Book Review – Kerstin Freudiger's *Die juristische Aufarbeitung von NS-Verbrechen* (Nazi Crimes Before The Courts)

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Review of Kerstin Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen* (Tübingen: J.C.B. Mohr (Paul Siebeck), 2002, € 69.00, ISBN 3-16-147687-5).

[1] Kerstin Freudiger patiently builds a strong case in *Die juristische Aufarbeitung von NS-Verbrechen* (Nazi Crimes Before the Courts) towards her conclusion that "essentially responsible, however, for the propensity towards partial or complete exculpation of Nazi criminals – to which there was always an alternative in the law – is the post-war judiciary." (1) Freudiger's work contributes significantly to our better understanding of the legal reasoning that was used by the West German courts to reach their verdicts and assess the sentencing of individuals who were accused of certain categories of criminal conduct perpetrated during the Nazi era.

[2] To set the stage for her study, Freudiger begins by briefly pointing out that there are conflicting opinions to be found in the literature today as to whether or not Germany adequately addressed the crimes which had been committed between 1933 and 1945, the period during which the Nazis were in power in Germany. (2) She notes that as a result of the fall of the Wall and the reunification of Germany the issue resurfaced, with at least one author concluding that the post-war West German judiciary had effectively prosecuted the crimes committed during the Nazi period and that any reprehensible gaps in prosecution should be attributed to the role of the German legislature, not the courts. (3) Freudiger's conclusion, based on her detailed analysis of the facts of a wide range of relevant cases and the judicial decisions levied with respect thereto, is exactly the opposite.

[3] Freudiger's first chapter is a review of the structural legal parameters in place in post-war West Germany for addressing crimes committed during the Nazi regime. (4) The reader is reminded that although the laws put in place by the occupying powers and the activities of the International Military Tribunal at Nuremberg dominated immediate post-war efforts to address criminal activity of the Nazi period, German courts were also prosecuting such crimes even prior to the founding of the Federal Republic of Germany in 1949. (5) Freudiger makes the interesting point that between 1945 and 1949 the West German courts sentenced 4,419 people for crimes committed during the Nazi period, (6) but only 1,426 people were sentenced for such crimes in West Germany from 1950 to 1954. (7) Despite the opening of the *Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen* in Ludwigsburg in 1958, the total of such sentences for the period 1945 through 1995 was just 6,494, the result of 106,496 investigations opened by prosecutors during that period. (8)

[4] The book is subsequently devoted to an analysis of relevant cases which came before the post-war West German courts. The cases Freudiger looks at involve prosecutions for murder, accomplice to murder and manslaughter in connection with (i) the extermination of the European Jews whether in the concentration camps, by *Einsatzgruppen*, or by bureaucrats at their desks; (ii) euthanasia activities; (iii) the killing of Soviet prisoners of war and certain actions by the *Wehrmacht* in occupied countries; (iv) death sentences levied by the judiciary; and (v) denunciations. She examines the facts of the allegations from several cases in each category and reviews the legal reasoning of the courts trying the cases as well as relevant appellate court decisions. In each case, Freudiger provides information about the personal background of the defendant as well as the ultimate sentence handed down. Throughout the work, Freudiger relies on and acknowledges a wide range of earlier works on the various issues she addresses, (9) but she has broken new ground in reviewing relevant cases brought before the courts over a wide span of time and involving a broad spectrum of factual circumstances.

[5] As she works her way through the cases, Freudiger reveals repeated inconsistencies of verdicts and sentencing decisions over time and between the courts with respect to the treatment of defendants involved in similar fact patterns. She discusses at length the varied argumentation used by the courts that led to their concluding that a defendant's actions constituted not those of a murderer but only of an accomplice to murder or that the defendant's level of intent did not rise to that required for a conviction of murder but only for one of manslaughter. In post-war West Germany, such conclusions affected not just the sentencing parameters, but with respect to the downgrading of a crime from murder to manslaughter soon meant that the applicable statute of limitations precluded any conviction whatsoever.

[6] Thus, for example, Freudiger sets out the details of one of the early cases, that of Josef Hirtreiter, who was indicted by the prosecutors in Frankfurt am Main in 1948, and accused of murder in connection with his activity in the

Treblinka concentration camp. (10) The court found that from the autumn of 1942, until October of 1943, Hirtreiter was in charge of overseeing the victims in the Treblinka concentration camp as they were required to undress to be sent to the gas chamber, and that his activities in that role constituted criminal conduct. The court then went on to determine that Hirtreiter's intent was that of a murderer, and not just that of an accomplice. The court reasoned that Hirtreiter, who had joined the Nazi Party and the SA in 1932, acted out of base motives by considering it to be purposeful to exterminate an entire group of people who had been labeled inferior. In 1951, Hirtreiter was found guilty of murder with respect to an undetermined number of cases and sentenced to life in prison.

[7] Another case described by Freudiger, which when compared to that of Hirtreiter gives an idea of the trends Freudiger identifies, is that of Josef Oberhauser, indicted in Munich in August, 1963, accused of having been an accessory to murder in connection with his activity in the Belzec concentration camp. Oberhauser joined the Reichswehr in 1934, was accepted into Order of the Death's Head and the Nazi Party in 1935, and served in Poland before being transferred to Berlin in 1939 for assignment to certain of the euthanasia activities. (11) Oberhauser was next assigned to assist the commander of the Belzec concentration camp, Wirth, in 1941; was moved to Lublin to accompany Wirth in his new role as inspector of the concentration camps Belzec, Treblinka and Sobibor in 1942; and was promoted to SS-*Untersturmführer* and then SS-*Obersturmführer* in April, 1943, and January, 1945, respectively.

[8] Freudiger reports that Oberhauser was found guilty of being an accessory to murder with respect to five cases involving the murder of at least 150 individuals in each case for his activity overseeing their being unloaded from their transport to the concentration camp and with respect to one case involving the murder of at least 300,000 individuals for his role in procuring the materials for extending the concentration camp facilities.

[9] Oberhauser was sentenced to four and a half years' imprisonment. The court justified the verdict of accessory to murder on the grounds that the actual murderers were Hitler, Himmler and Heydrich, whereas Oberhauser was a tool used by the murderers and did not have the requisite intent to be qualified himself as a murderer as he was following the orders given by the murderers. The court reasoned that the sentence was just, because Oberhauser had otherwise not been involved with the law, was simply following orders, and may have had his respect for the value of the life of certain people labeled inferior by the regime affected by the long years of indoctrination to Nazi ideology.

[10] Freudiger remains focused throughout the book on the central issue she had chosen to tackle, namely whether the post-war West German judiciary should be found deficient in their approach to dealing with the crimes perpetrated during the Nazi era. The strong arguments presented by Freudiger for answering that question in the affirmative inevitably lead to other questions which should not remain unanswered if progress is to be made towards understanding how criminal activity perpetrated during totalitarian regimes can best be addressed by the successor regimes.

[11] One fundamental set of questions revolves around identifying the causes of the deficiencies of the post-war West German judiciary. Is it possible to identify individual judges as having been instrumental in determining the outcome of specific cases or the development of trends? Should attention be re-focused on the steps taken or not taken with respect to the denazification of the West German legal system, namely, its prosecutors, judges and law school professors? Was the behavior of the judiciary during and after the Nazi period affected by broader societal influences such as those discussed by Daniel Goldhagen in his analysis of individual perpetrators who contributed to the Holocaust? (12) Was there an adequate role allocated to the surviving relatives of victims, either as joint parties to the prosecution or as witnesses to the loss they had suffered for the purpose of informing the sentencing decisions?

[12] Another set of questions emanates from the fact that there are regrettably other examples of post-totalitarian regimes which can serve as a pool from which to draw comparative analyses. Are there lessons from the post-war West German experience that can be applied to other post-totalitarian regimes? Conversely, have methods been applied during other such regime changes, which shed light on what post-war West Germany might have done differently to the benefit of the society in the long term? What of the experience, for example, in post-war East Germany, or in the Central and Eastern European countries' after the fall of their Communist regimes, or in South Africa at the end of the Apartheid era? It will be interesting to see if Freudiger will bring any of her considerable expertise to bear to help us formulate answers to such questions.

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(1) Kerstin Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen* 419 (2002).

(2) *Ibid.*, pages 1-3.

(3) *Ibid.*, pages 3-4, citing Christa Hoffmann, *Stunden Null? Vergangenheitsbewältigung in Deutschland 1945 und 1989* (1992).

(4) Freudiger, Chapter 1. For those who would prefer an English-language review of the issues, *see*, Ingo Müller, *Furchtbare Juristen* (1989) (also available in English as *Hitler's Justice*, Cambridge, Massachusetts: Harvard University Press, 1991, translated by Deborah Lucas Schneider).

(5) Freudiger, pp. 12-16.

(6) *Ibid.*, p. 16.

(7) *Ibid.*, p. 23.

(8) *Ibid.*, p. 26.

(9) The works cited by Freudiger are primarily the key German-language sources on the subject, including: Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1946 SÜDDEUTSCHE JURISTENZEITUNG 105-108; Adalbert Rückerl's works, including NS-VERBRECHEN VOR GERICHT: VERSUCH EINER VERGANGENHEITSBEWÄLTIGUNG, Heidelberg (1982); and Barbara Just-Dahlmann and Helmut Just, DIE GEHILFEN, NS-VERBRECHEN UND DIE JUSTIZ NACH 1945 (1988.).

(10) Freudiger, pp. 38-42.

(11) *Ibid.*, pp. 163-167.

(12) Daniel Jonah Goldhagen, HITLER'S WILLING EXECUTIONERS. ORDINARY GERMANS AND THE HOLOCAUST (1996).