Speech

Why It Is High Time to Reform the Homicide Statutes

By Heiko Maas[*]

A. The Nazi Roots of Sections 211 and 212 of the German Criminal Code

The Bremen Regional Court is located in a monumental building – the *Altes Gerichtshaus* (Old Courthouse). A stone slab has adorned its facade since time immemorial. It has been placed directly under the jury courtroom – where the capital crimes come to trial. The inscription on the slab reads: "Thou shalt not kill." During the National Socialist dictatorship the ruling powers wanted to take down the slab and destroy it. But some citizens of Bremen stopped them. Instead, the commandment against killing was merely covered with a stone slab and not uncovered again until after 1945.[1] The admonition can still be seen today at the Bremen Regional Court. This episode from Bremen's judicial history brings to light three things. First, "Thou shalt not kill" – one of the ten Biblical commandments – is the archetype for all rules associated with human coexistence. Second, the commandment did not suit the agenda of the National Socialists, who perfected the killing of human beings in their extermination camps with industrial means. Third, the people sensed intuitively that rejecting the commandment against killing was a fatal error that would lead to barbarism. That is why they made sure the commandment stayed where it was, even though it became invisible during the Nazi dictatorship.

Luckily, history took a turn for the better. Today we live in a free state governed by the rule of law. Criminal law is the *ultima ratio*. Conduct that incurs criminal liability must be precisely defined in advance by statute. The punishment must relate to the crime and not to the perpetrator. And individual guilt is both the measure and the boundary of every penalty. In short: Today, we have a modern and liberal criminal law. But we have a few burdens from the past as well. There are still laws on the books whose language is influenced by the evil spirit of the Nazi ideology – and they are in the area where protection of the highest legal interests is at stake, where the guilt is greatest, and where the penalties are highest. To this day, our courts must still apply those outdated laws when they deal with murder and manslaughter. Working in the shadow of that legacy we force our courts to perform amazing feats of interpretation in order to arrive at just solutions. This should not be necessary in a state governed by the rule of law.

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[1] *See* MATTHIAS KÖCKERT, DIE ZEHN GEBOTE 9 (2007).

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Sections 211 and 212 of the current German Criminal Code were substantially written in 1941.[2] Their primary author was Roland Freisler, one of the most despicable jurists of that time. Freisler was infamous as the President of the so-called *Volksgerichtshof* (People's High Court). He had also been involved in legislative initiatives as State Secretary in the Reich's Justice Ministry. The structure of the law, with the introduction "A murderer...is" and the term "base motives," stems from the pen of Freisler.[3] The section on murder fit in well with the Nazi ideology on criminal law. Punishment – in the horrendous language of that era – also had the goal of "elevating the racial composition of the people by eradicating unsuitable elements."[4] For that reason, criminal law did not operate with concrete elements of criminal offences, but rather with offender types.[5] According to Freisler, the language of the law formulated these "types" so that "the judge could look at him and say: 'this subject deserves the noose.'"[6] Criminal law became the gateway to despotism. The much-needed clarity of the law was precisely what the regime sought to avoid.

Today, we look back with trepidation when we see how many Nazi jurists were allowed to continue judging, teaching or writing legislation after 1945. This personnel continuity in the Federal Justice Ministry is currently the subject of a study by the Rosenburg Project, initiated in 2010. The Project is named after the first post-war seat of the Ministry – the Rosenburg in Bonn. An independent commission is currently examining the influence that those who participated in Nazi crimes wielded on the justice system and the Justice Ministry of the young Federal Republic.[7] At the same time, however, we must look at the substantive continuities as well. For example, if one believes criminal law professor Gerhard Wolf, "today's criminal law (...) was influenced in core sections of its principles by legal rules, scholarly opinions and judgments that had also characterised the period between 1933 and 1945."[8]

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[2] *See* Act (Amendment of the Criminal Code) of 4 September 1941, RGBl. I. 549.

[3] *See* Roland Freisler, *Gedanken über das Gesetz zur Änderung des Reichsstrafgesetzbuches*, 103 DEUTSCHE JUSTIZ 929, 932 (1941).

[4] EDUARD MEZGER, KRIMINALPOLITIK AUF KRIMINOLOGISCHER GRUNDLAGE 79 (1934).

[5] *See* Freisler, *supra* note 3, at 931. *See also* Monika Frommel, *Die Bedeutung der Tätertypenlehre bei der Entstehung der §§ 211, 212 StGB im Jahr 1941*, 29 JURISTEN ZEITUNG 559 (1980).

[6] Roland Freisler, *Gedanken zur VO gegen Volksschädlinge*, 101 DEUTSCHE JUSTIZ 1450, 1451 (1939).

[7] *See* DIE ROSENBURG. DAS BUNDESMINISTERIUM DER JUSTIZ UND DIE NS-VERGANGENHEIT (Manfred Görtemaker & Christoph Safferling eds., 2013), available at www.uwk-bmj.de.

[8] Gerhard Wolf, *Befreiung des Strafrechts vom nationalsozialistischen Denken?*, 36 JURISTISCHE SCHULUNG 189, 195 (1996).

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B. How the Post-War Judiciary Has Tempered Nazi Law

Of course, it is not as if the judiciary of the Federal Republic has done nothing but blindly apply Nazi law in dealing with homicide offences. Furthermore, the legislature has changed the threatened penalty. With the abolition of the death penalty in the Basic Law, murder is now threatened with a penalty of life in prison. But the problem is that our judiciary, in applying the homicide offences in a manner consistent with the rule of law, is forced to reshape the law by engaging in extensive legal interpretation.

One striking example of this involves the efforts of the courts to come to just results in cases that have become known as the "domestic tyrant cases." The violent husband who beats and abuses his wife for years, and at some point beats her to death, will probably not be convicted of murder because he has not fulfilled the elements of that crime as defined. Contrast this with the abused wife who – in her desperation – kills her abuser. She resorts to killing her abuser because she is physically weaker than her husband and cannot risk provoking an open confrontation with her violent partner. So she kills him while he is sleeping – and has, therefore, "murdered by stealth." The respective convictions and penalties in these examples are manslaughter and a fixed-term prison sentence for the man, and murder and life in prison for the woman. This, of course, is manifestly unjust. Even in cases where stealth "is the weapon of the weak and defenceless against superior strength, violence and brutality,"[9] its consequence is the most severe penalty known in our penal system. The current version of section 211, therefore, disadvantages those people who are physically weaker, and these are often women.[10] The judiciary has had a very difficult time dealing with this injustice. For example, in just such a case, a regional court mitigated the woman's sentence due to "unusual circumstances."[11] This certainly seems fair, but it is a ground for mitigation that cannot be found anywhere in the law.

C. The Continuing Need for Reform and the Reform Debate

As shown by the above example, the judiciary has, over the decades, made the murder section palatable from a rule-of-law standpoint. But the situation remains unsatisfactory. There continues to be a big difference in the length of the prison terms imposed for murder and manslaughter. If the sentence is "life," the time in prison averages 18 years and six months.[12] By contrast, if the conviction is for manslaughter the average prison

[9] Hans-Heinrich Jescheck, *Anmerkung zu BGH*, 6 JURISTEN ZEITUNG 387 (1957).

[10] *See* Rudolf Rengier, *Totschlag oder Mord und Freispruch aussichtslos? Zur Tötung von (schlafenden) Familientyrannen*, 23 NEUE ZEITSCHRIFT FÜR STRAFRECHT 233, 234 (2004).

[11] *See* Decision of the Federal Court of Justice (BGH), 22 NEUE ZEITSCHRIFT FÜR STRAFRECHT 482 (2003).

[12] Based on those released from prison between 2002 and 2010 following a life sentence.

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term is only six years and five months.[13] For the convicted individual, it makes an immense difference whether he is considered to be a murderer or a manslaughterer. Therefore, the fact that the law offers virtually no guidance as to how murder and manslaughter are to be differentiated is highly problematic. What, for example, constitutes "base motives"? Is a man who kills his wife because she has left him acting out of base motives? The jurisprudence here makes a difference as to whether the man acted more out of desperation or more out of anger. It considers only anger to be particularly contemptible; it does not usually judge desperation in the same manner.[14] This may be an acceptable differentiation, but the courts cannot derive it from the statute.

The fact that existing law lacks precision – of all things, where the highest legal interests and most severe penalties are at stake – is most unsatisfactory. The casuistry itself is not even the biggest problem here. The problem is that the personality of the perpetrator is often key to establishing the elements of the offence, and the criteria for this are personal rather than legal. Jealousy, a sense of honour, or self-interest can be either understandable or reprehensible emotions because they are morally charged.

Sixty-five years of case law on "base motives" shows clearly how much depends on the *Zeitgeist*. Judges have succeeded in coming to fair judgments despite this norm. They have been forced to interpret this section with its dubious history – and they have made the best of it. But according to my understanding of the Constitution, the division of powers between the legislature and the judiciary means something quite different. The legislature determines precisely and distinctly the boundaries of criminal conduct and the judges apply the law on a case-by-case basis. But this is currently not true, which is why the legislature should take action and finally do away with this structural defect in the statute on murder.

Many people have very persistently called for this for many years. As early as 1980, the German Jurists' Forum (*Deutscher Juristentag*) advocated a comprehensive reform of the homicide offences based on an expert opinion by Albin Eser. At that time, there were already numerous suggestions for amendment.[15] Meanwhile, there is a broad consensus regarding the need for reform. Sections 211 and 212 of the Criminal Code are "almost universally seen as in need of reform."[16] There has been no lack of ideas for reform in

[13] Based on those convicted in 2012 of sections 212, 213 of the Criminal Code; including attempts and aiding/abetting.

[14] *See* THOMAS FISCHER, *§ 212*, *in* STRAFGESETZBUCH (STGB) – KOMMENTAR margin no. 28 (61st ed., 2014).

[15] *See* ANETTE GRÜNEWALD, DAS VORSÄTZLICHE TÖTUNGSDELIKT 1 (2010).

[16] FISCHER, *Anmerkung vor §§ 211-212*, *supra* note 14, at margin no. 3.

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recent times as well.[17] But because no endeavour has yet been successful, this project is seen as a "forgotten reform,"[18] and some commentators have meanwhile resigned themselves to this, concluding that "the reform of the homicide offences is overdue, but it is not in sight."[19]

D. Grand Coalition = Grand Reform? A New Attempt at an Overdue Reform

It is certainly true that reform is overdue. But now it is finally in sight as well. I would like to take up this challenge, and I believe that this is a good time for it. To that end, I have established a Commission that began its work on 20 May 2014. It was tasked with elaborating concrete proposals for a reform of the homicide statutes. The Commission is composed of experts from academia and legal practice; policymakers need to tap the expertise of those who have long been addressing the issue.[20] Their arguments are well-founded and solid from a historical, philosophical, criminological, systematic and psychological perspective. As such, the debates in the Commission promise to be quite diverse.

The Commission will address the ideologically tainted language of the statute, the relationship between murder and manslaughter, and the consequences for those who aid and/or incite. The Commission will also examine the consequences of a conviction for murder, including mandatory life in prison, the possibility of determining guilt of particular gravity, or ordering preventive detention. My motive here is not to call life imprisonment into question, but rather only to bring consistency back to existing law and to the language of the Criminal Code. And we are also striving to find a solution to the "domestic tyrant" cases – one that no longer disadvantages women.

The proposals should be ready in about one year. This is an ambitious schedule. But I believe it can be done because we can rely on a great deal of important preliminary work. The framework conditions for a successful reform are optimal for two reasons. The first

[17] See the proposed legislation by Schleswig-Holstein, BR-Drs. 54/14. On the proposal by the German Bar Association, *see* Stefan König, *Überlegungen zur Reform der Tötungsdelikts-Normen*, 50 RECHT UND POLITIK 9 (2014).

[18] Anette Grünewald, *Zur Abgrenzung von Mord und Totschlag - oder: Die vergessene Reform*, 44 JURISTISCHE ARBEITSBLÄTTER 401 (2012).

[19] Ralf Eschelbach, *§ 211*, *in* BECK-ONLINE KOMMENTAR ZUM STGB margin no. 1 (Bernd von Heintschel-Heinegg ed., 3rd ed. 2014).

[20] The members of the Commission include: Prof. Dr. Dieter Dölling (Heidelberg), Prof. Dr. Anette Grünewald (Humboldt University of Berlin), Bernhard Jass (Berlin Homicide Squad), Dr. Stefan König und Tanja Brexl (German Bar Association), Prof. Dr. Hans-Ludwig Kröber (Berlin), Prof. Dr. Reinhard Merkel (Hamburg), Martin Reinhard (München), Regina Rieker-Müller, Regional Court presiding judge (Stuttgart), Prof. Dr. Ruth Rissing-van Saan (former Federal Court of Justice presiding judge), Prof. Dr. Christoph Safferling (Marburg), RiAG Dr. Jan Schady, Labour Court Judge (Kiel), BABGH Prof. Dr. Hartmut Schneider, federal prosecutor at the Federal Court of Justice.

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factor favouring reform is the matter of how the law is perceived by the population. The majority of the people have never really internalized the law as it currently exists. Most laypeople still believe today that, on one hand, "murder" is premeditated, intentional killing, and on the other hand, "manslaughter" is killing on impulse. This was the law until the Nazis changed it, and this is what many laypeople still think although the legal situation is actually different. So after the reform is finished, nobody must fear that the German people will not be able to get used to the new law. After all, they are barely familiar with the law as it now exists. The second factor favouring reform is that crime has decreased. Homicide offences have been declining steadily for the past 20 years. While police crime statistics counted more than 1,200 murders in 1995, today the annual rate is only 630.[21] In the past several years, the number of murders has been cut almost in half. Germany has become increasingly safe in this respect. The reason we emphasize this is so that the reform project does not get pulled into a debate on security policy, where it does not belong. Today, we are able to speak quite rationally about the basic rule-of-law goal of this reform without having to worry that it will turn into a fight over the proper response to crime. For these reasons, I am confident that the new Commission will create a solid basis for the parliamentary debate. By the end of this parliamentary term in 2017, the changes could already be enacted.

Legal policymakers have certainly taken their time in tackling this reform. The Nazis created the rule on homicide offences 73 years ago, and its substance still exists today. Thirty-four years have passed since the appeal for reform issued by the German Jurists' Forum. Let us not delay this project any longer. We should finally take action – it is high time.

[21] See police crime statistics of the Federal Criminal Police Office, available at www.bka.de.

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