

## **The “Arnim Paragraph” (=section)**

“Bismarcks Zorn” (= Bismarck’s rage) <sup>1</sup> with these words Bernd Heinrich entitles his detailed work to § 353a StGB (Criminal Code, German: Strafgesetzbuch), commonly called “Arnim Paragraph”. The legal details are not so much to be examined here but rather the cause and the history of the development of this criminal offence.

In the German Encyclopedia, “Meyers Lexikon”, one finds under the headword “Arnim Paragraph” the following: “Name for § 353a StGB which threatens a diplomatic representative of the Federal Republic of Germany in a country abroad to be sentenced to up to 5 years prison for civil disobedience and intentionally giving deceiving accounts of false reports as actual facts to the Federal Republic of Germany. The Arnim paragraph was inserted in 1876 in the StGB in its original version, after the German ambassador in Paris, Harry Count von Arnim- Suckow had appropriated official documents in 1874 and was therefore recalled <sup>2</sup> by Bismarck and sentenced to imprisonment by Berlin courts“ <sup>3</sup>

In the German Encyclopedia “Brockhaus” the description is a little shorter and without reference to today’s operative laws of the Federal Republic of Germany.

“Arnim Paragraph”, unofficial description of § 353a StGB, which makes the breach of confidence or misleading the government by means of false reporting a punishable offence. The A.P. goes back to the criminal proceedings against the former German ambassador in Paris, Harry Count von Arnim- Suckow (1824 – 1881) “<sup>4</sup>

### **Past history**

In 1874 the diplomat Harry Count von Arnim was officially reprimanded with dismissal from his position /post as German ambassador of the German embassy in Paris, the (disciplinary) transfer to Constantinople and finally his temporary retirement. At the Imperial Chancellor Lord Bismarck’s instigation he was to be eliminated politically by criminal proceedings. It soon turned out that the deeds Harry Arnim was accused of were criminally difficult to apprehend.

Actually it was about the fact that Harry Arnim’s views on two fields of politics were distinctly different to those of Bismarck. The one was the dealings with the Pope and the position of the Catholic Church in Germany. The other was the current policy of the young empire towards defeated France, especially about whether republican – thus Bismarck – or monarchic tendencies – thus Harry Arnim – were to be promoted. Despite numerous admonitions the imperial ambassador had not kept to Bismarck’s directives /instructions. Therefore the recall, transfer to another post and temporary retirement were consistent reactions to the official violations. Furthermore Harry Arnim had given the impression that he was intriguing against his superior, the Chancellor, and was trying to weaken that man’s position at the imperial court. Rumour had it that Harry Arnim was striving for the office of chancellor. At the same time articles appeared in the press, which most probably went back to information that Harry Arnim was supposed to have given on behalf of his official knowledge. Criminal proceedings were not justified at this point of time. They could only be initiated when it was discovered that documents were missing in the embassy in Paris after the ambassador had left and that a part of the papers were the basis of the previously mentioned Bismarck-hostile press publications. His attempt to make himself the mouthpiece of the Bismarck opponents and win political influence became obvious. This asked for counter measures. Official measures and disciplinary methods were not sufficient. Fritz Hartung says, “Only if it was possible to put a moral stain on Arnim’s reputation the return to the political stage could be made finally impossible. And thus the big guns of criminal proceedings were placed in position.” <sup>5</sup> Harry Arnim was arrested on October 3<sup>rd</sup>, 1874 on his estate Nassenheide and charges brought against him.

### **The Arnim proceedings of 1874/75**

He was accused (reproached for) having inadmissibly appropriated official documents as the ambassador. While the public prosecutor represented the view the papers were certified documents, that would have given reasons for a punishable offence, however this was disputed by the defence. In the first court case in Dec. 1874 the Supreme Court in Berlin basically followed the arguments of the defence, as most of the deeds of the accused were to be apprehended by disciplinary laws. Harry Arnim was sentenced to 3 months in prison only on account of the misappropriation of documents. Only the Court of Appeal in June 1875 granted the papers the characteristics of documents and Harry Arnim was distinctly harsher sentenced according to § 348 STBG on account of deliberate hiding away official documents, leading to nine months in prison.

### **The legal procedure to § 353a StGB**

“From the experience of the first proceedings and the loopholes in the punishable offence, which had crept up in the proceedings, the Foreign Office under the overall control of Bismarck came to the conclusion that a new paragraph had to be created in order to be able to capture similar cases in future.”<sup>6</sup> Therefore a bill regarding this case was introduced in 1875 which was added as § 353a to the StGB verbatim in the following year:

#### **§ 353a StGB**

“A civil servant on duty in the Foreign Office of the German Empire, who violates the rule of being bound to secrecy in such a way that he informs others illegally about official papers entrusted or accessible to him, or informs of an instruction by his superior or its content, is sentenced to prison or is fined up to 5,000 Marks – provided that according to other rules a heavy punishment has been forfeited.

The same punishment applies to a person entrusted with a foreign mission or a civil servant employed in such an office who deliberately violates the officially given instructions or who intends to lead his superior astray in his official action by reporting invented or distorted facts.”

Even at an early stage the conclusion has been drawn from the later added introduction of this criminal regulation which has direct reference to criminal proceedings against Harry Arnim that the legal position during Arnim’s period of service to the state was not clear.”<sup>7</sup> A peculiarity of the newly developed ‘libel’ paragraph lies in the fact that these particular actions put under threat of punishment here are considered as typical breaches of duty for all the other civil servants and thus fall under disciplinary law even today. In contrast to other official crimes only one is to be mentioned,” Only concerns inner relationships of the civil servant to his employer (i.e. there is no abuse of one’s position but only a violation of compulsory service”<sup>8</sup> For the civil servant of the Foreign Office a special provision – almost unique in the world – was created and already then called a rarity by diplomats. During the consultation of the planned wording of the law Bismarck objected to this argument by saying that the diplomats were predominantly financially independent noblemen, who could not be got hold of with the means of disciplinary law, i.e. dismissal from service, shortening or cancellation of pensions and similar methods. That would have also been valid for many other civil servants in higher positions at the time.

In the discussion of legislation the necessity of a new legal instruction has been looked at critically at that time. “Fault was found that § 353a StGB was a singular case of occasional law that was only tailor-made for a particular individual case and would therefore fail in cases of another kind.”<sup>9</sup> Bernd Heinrich thus comes to the conclusion, the admission of § 353a into the Criminal Code is to be attributed exclusively to the initiative of the then imperial chancellor Bismarck who, as a consequence of his clash over the ambassador in Paris Count von Arnim had induced it. “<sup>10</sup> In this connection he refers to a speech of the representative

Treitsche, whose remark was recorded in the minutes of the Reichstag (Parliament). There it says, “ As it is a coincidence that we are capable of showing by a factual justified change that we trust the present imperial chancellor so I welcome this coincidental encounter with great joy.”<sup>11</sup> The consultations of 1875/76 ran parallel to the Arnim proceedings in Berlin. Treitschke’s emotional remark contains no factual argument and most probably alludes to the polarization Bismarck-Arnim. Heinrich continues, “It is to be assumed that (the inclusions of § 353a into the StGB) was only approved of by the then assembly (The ‘Reichstag’) in order not to add another personal defeat which would have further endangered the already shattered Imperial Chancellor.”<sup>12</sup>

### **Today’s valid version of the “Arnim Paragraph”**

After the Second World War the paragraph was deleted from the Criminal Code in 1946 as there was to be no German foreign policy any more anyway. After the founding of the Federal Republic of Germany the view prevailed not to be able to do without a corresponding threat of punishment. Thus libel as an offence was again admitted in a slightly changed form by 1951.

§ 353a StGB “Arnim Paragraph” new or revised edition of August 30<sup>th</sup>, 1951

Whoever at the embassy of the ‘Federal Republic of Germany deliberately violates an official instruction towards a foreign government, a communion of states or an international institution or intends to lead the Federal Republic astray, or gives false reports on factual ways is to be sentenced to prison. The deed will only be prosecuted with the authorization of the Federal Government”

The word “deliberately” was deleted in 1974, the word “prison” replaced by “prison sentence up to five years”.

### **Were all these efforts justified?**

“§ 353a (StGB) ... has never been applied”, Bernd Heinrich quotes a commentary from 1998 accordingly. “The paragraph has not played any part in education, training, science and criminal law practice.”<sup>13</sup> Finally Heinrich comes to the conclusion with regard to the “Arnim Paragraph” “that the facts of the matter of § 353a, at least from today’s point of view, are superfluous.” Unfortunately the legislative body had forgotten in 1998 to make use of the possibility of the abolition of the law. “<sup>14</sup>

### References

1. Heinrich, Bernd: Bismarcks Zorn., Inhalt und Bedeutung eines “vergessenen” Tatbestandes, in: ZStW, Bd. 110, 1998. pp. 327 – 249
2. This statement is not quite true as Harry Arnim had already been recalled from office for other reasons, before it was discovered that the documents were missing.
3. Arnim-Paragraph, in: Meyers enzyklopädisches lexicon in 25 Bänden, Bd. 2 München 1973
4. Arnim-Paragraph, in: Brockhaus. Die Enzyklopädie in 24 Bänden, Bd. 2 Leipzig und Mannheim 1996
5. Hartung, Fritz: Bismarck und Graf Harry Arnim; in: HZ, bd. 171, München 1951, pp. 47 – 77; p. 73
6. Heinrich; p. 332
7. Hartung; p. 73
8. Heinrich; p. 334
9. Heinrich; p. 335
10. Heinrich; p. 346
11. Stenographische Berichte über die Verhandlungen des Reichstages, II. Legislaturperiode, 3. Session 1875/76 Bd. 39, 41. Sitzung, pp. 1001, 1022 quoted from Heinrich, Bernd: Bismarcks Zorn, p. 347
12. Heinrich, p. 347
13. Heinrich, p. 327
14. Heinrich, p. 349

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