



Opinion and Judgement concerning defendant Schlegelberger at the Nuremberg Military Tribunal, Case 3

The defendant Franz Schlegelberger was born on 23 October 1875 in Koenigsberg. He received the degree of doctor of law at the University of Leipzig in 1899 and passed the higher state law examination in 1901. He is the author of several law books. His first employment was as an assistant judge at the local court in Koenigsberg. In 1904 he became judge at the district court at Lyck. In 1908 he was appointed judge of the local court in Berlin and in the fall of the same year was appointed as an assistant judge of the Berlin Court of Appeals. He was then appointed councillor of the Berlin Court of Appeals in 1914, where he worked until 1918. During the First World War, on 1 April 1918 he became an assistant to the Reich Board of Justice. On 1 October 1918 he was appointed Privy Government Councillor and department chief. In 1927 he was appointed ministerial director in the Reich Ministry of Justice. On 10 October 1931 he was appointed Secretary of State in the Reich Ministry of Justice under Minister of Justice Guertner, which position he held until Guertner's death. Upon Guertner's death on 29 January 1941 Schlegelberger was put in charge of the Reich Ministry of Justice as administrative Secretary of State. When Thierack became the new Minister of Justice on 20 August 1942, Schlegelberger resigned from the Ministry.

In 1938 Hitler ordered Schlegelberger to join the NSDAP Schlegelberger testified that he made no use of the Party, that he never attended a Party meeting, that none of his family belonged to the Party, and that Party attitudes often rendered his position difficult. However, upon his retirement as Acting Minister of Justice on 20 August 1942, Schlegelberger received a letter of appreciation from Hitler together with a gift of 100,000 RM.

Later in 1944 Hitler gave Schlegelberger the special privilege to use the 100,000 RM to purchase a farm, which under the rule then prevailing could have been purchased only by an expert agriculturist. Schlegelberger states that the 100,000 RM were on deposit in a Berlin German bank to his account when the collapse came. Thus, it is shown that Hitler and Schlegelberger were not too objectionable to each other. These transactions also show that Hitler was at least attempting to reward Schlegelberger for good and faithful service rendered in the performance of some of which Schlegelberger committed both war crimes and crimes against humanity as charged in the indictment. We have already adverted to his speech at the University of Rostock on 10 March 1936, on the subject, "A Nation Beholds Its Rightful Law." In this speech Schlegelberger declared:

“In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto.”

As amended, section 2 remained in effect until repealed by Law No. 11 of the Allied Control Council. The term “the sound people's sentiment” as used in amended section 2 has been the subject of much discussion and difference of view as to both its proper translation and interpretation. We regard the statute as furnishing no objective standards “by which the people's sound sentiment may be measured”. In application and in fact this expression became the “healthy instincts” of Hitler and his co-conspirators.

What has been said with regard to the amendment to section 2 of the criminal code is equally true of the amendment of section 170a of the code by the decree of Hitler of 28 June 1935, which is also signed by Minister Guertner and which provides:

“If an act deserves punishment according to the common sense of the people but is not declared punishable in the code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law.”

This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offense. It destroyed the feeling of legal security and created an atmosphere of terrorism. This principle of treating crimes by analogy provided an expedient instrumentality for the enforcement of Nazi principles in the occupied countries. German criminal law was therefore introduced in the incorporated areas and also in the nonincorporated territories, and German criminal law was thereafter applied by German courts in the trial of inhabitants of occupied countries though the inhabitants of those countries could have no possible conception of the acts which would constitute criminal offenses.

In the earlier portions of this opinion we have repeatedly referred to the actions of the defendant Schlegelberger. Repetition would serve no good purpose. By way of summary we may say that Schlegelberger supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretence of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence. It was his signature on the decree of 7 February 1942 which imposed upon the Ministry of Justice and the courts the burden of the prosecution, trial, and disposal of the victims of Hitler's Night and Fog. For this he must be charged with primary responsibility.

He was guilty of instituting and supporting procedures for the wholesale persecution of Jews and Poles. Concerning Jews, his ideas were less brutal than those of his associates, but they can scarcely be called humane. When the “final solution of the Jewish question” was under discussion, the question arose as to the disposition of half-Jews. The deportation of full Jews to the East was then in full swing throughout Germany. Schlegelberger was

unwilling to extend the system to half-Jews. He therefore proposed to Reich Minister Lammers, by secret letter on 5 April 1942 (*4055-PS, Pros. Ex. 401*):

“The measures for the final solution of the Jewish question should extend only to full Jews and descendants of mixed marriages of the first degree, but should not apply to descendants of mixed marriages of the second degree. [First degree presumably those with two non-Aryan grandparents, and second degree with only one.] With regard to the treatment of Jewish descendants of mixed marriages of the first degree, I agree with the conception of the Reich Minister of the Interior which he expressed in his letter of 16 February 1942, to the effect that the prevention of propagation of these descendants of mixed marriages is to be preferred to their being thrown in with the Jews and evacuated. It follows there from that the evacuation of those half-Jews who are no more capable of propagation is obviated from the beginning. There is no national interest in dissolving the marriages between such half-Jews and a full-blooded German. Those half-Jews who are capable of propagation should be given the choice to submit to sterilization or to be evacuated in the same manner as Jews.”

Schlegelberger knew of the pending procedures for the evacuation of Jews and acquiesced in them. As to half-Jews his only suggestion was that they be given the free choice of either one of the impaling horns of a dilemma. On 17 April 1941 Schlegelberger wrote to Lammers as follows (*NG-144, Pros. Ex. 199*):

“On being informed of the Fuehrer's intention to discriminate in the sphere of penal law between the Poles (and probably the Jews as well), and the Germans, I prepared, after preliminary discussions with the presidents of the courts of appeal and the attorneys general of the annexed eastern territories, the attached draft concerning the administration of the penal laws against Poles and Jews in the annexed eastern territories and in the territory of the former Free City of Danzig.”

The draft of a proposed ordinance “concerning the administration of justice regarding Poles and Jews in the Incorporated Eastern Territories” was attached to his letter and is in evidence. A comparison of its phraseology with the phraseology contained in the notorious law against Poles and Jews of 4 December 1941 discloses beyond question that Schlegelberger's draft constituted the basis on which, with certain modifications and changes, the law against Poles and Jews was enacted. In this respect he was not only guilty of participation in the racial persecution of Poles and Jews; he was also guilty of violation of the laws and customs of war by establishing that legislation in the occupied territories of the East. The extension of this type of law into occupied territories was in direct violation of the limitations imposed by the Hague Convention, which we have previously cited.

It is of interest to note that on 31 January 1942 Schlegelberger issued a decree providing that the provisions of the law against Poles and Jews “will be equally applicable with the consent of the public prosecutor to offenses committed before the decree came into force”. We doubt if the defendant would contend that the extension of this discriminatory and retroactive law into occupied territory was based on military necessity.

Schlegelberger divorced his inclinations from his conduct. He disapproved “of the revision of sentences” by the police, yet he personally ordered the murder of the Jew Luftgas [!] on the request of Hitler, and assured the Fuehrer that he would, himself, take action if the Fuehrer would inform him of other sentences which were disapproved.

Schlegelberger's attitude toward atrocities committed by the police must be inferred from his conduct. A milking-hand, Bloedhug, was sentenced to death in October 1940, and during the trial he insisted his purported confession had been obtained as a result of beatings imposed upon him by the police officer Klinzmann. A courageous judge tried Klinzmann and convicted him of brutality and sentenced him to a few months imprisonment. Himmler protested against the sentence of Klinzmann and stated that he was going "to take the action of the Hauptwachtmeister of the police Klinzmann as an occasion to express gratitude for his farsighted conduct which was only beneficial to the community." He said further:

"I must reward his action because otherwise the joy of serving in the police would be destroyed by such verdicts. But finally K. has to be rehabilitated in public because his being sentenced by a court is known in public."

On 10 December 1941 Schlegelberger wrote to the Chief of the Reich Chancellery stating that he was unable to understand the sentence passed against Klinzmann. We quote:

"No sooner had the verdict passed on Klinzmann become known here, orders were for this reason given to the effect that the sentence in case of its validation should not be carried out for the time being. Instead, reports concerning the granting of a pardon should be made as soon as possible. In the meantime, however, the sentence passed on Klinzmann became valid, by decision of the Reich [Supreme] Court of 24 November 1941 which abandoned the procedure of revision as apparently unfounded. Taking into regard also the opinion you expressed on the sentence, Sir, I now ordered the remission of the sentence and of the costs of proceedings by way of pardon as well as the striking out of the penalty note in the criminal records."

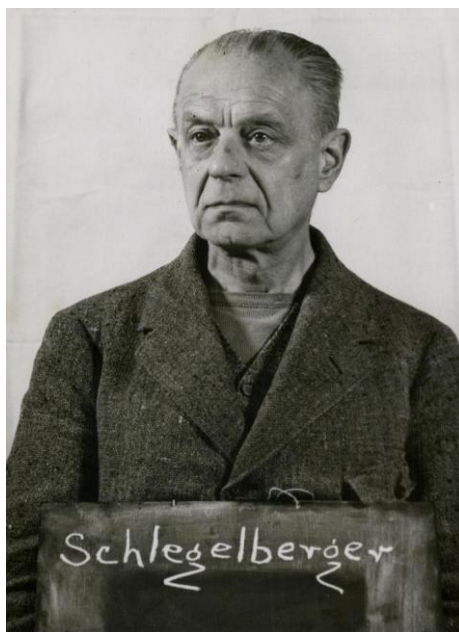
On 24 December 1941 Schlegelberger wrote to Lammers that he had quashed the proceedings. In February 1942 Himmler wrote expressing appreciation of the efforts in quashing the proceedings against Klinzmann and stated that he had since promoted him to Meister of the municipal police.

Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was under persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defence squares neither with the truth, logic, or the circumstances.

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police, Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied

countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police is cold comfort to the survivors of the “judicial” process and constitutes a poor excuse before this Tribunal. The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.

Schlegelberger resigned. The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police, aided by Thierack, prevailed. Schlegelberger had failed. His hesitant injustices no longer satisfied the urgent demands of the hour. He retired under fire. In spite of all that he had done he still bore an unmerited reputation as the last of the German jurists and so Hitler gave him his blessing and 100,000 RM as a parting gift. We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of an intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security. He is guilty under counts two and three of the indictment.¹



This Tribunal has adjudged the defendant FRANZ SCHLEGELBERGER guilty on counts two and three of the indictment filed in this case. For the crimes of which he has been convicted, this Tribunal sentences him to imprisonment for life.²

Source: <http://www.mazal.org/archive/nmt/03/NMT03-T1087.htm> (8 January 2009).

¹ War crimes; crimes against humanity

² Schlegelberger was released from Landsberg prison in January 1951 because of poor health. He enjoyed the pension of a former state secretary. He died in December 1970.