## Developments

# *Review Essay* – The Criminal Judge as Modern Inquisitor

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**[Volker Haas, *Strafbegriff, Staatsverständnis und Prozessstruktur*, Mohr Siebeck, Tübingen 2008; 508 pp., ISBN: 978-3-16-149402-4, €109.00]**

The term "inquisition" has had bad press for a long time. Comparably bad is the reputation of the inquisitorial system, a judicial model that dominated German criminal law enforcement until the beginning of the 19th century. A distinctive feature of inquisitorial proceedings is the eminently strong position of the inquisitor who unifies the functions of an investigator, a prosecutor, and a judge in one and the same person. Although the codes of criminal procedure in the German states – which in 1871 formed the *Kaiserreich* (German Empire of 1871-1918)– included detailed rules of evidence to prevent arbitrary investigations, at the beginning of the 19th century it was a common opinion that these control mechanisms were practically insufficient and that the inquisitorial system ought to be replaced by a judicial model, which would guarantee more effective protection of the defendant against unjustified conviction.

In the decades following the revolutionary year 1848, a reformed criminal procedure was implemented. Alongside the introduction of public trials and the implementation of a jury system, the installation of a stand-alone public prosecutor was its most important innovation, as, in general, the prosecutor now had to bring charges against a person before the court started its work. Today's law students are usually told that with the new criminal procedure model, whose main features are still valid, obscurant inquisition proceedings were finally overcome and a bright liberal future began. However, both historic legislators and contemporary lawyers adopted a different point of view. As the official legislative intent shows, the position of the judge should basically remain the same as before. And indeed, even today criminal courts still function as institutions that both prosecute and punish since the control over criminal proceedings passes from the prosecutor to the court once the court has ordered that a case is going to trial. From this point on, the court is not bound to the petitions of the prosecutor or the defendant. Rather, the judge may deploy

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all means that he considers to be necessary to clear up the truth – just as courts had done before. Thus, the principle of inquisition has weathered the introduction of the accusation form.

However, by the 19th century an alternative model would have been available: Criminal proceedings could have been designed according to the adversary system – well known to common law countries. According to this system, a criminal trial would have become a proper legal dispute in which the prosecutor would have assumed the role of a party which has the power to dispose of the state's rights and that acts on the same procedural level as the defendant. So, why did the historic legislator opt against the model of adversarial proceedings and modify the inquisition proceedings instead, and are these reasons still valid today? These questions are so obvious that one would expect relevant studies to fill a library on their own. The impressive *Habilitation* (professorial thesis) by Volker Haas shows that such books are lacking. In the past, the theory of criminal procedure, a once flourishing branch of German legal science, was crumbled between a petty jurisprudence designed to fulfil the needs of judiciary's daily routine and a permanent political excitement of those who smell danger for the rule of law in every new legislative authorization for the law enforcement bodies. With Haas' book, the theory of criminal procedure spectacularly returns.

Haas proves that the decision against the adversary system was primarily founded on considerations that stem from particular philosophical conceptualizations of the State. In particular, adversarial proceedings were regarded as incompatible with the contemporary idea of sovereignty, since the monarchy kept an absolutist flavour even in the political compromise model of the so-called *konstitutionelle Monarchie* (constitutional monarchy), which was established after the victory over Napoleon. It was felt that, if the judge were allowed to decide impartially, the regent would lose his sovereignty, which was still conceived to be comprehensive. The judge, a servant of the regent, should not rise above his master. For that reason, even Paul Laband, the leading state law scholar of the German *Kaiserreich*, reduced criminal jurisdiction to the status of a "form", in which the ruler's right is being executed. Settling legal disputes in a neutral manner was a task reserved for civil law courts whereas a criminal judge was expected to do nothing less than putting material justice into practise. To that end, the judge –like a Hercules of law – was expected to investigate what had actually happened. This emphatic description of the task of criminal jurisdiction as well as the exaggeration of the State to a moral power – a tendency which was closely linked with Hegelianism – steadied themselves. It is not clear to me what this means The result was the decision for the inquisitorial model.

In our times of sober legal thinking, such pathos may, at best, evoke astonishment. The argument of sovereignty has, most recently, been outpaced by the implementation of an independent administrative jurisdiction, which settles disputes between a citizen and the State as parties of equal rights. The claim that criminal law shall put justice into practise as well as the idea of the State being a moral subject are inconsistent with today's almost

commonly accepted conceptualization of the State as a service provider for its citizens. In short: The theoretical foundation on which the German criminal procedure was founded has long disappeared.

Haas draws harsh conclusions from these findings. Since the current arrangement of criminal proceedings "perpetuates a spirit which is in diametric contrast to the spirit of the *Grundgesetz* [*i.e.* the German constitution]", for him it is time to break from the inquisitorial model. He points out that according to the present system the criminal judge acts in two different roles: on the one hand, the judge executes his procedural powers to investigate the case and to find all necessary facts, while, on the other hand, he is supposed to decide as a neutral person whether the accusations brought against the defendant are justified. To Haas, both process roles are "incompatible" and the combination of these roles violates the constitutional rights of the defendant.

But is this grim "all-or-none" actually compellable? Is it an advantage for defendants, especially for the many that come from a precarious social milieu, when they face a formally equal, but materially superior prosecution all alone and look into the impermeable face of an uninvolved observer when they turn to the judge's desk? The conceivable solution of assigning lawyers to every defendant (by the way: who should pay for that?) would not be of great help. Every judge can tell plenty of stories about the mischief bad lawyers do. The hands of a judge treat defendants with more care than disinterested low-grade lawyers would. Thus, German criminal jurisdiction – just like other institutions – has undergone a silent replacement of its foundations. Whereas the 19$^{th}$ century made a claim for striving after justice, today's defenders of the inquisitorial system can refer to the State's duty to care for the weakest of its citizens who, in a criminal court, are confronted with an extraordinarily critical situation. To dismiss this, like Haas does, as an expression of an "authoritarian patriarchal legal culture" is rather sweeping, for this argument can be brought against any social activity of modern states. Therefore, the reproach of "the unconstitutionality of the current legal situation" can be turned against Haas' own position. Isn't his plea for an adversary system founded on a merely formal conception of freedom that runs contrary to the principles of a welfare state guaranteed by the German constitution? Haas' central thesis hence stands on shaky ground. But even his miscarriage is more inspiring than the boring correctness of scientific mass-production.

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