האוניברסיטה העברית בירושלים
THE HEBREW UNIVERSITY OF JERUSALEM

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Administrative Penalties in the Rechtsstaat: On the Emergence of the Ordnungswidrigkeit Sanctioning System in Post-War Germany

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Abstract[*]

Under current German law, administrative authorities are vested with the power to impose a monetary penalty and other designated sanctions for a violation that is statutorily categorised as an *Ordnungswidrigkeit*, rather than as a criminal offence. Generally speaking, the accelerating tendency in Western jurisdictions to resort to administrative penalties has been ascribed to the need to develop alternatives to the criminal sanctioning process in order to lessen judicial workload and streamline procedures, so as to effectively induce compliance through speedy enforcement. This paper, however, articulates the historical singularity of the German experience with administrative penalties. Specifically, it draws attention to the numerous links between the major statutory developments through which the *Ordnungswidrigkeit* sanctioning system took shape and the larger economic, political and social changes that unfolded in the decades following the end of the Second World War, whereby the Federal Republic of Germany acted to break with its Nazi past and secure its foundations as a sovereign democratic *Rechtsstaat*.

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Table of Contents

Introduction

Under current German law, administrative authorities are vested with the power to impose a monetary penalty and other designated sanctions for a violation that is statutorily categorised as an *Ordnungswidrigkeit* (hereinafter, 'violation' or '*Ordnungswidrigkeit*'), rather than as a criminal offence. The substantive and procedural aspects of this sanctioning process are primarily governed by the *Ordnungswidrigkeitengesetz*, the centrepiece statute on the subject.[1] The merits and demerits of the *Ordnungswidrigkeit* sanctioning system have inspired a good deal of commentary by English-speaking criminal law scholars. Some have commended it for offering a moderately intrusive, non-stigmatising sanctioning mechanism to enforce prohibitions which are said to be morally neutral.[2] Indeed, the social stigma suffered as a result of the administrative monetary penalty is, in most cases, inconsequential, since it is not taken to convey moral condemnation, and a criminal record does not ensue.[3] Furthermore, barring exceptional circumstances, measures restrictive of liberty are not available in *Ordnungswidrigkeit* proceedings.[4] Other commentators, however, have been less sanguine about the German administrative sanctioning system, because the penalties are mainly aimed at discouraging the prohibited conduct, rather than unambiguously condemning it as a wrongful act which stands against the values of the polity.[5] In addition, it has been suggested that the

[1] Gesetz über Ordnungswidrigkeiten [OWiG, Ordnungswidrigkeitengesetz], repromulgated Feb. 19, 1987, Bundesgesetzblatt [BGBl.] I, 602, last amended by Gesetz, July 29, 2009, BGBl. I, 2353. An English translation is available at http://www.gesetze-im-internet.de/englisch_owig/index.html.

[2] See James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between American and Europe* (Oxford: Oxford University Press, 2003) at 83; Paul H. Robinson and Michael T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve* (Oxford: Oxford University Press, 2006) at 219.

[3] See e.g. Jerome Hall, *Law, Social Science and Criminal Theory* (Littleton, Colorado: Rothman, 1982) at 285-286.

[4] See Thomas Weigend, 'Federal Republic of Germany: The System of Administrative and Penal Sanctions' in European Commission, *The System of Administrative and Penal Sanctions in the Member States of the European Communities, Vol. I: National Reports* (Luxembourg: Office for Official Publications of the European Communities, 1994) 91, at 108. Although imprisonment is not available as a sanction, detention may be judicially ordered as a compulsion measure in the event that a defendant who is not impecunious fails to disburse the monetary penalty. See OWiG § 96.

[5] See Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial: Vol. 3, Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007) at 189-198. The claim that a violation does not imply moral condemnation is arguably buttressed by the provisions of the *Ordnungswidrigkeitengesetz* authorising the imposition of administrative penalties on corporations. See especially OWiG § 30. Similar provisions do not exist in the German criminal code. The prevailing viewpoint in the German literature is that corporations cannot be held criminally liable because legal entities are not capable of moral blameworthiness and responsibility. See generally Weigend, 'Federal

Ordnungswidrigkeitengesetz offers a stratagem for not granting defendants all the protections they would otherwise enjoy in a criminal trial.[6]

This article does not discuss the normative principles around which the German administrative sanctioning process should be organised, or address the issue of whether or not a coherent justificatory account can be offered for its differentiation from the machinery of the criminal law with respect to the procedural barriers to the imposition of sanctions. Rather, it takes a broad historical approach. Specifically, it seeks to articulate the singularity of the German experience with administrative penalties by drawing attention to the manifold links between the major statutory developments through which the *Ordnungswidrigkeit* sanctioning system took its current shape and the larger economic, political and social changes that unfolded in the decades following the end of the Second World War, whereby the Federal Republic of Germany acted to break with its Nazi past and secure its foundations as a sovereign democratic *Rechtsstaat*.

I situate my inquiry in the context of the 'new police science' literature. Part I discusses the central place that the paradigms of governance of 'law' and 'police' occupy within that literature and addresses the connections, distinctions and conflicts encountered in various historical contexts and traditions between these two modalities of rule. Parts II and III set the *Ordnungswidrigkeit* sanctioning system on a broad historical canvas. Part II covers the period from the mid-fifteenth century until the turn of the twentieth century. It begins by explicating the distinction made in the Holy Roman Empire of the German Nation between the criminal law and the law of police and subsequently examines the changes, introduced with the rise of the absolutist *Polizeistaat*, which resulted in the empowerment of administrative 'police' authorities to directly impose penalties for certain offences. It then outlines the reforms carried

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Republic of Germany: The System of Administrative and Penal Sanctions' supra note 4 at 103-104; Klaus Rogall, 'Country Report: Germany' in James Gobert and Ana-Maria Pascal, eds., *European Developments in Corporate Criminal Liability* (London: Routledge, 2011) 334 at 342.

[6] Duff, Farmer, Marshall and Tadros, supra note 5 at 191-192. The European Court of Human Rights ruled in a landmark decision that the failure to guarantee a defendant the free assistance of an interpreter in *Ordnungswidrigkeit* proceedings amounted to a breach of his right to a fair trial under article 6(3)(e) of the European Convention on Human Rights. See Öztürk v. Germany 6 EHRR 409 (1984). The deficit in procedural safeguards in *Ordnungswidrigkeit* proceedings should not be overstated. Under current law, the defendant is entitled to contest the administrative penalty decision and request that the court hold a *de novo* trial. To be sure, the *Ordnungswidrigkeitengesetz* authorises the court to simplify the procedure in various respects by relaxing evidentiary requirements or inviting the parties to submit their arguments in writing. However, these departures from standard principles of criminal procedure are almost always made conditional on the consent of the parties. See Weigend, 'Federal Republic of Germany: The System of Administrative and Penal Sanctions' ibid. at 108-112.

out in the course of the second half of the nineteenth century to bring these administrative sanctioning mechanisms in line with the separation of powers doctrine. Part III examines the far-reaching changes which transpired following the rise of the Third Reich. It provides a relatively detailed account of the extensive use made by the Nazi regime of administrative monetary penalties in steering the economy to achieve its military and ideological goals. The remainder of the article chronicles the major statutory developments that unfolded in the period from the end of the Second World War until 1975, while tracing the interplay with the state-building and democratisation efforts of the post-war era. Part IV charts the period from the demise of the Third Reich to the proclamation of the Federal Republic of Germany in 1949. It relates the events which precipitated the enactment of legislation to remodel and standardise the rules governing the imposition of administrative sanctions for economic illegalities. Part V focusses on the 'framework-statute' enacted in 1952, which laid the groundwork for the widespread use of administrative sanctions in the regulation of professional and commercial forms of activity. Part VI addresses the political and social developments that culminated with the promulgation of the highly controversial anti-cartel law in 1957, which singled itself out by eschewing criminalisation, mainly relying on tough administrative monetary penalties for the enforcement of its provisions. Part VII discusses the shifting currents of West German society in the middle and late 1960s that propelled a diverse range of criminal law reform undertakings, one of which revamped the *Ordnungswidrigkeit* sanctioning system and fundamentally redefined the terms of its relationship with the machinery of the criminal law, giving it the shape that it still has today. The article closes by re-examining the events through which the *Ordnungswidrigkeit* sanctioning system took root alongside the criminal sanctioning process in post-war Germany and assesses the imbrication of these events within the larger state-building and democratisation process in the light of the debate about the relationship between law and police in the new police science literature.

I. The New Police Science: Law and Police as Modalities of Governance

Over recent decades, the functioning of police in state governance has increasingly been the focus of scholarly attention, giving rise to what has been called a "new police science."[7] Police is not understood here in the contemporary sense of the term denoting law enforcement by constabularies whose mission it is to detect and prevent criminal conduct. Rather, police refers broadly to the administration of the economic and social order with a view to pursuing the welfare of the community as a whole. In his study of the conceptual genealogy of police throughout the history of Western political thought and practice, Markus Dubber asserts that police is rooted in heteronomy, in that the state governs persons and things as a patriarch governs his household to achieve prosperity, security and wellbeing.[8] Dubber contrasts police with law, the mode of governance through which the state acts to translate into reality the idea of right (*Recht)* or justice. The foundational guiding principle of law, according to Dubber, is the autonomy and self-government of the individual, a principle which also underpins the democratic state, understood as the institutional actualisation of collective self-government.[9]

Dubber insists that governance through police, on its own terms, eludes critical scrutiny on normative grounds (it is, as he puts it, "alegitimate"),[10] for police ultimately rests on "the discretionary authority of a patriarch who, for all pragmatic purposes, is all-powerful."[11] Yet, Dubber also recognises that the exercise of the police power in specific instances may give rise to criticism on the ground that it fails to realise such goods as efficiency, order or public welfare.[12] With respect to law, Dubber proceeds on the basis that modern democratic societies all recognise

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[7] See generally Markus Dubber and Mariana Valverde, eds., *The New Police Science: The Police Power in Domestic and International Governance* (Stanford: Stanford University Press, 2006) [Dubber and Valverde, *The New Police Science*]; Markus Dubber and Mariana Valverde, eds., *Police and the Liberal State* (Stanford: Stanford University Press, 2008) [Dubber and Valverde, *Police and the Liberal State*]. Research over the past two decades by German legal historians has generated a burgeoning literature on police in the early modern period. An overview of the studies published to date can be accessed at http://www.rg.mpg.de/de/publikationen/policeywissenschaft/. Due to lack of translation, the bulk of this research has gone unnoticed in the new police science literature.

[8] Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005) at 3.

[9] Ibid. at 3-4.

[10] Ibid. at 181.

[11] Dubber, 'Criminal Police and Criminal Law in the *Rechtsstaat'* in Dubber and Valverde, *Police and the Liberal State*, supra note 8 at 93.

[12] Ibid. at 109.

autonomy as "the fundamental touchstone of legitimacy."[13] Dubber makes the normative claim that the protection and promotion of individual and collective self-government should therefore constitute the sole justificatory basis for state action, and that these values should shape the standards by which current practices of governance are assessed and controlled.[14]

With respect to the penal law, Dubber affirms that the state's authority to protect the capacity for autonomy of its citizens constitutes the sole basis of legitimacy for prohibitions that are punishable by means of the criminal sanctioning process. State punishment can only be legitimate if it is imposed on an offender to reaffirm the dignity and personhood of the victim.[15] Significantly, Dubber conceptualises criminal wrongdoing as the attempt by one person to subjugate another person. In his view, wrongdoing only materialises if the offender acts with a subjective category of fault (such as purpose, oblique intention or recklessness as to the prohibited result). The upshot is that, for Dubber, harm caused with objective fault or negligence should remain outside of the penal law. The same conclusion applies with respect to public welfare offences, which are instrumental in enforcing compliance with norms designed to regulate professional and commercial activity for the health, safety and welfare of citizens. Dubber characterises these offences as offences of "pure disobedience" [16] and asserts that they constitute a patent manifestation of the police authority of the state.[17]

Dubber also discusses the implications of the opposition between law and police for the field of criminal procedure.[18] Whereas the law model of the criminal process upholds principles reflective of respect for the status of participants in the investigation and the trial as persons capable of self-government, such as the right of the defendant to confront witnesses of the prosecution and not to be compelled to self-incriminate, the police model is informed by considerations that are characteristic of patriarchal household governance, such that participants are treated as objects of cases

[13] Markus Dubber, 'Legitimating Penal Law' (2007) 28 Cardozo Law Review 2597 at 2602.
[14] Ibid. at 2607. See also Dubber, *The Police Power*, supra note 8 at 211-217.
[15] Dubber, 'Legitimating Penal Law' supra note 13 at 2607.
[16] Dubber, 'Criminal Police and Criminal Law in the Rechtsstaat,' supra note 11 at 107.
[17] It should be noted that Dubber does recognise that regulatory norms may in some cases also be framed as an attempt to enhance individual autonomy. Yet, he opposes the invocation of penal sanctions for the sake of enforcement and argues that the state should resort to less intrusive means to secure compliance. Dubber, *The Police Power*, supra note 8 at 215.
[18] Markus Dubber, 'The Criminal Trial and the Legitimation of Punishment' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, eds., *The Trial on Trial: Vol. 1, Truth and Due Process* (Oxford: Hart Publishing, 2004) 85.

to be processed and considerations of efficiency are typically given priority so as to maximise the limited resources available across the criminal justice system. Significantly, Dubber notes that, from the perspective of police, the separation of powers need not constitute a structural feature of the criminal process for "[p]olice authority is exercised without checks, other than the ultimate end of the community's welfare… [A] division of power retards the execution of the superior's measures[.]"[19]

Dubber intends his conceptual account of the distinction between law and police to be not only normative but also descriptive. Dubber notes that the conceptual differences between law and police may not always be obvious in the practice of state rule.[20] Indeed, he emphasises that various governmental practices, including criminal punishment, may lend themselves to being analysed either as instantiations of the idea of right or as manifestations of the police power.[21] Dubber has identified nonetheless a number of features which, in his view, typically differentiate police from law:

> [T]he different types of interference associated with police and law (prevention and remedy), the different objects of that interference (threats and persons), the different styles of government (informality and formality, flexibility and definiteness), the different types of scrutiny applied (effectiveness and justice), and – perhaps most important – the different relationships between the subject and the object of government that characterize police and law as modes of governance (hierarchy and equality).[22]

Dubber uses the distinction between law and police to closely scrutinise and dissect governmental strategies through which the state intervenes in the lives of individuals and collective bodies to achieve its economic and social goals.[23] For instance, Dubber has employed his account of police as a lens to explain the

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[19] Dubber, *The Police Power*, supra note 8 at 75. See also Dubber, 'Legitimating Penal Law' supra note 13 at 2606.
[20] Markus Dubber, 'Criminal Police and Criminal Law in the *Rechtsstaat'* supra note 11 at 93.
[21] Ibid. ("The very same practice, in fact, may well combine law aspects with police aspects and may even, as a whole, appear as a manifestation of police or law, depending on how it is viewed.")
[22] Dubber, *The Police Power*, supra note 8 at 158.
[23] Dubber, 'Criminal Police and Criminal Law in the *Rechtsstaat*' supra note 11 at 109. In this respect, there is a close affinity between the new police science and the field of 'governmentality' studies. This is not surprising since the growth of governmentality studies was largely prompted by Michel Foucault's *Collège de France* lectures on the centrality of police in the emergence of early modern strategies of state governance. See generally Mariana Valverde, 'Police, Sovereignty, and Law: Foucaultian Reflections' in Dubber and Valverde, *Police and the Liberal State*, supra note 7 at 15.

criminalisation of incest.[24] For Dubber, the prohibition of incest makes sense from the standpoint of governing the state as a macro-household because the behaviour in question evinces the incompetence of the father in fulfilling his responsibilities (as micro-householder) to secure the welfare of his family, thereby providing grounds for disciplinary action by the state.[25] Dubber insists that the offence of incest resists analysis in terms of law, understood as the government of persons as beings endowed with the capacity for self-government, because it denies the personhood of the parents and/or siblings concerned by bringing within its reach cases in which the sexual relationship is consensual, in spite of their autonomous decision.[26]

Commentators have claimed that in deploying law and police as descriptive categories Dubber makes too sharp a distinction between the two modalities of governance.[27] Pointing to historical developments from different periods, critics have claimed that his approach does not take into consideration cases in which the implementation of traditional police strategies and techniques of government corresponded with larger social, economic and institutional changes to advance the realisation of values identified with law, such as collective and individual self-government, equality and justice.[28] In this vein, Peter Ramsay contends that Dubber unduly reduces all modes of governmental intervention that do not fall within the narrow contours of his conception of penal law, which is centred on protecting the capacity of the individual for autonomy, to a manifestation of the traditional patriarchal power of police. More pointedly, Ramsay argues that Dubber's depiction of public welfare offences as nothing but police measures which uphold the authority of the state to secure the welfare of the public fails to do justice to the decisive manner in which the twentieth-century welfare state helped protect economically

[24] Markus Dubber, 'Policing Morality: Constitutional Law and the Criminalization of Incest' (2011) 61 UTLJ 737.
[25] Ibid. at 750.
[26] Ibid. at 738.
[27] See e.g. Christopher Tomlins, 'Framing the Fragments: Police, Genealogies, Discourses, Locales, Principles' in Dubber and Valverde, *The New Police Science*, supra note 7, 248 at 279. ("[L]aw and police are distinguishable as ideational complexes, but both are strategies for ruling and are intertwined. The history of both can be written according to attempts made to draw hard and fast distinctions between rule of police and rule of law, but actually to assert the reality of hard and fast distinction is a species of normative rather than critical argument.")
[28] By the same token, commentators have also stressed the myriad ways institutions associated with the rule of law have been instrumental in the development of government through police. See William Novak, 'Police Power and the Hidden Transformation of the American State' in Dubber and Valverde, *Police and the Liberal State*, supra note 7, 54 at 56; Christopher Tomlins, 'Framing the Fragments: Police, Genealogies, Discourses, Locales, Principles' in Dubber and Valverde, *The New Police Science*, supra note 7, 248.

disadvantaged individuals from the perils of the market and enabled them to play a greater part in the democratic process.[29] Historians of the founding of the American Republic in the late eighteenth century have also voiced misgivings about Dubber's stark differentiation of law from police. As Christopher Tomlins explains, in early America, police came to form a central medium through which the states established their exclusive jurisdiction over economic and social affairs, such that it became "virtually synonymous with the power to govern itself…transferred by revolutionary succession from the [King of England]."[30] In contrast, the 'rule of law' entailed the reign of "juridical elites wielding an undemocratic common law."[31] It was championed by elites with vested economic and institutional interests who felt threatened by the prospect of unfettered rule by popularly elected legislatures.[32] Although, as Tomlins makes clear, law became (especially at the national level of government) the dominant paradigm through which Americans expressed their relationship to each other and to the polity in the early nineteenth century, police certainly did not disappear.[33] Indeed, William Novak has thoroughly documented that state legislatures, municipal authorities and local courts embraced a vision of government rooted in the notion of "the well-regulated community"[34] and engaged in a vast array of police practices restrictive of individual liberty and property.

This article, which discusses the economic and political reconstruction of West Germany after the collapse of the Nazi state, also addresses the connections between police and processes of democratic state formation by specifically focussing on the evolution in the post-war period of a mechanism of control traditionally identified in German legal history with police, namely, administrative penalties. As explained below, in the late nineteenth and early twentieth centuries, the viewpoint prevailed that the transition from an absolutist state system grounded in monarchical

[29] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press) at 200-201. Cf. also Peter Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy, and the Welfare State' (2006) 69 Modern Law Review 29.
[30] Christopher Tomlins, 'To Improve the Condition of Man: The Power to Police and the History of American Governance' (2005) 53 Buffalo Law Review 1215, at 1233-1234. See also Christopher Tomlins, 'The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to Lochner' in Dubber and Valverde, *Police and the Liberal State*, supra note 7 33 at 37.
[31] Tomlins, 'To Improve the Condition of Man: The Power to Police and the History of American Governance' ibid. at 1255.
[32] Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* at 38 (Cambridge: Cambridge University Press, 1993).
[33] Ibid. at 39.
[34] William Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

sovereignty to a *Rechtsstaat* grounded in constitutional democracy necessitates the curtailment of administrative sanctioning powers and the assignment of the competence to punish to the judicial branch of government. However, in the decades following the end of the Second World War, the use of penalties by an administrative authority to sanction violations was no longer seen as lying in deep tension with fundamental principles of constitutional democracy. With a view to investigating the mutations that led to this change in perspective, I examine the various developments through which the *Ordnungswidrigkeit* sanctioning system took root in the West German legal order. To lay the groundwork for the inquiry, the next part provides background on the antecedents and precursors of the *Ordnungswidrigkeit* sanctioning system by tracing back its roots through the various shifts that shaped the divide between (criminal) law and police from the late modern period onwards.

II. *Polizeiordnungen* and the *Polizeistaat*: Administrative Sanctions as Police Power

As early as the mid-fifteenth century, rulers in the Holy Roman Empire, the loose federation of princely states that politically embodied the German nation until 1806, resorted to 'police ordinances' to regulate economic and social activity and uphold public peace and order.[35] The first ordinances were promulgated by territorial princes and rulers in the imperial cities.[36] In 1530, a *Reichspolizeiordnung* was issued by Charles V; it was followed by additional ordinances in 1548 and 1577.[37] These ordinances applied, subject to certain restrictions, throughout the Empire, together with the *Constitutio Criminalis Carolina*, a code of criminal law and procedure (hereinafter, *Carolina).*[38] The *Carolina* prohibited mostly serious moral wrongs such as homicide, rape and theft, while the imperial police ordinances prohibited a vast array of activities deemed inimical to the maintenance of a social and economic order conducive to a respectful and virtuous Christian life.[39] The boundaries between the *Carolina* and the police ordinances were by no means watertight.[40] Cross-references appeared in provisions dealing with subjects concurrently legislated upon, such as offences against religion.[41] In some instances, prohibitions enacted through the police ordinances had the effect of altering the scope and substance of crimes under the *Carolina*.[42] Although, on the whole, summary procedures were reserved for minor police offences, in the sixteenth century no differentiations were systematically made between the two categories of unlawful conduct as regards the jurisdiction competent

[35] See generally Karl Härter, 'Security and "Gute Policey" in Early Modern Europe: Concepts, Laws and Instruments' (2010) 35 Historical Social Research 41; Franz-Ludwig Knemeyer, 'Polizei' (1980) 9 Economy and Society 172.

[36] See Michael Stolleis, 'Geschichte der Polizei in Deutschland' in Hans Lisken and Erhard Denninger, eds., *Handbuch des Polizeirechts* (München: Beck, 2007) 1 at 2-5.

[37] See Matthias Weber, *Die Reichspolizeiordnungen von 1530, 1548 und 1577* (Frankfurt am Main: Klostermann, 2002).

[38] The "Salvatorische Klausel" provided that the *Carolina* applied on a subsidiary basis throughout the Empire, such that the territorial rulers could depart from its provisions. See R. Lieberwirth, 'Carolina' in Adalbert Erler and Ekkehard Kaufmann, eds., *Handwörterbuch zur deutschen Rechtsgeschichte*: *Vol. I* (Berlin: Schmidt, 1971) 592 at 593.

[39] See generally Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Reichspublizistik und Policeywissenschaft (1600-1800): Vol. I* (München: Beck, 1988) at 560-562.

[40] See Karl Härter, 'Policeygesetzgebung und Strafrecht: Criminalpolicey Ordnungsdiskurse und Strafjustiz im frühneuzeitlichen Alten Reich' in *Sonderdruck aus Kriminalität in Mittelalter und Früher Neuzeit* (Wiesbaden: Harrosowitz, 2007) 189.

[41] See Heinz Mattes, *Untersuchungen zur Lehre von den Ordnungswidrigkeiten: Vol. I* (Berlin: Duncker & Humblot, 1977) at 50-57.

[42] See Karl Härter, 'Social Control and the Enforcement of Police Ordinances in Early Modern Criminal Procedure' in Heinz Schilling, ed. *Institutionen, Instrumente und Akteure sozialer Kontrolle und Disziplinierung im frühneuzeitlichen Europa* (Frankfurt am Main: Klostermann, 1999) 39 at 44.

to hold the trial or the rules of procedure to be followed.[43] As for penalties, most police offences (and relatively minor crimes prohibited under the *Carolina)* were subject to *poena extraordinaria,* notably monetary sanctions and short terms of imprisonment. Significantly, the severity of these penalties could be adjusted by the competent authority in the light of the specific circumstances of the case and the actor concerned, unlike the *poena ordinaria* of corporal and capital punishment which were to be unconditionally inflicted.[44]

After the Peace of Westphalia in 1648, the locus of power shifted from the Emperor to the territorial rulers, who marked their sovereignty, *inter alia,* through police.[45] In this age of absolutism, the princes derived their power to police not from prerogatives devolved by the Emperor but from the notion of '*ius politiae,*' which made it incumbent upon them to actively intervene in economic and social affairs so as to safeguard and advance the common good.[46] Two related objectives animated − not without tension − this governmental project: consolidating the military strength and financial wealth of the state and its rulers; and promoting the welfare and happiness of their subjects.[47] In this historically denominated 'Police State'[48] (*Polizeistaat),* the old order, based on a division of society into well-defined Estates, underwent profound changes.[49] Rulers did not confine themselves to upholding a morally-oriented social and economic order; rather, they took it upon themselves to closely manage the economy so as to put in place a new order generative of material prosperity.[50] The police ordinances reached all domains of life, with no distinction

[43] Ibid. at 53-56. Furthermore, in the early modern period, judicial and administrative functions were inextricably intertwined: courts often performed administrative responsibilities and administrative authorities exercised judicial powers over a broad range of matters. See Härter, 'Policeygesetzgebung und Strafrecht' supra note 40 at 191. For analysis of the intricacies of jurisdictional boundaries and procedural rules in the early modern period see Karl Härter, *Policey und Strafjustiz in Kurmainz*: *Vol. I* (Frankfurt am Main: Klostermann, 2007) at 246-342.

[44] See Härter, 'Social Control and the Enforcement of Police Ordinances in Early Modern Criminal Procedure' supra note 42 at 46-47.

[45] See Stolleis, 'Geschichte der Polizei in Deutschland' supra note 36 at 5.

[46] See Georg-Christoph von Unruh, 'Polizei, Polizeiwissenschaft und Kameralistik' in *Deutsche Verwaltungsgeschichte: Vol. I* (Stuttgart: DVA, 1983) at 390.

[47] See Michel Foucault, *Security, Territory, Population* (London: Palgrave MacMillan, 2007) at 333-360.

[48] See Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* supra note 39 at 366-394.

[49] See generally Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through the Law in the Germanies and Russia, 1600-1800* (New Haven: Yale University Press, 1983).

[50] See Stolleis, 'Geschichte der Polizei in Deutschland' supra note 36 at 5.

being made between private and public spheres.[51] Police became all-encompassing, signifying eventually the internal administration of the state in its entirety.[52] To support this pervasive regulatory activity of the state a special administrative science took form – the *Polizeiwissenschaft* – which was systematised in expert manuals and taught in training schools and academic programs in the universities.[53]

A significant development in the absolutist era concerned the rearrangement of the jurisdiction of the courts to remove disputes regarding police measures from the ambit of judicial authority.[54] As a result, police authorities were given the power to directly impose relatively minor penalties in response to the commission of a police offence.[55] Following the dissolution of the Holy Roman Empire in 1806, and the establishment of a confederation of sovereign states (with relatively limited central power) in the former imperial territory in 1815, critics began to challenge the sanctioning powers of police authorities. Invoking the separation of powers doctrine, they argued that the adjudication of penal offences and the determination of penal sanctions constitute functions that should be within the authority of the judiciary, which is impartial and independent of the other branches of government.[56] Viewed through the wider lens of the divide between law and police, this opposition to the maintenance of police sanctioning mechanisms ushered in a period of far-reaching reform. As explained below, legislative practice from the middle of the nineteenth century until the 1930s was marked by the conviction that the transition from a *Polizeistaat* to a *Rechtsstaat* required that authority to mete out punishment ultimately lay in the hands of the judiciary. This outlook was most poignantly affirmed by the revolutionary *Paulskirchenverfassung* (the Constitution of St. Paul's Church), which was adopted in

[51] See von Unruh, supra note 46 at 405-409; G.K. Schmelzeisen, 'Polizeiordnungen' in Adalbert Erler and Ekkehard Kaufmann, eds., *Handwörterbuch zur deutschen Rechtsgeschichte: Vol. III* (Berlin: Schmidt, 1971) 1803 at 1805-1806.
[52] See Knemeyer, supra note 35 at 182; Stolleis, 'Geschichte der Polizei in Deutschland' supra note 36 at 6.
[53] See von Unruh, supra note 46 at 409-418.
[54] See Hans Maier, 'Polizei' in Adalbert Erler and Ekkehard Kaufmann, eds., *Handwörterbuch zur deutschen Rechtsgeschichte*: *Vol. III* (Berlin: Schmidt, 1971) 1799 at 1801; von Unruh, ibid. at 403-404; Stolleis, 'Geschichte der Polizei in Deutschland,' supra note 36 at 6.
[55] See Knemeyer, supra note 35 at 178-179. The *Allgemeine Landrecht für die Preußischen Staaten* (the General State Law for the Prussian State) enacted in 1794, which applied on a subsidiary basis throughout Prussia, is illustrative. Police authorities were assigned jurisdiction to prosecute and impose penalties for the violation of police laws, whereas the ordinary courts were competent to adjudicate cases involving crimes (*Verbrechen*). Special jurisdictional arrangements also applied with respect to minor criminal offences, such as theft. Police sanctions consisted of a monetary penalty and detention for a maximum period of fourteen days. See generally Mattes, supra note 41 at 74-80.
[56] See Wolfgang Sellert and Hinrich Rüping, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege: Vol. II* (Aalen: Scientia, 1994) at 17-21.

Frankfurt in March 1849, shortly before the popular movement for the introduction of democratic governmental reforms came to an end because of the ruling sovereigns' refusal to relinquish power. Tellingly, the Frankfurt Constitution contained both a general provision establishing the principle of the separation of the judiciary from the administrative branch of government and a specific provision explicitly denying police authorities the power to adjudicate cases involving crimes and punishment.[57]

The influence of this viewpoint on the codification of the principles of criminal law and procedure through the middle and late nineteenth century was evident as the question arose of whether a different set of substantive and procedural rules should apply to police offences than to crimes. The 1871 imperial criminal code enacted subsequent to the unification of Germany into a federal constitutional monarchy[58] lumped together criminal offences and police offences, reflecting the view that a generic distinction between the two categories of offences could not be drawn.[59] It also institutionalised the tripartite classification of crimes (*Verbrechen*), delicts (*Vergehen*) and contraventions (*Übertretungen*) that would remain in place for over a century, until this last category was abolished with the introduction of a new criminal code in 1975.[60] Yet, the imperial code of criminal procedure enacted in 1877 authorised the *Länder* to introduce an administrative pre-trial diversion mechanism, the *Polizeistrafverfügung*, as an alternative to the criminal trial process. Thus, police authorities could impose penalties for contraventions in a summary procedure, subject to the right of the defendant to request a trial *de novo* by the criminal court. The sanctions available in this context, however, could not exceed fourteen days detention and a criminal fine.[61] As a matter of legislative practice, the *Länder* often availed themselves of this formula, particularly to deal with breaches of regulatory norms.[62]

The developments above provoked a major theoretical debate among German criminal law scholars about the commonalities and differences between criminal

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[57] See Articles 181-182 of the 1849 Constitution in Elmar Hucko, ed., *The Democratic Tradition: Four German Constitutions* (Leamington Spa: Berg, 1987).
[58] Reichsstrafgesetzbuch, May 15, 1871, Reichsgesetzblatt [RGBl.], 127. Police laws previously enacted by the *Länder* remained in force after the promulgation of the imperial criminal code. See Heinrich Rosen, 'Polizeistrafrecht' in Max Fleischmann, ed., *Wörterbuch des deutschen Staats- und Verwaltungsrechts: Vol. III* (Tübingen: Mohr, 1914) 112 at 115.
[59] Joachim Bohnert, 'Einleitung' in Lothar Senge, ed., *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten*(3rd. ed. München: Beck, 2006) 1 at 9.
[60] Ibid.
[61] Reichsstrafprozeßordnung, February 1, 1877, RGBl, 253, §§ 453-458. See also Joachim Bohnert, 'Die Entwicklung des Ordnungswidrigkeitenrechts' (1984) Jura 11 at 13.
[62] See Mattes, supra note 41 at 102.

wrongs and police offences, on the one hand, and the aims and functions of criminal punishment and police sanctions, on the other. The debate, which remained alive throughout the greater part of the nineteenth century, has been surveyed elsewhere;[63] it need not detain us here. More important is the publication at the turn of the twentieth century of James Goldschmidt's groundbreaking monograph *Das Verwaltungsstrafrecht* (the administrative penal law),[64] which most systematically articulated the rationales and contours of a specifically administrative power to sanction, as distinguished from the authority, which inheres in the judiciary, to punish actors who commit an offence against the criminal law. Goldschmidt identified two distinct orders of government within the state: the legal order and the order of the public administration. The legal order, Goldschmidt argued, secures peaceful coexistence in society by demarcating from one another the spheres of interests (e.g., freedom of movement, bodily integrity, and property) of particular actors, including the state. The legislator protects these *Rechtsgüter* (law goods) through the criminal law by prohibiting conduct which encroaches upon these spheres of interests. The judiciary, for its part, speaks with the voice of the law by delivering a counter-response when an actor oversteps the bounds set by the criminal law while manifesting an attitude of defiance towards the normative order. Judicial pronunciation of the conviction and sentence of the offender, in turn, restores the legal order by injuring the interests of the offender proportionally to the wrong committed. Within the administrative order, on the other hand, the exercise of state authority is solely guided by the overarching aim of attaining public welfare ─ just like the traditional police power.[65] Goldschmidt emphasised the limited value of merely preserving the potential for freedom of action, without providing substance to the life of the individual as a member of the community. Welfare seeks to fill this void and enable the individual to reach an absolute condition of material and spiritual

[63] See Mireille Hildebrandt, 'Justice and Police: Regulatory Offenses and the Criminal Law' (2009) 12 New Criminal Law Review 43; Dubber, *The Police Power* supra note 8 at 75-77. See also Mattes, ibid. at 105-135.

[64] James Goldschmidt, *Das Verwaltungsstrafrecht* (Berlin: Heymanns, 1902). See also James Goldschmidt, 'Begriff und Aufgabe eines Verwaltungsstrafrechts' (1903) Goltdammer's Archiv für Strafrecht 49; James Goldschmidt, 'Das Verwaltungsstrafrecht im Verhältnis zur Moderne Staats- und Rechtslehre' in *Festgabe für Richard Koch* (Berlin: Liebmann, 1903) 415; James Goldschmidt, 'Was ist "Verwaltungsstrafrecht"?' (1914) Deutsche Strafrechts-Zeitung 222. Goldschmidt's theory was further developed by Erik Wolf in an important article published in 1930. See Erik Wolf, 'Die Stellung der Verwaltungsdelikte im Strafrechtssystem' in August Hegler, ed., *Festgabe für Reinhard Frank: Vol. II* (Tübingen: Mohr, 1930) 516.

[65] See Knut Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft* (Frankfurt am Main: Athenäum, 1972) at 116-117.

wellbeing. The individual is not viewed here as the 'bearer of a will' (*Willensträger*) but as an 'object' which needs to be taken care of (*Fürsorgeobjekt*).[66] The administrative order is fundamentally distinct from the legal order, which maintains a stable order by laying down rules that are foreseeable in advance to mediate between the potentially conflicting spheres of individual (and state) power.[67] Welfare, Goldschmidt explained, is not like a *Rechtsgut*, because it constitutes a *goal* which is never fully reached, and the administration must actively pursue it in a creative and dynamic fashion. Thus, Goldschmidt insisted that an administrative violation is of a different essence than a wrong against the legal order (*Rechtswidrigkeit*), as it constitutes a failure on the part of a citizen to fulfil his duty to assist the public administration in its active pursuit of welfare. Evoking the hierarchical relation implied by the traditional police power, Goldschmidt asserted that the administration can, in the exercise of its prerogative to obtain the obedience of a member of the polity, 'call him to order' by imposing a penalty. He claimed that the imposition of such a sanction is not a matter of justice, i.e., of redressing a wrong done to the legal order, such that the administration need not pass through the judicial system. Goldschmidt further argued that this power is inherently possessed by the administration by virtue of its fundamental mission to pursue welfare, i.e., it is not delegated or assigned to it by the legal order. Introducing another dimension to his theory, Goldschmidt additionally claimed that administrative violations and criminal wrongs are dissimilar in that the norms underpinning administrative violations are not firmly anchored in moral conscience, but rather constitute an artefact produced by the will of the state for the purpose of advancing the public welfare.[68]

Goldschmidt's theory spawned a number of law reform proposals in the interwar period calling for the removal of police contraventions from the criminal code and the assignment to administrative authorities of the power to enforce them with penalties. But the legislature did not follow suit.[69] More important, the 1930s witnessed major statutory developments which catapulted the debate about the administrative penal

[66] Goldschmidt, *Das Verwaltungsstrafrecht*, supra note 64 at 530-532.
[67] Ibid. at 533.
[68] See Goldschmidt, 'Das Verwaltungsstrafrecht im Verhältnis zur Moderne Staats- und Rechtslehre' supra note 64 at 422; Goldschmidt, 'Was ist "Verwaltungsstrafrecht"?' supra note 64 at 226.
[69] See Bohnert, supra note 59 at 10. Moreover, Goldschmidt's theory was increasingly subjected to criticism by the late 1920s. See Fritz Trops, *Begriff und Wert eines Verwaltungsstrafrechts* (Breslau: Schletter, 1926); Robert von Hippel, *Deutsches Strafrecht: Volume II – Das Verbrechen* at 106-119 (Berlin: Springer, 1930).

law into a radically new and perilous political arena. As described below, the Nazi regime introduced administrative penalties on a vast scale by granting administrative authorities the power to impose an *Ordnungsstrafe*[70] to secure compliance with economic legislation. This monetary penalty distinguished itself from the *Polizeistrafverfügung* in that the person concerned was not entitled to request a judicial trial in a criminal court.[71] Moreover, the penalty, unlike the criminal fine, could not, as a rule, be converted into a custodial sanction in the event of a default of payment.[72]

[70] See generally Hans Pechstein, *Von alten und neuen Sinn der Ordnungsstrafe* (Breslau-Neukirch: Kurtze, 1942) at 7-13.

[71] On the procedural aspects of laws enacted prior to 1933 which empowered administrative authorities to impose an *Ordnungsstrafe* see Bohnert, supra note 59 at 11; Stefan Werner, *Wirtschaftsordnung und Wirtschaftsstrafrecht im Nationalsozialismus* (Frankfurt am Main: Lang, 1991) at 48-50.

[72] See Pechstein, supra note 70 at 12. But see Dritte Verordnung des Reichspräsidenten zur Sicherung von Wirtschaft und Finanzen und zur Bekämpfung politischer Ausschreitungen, Oct. 6, 1931, RGBl. I, 537, § 2 (authorising detention for a maximum period of six weeks in the event of default of payment).

III. War, Economy and the *Ordnungsstrafe*: The Ubiquity of Administrative Penalties in the Nazi Management of the Economy

Following Hitler's rise to power in early 1933, the Nazi state acted vigorously to secure its economic and military needs, without, however, relying on Soviet-style central planning by removing private ownership or the profit incentive of capitalism.[73] In 1934 and 1935, a series of economic controls were enacted with the aim of implementing the so-called 'New Plan.'[74] Most significantly, controls were imposed on imports, so as to manage the shortage in foreign currency, which was vitally needed to repay external debt and import goods, such as food and raw materials – especially materials needed to sustain rearmament efforts. Because the Nazi leadership was loath to devalue the *Reichsmark*, access to foreign currency could not be secured straightforwardly by enhancing the international competitiveness of German businesses through a deliberate adjustment downward of the exchange rate. Yet the limits fixed on imports unleashed a series of consequences, including inflationary pressures, which, in turn, called for additional interventions, such as price and wage freezes and rationing and allocation of goods and services delivered by public authorities. Within a couple of years, a wide-ranging complex of economic controls was in place that enabled governmental authorities to monitor, organise and steer all spheres of business activity.[75]

Returning to the *Ordnungsstrafe*, the discussion to follow outlines the manifold respects in which it figured prominently in carrying out the economic priorities of the Third Reich. To begin, the *Ordnungsstrafe* played a key role within the vast network of price controls[76] introduced across the economy to secure individuals and their families an adequate living standard and, no less important, to stave off the risk of inflation by barring businesses from raising their prices to take advantage of the regime's rearmament efforts and the high demand that resulted from the limited

[73] On the Nazi management of the economy see generally Adam Tooze, *The Wages of Destruction* (London: Allen Lane, 2006); R.J. Overy, *War and Economy in the Third Reich* (Oxford: Clarendon Press, 1994); Avraham Barkai, *Nazi Economics* (New Haven: Yale University Press, 1990); Franz Neumann, *Behemoth* (New York: Oxford University Press, 1942).
[74] On the 'New Plan' introduced by Hjalmar Schacht, the Minister of Economic Affairs until 1937 see Barkai, ibid. at 177-183; Daniela Kahn, *Die Steuerung der Wirtschaft durch Recht im nationalsozialistischen Deutschland* (Frankfurt am Main: Klostermann, 2006) at 211-216.
[75] See Tooze, supra note 73 at 86-96.
[76] See generally Werner, supra note 71 at 170-180; Pechstein, supra note 70 at 80-86.

availability of products in many sectors.[77] Whereas the Nazi regime moved to regulate price levels early on, following in the steps of the Weimar Republic in its closing years,[78] the controls it imposed widened and deepened in the years leading up to the war and afterwards.[79] Shortly after legislation was enacted in 1936 to implement the 'Four-Year Plan' – a series of economic reforms intended to prepare Nazi Germany for war – a sweeping ban on price increases was issued for all sectors of the economy.[80] The reach of the *Ordnungsstrafe* heightened in turn, as did the scale of the penalties available. Whereas in the early years of the Nazi regime, a failure to comply with price-related measures could attract a maximum penalty of a thousand *Reichsmark*,[81] enactments passed between 1936 and 1939 specified that there would be no ceiling on the amount of the penalty susceptible of being imposed by the competent authorities in response to a breach of the price barriers.[82]

The Nazi regime also acted to curb price levels through cartel formations, which in the years leading up to the war increasingly assumed a major function in the centralised direction of the economy.[83] In July 1933, the Reich Minister of Economic Affairs was given statutory authority to form compulsory cartels, to render compulsory previously voluntary cartels, to bar the entry of new businesses within a given sector and to limit investments in plant expansions.[84] Voluntary cartel

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[77] For discussion see generally Barkai, supra note 73 at 188-196; Tooze, supra note 73 at 107-108; Arthur Schweitzer, *Big Business in the Third Reich* (Bloomington: Indiana University Press, 1964) 184-196; Neumann, supra note 73 at 305-316.

[78] See Gesetz über Übertragung der Aufgaben und Befugnisse des Reichskommissars für die Preisüberwachung, July 15, 1933, RGBl. I, 490.

[79] See generally Werner, supra note 71 at 170-180.

[80] Verordnung über das Verbot von Preiserhöhungen, November 26, 1936, RGBl. I, 955.

[81] Verordnung über Preisüberwachung, December 11, 1934, RGBl. I, 1245, § 15; Verordnung über Ordnungsstrafe bei Zuwiderhandlungen gegen Preisschildervorschriften und Preisfestsetzungen, January 8, 1935, RGBl. I, 10, § 1.

[82] Gesetz zur Durchführung des Vierjahresplans, October 29, 1936, RGBl. I, 927, § 4; Verordnung über das Verbot von Preiserhöhungen, November 26, 1936, RGBl. I, 955, § 4(3); Verordnung über Strafen und Strafverfahren bei Zuwiderhandlungen gegen Preisvorschriften, June 3, 1939, RGBl. I, 999, § 8(3). In one reported case, the Price Commissioner imposed an *Ordnungsstrafe* in the amount of one and a half million *Reichsmark*. See Justus Wilhelm Hedemann, *Deutsches Wirtschaftsrecht* (Berlin: Junker & Dünnhaupt, 1939) at 75.

[83] See generally Tooze, supra note 73 at 108; Schweitzer, supra note 77 at 261-287; Neumann, supra note 73 at 261-274, 307; Werner, supra note 71 at 81-85. Once the war began, however, the cartels diminished in importance. The Nazi authorities primarily steered the economy through the *Reichsvereinigungen* (the Reich associations), which were directly controlled by the state. See Philip C. Newman, 'Key German Cartels under the Nazi Regime' (1948) 62 The Quarterly Journal of Economics 576, at 577; Werner, ibid. at 370-374.

[84] Gesetz über die Errichtung von Zwangskartellen, July 15, 1933, RGBl. I, 488, § 1(1) and § 5. In addition, the Reich Minister of Economic Affairs was given the power, which was previously reserved to the Cartel Court (*Kartellgericht*), to render void cartel agreements that "endanger the economy and common weal." Gesetz über Änderung der Kartellverordnung, July 15, 1933, RGBl. I, 487, § 4(1)(1),

agreements could also be brokered under the mediation of the government.[85] From July 1933 to December 1936, the Reich Minister of Economic Affairs dictated the terms of 120 compulsory cartels and was instrumental in the conclusion of 1600 voluntary agreements.[86] These cartelisation measures, which often consolidated entire industries under a single organisation with fixed prices, facilitated the regulation of domestic price-setting.[87] In this vein, a series of decrees were issued requiring that, before taking effect, price-fixing agreements between firms within a given industry obtain the approval of the Price Commissioner.[88] As with the price controls examined previously, businesses that failed to comply with requirements could receive an *Ordnungsstrafe*, subject to no maximum limit.[89]

To further tighten the centralised organisation of the economy within the Nazi state, an elaborate network of compulsory associations was set up which, as explained below, operated separately from, yet in conjunction with, the cartels.[90] The Reich Minister of Economic Affairs aimed to co-opt the well-functioning hierarchy of business organisations, whose members previously joined on a voluntary basis, to act as a transmission channel for the regime's directives on economic policy.[91] The multi-echeloned structure was partitioned at the upper levels between seven *Reichsgruppen*, which then broke down into *Wirtschaftsgruppen* (business associations) for different sectors. These were then subdivided into *Fachgruppen* (branch associations), which ramified again downwards, spawning further levels of subsidiary units (*Fachuntergruppen*, *Fachabteilungen*) (branch sub-associations, branch

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amending the Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen, November 2, 1923, RGBl. I, 1067.

[85] See Hedemann, supra note 82 at 337.

[86] See Schweitzer, supra note 77 at 272.

[87] See Tooze, supra note 73 at 108; Barkai, supra note 73 at 194.

[88] Verordnung über das Verbot der Festsetzung von Mindestpreisen, Mindesthandelsspannen und Mindestzuschlägen im Handel mit Lebensmitteln durch Verbände oder Vereinigungen, June 13, 1933, RGBl. I, 370; Verordnung gegen Preissteigerungen, May 16, 1934, RGBl. I, 389; Zweite Verordnung gegen Preissteigerungen, August 7, 1934, RGBl. I, 771; Verordnung über die Anmeldepflicht von Preisbindungen, November 19, 1934, RGBl. I, 1186; Verordnung zur Förderung selbstständige Kostenberechnungen in der Wirtschaft, November 15, 1934, RGBl. I, 1180; Verordnung über Preisbindungen und gegen Verteurung der Bedarfsdeckung, December 11, 1934, RGBl. I, 1248; Verordnung über Preisüberwachung December 11, 1934, RGBl. I, 1245.

[89] Gesetz über die Errichtung von Zwangskartellen, July 15, 1933, RGBl. I, 488, § 7(1); Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen, November 2, 1923, RGBl. I, 1067, § 17. See Werner, supra note 71 at 180-185.

[90] Gesetz zur Vorbereitung des organischen Aufbaus der gewerblichen Wirtschaft, February 27, 1934 RGBl. I, 185. See generally Neumann, supra note 73 at 235-247; Kahn, supra note 74 at 205-211; Hedemann, supra note 82 at 371-389; Ingeborg Esenwein-Rothe, *Die Wirtschaftsverbände* (Berlin: Duncker & Humblot, 1965).

[91] See Tooze, supra note 73 at 107-108.

departments).[92] The key link between governmental decision-makers and the members of the various *Reichsgruppen* was the *Wirtschaftsgruppe*. Governmental authorities devolved to it such functions as providing firms with guidance in navigating the bureaucracy and paperwork involved in complying with the plethora of measures introduced as part of the New Plan;[93] collecting a special tax to fund subsidies granted to German exporters;[94] supervising cartels operating within their sector of the economy;[95] and implementing a uniform system of bookkeeping and cost accounting designed to induce firms to improve efficiency and diminish costs, so as to bring about in turn a reduction in prices.[96] Significantly, the *Ordnungsstrafe* was firmly embedded in the machinery of oversight and enforcement used to govern this complex apparatus of entrepreneurial organisations, as the chairman of each business association, who was directly appointed and dismissed by the Reich Minister of Economic Affairs,[97] was empowered by law to impose a monetary penalty on members who, despite repeated warnings, failed to comply with requirements related to the business association's fulfilment of its responsibilities.[98]

Another important area of economic regulation where the *Ordnungsstrafe* was routinely put to use involved the control of raw materials. In 1934, the Reich Minister of Economic Affairs was vested with the authority to supervise and regulate the

[92] Parallel to this functionally-divided hierarchy of *Gruppen*, the *Kammern* (chambers) operated on a territorial basis. All business enterprises were required to hold membership in both organisational spheres. See Neumann, supra note 73 at 240-247.
[93] See Barkai, supra note 73 at 178; Tooze, supra note 73 at 106-107.
[94] The tax was levied to offset the disadvantage faced by German firms on the international market due to their limited access to foreign raw materials as a result of the controls put in place to ration foreign currency. Specifically, the business associations were charged with assessing the turnover of their members and administering the levy that funded the export subsidy. Tooze, ibid.
[95] See Erlaß des Reichs- und Preußischen Wirtschaftsministers über die Reform der Organisation der gewerblichen Wirtschaft, July 7, 1936, Deutscher Reichsanzeiger, Nr. 157 (July 9, 1936), 1; Erlaß des Reichs- und Preußischen Wirtschaftsministers betreffend die Zusammenarbeit mit der Organisation, November 12, 1936. Each cartel had to register with its affiliated business association, supply all information required about its bylaws and activities, and allow the chairman of the association to attend the meetings of its members. The business associations were also in charge of processing requests submitted by compulsory cartels to the Minister. More important, agreements between cartel members had to be submitted to the business association, which could then refer its recommendations to the Minister for consideration and determination whether to declare the agreement void. See Schweitzer, supra note 77 at 286-287; Hedemann, supra note 82 at 380-381; Kahn, supra note 74 at 276-292.
[96] See Schweitzer, supra note 77 at 285.
[97] See Hedemann, supra note 82 at 373.
[98] Erste Verordnung zur Durchführung des organischen Aufbaues der deutschen Wirtschaft, November 27, 1934, RGBl. I, § 17. See Werner, supra note 71 at 198. For instance, the chairman of a business association could impose bookkeeping and cost accounting standards on member firms and, if necessary, invoke the *Ordnungsstrafe* to ensure compliance. See Der deutsche Volkswirt, 'Bemerkungen zur Woche' November 20, 1936, 360.

purchase, distribution, sale and consumption of all goods.[99] Furthermore, the Minister was empowered to establish so-called "supervisory agencies" (*Überwachungsstellen*) to carry out these functions.[100] From 1939 onwards, the agencies became actively involved in the rationing of raw materials necessitated by wartime scarcity.[101] A rationing and distribution system was introduced together with a schedule of quotas, and special distributing agencies – which usually corresponded to the business association or cartel operating in the sector in question – were required to assist the supervisory agency concerned.[102] The supervisory agencies possessed a wide range of powers, which included the power to inspect goods, demand information regarding prices, inventories, production and productive capacity, make orders for the registration of raw materials, and set restrictions on quantities produced.[103] A failure to comply with their requests or, moreover, with the regulations governing the distribution and use of raw materials, could result in the imposition of an *Ordnungsstrafe* on the person or business concerned.[104]

Turning to the other end of the supply chain, the Nazi regime also imposed restrictions on the consumption of goods in the years preceding and during the war.[105] Though certain goods whose availability was relatively limited, such as butter, were rationed before the war, an orderly rationing system affecting virtually all mainstays of daily life was only introduced in 1939. It expanded in scope and depth as the military forces suffered setbacks on the battlefield and the major transportation veins

[99] Verordnung über den Warenverkehr, September 4, 1934, RGBl. I, 816.
[100] Ibid. § 3. At first, the intent was for these agencies to ensure a sound distribution of raw materials. But following the introduction of the New Plan in September 1934 (which aimed to tightly regulate foreign trade, mainly by controlling access to foreign exchange), these agencies were charged instead with controlling imports, most notably by scrutinising and processing applications by local businesses for exchange certificates authorising them to purchase goods from abroad. See Michael Ebi, *Export um jeden Preis: Die Deutsche Exportförderung von 1932-1938* (Stuttgart: Steiner, 2004) at 129-130; Tooze, supra note 73 at 81. The agencies were later rebaptised *Reichsstellen*. Zweite Verordnung zur Ergänzung der Verordnung über den Warenverkehr, August 18, 1939, RGBl. I, 1429, § 1.
[101] See Zweite Verordnung zur Ergänzung der Verordnung über den Warenverkehr, August 18, 1939, RGBl. I, 1429; Verordnung über den Warenverkehr, December 11, 1942, RGBl. I, 686.
[102] See Kahn, supra note 74 at 418; Hedemann, supra note 82 at 425-426; Neumann, supra note 73 at 251-252, 351-353.
[103] See Karl Siegert, *Deutsches Wirtschaftsstrafrecht* (Berlin: Spaeth & Linde, 1939) at 136-140.
[104] Verordnung über den Warenverkehr, September 4, 1934, RGBl. I, 816, § 13-15; Verordnung zur Ergänzung der Verordnung über den Warenverkehr, June 28, 1937, RGBl. I, 761, § 4; Zweite Verordnung zur Ergänzung der Verordnung über den Warenverkehr, August 18, 1939, RGBl. I, 1429, § 3-4; Verordnung über den Warenverkehr, December 11, 1942, RGBl. I, 686, § 14-15. See Werner, supra note 71 at 456-462; Wolfgang Gähtgens, 'Zum Ordnungsstrafrecht der Überwachungsstellen' (1936) Juristische Wochenschrift 2614.
[105] Hedemann, supra note 82 at 421-422, 432-433.

by sea and land into Germany were put out of use.[106] The *Ordnungsstrafe* formed an important part of the backbone of the rationing system, as it allowed the competent authorities to directly impose penalties on business actors who hoarded goods earmarked for distribution or sold goods to individuals not in possession of coupons.[107]

It should be emphasised that by no means did the ascent of the *Ordnungsstrafe* under the Third Reich result in the displacement of the criminal law insofar as the regulation of economic activity was concerned. In most (though not all)[108] areas subject to economic controls, failure to comply with requirements was also constitutive of a criminal offence – subject to such sanctions as hard labour (*Zuchthaus*), imprisonment (*Gefängnis*) and, in some exceptional cases, the death penalty.[109] Where a given prohibited course of conduct was made subject to administrative and criminal penalties, it was often standard legislative practice to provide that the administrative authority concerned should determine whether the public interest requires the initiation of criminal proceedings or the imposition of an *Ordnungsstrafe*.[110] This practice substantially undermined the principle of compulsory prosecution in the criminal law, according to which a prosecutor must file charges where sufficient incriminating evidence of criminal conduct obtains.[111] Significantly, the principle of compulsory prosecution derives in part from the

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[106] Overy, supra note 73 at 283-285.

[107] Verbrauchsregelungsstrafverordnung, April 6, 1940, RGBl. I 610, § 1-2; and the later version: Verbrauchsregelungsstrafverordnung in der Fassung vom 26. November 1941, RGBl. I 734, § 1-3. See Werner, supra note 71 at 442-445. Certain offences which were considered egregious, such as maliciously hoarding food, clothing and other necessities vital to the population, or taking advantage of the extraordinary state of war, were made subject to more severe criminal penalties under specific enactments. See Kriegswirtschaftsverordnung, September 4, 1939, RGBl. I, 1609, § 1; Volksschädlingsverordnung, September 5, 1939, RGBl. I, 1679, § 4. See also Werner, supra note 71 at 445-455; Gerhard Werle, *Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich* (Berlin: de Gruyter, 1989) at 220-235.

[108] For example, while failure to comply with the instructions of the leader of a business association could provide grounds for the imposition of an *Ordnungsstrafe*, it did not automatically amount to a criminal offence. See Siegert, supra note 103 at 360.

[109] See Werner, supra note 71 at 300-301.

[110] See e.g. Verbrauchsregelungsstrafverordnung in der Fassung vom 26. November, supra note 107, § 4. See also Werner, supra note 71 at 267. In April 1942, the Minister of Justice issued general instructions that a public interest in a judicial process exists where the level of culpability of the actor is so serious that it warrants a custodial sanction or, at least, a criminal record. See Mattes, supra note 41 at 170; Bohnert, supra note 59 at 13.

[111] Cf. Mattes, supra note 41 at 170. The principle of compulsory prosecution is currently codified at Strafprozessordnung (Code of criminal procedure), § 152. Statutory exceptions to the principle of compulsory prosecution, which was introduced by the 1877 imperial code of criminal procedure, were already enacted in the Weimar Republic. See generally Joachim Bohnert, *Die Abschlußentscheidung des Staatsanwalts* (Berlin: Duncker & Humblot, 1992) at 64-79.

separation of powers doctrine.[112] Most importantly, the principle guarantees the separation of the executive from the judiciary by impeding the prosecution from diverting or screening cases out of the criminal justice system, which would interfere with the ability of the courts to fulfil their function.[113]

It is noteworthy that under the Third Reich uniform rules were not set forth in a framework statute governing the procedural and substantive aspects of the administrative sanctioning process. Rather, each discrete statute introducing economic controls contained special provisions authorising the imposition of an *Ordnungsstrafe* for failure to comply with requirements. That said, it can be generalised that the procedural barriers to the imposition of an *Ordnungsstrafe* by an administrative authority were significantly lower than those applicable in a criminal trial. Moreover, insofar as judicial review was concerned, some enactments straightforwardly barred it, providing that an appeal could only be filed with an administrative authority of higher rank,[114] whereas others required that the administrative authority submit its application for a penalty to an administrative court ─ whose decision was deemed final.[115] Some enactments exceptionally endowed the *Amtsgericht* (the county court) with jurisdiction to adjudicate an appeal, without however empowering it to conduct a *de novo* trial or hold an oral hearing.[116]

That Nazi enactments in the economic realm often designated prohibitions simultaneously as crimes and violations that may give rise to an *Ordnungsstrafe* evinces that legislative practice in this regard was not patterned after the conceptual edifice of *Das Verwaltungsstrafrecht.* Legal commentators during the Nazi period could not tolerate Goldschmidt's theory[117] because its underlying premise that

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[112] On the principle of compulsory prosecution in German criminal law see generally Joachim Herrmann, 'The Role of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 468; John Langbein, 'Controlling Prosecutorial Discretion in Germany' (1974) 41 University of Chicago Law Review 430; Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* at 133-171 (1995); Thomas Weigend, 'Prosecution – Comparative Aspects' in Joshua Dressler, ed., *Encyclopedia of Crime & Justice: Vol. III* (2nd ed., New York: Macmillan Reference USA, 2002) 1232, at 1237-1238.

[113] See Langbein, ibid. at 434; Armin Schoreit in Rolf Hennich, ed., *Karlsruher Kommentar zur Strafprozessordnung*, § 152 (6th ed., München: Beck, 2002) 900 at 902.

[114] See e.g. Verordnung über Strafen und Strafverfahren bei Zuwiderhandlungen gegen Preisvorschriften, June 3, 1939, RGBl. I, 999, § 28-32.

[115] See e.g. Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen, November 2, 1923, RGBl. I, 1067, § 12. See Werner, supra note 71 at 283-284.

[116] See Verbrauchsregelungs-strafverordnung, supra note 107, § 6-7.

[117] Due to his Jewish descent, Goldschmidt's writings were almost never referred to in the literature during the Nazi period. Cf. Wolfgang Sellert, 'James Paul Goldschmidt (1874–1940)' in Heinrichs Helmut, Hans Franzki, Klaus Schmalz and Michael Stolleis, eds., *Deutsche Juristen jüdischer Herkunft* (München: Beck, 1993) 595.

criminal offences perform the function of protecting *Rechtsgüter* was not in keeping with the Nazi doctrine that the loyalty of the actor towards the values of the *Volk* should constitute the main focus of the criminal law.[118] In addition, *Das Verwaltungsstrafrecht*'s asserted fidelity to the separation of powers doctrine, as manifested by its substantive demarcation of the legislative and judicial spheres from the administration's pursuit of welfare, was diametrically opposed to the Nazi *Führerstaat* (*Führer*-state) doctrine, according to which all modalities of state power should ultimately reside within the person of the *Führer*, who immediately incarnates the true interests of the German nation.[119]

Although *Das Verwaltungsstrafrecht* did not find favour with legal theorists in the Third Reich, nothing of greater theoretical novelty was forthcoming in the relatively large literature of the 1930s and early 1940s addressing the particular nature of the aims and functions of the administrative penal law as opposed to the criminal law.[120] Some commentators argued that no fundamental difference exists between the criminal law and the law governing the imposition of an *Ordnungsstrafe*, as both branches of the penal law serve the moral purpose of upholding the values underpinning the economic order.[121] Other commentators conceptualised an economic violation subject to an *Ordnungsstrafe* as a mere failure on the part of the actor to fulfil his share in facilitating the smooth operation of the governmental machinery of the state, arguing that such an omission qualitatively differs from conduct proscribed within the criminal law, as it does not betray a deficiency in loyalty on the part of the actor.[122] Though these opposing viewpoints yielded different positions as to whether criminal and administrative penalties could be imposed cumulatively on offenders,[123] the practical ramifications of the dispute were limited, as it was almost always statutorily specified that an *Ordnungsstrafe* may only be availed of in cases where no public interest in the initiation of criminal proceedings obtains.

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[118] See Pechstein, supra note 70 at 127-128.
[119] See Bohnert, supra note 59 at 19; Mattes, supra note 41 at 171.
[120] For an overview of the literature see generally Mattes, ibid. at 171-174.
[121] See Siegert, supra note 103 at 29-31; Heinrich Braukmüller, *Das Ordnungsstrafverfahren des Preisrechts* (Breslau-Neukirch: Kurtze, 1941) at 14-21. Cf. Pechstein, supra note 70 at 94-133.
[122] See Helmut Meeske, 'Über die Ordnungsstrafgewalt im werdenden Wirtschaftsrecht' (1936) Deutschen Juristenzeitung 109, at 115-116; Herbert Rauch, 'Werdendes Wirtschaftsstrafrecht' (1938) ZStW 75, at 96; Karl Hartmann, *Das Ordnungsstrafverfahren in der landwirtschaftlichen Marktordnung* (Breslau-Neukirch: Kurtze, 1940) at 2.
[123] See generally Werner, supra note 71 at 267-269.

Despite the fact that the *Ordnungsstrafe* formed an integral part of the vast apparatus mounted by the Nazi regime to steer the economy so as to carry out its military and ideological ambitions, it was not abolished outright after the end of the war. The remainder of this article offers an analysis of the various causes and factors that contributed to the resilience and growth of administrative sanctions in West Germany, while emphasising the complex interplay with the post-war democratic state formation process. It proceeds by examining in turn the major statutory developments in which the limits, contents and justificatory grounds of the sanctioning power of the administration, and the terms of its relationship with the judicial power to punish within the criminal law, were negotiated and redefined in the 1945-1975 period. Four segments in the trajectory are singled out for discussion. It is necessary to talk of 'segments' since each segment corresponds roughly to a period of time and also goes beyond it, linking with other events in complex and multiple ways. With respect to each segment, I spell out how the legislative reform concerned redrew the contours of the administrative sanctioning process vis-à-vis the investigative and adjudicative stages of the criminal process and explain how its impetus derived from larger developments pertaining to the political and economic reconstruction of West Germany in the shadow of the Nazi period.

IV. *Wirtschaftsstrafgesetz* and *Wirtschaftswunder:* Reforming the Nazi Administrative Sanctioning Machinery in the Midst of the 'Economic Miracle'

Although immediately following the capitulation of the Third Reich in May 1945, the governing authorities – the Allied Control Council and the military governments of the American, British, French and Soviet occupying powers in their respective zones – abolished a swath of enactments passed since 1933 bearing the imprint of Nazi totalitarianism,[124] they did not immediately abrogate the vast array of economic controls surveyed above. Rather, given the bitter penury that prevailed in the initial post-war period, many of the economic controls were left in place. Most notably, the food rationing system, the controls on raw materials and the limits on prices remained in force, as their sudden abolition would have precipitated the population into chaos.[125] Food tickets were issued and special permits were granted to businesses and individuals wishing to purchase clothing, materials, parts, fuel and other essentials. Under conditions of harsh scarcity and near famine, a flourishing black market developed, firms and individuals resorted to illegal bartering, and hoarding was widespread. The *Ordnungsstrafe* was maintained during this period because it offered governing authorities a discretionary tool to quickly sanction offenders without having to necessarily pass through the courts.[126] At the same time, piecemeal efforts were made to curtail aspects of the administrative sanctioning mechanism that were manifestly at odds with *Rechtsstaat* principles.[127]

A political process for comprehensive reform of the *Ordnungsstrafe* began in earnest in June 1947 with the appointment of a commission of experts in the Bizone – the combination of the American and British occupations zones[128] – to draft a

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[124] See Michael Stolleis, *The Law under the Swastika* (Chicago: University of Chicago Press, 1998) at 167-184. See also Matthias Etzel, *Die Aufhebung von national-sozialistischen Gesetzen durch den Allierten Kontrollrat* (Tübingen: Mohr Siebeck, 1992).

[125] See generally Allan Kramer, *The West-German Economy 1945-1955* (Oxford: Berg, 1991) at 71-89.

[126] See Bohnert, supra note 59 at 13.

[127] Most notably, by providing an avenue for judicial review of the administrative penalty decision where none existed beforehand; by laying down maximum penalty amounts where previously no ceiling was specified; and by transferring to the prosecutorial authorities the power to determine in a given case whether an administrative penalty should be imposed or the machinery of the criminal law should be set in motion ─ as is required by the principle of compulsory prosecution (*Legalitätsprinzip*). See Eberhard Schmidt, 'Probleme des Wirtschaftsstrafrechts' (1948) Süddeutsche Juristen Zeitung [SJZ] 227, at 228.

[128] In December 1946 the American and British governments agreed to the economic fusion of their zones. At the end of May 1947 a Bizone Economic Council was created consisting of delegates from the *Länder* of the two zones. (An enlarged version of the Economic Council, with a permanent seat in

framework-law standardising the substantive and procedural rules governing the imposition of administrative and criminal sanctions on economic offenders, so as to make these rules consistent with the *Rechtsstaat* principles of legal security and predictability.[129] The chair of the commission, Eberhard Schmidt, proved to be a leading advocate of expanding the use of administrative sanctions in the years leading up to the proclamation of the Federal Republic and afterwards.[130] Adapting and transferring Goldschmidt's ideas in *Das Verwaltungsstrafrecht*, Schmidt reframed the *Ordnungsstrafe* as a specifically 'administrative' penalty designed to sanction violations that are intrinsically 'administrative' in nature, so as to argue that such a penalty does not run afoul of the *Rechtsstaat* principle of the separation of powers, as it is distinct from criminal punishment in its aims and functions, and thus need not be pronounced by a judicial authority.

The draft bill produced by the commission[131] was enacted into law in 1949 as the Economic Penal Law Act (*Gesetz zur Vereinfachung des Wirtschaftsstrafrechts - Wirtschaftsstrafgesetz*).[132] The Act drew a distinction between criminal wrongs (*Straftaten*), which were to be prosecuted in a judicial trial and made subject to criminal sanctions, and violations (*Ordnungswidrigkeiten*) that were to be subject

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Frankfurt, was later joined by a *Länderrat*, in which each land had two seats, as a second chamber, and an Administrative Council as a cabinet). Although German representatives decisively contributed to policy-making, it was ultimately the responsibility of the occupiers to govern. Laws voted by the Bizone Economic Council could be promulgated only after approval by the American-British Control Board. See Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Vol. V, Die geschichltichen Grundlagen des Deutschen Staatsrechts* (München: Beck, 2000) at 1169-1197.

[129] See generally Eberhard Schmidt, 'Straftaten und Ordnungswidrigkeiten: Erinnerungen an die Arbeiten der Wirtschaftsstrafrechtskommission (1947-1949)' in Horst Ehmke, Carlo Schmid and Hans Scharoun, eds., *Festschrift für Adolf Arndt* (Frankfurt am Main: Europaïsche Verlagsanstalt, 1969) 415.

[130] See generally Eberhard Schmidt, 'Probleme des Wirtschaftsstrafrechts' (1948) SJZ 225; Eberhard Schmidt, 'Rechtsnot im Wirtschaftsstrafrecht und ihre Überwindung' (1948) SJZ 569; Eberhard Schmidt, 'Zur Anwendung des Kontrollratsgesetzes Nr. 50' (1948) Deutsche Richter Zeitung [DRZ] 412; Eberhard Schmidt, 'Das Gesetz zur Vereinfachung des Wirtschaftsstrafrechts' (1949) SJZ 666; Eberhard Schmidt, *Das Neue Westdeutsche Wirtschaftsstrafrecht* (Tübingen: Mohr, 1950); Eberhard Schmidt, 'Straftaten und Ordnungswidrigkeiten' (1951) Juristen Zeitung [JZ] 101; Eberhard Schmidt, *Lehrkommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz: Vol. I* (Göttingen: Vandenhoeck & Ruprecht, 1952) at 165-167. For discussion of Schmidt's chairmanship see generally Werner Niese, 'Eberhard Schmidt' (1961) Neue Juristische Wochenschrift [NJW] 449; Simone Gräfin von Hardenberg, *Eberhard Schmidt (1891-1977)* (Berlin: Duncker & Humblot, 2009) at 358-362.

[131] The bill and explanatory notes are reprinted in Kurt Haertel, Günther Joel and Eberhard Schmidt, *Gesetz zur Vereinfachung des Wirtschaftsstrafrechts (Wirtschaftsstrafgesetz)* (Heidelberg: Schneider, 1949) at 68-195.

[132] Gesetz zur Vereinfachung des Wirtschaftsstrafrechts (Wirtschaftsstrafgesetz) [WiStG], July 26, 1949, Gesetzblatt der Verwaltung des Vereinigtes Wirtschaftsgebiet [WiGBl.], Nr. 27, 193. For systematic analysis of the Act see Heinrich Drost and Georg Erbs, *Kommentar zum Wirtschaftsstrafgesetz* (Frankfurt am Main: Lutzeyer, 1949).

primarily to a monetary penalty (*Geldbuße*)[133] imposed by an administrative authority.[134] The notions that there is a qualitative, rather than a quantitative variation between the two forms of unlawful conduct, and that different aims and functions are served by criminal and administrative sanctions, were built into the architecture statutorily put in place to coordinate between the criminal process and the administrative sanctioning system. Tellingly, the Act provided that where the same incident involved the commission of distinct acts amounting to a violation and a crime respectively, separate administrative and criminal sanctioning proceedings were to be conducted.[135] Moreover, it was exclusively within the jurisdiction of the administrative authority concerned to determine at the outset of an investigation whether to set in motion administrative sanctioning proceedings, regardless of the position taken by the prosecution.[136] The administrative authority had a relatively wide sphere of discretion in this respect under the so-called "principle of opportunity" (*Opportunitätsprinzip*).[137] The public prosecution was explicitly precluded from intervening in the judicial phase of the proceedings; only the administrative authority was to appear before the court to defend its decision if the person concerned moved to

[133] Additional sanctions available included closure of a business establishment, confiscation, forfeiture of benefits gained from the violation, and professional disqualification. WiStG, § 33-52.

[134] A third, 'mixed' category was also created ─ the *Mischtatbestände*. Many economic offences enacted under the Third Reich were very widely defined, encompassing both forms of conduct constitutive of an administrative violation and forms of conduct constitutive of criminal wrongdoing. WiStG, § 6 provided relatively detailed criteria which were designed to guide the *court* (rather than the prosecution or the administrative authority) in determining whether the specific circumstances of the case at hand warrant treating the act concerned as a crime or an administrative violation.

[135] See Drost and Erbs, supra note 132 at 99. On the other hand, if the *same act* amounted to both an administrative violation and a criminal offence, then only criminal proceedings were to be instituted. WiStG, § 32. For criticism of this last rule on grounds of inconsistency with the theoretical conception of a qualitative difference between the two categories of unlawful conduct see Heinz Mattes, 'La réforme du droit des infractions règlementaires dans la République Fédérale d'Allemagne' (1967) Revue Internationale de Droit Pénal 437 at 448 [Mattes, 'La réforme du droit des infractions réglementaires']. Several provisions of the Act also required the prosecution and the administrative authority to inform each other where a decision is taken in response to an instance of unlawful conduct that might also be subject to its jurisdiction. WiStG, § 54(2), 58, 76, 80. In the event of disagreement regarding the proper qualification of a given instance of unlawful conduct, the prosecution and the administrative authority concerned could avail themselves of a special judicial resolution mechanism. § 59, § 85-91 WiStG. For critical analysis of these issues see Karl-Heinz Nüse, 'Gedanke zum Gesetz zur Vereinfachung des Wirtschaftsstrafrechts' (1949) Juristische Rundschau 401.

[136] WiStG, § 54(1), § 77.

[137] WiStG, § 22(2). See Drost and Erbs, supra note 132 at 88. As mentioned previously, in criminal proceedings the *Legalitätsprinzip* mandated that, as a rule, charges should be brought where sufficient evidence exists to obtain a conviction. It should be added, however, that, as mentioned previously, since 1924 departures from the compulsory prosecution rule had been statutorily authorized in designated cases of minor importance. See supra note 111 and accompanying text.

contest the penalty.[138] The Act provided further that the judicial phase of the proceeding, unlike a criminal appeal, need not consist of a *de novo* trial.[139]

The linkage between the *Wirtschaftsstrafgesetz* and the process of democratisation and severance from the Nazi era comes into stark relief if one considers the larger setting in which it passed into law. Specifically, events in the Bizone took a dramatic turn in June 1948 when Ludwig Erhard, the Economic Director of the Economic Council, introduced a major currency reform supplanting the *Reichsmark* with the *Deutsche Mark*. Erhard also lifted many of the price controls for manufactured goods and foodstuffs, and refrained from renewing directives on the rationing of goods and the central allocation of resources.[140] Yet, the termination of many of the rationing and other price-related measures imposed by the Nazi regime in favour of the 'social market economy' championed by Erhard had the unanticipated effect of nearly thwarting the planned structural reform of the sanctioning system for economic offences. For many, though not all, of the prohibitions concerned, such as hoarding vital goods[141] and using a forged food-coupon[142] appeared to have lost all practical relevance.[143] Records of debates in the Economic Council reveal that, in view of the widespread aspiration among the West German population to break free of the economic controls originally imposed by the Nazi authorities, the delegates entertained growing doubts about the need for reform along the lines proposed by the commission.[144] As a result, the Economic Council approved the Act subject to the proviso that it only remain in force for a six-month period.[145] Given the vicissitudes of the economic transition, the uncertainty about the fate of the law was not resolved

[138] WiStG, § 82.
[139] WiStG, § 82(3). That said, the court was given much leeway in exercising judicial review. Though it was not bound to hold an oral hearing, it had the power to order further investigative measures for the collection of evidence and to hear witnesses and expert testimony. The court could confirm, alter or annul the administrative decision as long it was not to the disadvantage of the person concerned. See Drost and Erbs, supra note 132 at 155-156.
[140] See Gesetz über Leitsätze für die Bewirtschaftung und Preispolitik nach der Geldreform, June 24, 1948, WiGBl. 59. See also Herbert Giersch, Karl-Heinz Paqué and Holger Schmieding, *The Fading Miracle: Four Decades of Market Economy in Germany* (Cambridge: Cambridge University Press, 1994) at 37-38.
[141] WiStG, § 1.
[142] WiStG, § 2.
[143] See Erich Gerner and Hugo Winckhler, *Wirtschaftsstrafgesetz 1954* (München: Beck, 1954) at 2-3.
[144] See Institut für Zeitgeschichte und dem Deutschen Bundestag, Wissenschafltiche Dienste, eds., *Wörtliche Berichte und Drucksachen des Vereinigten Wirtschaftsgebiets: Vol. III* (München: Oldenbourg, 1977) at 1684-1688. See also Georg Müller, *Die Grundlegung der westdeutschen Wirtschaftsordnung im Frankfurter Wirtschaftstrat 1947-1949* (Frankfurt am Main: Haag & Herchen, 1982) at 161-163.
[145] WiStG, § 105.

within a short period of time. Indeed, the *Bundestag* had to repeatedly prolong the Act's lifeline until it passed an entirely new version in 1954.[146]

Yet, even as the reform of the administrative sanctioning process was nearly derailed by Erhard's free-market remedies, the larger project of establishing a *Rechtsstaat* which decisively breaks with the Third Reich provided sustenance for it to stay on course after the proclamation of the Federal Republic and its Basic Law ─ the *Grundgesetz*.[147] To salvage the reform from drifting into irrelevancy, the members of the commission cast the *Wirtschaftsstrafgesetz* as an impetus to wrench the administrative sanctioning system of the newly proclaimed Republic away from its Nazi roots and re-anchor it in *Rechtsstaat* principles. Their advocacy efforts reveal how in the years immediately following the demise of the Nazi regime the separation of powers turned from a doctrine inimical to the recognition of an administrative power to impose sanctions to a programme that could underpin and sustain it. Thus, Eberhard Schmidt insisted that the Act aimed first and foremost to entrench the separation of powers principle by statutorily demarcating in advance the forms of unlawful conduct which are subject to an administratively imposed penalty from those which may only be criminally prosecuted in a judicial process. Taking issue with opponents of the Act who invoked the need to support Erhard's social market economy reforms, Schmidt further asserted that the purpose of the *Wirtschaftsstrafgesetz* is not to uphold the Nazi "command economy" but to "liberate" the economic penal law from "the degeneracy of the strong totalitarian state" so as to "realise the *Rechtsstaat* principles in concordance with the Constitution of the Federal Republic of Germany."[148] Adolf Arndt, who was also closely involved in the work of the commission,[149] stressed that the objective of the *Wirtschaftsstrafgesetz* was to finish, once and for all, with the Nazi economic

[146] See Hellmuth Ebisch, *Wirtschaftsstrafgesetz vom 9. Juli 1954 in der Fassung vom 21. Dezember 1958* (Berlin: Vahlen, 1959) at 10-15.
[147] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz], May 23, 1949, Bundesgesetzblatt [BGBl.] I.
[148] Schmidt, 'Das Neue Westdeutsche Wirtschaftsstrafrecht,' supra note 130 at 8 (author's translation). Another commentator hailed the Act as a "milestone on the way to the creation of a genuine *Rechtsstaat*." Heinrich Drost, 'Die Hauptgedanken des neuen Wirtschaftsstrafrechts' (1949) DRZ 405 at 405 (author's translation).
[149] Moreover, Adolf Arndt was a delegate in the Economic Council. See Dieter Goswinkel, *Adolf Arndt* (Bonn: Dienst, 1950) at 157-158; Adolf Arndt, 'Rechtsprechende Gewalt und Strafkompetenz' in Theodor Eschenburg, Theodor Heuss and Georg-August Zinn, eds., *Festgabe für Carlo Schmid* (Tübingen: Mohr, 1962) 5 at 8-9.

regulatory system, and bring it in conformity with *Rechtsstaat* principles.[150] In the same vein, Alfred Gross objected to the six-month time-limit grafted onto the bill by the Economic Council by evoking the cynical brutality of the Nazi regime and its arbitrary enforcement of the law, in complete disregard of the separation of powers doctrine. The *Wirtschaftsstrafgesetz,* Gross affirmed, was animated by the aspiration of putting the economy back on solid *Rechtststaat* foundations.[151] Interestingly, Erhard's social market economy agenda did not always prove incompatible with the growth of administrative sanctions. As will be seen below, Erhard's efforts in the 1950s to secure the foundations for a free competitive economy through the introduction of anti-cartel legislation constituted a turning point in its use of tough administrative penalties to deter business misconduct.

[150] See Adolf Arndt, 'Das neue Wirtschaftsstrafgesetz' (1949) Der Betriebs Berater [BB] 425.
[151] Alfred Gross, 'Dem Gesetz zur Vereinfachung des Wirtschaftsstrafrechts zum Geleit' (1949) Monatsschrift für Deutsches Recht [MDR] 528.

V. Establishing the Administrative Sanctioning System: The 1952 *Ordnungswidrigkeitengesetz*

Despite the birth pangs of the initial post-war years, the promulgation of the *Wirtschaftsstrafgesetz* generated effects well beyond its immediate sphere of application. The *Bundestag* took things a step further in early 1952 with the passage of the first *Ordnungswidrigkeitengesetz* (hereinafter, the "1952 OWiG Act"),[152] which laid the foundations for a comprehensive administrative sanctioning system and paved the way for administrative penalties to be employed in lieu of the criminal law broadly, extending not just to the violation of economic controls but to regulatory violations committed in all fields of professional and commercial activity.[153] Just like the *Wirtschaftsstrafgesetz*, the structural edifice of the 1952 OWiG Act was assembled based on the viewpoint that the administrative penal law and the criminal law target qualitatively distinct categories of wrongs and that their respective sanctions serve different aims and functions.[154]

There were several factors which created the impetus for the 1952 OWiG Act, most of which had to do with events that occurred in the immediate aftermath of the proclamation of the Federal Republic, as the *Bundestag* acted to restore the civil and criminal court system. To ease the transition, the intent was to reinstate the statutory framework in force prior to the rise of the Nazis to power in 1933, while allowing for the introduction of changes required by the newly enacted *Grundgesetz.*[155] The Ministry of Justice proposed to restore the administrative *Polizeistrafverfügung* sanctioning mechanism to its original form,[156] whereby statutorily designated local

[152] Gesetz über Ordnungswidrigkeiten, March 25, 1952, BGBl. I, 177 (hereinafter, 1952 OwiG).
[153] See generally Mattes, *Untersuchungen zur Lehre von den Ordnungswidrigkeiten: Vol. II* (Berlin: Duncker & Humblot, 1977) at 50-80 (hereinafter, Mattes, Untersuchungen – Vol. II). See also Adolf Arndt's declaration at the Bundestag in Verhandlungen des Deutschen Bundestages, I. Wahlperiod 1949, Stenographische Band 10 von der 182. Sitzung am 9 Januar 1952 bis zur 197. Sitzung am 29. Februar 1952, 196. Sitzung 28. Februar 1952, 8457. ("The law is a framework-law; it aims to regulate in a uniform manner administrative violations for all areas…not just for economic regulation but also particularly for labour regulation, energy regulation, sales regulation, and whatever else may require consideration") (author's translation).
[154] For detailed analysis of the provisions governing coordination between administrative authorities and decision-makers in the criminal justice system see Mattes, 'La réforme du droit des infractions réglementaires' supra note 135 at 447-451.
[155] See Karl Schäfer, 'Einleitung' in Karl Schäfer, Hanns Dünnebier and Peter Rieß, eds., Ewald Löwe and Werner Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz: Großkommentar* (24th ed., Berlin: de Gruyter, 1988) 1 at 27-28.
[156] Entwurf eines Gesetzes zur Wiederherstellung der Rechtseinheit auf dem Gebiet der Gerichtsverfassung, der bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts mit Begründung, Deutscher Bundestag: Drucksachen und Protokolle 153/0, § 413-417, 54.

authorities were empowered to issue a penal order sanctioning an offender with either a monetary penalty or detention for a maximum period of fourteen days.[157] Yet, this specific proposal provoked objections that led to modifications in the bill submitted to the *Bundestag*.[158] It should be noted that in the interim period following the collapse of the Third Reich, the American and British occupation authorities abolished the *Polizeistrafverfügung* mechanism based on the view that it violated the separation of powers doctrine.[159] Although the Adenauer government attempted in its bill to reverse this legacy, the *Bundestag* did not follow suit.[160] The Committee for the Legal System and Constitutional Law, to which the bill was referred for deliberation,[161] held the view that "[t]he judicial power has acquired a different standing in the framework of our state organism than it has had thus far, such that it is no longer possible for the police to exercise judicial functions."[162] As a result, "punishment in the future may only be pronounced by a judicial court."[163] The bill was consequently amended to provide that administrative authorities must obtain a court order to impose sanctions on the defendant. This outcome had potentially far-reaching practical ramifications, as the *Polizeistrafverfügung* previously served to divert large numbers of cases involving regulatory offences out of the criminal justice system. To allay worries about possible judicial overload − while arguably remaining in line with the separation of powers doctrine − the *Bundestag* adopted the 1952 OWiG Act, thereby filling the vacuum created by its reworking of the *Polizeistrafverfügung.*[164] Significantly, this legislative

[157] See supra text accompanying notes 62-63 and accompanying text.

[158] See Gesetz zur Wiederherstellung der Rechtseinheit auf dem Gebiete der Gerichtsverfassung, der bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts, September 12, 1950, BGBl. I, 455. See also Bohnert, supra note 59 at 14.

[159] See Schäfer, supra note 155 at 25-26; Mattes, supra note 41 at 104; Ottmar Bühler, 'Die eigene Strafgewalt der Verwaltungsbehörden nach deutschem Recht' in *Festschrift für Ernst Heinrich Rosenfeld* (Berlin: de Gruyter, 1949) 203.

[160] The West German authorities could not have been impervious to this prior development. It is noteworthy in this respect that the Occupation Statute, in the version in force in 1950, granted the Western Allies authority to invalidate legislation which in their view failed to conform to the *Grundgesetz.* Text of Occupation Statute promulgated on 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones, in 1 *Official Gazette of the Allied High Commission for Germany*. 23.09.1949, 13. See also Stern, supra note 128 at 1388-1389.

[161] Mündlicher Bericht des Ausschusses für rechtswesen und Verfassungsrecht (23. Ausschuß) über den Entwurf eines Gesetzes zur Wiederherstellung der Rechtseinheit auf dem Gebiet der Gerichtsverfassung, der bürgerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts (Nr. 530 der Drucksachen), Deutscher Bundestag: Drucksachen und Protokolle 1/1138.

[162] 1. Wahlperiode, 79. Sitzung, Sten. Ber. p. 2877, at 2855 (author's translation).

[163] Ibid.

[164] See Entwurf eines Gesetzes über Ordnungswidrigkeiten mit Begründung, March 28, 1951, Deutscher Bundestag: Drucksache und Protokolle 1/2100, 14. See also Hans Eberhard Rotberg, *Kommentar zum Gesetz über Ordnungswidrigkeiten* (Berlin: Vahlen, 1952) 26-27. The *Polizeistrafverfügung* was not frequently put to use in the post-war period. In 1975, it was abolished,

enactment marked a major inroad for administrative penalties into the nascent West German legal order, as it enabled the legislator to provide sanctions for actors who fail to comply with regulatory requirements generally, without having to press the criminal law into service.

The aforementioned events surrounding the enactment of the 1952 OWiG Act did not represent the sole link tying together the enlargement of the sanctioning powers of the administration in West Germany and the process of democratisation which was underway in the late 1940s and early 1950s. In addition to emphasising the need to develop an alternative to the criminal sanctioning process so as to reduce the workload of the courts, the explanatory notes accompanying the bill introduced to the *Bundestag* also attached importance to *Rechtsstaat* considerations.[165] Specifically, the claim was made in the official comments that since crimes are intrinsically distinct from violations – such that conviction of criminal conduct, unlike an administrative penalty decision, carries the social stigma of moral turpitude – the *Rechtsstaat* principles of legal predictability and legal determinability *require* legislative intervention to categorically distinguish between the two types of wrongdoing and their attendant sanctions.[166] The explanatory notes further defended the necessity for introducing administrative sanctions on a wider scale with the assertion that, having enacted the 1949 *Wirtschaftsstrafgesetz*, the *Bundestag* cannot stop halfway, for it offends the sense of justice to draw a distinction between crimes and violations as regards economic offences, while resorting to the criminal law to sanction failures to comply with laws regulating other areas of commercial and professional activity.[167] The explanatory notes also stated that while the separation of powers doctrine precludes assigning punitive powers to administrative authorities as regards offenders charged with a criminal offence, the *Ordnungswidrigkeit* sanctioning mechanism is confined to cases involving violations, which are qualitatively distinct from criminal wrongs.[168]

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together with the category of contraventions as a whole. Art. 21 Nr. 107 EGStGB March 2, 1974, BGBl. I, 469. See Bohnert, 'Die Entwicklung des Ordnungswidrigkeitenrechts,' supra note 61 at 14.

[165] Entwurf eines Gesetzes über Ordnungswidrigkeiten mit Begründung, supra note 164.

[166] Ibid. at 14.

[167] Ibid. at 15.

[168] Ibid.

VI. Decartelisation and Democratisation: The 1957 Competition Act

As spelled out in the Potsdam Agreement, decartelisation of the German economy constituted a major objective of the Allied occupation governments in 1945.[169] The Western military authorities each followed suit in the course of 1947 by enacting decartelisation laws in their respective zones[170] with sweeping prohibitions of excessive concentrations of economic power.[171] These laws would remain in effect on a transitional basis after the establishment of the Federal Republic in May 1949, until the *Bundestag* passed legislation to take their place.[172]

In the period leading up to the foundation of the Federal Republic, experts associated with Ludwig Erhard prepared a highly detailed draft for an anti-cartel law that was to supersede the Allied decartelisation laws.[173] Yet, the public disclosure of the final product, known as "the Josten draft"[174] prompted an uproar in business

[169] Potsdam Agreement, Aug. 2, 1945, 59 Stat. 1823, E.A.S. No. 48, § II.B. (12).

[170] For the American zone see U.S. Military Government Law 56, Military Government Gazette – Germany United States Area of Control Issue C, 2 (April 1, 1947). For the British zone see British Military Government Ordinance 78: Prohibition of Excessive Concentration of German Economic Power, 16 Military Government Gazette – Germany British Zone of Control 412 (1947). For the French zone see Ordonnance 96 prohibant toute concentration excessive de la puissance économique allemande 78 Journal Officiel du Commandement en Chef Français en Allemagne 784 (1947). For discussion of decartelization and deconcentration in the post-war period under the occupation see Heinrich Karl Bock and Hans Korsch, 'Decartelization and Deconcentration in the West German Economy since 1945' in W. Friedmann, ed., *Anti-Trust Laws: A Comparative Symposium* (London: Stevens, 1956) 138; Ivo E. Schwartz, 'Antitrust Legislation and Policy in Germany – A Comparative Study' (1957) 105 University of Pennsylvania Law Review 617 at 643-652; Wernhard Möschel, 'Entflechtung-Antimonopolrecht' in Bernhard Diestelkamp et al. eds., *Zwischen Kontinuität und Fremdbestimmung* 233 (Tübingen: Mohr, 1996).

[171] The American and British laws prohibited cartels or "any other form of understanding or concerted undertaking between persons, which have the purpose or effect of restraining, or fostering monopolistic control of domestic or international trade or other economic activity, or of restricting access to domestic or international markets[.]" Article I, paragraph 2, U.S. Military Government Law 56, Id.; Article I, paragraph 2, British Military Government Ordinance 78, supra note 150.

[172] Paragraph 2(b) in combination with paragraph 7 of the Text of Occupation Statute promulgated on 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones, in 1 *Official Gazette of the Allied High Commission for Germany*. 23.09.1949, 13. See also David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon Press, 1998) 269 (hereinafter, Gerber, Law and Competition).

[173] According to Peter Hüttenberger, work on the draft had begun in the fall of 1946. See Peter Hüttenberger, 'Wirtschaftsordnung und Interessenpolitik in der Kartellgesetzgebung der Bundesrepublik 1949-1957' (1976) 24 Vierteljahrshefte für Zeitgeschichte 287 at 291.

[174] The draft was named after Paul Josten, chair of the committee appointed to prepare the bill. For discussion of the draft see generally Rüdiger Robert, *Konzentrationspolitik in der Bundesrepublik – Das Beispiel der Entstehung des Gesetzes gegen Wettbewerbsbeschränkungen* (Berlin: Duncker & Humbolt, 1976) at 102-106; Lisa Murach-Brand, *Antitrust auf Deutsch* (Tübingen: Mohr Siebeck, 2004) at 101-113; Gerber, Law and Competition, supra note 172 at 273-274; A.J. Nicholls, *Freedom with Responsibility* (Oxford: Clarendon Press, 1994) at 326-329.

circles because it proposed to virtually eliminate cartels altogether.[175] Due the controversy that ensued, Erhard shrank back from the draft. Only by 1952, after conducting intense negotiations with the business sector, did the Adenauer government present a bill to the *Bundestag* (hereinafter, the 1952 GWB bill).[176] Its passage was not assured, and only in 1957 was the Act Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (hereinafter, the 1957 GWB Act) promulgated.[177] While the 1957 GWB Act did forbid anticompetitive agreements and practices, it considerably watered down the principles that Erhard pushed for as part of his social market economy program by introducing numerous exemptions because of pressure by German business.[178]

The events which culminated with the enactment of the 1957 GWB Act were to have significant repercussions on the future trajectory of legislative practice as regards the use of administrative sanctions as a tool to induce compliance with statutory norms. Unlike the Josten draft and the Allied decartelisation laws, the 1957 GWB Act was free of criminal sanctions.[179] All prohibitions laid down in the Act,

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[175] See generally James C. Van Hook, *Rebuilding Germany* (Cambridge: Cambridge University Press, 2004) at 236-250; Volker R. Berghahn, *The Americanization of West German Industry 1945-1973* (New York: Cambridge University Press, 1986) at 155-161. The Josten draft also laid the foundations for the creation of an independent agency, the 'Monopoly Office' (*Monopolamt*) with far-reaching powers to oversee implementation and enforcement of the law. The draft included as well detailed provisions governing the concentration of economic power. However, these draft provisions were not subsequently adopted, because the Western Allied governments reserved to themselves powers for the deconcentration of heavy industry. See Murach-Brand, supra note 174 at 99-101.

[176] Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, Deutscher Bundestag: Drucksachen und Protokolle 2/1158. An unofficial abridged English translation is reprinted in W. Friedmann, *Anti-Trust Laws: A Comparative Symposium* 189-237 (1956) at 189-237. For analysis of the bill see Ivo E. Schwartz, 'Antitrust Legislation and Policy in Germany – A Comparative Study' (1957) 105 University of Pennsylvania Law Review 617 at 652-690.

[177] Gesetz gegen Wettbewerbsbeschränkungen, June 27, 1957, BGBl. I, 1081 (hereinafter, 1957 GWB Act). On the 1957 GWB Act see generally Heinrich Kronstein, '"Cartels" under the New German Cartel Statute' (1958) 11 Vanderbilt Law Review 271; Peter D. Schapiro, 'The German Law against Restraints of Competition – Comparative and International Aspects – Part One' (1962) 62 Columbia Law Review 1; Peter D. Schapiro, 'The German Law against Restraints of Competition – Comparative and International Aspects – Part Two' (1962) 62 Columbia Law Review 200.

[178] For analysis of the differences and conflicts that protracted and complicated the legislative process for over five years see generally Viola Gräfin von Bethusy-Huc, *Demokratie und Interessenpolitik* (Wiesbaden: Steiner, 1962) at 36-81; Van Hook, supra note 175 at 233-289; Susanne Hilger, 'Zur Genese des "German Model". Die Bedeutung des Ordoliberalismus für die Ausgestaltung der bundeseutschen Wettbewerbsordnung nach dem Zweiten Weltkrieg in Paul Windolf, ed., F*inanzmarktkapitalismus. Analysen zum Wandel von Produktionsregimen* (2005) Kölner Zeitschrift für Soziologie und Sozialpsychologie 222 at 227-235.

[179] This policy decision stirred controversy in the literature for decades. For an overview of this debate see generally Florian Wagner-von Papp, 'What if All Bid-Riggers Went to Prison and Nobody Noticed?' in Caron Beaton Wells and Ariel Ezrachi, eds., *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart Publishing, 2011) 157, 162-163, 174-182; John O. Haley, *Antitrust in Germany and Japan* (Seattle: University of Washington Press, 2001) at 157-162. For a defence of non-criminalisation see Wolfgang Kartte and Alexander von Portatius,

including prohibitions targeting 'hard-core' forms of cartel behaviour, such as unauthorised price-fixing or limiting the supply or production of goods or services, were designated as *Ordnungswidrigkeiten.*[180] This sanctioning strategy was first set forth in the 1952 GWB bill. Significantly, the 1952 GWB bill went so far as to authorise a maximum *Bußgeld* of one million DM.[181] (In the end, the 1957 GWB Act only set the ceiling at 100 000 DM.)[182] The official comments accompanying the 1952 GWB bill stressed the need for hefty monetary penalties to counter the economic power of business actors most liable to engage in anticompetitive activity. Pointing to the advantages of leaving enforcement authorities a wide scope of discretion, the explanatory notes also called attention to the fact that designating breaches of competition law as violations, rather than crimes, offsets the principle of compulsory prosecution, thereby enabling the cartel authorities to enforce the law in an "elastic and unbureaucratic" manner, without having to impose penalties in cases of minor seriousness.[183]

The administrative sanctioning provisions introduced by the 1952 GWB bill represented a major novelty compared with the 1949 *Wirtschaftsstrafgesetz* and the 1952 OWiG Act.[184] Given that the 1952 OWiG Act only envisaged a maxima of 1000

'Kriminalisierung des Kartellrechts?' (1975) BB 1169; Peter Selmer, *Verfassungsrechtliche Probleme einer Kriminalisierung des Kartellrechts* (1977); Wernhard Möschel, 'Zur Kriminalisierung von Kartellverstössen' in *Festgabe zum 65. Geburtstage von Max Kummer* (Bern: Stämpfli, 1980) 431. For the viewpoint favoring criminalisation see Jürgen Baumann and Gunther Arzt, 'Kartellrecht und allgemeines Strafrecht' (1970) Zeitschrift für des gesamte Handelsrecht und Wirtschaftsrecht 24; Klaus Tiedemann, *Kartellverstöße und Strafrecht* (1977); Karsten Schmidt, 'Zur Verantwortung von Gesellschaften und Verbänden im Kartell-Ordnungswidrigkeitenrecht' (1990) Wistra 131. In 1997, a criminal offence of "anticompetitive agreements in tendering procedures" was enacted. Strafgesetzbuch, § 298(1). See Wagner-von Papp, ibid. at 165-166.

[180] 1957 GWB Act, § 31. To bring the monetary penalty to bear on an offender, section 81 required the cartel authorities to file with the *Oberlandsgericht* (the Higher Regional Court) an application similar to a criminal charging sheet. See Eugen Langen, *Kommentar zum Kartellgesetz*, § 31; at 81 (3rd ed., Neuwied: Luchterhand, 1958). However, this special judicial proceeding was abolished in 1965, and the cartel authorities were empowered to initially impose the penalty themselves. See Heinrich Tetzner, *Kartellrecht* at 244-245 (München: Beck, 1967).

[181] 1952 GWB bill, § 31.

[182] 1957 GWB Act, § 38-39.

[183] Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, supra note 176, section B II. That the *Legalitätsprinzip* is not binding on administrative authorities in *Ordnungswidrigkeit* proceedings is often considered a major advantage by supporters of non-criminalisation, for it gives the cartel authorities leeway to determine the manner in which to allocate its limited resources and to consider such factors as the seriousness of the act in question and the development of judicial construction of the law. See Haley, supra note 157 at 158-159; Kartte and von Portatius, supra note 179 at 1173; Möschel, supra note 179 at 433. See also Wagner-von Papp, supra note 179 at 174-180.

[184] Cf. Hans Mittelbach, 'Das Ordnungswidrigkeitensverfahren in Gegenwart und Zukunft' (1959) MDR 617 at 618.

DM,[185] academic commentators expressed serious misgivings as to whether a penalty of such a magnitude as one million DM (as originally proposed by the 1952 GWB bill) could still be characterised as a mere 'call to order' that is in its essence distinct from the criminal fine.[186] Tellingly, Eberhard Schmidt disparaged the anti-cartel bill because it strayed from the principles developed in the legal literature to mark off the criminal law from the administrative penal law:

> In my view, it was a very grave error for the legislator to treat conduct in cartel law which is criminal beyond a doubt as an administrative violation. At the time we drafted the economic penal legislation, such a development was in no way foreseen. Then something entirely different was being considered, specifically that economic crimes would be prosecuted within the judicial system. The fundamental idea behind the Administrative Violations Act [the 1952 OWiG Act] is in my view definitely correct. Yet it presupposes that the legislator not downgrade to an administrative violation, whatever the underlying considerations, conduct which is obviously a criminal wrong.[187]

Despite these grievances concerning the reconfiguration of the relationship between criminal liability and punishment and administrative penalties, the sanctioning structure of the1952 GWB bill largely survived in the Act promulgated in 1957 and, with this, set an example that would be followed in the years and decades afterwards, as regulatory statutes provided for tough administrative monetary penalties to deter against unlawful business activity.[188]

It may seem that nothing more stood behind the change introduced by the 1952 GWB bill and the 1957 GWB Act than a trade-off between representatives of German industry intent on shielding business actors from the risk of stigmatisation and

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[185] 1952 OWiG Act, § 5.

[186] See Hans-Heinrich Jescheck, 'Das deutsche Wirtschaftsstrafrecht' (1959) JZ 457 at 461; Dietrich Lang-Hinreisen, 'Verbandsunrecht' in Friedrich Geerds and Wolfgang Naucke, eds., *Festchrift für Hellmuth Mayer* 49 at 58-59 (1966). See also the statements by Hans-Heinrich Jescheck and Eberhard Schmidt concerning the 1952 GWB bill in *Niederschriften über die Sitzungen der Großen Strafrechtskommission: Vol. IV* (Bonn: Bundesministerium der Justiz, 1958) at 324-326.

[187] *Niederschriften über die Sitzungen der Großen Strafrechtskommission*: *Vol. VIII* (Bonn: Bundesministerium der Justiz, 1959) at 80 (author's translation). Moreover, it is noteworthy that some of the violations of the anti-cartel rules subject to an administrative penalty impaired the *Rechtsgut* of the free competitive order as such, rather than the 'administrative' interests of the cartel authorities. See Jescheck, 'Das deutsche Wirtschaftsstrafrecht,' ibid. at 461; Lang-Hinreisen, ibid. at 58-59. For a different view see Hans-Eberhard Rotberg, *Gesetz über Ordnungswidrigkeiten* (3rd ed., Berlin: Vahlen, 1964) at 27.

[188] See Hans Achenbach, 'Ahndung materiell sozialschädlichen Verhaltens durch bloße Geldbuße?' (2008) Goltdammer's Archiv für Strafrecht [GA] 1 at 5. Cf. Mattes, *Untersuchungen - Vol. II*, supra note 153 at 81.

imprisonment and the Adenauer government, whose ambition it was to enable the cartel authorities to present a credible threat by imposing severe monetary penalties.[189] Yet, sight should not be lost of the variety of ways in which this important turning point in the emergence of legislative practice as regards administrative sanctions was inscribed in the broader process of the democratic reconstruction of West Germany as a sovereign state after the war.

It is important to recognise that Erhard's anti-cartel campaign extended far beyond the realm of economic policy. The issues at hand reverberated with poignant questions about the defining characteristics of West German identity and the Federal Republic's stance vis-à-vis the Weimar Republic and the Nazi regime, where arrangements among competitors to restrict prices, outputs and other forms of competition formed an integral part of economic life.[190] Representatives of German industry – especially, the powerful *Bundesverband der deutschen Industrie* – advocated a return to the relatively lax regime that prevailed in the Weimar Republic, whereby state intervention against cartels was only mandated in the event of an "abuse of power" (the *Missbrauchsprinzip*).[191] David Gerber explained the fundamental issues that were at stake in the post-war debate on competition law:

> [E]rhard, and others who were associated with the drive to assure a democratic society and a market-based economy portrayed competition law as the key to the social market economy and the social market economy as the key to a new future for Germany. The GWB was not just another law and the FCO [Federal Cartel Office] not just another administrative office. Together, they symbolized the rejection of a failed regime and belief in a democratic alternative….[A] competitive economic 'order' was fundamentally different from a command-based order…to choose such an order was the best (only) means of achieving economic stability and democratic freedom[.][192]

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[189] Cf. Gerhard Dannecker, Ulrich Immenga and Ernst-Joachim Mestmäcker, *Gesetz gegen Wettbewerbsbeschränkungen – Kommentar* (3rd ed., München: Beck, 2001) Vorbemerkung vor § 81, at 1929.

[190] See David J. Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 American Journal of Comparative Law 25 at 64 (1994). On the influence of cartels on German economic life during the inter-war period see Wagner-Von Papp, supra note 179 at 161; Schwartz, supra note 176 at 625-642. As discussed earlier, these patterns of business behaviour were by no means unsettled by the Nazi regime, where voluntary and mandatory cartel organizations operated on a vast scale under the direction of the state.

[191] *See* Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen, November 2, 1923, Reichsgesetzblatt, Vol. I, 1067. For an overview of cartel law under the Weimar Republic see generally Schwartz, ibid. at 635-641.

[192] Gerber, *Law and Competition*, supra note 172 at 282.

In order to understand more fully the link between the social market economy and the renewal of the West German economic and political system after the war, it is also important to consider the intellectual framework of Erhard's anti-cartel program. Erhard was deeply influenced by the school of 'Ordoliberalism,' an intellectual movement originally formed by a group of legal and economic scholars working in Freiburg in the early 1930s.[193] Although highly critical of state economic steering and planning, the Freiburg school distinguished itself from classic capitalism by envisioning competition not as the result of a process whereby individuals are left free to pursue their self-interest but as the product of an economic order consciously designed by the state. Accordingly, the Ordoliberals called for active state intervention as regards the market through the prohibition of formations – such as cartels and monopolies – that distort the process of competition.

One of the most distinctive traits of Ordoliberal doctrine was its emphasis on the inherent interdependence of the economic and political orders of government.[194] Expanding the state's role in the economy, the Freiburg school argued, produces outcomes which are not only detrimental to material prosperity but inimical to democracy. Its members argued that Germany's tradition of state-directed economic policy, together with its culture of cartelisation, enabled the expansion and intensification of state authority in the economic crises of the 1920s and early 1930s that paved the way for the establishment of the Nazi state with the support of big business.[195] To counter the potential threat of escalation in state authoritarianism, the

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[193] For discussion of the impact of Ordoliberalism on postwar German economic policy see Gerber, *Law and Competition*, ibid. at 232-265; François Bilger, *La Pensée Économique Libérale dans L'allemagne Contemporaine* (Paris: Pichon & Durand-Auzias, 1964); Heinz Rieter and Matthias Schmolz, 'The Ideas of German Ordoliberalism 1938-1945: Pointing the Way to a New Economic Order' (1993) 1 European Journal of the History of Economic Thought 87; Nicholls, supra note 174; Keith Tribe, *Strategies of Economic Order* (Cambridge: Cambridge University Press, 1995) at 203-240. For analysis of the differences between Ordoliberalism and other varieties of neo-liberalism see Gerber, ibid. at 236-237; Manfred E. Streit and Michael Wohlgemuth, 'The Market Economy and the State: Hayekian and Ordoliberal Conceptions' in Peter Koslowski, ed., *The Theory of Capitalism in the German Economic Tradition* (Berlin: Springer, 2000) 224.

[194] See Walter Eucken, 'What Kind of Economic and Social System?' in Alan Peacock and Hans Willgerodt, eds., *Germany's Social Market Economy: Origins and Evolution* 27 (Hampshire: Macmillan, 1989); Streit and Wohlgemuth, ibid. at 230 ("It is a key message of the Freiburg tradition that private (market-) power not only reduces the freedom of the many in favour of the domination by the few in the economic system, but that it also penetrates and impairs the political system").

[195] See Eucken, 'What Kind of Economic and Social System?' ibid. at 35. See also Bilger, supra note 193 at 121-123; Michel Foucault, *The Birth of Biopolitics* (London: Palgrave Macmillan, 2007) at 113-114. For discussion of the problem of the 'strong state' in Ordoliberal thought see Manfred E. Streit and Michael Wohlgemuth, 'The Market Economy and the State: Hayekian and Ordoliberal Conceptions' in Peter Koslowski, ed., *The Theory of Capitalism in the German Economic Tradition* 224 at 232-234 (Berlin: Springer, 2000); Gerber, *Law and Competition*, supra note 172 at 249-250.

Ordoliberals urged that the nineteenth-century conception of the *Rechtsstaat* be revised to control the use of state power in the economic realm.[196] Specifically, the Ordoliberals endeavoured to legislatively entrench the fundamental principles of a competitive order in an 'Economic constitution' (*Wirtschaftsverfassung*), which would both constrain and provide the impulse for governmental decision-making in economic matters, thereby preventing state officials from giving in to pressures by unions and business groups to intervene in the economy beyond what is required to maintain a healthy level of competition.[197]

Ordoliberal thought permeated a great deal of the post-war debate about competition law.[198] The Josten draft was prepared by a committee that included among its members such prominent Ordoliberal theorists as Franz Böhm.[199] Though Erhard recoiled from the draft at the last minute, he viewed robust anti-cartel legislation as a pillar of his social market economy program.[200] Indeed, the official comments accompanying the 1952 GWB bill affirmed salient Ordoliberal ideas concerning the inherent interpenetration of the economic and political spheres of the constitutional order, noting, for instance, that an economic order based on free competition represents the counterpart of a democratic political order; for whereas democracy allows citizens to exercise their right to take part in the polity's self-determination, a free competitive order secures the fundamental rights of freedom of labour and consumer choice.[201]

Setting the policy of the Adenauer government to provide administrative rather than criminal sanctions for practices which impair competition against the complex backdrop of the post-war debate about the role of cartels in the 1920s and 1930s endows it with additional significance. From the perspective of democratic governance, this policy provided a bridge between the government's steadfast refusal to repeat the experience of widespread cartelisation which prevailed prior to the war

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[196] Franz Böhm, 'Rule of Law in a Market Economy' in Alan Peacock and Hans Willgerodt, eds., *Germany's Social Market Economy: Origins and Evolution* (Houndmills: Macmillan, 1989) 46. See also Bilger, ibid. at 147.

[197] Walter Eucken developed in detail these fundamental principles. See Walter Eucken, *Grundlagen der Nationalökonomie* (Jena: Fischer, 1940); Walter Eucken, *Grundsätze der Wirtschaftspolitik* (Tübingen: Mohr, 1952). For discussion see Hilger, supra note 178 at 225-227; Bilger, ibid. at 150-160; Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New Europe",' supra note 190 at 45-48.

[198] See generally Gerber, ibid. at 62-69

[199] See Haley, supra note 179 at 44-48.

[200] See Nicholls, supra note 174 at 322-329.

[201] Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, supra note 176, section A.

and its determination to put in place the institutional mechanisms needed to enable the newly established Federal Republic to play a strong role in preventing cartels from obstructing free-market forces.[202] The official comments accompanying the 1952 GWB bill asserted that while criminalisation could be envisaged once the principles and values of a free competitive order took root in the collective West German psyche, pursuing such a policy straightaway would be unduly harsh.[203] Declining to criminalise unlawful conduct where claims of moral wrongdoing had not yet gained broad-based support within the German population thus displayed cognisance of the need for political consensus before taking a heavy-handed approach to instilling a competitive culture of business activity.

Before concluding this contextual assessment of the policy of non-criminalisation adopted in the 1957 GWB Act, it is necessary to also consider the historical mutations that reconfigured the balance of power between the West Germans and the Western Allies in the approximately ten-year period that the Act was in the making. As mentioned previously, the Allies, especially the United States, implacably opposed the presence of German cartels.[204] In March 1949, the Bipartite Control Office directed the Bizone Economic Council to prepare legislation on cartels that would replace the decartelisation laws enacted in 1947.[205] According to the Occupation Statute promulgated by the Western military authorities in tandem with the proclamation of the Federal Republic in May 1949,[206] the Allies could intervene in a

[202] Cf. Haley, supra note 179 at 160-161.

[203] Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, supra note 176, section B II. In this specific respect, the official comments expressed a view that was widely shared by commentators at the time, namely, that what makes violations qualitatively distinct from crimes is their moral neutrality. See especially Richard Lange, 'Nur eine Ordnungswidrigkeit?' (1957) JZ 233; Rotberg, supra note 187 at 27. See also Richard Lange, 'Ordnungswidrigkeiten als Vergehen' (1953) Goltdammer's Archiv für Strafrecht [GA] 3; Richard Lange, 'Der Strafgesetzgeber und die Schuldlehre' (1956) JZ 73; Richard Lange, 'Die Magna Charta der anständige Leute' (1956) JZ 519; Hans-Gerhard Michels, *Strafbare Handlung und Zuwiderhandlung* (Berlin: de Gruyter, 1963). Several commentators, however, opposed the view that violations are 'morally neutral,' arguing that, like criminal law prohibitions, violations are (and must be) grounded to a minimal extent in social norms. See Gottfried Boldt, 'Zur Struktur der Fahrlässigkeits – Tat' (1956) 56 Zeitschrift für die gesamte Strafrechtswissenschaft [ZStW] 335, 370-371 (1956); Hans Welzel, 'Der Verbotsirrtum im Nebenstrafrecht' (1956) JZ 238, 240; Hans-Heinrich Jescheck, 'Das deutsche Wirtschaftsstrafrecht' supra note 186 at 457; Justus Krümpelmann, *Die Bagatelldelikte* (Berlin: Duncker & Humblot, 1966) 149-177.

[204] For discussion of the reasons for American hostility towards cartel formations see generally Haley, supra note 179 at 14-15; Wyatt Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002) at 137-140; Robert, supra note 174 at 85-97.

[205] See Robert, ibid. at 111.

[206] Text of Occupation Statute promulgated on 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones, in Official Gazette of the Allied High Commission for Germany, September 23, 1949, No. 1, 13.

range of fields, including that of decartelisation, such that the promulgation of anti-cartel legislation by the West Germans necessitated their approval.[207] In March 1951, the Allies agreed, however, to relinquish their powers relating to decartelisation "upon the enactment by the Federal Republic of legislation satisfactory to the Occupation Authorities."[208] Though Erhard's agenda generally converged with that of the United States, American authorities exerted considerable pressure on the Adenauer government to toughen its proposed legislation. As Volkher Berghahn put it, "the [German] Federal government was constantly faced with the Damocles [sic] sword of Allied interventions based on occupation law."[209] Significantly, it was not uncommon for U.S. officials to meet with representatives of the Ministry of Economic Affairs to convey their position in detail concerning legislative drafts under consideration.[210] Still, when the 1952 GWB bill fell short of their stringent proposals, the Americans relented on their demands, *inter alia*, in view of the loaded local political climate surrounding the issues at hand.[211] In March 1955, the Occupation Statute was finally abolished, such that approval of the Allies as regards German anti-cartel legislation was no longer required.[212]

These developments add a significant substrate to the account above regarding the salience of administrative penalties in the gestation of the 1957 GWB Act. In her detailed historical study of the influence exerted by the American authorities on the evolution of the anti-cartel bill, Lisa Murach-Brand emphasised the importance of the

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[207] Ibid. at § 2(b). See Wagner Von Papp, supra note 179 at 162. In March 1951 the Occupation Statute was revised by the Allied governments to relax restrictions on the powers granted to the West Germans in a number of areas, including, most notably, foreign relations. First Instrument of Revision of the Occupation Statute, Official Gazette of the Allied High Commission for Germany, March 6, 1951, Nr. 49, 792 (1951). See Stern, supra note 108 at 1400-1401. The Allies signed the Bonn contractual agreements with the West German government in May 1952. The Bonn agreement served as an ersatz peace treaty and awarded sovereignty to the Federal Republic on domestic matters. But the Bonn contractuals contained a provision stating that the Allied decartelisation laws would remain in effect until a sufficiently stringent West German law emerged to take its place.

[208] Decision No. 10 – Programme for the Revision of Occupation Controls, Official Gazette of the Allied High Commission for Germany, March 6, 1951, Nr. 49, 794 § 2(a) (1951).

[209] Berghahn, supra note 155 at 165-172. Cf. also Van Hook, supra note 155 at 244, 268; Hüttenberger, supra note 153 at 297.

[210] See Möschel, supra note 150 at 241-242.

[211] See Van Hook, supra note 155 at 275-276; Möschel, ibid. at 240.

[212] See Robert, supra note 154 at 114. The Adenauer government nonetheless committed itself to "oppose all efforts to repeal or modify the Allied legislation…before the coming into force of a German law containing general provisions against restraints of competition." Letters from the Federal Chancellor to each of the Three High Commissioners relating to Cartel Policy, October 23, 1954, Bundesgesetzblatt, 1955, Vol. II, 482. On the abrogation of the Occupation Statute see generally Reinhard Mußgnug, 'Entstehen der Bundesrepublik' in Josef Isensee and Paul Kirchhof, eds., *Handbuch des Staatsrechts: Vol. I* (3rd ed., Heidelberg: Müller, 2003) 315 at 349. Limitations on the sovereignty of West Germany remained, however, particularly as regards the stationing of troops by the Western Allies. See Stern, supra note 128 at 1424.

decartelisation laws enacted by the Allies in 1947 for a proper understanding of what was at stake in the non-criminalisation policy of the Adenauer government. In her view, "[g]iven the punitive character of the military laws [the Allied decartelisation laws] it appeared impossible to gain acceptance for similar [criminal] provisions in the Federal Republic."[213] Indeed, the American approach to decartelisation prompted reservations amid the West German population and its leadership, from all sides of the spectrum.[214] The Allied decartelisation laws, despite the fact that they were backed by criminal sanctions, did not become part of West German legal culture, and retained the 'odour of an imposed system' for actors within the business milieu.[215] West German industry, in its bid to discredit Erhard's anti-cartel program, launched a campaign identifying the 1952 GWB bill with the Americans' plan to destroy German industry in retaliation for its asserted involvement in the rise of Nazism to power.[216] In the light of this broader constellation of events, it can be better grasped how the failure to invoke criminal sanctions contributed to casting the 1952 GWB bill and the 1957 GWB Act as the products of the democratic process of an emergent sovereign state ─ rather than a mere replicate of American antitrust legislation enacted under external duress. Ironically, in a seminal critique of the over-criminalisation of white-collar crime in the United States published roughly a decade later, the American legal theorist Sanford Kadish would refer to the 1957 GWB Act in suggesting that administrative penalties should be used to sanction forms of business activity commonly viewed as morally neutral, such as agreements restrictive of competition.[217]

[213] See Murach-Brand, supra note 174 at 197 (author's translation).
[214] Commentators have stressed that, notwithstanding their common aversion to cartels, significant differences existed between the American approach to decartelisation and the German Ordoliberal philosophy underpinning the social market economy. See Van Hook, supra note 175 at 243; Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New Europe"' supra note 190 at 62-63; Nicholls, supra note 174 at 325-329.
[215] See generally Gerber, *Law and Competition*, supra note 172 at 270. On the application of the Allied decartelisation legislation prior to the entry into force of the 1957 GWB Act see Wagner-von Papp, supra note 179 at 163; Möschel, supra note 170 at 239.
[216] See Van Hook supra note 175 at 247-249. Cf. Möschel, ibid. at 240.
[217] Sanford Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423, 448-449.

VII. The Social Movement of the Late 1960s and the Revision of the *Ordnungswidrigkeitengesetz*

In the 1950s, the government and citizens of the newly created Federal Republic directed their attention almost exclusively to repairing the ravages of war and reconstructing the political and economic structures of West German society. By the second half of the 1960s, however, the country entered a new era. The social and political climate underwent a major transformation towards greater pluralism and democracy, as dissent mounted against many of the beliefs and values that reigned in the years following the end of the Second World War.[218] A number of events combined to spur scepticism and rebelliousness during this period, particularly on the part of the younger generation. The 'Auschwitz trial' conducted in 1963-1965 and the debate which erupted in its wake concerning the need for the *Bundestag* to extend the statute of limitations for Nazi crimes prompted many university students, who had not experienced the Third Reich first-hand, to openly confront members of the previous generation and their silence about the National-Socialist regime. Against the historical backdrop of the Nazi period, the constitutional amendment passed by the 'Great Coalition' government – formed of the two principal political parties, the CSU/CDU and the SPD, in the period of 1966-1969 – to allow for the exercise of special powers by the Federal government in states of emergency further fuelled the controversy over the failure to come to terms with the past. More generally, the social unrest of the late 1960s had the effect of calling into question the authoritarianism and conformism which continued to dominate public and social life, resulting, most notably, in the decline of conservative views of individual sexuality, family life, and the role and status of women which had formed a mainstay of West German social consciousness.

These fluctuations in the social and political environment provided fertile terrain for statutory reform. In this context, a comprehensive revision of the *Ordnungswidrigkeitengesetz* was promulgated in 1968 (hereinafter, the 1968 OWiG Act), ushering the administrative sanctioning system into a new era.[219] As explained below, the 1968 OWiG Act introduced a vast array of changes that had the effect of

[218] See generally Klaus Hildebrandt, *Geschichte der Bundesrepublik Deutschland, Vol. IV: Von Erhard zur Großen Koalition 1963-1969* (Stuttgart: Deutsche Verlags-Anstalt, 1984) 365-401, 417-444.
[219] Gesetz über Ordnungswidrigkeiten, May 24, 1968, BGBl. I, 481 (Hereinafter, 1968 OWiG Act). See generally Erich Göhler, 'Das neue Gesetz über Ordnungswidrigkeiten' (1968) JZ 583; Harald Wittman, 'Das neue Recht der Ordnungswidrigkeiten' (1968) BB 1405.

altering the nature of the relationship between the administrative and criminal sanctioning processes in such a manner that a straightforward differentiation in terms of the quality of the wrongs involved and the aims and functions of the sanctions imposed could no longer be sustained. The systematic implications of the reconfiguration of the relationship between the criminal law and the *Ordnungswidrigkeitenrecht* were far-reaching, resulting in a significant expansion of the reach of administrative sanctions in the West German legal order. The most immediate impetus for the reconstruction of the *Ordnungswidrigkeit* sanctioning system was the pressing need to arrest the judicial congestion caused by the adjudication of road-traffic offences.[220] Root and branch reform was indispensable to adapt the *Ordnungswidrigkeitengesetz* to this task. The arrangements governing coordination between decision-makers in the two jurisdictional spheres needed to be reassembled by doing away with the stringent segregation that characterised the 1952 OWiG Act and widening the powers of the public prosecutor as regards the sanctioning of administrative violations. To this end, the 1968 OWiG Act vested the public prosecutor with the authority to bring charges for an administrative violation in criminal proceedings[221] if a nexus with a criminal offence is present.[222] The 1968 OWiG Act also provided that the public prosecutor's decision as to whether a given unlawful act under investigation should be prosecuted as a criminal offence, rather than a violation, is binding on the administrative authority.[223] Lastly, the public prosecutor, not the administrative authority, was deemed competent to defend the administrative penalty decision at the judicial phase of the process.[224]

Moreover, the 1968 OWiG Act enhanced the safeguards ensured to defendants by bringing the substantive principles of liability and rules of procedure in *Ordnungswidrigkeit* proceedings in greater consonance with norms that

[220] The difficulties involved in enforcing road-traffic offences drew much attention in the literature in the years leading up the enactment of the 1968 OWiG Act. See especially the collection of articles in *Folgenlose Verkehrsgefährdung als Massenerscheinung* (Boppart am Rhein: Boldt, 1963).
[221] 1968 OWiG Act, § 40.
[222] 1968 OWiG Act, § 42. The 1968 OWiG Act also provided that a court could, in the course of a criminal trial, convict the accused of a violation, even if at the outset the charges only related to the commission of a criminal offence. 1968 OWiG Act, § 82. At the judicial phase of proceedings concerning the imposition of an administrative monetary penalty, the court could reach the conclusion that, in fact, a criminal offence, rather than a violation, had been committed, and, after fulfilling certain procedural requirements, convict the defendant. 1968 OWiG Act, § 81.
[223] 1968 OWiG Act, § 44. Under the 1952 OWiG Act, in the event of a disagreement between the public prosecution and the administrative authority concerning the qualification of an act as a violation or a criminal offence, the dispute was referred to the Criminal Chamber of the *Landgericht.* 1952 OWiG Act, § 32.
[224] 1968 OWiG Act, § 69(2).

correspondingly apply in the criminal process. Most importantly, the 1968 OwiG Act provided that a contested administrative penalty decision would result in the court proceeding *de novo* by independently undertaking the fact-finding process and delivering its own reasons for judgment,[225] while allowing a limited number of procedural 'simplifications' in order to enable the court to streamline proceedings.[226] That said, certain distinguishing features of the administrative sanctioning proceedings remained in place, including, most importantly, the *Opportunitätsprinzip*, which enables administrative authorities to exercise discretion over which violations are actually prosecuted,[227] in contrast with the principle of compulsory prosecution that applies, albeit subject to numerous exceptions, in criminal proceedings.[228] Lastly, it is noteworthy that the structure of the administrative sanctioning process put in place by the 1968 OWiG Act has remained substantially the same to this day, notwithstanding the numerous amendments introduced over the years to improve efficiency.[229]

The upshot of the initiative to revamp the *Ordnungswidrigkeitengesetz* in order to lay the groundwork for the use of administrative penalties to sanction road-traffic offenders was that the theoretical conception, rooted in James Goldschmidt's *Das Verwaltungsstrafrecht*, which previously formed the matrix of the 1952 OWiG Act, had to be relinquished.[230]Since road-traffic offences often protect interests, such as life and bodily integrity, which are also the focus of prohibitions within the criminal law, administrative violations could no longer be wedded in theory only to actions that tend to upset the capacity of administrative authorities to fulfil their mission to advance the welfare of the public. This shift in outlook was anticipated in the criminal law literature beginning in the mid-1950s, as an increasing number of theorists took issue with the bipartite conception of the penal law derived from *Das Verwaltungsstrafrecht*.[231] Pointing out that the *Grundgesetz* specifically provides that

[225] See Wittman, supra note 219 at 1412.
[226] 1968 OWiG Act, § 71-78.
[227] 1968 OwiG Act, § 47.
[228] See supra note 138. See also Michael Bohlander, *Principles of German Criminal Procedure* (Oxford: Hart Publishing, 2012) at 25-27, 101-111.
[229] See Bohnert, supra note 59 at 15.
[230] Indeed, the explanatory notes accompanying the bill made it clear that a different register had to be found to articulate the relationship between criminal law and the *Ordnungswidrigkeitenrecht.* Bundestagsdrucksache V/1269, 22-26. For critical analysis *see* Heinz Mattes, 'Die Problematik der Umwandlung der Verkehrsübertretungen in Ordnungswidrigkeiten' (1970) 82 ZStW 25 at 34-39.
[231] See Hans-Heinrich Jescheck, 'Das deutsche Wirtschaftsstrafrecht' (1959) JZ 457 at 460-461; Klaus Tiedemann, 'Die Gesetzgebungskompetenz für Ordnungswidrigkeiten' (1964) 89 Archiv des

the "Federal Republic of Germany shall be a democratic and *social* federal state" [232] critics maintained that the tenets of nineteenth-century liberalism which permeated Goldschmidt's conception of *Recht* no longer hold sway, such that the legal order (the *Rechtsordnung)* can no longer be confined to protecting constitutionally recognised spheres of individual liberty, without regard for the duty of the state in putting in place the structures necessary to facilitate the development of human capacities which make individual flourishing possible. The dichotomy affirmed by Goldschmidt between justice and welfare, they further argued, is untenable because prevailing conceptions of justice no longer limit themselves to ensuring that wrongs done to individual interests are redressed by the judicial system, but rather also encompass notions of distributive and social justice. The public administration (whose aim it is to pursue welfare) thus forms an integral part of the *Rechtsordnung*, and its orderly functioning constitutes a *Rechtsgut,* such that failure to comply with its legitimate requirements amounts to a *Rechtswidrigkeit* that is of the same wrongful essence as a criminal offence.

As mentioned above, the direct impetus for the enactment of the 1968 OWiG Act was the need to reduce judicial workload in respect to the enforcement of road-traffic offences. It should be borne in mind, however, that the reform of the *Ordnungswidrigkeitengesetz* also formed part and parcel of a multi-staged reform of the criminal code that was the product of nearly two decades of efforts.[233] Significantly, these major legislative changes tied in closely with the unique social and political constellation that had formed in the late 1960s. As Tim Bush explained:

The reform policy of the coalition was sustained by the broader social changes in Germany. Part of the population, particularly the student movement, demanded in the 1960s and the 1970s greater input into policy formation and that the legal system adjust to changing values and moral attitudes. Criminal prohibitions should be

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öffentlichen Rechts 56 at 72; Justus Krümpelmann, *Die Bagatelldelikte* (Berlin: Duncker & Humblot, 1966) at 165-186; Amelung, supra note 65 at 289-290. See also the statements made by Wilhelm Gallas in *Niederschriften über die Sitzungen der Großen Strafrechtskommission: Vol. I* (Bonn: Bundesministerium der Justiz, 1956) at 87.

[232] Grundgesetz, supra note 147, § 20(1) (emphasis added). On the *Sozialstaatsprinzip* see generally Harmut Maurer, *Staatsrecht I* (6th ed., München: Beck, 2010) 230-240. See also Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart Publishing, 2011) at 44-46. This principle is not alterable by constitutional amendment. Grundgesetz, supra note 147, § 79(3).

[233] See generally Albin Eser, 'Major Stages of Criminal Law Reform in Germany' (1996) 30 Israel Law Review 28. See also Ulrich Eisenhardt, *Deutsche Rechtsgeschichte* (5th ed., München: Beck, 2008) at 528-529; Michael Kubnik, *Strafe und ihre Alternativen im zeitlichen Wandel* (Berlin: Duncker & Humblot, 2001) at 407-467.

resorted to only as concerns especially serious forms of conduct, and criminal sanctions should not be used to secure conformity to morality or laws dealing with vice. [234]

A salient commonality that lied at the heart of the various phases of the reform was the aspiration to minimise stigmatisation and curtailment of personal liberty through the criminal law.[235] Specifically, amendments were enacted to reduce the use of the criminal law to enforce controversial norms of morality.[236] Offences criminalising adultery, homosexual relations, and bestiality were repealed;[237] and sexual offences were redrafted to focus the prohibition on the infringement of the sexual autonomy of the victim, rather than the immoral conduct of the offender.[238] Furthermore, a series of measures were introduced to scale down the use of custodial sanctions:[239] the conditions under which suspension of a prison sentence is allowed were widened;[240] a 'day-fine' system was introduced, thereby laying the groundwork for courts to more frequently bring monetary sanctions to bear on offenders;[241] and the conditions under which a short-term imprisonment can be imposed were narrowed.[242]

The promulgation of the 1968 OWiG Act closely tied in with these statutory developments. Contraventions were abolished as a category in the criminal code, thereby clearing the path for the decriminalisation of such offences as making annoying noise,[243] unleashing a dangerous animal[244] and fabricating currency counterfeiting tools,[245] by way of their conversion into *Ordnungswidrigkeit* violations.[246] That the concern with diminishing the scope of state intervention with liberty formed an integral part of the reception of the 1968 OWiG Act was also visible

[234] Tim Busch, Die deutsche Strafrechtsreform (Baden Baden: Nomos, 2005) at 52-53 (author's translation).
[235] See Uwe Scheffler, 'Das Reformzeitalter 1953-1975' in Thomas Vormbaum and Jürgen Welp, eds., *Das Strafgesetzbuch: Sammlung der Änderungsgesetze und Neubekanntmachungen, Supplementband I: 130 Jahre Strafgesetzgebung – Eine Bilanz* (Berlin: Berliner Wissenschafts-Verlag, 2004) at 174, 233.
[236] Busch, supra note 234 at 62-66, 103-113.
[237] Erstes Gesetz zur Reform des Strafrechts, June 25, 1969, BGBl. I, 645, abolishing § 172, 175b and amending § 175.
[238] Viertes Gesetz zur Reform des Strafrechts, November 23, 1973, BGBl. I, 1725.
[239] Busch, supra note 234 at 55-62, 73-75.
[240] Erstes Gesetz zur Reform des Strafrechts, June 25, 1969, BGBl. I, 645, § 24-26.
[241] Zweites Gesetz zur Reform des Strafrechts, July 4, 1969, BGBl. I, 717, § 40-43.
[242] Erstes Gesetz zur Reform des Strafrechts, June 25, 1969, BGBl. I, 645, § 14.
[243] 1968 OWiG Act, § 117.
[244] 1968 OWiG Act, § 121.
[245] 1968 OWiG Act, § 127-128. See also Kubnik, supra note 233 at 461-462.
[246] Zweites Gesetz zur Reform des Strafrechts, July 4, 1969, BGBl. I, 717, § 12.

in the ruling of the Federal Constitutional Court delivered in the immediate aftermath of the Act's entry into force, on the question of whether empowering an administrative authority to impose a penalty for a road-traffic violation unconstitutionally detracts from the powers of the judiciary under section 92 of the *Grundgesetz*, which provides that powers of a judicial character shall be vested in the courts.[247] The fact that the 1968 OWiG Act was no longer aligned with the theoretical model, anchored in Goldschmidt's work, that previously formed the mould of the 1952 OWiG Act raised the issue of the grounds on which the frontiers of the administrative sanctioning system should be marked vis-à-vis the criminal law.[248] The Court ruled that section 92 definitely encompasses the adjudication of proceedings in which the criminal law is brought to bear on the facts of the case. However, the Court made a significant distinction in this respect between matters belonging to the *core* of the criminal law and more peripheral matters. The adjudication of matters belonging to the core of the criminal law, the Court ruled, is exclusively of the authority of the judiciary, because a judgment of criminal conviction implies the charge that the offender acted in rebellion against the legal order, thereby producing an adverse impact on his reputation. Hence, with respect to such wrongful acts administratively imposed sanctions may not serve as a substitute for the criminal law, even if the person concerned is permitted to subsequently request adjudication of the case in a judicial process. The Court added, however, that under the *Grundgesetz* the legislator, acting as the representative of the community, is given considerable latitude to determine whether a given unlawful course of conduct belongs to the core of the criminal law. In reaching its ruling that the transfer of sanctioning powers to an administrative authority is constitutionally permissible within certain limits, the Court emphasised that the build-up of governmental intervention in the regulation of business and professional activity throughout the greater part of the twentieth century generated a spiral of prohibitions and penalties, prompting worries about an overkill (*Übermaß*) of state punishment threatening to eviscerate the criminal law of its distinctive condemnatory character.[249] Consequently, the Court explained, it was necessary to create a separate non-criminal category of violations subject to administrative penalties which only affect the property of the offender. The Court thus

[247] Entscheidungen des Bundesverfassungsgerichts [BverfGE] 27, 18.
[248] BVerfGE 27, 18. See also BverfGE 45, 272; BverfGE 51, 60, 74; BverfGE, 80, 182, 186; BverfGE 90 145, 173.
[249] BVerfGE 27, 30-32.

affirmed the constitutionality of the conversion of road-traffic offences into *Ordnungswidrigkeit* violations, stressing the acute risk of a surfeit of criminalisation given that speeding and parking violations are widespread amid the general population.

Before concluding this discussion of the reception of the 1968 OWiG Act, it should be noted that although at first the decision of the Constitutional Court was generally well-received in the literature because of the practical need to avoid the paralysis of the judicial system with respect to the enforcement of road-traffic offences,[250] objections have been raised over the past two decades against the Court's consecration of the stigma entailed by a criminal conviction (that derives from the implication drawn that the act constitutes an act of defiance against the legal order) as the distinguishing attribute of the criminal law for the purpose of constitutionally marking out the sphere of judicial authority to impose punitive sanctions. This feature, it has been argued, is not unique to the core of the criminal law, because an *Ordnungswidrigkeit* violation may also convey an act of defiance against the legal order.[251] As one commentator put it, a parking violator rebels no less against the legal order than a thief.[252] Moreover, it has been argued that since it fails to clearly specify the grounds for determining whether a given course of conduct worthy of prohibition amounts to an act of rebellion against the legal order, the Court's jurisprudence provides scant guidance to the legislator confronted with the decision of whether to criminalise a breach of a statutory norm or provide for an administrative penalty instead.[253]

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[250] Gero Fischer, 'Bericht über das Kolloquium "Die Problematik der Umwandlung der Verkehrsübertretungen in ordnungswidrigkeiten"' (1970) 82 ZStW 108 at 118-119 (1970).

[251] See Ivo Appel, *Verfassung und Strafe* (Berlin: Duncker & Humblot, 1998) 90-93, 220-227, 505-507, 554-556. Appel acknowledges that the criminal law and the *Ordnungswidrigkeitenrecht* are indistinguishable in terms of the quality of their wrongs and the aims and functions of their sanctions. However, he argues that section 92 of the *Grundgesetz* should not apply to administratively-imposed monetary penalties, because the requirement that penal matters be adjudicated by the judiciary should only concern cases involving custodial sanctions.

[252] Bohnert, supra note 59 at 24.

[253] See ibid. at 25-26. See also Wolfgang Wohlers, *Deliktstypen des Präventionsstrafrechts – zur Dogmatik "moderner" Gefährdungsdelikte* (Berlin: Duncker & Humblot, 2000) at 104. For a detailed analysis of the constitutional principles of individual rights that could provide a stronger framework for the legislative decision-making process in this respect see Otto Lagodny, *Strafrecht vor den Schranken der Grundrechte* (Tübingen: Mohr Siebeck, 1996) 416-450.

Concluding Remarks

The historical account of the *Ordnungswidrigkeit* sanctioning system's trajectory provided in this article examined its interrelations with the following phases of the post-war reconstruction process: the economic collapse of West German society in the initial period following the collapse of the Third Reich; the measures taken by the Allies (led by the Americans) to impose structural changes and ideological conformity with democratic principles on the emergent Federal Republic of Germany, especially in regards to the shaping of its governmental institutions and the pillars of its economic policy; the major reforms introduced based on the social market economy programme, which rested on a socially conscious model of market capitalism, and which entailed the termination of Nazi-era economic controls and the pursuit of a long and difficult struggle to enact vigorous anti-cartel legislation; and the tumultuous social events of the 1960s, during which the emergence of a student movement called into question the taboos of the 1950s regarding the Nazi past, and demanded that the country reform its institutions and cultural practices, as well as the conservative and authoritarian structures which had taken form or persisted beginning in the pre-war period.

Viewing these developments from the perspective of the new police science literature concerning the relationship between law and police, it becomes evident that any attempt to neatly confine the *Ordnungswidrigkeit* sanctioning system to one side or another of the divide between these two modalities of governance will inevitably fail to fully capture the complexity of the historical events that shaped its emergence. To be sure, the statutory enactments which expanded the reach of administrative penalties in the West German legal order all bore certain characteristic marks of police government. Indeed, these developments were driven by such considerations as the need to devise a deterrent mechanism enabling administrative authorities to swiftly enforce laws and regulations by directly imposing sanctions on violators without having to necessarily conduct a criminal trial; the need to afford administrative authorities a relatively wide scope of discretion in determining whether to set in motion proceedings for the imposition of a penalty; and the need to create alternatives to the criminal sanctioning process that allow for a more efficient operation of the judicial system by reducing the workload of the courts. Yet, notwithstanding these causes and factors, which decisively influenced the evolution of

the *Ordnungswidrigkeit* sanctioning system, we should resist the tendency to explain it as just a manifestation of police government, even if administrative penalties were previously widely used in the absolutist *Polizeistaat* and the Nazi state. Significantly, the economically devastated West German state that was established following the downfall of the Third Reich and the onset of the Allied occupation bore very little resemblance to the figure of the all-powerful police state which intervenes at will in economic and social affairs without having to face challenges to its legitimacy. Shouldering the burdens of culpability and defeat, the West Germans had to endure a period of occupation and truncated statehood prior to obtaining the restoration of most (though not all) aspects of their sovereignty. It is only through a delicate process of negotiation and accommodation that the West Germans extracted themselves from their fate as an ostracised and vanquished people, and were able to reintegrate into Europe and gain the acknowledgment of the Western community, as manifested, inter alia, by the entry of the Bonn Republic into the European Community and NATO.

To gain legitimacy, the West Germans had to establish a democratic *Rechtsstaat* under the tutelage of the Allies while severing all ties with the economic and political system of the Nazi regime and structuring governmental institutions so as to address the deficiencies of the Weimar Republic that facilitated Hitler's seizure of power. As the historical discussion above makes clear, the sanctioning mechanism of administrative penalties proved to be instrumental in many ways as the West Germans revised their political institutions, economic structures and social values. Offering a more efficient, yet less stigmatising and less intrusive alternative to the criminal law, it showed itself to be highly malleable and susceptible to adaptation to a variety of uses, depending on the specific context and concerns at hand. At the same time, it was through the exigencies and constraints faced by the West Germans in this protracted and precarious process that the contours of the *Ordnungswidrigkeitenrecht* were delineated, and its distinguishing features vis-à-vis the criminal sanctioning process were forged.

Throughout this process, the *Ordnungswidrigkeit* sanctioning system gradually came to form an integral part of the *Rechtsstaat*. The above analysis of legislative texts, judicial decisions, and scholarly literature underscores the interplay between debates about the reasons for differentiating between the *Ordnungswidrigkeit* sanctioning system from the criminal sanctioning process and broader debates concerning the nature of the nascent legal and economic order of the Bonn Republic.

As a result, the criminal law and the *Ordnungswidrigkeitenrecht* are no longer pitted against each other in terms of the quality of their wrongs and the purposes and functions of their attendant sanctions; rather, they are viewed as interconnected branches of the penal law that both serve to uphold and advance the values of the legal order.

To conclude, the above discussion of the evolution of the *Ordnungswidrigkeit* sanctioning system in the post-war period bears out Christopher Tomlins' claim that "any critical inquiry into the production and purposes of police [is inadequate if it] is not at the same time [a] critical inquiry into the production and purposes of law."[254] Each of the salient developments that marked the trajectory of the *Ordnungswidrigkeit* sanctioning system bespoke the constellation of economic, military, political, and social relations that shaped the post-war reconstruction process. Thus, the impulse for the institutionalisation and consolidation of what traditionally constituted a mechanism of police ─ administrative penalties ─ grew out of some of the prominent events through which the West Germans acted to sever all ties to the Third Reich and secure the Bonn Republic's foundations as a sovereign democratic *Rechtsstaat*. In this light, it is possible to understand why the view that administrative penalties are inconsistent with *Rechtsstaat* principles on account of their non-judicial character, which prevailed in the nineteenth and early twentieth centuries, no longer held sway in the post-war period.

[254] Tomlins, 'Framing the Fragments: Police, Genealogies, Discourses, Locales, Principles' supra note 27 at 252.

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