MARC LINDER

The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

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Linder, Marc: The Supreme Labor Court in Nazi Germany: a jurisprudential analysis Marc Linder. - Frankfurt am Main: Klostermann, 1987. (Rechtsprechung; Bd. 2) ISBN 3-465-01757-9 NE: GT

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Druck: Weihert-Druck GmbH, Darmstadt

Printed in Germany



Original from UNIVERSITY OF MICHIGAN

Chapter 10

Other Politically Motivated Discharges

Especially during the early years of the Nazi regime, large numbers of employees perceived as opponents of the new rulers were discharged. Such discrete groups of enemies as Communists, trade unionists, Social Democrats and Jews are treated elsewhere. But others were dismissed on a more individualized basis for isolated acts of non-conformity or resistance. Since suit in virtually all of these cases was brought by plaintiffs seeking backpay, retention of pensions and other contractual benefits affected by their discharge, it must be assumed that the attitudes, statements or actions that occasioned dismissal were not politically grave enough to have led to imprisonment or execution. Many politically inspired dismissals, in other words, were not permitted to work their way through the judicial system; the representativeness of reported cases, then, is once again in doubt.

The first heading under which the discharges will be examined is recourse to the ordinary private law provisions governing unilateral termination of employment contracts. Next, discharges arising under the two statutes of April 1933 – dealing with enemies of the State and politically unreliable civil servants – will be reviewed. Finally, dismissals from DAF (as well as other employment-related disputes between DAF and its employees) will be discussed.

I. Private-Law Discharges

These discharges can be subdivided into three categories: A. those in which the Nazi party (or other Nazi organizations) exerted pressure on the employer to dismiss the employee; B. those in which the employee engaged in some subjectively or objectively anti-Nazi act; and C. those in which religion or a church organization was involved.

A. Third-Party Pressure

In a number of cases the Nazi party, at the local level, was clearly a moving force in the dismissal. It is not always so clear whether the



employer complied eagerly or only halfheartedly.³⁹ Even where reproaches from a third party were unjustified, the court held that it might be unreasonable to expect the employer to retain the employee where continued employment would involve self-sacrifice by the former in light of the government's views on the matter. (RAG 150/34, 22:209-14, No. 45, 28 November 1934.)⁴⁰ With this decision behind it, the court had no difficulty several months later upholding the cancellation of an estate overseer's employment contract after authoritative Nazi party officials had complained of plaintiff's attacks on the party. Defendant-employer, who like plaintiff had been a member of the DNVP, was, the court held, justified in having avoided jeopardizing his own display of loyalty to the government by ridding himself of the politically suspect overseer. (RAG 254/34, 23:194-98, No. 41, 13 March 1935.)⁴¹

But even after the war began, the mere fact that the Nazi party had failed to certify an employee as politically unobjectionable (*Unbedenk-lichkeitszeugnis*) was held not to have justified a discharge. (RAG 86/39, 38:81-90, No. 18, 7 February 1940.)⁴² RAG also held that exclusion of a municipal employee from the Nazi party did not, without more, constitute grounds for dismissal without notice. In this factually interesting case even the presence of "more" did not decide the case without more still.⁴³ Plaintiff had joined the Nazi party and the SA in 1926, but left both organizations the following year after having become unemployed.

³⁹ In an interesting twist, RAG held for an employee whose contract had been terminated before he began working for a department store that the government had closed. The court ruled that defendant bore the risk since it had known of the Nazi party's opposition to department stores. (RAG 215/33, 19:159-63, No. 38, 25 October 1933.)

⁴⁰ Hueck took the court to task for not holding the employer to his duty of loyalty, which Hueck would have set aside only in extraordinary circumstances (RAG 22:214).

41 The court ruled that the pressure exerted by the Nazi party did not constitute the justification for the cancellation but only evidence of the serious consequences of not canceling.

⁴² For more background on the political circumstances surrounding discharges in the Saar following its return to Germany, see RAG 66/39, 38:90-98, No. 19, 13 December 1939. This case reappeared on RAG's docket (RAG 10/1943, 8 October 1943). The court at that time held that although the Versailles Diktat could not, without more, operate to set aside contractual agreements between German parties that had been entered into as a result of the Diktat, an ordinary termination could subsequently be converted into one based on an important cause if the employee knew that the employer wanted to terminate the employment contract because he was faced with a Hobson's choice (Zwangslage). The opinion, signed by Schrader, Besta and Schwegmann, was provisionally excluded from publication (and was in the event never reported). See BA R 22/4024.

⁴³ Cf. RAG 150/38, 35:165-68, No. 35, 22 March 1939, in which a deceased employee – the medical superintendant of a hospital – was fired without notice because he had been excluded from the Nazi party for unspecified reasons pursuant to a temporary injunction. The highest Nazi party court later overturned the exclusion but issued the member a

warning. RAG held that the dismissal had been unfounded.



He rejoined in 1932 and thus became eligible for the patronage jobs distributed to so-called old fighters by the Nazis after they came to power.⁴⁴ Plaintiff received a job as superintendant of a municipal building. When it was later revealed that he had been making instalment purchases at a Jewish-owned clothing store, he was excluded from the Nazi party and the SA and dismissed without notice. The trial court voided the dismissal, but the appeals court ruled that both the exclusion and the purchases supported the dismissal. RAG remanded the case insofar as the latter charge was concerned.⁴⁵

RAG rejected outright, however, LAG's ruling on the exclusion from the Nazi party. Citing the official organ of the Supreme Party Court,46 RAG noted that the party courts had recently created three classifications of exclusion.⁴⁷ The middle level, to which plaintiff had been subject, was not intended to affect the excluded member economically. The court drew the conclusion that such an exclusion did not automatically justify a discharge without notice although it was a factor to be weighed. What is more significant: the court ruled that the ordinary civil courts in general and the labor courts in particular retained jurisdiction over the question as to whether charges leveled against excluded Nazi party members justified dismissal. The court reproached LAG for not having fulfilled this duty of independent judgment especially since the decisions of the Nazi party and the SA courts had not been made available to it; as a result, LAG had not been in a position to review the record in order to determine whether those courts had taken into consideration all the factors that were relevant to the economic consequences of a discharge without notice. (RAG 156/37, 31:125-37, No. 22, 22 September 1937.)

Although the court acknowledged that a Nazi party block-warden was authorized to uncover Marxist intrigues in a plant, where he made a baseless charge against a plant supervisor, his dismissal without notice could be lawful.⁴⁸ (RAG 257/34, 23:187-90, No. 39, 13 March 1935.)⁴⁹ RAG



⁴⁴ See Timothy Mason, Sozialpolitik im Dritten Reich (Opladen, 1977), pp. 135-37.

⁴⁵ See the discussion in ch. 11 below.

⁴⁶ On the original grant of jurisdiction to these courts, see § 3 para.2 Gesetz zur Sicherung der Einheit von Partei und Staat, 1 December 1933, RGBI I, 1016. Cf. Donald McKale, *The Nazi Party Courts* (Lawrence [Kansas]), 1974).

⁴⁷ Entlassung, Ausschluß and Ausstossung.

⁴⁸ Within the meaning of § 123 no. 5 GewO. The block-warden had apparently been motivated by family considerations.

⁴⁹ An appeals court similarly rejected as inconsistent with the leader-principle the interference of the salaried employees plant council in management rights when it demanded the discharge of an alleged enemy of the State. (LAG 15 a S. 164/33, 20:174-76,

also upheld the dismissal of a branch manager on the grounds that DAF had tried to rent for her the store housing defendant-employer's business. Characterizing DAF's interference as impermissible, the court ruled that a dismissal could be justified even in the absence of fault on the part of the employee where outside influences that directly threatened the employer exhibited a relation to the person of the employee. (RAG 12/36, 27:11-14, No. 4, 25 April 1936.) This case is distinguishable from others in that here the third party was not exerting pressure on the employer to dismiss the employee; on the contrary: it was virtually conspiring with the employee to supplant the employer. In view of these special circumstances and the clear lack of authority of DAF to act in this area, the decision is not surprising.⁵⁰

B. Acts of Resistance or Defiance

Although it is possible that third parties also intervened in these cases to urge employers to dismiss employees, such outside interference was not a legal issue. Moreover, if the act was sufficiently egregious, once it became publicly known, few employers were likely to have required external stimuli in order to overcome whatever duty of loyalty they may have felt towards the offending employee. The acts most frequently complained of were: negative comments about prominent Nazis; disregard or disrespect for Nazi symbols; and non-participation in elections or "voluntary" organizations.

No. 44, 26 January 1934, Breslau [citing speech by Rudolf Hess to effect that petty officials and employees who had been seduced by Weimar system should not be treated harshly].) In a spirited defense of the Rechtsstaat, the same appeals court in Breslau ruled in favor of a Czech worker who had been dismissed as a result of pressure by his German co-workers. (LAG 15 A.S. 132/33, 20:176-79, No. 45, 12 December 1933.) Hueck commented that the fate of Germans living abroad should have been dispositive of the case (LAG 20:179).

⁵⁰ Cf. however RAG 79/41, 43:119-28, No. 17, 21 October 1941 (although discharge is void where it is in effect punishment for employee's having had recourse to DAF, if such recourse merely constitutes external occasion for discharge and determines its timing, it is valid). But two years later the court decided in favor of a plaintiff whose pension had been terminated by the Nazi Federation of Teachers because in a letter to DAF he had characterized defendant's rejection of his pension claims as embezzlement. One factor in the court's decision was plaintiff's long service and the short time remaining until his sixty-fifth birthday. (RAG 23/43, 46:397-403, No. 76, 16 July 1943.)



1. Criticism of Nazi Leaders

In the earliest such case, plaintiff was a fireman who was a candidate for a position as a tenured civil servant. He served in a firehouse in which the firemen were split into two groups - one supporting the Nazis and the other the Center party and SPD. On 21 February 1933 - i.e., before Hitler's first major legislative demolition of Weimar and before the March elections - plaintiff commented that there had never been a "shabbier and more mendacious [schofelere und verlogenere]" government than Hitler's. When the municipality sought to fire him administratively pursuant to § 4 BBG, the minister of the interior of Baden declined to proceed against him. The municipality then decided to dismiss him pursuant to traditional private-law termination provisions. The trial court found for plaintiff, awarding him his salary for all of 1934; the appeals court affirmed, ruling in addition that the termination had been void. Although by the time RAG decided this case (1936) the outcome must have been a foregone conclusion, it is worth noting that the court judged plaintiff by the political-ideological standards prevailing in early 1933; for by those of 1936 plaintiff's fate would have been determined by officials other than labor court judges. Nevertheless, in language untypical of RAG, the court held that in the period between 30 January 1933 and the March election, when Hitler was seeking to restore the German people to their former position, it was the self-explanatory duty of every civil servant to support the government and to refrain from making harmful and hateful remarks. That plaintiff had conducted himself unexceptionably since that election and had even subscribed to the Völkischer Beobachter was deemed irrelevant to the issue of whether he had given sufficient cause for the dismissal. (RAG 11/36, 27:59-66, No. 14, 13 May 1936.)⁵¹

Although the next case could also have been discussed under the rubric of third-party pressure, it is included here because the entire set of events took place within the judicial system. Plaintiff, who had been an officer in World War I and was an employee of the trial labor court in Berlin, in February 1935 told his co-workers – in the presence of the chairman of the local NSBO – that in an emergency Goebbels had



⁵¹ The court noted that these latter considerations would not have been irrelevant had plaintiff been dismissed pursuant to BBG. Freisler expressed interest in this case, which was decided by Linz, Obladen and Lersch. See BA R 22/2063, fol. 233-39.

forced a Jewish professor to attend to his daughter when she was very sick. Since plaintiff assumed that the NSBO chairman would inform against him, he took the initiative by informing the vice-president of the Landgericht in Berlin, who was in charge of the administration of the labor court. Apart from alerting plaintiff to the incredible character of the story and the danger in spreading it, the vice-president took no action even after the NSBO chairman informed him that he had instructed the Nazi party Gau. When, finally, in November of the same year the vice-president received a copy of the criminal charges pending against plaintiff,⁵² the latter was dismissed without notice. Plaintiff's suit was based on the collective contract for Prussian state employees, which provided that an employer forfeited the right to discharge an employee without notice where he waited more than a week after the time at which he first learned of the cause for which he was dismissing the employee. The case then turned on whether the criminal indictment constituted a new cause for dismissal, tolling as it were the contractual period of limitations.

The trial court⁵³ gave plaintiff a declaratory judgment that the dismissal was void; the appeals court affirmed. Although both courts agreed that plaintiff could have been dismissed in February, they ruled that only a criminal conviction – not a mere indictment – would have created a new cause for dismissal.⁵⁴ RAG's contrary reasoning appears circular: since plaintiff's remarks were so reprehensible, had the vice-president understood their import, he would have fired plaintiff on the spot; since he did not fire him, he must have been unaware or unconvinced of their import; hence the indictment, which for the first time alerted him to the seriousness of the remarks, constituted a fresh cause. (RAG 102/36, 28:64-70, No. 15, 8 August 1936.)

The court's reasoning cannot be denied a certain logic. Had the vicepresident believed that criminal charges would eventually be brought, retaining plaintiff during the interim would presumably have required a

53 The decision does not address the anomaly that the trial court was plaintiff's *de facto* if not *de jure* employer.

⁵⁴ While the appeal to RAG was pending, plaintiff was fined 200 marks in lieu of a two month sentence.



⁵² The statutory warrants were § 3 para. 1 VO des Reichspräsidenten zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Erhebung, 21 March 1933, RGBI I, 135; § l para. 1 G. gegen heimtückische Angriffe gegen Staat und Partei und zum Schutze der Parteiuniformen, 20 December 1933, RGBI I, 1269. On the special courts established to try these offenses, see VO des Reichspräsidenten über die Bildung von Sondergerichten, 21 March 1933, RGBI I, 136.

measure of courage and self-sacrifice. On the other hand, his realpolitical naivete seems astounding. Both possibilities, however, point to a case of third-party pressure. Since RAG was inclined to presume the latter possibility (the former might have made the judicial officer involved an accessory to concealing a crime), it paradoxically created a safety valve for relatively loyal employers who were thus entitled to cover for their imprudent employees – until the point at which criminal charges were brought - without jeopardizing their own security.

Even more bizarre, however, was the approach of the lower courts. For they implicated themselves or their colleagues in the concealment of what they knew to be a punishable offense. But since they too acknowledged that plaintiff could be dismissed without notice once he was convicted, they in effect offered him nothing more than his salary for the period that elapsed between indictment and conviction.⁵⁵

The last case involving criticism of a Nazi leader occupied the court three times between 1937 and 1940. Plaintiff, who had worked for a municipal electric company for more than twenty years, was discharged without notice in 1936 for comments she had made concerning a crowd of SA and Nazi party members who had demonstrated against a Catholic clergyman who had been arrested for allegedly having urged his parishioners to vote "No" in the election of 29 March 1936. She was also accused of not having used the "Heil Hitler" greeting. The trial court held in her favor, but the appeals court overturned that decision; RAG set aside the judgment and remanded, in part on grounds relating to the invalid use of BBG. The remaining part of the opinion turned on the status of an evaluation by the Nazi party that plaintiff was politically unreliable. RAG interpreted the relevant statute⁵⁶ as not conferring a general political right of control on the Nazi party authorizing it to intervene directly in municipal administrative entities. Although it conceded that, even in the absence of special statutory provisions, the political judgment of a Nazi party county leader had to be accorded great weight, neither the employing municipality nor the court was relieved of the duty of exercising its own independent judgment. Since the lower court had not fulfilled this duty, and had also failed to inquire into whether the Nazi party evaluation had been viewed by defendant as the



<sup>Many such accused persons were placed in preventive detention or protective custody.
See, e.g., RAG 213/34, 23:168-70, No. 34, 20 February 1935.
§ 6, 33 and 41 Deutsche Gemeindeordnung, 30 January 1935, RGBl I, 49.</sup>

kind of charge or suspicion that would justified dismissal, the court remanded. (RAG 284/36, 30:22-34, No. 3, 14 April 1937.)

By the time the case came up again, defendant submitted that plaintiff had committed a punishable act by making certain remarks about Goebbels. LAG held against defendant, but RAG remanded once again. Although it emphasized that only special circumstances – not adduced by defendant – would warrant upholding a discharge based on unjustified suspicion even from authoritative quarters, it this time criticized LAG for not having attributed enough importance to the Nazi party's evaluation of plaintiff. (RAG 158/1938, 35:269-77, No. 50, 4 January 1939.)

In the third and final round LAG again ruled against defendant, but RAG dismissed the suit. Here it was finally revealed that plaintiff had been charged with insulting Goebbels by comparing Nazi and Catholic charitable activities and claiming that Goebbels had been educated by the Jesuits.⁵⁷ RAG held that it was unreasonable to expect a municipal employer to employ someone who had reviled one of the first men of the State and the movement. Since the leadership of a municipal administrative organization had to conform to the goals of the Nazi State leadership, an employee could give cause for dismissal without having the convictions of an enemy of the State; political unreliability sufficed. That plaintiff had spoken in good faith was irrelevant, for it was the external effect as much as her subjective attitude that counted. (RAG 13/40, 41:27-32, No. 5, 30 October 1940.)

Thus despite the court's postulation and observance of a separation of powers as among the court, administrative bodies (qua employers) and the Nazi party, and despite its willingness to entertain this case three times, involving itself in ambiguities and tergiversation,⁵⁸ it ultimately relaxed the requirements considerably for politically motivated discharges.

2. Disregard for Nazi Symbols

Although failure to observe the forms of daily intercourse introduced by the Nazis could be interpreted as an expression of rejection of the Nazi State, such neglect was not uniformly an occasion for the court to



 $^{^{57}}$ The court noted that a clergyman had served three months in prison for having made this assertion.

⁵⁸ Cf. Volkmar's annotation (RAG 35:276-77).

rule against plaintiff-employees.⁵⁹ Thus RAG agreed with the lower courts that the head of a department of a"public corporation" with sixteen years' seniority could, regardless of his other merits, be dismissed without notice for having slighted the "symbols of the new era" – to wit, for having failed to stretch his arm out to its full extent at the proper angle for the singing of the Horst Wessel song.⁶⁰ (RAG 305/36, 30:127-31, No. 24, 26 May 1937.) Equitable considerations were used, however, to save the pension of a teacher who had been deprived of it because she had not given the "Heil Hitler" salute. RAG ruled that the lower court's factual determination was not appealable according to which plaintiff's conduct was sufficiently mitigated by her having acted out of a feeling of having been treated unjustly. (RAG 34/39, 37:158-63, No. 22, 27 September 1939.)⁶¹

3. Non-Participation in Elections and "Voluntary" Organizations

RAG ruled in favor of a bank employee who had been discharged without notice for having allegedly voted "No" in the plebiscite/ election in November 1933. At trial plaintiff had refused to state under oath that he had voted "Yes." According to the version of the relevant provision of ZPO⁶² that was in force prior to 1934, such a refusal was considered proof of the opposite of the putative fact. (At the trial *de novo* before LAG plaintiff apparently did state under oath that he had voted "Yes".) RAG rejected defendant's submission that LAG had violated § 286 ZPO, which provided that the court was required to determine whether a factual assertion was true or false on the basis of the whole record of the hearings and the result of any evidence taken. RAG ruled that there was no support for the claim that LAG had overlooked evi-



⁵⁹ Cf. also RAG 114/39, 39:344-50, No. 62, 9 April 1940.

⁶⁰ In a case that may not have reached RAG, an appeals court ruled that the clear legislative intent of inclusiveness of causes for discharge embodied in § 123 GewO could not be upheld in the case of a Polish worker who had failed to sing the Horst Wessel song and stretch out his arm for the Nazi salute on a Kraft durch Freude excursion. It justified its ruling by including "noxious pest [Schädling]" within the statutory term "profligate conduct [liederlicher Lebenswandel]". (LAG 9 Sa 126/35, 27:67-71, No. 12, 9 January 1936.) Hueck's annotation reveals that he was appalled by this act of judicial legislation although he ultimately supported it as but one more chapter in the eternal struggle between legal certainty and equity (LAG 27:69-71). Cf. a similar decision by the trial court in Dresden involving a Czech worker which occupied the Foreign Office; BA R 22/2063, fol. 41-51.

⁶¹ See also the first appeal: RAG 13/38, 33:107-13, No. 19, 11 May 1938.

^{62 § 464} para. 2 was repealed by the version of ZPO promulgated on 8 November 1933; RGBl I, 821.

dence that plaintiff had always had leftist leanings. The court thus did not have to reach the question of whether plaintiff was required, in the course of litigation with his employer, to reveal how he had voted in a secret ballot. (RAG 79/34, 21:95-98 No 19, 11 July 1934.)⁶³

The court upheld the discharge without notice of a very highly paid employee of a public-law corporation doing business with the army who refused to join the rest of the Following in contributing ten per cent of his salary to the Winter Relief Fund (Winterhilfswerk). Although the court appeared to make the case turn on plaintiff's principled hostile attitude toward the State (RAG 132/37, 31:229-41, No. 41, 17 October 1937), during the war it approved of the same result without recourse to this issue (RAG 52/42, 46:24-33, No. 5, 27 November 1942).64 More interesting were the court's dicta in the case of a bookkeeper in a municipal savings bank who was dismissed without notice (but who was given severance pay as if he had received proper notice) for having relinquished his position as block-warden in the Nazi People' Welfare organization (NS-Volkswohlfahrt) with the permission of that organization. Although the court agreed that a public employer could expect his employees to contribute to the achievement of the Führer's goals, merely quitting the welfare organization did not, without more, justify labeling plaintiff politically unreliable, in particular where his conduct was otherwise correct. The court criticized the employer for not having confronted plaintiff with his complaints before taking the drastic step of depriving a family of a pension entitlement and other benefits. The court found it revealing that defendant spoke in his appeal of making up for the "purge" (Säuberung) of non-Nazi elements that he should have conducted in 1933. Defendant was mistaken, the court stated, in his belief that he could use § 626 BGB without good reason to accomplish what might have been possible at one time pursuant to BBG. (RAG 14/38, 33:97-107, No. 18, 25 May 1938.)65



⁶³ This decision should be compared with one handed down by LAG two years later in the case of an employee who was dismissed (with notice) for not having voted in the election of March 1936. The fact that Hitler himself had appeared at the employee's plant two days before the election may have helped shape the opinion, which, once again, differed radically in tone and language from any of RAG's products. (LAG S a 56/36, 28:203-206, No. 52, 8 July 1936, Essen.)

⁶⁴ This case came up on appeal from Austria. Cf. RAG 10/35, 23:227-32, No. 48, 3 April 1935. According to Richard Grunberger, *The 12-Year Reich* (NY, 1972), pp. 86-87, once full employment was attained, the Winter Relief campaign became "a gratuitous ritual."

⁶⁵ Two lower courts denied employers the right to dismiss (sick/disabled) employees who refused to join DAF. (LAG 103 Sa 23/37, 29:178-82, No. 48, 20 March 1937, Berlin; LAG 24 Sa 49/37, 30:202-13, No. 58, 29 June 1937, Leipzig.)

C. Religion-related Dismissals

Most of these cases share elements common to the other rubrics (including those discussed under public-law dismissals); but in view of the importance which the Nazis attached to combating religious affiliation that competed with them for ideological hegemony,⁶⁶ the few cases are worth examining separately.

An employee of a state research institute who grounded his refusal to contribute to Winter Relief and People's Welfare on the claim that the Nazi Weltanschauung was a heresy (Irrlehre), fared no better than his aforementioned non-religiously motivated counterparts. To be sure, the court added - in a unique reference to the finer distinctions of Nazi ideology - that the result would have been different had plaintiff restricted his rejection of Nazi ideology to the views of Alfred Rosenberg (the Nazi party's leading 'philosopher'). (RAG 271/37, 34:205-12, No. 36, 15 June 1938.)⁶⁷ More significant was a case which began when the Gestapo ordered the removal of the chairman of a Protestant seminary of the kindergarten of which plaintiff was director. She was subsequently dismissed with notice by a deputy appointed by the Reich governor of Hesse. Although the court implicitly accepted plaintiff's submission that the measures taken against her were impermissible, it agreed with the lower court that the appointment of the deputy was not subject to judicial review; the provisions of private law were therefore irrelevant. The court appeared to rest easier knowing that its decision was in accord with the positive law since art. 124 of the Weimar constitution, which guaranteed freedom of association, had been constitutionally repealed seven years earlier. (RAG 54/40, 39:452-58, No. 78, 7 August 1940.)68

By far the most interesting of this group of cases involved a Jehovah's Witness whose pension was terminated by the Nazi successor-organization to the German Civil Servants Federation whose employment plaintiff had left in March 1933. After the Prussian minister of the interior had dissolved the Jehovah's Witnesses organization in June of that year plaintiff continued to be active in the group; as a result, he was sen-



⁶⁶ See Ernst Fraenkel, Der Doppelstaat (F., 1974 [1941]), pp. 40-41, 43-44, 83-84, 145-52.

⁶⁷ Cf. LAG 15 Sa 75/37, 32:65-71, No. 16, 11 November 1937, Breslau.

⁶⁸ § I VO des Reichspräsidenten zum Schutz von Volk und Staat, 28 February 1933, RGBI I, 83 was the statutory warrant. Cf. RAG 2/33, 17:474-79, No. 98, 25 February 1933, decided three days before the aforementioned statute was enacted. The court merely alluded to the political background of the case.

tenced by a special court to twenty-one months in prison, which he then served. For part of this time the minister of the interior suspended plaintiff's pension payments stemming from his earlier employment for the city of Berlin. Defendant claimed that as an organization affiliated with the Nazi party it could not reasonably be expected to make pension payments to someone convicted of such a crime. (The minister of the interior had characterized plaintiff's activity as Marxist.)

Reversing both lower courts, RAG ruled in favor of plaintiff. It held that since pension payments constituted deferred compensation for work already performed, their termination was in principle impermissible. The court conceded that a retired employee in some measure owed a duty of loyalty to his former employer, violation of which could justify termination of the pension. But the court barred the application of this rule to the case at bar by limiting that duty solely to the actual former employer and not to a successor organization for which plaintiff had never worked. Moreover, plaintiff's activity in the illegal organization had never been directed against defendant. Taking this reasoning one step further, the court also rejected defendant's assertion that plaintiff had violated a general duty of loyalty owed to Volk, State and Party. Foreshadowing a line of reasoning it would apply the next year to sustain pension rights of Jews (see ch. 11), the court held that defendant could no more lawfully refuse to continue paying out pension benefits than it could, for example, have refused to to pay plaintiff for land that it had bought from him: "Those convicted of a criminal act against Volk, State and Party do not stand outside of the civil law." Absent express provision by positive legislation, private creditors were not entitled to profit from the criminal conviction of debtors. (RAG 88/39, 37:343-49, No. 52, 29 November 1939.)

In view of the latitude which the expansive notion of the plant-community would have provided the court to rule in favor of the employer, ⁶⁹ and given also "the unfathomable hatred of the National Socialists towards the Jehovah's Witnesses" on account of the latter's uncompromising rejection of Nazi ideology and authority, ⁷⁰ this seemingly courageous ⁷¹ wartime decision may be best understood as the court's recoiling



⁶⁹ See, e.g., Hueck's annotation (RAG 37:347-49), which is perhaps the most explicitly Nazi annotation he published.

⁷⁰ Fraenkel, Doppelstaat, p. 147.

⁷¹ See also AG I AH B 538/33, 20:102-103, No. 6, 22 December 1933, Mannheim (Jehovah's Witness cannot be dismissed without notice because his non-participation in Nazi meetings and election led to unrest among his co-workers where employer did not

at the brink of the slippery slope toward the total absorption of private law obligations by political dictates. Indeed, as virtually all of the cases discussed in this chapter show, to the extent that the contrast between the (formal) voluntary creation of obligations and non-participation in the creation of binding obligations captures an important element of the distinction between private and public law, that supposed great divide became even more untenable under the Nazis than its most severe critics had imagined under pre-fascist conditions. For none of these dismissals was motivated by the economic interests of the employer as traditionally understood; none of them would have occurred in the absence of positive laws or State-mandated observance of certain ideological tenets.

In this sense "the ideological character" of an "absolutizing" "dualism" "between a public (or political) and a private (or unpolitical) legal sphere," which in "the capitalistic system" was "designed to prevent the recognition that the 'private' right created by the legal transaction of a contract is just as much the theater of the political dominion as the public law created by legislation and administration,"74 was not a desideratum of the Nazi political-economic system. For Karl Renner, the fiction of the division between private and public law collapsed once it was recognized that the right which the capitalist had - on the basis of his ownership of the means of production - to control and dominate his employees was public power blindly delegated for the capitalist's own gain; in this sense the employment relationship was a "public duty to serve."75 The Nazis' subordination of the capitalist's command over his workers to the interests of the State (§ 1 AOG) represented the ultimate realization of Renner's notion of publicly delegated power encased in the form of private law.76

Where specific statutory warrant was lacking, the court succeeded in anchoring the political and ideological requirements of the Nazi State and party in the Civil Code by means of the general clauses. But the



previously put him on notice that continued employment depended on fulfilling this condition).

⁷² Wolfgang Friedmann, *Legal Theory* (2nd ed.; L., 1953 [1944]), p. 275, contends that this tendential total absorption characterized the entire Nazi legal system.

⁷³ These are Kelsen's principles of autonomy and heteronomy. See Hans Kelsen, *General Theory of Law and State* (NY, 1961 [1945]), pp. 204-205.

⁷⁴ Hans Kelsen, The Pure Theory of Law (Berkeley, 1970 [1934]), pp. 281-84.

⁷⁵ Karl Renner, Die Rechtsinstitute des Privatrechts und ihre soziale Funktion (Tübingen, 1929 [1904]), p. 55.

⁷⁶ See Wolfgang Friedmann, Legal Theory (5th ed.; NY, 1967 [1944]), p. 371.

introduction of Nazi content into general clauses was not synonomous with the end of calculability⁷⁷ or the realization of the Free Law doctrine (*Freirechtslehre*), according to which socially desirable outcomes were to be achieved by ignoring unambiguous statutory provisions.⁷⁸ For the decisions in this area were, on the one hand, surely no less calculable than dismissal cases had been in Weimar; and the outcomes desired by the Nazis were, on the other hand, not generated by blatantly anti-positivist legal reasoning. Moreover, the general clauses also served as the vehicles for success on the part of employees in a number of cases which "administrators" would presumably have resolved differently.

II. Discharges provided for by Special Statutes

In April 1933 Hitler enacted two laws which enabled private and public employers to discharge employees who were perceived to be politically suspicious or outright opponents of the new regime. Although there is good reason to assume that a significant area of overlap existed between the initiative of the Nazis and that of public employers as to which civil servants were to be dismissed on political grounds, the cases do not allow of an unambiguous judgment as to whether private employers were eager to avail themselves of the new statute in order to settle old scores with 'troublemakers.' Only relatively few cases arising under the first statute reached RAG. That law deprived employees of their right to protest to the plant council 79 if their discharge was based on a suspicion of anti-State leanings (Verdacht staatsfeindlicher Einstellung). Instead, appeal was permitted only to the highest authority of the Länder (oberste Landesbehörde).80 Since in a number of cases the appealing employees were cleared of such suspicion, it is possible that employers did act on their own initiative.81 Because the legal issues on

⁷⁷ As Franz Neumann, *Behemoth* (2nd ed.; NY, 1966 [1942]), p. 443, and idem, "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft," 6 *ZIS* 542-96 (1937), asserts.

⁷⁸ As Friedmann, Legal Theory (1967), p. 343, asserts.

⁷⁹ As provided in § 84 BRG.

⁸⁰ Art. II G. über Betriebsvertretungen und über wirtschaftliche Vereinigungen, 4 April 1933, RGBI I, 161.

⁸¹ See, e.g., RAG 252/36, 29:332-37, No. 61, 3 March 1937. Somewhat more complicated was RAG 309/35, 26:265-72, No. 55, 29 April 1936. That differences obtained between employers and government administrators was also revealed by litigation arising under art. I of the law, which authorized the same official to terminate the membership of enemies of the State in the plant council and to appoint new members in their place. See RAG 27/1934, 21:125-28, No. 24, 11 April 1934, and RAG 107/1934, 22:141-49, No. 31, 24 October 1934. In the latter case the court was unimpressed by the employee's argument that judicial

which the cases turned were identical to those in the cases arising under the second statute, they will be mentioned in that connection. The first statute was repealed – together with BRG – effective 1 May 1934 when AOG went into effect. With the abolition of plant councils and the protection they afforded employees against arbitrary discharges, the first statute became superfluous.⁸²

The second statute, BBG, as well as its numerous amendments and implementing decrees have been set forth in detail elsewhere.⁸³ Its purpose was to remove from the civil service Jews, Communists, Social Democrats and others appointed during Weimar. In this section those litigants are studied whose political failings either were not specified in the reported cases or did not fit under the aforementioned rubrics. Of particular significance is the catch-all provision (§ 4 BBG), which provided that employers of civil servants could – but were not required to – discharge civil servants whose previous political activity did not guarantee that they would support the national State without reservation. Judicial review of the definitive decision regarding dismissals by the highest *Reich* or *Länder* authority was barred. (§ 7 para. 1 BBG.)

The court's decisions dealt almost exclusively⁸⁴ with two issues: 1. whether and under what circumstances a discharge pursuant to BBG could subsequently be converted into a private-law dismissal; and 2. where the line was to be drawn between which aspects of a discharge were and which were not subject to judicial review. Although the statute was designed to effect a one-time purge of the civil service rather than to serve as a permanent instrument of political control,⁸⁵ the after-effects of dismissals, in particular issues relating to pension rights, continued to occupy the court as late as 1942.⁸⁶

toleration of his discharge would mean that "a measure of the total National Socialist State would be weaker"than the employer's decision to discharge.

82 § 64 and 65 nos. 1 and 4 AOG.

83 See the introduction to Part IV above.

84 But see RAG 45/34, 21:61-65, No. 12, 13 June 1934.

86 Other means were of course available to remove politically undesired civil servants after the expiration of the relevant statutory periods. The most interesting case to reach



⁸⁵ The deadline for dismissals was originally 30 September 1934 (§ 7 para. 2 DBG). The deadline for reassignments and superannuation resulting from agency rationalization (*Vereinfachung*) (§§ 5-6) was subsequently extended to 31 March 1934 (art. I Drittes G. zur Änderung des BBG, 22 September 1933, RGBl I, 655) and then to 30 September 1934 (art. I Viertes G. zur Änderung des BBG, 22 March 1934, RGBl I, 203). The deadline for such measures was ultimately extended to 1 July 1937 – the date on which the Deutsches Beamtengesetz went into effect (26 January 1937, RGBl I, 39). See art. I Sechstes G. zur Änderung des BBG, 26 September 1934, RGBl I, 845. RAG expressly upheld the time limits on political dismissals (RAG 284/36, 30:22-34, No. 3, 14 April 1937; and RAG 19/41, 43:66-82, No. 12, 19 September 1941).

A. Conversion of BBG-Discharges into Contract- and Tarifordnungbased Discharges

Where the statutorily designated officials vindicated civil servants discharged for political reasons, employers often sought to sustain the discharge by subsequently converting it into one within the scope of the termination provisions of BGB or of the relevant Tarifordnung. Uniformly the court ruled in these cases that such a conversion was void where the employer's will to terminate was rooted in a narrowly defined circle of motivating circumstances. It was held to be a violation of good faith to interpret such an expression of will after the fact as containing other motivations. The court grounded its decisions in such notions as the expectations relied on by employees and the rule that uncertainty in expressing his will should redound to the detriment of the employer. (RAG 156/34, 22:71-75, No. 14, 24 October 1934; RAG 17/35, 24:161-69, No. 25, 10 April 1935; RAG 309/35, 26:265-72, No. 55, 29 April 1936 [G. über Betriebsvertretungen]; RAG 217/35, 26:283-90, No. 59, 14 December 1935 [held against employee because will expressed; noteworthy for multitude of administrative and judicial panels involved]; RAG 62/35, 27:97-99, No. 21, 19 June 1936; RAG 68/36, 29:30-35, No. 8, 14 October 1936; RAG 252/36, 29:332-37, No. 61, 3 March 1937 [G. über Betriebsvertretungen; held formally in favor of employee; claim effectively undermined by statute of limitations].) Although plaintiffs in such cases could be validly dismissed afresh, they were spared the more far-reaching sanctions associated with dismissals arising under BBG.

Thus although the court was prepared to assert the traditional policies underlying the meeting of the minds/will theory in contract formation,⁸⁷ once the competent State authority ruled against the justification of the discharge *ab ovo* on political grounds, RAG was just as willing to apply a veneer of judicial reasonableness to statutorily prescribed retroactivity. Where, for example, the positive law provided that discharges that had been carried out before the statute went into effect were valid if

RAG involved an employee of the employment office in Danzig who knowingly falsified the workbook of a woman belonging to the Polish minority enabling her to obtain employment with the police. (RAG 124/41, 44:68-73, No. 10, 16 January 1943 [held against plaintiff-employee, affirming LAG, which had reversed AG].)

87 § 140 BGB provides that where a void transaction fulfills the requirements of another transaction, the latter is valid if it is to be assumed that there would have been a will to assert its validity had the invalidity of the first transaction been known.



they could have been supported by certain provisions in the statute,⁸⁸ the court rejected the argument that such a discharge constituted an interpretative conversion (*Umdeutung*) of a private-law discharge. Rather, the court held, it was merely a sustaining of the earlier termination under the aspect of BBG. (RAG 5/1937, 31:356-61, No. 61, 17 April 1937.)⁸⁹

B. Judicial Review

RAG was able to draw relatively bright lines between the issues over which it exercised jurisdiction and those over which the statute assigned exclusive jurisdiction to administrative officials. Thus the court ruled that judicial review was not available in BBG cases with regard to: 1. the time at which a discharge became effective (RAG 83/34, 21:65-69, No. 13, 13 June 1934); 2. whether one of the statutory causes for dismissal was present (RAG 151/34, 22:157-64, No. 34, 3 November 1934 ([court rejects LAG's view that defendant's arbitrary assertion that plaintiff had been spiteful could not justify extraordinary measure of excluding judicial review]); 3. the reduction or withdrawal of pensions unless the claim was based on a new agreement between the parties concluded after the discharge (RAG 184/34, 23:92-98, No. 18, 12 January 1935; RAG 3/39, 37:137-45, No. 20, 23 August 1939; RAG 181/39, 39:264-71, No. 48, 17 April 1940; RAG 134/39, 39:332-36, No. 60, 17 January 1940; RAG 181/40, 41:282-89, No. 38, 4 March 194191; RAG 133/41, 44:217-20, No. 35, 27 March 1942); 4. declaring a private-law dismissal void for violating the mandatory hearing provisions where the dismissal was also based on BBG (RAG 288/36, 30:74-77, No. 12, 9 June 1937); and 5. tort claims based on allegations of unfair procedures in determining plain-

88 § 5 para. 7 Zweite VO zur Durchführung des BBG, 4 May 1933, RGBl I, 233.
89 Cf. Dersch's annotation (RAG 31:359-61) and RAG 189/37, 32: 104-14, No. 14, 23 February 1938, interpreting art. I Sechste VO zur Änderung und Ergänzung der Zweiten VO zur Durchführung des BBG, 3 August 1935, RGBl I, 1093, which provided for retroactively sustaining certain discharges that at one point were not valid pursuant to BBG if they had not been expressly revoked ("expressly" interpreted in favor of employer).
90 The availability of judicial review was generally asserted where the parties voluntarily created a new contractual relationship following a discharge. See RAG 51/39, 37:278-84, No. 45, 18 October 1939 (facially non-political case based on no. 6 para. 1 Zweite VO zur Durchführung des BBG), and RAG 51/39, 38:299-306, No. 56, 18 October 1939 (same case).
91 Although plaintiff-employer's suit – to overturn the decision of an administrative tribunal – should have been dismissed, the court entertained it because it contained within it a request for a declaratory judgment that the decision of the Hamburg Senate was unreviewable by the labor courts or the administrative tribunal.



tiff's political reliability (RAG 45/37, 31:149-53, No. 26, 22 September 1937 (§ 839 BGB governs tort recovery for violation of official duties).92

RAG asserted its jurisdiction where: 1. employees sued for their salary for the period intervening between discharge and administratively ordered reappointment (RAG 192/34, 23:56-57, No. 14, 19 December 1934); 2. the employer in discharging an employee used the language of BBG but expressly referred to the Law on Plant Representation (RAG 147/35, 26:26-34, No. 10, 16 November 1935 [different procedures govern each law]); 3. the employer was entitled – but not obligated – to discharge an employee and the latter requested a certificate from the former to prove to the pension fund that he was not at fault (RAG 155/35, 26: 304-306, No. 63, 16 October 1935 [fact that Prussian minister of interior rejected plaintiff's objection to dismissal not dispositive of fault issue, which must be adjudicated according to private law principles]; RAG 284/35, 27:343-52, No. 60, 8 July 1936 [G. über Betriebsvertretungen]); 4. statute of limitations had run (RAG 284/36, 30:22-34, No. 3, 14 April 1937); 5. the threshold issue⁹³ was presented as to whether the prerequisites for the application of BBG were present, i.e., whether the employee was covered by the statute and whether an authorized official had issued the termination; absent these prerequisites, the entire litigation was to be conducted before ordinary civil courts (RAG 200/36, 29:246-54, No. 49, 27 December 1936 [plaintiff-administrative director of a people's theater in Berlin, who challenged discharge by Goebbels in latter's capacity as minister for popular enlightenment and propaganda without approval of DAF as co-plant-leader, lost on merits in all courts]; RAG 167/37, 31:401-405, No. 70, 24 November 1937); and 6. a discharge was based on an employee's allegedly incorrect answers on a form required by procedures preliminary to evaluating employees' political reliability within the meaning of BBG; since the discharge was based on § 626 BGB before BBG had been applied, judicial review was available (RAG 194/34, 23:132-42, No. 26, 9 February 1935).44

⁹² See also RAG 260/39, 39:462-74, No. 80, 10 July 1940.

⁹³ Cf. RAG 158/39, 39:106-12, No. 18, 20 March 1940 (judicial review available where BBG is a threshold issue to a declaratory judgment that salary claims date from a certain point in time).

⁹⁴ Plaintiff had answered "No" to a question regarding membership in four named organizations, which did not include the Black Front, to which he had belonged. RAG held that defendant had not proved that plaintiff was acquainted with ad § 2 no. 2 Dritte VO zur Durchführung des BBG, 6 May 1933, RGBI I, 245, which required the discharge of those who had been active along the lines of that organization. The court ruled that it was irrelevant that plaintiff could have been dismissed for his membership, especially since

In summary, then, RAG was careful not even to appear to be arrogating to itself jurisdiction over issues that could be conceived of as even marginally belonging to the political realm which the regime statutorily monopolized.

III. DAF as Employer

Generally the court showed great deference to DAF95 in its role as defendant in employee-initiated litigation. With the exception of a vacation rights case (RAG 153/41, 44:177-81, No. 28, 20 March 1942), the plaintiff party prevailed unambiguously only once. In that case DAF approached plaintiff, who was a partially disabled legal and tax advisor, to manage the office it had recently opened in his town. When, in the course of reorganization, the office was closed several months later, plaintiff was dismissed (with six weeks' notice). It was plaintiff's claim that in abandoning his previous livelihood he had relied on DAF's implied promise of lifetime employment. The court inferred such an agreement from the circumstances of the negotiations; although DAF could still terminate the relationship for extraordinary cause, reorganization did not constitute such a cause because DAF's size enabled it to find other suitable employment for plaintiff. The court emphasized that it was judging DAF as it would any other legal personality. (RAG 188/36, 28:332-37, No. 69, 16 December 1936.)

In a number of cases RAG held that since DAF was not a corporation under public law (Körperschaft des öffentlichen Rechts), its internal employment regulations (Dienstordnung) were not covered by AOG (or the latter's public employment counterpart) and were therefore not legally binding unless they were integrated into the labor contract by agreement. (RAG 171/36, 29:224-31, No. 43, 16 December 1936; RAG 143/38, 35:223-29, No. 45, 15 February 1939.) Similarly, the court ruled that DAF's honor and disciplinary code (Ehren- und Disziplinarordnung), which contained limits on DAF's power to discharge employees, was not, without more, legally binding, but merely constituted an inter-

defendant had not presented such evidence until the first appeal, at which time it was impermissible, and also did not appeal this point.

⁹⁵ Cf. RAG 118/38, 35:21-29, No. 6, 21 December 1938 (Reich Farmer Führer [Reichsbauernführer] is justified in discharging without notice a highly paid attorney who acted contrary to his plans by submitting other proposals to Nazi party); and RAG 75/37, 38:131-39, No. 27, 3 November 1937 (Food Estate [Reichsnährstand] is unjustified in discharging without notice an employee who testified against it at a criminal trial).



nal directive to proceed cautiously in dismissing employees. (RAG 25/38, 34:212-21, No. 37, 13 July 1938; RAG 105/38, 34:312-15, No. 49, 30 November 1938.) Mansfeld, the labor ministry's expert on labor law, found the judicial deference unwarranted and the consequent lack of protection for employees vis-a-vis the organization charged with protecting all workers absurd. (RAG 34:221.)⁹⁶

The most significant DAF case, which occupied the court twice, involved an employee who was discharged without notice because the head of the Nazi party Gau personnel office had declared that he was politically unreliable. Whereas plaintiff denied that such a declaration sufficed as a ground for discharge (and, in the alternative, that he was politically unreliable), defendant submitted that the Nazi party's declaration was per se binding on it, and that the concrete facts giving rise to the declaration were immaterial since neither it, DAF, nor the court was empowered to review them. RAG remanded to LAG which, in ruling for DAF, had overturned the trial court's judgment. Since the Nazi party office in question was not authorized to dismiss plaintiff, judicial review was available to him. On remand LAG was instructed to determine whether plaintiff had been expressly characterized as politically unreliable or whether merely doubts had been raised; LAG was also to determine whether a body exercising sovereign rights (Hoheitsträger) or a subordinate office had issued the declaration. (RAG 276/37, 33:22-27, No. 6, 15 June 1938.) On remand LAG affirmed the trial court's ruling in favor of plaintiff after having found that the Nazi party office's withdrawal of its previous certification that plaintiff was unobjectionable indicated that it intended plaintiff to be discharged but only with the normal notice period. RAG set aside this judgment and remanded once again with instructions to determine whether the Nazi party office was affirmatively stating that plaintiff was unreliable (in which case discharge without notice was justified) or was merely expressing doubts (which were subject to review by DAF and then by RAG to determine whether DAF could reasonably be expected to retain plaintiff in employment until the notice period expired). (RAG 215/38, 36:158-62, No. 30, 26 April 1939.)

Although the final disposition of the case is unknown, it is worth noting that the court was willing to devote so much and such minute attention to ascertaining the status and intentions of a Nazi party office on

⁹⁶ For a further example of the court's approval of DAF's traditional employer mentality, see RAG 207/36, 29:209-11, No. 38, 24 February 1937.



which turned only whether the dismissed employee would receive backpay for the duration of the notice period. It is also unclear why the court struggled so tenaciously to retain its jurisdiction to review these actions by DAF and the Nazi party. In the view of Ernst Fraenkel, however, such decisions are crucial to his thesis that a general exemption of the Nazi party from all judicial jurisdiction would have jeopardized the existence of the partial Normative State that characterized the Nazi legal system.97 A labor court case adduced by Fraenkel in this context involved an officer in the SA who brought suit for his salary after he had lost his position as an administrator as a result of the refusal of the office to which he had been transferred to employ him. 96 Defendant-SA argued that no employment relationship existed because service in the SA was honorary and voluntary. The trial court ruled in plaintiff's favor to the extent that it recognized his salary claim for the duration of the normal notice period. Both parties appealed, but LAG affirmed the lower court's ruling as did RAG on appeal by defendant. Although the court acknowledged that the SA's authority to relieve a member of a position as a Führer was, as an emanation of its command power (Befehlsgewalt), not subject to judicial review, it also ruled that such authority was not inconsistent with the existence of a private law employment relationship with its attendant legal rights. Referring to, but not having to reach the question of, the SA's submission that the Nazi party stood above the State, the court nevertheless concluded that it was not inconsistent with Nazi party-organizations' being subject to the general principles of private law in their relations with individuals. (RAG 244/36, 29:315-23, No. 58, 10 February 1937.)

97 Fraenkel, Doppelstaat, p.63 Cf. Erlass des Führers über die Rechtsstellung der Nationalsozialistischen Deutschen Arbeiterpartei, 12 December 1942, RGBI I, 733. 98 Several other cases not cited by Fraenkel indirectly support his contention that a general exemption was never accorded the Nazi party: RAG 10/38, 33:128-35, No. 23, 16 June 1938 (contract of editor of official Nazi party newspaper); RAG 15/43, 46:142-46, No. 29, 2 April 1943 (case could have been but was not decided on basis of general immunity of Nazi party: private entrepreneurs can be charged with conducting lottery the employees of which are not also employees of Nazi party). This aspect of the exemption must be distinguished from bias in favor of the Nazi party or its members: RAG 61/40, 39: 413-19, No. 72, 31 July 1940 (potential contributory negligence of plaintiff in tort suit mitigated inter alia by fact that accident occurred while he, a Nazi party member, was on his way to a Nazi party celebration commemorating Hitler's takeover of power). But see RAG 163/39, 39:215-21, No. 40, 21 February 1940 (garnishment of salary of employee of Nazi party provincial organization), which Volkman the commentator, implicitly criticized for not being based on the fact that the nature of the employer (Nazi party) precluded suspicion of any intention to disadvantage the employee's creditor. See also RAG 56/38, 34:192-99, No. 34, 10 August 1938 (no statutory basis for claim that government agency in Nazi State per se sufficiently guarantees that its employees are correctly classified as to salary scales).



The import of this decision should not be overestimated. The court did limit its holding to full-time administrative employees of the SA; and as Volkmar, the most Nazi-oriented of the ARS commentators pointed out, individual inequities were available for review without thwarting the political goals of the SA (RAG 29:323). Unless jurisdictional disputes internal to the SA⁹⁹ - not alluded to in the opinion - could account for the decision to provoke a resolution through the civil courts, it must be assumed that in view of the important paramilitary functions of the SA at the time the decision was handed down,100 the leadership of the SA or of the Nazi party itself would have dealt with plaintiff extra-judicially had judicial review been anathema to it. Although the court clearly upheld freedom of (labor) contract, it could with equal plausibility have contained the untoward ramifications - for commercial interests in general - of a judgment in favor of the SA so that no precedent would have been generated, for example, to support a future claim by the SA that it lay within its discretion whether to fulfill an agreement with a corporation supplying it with uniforms. Since it is chiefly this latter issue that Fraenkel had in mind when he supposed that the unbridled growth of the Prerogative State would have been dangerously dysfunctional for the German capitalist economy, it is no longer clear that RAG was intentionally or even inadvertently serving indispenable macro-politicaleconomic ends.

A more plausible interpretation of the court's activity in this area lies in focusing on the legitimation generated for the Nazi regime by the court's conducting "business as usual" within the more restricted yet more openly politicized jurisdictional sphere still available to it. Once the regime itself had drawn bright lines around those real-world events and legal issues the untoward or merely random judicial treatment of which might have jeopardized the regime's stability, the preservation of a rump Rechtsstaat served the function of securing the loyalty of the judiciary. Once the regime had determined what questions were justiciable, that is, once it had decided what kinds of cases it could 'afford to lose' in the course of random rule-of-law-like adjudication, the fact that some proportion of allegedly politically unreliable or hostile employees successfully pressed their claims for backpay for the duration of notice



 ⁹⁹ It is conceivable that the Nazi party welcomed this outcome as documenting the subordinate status of the SA after Röhm's murder. See Charles Bloch, *Die SA und die Krise des NS-Regimes 1934* (F., 1970), pp. 154-59.
 ¹⁰⁰ See Neumann, *Behemoth*, pp. 384, 531.

periods, etc., could only redound to the benefit of the regime in terms of consolidating domestic political acceptance and international toleration.

The court's accommodation to the political, economic and social goals of the new regime was facilitated by the German legal tradition, for which - unlike the Anglo-American Rule of Law - the democratic genesis of laws did not constitute a criterion of Rechtsstaatlichkeit. 101 But as the experience of anti-communist legislation and its judicial sanctioning in the United States during the period after World War II has demonstrated, 102 the organic interconnection of the political structure of the State (i.e., a democratically elected legislature that enacts laws according to democratic procedures) with the formal requirements of the Rule of Law (namely, the self-subordination of the State to general and abstract rules precluding arbitrary exercise of power; promulgation of laws; judicial review; independence of the judiciary; and due process¹⁰³) also does not constitute a guarantee of the self-subordination of the legislator to the requirements of the preservation of civil and socioeconomic rights and of the protection of minorities against oppression by the majority (material Rechtsstaat).

¹⁰¹ See ch. 1 § IV.A. above.

¹⁰² E.g., Flemming v. Nestor, 363 U.S. 603 (1960), upholding termination of social security insurance benefits to an alien who was deported pursuant to a statute that provided for deportations of aliens because of past Communist party membership (plaintiff had left Communist party fourteen years before statute was enacted). Both provisions – 42. U.S.C. 5402(n) (1954) and 8 U.S.C. § 1251(a)(6)(c)(1) (1953) – are still in force. On the postwar loyalty qualifications for government employment, see Thomas Emerson, The System of Freedom of Expression (NY, 1970), pp. 205-46.

¹⁰³ See Louis Jaffe and Edith Henderson, "Judicial Review and the Rule of Law: Historical Origins," 72 LQR 345-64 (1956); A.V. Dicey, Introduction to the Study of the Law of the Constitution (8th ed.; L., 1931 [1885]), pp. 179-201; Carl Schmitt, Verfassungslehre (Munich, 1928), pp. 125-57; Martin Kriele, Einführung in die Staatslehre (Reinbek, 1975), p. 104.