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# The Rosenberg Files – The Federal Ministry of Justice and the Nazi Era



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Manfred Görtemaker / Christoph Safferling

# The Rosenberg Files – The Federal Ministry of Justice and the Nazi Era

# Preface



Heiko Maas  
Federal Minister of Justice  
and Consumer Protection

The Nazi dictatorship committed unthinkable crimes and brought great suffering upon Germany and the world. The collaboration of the judicial system and lawyers with the Nazi regime has meanwhile been well documented in academic studies. Previously, however, it had been an open secret that many lawyers who were guilty of crimes returned to West German government service after the foundation of the Federal Republic of Germany in 1949.

The Independent Academic Commission set up to investigate how the Federal Ministry of Justice dealt with its Nazi past, the “Rosenburg Project”, undertook an intensive study of the continuity in terms of personnel and its consequences. Our Ministry allowed researchers full access to all the files for the first time. I would like to express my great thanks to the two Heads of Commission, Professor Manfred Görtemaker and Professor Christoph Safferling, and to their entire team for their committed work.

The results are depressing. Of the 170 lawyers who held senior positions in the Ministry between 1949 and 1973, 90 had been members of the Nazi Party and 34 had been members of the SA. More than 15 percent had even worked in the Nazi Reich Ministry of Justice before 1945. These figures highlight why the prosecution of Nazi crimes was impeded for so long, the suffering of the victims was ignored far too long and many groups of victims – such as homosexuals or Sinti and Roma – suffered renewed discrimination in the Federal Republic of Germany.

The perversion of justice during the Nazi era and the failure of the young Federal Republic to carry out a critical study of the past make one thing quite clear: lawyers today must be more than mere technicians of the law who enshrine in articles and enforce any political idea. Their aim should rather be to internalise and to live the values of our Basic Law – human dignity, freedom and diversity. Knowledge about the past makes us sensitive to current violations of human rights and the rule of law. That is why I hope that the final report on the Rosenberg Project and this publication will be widely distributed. All German lawyers should be aware of the negative sides of the past among members of their profession in order to recognise what a great responsibility they bear for the present and the future.

A handwritten signature in black ink, appearing to read 'Heiko Maas', with a stylized, cursive script.

Heiko Maas

Federal Minister of Justice and Consumer Protection

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The two authors are senior members of the Independent Academic Commission at the Federal Ministry of Justice and Consumer Protection for the Critical Study of the National Socialist Past.

# The book

The present publication summarises the main results of the work of the Independent Academic Commission at the Federal Ministry of Justice and Consumer Protection for the Critical Study of the National Socialist Past. The long version of its findings *Die Akte Rosenberg* has been published in book form by the publishing house C.H. Beck.



Manfred Görtemaker /  
Christoph Safferling

## **Die Akte Rosenberg**

Das Bundesministerium der  
Justiz und die NS-Zeit

2016. Approx. 600 pages with  
approx. 30 illustrations.

Hardback € 29.95 (price in  
Germany)

ISBN 978-3-406-69768-5

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Manfred Görtemaker / Christoph Safferling

# The Rosenberg Files – The Federal Ministry of Justice and the Nazi Era

## Introduction

The “Rosenburg” on Venusberg in Bonn-Kessenich, a Romanesque-revival palace built upon the instructions of Bonn Professor Georg August Goldfuß in 1831, was the seat of the Federal Ministry of Justice from 1950 to 1973. That is also approximately the period dealt with by the activities of the “Independent Academic Commission at the Federal Ministry of Justice for the Critical Study of the National Socialist Past”, set up in January 2012 by Federal Minister of Justice Sabine Leutheusser-Schnarrenberger. The Commission has now presented its report entitled *Die Akte Rosenberg* (The Rosenberg Files), which was published by C. H. Beck Verlag in Munich in October 2016.<sup>1</sup>

The Commission’s subject of research was not primarily the judiciary in the “Third Reich”, but the question of how the Federal Ministry of Justice dealt with its Nazi legacy *within the Ministry* after 1949. What personnel-based and institutional continuities were there? How deep really was the break between 1945 and 1949? And what about the content aspects of its policies? Assuming that many of the people operating after 1949 were already active before 1945, were they influenced by Nazi attitudes? And if so, in what way? In order to be able to answer these questions as comprehensively as possible, from both historical and legal perspectives, the members of the Commission came from different disciplines, with a working group consisting mainly of lawyers at the Philipps University of Marburg and a group consisting mainly of historians at the University of Potsdam. The Commission was given unlimited access to the Ministry’s files for their research. Not least, that also applied to the particularly



sensitive personnel files, insofar as they related to the period of study concerned.

A corresponding study on the Federal Foreign Office was completed in 2010.<sup>2</sup> A study on the Federal Criminal Police Office was published in 2011.<sup>3</sup> On 1 November 2011, upon the initiative of Heinz Fromm, former President of the *Bundesamt für Verfassungsschutz (BfV)*, Germany's domestic intelligence service, that agency also commissioned a research group to examine the "organisational history of the BfV from 1950 to 1975, taking into special account the Nazi connections of former members of staff in the start-up phase"; its results were presented in 2015.<sup>4</sup> Other studies on ministries and other institutions are under preparation: on the *Bundesnachrichtendienst*, Germany's foreign intelligence service, the Federal Ministry of Finance, the Federal Ministry of Economics and Technology, the Federal Ministry of Labour and Social Affairs and the Federal Ministry of the Interior.<sup>5</sup>

The Federal Ministry of Justice and Consumer Protection, as it has been called since 2013, has now followed suit. It is thus part of what has become a very far-reaching effort to study the possible Nazi legacy of central institutions in the Federal Republic of Germany during the post-war period. On the initiative of the Federal Ministry of Justice and Consumer Protection, the official name of the Federal Ministry of Justice since the last Bundestag election, a sentence was included to this end in the Coalition Agreement signed between the CDU/CSU and the SPD in 2013, which made the following statement concerning the political intentions of the Federal Government that was to be formed:

*"The coalition will foster the critical examination of the National Socialist past of the ministries and the federal agencies."*<sup>6</sup>

In the 1980s under Minister Hans A. Engelhard, the Federal Ministry of Justice promoted a number of studies that dealt with the possible personnel-based and approach-based continuities from the Nazi era

through to the Federal Republic of Germany.<sup>7</sup> Large gaps in the research remained, however, which only now, with the Rosenberg Project, have been closed. The initiative for this project came from within the Ministry itself. As in the Federal Foreign Office, where in 2005 Federal Foreign Minister Joschka Fischer had commissioned an “Independent Historians’ Commission for the Critical Study of the History of the Foreign Office in the National Socialist Era and in the Federal Republic of Germany”, the Federal Ministry of Justice had meanwhile become convinced that the judiciary also required closer study. Senior Ministry officials under Federal Minister Leutheusser-Schnarrenberger and, after 2013, Federal Minister of Justice Heiko Maas consistently supported the project, thereby helping it to gain the greatest possible public resonance.

### **1. The Commission’s subjects of study and working methods**

The Commission’s subject of study was primarily the way in which the Federal Ministry of Justice and the agencies under its remit dealt with the personnel and political legacy of the “Third Reich”. First of all, research was done into the number of people who had already been active during the Nazi era and were taken over into the service of the Federal Ministry of Justice after 1949 and what criteria and standards applied to their employment and promotion. One starting point of the study was the standard developed at the Nuremberg Justice Trials in 1947 for judging the conduct of ministerial officials, judges and public prosecutors. The study not only dealt with the issues of the employment of lawyers in the service of the Federal Ministry of Justice, but also critically assessed the substance of the acts of injustice by the Nazi judiciary, the revision of laws to remove Nazi ideology and the prosecution of Nazi perpetrators by the judiciary of the Federal Republic of Germany.<sup>8</sup>

The study also examined the role of the Federal Ministry of Justice in amnestying Nazi perpetrators and their premature release from prison, by means of which nearly all those convicted were released by 1958, and in drafting the Introductory Act to the Regulatory Offences Act of

24 May 1968, which reduced criminal liability for aiding and abetting in certain case constellations, which in combination with the so-called case law on abetting led to the retrospective statutory limitation on 9 May 1960 of many violent crimes committed by the Nazis. Another question that was studied was the extent to which the Federal Ministry of Justice played a part in delaying the rehabilitation of the victims of the Nazi judiciary, for example in the case of decisions by criminal courts, heredity health judgments or in the military tribunals. Judgments by the *Volksgericht* (National Socialist People's Court) and courts martial were not generally reversed by Federal Law until 28 May 1998 and 17 May 2002 respectively, and judgments relating to military treason cases were reversed as late as in September 2009.

Important further fields of study were the attitude of the Federal Ministry of Justice to the Allied Control Council, for example to Control Council Law No. 1 of 20 September 1945 on the repeal of a total of 24 laws, orders and decrees from the period of the "Third Reich", and to the Nuremberg Trials held by the Allies after 1945 and their judgments, which, as is well-known, continued to be controversial in the Federal Republic of Germany. Finally, the study also examined the Ministry's attitude to the central division providing legal protection to Germans prosecuted abroad (*Zentrale Rechtsschutzstelle – ZRS*), a division of the Federal Ministry of Justice until 1953, before it was transferred to the Federal Foreign Office's area of responsibility. The ZRS not only helped prisoners of war and provided legal assistance for Germans who had to stand trial abroad, but also, until its dissolution in 1968, operated as an instrument for warning German war criminals, thus impeding the work of the Central Office for the Investigation of National Socialist Crimes in Ludwigsburg, which was set up in 1958.<sup>9</sup>

Thus, the Commission's work was determined by a very extensive catalogue of themes. It did not carry out its research in an ivory tower of scholarly research, but from the outset took the path of writing public history. The work and the resulting insights were put up for discussion

in symposia and conferences in order to make the individual steps transparent and to contribute to a critical discourse at as early a stage as possible – well beyond the limited circle of academia. Thus, it was no coincidence that on 26 April 2012, when this work began, a symposium convened in the very chamber of the Berlin Higher Regional Court where in 1944 Roland Freisler's "People's Court" had been held and where in 1945 the International Military Tribunal had been constituted which then tried the major war criminals in the Nuremberg Trials. There, an initial survey was carried out, the results of which can be read in an anthology.<sup>10</sup> That was followed in February 2013 by a symposium on the responsibility of jurists, which was held in the jury courtroom of the Nuremberg-Fürth Regional Court i.e. the historical Courtroom Number 600 where the main war criminals of the Nazi regime went on trial in 1945/46 and later, between February and December 1947, the so-called Justice Trial was also held, in which civil servants, most of whom had worked at the Reich Ministry of Justice or were lawyers working in the judicial system, were tried before an American military court. In this trial, the lawyers' involvement in the judicial terror of the Nazi regime in the fields of legislation, administration and case law was the subject of a criminal trial for the first time. "The dagger of the assassin was concealed beneath the robe of the jurist" – this statement made in the judgment in the Nuremberg Justice Trial underlines the jurists' responsibility for the appalling result of the Nazi dictatorship: many thousands of counts of murder. The speakers included Gabriel Bach and Heinz Düx, who reported on their experiences. Bach was a judge at the Supreme Court of Israel and the deputy prosecutor in the prosecution of Adolf Eichmann in Jerusalem in 1961, and Düx was the investigating judge at the Regional Court Frankfurt am Main, where he was occupied with the Auschwitz and euthanasia proceedings from 1960 to 1963. Other events took place at the Institute of Contemporary History (*Institut für Zeitgeschichte – IfZ*) in Munich, at the Haus der Geschichte in Bonn, at the Federal Court of Justice in Karlsruhe, at the House of the Wannsee Conference in Berlin, and in the USA – at the German Historical Institute in Washington and at the Leo Baeck Institute in New York, where dialogue was sought, in particular with Jewish associations.

## 2. The role of the judiciary in the Nazi era and in the Federal Republic of Germany

Much research has already been carried out into the role of the judiciary during the Nazi era. Extensive studies have been published, both on the era under Reich Minister of Justice Franz Gürtner and on the period of his successor Otto Georg Thierack.<sup>12</sup> Many other academic studies have discussed individual regions or courts and their case law during the Nazi era. The Federal Ministry of Justice took part in this critical study in the exhibition “In the Name of the German People – the Judiciary and National Socialism”. The three sections of the exhibition dealt with the judiciary under National Socialism, its background in the Weimar Republic and the question of how the judiciary in the Federal Republic of Germany dealt with this past. Some 2,000 documents and pictures as well as accompanying texts on each individual subject area highlighted important aspects of the historical and ideological bases of the judiciary, the influence of the party on the judiciary and the cooperation between the judiciary, the Nazi Party and the SS. The exhibition was opened in Berlin’s State Library on Potsdamer Straße in 1989 before going on tour through all the Federal Länder for two decades. It was shown in 43 cities, mainly in courts and judicial buildings, before taking up a permanent place at the Higher Administrative Court Berlin-Brandenburg in Berlin’s Hardenbergstraße 31 near the Zoological Garden railway station in June 2008.<sup>12</sup>

The exhibition not only shows what a calamitous role the judiciary played in the “Third Reich”, but also its connections to the judiciary in the post-war Federal Republic of Germany. Ingo Müller drew attention to this in his doctoral thesis on legal history in 1987. *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz* (Terrible Lawyers. The Past Our Judiciary Has Not Overcome) shows the depth of lawyers’ complicity in the crimes and mass murder of the Nazi regime and the personnel-based and approach-based continuities within the judiciary after the caesura of 1945.<sup>13</sup> Meanwhile, Müller’s statements, initially controversial, are now largely undisputed and they are confirmed by a number of studies. The much-discussed book by Norbert Frei *Vergangenheitspolitik*.

*Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration), first published in 1996, deserves special mention. Taking as his starting point the fundamental setting of the course by parliament and government, Frei deals with the failure of the Federal Republic of Germany to "come to terms with the past" (*Vergangenheitsbewältigung*) in the early 1950s, devoting extensive passages in particular to the judiciary.<sup>14</sup> In 2004, Marc von Miquel continued these considerations to include the 1960s, reaching similar conclusions.<sup>15</sup>

Also to be mentioned in this connection, however is the publicist Jörg Friedrich. Twenty years before these later publications, he drew attention to the scandalous behaviour of judges and public prosecutors, questionable judgements and the calculated "clean break attitude" of policymakers in his books *Freispruch für die Nazi-Justiz* (Not Guilty Verdict for the Nazi Judiciary) and *Die kalte Amnestie – NS-Täter in der Bundesrepublik* (The Cold Amnesty – Nazi Perpetrators in the Federal Republic of Germany), despite the fact that access to material was still very limited. In spite of the provisional nature of his insight, due to limited access to the material, Friedrich's publicistically pointed remarks at least gave some idea of the problems that were awaiting closer examination.<sup>16</sup> Finally, the Berlin legal sociologist Hubert Rottleuthner, who after 2000 analysed the "careers and continuities of German jurists in the judicial system before and after 1945" based on data of more than 34,000 persons who worked in the higher judicial service between 1933 and 1964, provided comprehensive evidence to show what was meanwhile hardly a secret anymore: that career breaks among German jurists after the end of National Socialism were an exception and that most jurists, even if they were politically tainted by association with the Nazis, had been able to pursue their career more or less seamlessly following the establishment of the Federal Republic of Germany.<sup>17</sup>

In fact, the German judicial system in the post-war era, with the exception of the Nuremberg Justice Trial, which took place under Allied leadership,

avoided being prosecuted itself almost entirely in spite of the fact that thousands of judges and public prosecutors had helped to enforce National Socialist ideology in ordinary courts, special courts, courts martial or the notorious People's Court and were directly or indirectly involved in the crimes of the Nazi regime. They had been supplied with the methodological tools of the trade by many university teachers and the "Academy of German Law" which had been founded in Munich on 26 June 1933 under its President Hans Frank (until 1942) and Otto Georg Thierack (until 1944). The Academy functioned as a central academic agency for restructuring German law in line with the Nazi world view and as an instrument of judicially enforced conformity. The Reich Ministry of Justice prepared laws and decrees and also meticulously monitored compliance with the new ideology by the judiciary. Following completion of their training and the start of their working life, practically a whole generation of jurists had fitted into this framework in the 1930s. Partly out of conviction and partly out of opportunist careerism, they had devoted themselves to the Nazi party and the "Führer".

Yet hardly any judges and public prosecutors in the Federal Republic of Germany after 1949 were held accountable for unjust judgments in the "Third Reich". In der Soviet Zone of Occupation/GDR the attempt was at least made to remove public prosecutors who were tainted by their association with the Nazis and to replace former judges by so-called "People's Judges" who had undergone short-term training. This came at a high cost, however: the loss of political independence and specialist legal knowledge. In the Federal Republic of Germany, on the other hand, countless jurists who had supported the Nazi regime returned to their desks and benches largely unrepentant, tacitly adapting to the new constitutional order, often sustained by the will to cover the past with a veil of silence and to let the inconceivable extent of the crimes be forgotten. Although this did not seriously endanger democracy in the Federal Republic of Germany, tainted former Nazi lawyers thus continued to exert an influence in important government and

social positions and repeatedly helped each other to evade a judiciary operating under the rule of law.

SS judge Dr Otto Thorbeck, who from 1941 to 1945 held the position of senior judge at the SS and Police Court in Munich and who worked as an attorney in Nuremberg after the war, and SS *Standartenführer* (Colonel) Walter Huppenkothen, whose final position was head of directorate in the Main Reich Security Office (RSHA), are clear examples of the difficulties the West German judiciary had in dealing with perpetrators who committed crimes within the Nazi judicial system. The two men were convicted in 1955 and sentenced to a number of years' imprisonment by the Regional Court Augsburg on counts of being accessories to murder. Yet in appeal proceedings on points of law on 19 June 1956, the Federal Court of Justice acquitted Thorbeck. Huppenkothen's conviction of six years' imprisonment was upheld, but he only had to serve three years. The grounds for the judgment by the court of assizes in Augsburg, on which the Federal Court of Justice had to adjudge, was the SS court martial held on 8 April 1945 in Flossenbürg concentration camp against Admiral Wilhelm Canaris, his chief assistant Hans Oster, Pastor Dietrich Bonhoeffer, Reich Court Counsellor (*Reichsgerichtsrat*) Hans von Dohnanyi, Army chief judge Dr Karl Sack and the Liaison Officer in Wehrkreis IV, Hauptmann Ludwig Gehre. Thorbeck had been the presiding judge at the trial and Huppenkothen had represented the prosecution. The trial ended with death penalties for all the defendants, who were accused of involvement in the conspiracy of 20 July 1944. But it had been a show trial that did not uphold minimum legal standards, no record had been made of the proceedings, there was no defence counsel, and the judgments were a foregone conclusion. Nor should the trial have been held in that form, since the defendants were not members of the SS and therefore, under the Wartime Regulations for Criminal Procedures (*Kriegsstrafverfahrensordnung – KStVO*), they should not have faced an SS court martial, but an ordinary military tribunal.



The court of assizes in Augsburg consequently argued that the court martial proceedings had not been ordered with the aim of investigating the truth and allowing law and justice to prevail, but merely “to be able to remove prisoners who had become inconvenient under the appearance of court proceedings”. Consequently, the court sentenced the responsible judge Dr Thorbeck to four years’ imprisonment on the count of being an accessory to murder. In its judgment on the appeal on points of law in 1956, however, the Federal Court of Justice declared that the starting point for determining guilt under criminal law had to be “the state’s right to self-assertion”. In the “battle for survival or non-survival”, “all peoples have always passed strict laws for the protection of the state”. Even the National Socialist state could “not automatically (be) denied the right to have passed such laws” even if those laws “to an ever-increasing extent also (served) to maintain the reign of terror of the National Socialist rulers”. It was not only the resistance fighters who found themselves in a “fateful interdependence” in this situation. A judge, too, “who had to pass sentence on a resistance fighter at that time [...] and considered him to have been found guilty in proper proceedings” could “not be reproached today, from the point of view of criminal law, if, “on account of his subservience to the laws of the time”, he believed that “he had to find him guilty of high treason, treason or military treason (Section 57 of the German Military Criminal Code – *Militärstrafgesetzbuch* – *MStGB*) and therefore had to sentence him to death”.<sup>18</sup> Thus, the Federal Court of Justice attested that SS Judge Thorbeck had taken legitimate legal action within a judicial system deemed to be just, while the actors of resistance were retrospectively declared to be criminals a second time.

The conviction of SS *Standartenführer* (Colonel) Huppenkothen, who had acted as prosecutor in the proceedings against the conspirators of 20 July, on the other hand, was also upheld, at least in part, by the Federal Court of Justice. In the final analysis, however, he was not convicted for his involvement in the proceedings, or in the murder of at least 60,000 people as a member of staff of the SS Security Service SD

and the Gestapo and as a member of the 1<sup>st</sup> deployment group (*Einsatzgruppe I*) in Poland from autumn 1939 to spring 1940, but only for acting as an accessory to murder through his involvement in the execution of the sentence. In the trial against Canaris, Oster, Bonhoeffer, Dohnanyi, Dr Sack and Gehre, Huppenkothen failed to request the confirmation of the death penalties from the supreme legal authority before they were carried out, as required by the Wartime Criminal Procedure Ordinance. The resulting illegality of the killings was confirmed in the manner of their execution, namely by “hanging in a completely unclothed state”, which disregarded human dignity, whereby this was immediately followed by the remark that this corresponded to “the practices in the concentration camps”.<sup>19</sup>

The judgments of the Federal Court of Justice and the reasons given for them speak for themselves. Yet Huppenkothen was the only public prosecutor to be handed down a prison sentence by the West German judiciary for his actions in the “Third Reich” who actually had to go to prison. The failure of the judiciary in the Federal Republic of Germany in dealing with the Nazi legacy is thus self-evident. In 1987, German-Jewish publicist Ralph Giordano therefore spoke of the Germans’ “second guilt”.<sup>20</sup> This guilt was all the greater because it concerned primarily the professional group of jurists themselves, who had a special responsibility for upholding the law. Also, anyone who claims that the conscious disregard for demands for justice under the Nazi regime lay in the totalitarian nature of National Socialism cannot but admit that there were judicial shortcomings in the period after 1949, when a critical assessment of the past was possible without any personal risk or at least without any danger to one’s own life.

Legal standards for assessing crimes by the judiciary were available by 1946 at the latest, when the former Reich Minister of Justice and legal philosopher Gustav Radbruch, the first German professor to be dismissed from state service after the Nazis seized power on 30 January 1933, had developed his now famous “formula”. It said that in a conflict between

justice and legal security, a situation could arise where “the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered ‘erroneous law’”.<sup>21</sup> In situations where “justice is not even striven for”, as was evidently the case in National Socialism, where “equality, which is the core of justice, is renounced in the process of legislation, a statute is not just ‘erroneous law’, but in fact it is not of a legal nature at all”.<sup>22</sup>

The view that legalist injustice not only must not be applied, but that the very making and application of it may even be punishable, as a crime against humanity, for example, emerged after 1945, particularly in the Nuremberg Justice Trial. In the Federal Republic of Germany after 1949, this idea was soon forgotten or suppressed, however. Instead, there was a retreat to an interpretation of the law that enabled criminals who had committed the most serious crimes under the cover of the law to go unpunished because their wrongdoing was legalistically covered. In the Nuremberg Justice Trial, in which no fewer than nine of the 16 accused had held a senior position in the Reich Ministry of Justice, the court thus attested that the accused had consciously participated “in a system of brutality and injustice that was spread throughout the whole country and was organised by the government” and had not only violated laws of war, but also laws of humanity “in the name of justice, under the authority of the Ministry of Justice and with the assistance of the courts”.<sup>23</sup>

### **3. The Federal Ministry of Justice and its Nazi past**

Most heads and deputy heads of directorates-general and many heads of division at the Federal Ministry of Justice in the 1950s and 1960s had a Nazi past that was pertinent in this context. Among them were some spectacular cases, such as that of

Franz Maßfeller, responsible for family law and race law at the Reich Ministry of Justice prior to 1945, who attended the meetings following up the Wannsee Conference, who published a commentary on the Law

for the Protection of German Blood and German Honour, who after World War II was permanent secretary (*Ministerialrat*) at the Federal Ministry of Justice and head of division for family law until 1960;

or Eduard Dreher, who until 1945 was head public prosecutor at the Innsbruck Special Court (*Sondergericht*) and was involved many death sentences for trivial matters that were handed down by that court and who subsequently worked at the Federal Ministry of Justice from 1951 to 1969, ending his career with the rank of assistant director (*Ministerialdirigent*);

Ernst Kanter, who prior to 1945 served as a “General Judge” in German-occupied Denmark and was involved in handing down 103 death sentences, and who, like Dreher, was an assistant director at the Federal Ministry of Justice until 1958;

Josef Schafheutle, who was responsible for political criminal law at the Reich Ministry of Justice before 1945, and after 1949 was director (*Ministerialdirektor*) and Head of Division II (criminal law) at the Federal Ministry of Justice;

Walter Roemer, who before 1945 was head public prosecutor at the Regional Court I in Munich, and after 1949 was director and head of the Directorate-General for Public Law responsible for constitutional law and human rights at the Federal Ministry of Justice;

Hans Gawlik, who prior to 1945 was public prosecutor at the Breslau Special Court, involved in handing down numerous death sentences. After 1945, he acted as senior defence attorney for the intelligence service SD (*Sicherheitsdienst*) of the SS and a number of deployment group leaders in the Nuremberg Trials and after 1949, he was head of the central division within the Federal Ministry of Justice that provided legal protection to Germans prosecuted abroad;

or Max Merten, who from 1942 to 1944 was a military administrator (*Kriegsverwaltungsrat*) for the Wehrmacht commander in Thessaloniki, where, as head of the “administration and business” directorate, he helped to organise the dispossession and deportation of more than 50,000 Jews – i.e. he was one of the most extreme German war criminals; in 1952, he was head of the division for coercive execution at the Federal Ministry of Justice for several months.

In the final analysis, however, the redeployment of former Nazis applied to the entire civil service. To this end, the Parliamentary Council had even included Article 131 in the Basic Law, which placed the future legislator under an obligation to provide for the reinstatement of former members of the civil service. The Bundestag fulfilled this request in 1950 by means of a law that was passed unanimously, with just two abstentions, enabling all civil servants from the period prior to 1945 to be integrated in principle into the public service of the Federal Republic of Germany. Thus, the redeployment of functional elites, even if they had been seriously tainted through their involvement with the Nazi regime, was politically desired because it was thought that not only the functioning of the new state depended on them, but also because they were expected to have an integrative effect which, unlike in the Weimar Republic, was to considerably contribute to the inner stability of the Federal Republic of Germany.

#### **4. Amnesty and the statute of limitations**

The efforts towards integration and reconciliation, or even towards forgiving and forgetting, also manifested themselves in the questions of amnesty and the statute of limitations. Shortly after the end of the Nuremberg Trials, political, church and other social groups were already advocating a comprehensive amnesty for convicted Nazi perpetrators. The aim of this was to counterbalance the actions of the Allies, which were perceived to be too hard and one-sided towards broad segments of the population in Germany. One of those who voted for a gradual amnesty was not least Federal Minister of Justice Thomas Dehler (FDP).

Thus, by 1958, nearly all those convicted of Nazi crimes were pardoned and released.

The possibility of limitation was also discussed at an early stage, whereby the debate on a statute of limitations was partially undermined by the so-called “cold limitation”, where cases were time-limited even before they came to trial, as was the case in the proceedings against the personnel of the Reich Main Security Office in 1968/69. The Introductory Act to the Act on Regulatory Offences of 24 May 1968 referred to above was of particular significance here. It led to countless acts of aiding and abetting being statute-barred with retrospective effect. Thus, thousands of perpetrators against whom criminal proceedings had already been initiated or would have had to be initiated went unpunished. By way of contrast, unjust Nazi sentences were not set aside uniformly across the board because Federal Minister of Justice Dehler, but also most of his successors and broad sections of the judicial system, considered it necessary to take case-by-case decisions in order to maintain what they declared to be “legal security”; this was not a decisive argument in questions of amnesty and limitation, however. Many victims of the unjust Nazi regime were therefore only hesitantly rehabilitated and compensated. For many, rehabilitation came too late; they had already died.

Yet it must also be asked why, despite the burden of the Nazi past bearing down on the judicial sector and many other sectors of politics, business and society, the Federal Republic of Germany attained a remarkable level of internal stability and democratic substance – unlike the Weimar Republic, where the judiciary was also known for being “blind in the right eye”. In any case, it is certain that the restructuring process to make the Federal Republic of Germany a democratic state based on the rule of law succeeded on the basis of the Basic Law in spite of the involvement of old elites and that the transition from the Nazi regime of injustice to a free and open society evidently took place quickly and apparently effortlessly.

One explanation for this is the fact that German legal history may not be reduced to the twelve years of the “Third Reich”, but that after 1949, the judiciary, judicial administration and ministerial bureaucracy were able to pick up on traditions which, while they had been temporarily forcefully suspended, had by no means been destroyed entirely. Not least, the Federal Constitutional Court played a role here, proving itself to be a worthy protector of the constitution. A link with the positive tradition of German legal and judicial history was also made by American chief prosecutor Telford Taylor at the Nuremberg Justice Trial. In his opening declaration on 5 March 1947, he accused the defendants of desecrating the “German temple of justice” and surrendering Germany to dictatorship “with all its methods of terror and its cynical and open rejection of the rule of law”; on the other hand, however, he expressed his respect for the historical achievements of the German judiciary and called for “the temple of justice (to) be reconsecrated”.<sup>24</sup>

## **5. The crimes and their perpetrators**

Taylor’s call, as we know, was heeded. But the successful new beginning after 1949 cannot obscure the fact that the generous reinstatement of lawyers who had been complicit in Nazi injustice into the German judiciary and judicial administration also led to the prevention of critical study of judicial Nazi terror. The jurists’ approach, graphically circumscribed as “crows’ justice”, meaning that jurists, like crows, do not peck out one another’s eyes, was only possible by using the ostensible self-justification that they had retained their “decency” before 1945 and had used their judicial skills to prevent “worse” things happening. On sober reflection, it is difficult to imagine how even worse things could have happened, i.e. what exactly was prevented by “those who retained their decency”. Yet the myth that jurists had acted to the best of their knowledge and in good faith and that they played a subordinate role as mere “assistants” in the machinery of the Nazi regime soon prevailed after 1945 and persisted in the case law of the 1960s. But who were these “perpetrators” and what guilt may be attributed to the individuals concerned for the acts in question? How does one assess a profession such as that of lawyers, who mainly operated from their

desks, acting behind the mask of a supposedly loyal application of the law? And what is to be understood by the term “Nazi legacy”?

So-called “perpetrator research” has already dealt with these questions at length, differentiating between three stages in the way perpetrators have been viewed. In the immediate post-war period and in the 1950s, practically only the SA, the Gestapo and the SS were regarded as the main perpetrator groups; their thugs and murderers were vilified as “blood-thirsty extreme perpetrators” (*Exzesstäter*) who had lowly instincts and a low-class background, and they were ostracised.<sup>25</sup>

After the trial of Adolf Eichmann in Jerusalem in 1961, this point of view changed. Since the 1960s, Hitler’s “death factories” and the Holocaust increasingly came to be seen as faceless, industrialised mass murder, initiated and supported by abstract institutions and structures behind which the personalities of the murderers were hardly recognisable.<sup>26</sup> It was not until the third phase, which began in the 1990s with Christopher Browning’s basic study *Ordinary Men. The Reserve Police Battalion 101 and the Final Solution in Poland* and with the debate on Daniel Goldhagen’s book *Hitler’s Willing Executioners*,<sup>27</sup> that the question was raised as to who in fact were the actors behind the crimes: “Ordinary men”, according to Browning, a whole nation of collective perpetrators with a specifically German anti-Semitism, as Goldhagen claimed. Or, as Karin Orth, Michael Wildt and Klaus-Michael Mallmann explained, as well as the “ideological elites” from the Nazis’ ranks, there were also the “rank and file of the final solution”: the countless representatives of civil administrations and local collaborators who jointly operated the murder machinery.<sup>28</sup>

An important contribution to this research into the question of the perpetrators was also made between 1995 and 1999 and between 2001 and 2004 by two travelling exhibitions by the Hamburg Institute for Social Research. These exhibitions focused on the crimes of the Wehrmacht, particularly in the war against the Soviet Union. The Wehrmacht, like



the Foreign Office, had previously been presented primarily as a haven of “apolitical neutrality” that apparently had nothing to do with the Nazis’ crimes; now it was demonstrated that even ordinary soldiers were involved in the murder operations in the east.<sup>29</sup> The debate triggered on the subject was helpful in that it opened the eyes of a broad public to the impossibility of limiting the group of perpetrators to a small class of fanatical Nazis.

All in all, the results of the research into the perpetrators can be summarised by saying that those who committed Nazi crimes were by no means only “obedient and spineless executors of an ideology” and “unemotional machines carrying out orders”, but people who came from mainstream society and from all classes and who often had an above-average educational background. And they were by no means all male.<sup>30</sup> Of course, they included different types: ideological perpetrators, perpetrators who displayed a violent zeal well beyond the ostensible requirements of the law, perpetrators with utilitarian motives, desktop perpetrators and traditional perpetrators who were carrying out orders. However, Gerhard Paul concludes that

*“no age group, no social and ethnic milieu of origin, no denomination and no educational class resisted the terrorist temptation.”<sup>31</sup>*

The “functional elites”, including jurists, played a special role and a large majority of them not only concealed and approved the Nazi regime’s crimes, but were also complicit in them “in one way or another”.<sup>32</sup> According to Gerhard Hirschfeld, their professional “collaboration” and “behaviour often determined by considerations of usefulness and functionality” was certainly ambivalent. Many of them showed “personal distance to the Nazi regime and its protagonists, particularly towards Adolf Hitler” in their private contacts while at the same time they saw “no, or only a slight, contradiction” in “supporting – or even promoting – the regime and its criminal policies through their commitment and the sheer professionalism of their actions”.<sup>33</sup> They were, like the majority of Nazi officials, neither ideologised, violently zealous perpetrators nor

unscrupulous mass murderers; “occasional doubts about their actions and sometimes even partial disagreement with the state leadership” were by no means foreign to them.<sup>34</sup> And yet they did what they did and thus played a major part in the crimes of the regime, which would not have been able to function without them. Extensive segmentation of responsibilities, routine administrative procedures – even in the case of the “administered mass murder” (Hannah Arendt) of the Jews or the Sinti and Roma – and the withdrawal to a supposedly moral-free “effectiveness perspective” (Eberhard Kolb) made it easier for them to act as they did. Other factors that often played a part were anti-Semitism, faith in authority, group pressure and above all, career plans. All this does not relativise the guilt of the functional elites, but it helps to explain why the perpetrators later managed, apparently effortlessly, to distance themselves from their actions.

As far as the criterion of “Nazi involvement” is concerned, to be evaluated on the basis of the reinstatement of former functional elites in the Federal Republic of Germany after 1949, it is not only membership of a Nazi organisation that should play a role, which in itself does not say very much. What should be considered is rather the specific behaviour during the “Third Reich”, which can provide information about how an entire profession allowed itself to be pressed into the service of a criminal regime. In 1948, this led Max Frisch to ask in bewilderment:

*“If people who have had the same education as I have, who speak the same words as I do, who love the same books, the same music, the same paintings as I do – if these people are by no means protected against the possibility of becoming inhuman and doing things that hitherto we would not have believed that people of our time could do, except for pathological individual cases, where do I draw the confidence that I am immune from doing such things?”<sup>35</sup>*

The journalist and writer Inge Deutschkron gave what is perhaps the only possible answer to this self-doubting question at a Holocaust

commemoration by the German Bundestag when she declared on 30 January 2013 that it is important

*“to know the truth, the whole truth. For as long as there are unanswered questions as to how such terrible things could happen, the danger has not been averted that similar crimes could once again befall humankind.”<sup>36</sup>*

## **6. Problems of transformation after 1945**

The transition from the “Third Reich” to the Federal Republic was a time of new beginnings, but also of continuity. The judicial sector, as stated above, was no exception. That applied to the public prosecutors and courts as well as to the academic training of young lawyers at the universities and, not least, to the Federal Ministry of Justice itself. The Federal Ministry of Justice is a clear example of the two-faced nature of the situation. The Minister, State Secretaries and ministerial officials cooperated to build up the liberal-democratic order of the Federal Republic of Germany and to develop the new state based on the rule of law. But in many respects, their activity was tainted by the legacy of Nazi injustice. Thus, staff recall the development phase at the Rosenberg after 1949 as being a strenuous, but also a successful period during which they worked with great personal commitment and untiring dedication on drafting the laws – and sometimes also on interpreting and commenting on them – and thus on helping to shape the internal organisation of the new democracy. Seen from the outside, the Rosenberg also was of good standing. The ministerial apparatus was regarded as knowledgeable and experienced. The officials were leading experts in their field and had a good reputation. They advised politicians, and through their usually technically sound draft laws, made a major contribution to pouring the political will into the abstract mould of legislation, thereby making it enforceable in the parliamentary process.

But there was another side to this superficially successful story. When Federal Minister of Justice Thomas Dehler and State Secretary Walter

Strauß developed the new Federal Ministry of Justice in 1949 in terms of its equipment and personnel, they did so following the structures of the former Reich Ministry of Justice. At the same time, they took over many staff, some of whom had already worked in judicial service before 1933, but many of whom had only made their careers in the “Third Reich”. In terms of its staff, the Federal Ministry of Justice was therefore tainted from the outset. Until the late 1950s, the extent to which members of staff in senior positions in the directorates-general and divisions had been involved with the Nazis even increased on account of promotions and only in the 1960s did it gradually decline, as can be seen in the personnel developments at the Ministry.

## **7. Personnel developments between 1949 and 1973**

With 67 planned civil servant posts, the Federal Ministry of Justice was the smallest Federal Ministry when it was set up in 1949. In 1973, at the end of the period under review, there were already 250 posts, but that meant that it was still a very small ministry.<sup>37</sup> The research of the Independent Commission, which was commissioned in 2012 to study the Ministry’s involvement with the Nazis, focussed on senior staff: Heads of Directorate-General, Deputy Heads of Directorate-General and Heads of Division (at that time they were referred to as Desk Officers), while in the case of the group then called Assistant Desk Officers (now called Desk Officers) there was greater fluctuation since most of these staff had been people seconded from the Länder for a period of only two to four years; this group was therefore not included in the study.

A total of 258 personal files were viewed, with the assessment focussing on those born before 1927 – some 170 individuals – who were at least 18 years old at the end of the war in 1945, who had completed their schooling in Nazi Germany, who might have worked in Nazi youth organisations and, as a rule, had completed labour service and served in the Wehrmacht. However, attention focussed on those individuals who were born in the first decade of the 20<sup>th</sup> century. They had completed their legal training before the war, had already worked as jurists during

the Nazi era before working in the Land judicial administrations or the Allied zones of administration after 1945 and finally came to the Federal Ministry of Justice.

The personnel files contained each individual's examination results in the First and Second State Examinations in Law and, if they had completed a doctorate, the date and grade achieved. The person's career before entering the Federal Ministry of Justice is given and any promotions within or outside the Ministry, for example to become a Federal Judge at the Federal Court of Justice. Of particular interest was any mention of membership of the Nazi Party (NSDAP) or its divisions or affiliated organisations such as the SA, National Socialist Motor Corps (NSKK), National Socialist Flying Corps (NSFK) or, of particular relevance for legal professionals, the National Socialist Association of German Legal Professionals (NSRB). As well as these memberships, however, official positions such as Block Leader (*Blockführer*) and labour, military and war service including the dates of recruitment and military decorations and, if relevant, the date of return from war captivity are also noted. Finally, the personnel files also indicate whether the person underwent denazification, information on the trial before the denazification tribunal as well as on the category in which the person concerned was placed. This information allows conclusions to be drawn both concerning the qualifications of the staff and on their involvement with the Nazis, both in the formal sense of membership and in the sense of activities within Nazi organisations. Any earlier judicial activity of the individuals examined, particularly in the Reich Ministry of Justice (RJM), may be relevant to an evaluation. It is also of significance in connection with the recruiting policy of the early Federal Ministry of Justice how the person concerned re-entered the judicial system between 1945 and 1949.

The files bear out the claim by Minister Dehler and State Secretary Strauß that specialised qualifications were the decisive criterion for being accepted for service in the Ministry. Of the 170 persons who were subjected to close examination for this study, 155 were fully-qualified

jurists, 94 of whom had achieved an examination grade of fully satisfactory to very good – i.e. “honours” in the State Examination. Eight had achieved an examination grade of “very good” (5 percent), 66 “good” (43 percent) and 20 “fully satisfactory” (13 percent). Thus, more than 60 percent of the fully-qualified jurists working as heads of division or heads or deputy heads of directorate-general at the Federal Ministry of Justice had an honours degree. Considering the fact that as a rule only about 15 percent of examination candidates achieve a grade of “fully satisfactory” or better, this means that, judging solely on the basis of their examination results, this was a notable gathering of outstanding lawyers.

If one takes doctorates as an additional measure of quality, this impression is confirmed further. Of the 155 fully-qualified jurists, a total of 90 had completed a doctorate and a further two had been awarded an honorary doctorate. This corresponds to a proportion of 58 percent holding doctorates. It should be considered, however, that doctoral theses in law written between the 1920s and the 1940s were generally less than 100 pages in length and it was possible to write them alongside training during the three-year training period. On the other hand, it should not be overlooked that the technical aids to prepare a manuscript were still very limited and access to sources and literature caused considerable problems, particularly in the early post-war period. In the case of 17 of the 90 doctorates, it was not possible to determine the date of completion. 28 doctoral proceedings were carried out after 1945 and 19 in the period before 1933. Thus, at least 28 individuals completed their doctorates in the period between 1933 and 1945. In view of the “enforced conformity” of the universities, there was the danger that National Socialist legal views were presented in their writings. Thus, to the extent that this was possible, these persons’ doctoral theses were viewed. While they did indeed contain some passages that paid tribute to the “new legal thinking”, some theses were written in a much more liberal spirit.

### Membership of Nazi organisations

Of the 170 persons examined who were born before 1927 and thus had their own Nazi biography, 90 – i.e. some 53 percent – were members of the Nazi Party. None of the Federal Ministry of Justice staff observed had joined the party before the Nazis seized power on 30 January 1933, but as many as 23 had acquired their membership in the year 1933. The majority (34) were only allowed to join the party on 1 May 1937, after the party leadership had relaxed the block on new membership that had been introduced on 19 April 1933 in order to avoid a rush of opportunistically-motivated membership applications after the seizure of power.<sup>38</sup> The other members of staff at the Federal Ministry of Justice who belonged to the Nazi Party only joined after 1 May 1937. All the party members were also members of the National Socialist of German Legal Professionals (NSRB) or, before 1936, its predecessor organisation, the Federation of National Socialist German Legal Professionals (BNSDJ).

34 people, i.e. 20 percent of the staff examined, were also members of the SA. No evidence was found of anyone joining the SA before 1933. However, 27 persons joined in 1933, of whom another 19 were only accepted as Nazi Party members in 1937. Thus, following the block on new membership of the Nazi Party, SA membership was evidently regarded as a suitable alternative, either to express that one shared the Nazis' objectives or in the hope that a visible demonstration of loyalty would benefit one's legal career.

Only six individuals were members of the SS, representing a share of 3.5 percent of all the individuals surveyed. Of these six SS members, three left again between 1936 and 1939. One application was apparently withdrawn. One person claimed to have been only a "funding member" until 1939. One member said that he had worked for the Security Service of the Reichsführer-SS.<sup>39</sup> Overall, then, former SS memberships played only an insignificant role among the staff of the Federal Ministry of Justice after 1949.

This picture may be further differentiated with regard to the overall Rosenberg period, put into chronological order and presented in relation to the respective size of the Ministry.<sup>40</sup> To this end, five samples were taken: in 1950, 1957, 1963, 1969 and 1973 (cf. diagram 1). They indicated that 35 people were working as heads of directorate-general or heads of division at the Ministry in 1950. 18 of them (51 percent) had been members of the Nazi Party, and 11 (29 percent) had belonged to the SA. Of the four heads of directorate-general (at this time, Directorate-General Z was still under the personal directorship of State Secretary Strauß), however, only one had been a party member. In 1957, 55 people were found to have a formal Nazi past: 42 (76 percent) had been in the Nazi Party and 18 (33 percent) in the SA, although none of the heads of directorate-general had belonged to the Nazi Party.

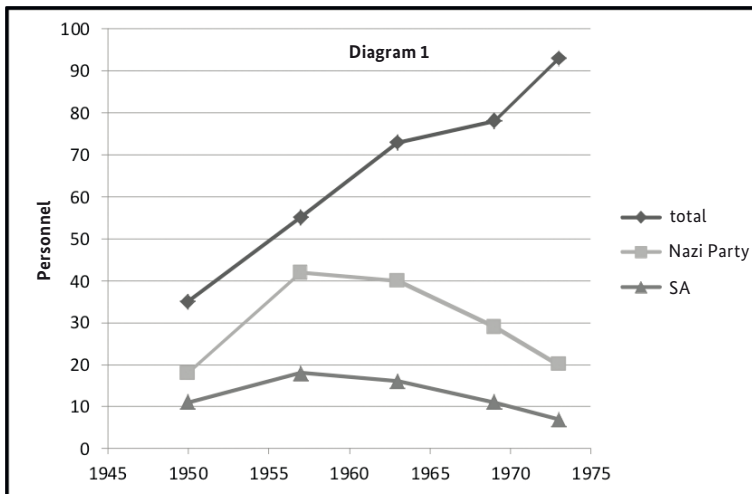


Diagram 1: Personnel developments at the Federal Ministry of Justice between 1950 and 1973 and membership of the Nazi Party and the SA.

However, three of the eight deputy heads of directorate-general had been in the party. In 1963, there were 73 people who had a Nazi past, of whom 40 (55 percent) had belonged to the Nazi Party and 16 (22 percent) had belonged to the SA. Of the Ministry staff in senior positions, two



(and from 1966 onwards three) out of five heads of directorate-general and as many as six out of ten deputy heads of directorate-general were former party members. In 1969, it may be assumed that there were 78 senior members of staff, of whom 29 (37 percent) had belonged to the Nazi Party and eleven (14 percent) had belonged to the SA. Of the heads of division at this time, there were still three former Nazi Party members and of the eleven deputy heads of division there were still five former Nazi Party members. When the Ministry left the Rosenberg in 1973, there were 93 people to whom the specified criteria applied, of whom there were still 20, or 22 percent, who had carried a Nazi Party card. Seven people, or 8 percent, had been in the SA. Three out of six heads of directorate-general and four out of twelve deputy heads of directorate-general had been Nazi Party members.

The graph shows the overproportionate increase in the number of former Nazi Party and SA members in the ranks of senior Federal Ministry of Justice staff in the 1950s. From the early 1960s, the number of “tainted” former Nazi Party members saw a continuous decline. The Ministry was not free of former Nazi Party members until the retirement of deputy directors-general Gerhard Marquardt and Rudolf Franta in 1978 and of director-general Dr Günther Schmidt-Räntsch in 1986.

On average, the number of former Nazi Party members during the period under review was significantly more than 50 percent and in some directorates-general it was even more than 70 percent at times. What was even more important than membership of the Nazi Party or SA, however, was the fact that many senior members of staff had been directly involved in implementing the “will of the Führer” in the ministries of the Nazi state before 1945. Through their work in courts, inter alia in the “special courts” of the “Third Reich” or courts in the “occupied territories” or in military tribunals, others had applied the criminal laws that had been prepared and expedited in the former Reich Ministry of Justice, thereby assuming a heavy burden of personal culpability.

A total of 16 people were identified who had performed an activity in the field of the political or military judicial system during the “Third Reich”. This is a proportion of approximately 10 percent of the total number of senior staff of the Federal Ministry of Justice. Six of them had worked at special courts, one as an investigative judge at the People’s Court and nine in military tribunals. The numbers of staff who had worked in the Reich Ministry of Justice and in the system of judicial policymaking cannot be merely added, however, because there was a certain level of staff fluctuation. At least three of the nine jurists in the military tribunals, for example, were also employed at the Reich Ministry of Justice.

Yet criminal proceedings in connection with Nazi crimes were only initiated against Ministry members of staff in exceptional cases. There was a total of ten proceedings, which appears to be a not insignificant number in view of the small size of the Federal Ministry of Justice at the beginning of the 1950s. But in most cases, the proceedings, most of which were based on criminal complaints by private individuals, were soon closed. In just one case – that of Head of Division Heinrich Ebersberg – a different outcome might have been reached in the late 1960s. However, the statute of limitations worked in his favour.

Thus, it is difficult to answer the question of why the two “founding fathers” of the Ministry of Justice in particular, Thomas Dehler and Walter Strauß, selected such problematical individuals for their Ministry and failed to target and recruit returned emigrants or to seek staff who did not have a Nazi past from the outset. The two men themselves were both wholly “untainted.” Dehler’s wife was Jewish and Strauß had Jewish parents. Both of them suffered discrimination during the “Third Reich”; Strauß only just managed to survive. Yet they did not shy away from employing staff who had a Nazi past. Their most important selection criteria were specialist competence and ministerial experience. Personal acquaintance and, to a lesser extent, political recommendation also played a part. The “networks” of Dehler in Bamberg and Strauß in the

business administration of the Bizone in Frankfurt am Main played a role. Political encumbrances from the Nazi era, on the other hand, were much less significant. They were always an issue and were often discussed internally. However, the evidence suggests that they only rarely led to a desired member of staff being refused employment.

The primary concern of both Dehler and Strauß was to ensure the Ministry's ability to work, which they believed could only be guaranteed if its members had the necessary specialist competence and experience. Before 1933, Strauß himself had worked at the Reich Ministry of Economics. In his speech on 30 October 1957 to mark the occasion of Federal Minister of Justice Hans-Joachim von Merkatz handing over office to his successor Fritz Schäffer, Strauß therefore spoke explicitly of "valuable experience" that had been brought into the work of the Federal Ministry of Justice "from past decades, in spite of the dozen-year Reich" and said:

*"A not insignificant proportion of us used to work in the Reich ministries and I believe that if we did not have these colleagues and their experiences, we would not have been in a position to complete the work of the last eight years."*<sup>41</sup>

On other occasions, Strauß often used the notion of the "apolitical civil servant." No such person had existed during the "Third Reich", however, and nor did any such person exist later, because they were a myth. An imaginary figure that could not exist, at least not at ministerial level, because proximity to politics and political consultancy are part of the essence and the core tasks of ministerial administration.

What Strauß meant was something different, however. He referred to the fact that the jurists' technical skills can be quickly adapted to the respective political situation and wishes and that legal activity is thus basically independent from the respective regime provided the jurist does not have a conscience of his own. While this statement applied to

many professions, jurists fulfil a central function within the system of government in that they help to draft laws without having to bear direct political responsibility for them and are crucially involved in enforcing the law as public prosecutors and judges. They are thus “technicians of power” and contribute to safeguarding power and stabilising political regimes. In the “Third Reich”, this “instrumentalisation” of judges was largely, almost entirely, successful – the question as to whether they acted from inner conviction, pragmatic career designs or under pressure to conform was all too often no longer asked after 1949. It is thus not surprising that Dehler and Strauß, as well as the Ministers and State Secretaries who succeeded them, sought previous experience of working in a Ministry when selecting staff (cf. diagram 2).

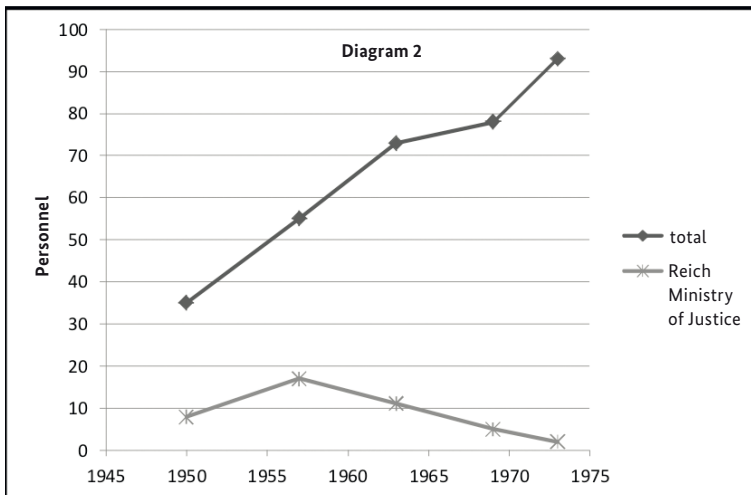


Diagram 2: Personnel developments at the Federal Ministry of Justice between 1950 and 1973 and ministerial experience in the Reich Ministry of Justice

This was because there was little difference between the legal skills civil servants in the Federal Ministry of Justice were required to have and those considered important in the Reich Ministry of Justice. One could make the cynical statement that it does not matter to a legal practitioner whether he drafts a law banning “mixed marriages” or a law

for the equal treatment of children born in and out of wedlock under inheritance law. In fact, some staff at the Rosenberg did precisely that. They had drafted the “Habitual Criminals Act” in the “Third Reich” and now determined the discussion on criminal law reform. They had worked on the reform of the Juvenile Criminal Code in 1943 and were now responsible for reforming the Juvenile Courts Act of 1953. They had worked as judges in military courts in the Wehrmacht or in military tribunals of the “Third Reich” and were now planning a new military penal law for the Federal Armed Forces. It was a similar situation with regard to family law, foreclosure law and corporate business law. Accordingly, ministerial experience was another criterion in recruiting staff for the Federal Ministry of Justice after 1949, and there is statistical evidence for this. Thus, of a total of 170 people, 27 senior staff of the Federal Ministry of Justice were former members of staff of the Reich Ministry of Justice (16 percent). Of these, eight were taken over by the Federal Ministry of Justice as early as in 1949, with a further eight joining in 1950. The other eleven were employed in the period up to 1955. All former members of staff of the Reich Ministry of Justice had been members of the National Socialist Association of German Legal Professionals.

Of the 170 people examined, 107 were former war combatants, a proportion of 63 percent. It is striking that the number of combatants continued to grow strongly for a long time, only falling again in the mid-1960s. In 1950, 20 out of 35 people, or 57 percent, had been in the Wehrmacht. In 1957, the number was 40 out of 55 (73 percent) and in 1963, it was 49 out of 73 (67 percent). The number subsequently declined. But in 1969, too, the figure was still 42 out of the 78 staff examined (54 percent) and in 1973 it was still 28 out of 93 staff who were former members of the Wehrmacht, i.e. 30 percent (cf. diagram 3).

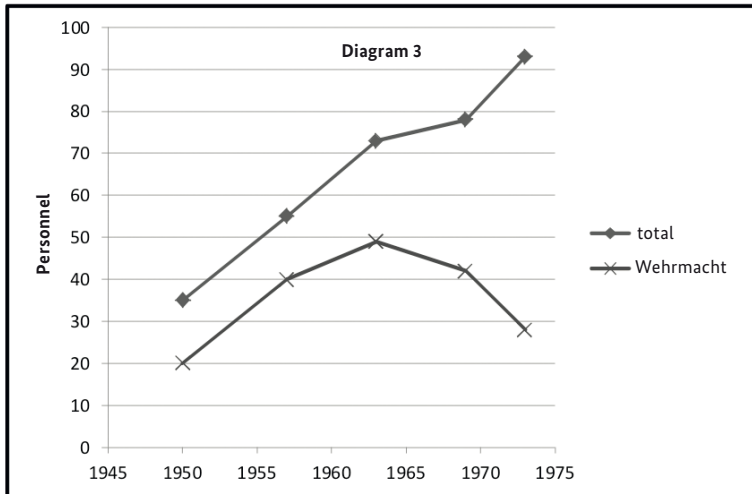


Diagram 3: Personnel developments at the Federal Ministry of Justice between 1949 and 1973 and proportion of former members of the Wehrmacht

### Recruitment from the zones of administration and “131ers”

A major factor for employing staff in the service of the Federal Ministry of Justice was in many cases earlier employment in the German zones of administration after 1945. There were some conspicuous cases of “marching through”, i.e. former staff of the Reich Ministry of Justice who were taken on by a zone of administration and then moved to the Rosenberg. Work in a zone of administration was relevant for two reasons. Firstly, administrative experience was highly desirable. Secondly, State Secretary Strauß had worked in a senior position in the Bizon Office of Economics and Law in Frankfurt and he therefore knew many people who were possible candidates for employment in the Federal Ministry of Justice or who could make recommendations and useful suggestions.

Thus, in the early years, a total of 25 people were recruited from the zones of administration. In 1950, as many as 11 out of 35, or 31 percent, of heads of division came directly from a zone of administration. The

provision of the 131 Law for the Reinstatement of individuals who had been civil service staff members before 1945 was also significant. A total of 36 staff at the Federal Ministry of Justice were employed on the basis of this provision. Six heads of division came to the Ministry as early as 1950 (17 percent), and in 1957 the number was as many as 18 out of 55, i.e. 33 percent.

Most ministerial civil servants who arrived at the Federal Ministry of Justice after 1949 had thoroughly conservative attitudes often based on pre-1933 traditions of the old civil service and regarded the Nazi dictatorship as a phase marked by a “misguided” understanding of the law. Indeed, in the drafting of the new laws, it was practically impossible to make out any Nazi ideology. This was prevented because parliamentary control functioned well and the general framework conditions under which the Federal Republic of Germany had become part of the Western community of values no longer permitted a simple continuation of politically discredited legal principles. Thus, there were at most isolated links with earlier notions, which were not necessarily based on the personal experience during the Nazi era of those who were now involved in drafting the relevant laws in the Federal Republic of Germany, but often corresponded to the *zeitgeist*, which had hardly changed in German society from the 1930s to the mid 1960s and only later gave way to new values which then also had an impact on legislation.<sup>42</sup> Thus, the legislation of the 1950s displays tendencies in some areas, for example family law or juvenile penal law, to refer back to the period before 1945 rather than to have an influence in the sense of adapting the law to modern social ideas. But often, there was also a lack of the necessary political-historical sensitivity to recognise, and thus avoid, Nazi patterns of thought. This was evident, for example, in dealing with clemency law where the “Führer’s” clemency order of 1935 was simply retained – albeit “with the omission” of the specific “Führer provisions” – because it was evidently considered to be unproblematic as an administrative provision.

## **8. The Federal Ministry of Justice and the prosecution of Nazi criminals**

The intrinsic links with the “Third Reich” were expressed in a particularly problematical way, however, in the prosecution of Nazi criminals, which was virtually prevented by the German judiciary – not least with the advice and assistance of the Federal Ministry of Justice. Urged by the Federal Government and under pressure from the German public, the Ministry prepared the immunity laws of 1949 and 1954, under which, until 1958, practically all Nazi criminals were released or spared further prosecution. The Ulm Deployment Group Trial of 1958, the Auschwitz trials in the 1960s and the decade-long delays in lifting unjust Nazi judgments are examples of the difficulties in dealing with the Nazi past under criminal law. In addition, the question of limitation that was discussed at various stages was undermined by the above-mentioned Introductory Act to the Act on Regulatory Offences of 10 May 1968. In this connection, the activities of the central division providing legal protection to prevent the prosecution of Germans abroad should also be mentioned and, as an example, the much-delayed suspension of the hereditary health judgments, which did not take place until the 1990s.

The Federal Ministry of Justice played a leading part in all these developments. That this was the case is to be explained above all by the reinstatement of the old elites, by no means only in the judicial field. The efforts of the Federal Government to draw on experienced administrative staff to ensure a smooth functional transition from the “Third Reich” to the Federal Republic of Germany and in particular to ensure that the civil service was committed to the new state thus not only led to a positive “achievement of integration”, which proved useful for the Federal Republic’s inner stability, but also had foreseeable negative effects. Thus, it may be shown by looking at the example of the Federal Ministry of Justice in the 1950s and 1960s that there was a direct correlation between the Nazi past of a number of directorates-general and the content of their legislative drafts. The penal legislation for the protection of the state and the military penal judicial system are just two examples.



The past could never be completely suppressed, however. First of all, it had to be at least considered when members of staff were employed. Then, propagandist revelations by the GDR in the context of the so-called “Brown Book Campaign” provoked a response. And finally, criminal charges against Ministry staff triggered internal investigations on the part of Directorate-General Z, particularly the Personnel Division. However, all the accusations were dismissed as “communist attacks”. Although all the reports were followed up, no genuinely critical assessment was made; the people concerned were merely asked to make statements that were summarised and evaluated by other Ministry staff – usually Josef Schafheutle, who himself bore a heavy burden of guilt. Thus, the accusations rarely had any negative consequences. Only in one case (Heinrich Ebersberg) did the examination lead to him not being promoted. Another person (Max Merten) left the Ministry following substantiation of the accusations made against him. And in the case of Eduard Dreher, his Nazi past may also have been a barrier to promotion; this is not recorded in the files, however.

When the Federal Ministry of Justice left the Rosenberg in 1973 and relocated to new premises in the “Kreuzbauten” (cross-shaped buildings) in Bad Godesberg, most of the staff with a Nazi-tainted past at the Federal Ministry of Justice had left the Ministry on account of their age. Yet the past still cast a shadow, as demonstrated by the discussion about compensation for the victims of forced labour and Nazi injustice. One contributing factor was the failure to act in the early years of the Federal Republic of Germany, when the mentality of “drawing a line under the past” and the demand for state normality had led to the exculpation of many Nazi perpetrators. Another contributing factor was the fact that it had taken far too long for a “critical reappraisal” of the Nazi past to be made, not least in the responsible ministries and public authorities of the Federal Republic of Germany.

- <sup>1</sup> Manfred Görtemaker and Christoph Safferling, *Die Akte Rosenberg. Das Bundesministerium der Justiz und die NS-Zeit*, Munich 2016.
- <sup>2</sup> Eckart Conze / Norbert Frei / Peter Hayes / Moshe Zimmermann, *Das Amt und die Vergangenheit. Deutsche Diplomaten im Dritten Reich und in der Bundesrepublik*. In collaboration with Annette Weinke and Andrea Wiegeshoff, Munich 2010.
- <sup>3</sup> Imanuel Baumann / Herbert Reinke / Andrej Stephan / Patrick Wagner, *Schatten der Vergangenheit. Das BKA und seine Gründungsgeneration in der frühen Bundesrepublik*, Cologne 2011.
- <sup>4</sup> Constantin Goscshler and Michael Wala, "Keine neue Gestapo". *Das Bundesamt für Verfassungsschutz und die NS-Vergangenheit*, Reinbek 2015.
- <sup>5</sup> A survey of the individual research commissions is provided by the study by Christian Mentel and Niels Weise, *Die Zentralen Deutschen Behörden und der Nationalsozialismus. Stand und Perspektiven der Forschung*, Munich/Potsdam 2016.
- <sup>6</sup> Coalition Agreement between the CDU, CSU and SPD, *Deutschlands Zukunft gestalten*, 18th legislative period, 2013, p. 130.
- <sup>7</sup> On this subject, cf. the detailed account by Manfred Görtemaker, 'In eigener Sache. Das BMJ und seine Beiträge zur Aufarbeitung der NS-Vergangenheit', in: Manfred Görtemaker and Christoph Safferling (eds.), *Die Rosenberg. Das Bundesministerium der Justiz und die NS-Vergangenheit – eine Bestandsaufnahme*, Göttingen 2013, pp. 17–42.
- <sup>8</sup> Federal Law Gazette I 2007, 2614 Article 4 of the German Act for the Removal of Obsolete Sections of the Occupation Law (*Gesetz zur Bereinigung des Besatzungsrechts*) Section 1 (2).
- <sup>9</sup> Cf. Oliver Schröm and Andrea Röpke, *Stille Hilfe für braune Kameraden. Das geheime Netzwerk der Alt- und Neonazis*, second edition, Berlin 2002.
- <sup>10</sup> Görtemaker and Safferling (eds.), *Die Rosenberg*, passim.
- <sup>11</sup> Concerning the Gürtner era, see in particular Lothar Gruchmann, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, 3rd edition, Munich 2001. Cf. also Ekkehard Reitter, Franz Gürtner. *Politische Biographie eines deutschen Juristen*, Berlin 1976. Concerning the Thierack era, see in particular Sarah Schädler, "Justizkrise" und "Justizreform" im Nationalsozialismus. *Das Reichsjustizministerium unter Reichsjustizminister Thierack (1942–1945)*, Tübingen 2009.
- <sup>12</sup> A similar exhibition followed after German reunification, also commissioned by the Federal Ministry of Justice, on the subject of "In the Name of the People? The Judiciary in the State of the Socialist Unity Party of Germany". It was prompted by a suggestion by judges, public prosecutors and civil rights activists in the new Federal Länder and, on 75 panels featuring more than 200 reproduced documents, diagrams and photographs, showed the abuse of a judiciary without independent judges in the dictatorship under the Social Unity Party of Germany. The exhibition opened in Berlin in 1994 and was then shown until 1999 in many cities, mainly in East Germany, but also in Braunschweig and Karlsruhe. Since then it has been on permanent display at the Moritzplatz Magdeburg Memorial. On this subject, see Federal Ministry of Justice (ed.), *Im Namen des Volkes? Über die Justiz im Staat der SED*. Two volumes: documents and catalogue, Leipzig 1996.
- <sup>13</sup> Ingo Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz*, Munich 1987 (7th, revised new edition, Berlin 2014).
- <sup>14</sup> Norbert Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*, Munich 1996.
- <sup>15</sup> Marc von Miquel, *Ahnden oder amnestieren? Westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren*, Göttingen 2004.
- <sup>16</sup> Jörg Friedrich, *Freispruch für die Nazi-Justiz. Die Urteile gegen NS-Richter seit 1948. Eine Dokumentation*, Reinbek 1983 (revised and extended edition, Berlin 1998). Ibid., *Die kalte Amnestie. NS-Täter in der Bundesrepublik*, Frankfurt am Main 1984 (extended new edition, Berlin 2007).
- <sup>17</sup> Hubert Rottleuthner, *Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945*, Berlin 2010. See also Hubert Rottleuthner, 'Hat Dreher gedreht? Über Unverständnis

lichkeit, Unverständnis und Nichtverstehen in Gesetzgebung und Forschung', in: *Rechts-historisches Journal*, no. 20, 2001, pp. 665-679; revised version in Kent D. Lerch (ed.), *Die Sprache des Rechts. Bd. 1: Recht verstehen*, Berlin 2004, pp. 307-320.

<sup>18</sup> Judgment of the Federal Court of Justice against Thorbeck, in: BGH, 19.06.1956 – 1 StR 50/56. Abt. C I. Quoted from: NSTZ 1996, p. 485-489.

<sup>19</sup> Federal Court of Justice, 19.06.1956 – 1 StR 50/56, Abt. C II 1 b.

<sup>20</sup> Ralph Giordano, *Die zweite Schuld oder von der Last Deutscher zu sein*, Hamburg 1987

<sup>21</sup> Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', in: *Süddeutsche Juristenzeitung (SJZ)* 1946, pp. 105-108.

<sup>22</sup> Ibid.

<sup>23</sup> Judgment in the Nuremberg Justice Trial, in: *BArch, All. Proz.* 1, XVII, S1 p. 56.

<sup>24</sup> Taylor states there: "The temple of justice must be reconsecrated." Quoted from: United States Government Printing Office, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. III, p. 34.

<sup>25</sup> Cf. the survey by Gerhard Paul (ed.), *Die Täter der Shoah. Fanatische Nationalsozialisten oder ganz normale Deutsche?* Göttingen 2002, p. 17. See also Peter Longerich, 'Tendenzen und Perspektiven der Täterforschung', in: *Aus Politik und Zeitgeschichte*, H. 14-15/2007, pp. 3-7; and Wolfgang Gippert, 'Neue Tendenzen in der NS-Täterforschung', in: *Zukunft braucht Erinnerung*, online portal, 27 September 2006.

<sup>26</sup> Paul, *Die Täter der Shoah*, p. 20.

<sup>27</sup> Daniel Jonah Goldhagen, *Hitlers willige Vollstrecker. Ganz gewöhnliche Deutsche und der Holocaust*, Berlin 1996. On this subject, cf. also Julius H. Schoeps (ed.), *Ein Volk von Mördern? Die Dokumentation zur Goldhagen-Kontroverse um die Rolle der Deutschen im Holocaust*, Hamburg 1996.

<sup>28</sup> Christopher R. Browning, *Ordinary Men. Reserve Police Battalion 101 and the Final Solution in Poland*, New York 1992; Karin Orth, *Die Konzentrationslager-SS. Sozialstrukturelle Analysen und biographische Studien*, Göttingen 2000; Michael Wildt, *Generation des Unbedingten. Das Führungskorps des Reichssicherheitshauptamtes*, Hamburg 2002; Klaus-Michael Mallmann, 'Vom Fußvolk der „Endlösung“. Ordnungspolizei, Ostkrieg und Judenmord', in: *Tel Aviv Jahrbuch für deutsche Geschichte*, 16 (1997), pp. 355-391.

<sup>29</sup> On the subject of the dispute concerning the Wehrmacht exhibition, see Christian Hartmann et al., *Verbrechen der Wehrmacht. Bilanz einer Debatte*, Munich 2005.

<sup>30</sup> Gerhard Paul and Klaus-Michael Mallmann, 'Sozialisation, Milieu und Gewalt. Fortschritte und Probleme der neueren Täterforschung', in: Paul Mallmann and Gerhard Paul (eds.), *Karrieren der Gewalt. Nationalsozialistische Täterbiographien*, Darmstadt 2004, pp. 1-32.

<sup>31</sup> Paul, *Die Täter der Shoah*, p. 62. On this subject, cf. also: 'Täterforschung als Kulturgeschichte. Ein neuer Blick auf die Ludwigsburger Akten', in: *Mitteilungen aus dem Bundesarchiv*, Themenheft 2008.

<sup>32</sup> Gerhard Hirschfeld, *Karrieren im Nationalsozialismus. Funktionseliten zwischen Mitwirkung und Distanz*, Frankfurt am Main and New York 2004, p. 10.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid., p. 11.

<sup>35</sup> Max Frisch, *Tagebuch 1946-1949*, Frankfurt am Main 1950, p. 286 (entry headed Hamburg, November 1948).

<sup>36</sup> German Bundestag, web and text archive, 2013.

<sup>37</sup> On this subject, cf. Jan Schröder, 'Das Bundesministerium der Justiz und die Justizgesetzgebung 1949-1989', in: Federal Ministry of Justice (ed.), *40 Jahre Rechtspolitik im freiheitlichen Rechtsstaat*, Bonn 1989, pp. 12, 26 f., 40.

<sup>38</sup> The ban on new memberships was not completely lifted until 10 May 1939. The order of 19 April 1933 was issued by Franz Xaver Schwarz, Reich Treasurer of the Nazi Party, and came into force on 1 May 1933. Those who joined the Nazi Party in the spring of 1933 were often not regarded in party circles as credible, convinced Nazi Party supporters, but were considered to be riding the gravy train and were disparagingly referred to as "killed in action in March" an allusion to the revolution of March 1848.

<sup>39</sup> The person involved here was Hans-Eberhard Rotberg, Head of Directorate-General II, later a judge at the Federal Court of Justice. A more detailed account of this story is given in his biography.

<sup>40</sup> On this subject, cf. also the statements by Joachim Rückert, 'Einige Bemerkungen über Mitläufer, Weiterläufer und andere Läufer im Bundesministerium der Justiz nach 1949', in: Görtemaker und Safferling (eds.), *Die Rosenberg*, p. 66 ff.

<sup>41</sup> State Secretary Dr Strauß, speech on the occasion of taking up office on 30 October 1957, in: *Ansprachen aus Anlaß von Amtsübergaben (Minister, Staatssekretäre) im Bundesministerium der Justiz Bonn 1953-1971*, Bonn, undated typewritten manuscript, p. 3 f.

<sup>42</sup> On this subject, cf. the study by Elisabeth Noelle-Neumann, *Werden wir alle Proletarier? Wertewandel in unserer Gesellschaft*, Zürich 1978, p. 8 and 10 ff. Noelle-Neumann remarks here that studies based on opinion polls had found that the "bourgeois values" that had hardly changed since the beginning of the 18th century only gave way to a new understanding of values in German society during the period between 1967 and 1972.

# Imprint

Published by the Federal Ministry of Justice and Consumer Protection, Division  
for Public Relations; Digital Communication

Mohrenstraße 37

10117 Berlin

Tel. +49 30 18 580-0

Fax: +49 30 18 580-9046

**Weblinks:**

[www.bmjv.de](http://www.bmjv.de)

[www.bmjv.de/Rosenburg](http://www.bmjv.de/Rosenburg)

**Design:**

Trautmann Marken

Bad Breisig

**Print:**

Printing and Publishing House Zarbock GmbH & Co. KG

Sontraer Straße 6

60386 Frankfurt am Main

**Picture credits:**

Page 2 Thomas Köhler/photothek.net

Page 4 Ralf Hirschberger (Görtemaker), Georg Poehlein (Safferling)

Situation as of April 2017

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