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MARC LINDER

The Supreme Labor Court  
in Nazi Germany:  
A Jurisprudential Analysis

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## Chapter 4

## The Labor Relationship: The Movement from Contractually mediated Domination back to Communitarian Status

The attempt by the Nazis to suppress the tradition of class conflict in Germany by combating and abandoning the juridical nomenclature that had been adopted from Roman law<sup>144</sup> to meet the economic and ideological needs of the capital-labor relationship was implemented by resurrecting feudal terminology.<sup>145</sup> In an important sense this tactic was politically so transparent and socio-economically so ahistorically deracinated that it scarcely merits systematic analysis. Worthy of study, however, are two related issues: 1. the jurisprudential tradition on which the Nazis could rely for intellectual support in reconceptualizing capital-labor relations; and 2. the tensions generated for the court by the direct and indirect drafting of the neo-feudal terminology onto modern industrial contractual relations.

## I. The Germanic Reaction against the Romanist Labor Contract

The conflicting legal interests engendered by the development of industrial capitalism, in particular after the unification of Germany, by means of its differential impact on industrial capitalists, large landowning agricultural employers and industrial, agricultural and artisanal workers as well as proletarianized strata,<sup>146</sup> came into focus in the debates surrounding the drafting and enactment of the German Civil Code (BGB). The first draft, which was the product of deliberations conducted in the 1870s and 1880s, had its first reading before parliament in 1888. Its treatment of the labor contract, which it called a service contract (*Dienstvertrag*), was very brief – encompassing only eight sections – and gave rise to voluminous critical comment. With one principal

<sup>144</sup> See point 19 of Nazi party program of 24 February 1920. Denecke, "Vermögensrechtliches oder personenrechtliches Arbeitsverhältnis?" 2 *DAR* 219-24 at 223 (1934), opined that Marx's doctrine of class struggle would probably have been impossible without the Roman law doctrine of the synallagmatic employment relationship.

<sup>145</sup> See Peter Schwerdtner, *Fürsorgetheorie und Entgelttheorie im Recht der Arbeitsbedingungen* (Heidelberg, 1970), p. 66.

<sup>146</sup> See Thorstein Veblen, *Imperial Germany and the Industrial Revolution* (NY, 1939); Alexander Gerschenkron, *Bread and Democracy in Germany* (Berkeley, 1944); Hans-Ulrich Wehler, *Bismarck und der deutsche Imperialismus* (Cologne, 1969).

exception, the provisions of the first draft reflected the formal rules of contract formation that had entered into German common law through the pandectist tradition of Roman law.<sup>147</sup>

The service contract, modeled after the general contract of purchase and sale of things, obligated the employee to perform the services agreed upon and the employer<sup>148</sup> to pay the agreed upon compensation.<sup>149</sup> Although the draft provided for a two-week notice period to terminate the service relationship in the absence of express stipulation (§ 563), it, unlike the French Civil Code of 1803 (§ 1780), sanctioned life-long service contracts. In its most significant deviation from the general law of contract,<sup>150</sup> the draft provided that a full-time employee was not deprived of his contractual claim to compensation by the fact that he had been prevented, for a not considerable length of time, from performing for a reason peculiar to his person for which, however, he bore no responsibility (§ 562). The drafters justified this provision on the basis of social policy and reasons of "humanity." They also noted that it was known to the common law.<sup>151</sup>

Criticism of these provisions of the draft came from many quarters. The SPD parliamentary fraction, which engaged in 'constructive' debate, ultimately voted against the draft that became law.<sup>152</sup> A non-

<sup>147</sup> On the origins of the code, see Helmut Coing, "Einleitung," J. von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (12th ed.; [West] B., 1978); cf. Franz Wieacker, *Industriegesellschaft und Privatrechtsordnung* (F., 1974). As an example of contemporary critical commentary, see O. Jacobi, "Die Lehre vom Dienstvertrag im Entwurf eines bürgerlichen Gesetzbuchs," 4 *AfBR* 137-69 (1890). On the pandectist tradition of labor law, see Ludwig Arndts Ritter von Arnesberg, *Lehrbuch der Pandekten* (8th ed.; Stuttgart, 1874 [1850]), § 314; Philipp Lotmar, *Der Arbeitsvertrag*, II (Leipzig, 1908), 920-39; Erich Molitor, "Zur Geschichte des Arbeitsvertrags," 87 *Zf das Gesamte Handelsrecht und Konkursrecht* 371-98 (1924); Günther Bernert, *Arbeitsverhältnisse im 19. Jahrhundert* (Marburg, 1972); Philipp Krapp, "Die Anfänge und die geschichtliche Entwicklung des Dienst- und Arbeitsvertrags, dargelegt am römischen Recht, am Recht der Papyrusurkunden und am deutschen Recht" (Diss., Erlangen, 1931).

<sup>148</sup> The draft referred to the employee as *Dienstverpflichteter* (one obligated to service) and the employer as *Dienstberechtigter* (one entitled to service). See the remarks by the SPD member of parliament, Stadhagen, in the session of 22 June 1896 in *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, ed. B. Mugdan, II: *Recht der Schuldverhältnisse* (B., 1899), 1329.

<sup>149</sup> § 559 in Mugdan, *Materialien*, II, lxxxiv.

<sup>150</sup> In particular from what became § 323 para. 1 BGB.

<sup>151</sup> See "Motive," Mugdan, *Materialien*, II, 258.

<sup>152</sup> The SPD aspired to create a unified labor law that would also have applied to farm laborers on the large landed estates. § 95 Einführungsgesetz zum BGB, 18 August 1896, RGBl p. 604, preserved the control of the individual states over the *Gesindeordnungen*, which was not abolished until 1918; see Aufruf des Rats der Volksbeauftragten, 12 November 1918, RGBl p. 1303. For a survey of the positions adopted by the SPD in the parliamentary debates, see Martin Martiny, *Integration oder Konfrontation?* (Bonn-Bad

socialist whose critique found favor in socialist circles, Anton Menger, stressed the anti-social tenor of the code in general and its blindness to the relations of domination inherent in the service contract in particular.<sup>153</sup>

But by far the most prominent critic of the draft was Otto von Gierke. He, too, adverted to the domination that was camouflaged by contractual conceptualization. For Gierke, however, this was not a new theme created by the draft. As early as 1868<sup>154</sup> Gierke had bemoaned the fact that capitalist commercial enterprises had become modern organizations of internal domination (*Herrschaftsverbände*) in which the workers were mere objects or tools and the representative of capital the absolute master. With labor deprived of all rights within such organizations, its only choice was where it would subjugate itself.<sup>155</sup>

In a number of publications<sup>156</sup> Gierke engaged in a comprehensive critique of the first draft of the code toward the end of the 1880s. With regard to the sections under review,<sup>157</sup> he declared that with the exception of § 564 – which permitted termination of service contracts stipulating a duration of more than ten years with a six-month notice period – none of the provisions was capacious enough to limit contractual freedom. Indeed, the service contract, conceptualized as the free purchase and sale of the commodity labor, made possible submission to any kind of servitude including that related to slavery.<sup>158</sup> Recapitulating his argument of two decades earlier and anticipating the work of Max Weber, Gierke pointed out that the individualistic schema of private law prevented it from recognizing the need to protect the personality of individuals in all forms of the modern bureaucratic *Herrschaftsverband*.<sup>159</sup>

Godesberg, 1976), pp. 56-72. Cf. Thomas Vorbaum, ed., *Sozialdemokratie und Zivilrechtskodifikation* ([West] B., 1977).

<sup>153</sup> Anton Menger, *Das Bürgerliche Recht und die besitzlosen Klassen* (4th ed.; Tübingen, 1908 [1890: first appeared in *Archiv für soziale Gesetzgebung und Statistik* (1889)], pp. 164-65 and passim.

<sup>154</sup> I.e., one year after Marx published the first volume of *Das Kapital*, in which he presented a sustained analysis of the labor contract as masking a relationship of exploitation and domination.

<sup>155</sup> Otto Gierke, *Das deutsche Genossenschaftsrecht*, vol. I: *Rechtsgeschichte der deutschen Genossenschaft* (B., 1868), pp. 1036-38.

<sup>156</sup> E.g., Otto Gierke, *Die soziale Aufgabe des Privatrechts* (B., 1889).

<sup>157</sup> For a detailed but unenlightening survey of Gierke's contribution to labor law, see Friedhelm Jobs, "Die Bedeutung Otto von Gierkes für die Kennzeichnung des Arbeitsverhältnisses als personenrechtliches Gemeinschaftsverhältnis," *Zf Arbeitsrecht* 305-43 (1972).

<sup>158</sup> Otto Gierke, "Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht," *JfGVVw*, vol. 13, fasc. 4, pp. 109-95 at 130-31 (1888).

<sup>159</sup> *Ibid.* at p. 131.

In particular, the draft ignored the fact that once a contractual obligation transcended isolated exchanges and was directed toward permanent activity, it “takes hold of the personality as such and therefore displays an element of the law of persons.”<sup>160</sup> Critical of the draft for being grounded in the fiction of autonomous and self-ruling contractual parties, Gierke objected that it provided the weak with less protection against the economic-superiority of the strong than any other code. Finally, he found it “strange” that the draft took the *locatio conductio operarum* of Roman law as its foundation since the latter was built on slave labor.<sup>161</sup>

As a result of public and parliamentary criticism, a second commission was called into being,<sup>162</sup> which amended the existing service contract provisions and drafted new ones. The change that Gierke regarded as the chief advance was the obligation that the new draft<sup>163</sup> imposed on the employer to maintain machines and rooms and to organize work processes so as to protect the health and life of the employee. Tort recovery claims arising out of violations of this obligation could not be contractually limited or waived. Gierke, to be sure, expressed his disappointment that this was the only new provision infused with a “social spirit.”<sup>164</sup>

At the same time that the German parliament was engaged in the debates leading to the eventual enactment of the code (mid-1890s), Gierke published the first volume of his monumental work on German private law. In it he developed the category of communities with legally sanctioned power over the persons of their members (*personenrechtliches Gemeinschaftsverhältnis*).<sup>165</sup> As a subset of such communities he singled out those that existed by virtue of sovereign power (*kraft herrschaftlicher Gewalt*) as expressed in a personal relationship of superordination and subordination. Gierke detected the communitarian component of this relationship in the fact that internally mutual rights and duties bound the ruler (*Gewalthaber*) and the ruled (*Gewaltunterworfenen*), while externally the ruler represented the ruled as well.<sup>166</sup>

<sup>160</sup> *Ibid* at p. 189: “die Persönlichkeit als solche ergreift und darum ein personenrechtliches Element entfaltet.”

<sup>161</sup> *Ibid.* at p. 191.

<sup>162</sup> See Paul Örtmann, *Recht des Bürgerlichen Gesetzbuches, Erstes Buch: Allgemeiner Teil, I: Einleitung* (3rd ed.; B., 1926), pp. 5-13.

<sup>163</sup> § 558 in Mugdan, *Materialien*, II, lxxxv. This provision then became § 618 BGB.

<sup>164</sup> Otto Gierke, *Das Bürgerliche Gesetzbuch und der Deutsche Reichstag* (B., 1896), p. 46.

<sup>165</sup> Otto Gierke, *Deutsches Privatrecht*, I (Leipzig, 1895), 660-72.

<sup>166</sup> *Ibid.* at p. 697.

Gierke located the roots of this particular type of community in Germanic family law out of which various Germanic feudal communitarian relations then evolved. Although these were destroyed over time, and although the law in the nineteenth century, even where it recognized relations of domination outside the family, regulated them only as contractual relations among unconnected persons, Gierke was convinced that modern industrial enterprises were in fact nothing but the old "*personenrechtliche Gemeinschaften kraft herrschaftlicher Gewalt*."<sup>167</sup> His insistence that the communitarian ruler owed protection and welfare care to the ruled, who in turn owed him service and obedience,<sup>168</sup> placed Gierke at odds descriptively and prescriptively with Maine's claim "that the movement of the progressive societies has hitherto been a movement *from Status to Contract*".<sup>169</sup>

It is crucial to understand the dual nature of Gierke's critique of the code's approach to modern capital-labor relations. On the one hand, Gierke pointed out that the very formality of contractualism incapacitated it from perceiving the personal relations of domination that lay beneath the surface phenomena of free and equal exchange of property.<sup>170</sup> On the other hand, Gierke was not satisfied with establishing the existence of structural domination between contracting parties. He also maintained that the individualist standpoint of private law precluded any insight into the *de facto* community that bound the ruler and the ruled to each other.

Towards the end of his life Gierke began more systematically to seek (and find) the roots of the contemporary German industrial capitalist-wage labor community in Germany's feudal past. The voluntarily created mutual obligations of loyalty and obedience of the vassal and protection and care of the lord became romanticized exemplars of modern-day capital-labor relations.<sup>171</sup> What is important to realize here is that the two strands of Gierke's critique are historically, conceptually and analytically distinct and separable. That is to say, acceptance of the thesis that wage labor involves domination does not necessitate acceptance of

<sup>167</sup> *Ibid.* at p. 698.

<sup>168</sup> *Ibid.* at p. 701.

<sup>169</sup> Henry Maine, *Ancient Law* (L., 1931 [1861]), p. 100; cf. *ibid.*, ch. V.

<sup>170</sup> Cf. Karl Marx, *Das Kapital*, vol. I (H., 1867 [reprint]), pp. 140-41, who characterizes the sphere of commodity exchange – including the purchase and sale of labor power – as a Garden of Eden of freedom, equality, property and Bentham.

<sup>171</sup> Otto von Gierke, "Die Wurzeln des Dienstvertrags," *Festschrift für Heinrich Brunner* (Munich, 1914), pp. 37-68; idem, *Deutsches Privatrecht*, III (Munich, 1917), 590-637.

the thesis that a re-feudalized industrial-paternalistic-welfare-capitalist community exists – let alone that it is to be valued positively.<sup>172</sup>

Indeed, in an important sense Gierke's critique of the code was unnecessarily circuitous because the Roman law distinction between *locatio conductio operarum* and *locatio conductio operis* already contained within it the notion that he who rented his labor power to another personally subordinated himself, whereas he who contractually obligated himself to produce a specified object did not – even temporarily – forfeit his autonomy.<sup>173</sup> The virtue of Gierke's critique consisted in its emphasis on the structurally determined inability of Romanist contractualism to transcend the view of those who rented out their labor power as isolated juridical subjects. By failing to develop the features peculiar to the domination characteristic of modern capital-labor relations, however, and working instead within a suprahistorical Germanic framework, Gierke prepared the way for the polar opposite view of wage workers as isolated objects of entrepreneurial welfare.<sup>174</sup>

## II. The Rise of a Contractualist-Domination Synthesis in the Scholarship of Emerging Labor Law in the Weimar Republic

The SPD was (at least verbally) committed to Marx's conceptualization of freedom of contract as masking and inverting the social significance of the underlying political-economic relations of exploitation and

<sup>172</sup> See Hermann Rehm, "Die verwaltungsrechtliche Bedeutung der Fabrikordnung," 1898 *Annalen des Deutschen Reiches* 132-57.

<sup>173</sup> See Edg. Löning, "Arbeitsvertrag," *Handwörterbuch der Staatswissenschaften*, I (2nd ed.; Jena, 1898 [1890]), 980-81; Lotmar, *Arbeitsvertrag*, II, 920-39; Molitor, "Zur Geschichte," pp. 371-78; Hugo Sinzheimer, *Grundzüge des Arbeitsrechts* (2nd ed.; Jena, 1927 [1921]), p. 121. This distinction, which has appeared in the United States in attempts by courts to determine the attributes of independent contractors (*N.L.R.B. v. Hearst Publications*, 322 U.S. 111 [1944]), is dealt with in German law under the rubric, "employee-like persons" (*arbeitnehmerähnliche Personen*). Following the new version of § 5 ArbGG, 10 April 1934, RGBI I, 507 (original statutory warrant: 23 December 1926, RGBI I, 507), RAG shifted its emphasis from personal to economic dependence. Compare RAG 290/35, 29:35-39, No. 9, 29 February 1936 with RAG 217/37, 32:221-26, No. 33, 9 March 1938. See the discussion by Arthur Nikisch, *Die Grundformen des Arbeitsvertrags und der Anstellungsvertrag* (B., 1926), pp. 85-108. Increasing capital concentration renders the drawing of bright lines in this area increasingly difficult if not illusory. See Ole Hasselbalch, *Arbejdsretslige Funktioner* (Copenhagen, 1979), p. 96.

<sup>174</sup> See Otto Kahn-Freund, "Der Funktionswandel des Arbeitsrechts," *Arbeitsrecht und Politik*, ed. Thilo Ramm (Neuwied, 1966 [first published in 67 *AfSwSp* 146-74 (1932)]), pp. 211-46 at 214. Cf. Ernst Wolf, *Das Arbeitsverhältnis. Personenrechtliches Gemeinschaftsverhältnis oder Schuldverhältnis?* (Marburg, 1970), pp. 60, 64 and passim.

domination.<sup>175</sup> To the extent that the views and programs of the SPD contributed to the shape and texture of Weimar legislation on the one hand and capital-labor relations on the other, the new discipline of labor law was bound to be influenced.

Chief among those advocating the structural incorporation of at least some of Gierke's insights into theorizing about labor law during Weimar was one of its pioneers, Hugo Sinzheimer.<sup>176</sup> Most striking about Sinzheimer's approach is that he did not formulate a concept of property specific enough to capitalist relations of production to enable him to mediate the latter with his perception of private law as oppressing and coercing the working class.<sup>177</sup> In this sense he reproduced Gierke's ahistoricism. Thus it was consistent for him to see the juridical core of the old *patria potestas* and the feudal Germanic relations of vassalage as living on in the new forms of dependent labor.<sup>178</sup>

The achievement of Weimar labor law scholarship in this area may be reduced to the long overdue structural recognition of the fact that the *locatio conductio operarum*, unlike the sale or rental of objects, involved a commodity that was inseparable from its owner.<sup>179</sup> Thus it became commonplace in the literature to underscore the personal exposure and subordination inherent in labor contracts.<sup>180</sup> Even some authors who expressly distanced themselves from the positions associated with

<sup>175</sup> For a summary view, see Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion* (Tübingen, 1929 [1904]), pp. 43-63. Cf. Franz Neumann, "Über die Voraussetzungen und den Rechtsbegriff einer Wirtschaftsverfassung," 8 *Die Arbeit* 588-606 (1931).

<sup>176</sup> But see also the earlier work by Sinzheimer, *Der korporative Arbeitsnormenvertrag*, pt. 1 (Leipzig, 1907), pp. 5-16. Cf. Löning, "Arbeitsvertrag," p. 986.

<sup>177</sup> See R.W. Müller, "Der Pluralismus – die Staatstheorie des Reformismus," *Klassenjustiz und Pluralismus* (H., 1973), pp. 395-424 at 404-407.

<sup>178</sup> Sinzheimer, *Grundzüge*, p. 11; cf. in general *ibid.*, pp. 7-121.

<sup>179</sup> The *Kathedersozialisten* developed this insight in the last quarter of the nineteenth century in terms of social policy but not in the context of rigorous jurisprudence. See, e.g., *Schriften des Vereins für Socialpolitik*, vol. 7: *Über Bestrafung des Arbeitsvertragsbruchs* (Leipzig, 1874). Cf. Alfred Söllner, "Der industrielle Arbeitsvertrag in der deutschen Rechtswissenschaft des 19. Jahrhunderts," *Studien zur europäischen Rechtsgeschichte*, ed. Walter Wilhelm (F., 1972), pp. 288-303. Lotmar, *Der Arbeitsvertrag*, I (Leipzig, 1902), 6-13, 41-52, also offered a realistic appraisal of the status and function of the labor contract. Cf. Klaus-Dieter Waldt, "Die Lehre vom Arbeitsvertrag bis zum Ende der Weimarer Republik, insbesondere ein Beitrag zum Arbeitsvertrag von Philipp Lotmar" (Diss., Münster, 1974).

<sup>180</sup> See, e.g., Heinz Potthoff, "Ist das Arbeitsverhältnis ein Schuldverhältnis?" 9 *Arbeitsrecht* cols. 267-84 (1922); Arthur Nikisch, "Der Anstellungsvertrag," 80 *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 1-139 at 125-35 (1930); Erich Molitor, *Arbeitnehmer und Betrieb* (Marburg, 1929), pp. 14-15; Wolfgang Roessler, *Die Arbeitskraft als Rechtsgut* (B., 1932), p. 6.

Gierke and Sinzheimer and the law of persons<sup>181</sup> opened their contractualist framework to the notions of loyalty and welfare.<sup>182</sup>

By the end of the Weimar Republic, then, labor law scholars by and large fell into two groups: the Romanist contractualists and those who stressed the elements of domination inhering in the employment relationship, regardless of whether they derived this domination from modern industrial capitalism or Germanic feudal origins. What is significant here is that the communitarian component, whatever its strength in other areas of labor law,<sup>183</sup> was not logically integrated into the theory of the labor contract. As a result, Gierke's historical-doctrinal structure disintegrated, scattering bits and pieces to be adopted or adapted by various schools.

### III. The Attempt to Recreate a *personenrechtliches Gemeinschaftsverhältnis* during the Nazi Period<sup>184</sup>

The overlay of neo-feudal terminology in AOG identified the Nazis as staking a claim to being Gierke's heirs.<sup>185</sup> The ideological nature of this

<sup>181</sup> On the law of persons in connection with Anglo-American master and servant law, see Otto Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment," 93 *LQR* 508-28 (1977); Philip Selznick, *Law, Society, and Industrial Justice* (n.p., 1969), pp. 122-24.

<sup>182</sup> See Erich Molitor, Alfred Hueck and Erwin Riezler, *Der Arbeitsvertrag und der Entwurf eines Allgemeinen Arbeitsvertrags-Gesetzes* (Mannheim, 1925), pp. 7, 46; Alfred Hueck and H.C. Nipperdey, *Lehrbuch des Arbeitsrechts*, I (3rd-5th eds.; Mannheim, 1931[1927]), 40-41, 101-102, 179. Erwin Jacobi, *Grundlehren des Arbeitsrechts* (Leipzig, 1927), pp. 41-44, adopted a radically different approach to labor law, defining labor in terms of natural science.

<sup>183</sup> See ch. 3 above. Potthoff, "Ist das Arbeitsverhältnis ein Schuldverhältnis?," came closest to effecting this integration.

<sup>184</sup> For overviews of the tradition before, during and after the Nazi period, see Reinhard Richardi, "Entwicklungstendenzen der Treue- und Fürsorgepflicht in Deutschland," *Treue- und Fürsorgepflicht im Arbeitsrecht*, ed. Theodor Tomandl (Vienna, 1975), pp. 41-70; Lutz Unterseher, *Arbeitsvertrag und innerbetriebliche Herrschaft* (F., 1969), pp. 52-63 and passim; Udo Mayer, *Paritätische Mitbestimmung und Arbeitsverhältnis* (F., 1976), pp. 57-89; Alfred Söllner, "Entwicklungslinien im Recht des Arbeitsverhältnisses," *NS-Recht in historischer Perspektive* (Munich, 1981), pp. 135-49; Olaf Radke, "Die Nachwirkungen des 'Gesetzes zur Ordnung der nationalen Arbeit,'" 13 *AuR* 302-308 (1965). A major postwar debate may be consulted in: Franz Neumann, "Das Arbeitsrecht in der modernen Gesellschaft," 4 *RdA* 1-5 (1951); Vassili Mavridis, "Eingliederungstheorie, Vertragstheorie und Gemeinschaftsverhältnis," 9 *RdA* 444-48 (1956); F. Farthmann, "Der 'personenrechtliche Charakter' des Arbeitsverhältnisses," 13 *RdA* 5-9 (1960); Helmut Pinther, "Ist das Arbeitsverhältnis ein personenrechtliches Gemeinschaftsverhältnis?" 9 *AuR* 225-30 (1961). On the parallel development in British law, see Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (L., 1974); Brian Haines, "English Labour Law and the Separation from Contract," 1 *JLH* 262-96 (1980).

<sup>185</sup> For express recognition, see Joseph Kausen, "Das Treuverhältnis als Ausgangspunkt des neuen Arbeitsrechts," 2 *DAR* 71-74 (1934); Walther Oppermann, "Deutsche Rechtsgedanken in der neuen Arbeitsverfassung," 2 *DAR* 332-38 at 336 (1934); Herbst.

statutory construct was underscored by the appearance in the same year (1934) of a study demonstrating that Gierke had erred in locating the origins of the German service contract in feudal *personenrechtliche Gemeinschaftsverhältnisse*.<sup>186</sup> The fact that the *personenrechtliche* view survived<sup>187</sup> the empirical refutation of its historical derivation has been analyzed as an indication that it had assumed an autonomous systemic status: it became a first attempt by labor law scholars to escape the intellectual and social crisis that resulted from the recognition that legal equality and formal contractual freedom were not only consistent with, but necessarily mediated and masked economic inequality and coercion.<sup>188</sup>

Such an analysis is undifferentiated insofar as it fails to distinguish between the communitarian and the law of persons traditions. For it is possible to offer a rigorous critique of the labor contract as mediating and masking domination without having recourse to romantic notions of a community embracing the ruled and the ruler. The advocates of the *personenrechtliches Gemeinschaftsverhältnis* were the theoretical spokesmen of an historically specific German social-conservative, paternalistic response to the revolutionary-disruptive consequences of industrial capitalism. As such they presented a variant of the reaction by the British ruling classes a century earlier to the social disorganization caused by the vast commodification of social relations generated by the industrial revolution.<sup>189</sup>

The tutelage that employers were statutorily required to exercise over their employees in Nazi Germany did not constitute a continuation of this older paternalistic class regimentation in the sense that it did not

"Der Treudienstvertrag," 3 *DAR* 181-87 (1935). Wolfgang Siebert, *Das Arbeitsverhältnis in der Ordnung der nationalen Arbeit* (H., 1935), p. 19, criticized Gierke for not having been more radical. In his first published comments on AOG, Franz Neumann remarked sarcastically that a ministerial researcher had perhaps read Gierke; see Leopold Franz [pseud.], "Die Ordnung der nationalen Arbeit," 1 *Zf Sozialismus* 160-65 at 164 (1934).

<sup>186</sup> Wilhelm Ebel, *Gewerbliches Arbeitsvertragsrecht im deutschen Mittelalter* (Weimar, 1934); idem, "Zum Ursprung des Arbeitsvertrags," 96 *ZfdgStw* 319-36 (1936). Cf. Heinz Schwarzkopf, "Der Treue- und Gemeinschaftsgedanke in den Arbeitsverhältnissen des deutschen Mittelalters" (Diss., B., 1938); Eberhard Schmieder, *Geschichte des Arbeitsrechts im deutschen Mittelalter*, I (Leipzig, 1939).

<sup>187</sup> Indeed, it thrived until the 1970s. See Alfred Hueck and Hans Carl Nipperdey, *Grundriss des Arbeitsrechts* (5th ed.; [West] B., 1970), pp. 46-47, 67; cf. Wolfgang Däubler, *Das Arbeitsrecht*, II (Reinbek, 1979), 182-90.

<sup>188</sup> Spiros Simitis, *Die faktischen Vertragsverhältnisse als Ausdruck der gewandelten sozialen Funktion der Rechtsinstitute des Privatrechts* (F., 1957), pp. 264-81.

<sup>189</sup> See Karl Polanyi, *The Great Transformation* (Boston, 1971 [1944]), pp. 72-73 and passim; Georg Jäger, *Das englische Recht zur Zeit der klassischen Nationalökonomie* (Leipzig, 1909), pp. 80-88.

represent an instinctively protective response of self-preservation by the traditional social order to the ravages inflicted on the working class. Rather, this wardship was a component of a political program designed to insure that the working class did not organize itself in self-protection so as to obstruct a political-economic recovery from Germany's catastrophic depression.<sup>190</sup> In this context the resurrection of Gierke's *personenrechtliches Gemeinschaftsverhältnis* could no longer be regarded as a relatively spontaneous way out of the crisis of freedom of contract. Rather, the neo-Germanic imagery transparently obscured the creation of legal categories adequate to the sublation of the originally fictitious conditions of freedom of (labor) contract to a higher level. For now, not only did much larger and political-economically stronger employing units confront a mass of economically immiserated<sup>191</sup> and organizationally atomized employees and potential employees, but an unprecedentedly ruthless State was prepared to compel worker and capitalist to conform to the new structures.<sup>192</sup>

That the Nazis did not intend to recreate conditions more favorable to substantive freedom of contract but rather ones that revealed with all imaginable brutality the integumentary fiction that freedom of contract was becoming was expressed by a future RAG judge. Several months after the promulgation of AOG he commented that the latter's provisions conferring sole decision-making authority on the plant-leader in general and requiring him to issue a set of regulations governing working conditions in particular (§§ 2 and 26 AOG) could not be reconciled with the traditional notion of the employment relationship as based merely on mutual contractual obligations:

Even if in practical life the will of the one contracting party as the economically more powerful one may be more or less decisive, none the less, in terms of juridi-

<sup>190</sup> See Alfred Sohn-Rethel, *Ökonomie und Klassenstruktur des deutschen Faschismus* (F., 1973).

<sup>191</sup> See Rene Livchen, "Net and Real Wages in Germany," 50 *International Labour Review* 65-72 at 69 (1944); idem, "Wage Trends in Germany from 1929 to 1942," 48 *International Labour Review* 714-32 (1943); Gerhard Bry, *Wages in Germany 1871-1945* (Princeton, 1960); Jürgen Kuczynski, *Geschichte der Lage der Arbeiter unter dem Kapitalismus*, vol. 6: *Darstellung der Lage der Arbeiter in Deutschland von 1933 bis 1945* (B. [GDR], 1964); Timothy Mason, *Sozialpolitik im Dritten Reich* (Opladen, 1977), pp. 89-91.

<sup>192</sup> As provided for in the authority of the trustees of labor to intervene in fixing working conditions. See the interpretation by Karl Korsch, "Zur Neuordnung der deutschen Arbeitsverfassung," Karl Korsch, *Politische Texte*, ed. Erich Gerlach and Jürgen Seifert (F., 1974), pp. 271-97; first published in *Rätekorrespondenz*, no. 6 (November 1934), pp. 1-20.

cal concepts, he never has the right to be the sole decision-maker, in particular the right to make changes in contract conditions unilaterally.<sup>193</sup>

Under the circumstances of the tendential socio-economic and political abolition of freedom of labor contract,<sup>194</sup> the jurisprudential differences between the compromising and compromised supporters and the more radical opponents of contract-based labor relations assume only subordinate significance.<sup>195</sup> Thus even those labor law scholars who insisted that a contract, based on the will of the parties, still underlay the employment relationship,<sup>196</sup> accepted the overarching significance of the *personenrechtliches Gemeinschaftsverhältnis*, to which contractual obligations yielded.<sup>197</sup> A leading contractualist announced in effect the bankruptcy of his school by conceding that working conditions were agreed upon only formally, while in fact they were unilaterally dictated by the entrepreneur.<sup>198</sup> The more cynically realistic authors, who were prepared to adapt theory wholesale to the ideological needs of the Nazis and to the changes on the labor market and at the workplace brought about by the transformation of the constellation of class forces, spoke of the (voluntary) "incorporation" (*Eingliederung*) of Followers into a plant-community, which did not rest on a contractual basis (although it was willed).<sup>199</sup> This wing of scholars took the re-feudalization of labor relations seriously. Thus it protested against the notion that the Follower placed his labor power at the entrepreneur's disposal eight hours a day; for the whole employment relationship rested on this availability which was not interrupted the other sixteen hours a day (merely actual performance was interrupted). Those who objected to this loss of autonomy were still caught up in the illusions of the free labor contract proclaimed by liberalism: "In today's Germany there is no room for such

<sup>193</sup> Denecke, "Arbeitsverhältnis?" p. 222. Cf. Arthur Nikisch, *Arbeitsrecht* (2nd ed.; B., 1944 [1936/1938]), p. 29.

<sup>194</sup> See ch. 5 below.

<sup>195</sup> For a discussion of these differences, see Simitis, *Die faktischen Vertragsverhältnisse*, pp. 299-306; Bernd Rütters, *Die unbegrenzte Auslegung* (Tübingen, 1968), pp. 379-92; Andreas Kranig, "Arbeitsrecht und Nationalsozialismus," *Recht, Rechtsphilosophie und Nationalsozialismus: ARSP*, Beiheft 18, pp. 105-19 (1983).

<sup>196</sup> Hueck-Nipperdey-Dietz, *Gesetz zur Ordnung der nationalen Arbeit. Kommentar* (4th ed.; Munich, 1943 [1934]), § 1 n. 17 at pp. 12-14, 52 n. 16 at p. 36.

<sup>197</sup> See Alfred Hueck, *Deutsches Arbeitsrecht* (2nd ed.; B., 1944 [1938]), pp. 11-19. Cf. *Entwurf eines Gesetzes über das Arbeitsverhältnis* (H., 1938), § 1 para. 1. But see Werner Mansfeld's programmatic statement concerning the need to overtake the communitarian doctrine by incorporating it into contract doctrine; BA R 22/2063, fol. 181-82. Cf. the implicit attempt by the minister of justice, Gürtner, to mediate between the two positions at a conference on 1 February 1936; *ibid.*, fol. 223-24.

<sup>198</sup> Hueck, *Deutsches Arbeitsrecht*, p. 19.

<sup>199</sup> Siebert, *Arbeitsverhältnis*, was the pioneer in this area.

feeble resentments. For it is precisely National Socialism that . . . has made the *ethos of serving* honorable again."<sup>200</sup>

It remains to be determined whether the court joined in this anti-synallagmatic campaign.

#### IV. RAG-Adjudication

Since most of the relevant decisions deal with substantive issues (in particular, vacation rights) that are treated in greater depth elsewhere, discussion of the factual settings will be brief.

In one of the earliest decisions dealing with AOG, the court overturned a lower court ruling that vacation rights could be derived from the welfare duty imposed on employers by § 2 AOG. RAG agreed that the old view of the employment relationship as purely contractual had given way to a *personenrechtlich* relationship within the plant-community. And although the court also agreed that the statutory and contractual conditions of the individual employment relationship had, after the promulgation of AOG, to be interpreted from this new standpoint, RAG appeared to fear the consequences for legal certainty if the welfare duty of § 2 AOG were sanctioned as a general clause conferring arbitrary discretion on judges to formulate sweeping generalizations enforceable on all employers and employees without an examination of the concrete situation. (RAG 264/34, 23:170-74, No. 35, 23 March 1935.)<sup>201</sup>

A year later, in holding in favor of a female employee who had been discharged for refusing to undress for an in-plant medical examination, the court insisted that the general clauses pertaining to *bonos mores* and good faith (§§ 138, 157 and 242 BGB) were the appropriate vehicles by which to introduce Nazi communitarian notions into private law. But, absent special statutory limitations, the labor contract still formed the basis of the employment relationship to which the general norms of BGB applied. (RAG 218/35, 26:125-43 at 135, No. 28, 7 March 1936.)

Until RAG abandoned its consideration-based view of vacation rights, it maintained that the recently adopted view of the employment relation-

<sup>200</sup> Arthur Nikisch, *Arbeitsvertrag und Arbeitsverhältnis* (B., 1941), p. 39. Labor law scholars were preoccupied with denying or justifying the unequal status of plant-leader and Following. See Hilmar Westpfahl, *Die Wichtigkeit von Arbeitsvertrag und Arbeitsverhältnis auf der Rechtsgrundlage des AOG* (Weimar, 1938), p. 50.

<sup>201</sup> RAG 250/35, 26:175-79, No. 33, 5 February 1936, expressly held that the first sentence of § 2 para. 2 AOG did not imply that all doubtful legal questions were to be resolved in favor of the Following. Cf. RAG 153/37, 33:172-82, No. 29, 19 January 1938. Ironically, had § 2 been interpreted as so implying, legal certainty would presumably have been enhanced.

ship as predominantly *personenrechtlich* could not alter the nature of those rights. (RAG 203/36, 30:70-73, No. 11, 16 January 1937.) Although the court reversed itself the next year, declaring that the predominantly *personenrechtliche* nature of the employment relationship was inconsistent with a consideration-based view of vacation rights (RAG 254/37, 32:316-23, No. 45, 16 March 1938), RAG not only continued to use the *personenrechtliche* aspect to deny claims to vacation rights on occasion (RAG 279/39, 39:326-32, No. 59, 28 May 1940), it also refused to the end of its existence to recognize a universal claim to paid vacations.<sup>202</sup>

Presented with its first opportunity to adopt a position concerning the theory of “incorporation” by an employee who claimed that he was entitled to a Christmas bonus from an employer for which he had worked while being formally employed by another employer,<sup>203</sup> RAG avoided a direct confrontation by noting that even adherents of the theory conceded that a community relationship had to be grounded in a meeting of the minds (*Willensübereinstimmung*), which was lacking in the case at bar. It added, however, that it was upholding its precedents according to which the employment relationship – even with its altered (i.e., *personenrechtlich*) content – had to be founded on a contract containing private law obligations (i.e., *schuldrechtlich*). (RAG 248/38, 36:385-92, No. 69, 17 June 1939.) Even the contractualist theoreticians found that the court was out of touch with Nazi reality.<sup>204</sup>

In a later case RAG rejected the “incorporation” theory in favor of the labor contract theory. Plaintiff, who had been a relatively highly paid salaried railway employee, was called up to the army before he was to begin working (1 October 1939). Although defendant-employer continued to pay the salaries of its conscripted employees, it excluded plaintiff from this arrangement because he had not yet begun working for it.<sup>205</sup> Reversing the lower courts, RAG ruled that the employment relationship became effective on 1 October 1939; a *de facto* incorporation into the plant was not required. However, since the payments were voluntary, defendant could determine the conditions under which they would be made provided that he treated similarly situated employees similarly.

<sup>202</sup> See the appendix to this chapter.

<sup>203</sup> See ch. 3 above for a more detailed account.

<sup>204</sup> Hueck-Nipperdey-Dietz, *Kommentar*, § 1 n. 17 at p. 13. Mansfeld (RAG 36:392) objected only to the outcome, not to the legal reasoning. See RAG 15/42, 45:140-48 at 148, No. 28, 29 May 1942, for a cryptic reference to the status of the labor contract.

<sup>205</sup> See RAG 260/38, 36:437-39, No. 79, 21 June 1939, on the continuation of an employment relationship during a vacation after the termination of an employee's work.

(RAG 56/40, 40:221-24, No. 36, 21 August 1940.) As Hueck noted, both theories could have generated this outcome (RAG 40:224).

Immediately after the start of World War II the court held that the provisions of BGB governing impossibility of contractual performance (§§ 323-326) were not applicable to the employment relationship as a *personenrechtliches Gemeinschaftsverhältnis* grounded in duties of loyalty and welfare. In an appeal brought by a Jewish employee,<sup>206</sup> RAG ruled that the BGB provisions frequently precluded an equitable and socially justifiable balancing of the interests of the entrepreneur and the following. Although the court seemed merely to be maintaining a tradition of realistic jurisprudence (and legislation<sup>207</sup>) that sought to mitigate the harshness of several of the societally abstracted provisions of the Romanistic BGB governing the formation, performance and termination of contracts, this specific ruling favored the employer.<sup>208</sup> This outcome underscores the uncertainty attendant upon the discretionary use of general clauses to avoid what seem to be statutorily predetermined undesirable social results. (RAG 8/39, 37: 230-45, No. 36, 13 September 1939.)<sup>209</sup>

Such uncertainty reappeared the next year in a case involving § 616 para. 1 BGB, which provides that employees remain entitled to their wages when they are prevented from working for a relatively not considerable length of time for a personal reason for which they bear no responsibility. This is one of the BGB provisions originally designed to mitigate the rigors of the provisions controlling impossibility. The court held that since these latter provisions no longer applied to employment relationships as predominantly *personenrechtliche Gemeinschaftsverhältnisse*, § 616 para. 1 could no longer be regarded as an exception to them. Rather, the social policy expressed in § 616 para. 1 had in the future to be regarded as an emanation of the entrepreneur's duties of loyalty and welfare to the employee. Where, as in the case at bar, the employer did not violate these duties by treating hourly and salaried employees differently, the statutory provision ceased to require protec-

<sup>206</sup> See the discussion in ch. 11 below.

<sup>207</sup> See, e.g., §§ 616 and 626 BGB.

<sup>208</sup> Rüthers, *Die unbegrenzte Auslegung*, pp. 394-97, misunderstands this decision, which overruled the appeals court, which had applied §§ 323-326 BGB in favor of plaintiff-employee. RAG arrived at a result only partly favorable to plaintiff on other grounds.

<sup>209</sup> See Alfred Hueck, "Die Pflicht des Unternehmers zur Fürsorge für den Gefolgsmann nach dem Gesetz zur Ordnung der nationalen Arbeit," *Festschrift - Justus Wilhelm Hedemann zum sechzigsten Geburtstag* (Jena, 1938), pp. 312-29 at 328.

tion of the former. (RAG 187/39, 40:282-92, No. 50, 30 October 1940.) In a late decision the court finally reached the issue that had triggered Gierke's original interest in the *personenrechtliches Gemeinschaftsverhältnis* – domination. In holding against an employee who had argued that a fine exacted by his employer exceeded the statutory limit on wage garnishment, the court characterized the plant-leader's power to levy such fines as arising not from an agreement between the parties, but from absolute powers (*Machtvollkommenheiten*) connected with the *personenrechtlich* aspect of the employment relationship and the leader-principle. As such, the fines did not constitute contractual penalties but flowed from the police-like powers statutorily conferred on the plant-leader in order to maintain order and security. (RAG 167/41, 44:228-32, No. 38, 14 April 1942.)

On the whole, then, the court proved much more resistant to the inroads of the *personenrechtliches Gemeinschaftsverhältnis* than did the contractualist theoreticians. Not only did the court delay drawing substantive conclusions from its initially more cosmetic adoption of the new view, but when it integrated the latter into its holdings it often reached results that could have been produced by synallagmatic principles as modified by the pre-Nazi general clauses of *bonos mores*, good faith and reasonableness. If it was true even before 1933 that RAG had “broken the record” for the use of these clauses,<sup>210</sup> the proliferation of decisions grounded in the duties of loyalty and welfare after 1933 opened new vistas for judicial discretion.<sup>211</sup> Although the leading Nazi jurists regarded the general clauses as an appropriate vehicle for introducing Nazi policy into the resolution of private law conflicts,<sup>212</sup> their unsystematic and irregular application to the *personenrechtliches Gemeinschaftsverhältnis* revealed the failure of the Nazis to impose a coherent pattern of adjudication on this residual area of individual labor law.<sup>213</sup>

<sup>210</sup> Justus Hedemann, *Die Flucht in die Generalklauseln* (Tübingen, 1933), p. 16.

<sup>211</sup> Cf. Alfred Hueck, *Der Treuegedanke im modernen Privatrecht* (Munich, 1947), p. 3.

<sup>212</sup> See ch. 1 above.

<sup>213</sup> Cf. Rütters, *Die unbegrenzte Auslegung*, pp. 232-36.

## Appendix to Chapter 4

## The Impact of Nazi Communitarian Ideology on Adjudications concerning Working Conditions: The Example of Paid Vacations

In Germany, as elsewhere,<sup>214</sup> few hourly production workers received paid vacations before the First World War.<sup>215</sup> Although the growth of trade unionism and the proliferation of collective bargaining agreements during Weimar meant that millions of German workers were able to achieve a modicum of success in this area of so-called fringe benefits,<sup>216</sup> no general statutory regulation of vacations rights was ever enacted.<sup>217</sup>

The labor court adjudication during Weimar was thus restricted to interpreting the relevant provisions of employment contracts and collective bargaining agreements. Within the framework of the debates that would occupy RAG during the Nazi period, the most important controlling principle enunciated by the court related to its consideration-based view of vacation pay: it was part of the compensation paid by the employ-

<sup>214</sup> United States: Sebastian de Grazia, *Of Time, Work, and Leisure* (Garden City, 1964 [1962]), pp. 59-60; Great Britain: Hugh Clegg, *The Changing System of Industrial Relations in Great Britain* (Oxford, 1979), pp. 82-83; Denmark: Walter Galenson, *The Danish System of Labor Relations* (Cambridge, Mass., 1952), p. 205; Norway: Walter Galenson, *Labor in Norway* (Cambridge, Mass., 1949), pp. 163, 201-203 (six days of annual vacation achieved before 1920); cf. Emil Lederer and Jakob Marschak, "Arbeiterschutz," *Grundriß der Sozialökonomik*, div. IX, pt. II (Tübingen, 1927), pp. 293-94; Italy: Daniel Horowitz, *The Italian Labor Movement* (Cambridge, Mass., 1963), p. 142 (paid vacations the rule by 1921).

<sup>215</sup> See Wolfgang Däubler, *Das Arbeitsrecht*, II (Reinbek, 1979), 98-99.

<sup>216</sup> In 1922, four-fifths of all employees covered by collective bargaining agreements received a paid vacation; half of these workers received a maximum of six to twelve days off, with one-quarter receiving a maximum of fewer than six or more than twelve days respectively. In that year over fourteen million employees worked in plants covered by agreements. See Emil Lederer and Jakob Marschak, "Die Klassen auf dem Arbeitsmarkt und ihre Organisationen," *Grundriss der Sozialökonomik*, div. IX, pt. II, pp. 205, 213. By the beginning of 1929, collective bargaining agreements covering 97.8% of all employees covered by such agreements contained vacation provisions. At the beginning of 1928, two-thirds of such workers received a minimum of three days or fewer, while one-third received a maximum of three to six days. The maximum length among hourly workers amounted to no more than six days for about two-fifths of the employees, six to twelve days for about one-half, and more than twelve days for the remainder. Salaried employees received considerably longer vacations. See Alfred Hueck and H.C. Nipperdey, *Lehrbuch des Arbeitsrechts*, II (3rd to 5th eds.; Mannheim, 1932 [1929]), 58-59.

<sup>217</sup> Several leading labor law scholars drafted a general labor contract statute, which in §§ 93-104 provided for three to nine days of paid vacation, but the draft never became law. See *Der Arbeitsvertrag und der Entwurf eines Allgemeinen Arbeitsvertrags-Gesetzes*, ed. Erich Molitor with the cooperation of Alfred Hueck and Erwin Riezler (Mannheim, 1925).

er in exchange for services rendered by the employee.<sup>218</sup> A number of corollaries flowed from this contractualist point of departure. First, the issue of the waiting period arose. Since paid vacations presupposed performance of labor, and since vacations were generally granted only once annually, complicated technical problems developed with regard to the length and character of the waiting period<sup>219</sup> and pro-rated payments. Second, in order to deal with the problem of the employee who left a firm before he had received his vacation *in natura*, the court developed the notion of two distinct but co-existing entitlements to time-off on the one hand and monetary compensation on the other. Third, at least as to individual employment contracts, the fiction of free, equal and autonomous contracting parties dictated that the employee himself was the best judge as to whether and how to use his vacation.<sup>220</sup> Finally, in spite of the *do ut facias* perspective of the court, which viewed this year's vacation pay as compensation for labor performed during the previous year, RAG tended to deal with the issue of short work weeks during an employee's vacation by allowing the employer to pay the vacationing employee only what he would have earned had he worked that week.<sup>221</sup> Although the court was aware of the conflicting principles, it reasoned that it would be unfair to pay a vacationing employee more than his working colleagues, and that the economic situation of the firm had also to be considered.<sup>222</sup>

Although Nazi ideology was to transform the socio-economic and legal conceptualization of the vacation, the leading labor law scholar of the period extending from Weimar to Bonn captured the essential character of the vacation common to all these societies<sup>223</sup> when he defined it as "the liberation from the obligation to work that is granted to the employee for a certain time for the purpose of recovery."<sup>224</sup>

<sup>218</sup> The drafters of the labor contract statute also adhered to a contractualist view; *ibid.*, p. 46.

<sup>219</sup> E.g., whether a waiting period was a so-called restrictive year (*Sperrjahr*).

<sup>220</sup> He could, for example, choose to engage in other paid employment during his vacation. Hueck cites only scholarly, but no decisional authority for this principle. See Alfred Hueck and H.C. Nipperdey, *Lehrbuch des Arbeitsrechts*, I (3rd-5th eds.; Mannheim, 1931 [1927]), 273 n. 34.

<sup>221</sup> See *ibid.*, I, 272 n. 29. RAG's view was controversial.

<sup>222</sup> Several of the key decisions during the Weimar period were: RAG 305/30, 11:358-63, No. 80, 21 January 1931; RAG 182/30, 10:128-33, No. 34, 4 October 1930; RAG 538/28, 6:196-203, No. 47, 24 April 1929; RAG 177/32, 17:166-70, No. 31, 6 July 1932.

<sup>223</sup> All belong to the "realm of necessity"; see Karl Marx, *Das Kapital*, vol. III, in Marx-Engels *Werke*, vol. 25 (B. [GDR], 1964), p. 828.

<sup>224</sup> Hueck/Nipperdey, *Lehrbuch*, I, 267. During the Nazi period another scholar of similar longevty defined the vacation as the "temporary renunciation by the entrepreneur of the

In view of the catastrophic proportions that unemployment attained during the waning years of Weimar and the first several years of the Third Reich, vacation rights temporarily ceased to be a vital social or legal issue. But as unemployment declined, the volume of litigation reaching RAG increased noticeably.<sup>225</sup> Nevertheless, no statutory regulation of vacations was enacted during these years either.<sup>226</sup> A group of prominent scholars under the aegis of the Academy for German Law published a draft of a statute regulating the employment relationship in 1938 which provided for mandatory annual vacations; but it failed to become law.<sup>227</sup> The following analysis of the court's adjudications focuses on the ideological transformation of the juridical foundations and character of vacation rights and of the socio-economic functions of vacations.

In two cases in 1933 the court tersely upheld its consideration-based precedents. (RAG 159/33, 18:434-37, No. 96, 9 September 1933; RAG 107/33, 19:29-31, No. 10, 23 September 1933.) Not until AOG officially sanctioned the authoritarian-communitarian principles of Nazi labor law ideology did the court see itself forced into justifying its traditional position. By 1935 it was squarely presented with the issue by a part-time tailor who in part based his claim to vacation pay on § 2 para. 2 AOG, which imposed on the plant-leader the duty to provide for the welfare of his Followers. The appeals court, in overturning the trial court, conceded that the provision contained nothing about vacation entitlements,

worker's services." Arthur Nikisch, *Arbeitsrecht* (2nd ed.; Tübingen, 1944 [1936/1938]), p. 111.

<sup>225</sup> Indeed, vacation rights may have been the most litigated issue during the Nazi period, certainly for the years after 1936. The last years of Weimar witnessed successful attempts by employers to attack the gains unions had made in securing the adoption of vacation provisions in collective bargaining agreements. See Ludwig Preller, *Sozialpolitik in der Weimarer Republik* (Stuttgart, 1949), p. 483.

<sup>226</sup> No such regulation was enacted until after World War II. See Däubler, *Arbeitsrecht*, II, 99. On the refusal of the parliament to integrate basic social rights, including vacation rights, into the West German constitution in 1949, see Hans-Hermann Hartwich, *Sozialstaatspostulat und gesellschaftlicher status quo* (Cologne, 1970), p. 47. For the postwar enactments, see for the Federal Republic of Germany, *Mindesturlaubsgesetz für Arbeitnehmer*, 8 January 1963, BundesGBl I, 2; for the German Democratic Republic, §§ 189-200, *Arbeitsgesetzbuch der Deutschen Demokratischen Republik*, 16 June 1977, GBl I, 185.

<sup>227</sup> *Entwurf eines Gesetzes über das Arbeitsverhältnis* (H., 1938), §§ 73-84 and pp. 80-89. Among the drafters were Denecke, Dersch, Hueck, Nipperdey and Richter. Mansfeld was also a member of the labor law committee. § 149 Entwurf einer Regelung der Arbeit (September 1942) continued to provide for a minimum of six days of annual vacation; BA R 61/115, fol. 68-69. On the development of vacation provisions in TOs, see Günther Schelp, "Die Entwicklung des Urlaubsrechts durch Tarifordnungen," 4 *DAR* 190-95 (1936); Kurt Klingenfuss, "Der Erholungsurlaub der Gefolgschaft" (Diss., Heidelberg, 1937).

but stated that the manifold nature of employment relations made it necessary to leave regulation of such issues to judicial determination. RAG agreed that all statutory and contractual conditions of employment relations had to be interpreted in the light of the new view of the employment relationship as one involving personal relations peculiar to the plant-community rather than merely as consideration-based claims. But the approach suggested by the appeals court could never guarantee the certainty required by employment relations since it lacked a fixed standard and was tantamount to arbitrariness. The court thus rejected the general clause of AOG as an insufficient basis in itself for creating an entitlement. (RAG 264/35, 23:170-74, No. 35, 23 March 1935.)<sup>228</sup>

A year later a case was decided in which plaintiff, who had worked for defendant for two weeks short of one year, was sick for two weeks and then returned to announce that she was quitting; immediately thereafter she began her new job. RAG held that she was entitled to her vacation pay regardless of how the employment relation had been terminated. Recognizing the progress made by the new view of vacation as a means of strengthening the worker, the court nevertheless insisted that the entitlement – to free time and/or vacation pay – was still juridically based on work performed in the past. (RAG 9/36, 26:321-26, No. 64, 11 March 1936.) Mansfeld's comment to the effect that the relationship between vacation and labor performed was becoming more and more tenuous (*ibid.*) was a self-fulfilling prophecy rather than a careful reading of the decision.<sup>229</sup>

The next year the court held that where a TO created an entitlement to vacation after eight months of work if a Follower left without being at fault, but also specified that other paid employment during the vacation was prohibited, the entitlement was not affected by the fact that the Follower immediately entered new employment after legitimately having given notice. Where, as here, the court stated, time-off was no longer possible, the prohibition on other employment became meaningless; and, it added, AOG did not alter the fact that the time-off and the compensation were not a gift, but consideration. Once again the commentator criticized the court for persisting in its old construction of the employment relationship. (RAG 203/36, 30:70-73, No. 11, 16 January 1937.)

<sup>228</sup> Mansfeld expressed shock at the lack of progress of the communitarian idea (RAG 23:174).

<sup>229</sup> Cf. Dersch's commentary (RAG 166/1936, 29:39-45 at 45, No. 10, 19 December 1936).

Towards the end of 1937 RAG programmatically defended its refusal to deviate from its traditional principles. Despite the possible justification for the claim that every worker was entitled to vacation after a certain period, the court stated that it was not authorized to accord that justification the status of a generally valid legal principle because the competent State agents,<sup>230</sup> which had introduced vacation provisions into so many TOs, alone had the statutory authority and expertise to regulate the multifarious relations on an individual basis. (RAG 113/37, 32:147-53, No. 21, 10 November 1937.)<sup>231</sup>

In the beginning of 1938 RAG for the first time made a vacation rights case turn on the use of the loyalty and welfare duties of AOG. It held that a TO that in effect required two years of employment before plaintiff could become entitled to six days of vacation was incompatible with the aforementioned duties; the latter required in the court's view a period of rest and recovery after considerably less than two years. (RAG 180/37, 32:210-16, No. 31, 16 February 1938.)

RAG finally articulated its definitive abandonment of the consideration-based view of vacation rights in the same year. In what it now declared to be the only possible view of the labor relationship as based on a personal relation of loyalty, vacations were to serve to maintain and restore the labor power of the working man not only in the interest of the individual, but equally in that of the *Volk* as a whole. (RAG 254/37, 32:316-23, No. 45, 16 March 1938.)

As the court itself obliquely admitted, it had been subject to frequent and intense scholarly criticism for its adherence to the purely consideration-based view.<sup>232</sup> Indeed, some scholars were still not satisfied with the position adopted by the court in this decision. In particular, they objected that the court had not recognized that vacation rights derived in the first instance from community and not personal interests.<sup>233</sup> Their disappointment was so much the greater as they themselves in their abovementioned draft specifically provided for a minimum of six days of

<sup>230</sup> It was referring to the trustees of labor.

<sup>231</sup> Cf. RAG 169/37, 31:273-77, No. 49, 24 November 1937.

<sup>232</sup> See, e.g., Arthur Nikisch, "Probleme des Arbeitsrechts im Lichte der nationalsozialistischen Ordnung der Arbeit," 5 *ZdA/DR* 41-44 (1938). See Louis Jaffe, "Labor Arbitration and the Individual Worker," *The Annals of the American Academy of Political and Social Science*, May, 1953, pp. 34-42 at 38, for an American analogue to the German conceptual dichotomy.

<sup>233</sup> See, e.g., Hermann Dersch, "Der Erholungsurlaub im Akademie-Entwurf eines Gesetzes über das Arbeitsverhältnis," 6 *DAR* 193-96 (1938); Robert Franke [chairman of labor court in Frankfurt/Main], "Wichtige Fragen des Urlaubsrechts," 6 *DAR* 225-28 (1938). Cf. Lersch, "Neue Gedanken im Urlaubsrecht," 7 *DAR* 122-25 (1939).

vacation annually based on the employer's welfare duty and designed to maintain the strength of the *Volk*.<sup>234</sup> And although the court continued to underscore the crucial nature of the plant and *Volk*-community as determinants of vacation rights,<sup>235</sup> until the very end of its existence it refused to acknowledge the existence of a common law right of every working German to an annual vacation.<sup>236</sup> Conceding that developments tended in that direction, it nevertheless insisted that achievement of that goal depended not only on a commendable need, but also on the labor and economic situation. (RAG 17/42, 45:98-108, No. 18, 17 July 1942.) Neither contemporaries<sup>237</sup> nor postwar scholars<sup>238</sup> forgave RAG its insistence on a legal basis independent of the welfare duty in order to sustain a claim to vacation.

At a time, however, when reportedly the six-day vacation had already become generalized in fact,<sup>239</sup> the court's acceptance or creation of a common law right to an annual paid vacation based on the general clause of § 2 para. 2 AOG would not have resulted in the unambiguous gain for the working class that critics appeared to attribute to it. For in numerous areas the court and contemporary critics agreed that elimination of the contractualist-consideration grounding of a vacation claim in favor of the welfare/loyalty-duty approach would have precluded pro-employee decisions.<sup>240</sup>

The anti-liberal components of Nazi ideology<sup>241</sup> dictated that labor power cease to be and be considered the *dominium* of the individual

<sup>234</sup> Entwurf eines Gesetzes, §§ 74-75.

<sup>235</sup> In three later cases such considerations led to denying plaintiffs' vacations claims. See RAG 80/39, 37:447-54, No. 68, 29 November 1939; RAG 279/39, 39:326-32, No. 59, 28 May 1940; RAG 159/41, 44:185-89, No. 30, 20 March 1942.

<sup>236</sup> The court did use plant custom to interpret labor contracts with regard to vacations; see RAG 76/39, 37:365-73, No. 55, 15 November 1939; RAG 29/41, 42:287-93, No. 45, 22 July 1941. The outcomes were opposed to each other.

<sup>237</sup> See Hueck's annotation in RAG 45:108; Hueck-Nipperdey-Dietz, *Gesetz zur Ordnung der nationalen Arbeit. Kommentar* (4th ed.; Munich, 1943 [1934]), 52 n. 173 at p. 49. Friedrich Syrup, *Hundert Jahre Staatliche Sozialpolitik 1839-1939* (Stuttgart, 1957), p. 489, claimed that RAG nevertheless then found another basis for granting an entitlement. This was clearly not always the case.

<sup>238</sup> E.g., Thilo Ramm, "Nationalsozialismus und Arbeitsrecht," 1 *KJ* 108-20 at 116 (1968); Däubler, *Arbeitsrecht*, II, 99.

<sup>239</sup> See *Entwurf eines Gesetzes*, p. 80; Günther Seger, "Arbeiter urlaub und seine Gestaltung in den Tarifordnungen" (Diss., B., 1938), pp. 45-46; Hasso Spode, "Arbeiterurlaub im Dritten Reich," *Angst, Belohnung, Zucht und Ordnung* (Opladen, 1982), pp. 275-328.

<sup>240</sup> E.g., with respect to terminations of employment and inheritance from a deceased employee.

<sup>241</sup> See Herbert Marcuse, "Der Kampf gegen den Liberalismus in der totalitären Staatsauffassung," idem, *Kultur und Gesellschaft*, I (F., 1965), 17-55 [first appeared in 3 *ZfS* (1934)].

worker.<sup>242</sup> In this regard it echoed the treatment accorded property by the Weimar constitution, art. 153 para. 3 of which obligated property to be used for the general good. But not only in the Weimar view of property, in that of labor power, too, must be sought the antecedents of Nazi ideology. The Law on Socialization, which in an attenuated form represented the anti-capitalist consciousness of large segments of the German working class in 1918 and 1919, declared in its first section that every German had the moral duty to use his mental and physical powers as required by the general welfare. It also placed labor power, as the greatest economic good, under the special protection of the national government.<sup>243</sup> The constitution, promulgated several months later, repeated these formulas.<sup>244</sup>

In his contribution to the standard commentary on the fundamental rights of the second part of the Weimar constitution, Gustav Radbruch, a legal philosopher and former SPD minister of justice, explained that by means of this constitutional guarantee labor power became a legal good – of the individual or of the society. A passage in *Das Kapital* even served Radbruch as authority for his claim.<sup>245</sup> Whereas earlier drafts of the constitution and of the Law on Socialization had articulated the protection explicitly in aggregate social terms, Radbruch interpreted § 157 para. 1 of the constitution not as restricting but as extending protection to the individual as well. As an individual legal good, labor power was protected against its buyer and third persons; as a national legal good it was in addition protected against its own holder – the worker himself. Thus the protection of the individual disposition of labor power was limited by the protection of the national labor power.<sup>246</sup>

In the practical realization of the Nazi critique of liberal capitalism the pseudo-communities of plant and *Volk* virtually absorbed the individual elements protected formally by contract law and, at least in the-

<sup>242</sup> See the earlier statement of this position by Wolfgang Roessler, *Die Arbeitskraft als Rechtsgut* (B., 1932), p. 9. Cf. Emil Wehrle, *Der Warencharakter der Arbeit und das heutige Recht* (Mannheim, 1925).

<sup>243</sup> 23 March 1919, RGBl, p. 341.

<sup>244</sup> Art 157 para. 1 and art. 163 para. 1, 11 August 1919, RGBl, p. 1383. The phrase "greatest economic good" was omitted.

<sup>245</sup> See *Das Kapital*, vol. I, in Marx-Engels *Werke*, vol. 23 (B. [GDR], 1962 [1867]), p. 53. The passage cannot, however, serve as a warrant for Radbruch's claim.

<sup>246</sup> Gustav Radbruch, "Artikel 157 Absatz 1," *Die Grundrechte und Grundpflichten der Reichsverfassung. Kommentar zum 2. Teil der Reichsverfassung*, ed. H.C. Nipperdey (B., 1930), III, 351-52.

ory, substantively by socialist legislation.<sup>247</sup> The regimentation and quasi-militarization of labor under the Nazis was in part legitimated by the authoritarian-paternalistic allocation of benefits the scope of which was controlled by judicial interpretation of the general clause of AOG. To the extent that the court refractorily adhered to a modified contractualist or positivist conception of vacation rights, it may or may not have protected workers' rights or employers' profits depending on the concrete facts of the case; but it surely acted at cross-purposes with the Nazi regime, which, as the authoritative macro-socio-economic planning agent and creator of a binding State ideology, had understood and set forth as a practical precept that the statutorily unchallenged power of the Nazi leadership on the one hand and of the individual capitals on the other would be undermined by a failure to mitigate absolute power by means of a welfare duty that was not an empty shell. The court's failure to accommodate itself to this dictate of social control and cohesion is even more remarkable in view of the fact that it was, at least facially, motivated not by some independent notion of a juster substantive outcome, but by the weight of precedent and deference to (the absence of dispositive) positive law.

According to this interpretation, then, the court was neither a champion of progressive social policies or traditional employers' interests nor a pliant tool of the Nazis. Rather, without intending to oppose the latter, it may, in a dysfunctional and disintegrative fashion, have influenced social life merely because it refused to abandon an abstract legal principle.

<sup>247</sup> See, e.g., *Arbeitsgesetzbuch*, cited at n. 13 above, which stresses throughout the goals of creating socialist individuals.