1299] 462/1308, Wiesbaden. Subject: Admission to the Bar, 12 November 1945.

limited number of personnel. Hence, the denazification programme was only put into effect at the beginning of the occupation, until the personnel shortage problem became the most critical underlying problem of the denazification. Although all of the jurists who were reinstated after 1945 had not necessarily taken part in the lawlessness of the National Socialist regime, there were the exceptions who managed to evade the denazification procedure[1300]. As a result of fulfilling denazification policy being outweighed by expediency within the circumstances, up to ninety percent of the judges and prosecuting attorneys who were in office before 1945 were reinstated into judicial office in western Germany by 1947-48[1301]. It became apparent by the time the denazification programme was ended that the programme had failed to achieve the goal of staging the intended cleansing of all National Socialist influences from public life. Approximately thirty-five percent of the acting legal personnel in Hesse who were judged to be "nominal" National Socialists were classified by the denazification tribunals by April 1947 as either "Person Exonerated" or "Follower"[1302]. Toward the end of the occupation, seventy percent of the reinstated judges and lawyers in Hesse were former members of the NSDAP[1303]. The denazification division of the military government in Hesse found that 10 percent of the *politische Beamte*, 47.5 percent of the *höhere Dienst*,

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[1300] Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung", p.95.

[1301] Diestelkamp, "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", p.145.

[1302] Loewenstein, "Reconstruction of the Administration of Justice", p.452.

[1303] 501/1592, Wiesbaden. "Das Ende der Denazifizierung" (n.d.).

50.6 percent of the *gehobene Dienst* (professional and executive levels of the civil service), and 33.7 percent of the *mittlere Dienst* were incriminated under the Law for Liberation. The number of individuals occupying high positions in the Ministry of Justice who were formerly incriminated by the law was particularly large. Most judges were to some extent incriminated under the Law for Liberation[1304]. Thirty-four percent of the civil servants in Hesse were dismissed as a result of political implication, and all but up to two percent of them were reinstated by July 1949. The results for the reinstatement of formerly politically implicated civil servants were similar in Baden-Württemberg and Bavaria[1305].

The standard of incrimination under the Law for Liberation did not accurately reveal whether an individual jurist was hostile to the standards of the postwar administration of justice. Uncovering the individual political and professional records of German jurists who had served under the National Socialist regime that displayed cases of dubious actions would take place years after the end of the military occupation[1306]. The process of screening judges according to the records of the *Sondergerichte* only began in West Germany when these records that had been hitherto inaccessible to the West German government were made available by the East German government in the nineteen-fifties[1307]. Individuals who had served with the *Volksgerichtshof* remained in judicial office after the

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[1304] 8/217-3/13, RG 260, OMGUS, Wiesbaden. APO 633. Subject: Monthly Division Report, 10 May 1948.

[1305] Niethammer, *Entnazifizierung in Bayern*, pp.531-532.

[1306] Sommer, "The Nazis in the Judiciary", pp.240-241.

[1307] *Ibid.*, pp.244-245; Diestelkamp, "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", pp.137-138.

denazification programme had been concluded. The Federal Ministry of the Interior sent the government of Hesse a list of the names of the former judges and prosecutors of the *Volksgerichtshof* on 28 January 1957. The Minister of the Interior intended to verify the extent to which the activity of these judges and prosecutors had breached the contemporary principles of justice, and whether formal disciplinary proceedings would be required under Art. 9 of Art. 131 of the Basic Law if such individuals had been reinstated without having disclosed the information about their former service in the *Volksgerichtshof*[1308]. These cases undermined the letter and spirit of the denazification.

In the case of the US zone, the hastily implemented denazification followed the principle of collective presumptive guilt. Individuals were to be called to account for allegedly participating in crimes committed by the National Socialist organisations of which they were members, regardless of their functions within the organisation, rather than being called to account and prosecuted for individual actions[1309]. The theory of presumptive guilt encompassed those jurists who followed the line of least resistance against the regime by joining the NSDAP or an affiliated organisation, as well as those who had promoted their own interests by actively and intentionally abetting the National Socialist regime. The denazification programme opened the way to errors in judgment since it did not provide for the thorough examination of the professional

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[1308] 501/4886. Wi/Tr., II/1 - Az: 25a02. "Betr.: "Richter und Staatsanwälte des früheren Volksgerichtshofs und der dortigen Reichsanwaltschaft", 22 February 1957; II3 - 23 330 -3609/57. "Richter und Staatsanwälte des früheren Volksgerichtshofs und der dortigen Reichsanwaltschaft", 28 Januar 1957.

[1309] Gimbel, *A German Community under American Occupation*, p.209.

record of every jurist who had served under the regime, in addition to political records. The question that was posed to jurists by the denazification authorities was whether they had been members of the NSDAP, rather than posing the more relevant question of whether they had administered National Socialist justice, and thereby evaluating their *professional*, rather than political record, and thus bring them to account for their actions accordingly. The denazification of the legal profession, and in fact the broad-sweeping denazification process, was therefore a dismal failure in this respect since "it barely scratched the surface."[1310]

As a consequence, the effectiveness of judicial institutions took precedence over the political views of individual judicial personnel. The reinstatement of dismissed former members of National Socialist organisations was characterised as "renazification", but this was false since they became apolitical followers of the new system, and they did not compose a movement of neo-fascist political activity[1311]. This conclusion also applies to the postwar judiciary. The jurists who served in postwar Germany could not necessarily all have been instilled with the National Socialist world view. Many of them had received their judicial training before 1933, while a number of the others who began their period of study after 1933 were decimated during the Second World War. Moreover, there was no manifestation of any form of block mentality among this total number. It is therefore to be deduced that the postwar judiciary did not possess a uniform National Socialist

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[1310] Sommer, "Nazis in the Judiciary", p.244.

[1311] Vollnhals, *Entnazifizierung: Politische Säuberung und Rehabilitierung in den vier Besatzungszonen*, p.63.

character[1312]. The role and responsibility of the judiciary thus remained for the individual jurists to fulfil within the postwar administration of justice.

Implementing the reform of the German administration of justice required its function according to the principles of the *Rechtsstaat*. The function of the *Rechtsstaat* was supported by the established German court jurisdictions in the separate stages of appeals, which could lead to pronouncing judgments at the highest courts that were provided for by the constitutions[1313] at the *Land* and at the national level. It was also unlikely that the political opinions of reinstated jurists could jeopardise the function of the *Rechtsstaat*. Unlike the experience of the Weimar Republic in which emotions opposing the democratic state were evident in the administration of justice, the transition to democracy in postwar Germany was much more successful. Since there was no alternative after the collapse of the National Socialist regime, judges in the Federal Republic of Germany rapidly accepted the new state and its constitution[1314]. The institutions of the administration of justice that would be operated by jurists, politically implicated or not, had been successfully denazified in the sense that former National Socialist practices had been eliminated.

[1312] Diestelkamp, "Kontinuität und Wandel in der Rechtsordnung", pp. 94-95; "Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit", pp.145-148.

[1313] "Das Besatzungsregime auf dem Gebiet der Rechtspflege", pp.45-46.

[1314] Rudolf Wassermann, "Richteramt und politisches System", *Revue d'Allemagne* Vol. 5 (1973), p.904.

Conclusion

The administration of justice was a major bulwark of the National Socialist regime. Its reconstruction after the end of the Second World War was therefore an integral part of the reconstruction of postwar Germany. The Allied policies regarding the reconstruction of the administration of justice in postwar Germany were governed by the principles of the rule of law, while maintaining the interests of the occupation powers. The postwar creation of *Land* Hesse in the US zone, and the restoration of an independent administration of justice in this *Land* took place on the basis of these objectives. The administration of justice was set upon the new foundations of a constitutional state at the *Land* level, which were developed under the supervision of the US military government during the political reconstruction of postwar Germany. The administration of justice in Hesse became fully functional when an independent German administration of justice was established upon the creation of the Federal Republic of Germany, and the political transition from the National Socialist regime to democracy was completed.

The political development of postwar Germany was influenced by two factors during the occupation: 1) there was no coherent German administration above the *Land* level; 2) the zonal division of Germany and the failure of the four occupation powers to introduce a uniform territorial reorganisation of the *Länder*. As a result, the boundaries of the *Länder* were redrawn within the western zones, and later served as elements of a system of federal government in West Germany[1315]. The decentralisation of German political administration was reinforced in the US zone, where three

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[1315] Friedmann, *The Allied Military Government of Germany*, p.68.

separate *Land* governments were established in Bavaria, Württemberg-Baden, and Hesse.

The Allied Control Council for Germany and the US military government in the US zone maintained a predominant authority for the duration of the military occupation. The functions of government and the administration of justice in Germany at the beginning of the military occupation were assumed by military governments in the four occupation zones after the centralised National Socialist regime had collapsed. The Control Council was established as a military government for Germany as a whole, while the zonal military governments were established in the four occupation zones, acting independently of this central authority in Germany. Each of the occupation powers carried out the various tasks of the postwar reconstruction in its respective occupation zone while it was to maintain the principles for the reconstruction of Germany that were set forth in the Potsdam Protocol, and implement the decisions of the Control Council in matters affecting Germany as a whole.

Justice in postwar Germany was to be administered in accordance with Allied objectives for the restoration of the rule of law. The restoration of the postwar German administration of justice began with a complete standstill of justice, and was subsequently reconstructed separately in the four occupation zones. The reconstruction entailed eliminating National Socialist enactments from the body of German law, restoring the structure and functions of the administration of justice in each occupation zone, and preventing the recurrence of National Socialist practices by the reconstituted German judicial organisations.

The German administration of justice in the US zone was decentralised among the *Länder* of the US zone, and functioned at two separate levels of jurisdiction. The US military government exercised its judicial authority through US military government courts that maintained the interests of the occupation powers, reserving categories of cases for

adjudication by these courts that were excluded from the jurisdiction of the German courts when they were re-opened by the US military government. The re-opened German courts adjudicated under German law, subject to Control Council and US military government legislation governing the functions of the German administration of justice.

The first *Amtsgerichte* and *Landgerichte* in what became *Land* Greater Hesse began to operate in the summer and autumn of 1945, adjudicating cases involving Germans that lay outside the interests of the US military government. The opening of these courts laid the foundations of the German administration of justice in what later became *Land* Hesse, prior to the establishment of this *Land* and its government. The *Land* governments in the US zone operated as the highest level of German administration, cooperating with the US military government in the various tasks of the postwar reconstruction. The US military government conferred the responsibility for the reconstruction of the permanent *Land* judicial organisation to the *Land* government in Hesse through the "Plan for the Administration of Justice in the US Zone" of 4 October 1945. This Plan defined the composition and functions of the administration of justice in Hesse under the authority of the *Land* Minister of Justice, who served as the leading administrator of the *Land* administration of justice in the *Land* government. The provisions of the Plan guided the reorganisation of the judicial organisation in Hesse until the construction of the ordinary courts was completed when the *Oberlandesgericht* was opened on 23 May 1946.

The courts of the other branches of the *Land* administration of justice and their affiliated appeal courts that were not specifically addressed in the Plan were re-established separately. Administrative courts were re-established in Hesse to defend the constitutional rights of the individual by hearing cases involving disputes between individuals and public authorities. In addition to composing

a safeguard against potential arbitrary abuse of power by the state, these courts were made more effective than before by extending their former jurisdiction to afford greater protection to the individual. Cases of labour disputes were initially heard by courts in the ordinary judicial organisation until an independent labour court organisation was established in Hesse. While the administrative courts defended the interests of all individuals before the state, the labour courts ensured the impartial administration of justice in the workplace.

The re-opened German courts in Hesse applied the law as it was reformed after the collapse of the National Socialist regime. Control Council and US military government legislation expressly forbade the application of National Socialist principles in the administration of justice from the beginning of the occupation. German law was reformed through Control Council, the US military government, and *Land* government legislation that abolished National Socialist enactments or amendments to German law, and ensured that the former abuses in the administration of justice were not perpetuated. The appeal courts exercising appellate jurisdiction over the ordinary courts, administrative and labour courts ensured that potential misuses or abuses in the administration of justice were rectified. The institution of jury courts in Hesse served as further safeguards against potential abuses of authority in the administration justice. The principles of the rule of law in the administration of justice and safeguards against abuses of authority by the state and the judiciary were entrenched in the *Land* constitution, which were upheld by the *Land* Supreme Constitutional Court that was responsible for upholding its provisions. The institutions of the administration of justice in Hesse were thus reconstructed, but the complete restoration of their functions was precluded by the predominance of occupation law. The ultimate authority for maintaining the rule of law rested

with the US military government that retained supreme authority, and the corresponding power to supervise and potentially intervene in the functions of the German courts to ensure their compliance with occupation policies for the postwar administration of justice.

The German courts functioned independently to the extent that their responsibilities were established under German law, which were limited by occupation law that represented the interests of the US military government. Greater responsibility was conferred by the US military government upon the *Land* judicial organisation in order to allow for a greater exercise of its functions, and to alleviate the burden of cases that were heard by the US military government courts. Occupation law was therefore amended to allow the German courts to adjudicate in a greater number of categories of cases that had initially lay within the jurisdiction of the US military government courts. The expediency of extending the responsibilities of the German courts correspondingly led toward restoring the jurisdiction of the German courts that was defined by German law, until occupation law in the German administration of justice was no longer prevalent at the end of the military occupation.

Occupation law superseded the authority of German law by limiting the jurisdiction of the German courts, and allowing for extraterritorial intervention in the German administration of justice in the event that the German courts misused or abused their authority. These controls over the German administration of justice were lifted when the supreme judicial authority exercised by the US military government was removed, and transferred to the German authorities. It was no longer in the interest of the occupation powers to exercise control over the German administration of justice when the occupation objectives were fulfilled, and the western Allies conferred full-

fledged state authority to the Federal Republic of Germany under the provisions of the Occupation Statute.

The restrictions on the responsibilities and independence of the German courts that were imposed under occupation law were subsequently lifted. Judicial independence was fully restored as the German judiciary was enabled to administer justice according to German law without any outside interference or control, either from the German government or the US military government. The abolition of National Socialist practices in the administration of justice restored the role of the judiciary in upholding the law of the state that conformed to the principles of the rule of law. Justice was administered independently to protect the interests of society and individuals, rather than solely serving the interests of a state that controlled the administration of justice.

There remained the question of whether the judiciary, which composed an integral part of the apparatus of the National Socialist regime, would accept the postwar administration of justice. As in every radically far-reaching political change, in which there were those who were involved in the former system, the question was who could be considered trustworthy in the new political order[1316]. The personnel reconstruction in the US zone, or staffing the reconstructed judicial organisation, took place simultaneously with the reconstruction of the judicial organisation. German judicial personnel in the US zone were initially treated as a politically suspect anonymous block of individuals. They were subjected to the wide-sweeping denazification procedures instituted by the US military government that affected the members of all professions. Military government legislation at the beginning of the

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[1316] Klaus-Dietmar Henke, "Die Grenzen der politischen Säuberung in Deutschland nach 1945", p.127.

occupation decreed that German jurists were to be suspended from practice, and were to be reinstated only after the extent of their political implication with the National Socialist regime was determined. The fundamental dilemma of denazification policy was striking the balance between the divergent objectives of the denazification and achieving administrative efficiency. This gradually became apparent when the denazification policy was attempted to be put in practice during the occupation[1317]. The initial criterion for the denazification in the US zone was whether membership in the NSDAP or its affiliated organisations was formal or superficial, active or nominal. This did not provide adequate grounds for passing a justifiable or decisive verdict for applicants for judicial positions in determining their moral, political and professional integrity. The ideal situation would have been to examine how they had operated in the National Socialist regime, but this would have required extensive research while judicial personnel shortages hindered the functions of the postwar administration of justice[1318].

[1317] Jones, "Eradicating Nazism from the British Zone of Germany: Early Policy and Practice", pp.148-149.

[1318] The problem of reinstatement or removal from office of incumbents in the administration of justice who had served in a dictatorship was later considered during the reconstruction of the administration of justice in the former *Länder* of the German Democratic Republic following the reunification of Germany on 3 October 1990. The initial consideration of the problem included the option of removing all jurists who had been members of the former ruling SED, drawing a parallel with the postwar denazification. It was decided that the criterion for reinstatement would be based on their performance in office - whether a judge had in fact administered justice on the basis of fairness and impartiality in cases of a non-political nature. Conversation with Herr Dr. Jr. Rolf Faber, Leitender Ministerialrat at the Thüringen Justizministerium. Hessisches Hauptstaatsarchiv, 7 April 1994.

The initial denazification policies were dropped in view of the fact that the denazification programme was later considered an unrealistic enterprise. This was indicated by the introduction of wide amnesties to reduce the scope of the denazification programme, and to accelerate its completion through modifications of the denazification legislation in order to shift the emphasis towards the more highly implicated individuals. Additional external factors that led to the rapid conclusion of the denazification programme were the Cold War and the impact of US public opinion, and the problems associated with the serious personnel shortages.

Restoring the functions of the German administration of justice required securing the necessary trained and qualified personnel for fulfilling these functions, which conflicted with the premise that they were also to be politically unimplicated. The ideal solution to this problem would have been rapidly training a new generation of jurists who would be politically acceptable, as was initially attempted in the Soviet zone, or lowering the standards of the denazification to allow for the reinstatement of a greater number of jurists. The US military government and the *Land* government had to reinstate former jurists on the basis of their professional qualifications rather than political records in order to bring the administration of justice to function as rapidly as possible, since the first option was impractical, and sufficient numbers of suitably qualified jurists were not available to replace all those who were politically implicated.

A break from the past was made in the administration of justice through the reconstitution of the standards for the administration of justice in the Federal Republic of Germany, which were based on the principles of a democratic constitutional state, or a *Rechtsstaat*. The judiciary was responsible for adhering to these principles in the discharge of their functions. Hence, the reconstructed

judicial organisation was to take precedence over the personnel reconstruction in the administration of justice. This was the only way of neutralising potential abuses that could arise from any remaining National Socialist predilections among the postwar judiciary. The safeguards present in the administration of justice, such as the appellate courts, the *Land* constitutional court, and the entrenchment of judicial independence that was guaranteed by both the *Land* and the federal constitutions, served to compensate for the personnel shortage of jurists who were not implicated with the National Socialist regime. A *complete* break from the past would later be achieved through a new generation of jurists who would be trained within the postwar administration of justice in a democratic state.

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