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I. Öffentliches Recht

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Summaries

La science juridique suisse et le régime national-socialiste (1933–1945)

Swiss Legal Scholarship and the Nazi Regime (1933–1945)

Jean-François Aubert

In this study, the author investigates the relations between Swiss Legal Scholarship and the Nazi regime. The focus is on the fundamental question of what renowned lawyers – most of them active in the field of public law – wrote about Nazi legal doctrine within the scope of their scientific work. Subject of investigation are the works of distinguished lawyers published in the years 1933–1945, the scientific discussion on the total revision of the Federal Constitution in the years 1933–1935, as well as the fields of interest which were in the center of scientific debate in the period under examination.

In the first part of the paper, the relevant publications (textbooks, essays and lectures) of six renowned lawyers (Fritz Fleiner, Walther Burckhardt, August Egger, Eduard His, Dietrich Schindler Sr., and Zaccaria Giacometti) are analyzed. The investigation shows that these representatives of Swiss jurisprudence clearly disassociated themselves from the Nazi philosophy of jurisprudence. This portrayal is basically confirmed by the reviews studied, in which the Swiss lawyers' general disapproval of Nazi legal doctrine was expressed. Exponents of Swiss jurisprudence who openly showed their sympathy for the Nazi regime were rather the exception.

In the debate on the total revision of the Swiss Federal Constitution in the years from 1933–1935, the majority of Swiss specialists in public law took position against any radical authoritarian change in the Swiss constitutional order. Traditional values such as democracy, federalism and the constitutional state were, according to the prevalent opinion, to continue to be decisive elements for the formation of the state. An adaptation to the Nazi interpretation of the state in this sense was rejected.

It is remarkable that there was very little scientific analysis of the Nazi regime in Swiss jurisprudence in the period 1933 to 1945. In particular, no – or only a very weak – connection to national socialist and fascist legal doctrine was found among the subjects discussed at the annual meetings of the Swiss Lawyers Association. And also in the contributions to the Swiss Law Journal, probably the most important periodical of jurisprudence in Switzerland at that time, very little attention was paid to the Nazi regime. This lack of interest for the events in Germany is also manifested in the range of subjects – far removed from Nazi ideology – (e.g. labor law, tax law, cantonal criminal law, reform of the Federal Code of Judicial Organization, etc.) which were under discussion by the Swiss legal experts of the time.

Original version in French

Fragen des Neutralitätsrechts im Zweiten Weltkrieg

Neutrality Law Issues during the Second World War

Dietrich Schindler

This contribution discusses questions of the Neutrality Law which arose in the context of studies by the ICE on transit traffic, export of war materiel, foreign economic policies, and clearing transactions. The investigation of the individual questions is preceded by an appraisal of the Neutrality Law which was applied in the Second World War.

In its capacity as a neutral state, Switzerland was subject to the Neutrality Law which in the course of the 19th century had evolved into an integral part of international common law and was subsequently set down in the Vth and XIIIth Hague Conventions of 1907. These conventions are to be situated in the context of traditional warfare of the 19th century: for many problems of modern warfare they offered no solution. Thus Neutrality Law in the Second World War was only of minor significance, even more so because the warring parties to a large extent ignored their obligations vis-à-vis the neutral states. These violations of neutrality did not, however, lead to an abrogation or modification of the Neutrality Law.

The status of neutrality according to international public law entails both rights and duties for the neutral state. The obligations listed in the Hague Conventions are essentially limited to the prohibition to render assistance to a belligerent party (obligation to refrain) and the obligation to prevent the belligerent parties from using one's territory for military purposes (obligation to prevent and repel). There is no general obligation of economic neutrality; however, in principle, the neutral state has the right to maintain commercial relations with all belligerent parties. The neutral state is not compelled to restrict the freedom of the press or in general the right of its citizens to express their free opinion out of consideration for the belligerent parties.

The question of whether Switzerland in the Second World War fulfilled the duties laid down in Neutrality Law specifically emerges in connection with the export and transit of war materiel. According to the Hague Conventions, the export of war materiel on the part of a neutral state to a belligerent state is prohibited, as is the transit of war materiel of a belligerent state through neutral territory. Basically permitted, on the other hand, is the export and transit of war materiel to belligerent parties by private suppliers. The distinction between export and transit by the state or by private persons is therefore of fundamental importance. It is undisputed that a shipment of arms is to be attributed to the state when it has been 'arranged for' by organs of the state. The ICE study on the export of war materiel shows that several arms deliveries were conducted upon the instigation of the army administration. These were to be attributed to the Federal government and thus were clearly in contradiction with neutrality.

Furthermore, the issue of neutral Switzerland's duty to carry out relevant controls arises in connection with the transit of war materiel. The obligation of the neutral state to prohibit the belligerent parties from using its territory for military purposes, requires suitable means of control. In this sense, it must be considered as having been a violation of Neutrality Law when Swiss authorities in the Second World War in fact failed to carry out effective inspections of the cargo on freight trains.

Finally, the granting of credit for the delivery of war materiel raises the question of a potential violation of neutrality. The Neutrality Law forbids the neutral state to grant loans to belligerent states for the upkeep of their war efforts. The neutral state may, however, admit that private entities grant loans to belligerent parties; on the other hand, the state may not launch an appeal to grant such loans. By signing the Swiss/German Agreement of August 9, 1940, the Swiss government granted clearing credits which contributed to the German financing of the war. Italy too received considerable amounts of credit in 1940 and 1942 to pay for Swiss supplies of war materiel. These credits were in contradiction with the Neutrality Law in vigor.

Original version in German

Transactions germano-suisse sur l'or pendant la Seconde Guerre mondiale

German/Swiss Transactions in Gold during the Second World War

Jacques-Michel Grossen

This council's opinion deals with the problems of international law in connection with the gold transactions which took place between the Swiss National Bank (SNB) and the German Reichsbank during the Second World War. In the foreground of the investigations are the Neutrality Law, as well as the principles of protection of property set down in the Hague Land Warfare Convention of 1907 (HLWC). Moreover the question of Switzerland's responsibility relating to international law – also playing a crucial role within the scope of the Washington Treaty of 25th May 1946 – has been analysed within the opinion.

In principle, the Neutrality Law in vigor during the Second World War did not compel the neutral states to break off their economic relations with the belligerent states. A general obligation of economic neutrality did not exist according to the prevailing doctrine and practice. Thus the gold transactions between the SNB and the German Reichsbank did not contradict the Neutrality Law in vigor at the time. On the other hand, the neutrality of Switzerland in no way justified the purchase of gold which had been expropriated in violation of international law. Relevant for the evaluation of these gold purchases are rather the protection of property, defined in the Hague Land Warfare Convention as well as other principles of international law.

The gold transactions carried out between the Reichsbank and the SNB are legally problematic insofar as they included gold which had been expropriated in violation of international law by the German authorities. Thus the gold supplied specifically included looted gold, i.e., gold that had been confiscated or plundered, and gold which the Nazi regime had stolen from murdered and surviving victims of the policy of persecution. These measures were a gross violation of the protection of private property guaranteed in the Hague Land Warfare Convention (Art. 46 and 47 HLWC).

The Swiss Civil Law Code (Schweizerisches Zivilgesetzbuch ZGB) recognizes the purchase in good faith of movable assets from unauthorized sellers, from which it follows that the bona fide purchaser of movable assets (e.g., gold) under certain circumstances may acquire such assets legally even if the seller was not authorized to transfer ownership (e.g., in the case of confiscation in violation of international law). According to this principle set down in Art. 934 ZGB, the SNB was able to claim ownership of the gold supplied by the Reichsbank, provided they were in a position to prove that they had been acting in good faith when purchasing the gold. According to Art. 3, Para. 2 of the ZGB, this was the case only if the board of governors of the SNB, despite due diligence, was not in a position to recognize the illegal origin of the gold purchased. The author calls the argument developed by the SNB board after 1943, i.e., that they had acquired the gold from Germany in good faith with respect to its unimpeachable origin, extremely dubious. Never was an assessment of this issue carried out by a Swiss court.

Finally, the question arises as to whether any accountability based on international public law can be imputed to the Swiss state because of the gold purchases of the Swiss National Bank. Based on international public law, there are at least two requirements for such liability: an act committed in violation of international public law, and imputation of responsibility. Numerous gold purchases of the SNB were no doubt based on an underlying criminal act. But problematic from a legal point of view is the question of imputation since the confiscations in violation of international public law in Nazi territory were to be imputed to Germany and not directly to Switzerland. In order to acknowledge the responsibility of Switzerland on the basis of international public law, recourse would have to be taken to criminal acts such as complicity or receiving stolen goods, acts which in the period being examined were certainly defined in criminal law, but not in international public law. It is thus rather unlikely that an international court of arbitration after the war would have acknowledged the responsibility of

Switzerland under international public law. The question is of no relevance insofar as the problem of compensation for looted gold was conclusively settled in the Washington Agreement of May 25, 1946.

Original version in French

Rechtsprechung der schweizerischen Gerichte auf dem Gebiet des öffentlichen Rechts im Umfeld des nationalsozialistischen Unrechtsregimes und der Frontenbewegung

The Administration of Justice in Swiss Courts with Respect to Public Law in the Context of the Nazi Regime of Injustice and the Frontist Movement

Arthur Haefliger

This investigation is about the administration of justice in Swiss courts within the scope of public law in the context of the Nazi regime. Subject to investigation are court judgments in connection with the Frontist movement, the proceedings against David Frankfurter, court judgments in cases of infiltration, espionage, and sabotage as well as a trial for high treason. The objective of this study in legal precedents is the illustration of the Swiss judicial system in confrontation with Nazi and Frontist movements.

In several cases, the Swiss judicial system was confronted with the activities of German National Socialists and Frontists in Switzerland. Thus the Federal Supreme Court in response to a constitutional appeal had to judge measures decreed by the cantons to restrict the right of assembly of different groups of Frontists. The subject of a constitutional appeal was, e.g., the interdiction of assembly which the government of the Canton of Zurich had issued on 8th February 1934 to the Frontist group «Harst der nationalen Front». The Federal Supreme Court repudiated the appeal with the justification that the right of assembly could not possibly apply to organizations such as the «Harst» which were seriously threatening national cohesion. In other cases investigated, the Federal Supreme Court consistently refused to acknowledge appeals filed by Frontist groups (e.g., The National Front, Union Nationale Neuchâteloise) invoking an infringement on the right of association and assembly.

In December 1936, the Cantonal Court of Graubünden had to try David Frankfurter on an indictment for murder. David Frankfurter – a Jewish medical student at the University of Bern – had shot the leader of the regional Nazi group in Switzerland Nazi, Wilhelm Gustloff, in his apartment on 4th February 1936, «as an act of revenge against the Nazi regime». The court sentenced Frankfurter in December 1936 to 18 years to prison for murder (taking into account the period of detention pending trial). In addition, he was expelled from the country for life and deprived of his civic rights. The court emphasized in its judgment that it should be borne in mind that the crime, even if in itself despicable, undeniably had an innate connection with the persecution of Jews in Germany, and this had caused the perpetrator to have understandable feelings of bitterness and even hatred. The cantonal parliament of Graubünden pardoned David Frankfurter in 1945.

In the period under examination, the courts also had to deal with a number of cases of infiltration, espionage, and sabotage. Thus the (military) Territorial Court 2 had to deal with an action of sabotage directed against Switzerland. On the order of Reichsmarschall Göring, ten saboteurs entered Switzerland illegally in the night of 13th to 14th July 1940 to destroy Swiss military airplanes at several airports by means of explosives. For the aborted action of sabotage - the operation could be prevented in time - the court sentenced all defendants without exception to prison for life.

Besides the Federal Criminal Court, cantonal courts also had to deal with the criminal activities of the Frontists. Of international interest was a trial which took place in the courts of

the Canton of Berne, the subject of which was the so-called «Protocol of the wise men of Zion». The Israelite Community of Berne had filed a suit against the Frontists in the Summer of 1933, because the latter had distributed an anti-Semitic pamphlet bearing this title in Switzerland. The Cantonal Court of Berne acquitted the principal defendants as the publication of the protocol did not fall under any article of legislation. However, it did not award them any compensation and made them bear the cost for their legal counsel themselves, with the argumentation that anyone who put such insidious propaganda into circulation would have to pay for any costs deriving therefrom.

In addition, one of the 33 proceedings for high treason is investigated, in which a military court decreed the death penalty. Subject matter of the proceedings was the violation of military secrets by two members of the Swiss army. These individuals had passed on information about important military installations (bridges and roads of military importance, explosives stockpiles, ammunition depots, etc.) to the German intelligence service. Taking into account all the circumstances, the court came to the conclusion that the crimes had to be punished with the harshest possible penalty. The death sentences were carried out on November 11, 1942.

Original version in German

Rechtliche Aspekte der schweizerischen Flüchtlingspolitik im Zweiten Weltkrieg

Legal Aspects of Swiss Refugee Policy during the Second World War

Walter Kälin

This council's opinion establishes the status and development of standards of international and national public law which were relevant for the refugee policy of Switzerland in the Second World War, and derives from this analysis, the criteria to be applied in a comprehensive evaluation of this policy. In the first part, the investigation deals with the national and international refugee law in vigor at the time, in particular the evolution of the term of refugee and the principle of non-rejection. The second part is dedicated to the Swiss government by executive authority (Vollmachtenregime), with particular focus on prescriptive law (Verordnungsrecht), which served to implement Swiss refugee policy.

On the level of national legislation, the refugee law in many European states before and during the Second World War was determined by a very narrow interpretation of the term refugee dating back to the 19th century. This was also the case in Switzerland. Only for «political refugees», i.e., persons who appeared to be at risk because of illegal political activities in their country of origin, was the option of granting asylum and protection from deportation defined by the law. For persons who were persecuted for any other reasons, Swiss national law did not provide any special status or protection. Therefore, Jews in particular as well as other persons who were persecuted on racial grounds, were not protected by the right to asylum.

On the level of international law, a gradual extension of the meaning of the term refugee can be noted in the thirties. In different international agreements, the quality of refugee was attributed to individual, clearly defined groups and persons from certain states, among which was Germany. The conferring of the quality of refugee did, however, not necessarily entail a particular legal status or protection. But at least there were first signs of an incorporation of the principle of non-rejection for such groups. Nor did the pertinent agreements in the majority of cases prohibit the rejection of such persons at the border, but instead limited the protection to those refugees who had been able to escape beyond the narrow border region into the interior of the country. For Switzerland, the obligation arose with the signature of the Provisional Arrangement of 4th July 1936, not to deport persecuted refugees from Germany

who had crossed the border and had not been immediately arrested while in the area near the border.

The government by executive authority during the years of war, i.e., the transfer of far-reaching legislative and constitutional competence from the Swiss parliament to the Federal Council was (and still is) almost unanimously accepted by legal experts as admissible. The decisive argument is basically that the risk which existed at that time for the survival and integrity of the state required such measures. From the admissibility of emergency law, it does not automatically follow, however, that all measures based on it brought no problems in their wake. Essentially the question was whether the measures taken did not exceed, with respect to content and timing, the dimension required to achieve the objective intended.

The opinion also closely examines the question of legitimacy of the obligation for refugees to deposit their assets and pay a solidarity tax, the problematic nature of the «J» stamp, and the treatment of refugees in internment and refugee camps. To summarize, the following picture emerges. According to modern standards, the treatment of refugees who had been allowed to enter Switzerland during the Second World War would have to be classified as unlawful in several respects. An evaluation from the point of view of those alive at the time comes to a different conclusion. The obligation for refugees to deposit their assets and the treatment of refugees in internment and refugees camp were not universally, but nonetheless to a large extent, compatible with the national and international laws in vigor at that time, insofar as they need not be considered as having been of a harassing nature in the light of actual circumstances. Nor were they in contradiction to specific commitments stemming from residence agreements.

Problematic from a legal point of view was the levying of a solidarity tax to the extent that this was opposed to residence agreements which protected emigrants and refugees with tolerance permits. There were also legal problems arising in connection with the «J» stamp. Even though according to the general understanding at that time, restrictions on German Jews' right to enter the country were not in conflict with any constitutional prohibition of discrimination, it was indeed in contradiction with the residence agreement with Germany, as well as with the fundamental values of the Swiss legal system (public order).

Original version in German

Der völkerrechtliche Schutz des Privateigentums im Kontext der NS-Konfiskationspolitik

The Protection of Private Property in International Law within the Context of Nazi Confiscation Policy

Frank Haldemann

This analysis from a viewpoint of legal history investigates the practice of Swiss diplomacy in dealing with Nazi confiscation policy against the background of contemporary international law of the time. In the first part of the study, the bases for the protection of property by international law are presented. In this context the basic question arises as to the extent to which international law in vigor at that time protected Swiss citizens in the «Third Reich» from state intervention in private property. In the second part, the diplomatic practice of the Swiss authorities in dealing with the principles of international law is illustrated. In the foreground are the discussions of principle which went on in the Federal administration in the years from 1938 to 1941, as well as the case of Oscar P. with which the Federal authorities were dealing in 1935–1938.

Even if under classical international law, domestic citizens and persons without nationality were exposed without any protection to the authority of their home state or state of residence, this was not true of foreign citizens. The international aliens law, which was embodied both in

international customary law as well as in international contractual law, set considerable limits on the authority of states vis-à-vis foreign citizens. In this context, in the period between the wars, the legal opinion had been gradually prevailing that in any case a basic inventory of fundamental and personal rights of a constitutional state was to be guaranteed to foreign citizens.

An important component of this «minimum standard of aliens law» was the protection of private property. In the period between the wars, the principle of vested rights was establishing itself as a principle of international common law. According to this principle, a state was not entitled to confiscate the property of foreign citizens without immediate and adequate compensation. But also a great number of agreements in commerce, friendship treaties, and residence agreements guaranteed extensive protection of private property, such as the bilateral residence agreements Switzerland, beginning in the 19th century, had signed with a large number of states. In addition, the international law of war granted certain fundamental rights to the civil population of occupied territories, among which was precisely the right of private property.

In view of the acute threat to Swiss Jews in the Nazi sphere of influence, the Swiss authorities were confronted with the question of diplomatic protection. The practice presented in the text gives a rather dubious impression of Swiss diplomacy in its relationship with Nazi policy of confiscation. Symptomatic for the behavior of the authorities was the increased link between diplomatic protection and politics. It was not the jeopardized legal position of oppressed Jewish compatriots that was the criterion for diplomatic action, but rather the requirements of foreign policy. In this context the authorities did not hesitate to throw established legal principles overboard – in particular the constitutional principle of equal rights and the principle of a minimum standard of aliens rights. And so, in diplomatic practice an adaptation to the ethnic criteria («völkische Kriterien») of the Nazi state became visible, an adaptation which was in stark contrast to the constitutional tenet of equal rights for Jews existing in Switzerland since 1874.

In the discussions on the German ordinance of 26th April 1938 concerning the registration of Jews, Swiss diplomacy's «political strategy of individual cases» became visible. The authorities failed to react with diplomatic countermeasures to the anti-Semitic ordinance which also affected Swiss Jews living in Germany. Not even the expert report by Federal Judge Robert Fazy, which was commissioned by the Swiss Federation of Israelite Communities (Schweizerischer Israelitischer Gemeindebund SIG), and the clearly exposed unlawfulness according to international law of this obligation to register, were able to move Swiss authorities to a fundamental intervention in favor of Swiss Jews in Germany.

The position of the authorities became clear in the debate of the parliamentary motion tabled by Graber on 12th June 1941. In a public statement, the Federal Council referred to international law to deny Swiss Jews the same claims to which the «other» Swiss citizens in France were entitled. This position of the Federal Council was – as is stated unequivocally by Paul Guggenheim, professor of international law, in his legal expert report written at the request of SIG – in open contradiction to the Swiss/French residence agreement of 23rd February 1882 as well as to the minimum standard in aliens law in vigor at that time.

Also typical in this respect was the behavior of the authorities in the case of Oscar P. In the Federal Department of Foreign Affairs, the opinion had apparently prevailed that «good relations with Germany» should not be jeopardized because of a «decidedly Jewish bookshop». The uncompromising legal position of the Ambassador in Berlin, Paul Dinichert, was not heard in Bern. He considered the anti-Semitic measures of the Nazi state as a clear breach of law and requested countermeasures.

Original version in German

Einordnung der schweizerischen Praxis zum NS-Unrecht nach dem Zweiten Weltkrieg

Evaluation of Swiss Legal Practice with respect to Nazi Injustice after the Second World War

Jochen Abr. Frowein

This study investigates Swiss legal practice after the Second World War and places it in the context of both the rules of international law in vigor at that time, as well as that of general legal principles. In the center of interest are questions in connection with reparations, entering in particular into the specific problems Switzerland had in the settlement of issues which arose as consequences of the war. The study closes with an evaluation of the Swiss practice of restitution in an international comparison.

Basically, for problems of reparations, a distinction has to be made whether the damage was caused by one's own state or by a foreign state. Thus, after the Second World War, a claim against a foreign state was countered by the immunity of states according to international public law. Claims against the German state, for example, filed with a Swiss court were not possible in this sense. Only in more recent times did the tendency appear to lift this immunity if the acts committed by the state were of extreme injustice. On the other hand, it was already an accepted tenet of international law that a state was in position to claim compensation for damages in the case of a violation of international public law. But this claim basically existed only from one state to another. For individuals, no right of compensation was provided in the case of violation of international law.

For questions of reparations, the practice of the Federal Republic of Germany has to be taken into particular consideration. The legal reparations for Nazi injustice there were based on the concept that this was a specific situation which could not be adequately solved based on the general legal system without creating specific legal regulations. The limitations of German law on reparations resulted in particular from the application of the so-called principle of territoriality according to which those persons were prioritarily compensated who had established their primary focal-point of existence in the territory of the Federal Republic of Germany. Another significant limitation to the right to compensation resulted from the fact that according to German law there was no separate right to claim for compensation of forced labor as such.

In Switzerland, legal problems in connection with the consequences of the war arose in various areas. With its decree on looted assets of 10th December 1945, the Federal Council attempted to face the problem. It determined that persons who had been deprived of property or assets in violation of international law or by force, confiscation, requisition or similar acts in a territory occupied by war, were entitled to reclaim the objects in question from their present owners, whether these had been acting in good faith or not, provided these objects were in Switzerland. The decree of the Federal Council of 1945 was also applicable to securities. According to the wording of the law, the condition for application of the decree was that the securities had been removed from the ownership or property of the beneficiary in violation of international law in a territory occupied by war.

In connection with the consequences of the war, Swiss courts also had to deal in particular with the insurance contracts concluded in Germany by Swiss insurance companies. The courts clearly emphasized the infringement of the Nazi Confiscation Policy on the Swiss public order; however, the conclusion that the expropriation carried out in Germany would have to be fully revoked in Switzerland was not drawn.

The question of compensation for forced labor is also of relevance for Switzerland, as the German branches or subsidiaries of Swiss companies had employed forced labor in the period in question. In accordance with the German law on compensation, persons abused in forced labor did not receive any compensation for the work performed, but in certain cases an indemnification was awarded for physical injuries or impaired health and for detention in

concentration camps. In recent times, on the initiative of the German Federal government and the German economy, the amount of 10 billion DEM was made available in the form of a foundation endowment for compensation to forced labor. This regulation is also to include persons who had been employed by Swiss companies. It must be emphasized, however, that it would not have been an obligation of Switzerland to formulate claims for compensation of forced labor, as the foreign companies with business activities in Germany had been completely subject to the German legal system and the employment of forced labor therefore had been governed by the standards of Nazi law.

The legal expert study compares the legal approach to the problem of looted assets in Switzerland with regulations in Belgium, France, and the Netherlands. Quite different from the Swiss regulation is that of the Netherlands which provides for reversing the burden of proof in the case of acquisition in good faith. Thus, it is the purchaser who has to prove that he was acting in good faith.

In his evaluation of the Swiss practice of restitution in international comparison, the author comes to the conclusion that in consideration of the special situation of Switzerland, it is in general not justified to criticize Swiss reactions to the injustices of the Third Reich.

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