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The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

For the University of Michigan Library

Vittorio Klostermann Frankfurt am Main
1987
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### III. Conclusions
Preface

This book deals with a number of subjects: labor law, class conflict, Nazi Germany, Jews, jurisdiction and judicial reasoning, among others. Yet none of these forms its centerpiece. Rather, at issue here is the autonomy of the judicial process. By that is meant not so much the extent to which other societal institutions and forces supervise and restrict the judiciary or whether the claim of legal reasoning to be essentially different from political discourse is sustained (although both of these areas are examined). The focus of this work embraces the following complex of questions: What kinds of societal conflicts are moulded into judicially cognizable disputes? What forces account for the exclusion/inclusion of certain conflicts from/in the judicial process? What principles – if any – underlie the process of transforming conflicts into disputes to be adjudicated by the courts? How does the process of attempted resolution of these disputes by judges differ from that applied by other societal agents? What are the material (including legitimation-generating) consequences of judicial – as opposed to non-judicial – dispute-resolution? Does the character of this judicial process change over time? Is its scope restricted or expanded over time in connection with shifts between its authority and that of other dispute-resolvers?

In short, this work deals with the position within the social division of labor occupied by (private, civil law) courts in capitalist societies. Among these it examines exclusively Nazi Germany. The latter is a test-case of judicial autonomy insofar as it might be expected that this society, given its anti-liberal posturing and partial revolution, would constitute one extreme of restrictes judicial autonomy.\(^1\) Moreover, Nazi Germany may operate as a methodological bridge to the study of liberal capitalist as well as anti-liberal non-capitalist societies.\(^2\) No attempt has been made to comprehend all of the court systems with jurisdiction over disputes arising under private law. In particular a comprehensive analysis of the decisions of the German Supreme Court in the areas of com-

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mercial and corporations law remains a desideratum of legal research. The present work deals only with labor law. This limitation derives primarily from considerations of manageability and not fungibility of subject matter. For in view of the overriding role that the suppression of the labor movement played throughout the course of Nazi rule, labor-capital conflicts and their juridical transformation into judicially cognizable disputes assumed a special significance.

Even within labor law not all jurisdictions could be taken into account. The sheer volume of adjudication and the inaccessibility of trial and intermediate appellate court decisions precluded the possibility of a representative sampling let alone an exhaustive investigation. Consequently, the primary source for this study is the corpus of published decisions of the Supreme Labor Court (Reichsarbeitsgericht [RAG]) between 1933 and 1945. Although all of the almost 2,000 decisions were digested, fewer than half of these have been cited. Largely cases fell by the wayside because they were too run-of-the-mill and/or did not present issues, problems or resolutions significantly different from those prevailing during the Weimar period. Chief among these were points of law relating to working hours, sick-leave benefits, other working conditions and wages as well as a large group of cases dealing with various aspects of social insurance. The fact that these cases proved to be jurisprudentially uninteresting during the Nazi period is interesting, but not in this context. In order, however, to provide the reader with some insight into the nature of such 'non-political' cases, an appendix has been included analyzing the jurisprudentially most important area (paid vacations). Also omitted are references to most cases involving disputes between employers on the one hand and independent agents (such as travelling salesmen) and very highly paid executives on the other except insofar as enemies of the regime (such as Jews) played a part or the decisions drew distinctions vis-a-vis labor-capital relations.

What remains, then, is hundreds of cases in which the court was forced, or forced itself, to wrestle or not to wrestle with the juridical consequences of attempts to restore an equilibrium between labor and capital that had existed before the rise of the labor movement – with the difference that now huge concentrations of capital confronted atomized

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3 Unpublished decisions from the years 1942 through 1944 were consulted in BA R 22/4024 and R 22/4025. The few relevant decisions have been cited.
Preface

XI

masses of workers—on the basis of ideological formulae provided by the Nazi movement. The choice of the expression "juridical consequences" rather than, for example, "superstructural reflection," is critical. For the question as to whether the judicial process is merely a quasi-automatic passive agent or capable of autonomous intervention and structuring of social relations constitutes the overarching controversy of this book.

Reacting to what was unique about the Nazi legal system, postwar authors long subscribed to an undifferentiated view of the role of the courts. One of the most succinct expressions of this tendency is to be found in a small book published immediately after the collapse of the Nazi regime. After discussing the unprecedented legal machinations surrounding the murder of Ernst Röhm and other members of the SA in 1934, the author concluded:

The end of the German system of justice had come. That which still existed later on no longer deserved this name and was a grotesque. For it had to be grotesque when one litigated for hours on end before a trial court and an appeals court concerning an insult to one's honor or 300 marks while at the same time it was lawful to knock off dozens of people like pheasants without judicial inquiry or proceedings.4

The present work may be regarded as an extended coming-to-grips with such a line of argument.

Following upon a lengthy introduction to the problematic of the Nazi legal system in general and the mechanics of the Supreme Labor Court in particular (Part I) are grouped the three main segments devoted to analysis of the cases: the impact of the Nazi resurrection of conservative-paternalistic ideologies of community on key doctrines of labor law (Part II); the control of labor (Part III); and the treatment accorded various enemies of the regime (Part IV).

The major jurisprudential concern in these chapters lies in confronting the latitude which the statutes, precedents and fact patterns allowed the judges with that of which they actually availed themselves. To determine whether some measure of analytical or political coherence or uniformity attaches to the limits which these three sets of structuring elements imposed on the decisions (or which the court imposed on itself) constitutes the primary task of the case-review. The further-reaching questions relating to the out-of-court consequences flowing from the court's expansion, constriction or acceptance of the existing perimeter of its autonomy and, even more speculatively, to why the court chose (or did not choose) to test its status within the social division of labor (or, alternatively, whether instead less conscious, quasi-spontaneous mechanisms were at work) are explored, but less rigorously.

Although this work is primarily jurisprudential in character and not prima facie a contribution to social history, the struggles that slumbered, simmered or raged during the period under review are not merely so much indifferent social grist for its jurisprudential mill. They count; and so do outcomes. Indeed, as far as the history of class struggle in Nazi Germany is concerned, the stories told in the cases may rise above the level of the anecdotal and constitute an important source of a still largely untold story. But more generally and methodologically: this study tests the claim – largely ignored by continental legal scholars and denied by latter-day legal realists – that not merely the styles or modes of judicial reasoning but also the outcomes of the cases exhibit coherence.

The bulk of the research for this book was done at the International Law Library of the Harvard Law School. Among its staff, Rich Greenfield, Fred Chapman and Jack Tobin were particularly helpful (Rich Greenfield continuing to provide otherwise unavailable materials after his return to the Library of Congress). Annette Meiburg at the Bundesarchiv in Koblenz pointed the way to materials that would have otherwise gone unnoticed. Rainer Erd of the Institut für Sozialforschung in Frankfurt/Main originally suggested Nazi labor law as an undercultivated field of study. Larry Zacharias of the University of Massachusetts at Amherst shared his knowledge of how to approach decisional output historically and his sixth sense for obscure points of law. Manfred Weiss and Spiros Simitis of the Institut für Arbeitsrecht of the Johann Wolfgang Goethe University and Dieter Simon of the Max-Planck-Institut
Für europäische Rechtsgeschichte (both of Frankfurt/Main) all read the manuscript and offered critical insights and encouragement. Wolfgang Hoffmann-Riem of the University of Hamburg and Udo Reifner of the Hochschule für Wirtschaft und Politik in Hamburg commented on parts of the manuscript. Though untutored in German law, Morton Horwitz, Henry Steiner, Martha Minow and Duncan Kennedy of the faculty of the Harvard Law School were willing to engage in provocative dialog concerning the limits to the usefulness of contextual case analysis. Charles Donahue of the same faculty made helpful suggestions about the medieval roots of German law.
Abbreviations and Glossary of German Legal Terms

AcP  Archiv für die civilistische Praxis
AfbR Archiv für bürgerliches Recht
AfS  Archiv für Sozialgeschichte
AfSwSp Archiv für Sozialwissenschaft und Sozialpolitik
AG* Arbeitsgericht ([trial] labor court)
AO  Anordnung (order; directive; regulation)
AOG Arbeitsordnungsgesetz/Gesetz zur Ordnung der nationalen Arbeit (Labor Code; National Labor Regulation Law)
AOGÖ Gesetz zur Ordnung der nationalen Arbeit in öffentlichen Verwaltungen und Betrieben (Labor Code in the Public Sector)
AOER Archiv des öffentlichen Rechts
ArbGG Arbeitsgerichtsgesetz (Statute establishing the Labor Courts)
ARSP Archiv für Rechts- und Sozialphilosophie
AuR Arbeit und Recht
AV Ausführungsverordnung (executive decree)
B. Berlin
BA Bundesarchiv Koblenz
BBG Gesetz zur Wiederherstellung des Berufsbeamten- tum (Law pertaining to the Restoration of the Professional Civil Service)
BGB Bürgerliches Gesetzbuch (Civil Code)
BO Betriebsordnung (plant rules and policies)
BRG Betriebsrätegesetz (Plant Council Statute)
CLR Columbia Law Review
DAF Deutsche Arbeitsfront (German Labor Front)
DAR Deutsches Arbeitsrecht
DBG Deutsches Beamtengesetz (German Civil Service Statute)
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>DJ</td>
<td>Deutsche Justiz</td>
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<tr>
<td>DJZ</td>
<td>Deutsche Juristenzeitung</td>
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<tr>
<td>DNVP</td>
<td>Deutschationale Volkspartei (German National People’s Party)</td>
</tr>
<tr>
<td>DR</td>
<td>Deutsches Recht</td>
</tr>
<tr>
<td>DRW</td>
<td>Deutsche Rechtswissenschaft</td>
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<tr>
<td>DRZ</td>
<td>Deutsche Richterzeitung</td>
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<tr>
<td>DVO</td>
<td>Durchführungsverordnung (implementing order)</td>
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<tr>
<td>EG*</td>
<td>Ehrengericht ([trial] honor court)</td>
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<tr>
<td>Erlass</td>
<td>decree</td>
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<tr>
<td>F.</td>
<td>Frankfurt/Main</td>
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<tr>
<td>fol.</td>
<td>folio</td>
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<tr>
<td>Following</td>
<td>Gefolgschaft (Nazi-feudal term designating as a collectivity the employees of a plant)</td>
</tr>
<tr>
<td>G.</td>
<td>Gesetz (statute; law)</td>
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<tr>
<td>Gefolgschaft</td>
<td>Following</td>
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<tr>
<td>GewO</td>
<td>Gewerbeordnung (Industrial Code)</td>
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<td>GVG</td>
<td>Gerichtsverfassungsgesetz (Statute regulating the Constitution of the Courts)</td>
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<td>H.</td>
<td>Hamburg</td>
</tr>
<tr>
<td>HGB</td>
<td>Handelsgesetzbuch (Commercial Code)</td>
</tr>
<tr>
<td>HLR</td>
<td>Harvard Law Review</td>
</tr>
<tr>
<td>JhJ</td>
<td>[Iherings] Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts</td>
</tr>
<tr>
<td>JfGWVw</td>
<td>Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft</td>
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<tr>
<td>JfNuS</td>
<td>Jahrbücher für Nationalökonomie und Statistik</td>
</tr>
<tr>
<td>JLH</td>
<td>Journal of Legal History</td>
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<tr>
<td>JW</td>
<td>Juristische Wochenschrift</td>
</tr>
<tr>
<td>JZ</td>
<td>Juristenzeitung</td>
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<tr>
<td>KJ</td>
<td>Kritische Justiz</td>
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<tr>
<td>KWVO</td>
<td>Kriegswirtschaftsverordnung (War Economy Ordinance)</td>
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<tr>
<td>L.</td>
<td>London</td>
</tr>
<tr>
<td>LAG*</td>
<td>Landesarbeitsgericht (appellate labor court)</td>
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<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
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<tr>
<td>NSBO</td>
<td>Nationalsozialistische Betriebszellenorganisation (Nazi Plant-Cell Organization)</td>
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<td>Abbreviation</td>
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<tr>
<td>NSDAP</td>
<td>Nationalsozialistische Deutsche Arbeiterpartei (Nazi Party)</td>
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<tr>
<td>NY</td>
<td>New York</td>
</tr>
<tr>
<td>personenrechtliches Gemeinschaftsverhältnis</td>
<td>communitarian relationship based on law of persons (Nazi term designating employment relationship as no longer based solely on individual contractual obligations)</td>
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<tr>
<td>PrOVG</td>
<td>Preussisches Oberverwaltungsgericht (Prussian Supreme Administrative Court)</td>
</tr>
<tr>
<td>PSQ</td>
<td><em>Political Science Quarterly</em></td>
</tr>
<tr>
<td>RAG*</td>
<td>Reichsarbeitsgericht (Supreme Labor Court)</td>
</tr>
<tr>
<td>RAGE</td>
<td><em>Entscheidungen des Reichsarbeitsgerichts. 27 vols. 1928-1944.</em></td>
</tr>
<tr>
<td>RArbBl or RABI</td>
<td>Reichsarbeitsblatt</td>
</tr>
<tr>
<td>RdA</td>
<td><em>Recht der Arbeit</em></td>
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<tr>
<td>REG*</td>
<td>Reichsgehrengerichtshof (Supreme Honor Court)</td>
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<tr>
<td>RFM</td>
<td>Reichsfinanzministerium (ministry of finance)</td>
</tr>
<tr>
<td>RG</td>
<td>Reichsgericht (Supreme Court)</td>
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<tr>
<td>RGBl</td>
<td>Reichsgesetzblatt</td>
</tr>
<tr>
<td>RGSt</td>
<td><em>Entscheidungen des Reichsgerichts in Strafsachen</em></td>
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<td>RGZ</td>
<td><em>Entscheidungen des Reichsgerichts in Zivilsachen</em></td>
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<tr>
<td>RJM</td>
<td>Reichsjustizministerium (ministry of justice)</td>
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<tr>
<td>SDR</td>
<td><em>Statistik des Deutschen Reiches</em></td>
</tr>
<tr>
<td>SEG*</td>
<td>Soziales Ehrengericht (social honor court)</td>
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<tr>
<td>SP</td>
<td><em>Soziale Praxis</em></td>
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<tr>
<td>SPD</td>
<td>Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)</td>
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<tr>
<td>SPSS</td>
<td><em>Studies in Philosophy and Social Science</em></td>
</tr>
<tr>
<td>StGB</td>
<td>Strafgesetzbuch (Penal Code)</td>
</tr>
<tr>
<td>TO</td>
<td>Tarifordnung (schedule of wages and regulations concerning working conditions issued and enforced by the trustees of labor; replaced the collective bargaining agreements of Weimar)</td>
</tr>
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<td>VdVdDS</td>
<td>Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer</td>
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<td>ViZ</td>
<td>Viertelsjahrshfte für Zeitgeschichte</td>
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### Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>VO</td>
<td>Verordnung (ordinance; executive or ministerial decree)</td>
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<tr>
<td>Volksempfinden</td>
<td>popular feeling</td>
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<tr>
<td>Volksgemeinschaft</td>
<td>people's community</td>
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<tr>
<td>YLJ</td>
<td>Yale Law Journal</td>
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<tr>
<td>ZdAfDR</td>
<td>Zeitschrift der Akademie für Deutsches Recht</td>
</tr>
<tr>
<td>Zfs</td>
<td>Zeitschrift für Sozialforschung</td>
</tr>
<tr>
<td>ZfdgStw</td>
<td>Zeitschrift für die gesamte Staatswissenschaft</td>
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<tr>
<td>ZPO</td>
<td>Zivilprozessordnung (Code of Civil Procedure)</td>
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*Unless otherwise noted, all decisions of the labor courts are cited according to ARS. Citations to RAG cases contain four items: docket number; volume and page number (indicating the first and last pages of the case); the number given to the case within the volume; and the date of the decision. E.g.: RAG 220/33, 19:207-10, No. 49, 28 October 1933, means that the docket number is 220/33; the decision is located at pages 207-10 of volume 19 of ARS; the case appears as no. 49 in that part of vol. 19 devoted to RAG cases; and the decision was handed down on 28 October 1933. Citations to lower court cases include, in addition, the location of the court. Generally these citations have been included in the text and constitute a system of references independent of the footnotes. Therefore a parenthetical “ibid.” in the text refers only to the immediately preceding text citation and not to the preceding note.*
A Note on Terminology

Throughout this work the word "Nazi" is used uniformly in place of the official term, "National Socialist." This deviation requires justification. Hitler and his followers did not call themselves Nazis. The latter epithet was used by their opponents, apparently in imitation of the disparaging term, "Sozis," which referred to Social Democrats. No serious scholar would, of course, ever characterize Social Democrats as "Sozis." Why then "Nazis"?

Almost four decades after the defeat of the Nazis it is still the received wisdom of political-economic, sociological and historical research that the Nazis' adoption of the word and some of the symbols of "socialism" constituted a world-historical fraud. Perhaps this is winners' history. Perhaps a day will come when the short biographical entry for Hitler will read simply, "European statesman." But as long as the world at large continues to regard the twelve years of Nazi rule as a phenomenon sui generis, it does not seem outlandish to put some distance between a work of scholarship and its object.

Besides: there is good precedential authority for this linguistic practice. In the first proclamation issued to the people of Germany by Supreme Commander, Allied Expeditionary Forces, General Eisenhower declared in English that "we shall obliterate Nazi-ism and . . . overthrow the Nazi rule, dissolve the Nazi Party," whereas the German half

5 But see Joseph Goebbels, Der Nazi-Sozi (Elberfeld, n.d. [1927]).
6 Cf. the English expression, "Commissaries.
8 As Herbert Marcuse noted, "An essential part of . . . [scholarship] is recognition of the frightening extent to which history was made and recorded by and for the victors, that is, the extent to which history was the development of oppression." Herbert Marcuse, "Repressive Tolerance," in Herbert Marcuse et al., Repressive Tolerance (Boston, 1966), p. 13.
of the bilingual proclamation spoke of "Nationalsozialismus," "Nationalsozialistischen Deutschen Arbeiterpartei" and "NSDAP."9

In West Germany it has become vogue to deal with this issue by recourse to the abbreviation "NS." Herbert Marcuse’s strictures on abbreviations are particularly apt here:

Most of these abbreviations are perfectly reasonable and justified by the length of the unabbreviated designata. However, one might venture to see in some of them a "cunning of reason" – the abbreviation may help to repress undesired questions. ... The abbreviations denote that and only that which is institutionalized in such a way that the transcending connotation is cut off. The meaning is fixed, doctored, loaded. Once it has become an official vocable, constantly repeated in general usage, "sanctioned" by the intellectuals, it has lost all cognitive value and serves merely for recognition of an unquestionable fact.10

In an age of instant knowledge and the latter’s virtually as rapid consignment to oblivion, when, for example, the Vietnam War has become ‘ancient history’ to many university students,11 use of a fighting word like “Nazi” may even serve an educational purpose by keeping alive some small part of the passion and suffering that it once evoked.

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10 Herbert Marcuse, One-Dimensional Man (Boston, 1967 [1964]), p. 94.