Petrażycki Lectures

Old Nazis on Trial. A story of delay

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„One thing can be known for certain today:
Evolution has always been highly self-destructive.
In the short term and in the long term".[1]

I.

He apologized. He expressed regret. But he did not confess. A man without monster-like features in his face and eyes that extinguished on May 30, 2017. An old man, like many others. When he was 22 years old, neither his face nor his eyes revealed any signs that he would go on to murder 170,000 people. A young man, like many others. In Auschwitz, in 1943 and 1944, when he was an SS guard in the death camp. On June 17, 2016, Reinhold Hanning was sentenced by the Detmold Regional Court to five years in prison. The sentence did not become final. The defendant died before the Federal Supreme Court in Karlsruhe was able to decide his appeal, based on points of law.

On June 10, 2017, Oskar Gröning celebrated his final birthday, his 96th. He was one of the accountants at Auschwitz, responsible for counting the money of the newly arrived prisoners and sorting it by currency. He never killed anyone. He was sentenced on July 15, 2015 by the Regional Court of Lüneburg to a four-year prison term for aiding and abetting the murder of 300,000 people. Further proof, if any is needed, that justice and jurisdiction depend on the case and the judge, rather than being something which is mechanically decided by the law. Four years' imprisonment for 300,000 deaths, five years' imprisonment for 170,000 deaths? On September 20, 2016, the Federal Supreme Court in Karlsruhe upheld the verdict. For a long time, a suitable prison was sought for the geriatric convict. Prior to the Gröning case, the oldest prisoner in Lower Saxony was only 83 years old. After the Federal Constitutional Court decided on December 21, 2017, to reject consideration of Gröning's constitutional complaint against the refusal to postpone the execution of his prison sentence - even very advanced age does not protect against punishment - after an application for mercy by Gröning was rejected by the Lüneburg public prosecutor's office on January 17, 2018, the accommodation of the Uelzen correctional facility awaited him. However, the German rule of law still entitled Gröning to submit objections to the Lower Saxony Ministry of Justice against the refusal to grant a pardon. A decision on this is no longer necessary; Gröning died on March 9, 2018.

Several other cases exist in this complex environment of people who were auxiliaries to Nazi crimes, namely those who, despite not being killers on the front of Nazi butchery, worked in the background and thus enabled the perpetrators to commit their crimes without any problems. Nazi trials took place, for example, in Hanau (before a juvenile court, as the defendant was

1 Niklas Luhmann, Ökologie des Nichtwissens, in: Luhmann, Beobachtungen der Moderne, Westdeutscher Verlag, Opladen 1992, p. 149-220, 149.

aged under 21 at the time of the crime), in Kiel and in Neubrandenburg. The death or failing health of the defendants ultimately prevented the trials from taking place in Hanau and Kiel. In Neubrandenburg, too, the trial against Ernst Hubert Zafke was finally ceased (September 11, 2017). The mental condition of the SS medic means that he can no longer recall anything, nor follow a trial that precisely concerns his knowledge. He has dementia. „The absence of knowledge releases the accused from responsibility"[2], said Niklas Luhmann, a former NSDAP member and one of the greatest legal theory scholars of the 20th century, who as a very young person probably failed to even notice the fact of this membership. On September 30, 2021, the trial of a former secretary who had worked in the Stutthof concentration camp had to be adjourned. The accused, a 96-year-old women who was charged with aiding and abetting murder in over 11,000 cases, had fled by cab from her retirement home before the first hearing at Itzehoe Regional Court. She was caught by the police. In June 2022, the Neuruppin Regional Court sentenced a 101-year-old former guard of the SS battalion in the Sachsenhausen concentration camp to five years' imprisonment for aiding and abetting approximately 3,500 murders. A few weeks ago, at the beginning of September of this year, the public prosecutor's office in Giessen brought charges of aiding and abetting 3,300 murders against a 98-year-old man, also a guard in the Sachsenhausen concentration camp.

II.

Since 2011, more than 50 cases have been brought in Germany against accused persons who were either in their nineties or centenarians, for having aided and abetted murder. The signal for the commencement of this small wave of proceedings was given by the Munich Regional Court on May 12, 2011, when it sentenced guard John Demjanjuk to five years' imprisonment for aiding and abetting 28,060 murders at the Sobibor death camp. This was, it is often noted, the first time that a defendant, who moreover was Ukrainian, rather than German, by descent and had obtained United States citizenship in 1958, was convicted of aiding and abetting without it being proven that the accused committed a direct and concrete act in relation to the murder. Demjanjuk died before the Federal Supreme Court was able to confirm or overturn the Munich verdict. But the race was on. Because finally a court, in Munich, had shaken the law, in an extremely sensitive area of criminal law, the area between action and non-action, between perpetrators and those who did nothing, in short, the zone occupied by those who did not do nothing but also did not commit the act resulting in death; namely, those who contribute. It is the intermediate zone between prohibition and permission, the zone in which the abettor does his work.

The criminal law of participation – alongside the law of criminal attempts - is certainly one of the most complicated. It is a question of setting a normative and nominalist difference between the nothing and the beginning of something. In order to avoid getting lost in the all and nothing dichotomy, for centuries the law has forged interpretative technical instruments that led to the development of general principles of criminal law in the 19th century, such as accessoriness (i.e. the relationship between the accessory's act and the principal's act), causality, immediacy, proximity. These are safeguards to avoid implicating everyone in an unlawful act. In general: aiding and abetting in the criminal sense must be linked to the act, the accomplice must know exactly what the main act consists of, he must concretely contribute to it. Someone who gives a kitchen knife to another and vaguely knows that this person has brutal impulses is not necessarily an accomplice if the recipient of the kitchen knife kills someone with it. That might

2 Ibidem, p. 178.

be judged differently if the murder weapon was a poniard. As always in law: it depends - on the numerous details of the case. Although the requirements of causality and immediacy have been weakened and distinguished over time, it remains the case that simply being in the same location that a perpetrator's crime is committed is fundamentally not enough - not sufficient - to make someone an abettor in law.

The „Demjanjuk" judgment and, above all, the final „Gröning" decision of the German Federal Supreme Court changed this case law and legal doctrine. Now everything is different, radically different. As the *Bundesgerichtshof* states: „He [the defendant] was involved in the organization of the mass killings by performing tasks according to the duty schedule when the victims arrived at the ramp", in other words: „He was part of the staff apparatus which was already on duty at Auschwitz at the time of the order for the ‚Hungarian Action'".[3]

As laconic as it is dramatically formulated in its legal consequences, this statement simply means that the connection between aiding and abetting and the main crime can be established by mere functionality. A concrete, individual, immediate, close connection? No longer necessary. It suffices to prove that the aider and abettor had a function within the apparatus. And of course, but this was not even disputed by the defendants themselves, it was clear that this apparatus was not a sweet factory, but one which produced corpses. They knew what they were doing and where. So now, on the basis of this new case law, since 2011/2016, under Article 27 of the German Criminal Code, in principle, all concentration camp employees, whether guards, administrators, or cooks, who were on duty for a day or a year, can be judged and convicted as having abetted at least one murder. As a reminder, about 10,000 men and women worked as SS personnel in the Auschwitz-Birkenau camp alone. Now it was necessary to hurry. Now that function and knowledge were sufficient, there was hardly any time left for judicial work. The categorical „conversion of ignorance into impatience"[4] concerned very old people.

III.

It was time. Time passes. Law is a matter of time. This is cruelly the case when responsibility for Nazi crimes is at stake. For let us not be under any illusions: the field between the nothing and the act, that is, the field of aiding and abetting, is the field of responsibility, of guilt, of many people, of everyone, perhaps.

After all, it is rather easy to say (and not to have to endure proof to the contrary): „I did not kill anyone" - which means that the border between the act and the rest, between murder and non-murder, is not really a problem, unless one implicates a mass of perpetrators due to a failure to assist, a rather far-fetched legal basis in the case of mass crimes. No, the German people were not an entire nation of perpetrators, of criminals - neither in reality nor in legal terms.

On the other hand, it is hard to say: I heard nothing, saw nothing, did nothing, I was not part of any organization of the Nazi state, at any level. And now, in 2011/2016, we have it: the integration into the realm of aiding and abetting of all those who, so to speak, did nothing, of this great majority who just did not kill anyone. And this area is becoming very, very wide - since 2011/2016. Since we know that there is hardly anyone left, in fact a few dozen judicial cases, at most, and maybe a few tens of thousands of very old people who were about 18 or 20 years old

3 BGH 3 StR 49/16 (decision from 20th September 2016), marginal 25.
4 Niklas Luhmann, Ökologie des Nichtwissens, in: Luhmann, Beobachtungen der Moderne, Westdeutscher Verlag, Opladen 1992, p. 149-220, p. 202.

at the time of the final solution. The people of the past, the accomplices, the assistants of the crimes, have disappeared. This people is (almost) dead.
And it is just at this time, now, that such people reappear. We do not speak here of historical people; they are dead. Nor do we speak of present people; they are busy with other things. Instead, we speak of an illusory people, an imaginary people, a people that can take up and carry the burden of responsibility, of guilt, precisely because such people are dead. This is what is signified by the spectacular turn of this jurisdiction regarding the responsibility of the abettor, this revolution of the law of perpetration and participation. Certainly, even in the 1960s, isolated judgments existed, even judgments of the Federal Court of Justice (BGH), which seemed to point to a functional jurisprudence of participation, but they did not have a lasting (i.e. general) effect. In truth, the field of aiding and abetting widens, without limits, at the very moment when almost no aider and abettor remains alive. Now. It opens to the mass of the dead who helped, who are no longer judicially responsible, and to a few very old men and some very old women who, with faces resembling those of all men on the threshold of death, arouse more pity than a feeling that it is necessary to inflict on them the suffering of punishment.

IV.
Everything is a question of time. Justice is a question of time. Most fundamentally. All law, that is to say, all our social relations, which can be judged and condemned by criminal law, by private law, by public law, exists underneath the sword of time. The legal term for this reaper of hopes and fears regarding law and justice is prescription. Prescription allows time to do its work: to forget, to excuse, to let pass. Without prescription, responsibility remains, guilt always remains, can always be dragged from latency to light; without prescription, law exercises unlimited, total power, even 70, 80 years after the events.

Prescription, the statute of limitations, the question of terminating the course of law, has led to what is still called the „ stellar hour (*Sternstunde*) of the parliament", of the German *Bundestag*. It was on March 10, 1965. The debate concerned one question, the question of time. Under the hitherto criminal code, murder was subject to a 20-year prescription period. Almost 20 years after the end of the barbarism, the debate concerned whether to extend this period (or not). Forget it, excuse it, let it pass? *Nullum crimen, nulla poena sine lege*? The principle of legality? The prohibition of retroactivity? Six million corpses, Jews, Gypsies, Communists, homosexuals? And the perpetrators? The largest trial in the history of the Federal Republic of Germany, the (first) Auschwitz trial before the jury court at the Frankfurt am Main Regional Court lasted for 15 months. After the trials in Nuremberg, organized by the Allied victorious powers against high-ranking Nazi leaders, after the rather few trials during the occupation and after the foundation of the Federal Republic of Germany - should that be represent the sum total of judicial condemnation? The established, legally judged responsibility, guilt for some ... and all the other actors, perpetrators, who were still free, embedded in the growing economic miracle country? Was it possible, after 20 years, to draw a line – one which fully complied with the prohibition on retroactive material criminal law - to draw a line under the responsibility, the guilt, for the atrocious acts of the Third Reich, which was destined to last a thousand years? And this responsibility, this guilt, who does it actually concern? You, me, you, all of us?

Karl Jaspers, the famous philosopher and psychiatrist, friend of Max Weber, friend for a lifetime of Hannah Arendt, friend before `33 of Martin Heidegger, Karl Jaspers, who still believed in 1933 that the *Führer* principle would be good for university reform and who was terribly

mistaken about the alleged operetta character of the Nazi regime, Karl Jaspers, who, married to a Jewess, soon retreated into inner emigration, Karl Jaspers, who after the war became one of the great moral authorities of German intellectual life, devoted his opening lecture at Heidelberg University in 1946 to the question of responsibility, the question of guilt. In „The Question of Guilt" he distinguishes between „criminal, political, moral and metaphysical" guilt. Criminal responsibility is a matter for the courts, and is thus measured according to the laws in force. Moral responsibility, which exists beyond the times of law, remains forever, regardless of judicial treatment. And responsibility, guilt, whatever its nature, cannot, must not be collective. Legally or morally, responsibility remains a matter for the individual, the single person. Jasper's lecture, printed shortly thereafter, was certainly one of the most important starting points for the extended debate that continues to this day regarding collective responsibility for the crimes committed in the Third Reich.

This question of collective responsibility, which was inextricably linked to the question of the limitation period, prescription, was also at the center of a parliamentary debate which took place on March 10, 1965. The jurist Adolf Arndt, one of the great politicians of the Social Democratic Party of Germany, a leading figure of the reformist, anti-socialist program of Godesberg adopted a few years earlier, expressed before the *Bundestag* all the ambivalence - not to say the abyss - of responsibility towards what had happened in Germany during 12 years: „The essential thing was known. I have had to say to young people: If your natural mother lies on her deathbed and swears by God [...] that she did not know, then I say to you: Your mother simply cannot bring herself to say it, because it is too terrible to have known or to be able to know, but not to want to know. I know that I am also guilty. Because you see, I did not go out into the street and scream when I saw that the Jews were being taken away from our midst by the truckload. I did not put on the yellow star and say: Me too! I cannot say that I did enough. [...] You cannot say: I was not born yet, this heritage is none of my business. [...] It is a matter of not turning our backs on the mountain of guilt and disaster that lies behind us".[5]

The prescription period was extended, first by the new „Law on the Calculation of Criminal Prescription Periods," which set December 31, 1949, the birth year of the Federal Republic of Germany, as the starting point of the prescription period. Of course, this was not enough; only four years was gained in this manner. The prescription period was then extended to 30 years and, finally, abolished entirely in relation to murder, with the abolition also applying to those who attempted or participated in committing murder. Thanks to the work of the „Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes," which began operating in Ludwigsburg on December 1, 1958, Nazi trials continue to take place until today. Since May 8, 1945, the German courts have convicted fewer than 7,000 people. Overall, there have been only a few, very few, far too few trials.

V.

And now, the new case law on aiding and abetting exists. It suffices, to establish guilt, that the accused knew that murders took place and to have been a functional element in an organization which sought to commit murder. An individual act, which was previous a *sine qua non* of the legal concept of participation, merges into the collective of a killing machine. It is irrelevant which small cog the individual accused represents in this machine; it could be a dog handler, a potato peeler in the kitchens, or a camp cultural officer - all of those who are no longer with us.

5 Verhandlungen des Deutschen Bundestages, 4. Wahlperiode. Stenografische Berichte, Band 57: 170. Sitzung vom 10. März 1965, p. 8552.

But the consequences of this new jurisprudence go further. The new jurisprudence does not explicitly say one thing, and indeed it cannot be said, because a case is merely a single and obiter dicta – judicial remarks which go beyond the facts of the case at hand – are rare. But it is clear that the new jurisprudence opens the door to prosecutions being brought against an average man in 1933-1945, towards all those who participated, contributed, collaborated in the functioning of the regime, perhaps primarily the soldiers, the railroad officials, the civil servants of all kinds and degrees, and even, beyond these administrative and governmental ties, the butchers, the bakers, the electricians, all those who worked to maintain the strength and capacity for action of the Reich, and still further, perhaps, ultimately, *in extremis*, the mothers and fathers who gave new life to this murderous organization. In short, the legal new definition of aiding and abetting basically affects everyone, because everyone, almost everyone, was a small cog in the great wheel of death, and everyone was aware, perhaps not aware of every detail, but let us remember the words of Adolf Arndt, quoted above. Every person knew what was happening in front of everyone's eyes from 1933 onwards.

So now, juridical responsibility can be extended to the collective level. This may start with an individual case, but when the individual is one amongst a sea of individuals who are functional, like everyone else, the concept of individual responsibility hardly retains any meaning.

It is obvious that such jurisprudence could not really, permanently and decisively come into existence when these functional atoms remained alive. One cannot condemn an entire people who, since the war, have constructed a new democracy, which was strongly - and inevitably? - stained by the old population, which literally remained in office to administer, inform, direct and electrify, heat and cook. In those (post-war) times, it was not even possible to prosecute and convict all of the perpetrators and direct assistants of the innumerable murderous acts. It is unsurprising that, during this period, the accessory-functional aider and abettor definition was not brought into existence and that the tender beginnings of the 1960s (see above) were stifled away. „Long live the people!" In other words, „Long live collective responsibility!" on the basis of a functionalist conception of participation in criminal law. This becomes possible only when the people who were actually involved have died.

VI.

In the end, time has passed over our feeble attempts to confront the unprecedented crimes of the mid-20th century. Certainly, they have not been excused, but they have been allowed to pass, as always happens. Nelson Mandela, faced with diametrically opposed options of total condemnation and complete relinquishment, opted for a third path, involving extrajudicial reconciliation which fully acknowledged the cruelty of the past, whilst building towards a harmonious future. But Nelson Mandela was unavailable. The present individual cases are, ultimately, not hugely important (apart from, of course, as regards the victims). They necessitated bizarre searches, lasting many months, to find a suitable prison for an extremely old and moribund man. But beyond its significance at an individual level, the recent jurisprudence on aiding and abetting has a significance for us all and for contemporary society that cannot be denied.

It inserts a finger, indeed a whole hand, into the perpetual wound of responsibility, a problem that each generation must understand how to bear in its own minds and hearts.

One of Niklas Luhmann's strangest texts (the „Ecology of Not-Knowing" which frequently escapes understanding) thematizes the difficulty of each generation, viewed only from the respective present, in constructing the past and the future. It does not speak of the Old Nazis. Indeed, Neo-Nazis appear only once in the text.[6] It does not concern the perpetration-and-participation dogmatics of (non-)knowledge, but rather ecology, such as our relationship with nuclear power. Nowadays, one would certainly need to add climatic and migratory catastrophes to that list: „From which present should we determine what can no longer be changed and what still lies far ahead in the future? Which spatial element determines being affected? What is far and what is near in space and time? How far must we consider now that what we currently doing will be the past in the future and cannot be changed then - if we do not know at the moment and cannot know what potential for change a future that is still hidden today will hold? And how can we take precautions to ensure that we do not now prevent the appropriate preparatory work from being undertaken for what may be possible? Who is to decide here? Nature has fallen silent. The observers are at odds".[7]

The final farewell to the material, concrete, active, substantial responsibility pronounced in the courtrooms of Munich and Karlsruhe, and the creation of the functional complicity, gathers individuals into a collective. It is perhaps not entirely delusional to think about how each of us considers this when sitting in front of our TV, computer, smartphone, sitting on the sofa at home, the coffee terrace, in the deck chair at the beach, consuming the latest news about wars, famines, displacements, floods and what other fields of death exist in the world. It is difficult to disentangle from this our own function and our own knowledge, here and now. A tweet is not enough! A sentence from Franz Kafka's officer „In the Penal Colony" comes to mind; one which is the basis of all judgments on this distant island. „Guilt is always beyond doubt!". So too is participation. Thus, we will continue to live under the sword of Damocles in respect to knowledge of Nazi atrocities and the division of labor, precisely functional complicity. This is inevitable and it helps to form consciousness, and perhaps even a conscience, in each of us. But in the broader sense of each person's functionality in the midst of the existing order, this collective failure in the face of contemporary atrocities becomes justiciable only (if at all) once we are no longer a part of this world. This is the reasoning of a law with dogmatics that spreads its wings only in the twilight, at the time of extinction. It is very likely that it can never be otherwise, so that one can live today.

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6 Niklas Luhmann, Ökologie des Nichtwissens, in : Luhmann, Beobachtungen der Moderne, Westdeutscher Verlag, Opladen 1992, p. 149-220, p. 200.
7 Ibidem, p. 171.