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The Supreme Labor Court
in Nazi Germany:
A Jurisprudential Analysis

For the University of Michigan Library

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Part IV

Enemies of the Regime

In order to understand the decisions involving politically motivated discharges, it is necessary to set forth the statutory basis for the discharges that gave rise to virtually all the litigation.

In connection with the alleged participation of Communists in the burning of the *Reichstag* building on 27 February 1933, Hitler induced President Hindenburg to sign an executive order "for the protection of the People and the State," which went into effect the next day.¹ The order was based on art. 48 para. 2 of the Weimar constitution², which authorized the president temporarily to suspend certain enumerated guarantees (personal freedom, freedom of speech, assembly and association, secrecy of mail, and freedom from search and seizure in the home as well as the protection of property) in order to restore public security and order if seriously threatened or disturbed. The preamble to the order singled out the necessity of defending the State against Communist acts of violence.

During the month of March the police, under Göring's control, and the SA, under instructions as a Nazi private army and also spontaneously at the local level, seized, imprisoned, beat and killed numerous Communists. Those members of the *Reichstag* who were not imprisoned went into the underground. Thus of the eighty-one candidates of the German Communist Party (KPD) elected to the *Reichstag* on 5 March 1933,³ none was able to attend the session of 23 March 1933 when the *Reichstag* debated the enabling act demanded by Hitler. Against the background of art. 76 of the Weimar constitution, which provided for changes in the constitution to be effected by the *Reichstag*, since only two-thirds of the quorum of two-thirds were required for passage, and since only those Social Democrats who had not yet fled voted Nay, the *Reichstag* enacted the Law for the Relief of the Distress of the People

¹ VO des Reichspräsidenten zum Schutz von Volk und Staat, 28 February 1933, RGBI I, 83. On the whole period (1933-34) of the so-called legalization of the dictatorship, see Karl Bracher, *Stufen der Machtergreifung* (F., 1974 [1960]), pp. 119-236. All empirical information in this introduction to Part IV not otherwise documented is derived from this section of Bracher's study. See also Konrad Heiden, *Der Fuehrer*, tr. Ralph Mannheim [book was not published in original German] (Boston, 1944), pp. 544-78.

² 11 August 1919, RGBI p. 1383.

³ 4,800,000 votes were cast for the KPD.

and Reich.⁴ The law, which was to expire after four years, enabled Hitler's cabinet not only to become the legislator, but to pass laws that deviated from the constitution.⁵

On this basis Hitler enacted on 4 April 1933 a Law on Plant Representation and on Economic Associations,⁶ which provided that the highest officials of the individual *Länder* could extinguish the membership of those plant council members with a hostile attitude to the State or the economy (art. I). Art. II abolished the protection afforded by § 84 of the Plant Council Statute⁷ against politically motivated discharges of any employees. It also abolished the right to complain to the plant council if the discharge was motivated by the suspicion of anti-State leanings; instead, it remitted the discharged employees to the officials mentioned in art. I for their remedy in the form of a hearing.

Three days later the cabinet enacted the Law pertaining to the Restoration of the Professional Civil Service (BBG).⁸ It provided that civil servants could be discharged even where the prerequisites for such discharges according to previously existing law had not been met (§ 1). Those who had entered the civil service after 9 November 1918 (i.e., after the demise of the old regime) without the prescribed or customary training or other qualifications had to be discharged. Although they were to receive their salaries for a period of three months following discharge, they were to be deprived of their entitlement to a pension; a reduced but revocable pension could be granted in cases of great need (§ 2). Compulsory retirement was also imposed on those of non-aryan descent except for those who had become civil servants before 1 August 1914, or who had fought at the front or whose fathers or sons had "fallen" in World War I (§ 3). Civil servants whose previous political activity afforded no guarantee that they would at all times champion the national State without reservation could (but did not have to) be dismissed; they were also to receive three months' salary upon dismissal and three-quarters of their pension (§ 4).

Decisions concerning discharges were to be made definitively by the highest authorities of the *Reich* or *Länder*, subject to no judicial review, by 30 September 1933 (§ 7). Those dismissed pursuant to §§ 3 and 4

⁴ RGBI I, 141.

⁵ See the analysis by Franz Neumann, *Behemoth* (2nd ed.; NY, 1966 [1942]), pp. 51-53.

⁶ RGBI I, 161. Arts. I and II were subsequently repealed by AOG.

⁷ 7 February 1920, RGBI p. 147.

⁸ RGBI I, 175. On BBG, see Hans Mommsen, *Beamtenum im Dritten Reich* (Stuttgart, 1966), pp. 39-61.

received no pension unless they had ten years' seniority (§ 8). This provision also applied retroactively to those civil servants who had retired before the law went into effect insofar as §§ 2-4 could have been applied to them had they still been civil servants (§ 9). Non-tenured salaried employees and hourly workers in the State sector were subject to the same provisions (§ 15).⁹ Finally, the minister of the interior could grant higher payments than those authorized by the statute in cases of inequitable hardship (§ 16).

The first ministerial implementing order provided that all civil servants who belonged to the Communist Party or its auxiliary organizations were "unqualified" within the meaning of § 2 and were subject to mandatory dismissal.¹⁰ This provision, which served to deprive Communists alone among the political opponents of the Nazis of their pensions, reflected a general Nazi policy of singling out the KPD for especially severe treatment.¹¹ Thus the third ministerial implementing order,¹² in interpreting § 2 BBG, required the dismissal of a civil servant who had been an active Communist even if he no longer belonged to the KPD or its auxiliaries (ad § 2 no. 2). In its interpretation of § 4 BBG, however, the implementing order declared that membership in a political party – other than the KPD – did not in itself justify the assumption of national unreliability, even if the civil servant was a dues-paying and active member (ad § 4 no. 1).

On 20 July 1933 Hitler promulgated a supplemental law to BBG which included a new § 2a expressly requiring the discharge of KPD members or communist activists. An exception could be made for those who subsequently supported or joined a party or organization that had backed the so-called national upheaval. But those who remained active Marxists after 20 July 1933 – whether as Communists or Social Democrats – were subject to mandatory dismissal.¹³

The third law amending BBG added to § 4 the provision that those who met the requirements of § 4 but who had already retired before its

⁹ See the provisions in the Second Implementing Order, 4 May 1933, RGBI I, 233.

¹⁰ 11 April 1933, RGBI I, 195.

¹¹ See the instructive ministerial correspondence concerning the impossibility of construing § 2 BBG as applying to Communists, particularly to those who joined the KPD after having acquired tenure, in Mommsen, *Beamtentum*, pp. 164-65.

¹² 6 May 1933, RGBI I, 245.

¹³ RGBI I, 518. See also Zweite VO zur Änderung und Ergänzung der zweiten VO zur Durchführung des Gesetzes zur Wiederherstellung des Berufsbeamtentums, 28 September 1933, RGBI I, 678, for similar changes affecting salaried and hourly wage employees.

enactment were to be deprived of their pensions.¹⁴ A fourth amending law appended to § 7 BBG the provision that decrees in accordance with §§ 2-4 BBG could be altered or withdrawn in favor of the affected civil servants until 30 September 1934.¹⁵

¹⁴ 22 September 1933, RGBI I, 655.

¹⁵ 22 March 1934, RGBI I, 203.

Chapter 8

Communists

Very few cases involving Communists reached RAG. Apart from several cases in which Communist activity or attitudes played only a peripheral part, the decisions dealt with dismissals either in connection with BBG or effected by Communist employers.

In the first case, plaintiff, who had been employed by the state railway since 1919, was discharged on 31 March 1933 for alleged Communist activities; he was in protective custody for three weeks and criminal proceedings for attempted high treason were quashed. He sued for his salary for the duration of the ordinary notice of termination period. BBG, § 1 para. 4 of which empowered the state railway to issue appropriate directives, had not yet been enacted at the time of the dismissal. Nevertheless, on 27 March 1933 the director-general of the railway issued a directive providing for the immediate dismissal of all employees involved in communist politics. Not until 18 April 1933 did the railway make use of the enabling act which excluded judicial review. The purpose of the authorization was, on the basis of public security and general welfare, to create the possibility for an administrative body to intervene in vested rights if necessary to abrogate existing labor contracts without reference to the previously existing legal framework. The court saw itself confronted not with administrative rules operating merely as instructions for officials, but rather with prescriptive regulations that the officials were obligated to apply where the appropriate prerequisites were present. The court acquiesced in the determination of the railway that judicial review was precluded also with regard to the retroactive force of discharges effected before 18 April 1933. (RAG 106/34, 21:234-40, No. 48, 18 April 1934.)

Plaintiff in the next case, a railway conductor who had been employed by a local government since 1910, was dismissed without notice because he had belonged to the Revolutionary Trade Union Organization¹⁶ for five weeks in 1931. He brought suit to force defendant to certify that he, plaintiff, was not at fault; for if plaintiff was not responsible for his dis-

¹⁶ On the Revolutionäre Gewerkschaftsorganisation, see F. David, *Der Bankrott des Reformismus* (B., 1932), pp. 249-69.

missal, then defendant, pursuant to the statute of the pension fund, would have to reimburse the fund for the sums it paid out to plaintiff. The court held in favor of defendant because under BBG¹⁷ defendant did not have the legal option of not discharging plaintiff – a circumstance that could not have been foreseen by the pension fund statute. (RAG 165/34, 22:149-54, No. 32, 7 November 1934.)

In other words, the court held that it was better not to disappoint defendant's expectation than plaintiff's two-fold expectation: 1. that membership in the Revolutionary Trade Union Organization would carry with it no legal liabilities; and 2. that he would receive certification of his not being at fault when he was not responsible for his discharge.

In another BBG case from this period the court held that a discharge based on this law did not, without more, also include a dissolution of the contractual employment relation. Although the dismissal of a communist-minded civil servant constituted an interference of the *Reich* in the employment relation by virtue of State sovereignty, holding such views did not, without more, contravene the contract. The statutorily enforced discharge did not necessarily include the will to annul the contract absent State interference. Where the letter of termination did not express such a will, defendant could not subsequently substitute a termination with notice for one without a period of notice without paying plaintiff's salary until the end of the calendar quarter (which was the period of notice for termination). (RAG 113/34, 22:154-57, No. 33, 22 September 1934.)

In the second group of cases both plaintiff and defendant were (alleged) Communists. Defendant in the first case was a joint-stock company owned by the Soviet Union. A ministerially appointed commissar installed to remove politically unreliable persons discharged plaintiff. Although this administrative act under public law terminated the labor contract, litigation between the contracting parties was to be treated according to the principles of civil law as if defendant itself had discharged plaintiff. RAG held that defendant could not resist plaintiff's claim to his salary for the duration of the contractual period of termination by counterclaiming that it was compelled to acquiesce in the situation created by the State-appointed commissar. Not only was it the case that defendant's own person created the suspicion of political unreliability leading to the installation of the commissar, but defendant could

¹⁷ No. I, RGBI I, 678 (1933).

not have used the suspicion of Communist activity as an important cause for a discharge without notice; since plaintiff's imprisonment had lasted but a few days, it was reasonable to demand of defendant that it wait that long in order to clarify the situation. (RAG 40/34, 22:164-71, No. 35, 17 October 1934.)

The same day the court decided a similar case similarly. There the company-defendant, also owned by the Soviet Union, had dismissed plaintiff – with the understanding of the commissar – because he was suspected of promoting goals that endangered the State. (RAG 19/34, 22:171-75, No. 36, 17 October 1934.)¹⁸

Several years later RAG disallowed, on procedural grounds, defendant-employer's charges that plaintiff, who had been dismissed as an estate inspector before 1933, was a Communist. (RAG 199/37, 33:27-37, No. 7, 9 February 1938.) In two other cases the court also attached little or no importance to charges of Communism. (RAG 273/39, 40:78-86, No. 14, 31 August 1940; RAG 53/43, 47:136-42, No. 26, 8 October 1943.)

Given the high priority which the Nazi party placed on combating the KPD, it can come as no surprise that the court relied heavily on a legal-positivist approach to the interpretation of what was already an abundantly unambiguous statute. Where this type of judicial reasoning did not suffice to generate the expected outcomes, the court shifted into extreme judicial acquiescence in the administratively decreed exclusion of judicial review.

Whereas even this extreme self-instrumentalization of the courts for the avowed political goals of the regime still betrayed certain formal traces of familiar judicial activity, the intermediate appeals courts served straightforwardly and unabashedly if not as *vox populi* then at least as *vox viae*.

Enmeshed in a fact-pattern resembling those recurring in the foregoing RAG cases, plaintiff, who had worked on the railway since 1919, was a member of the KPD, chairman of the Communist caucus on the city council, and editor and publisher of a Communist paper. Dismissed because of his Communist activity, he requested certification from defendant that his discharge had been involuntary and without fault on his part so that he could receive his pension. Defendant refused on the grounds that plaintiff's Communist activity made him responsible for his discharge. LAG indignantly rejected the trial court's finding that

¹⁸ See also RAG 169/34, 23:84-88, No. 16, 12 December 1934, which was remanded.

plaintiff could not be made to suffer any contractual liability for having exercised his rights under the Weimar constitution. LAG declared that the German people had always been convinced that the KPD was an illegal party intent on violent revolution and high treason, and that its members were regarded as enemies of the State and noxious pests. This popular view, which had now become the view of the State and of the law, perceived the KPD as a criminal organization of public enemies who acknowledged neither God, nor fatherland, nor authority nor *führership*. Sound legal feeling revolted at the thought of granting a forty-one year-old Communist functionary a lifelong pension of 85 marks per month. Had a Communist revolution succeeded, the court explained, pensions for anti-Communist party leaders would scarcely have been on the agenda.

Plaintiff could not rest his claim on art. 118 of the Weimar constitution because it protected only freedom of opinion – not the freedom to participate in the pursuit of criminal goals. Only as to the trial court's dictum that a decision against plaintiff logically implied the denial to an enemy of the State of a claim to any contractual right, did LAG flinch at provocatively embarking down the slippery slope: here the court found it expedient to distinguish contracts the fulfillment of which was independent of fault. (LAG 6 II S 110/33, 19:207-11, No. 49, 27 November 1933, Frankfurt/Main, 1st Dept.)¹⁹

A different judicial strategy unfolded in a case in which the trial court had ruled that the mere request by the district Nazi party leadership that defendant dismiss plaintiff constituted an important cause within the meaning of § 70 HGB because defendant would otherwise have suffered the most severe economic disadvantages. After recoiling at the ramifications of such a doctrine for the entire legal system, and reciting numerous State and Nazi party decrees prohibiting local Nazi party units from interfering with the private economy, LAG proceeded to generate the important cause for the instant discharge: "No employer in the National Socialist State could reasonably be expected to give a Communist-minded female person work and bread even for a day while thousands of deserving National Socialist old fighters and other nationally minded men lie unemployed in the street." (LAG 6. II 65/34, 22:16-18, No. 4, 17 September 1934, Frankfurt/Main.)

¹⁹ Although the court permitted an appeal, no decision was ever reported in *ARS*. See the somewhat more judicial-like grounding of the same result in LAG 181/33, 20:77-81, No. 19, 3 January 1934, Essen.

By adopting Nazi code-words and sacrificing the individual plaintiff, the court could imagine that it had succeeded in warding off the far worse evil of the uncoordinated intervention of local Nazi satraps into the sacred preserve of private law relations.

A measure of leniency LAG was willing to apply only to youth: the sins of the fathers were not, without more, to be visited on their sons. Thus a fifteen year-old apprentice whose father had, prior to his resignation from the KPD, been a Communist member of the city council, was adjudged to have had no independent mind and to have engaged in a stupid, little boy's prank when he shouted, "Heil Moscow." The court saw the boy's salvation in re-education by his peers and subjection to corporal punishment at the hands of the master who could, however, discharge him if the continued propagation of such views proved to harm the master's business. (LAG 9 S. 101/33, 19:132-33, No. 31, 21 September 1933, Gleiwitz.)²⁰

²⁰ In two cases before the honor courts, the accused-employer/ managers were convicted of having violated the social honor of employees in such a way as to offer propaganda to the communists. EG 1/34, 22:196-208, No. 19, 9 January 1935, Silesia; SEG 21/34, 22:208-16, No. 20, 18 December 1934, Brandenburg; the latter decision was overturned by REG EV. Arb. II 23/35, 26:155, No. 3, 18 February 1936.