BOOK REVIEW

The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis

by Marc Linder*
Frankfurt am Main: Klostermann, 1987

Reviewed by L.S. Zacharias**

Azdak, the intractable judge in Bertolt Brecht's *Caucasian Chalk Circle*,[1] ultimately commands our respect by looking within himself rather than to the authorities who control his livelihood. Yet, through Azdak's story Brecht makes a deeper point: namely, that law has a habit of breaking down and that in entrusting decisions about justice to judges we misplace our faith.[2] Marc Linder's

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* Attorney, Texas Rural Legal Aid, Farmworker Division. B.A., University of Chicago (1966); M.A. (1971), Ph.D., Princeton University (1973); J.D., Harvard University (1983).

** Associate Professor, School of Management, University of Massachusetts, Amherst.

1. The standard English version is in Brecht, Parables for the Theatre: Two Plays (E. Bentley & M. Apelman trans. 1961).

2. Contrast, for instance, the political debate leading to a resolution among comrades in Brecht's prologue with his description of Azdak's fortunes:

> The Story Teller and Chorus:
> And he broke the rules to save them;
> Broken laws like bread he gave them;
> Brought 'em to shore upon his crooked back.
> And at last the poor and lowly
> Had someone who was not too holy
> To be bribed by empty hands: Azdak.
> For two years it was his pleasure
> To give beasts of prey short measure:
> He became a wolf to fight the pack.
> From All Hallows to All Hallows
> On a chair beside the gallows
> Dispensing justice in his fashion sat Azdak.
>
> The Story Teller:
> But the era of disorder came to an end.
> The Grand Duke returned.
> The Governor's wife returned.
> A trial was held.
> Many people died.
> The suburbs burned anew.
> And fear seized Azdak.

Id. at 101-06, 173.

book, *The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis*,[3] is a study of the society Brecht had just left, one in which law had by all descriptions broken down. Yet, numerous practitioners continued to engage in something that looked like law. Just what, Linder asks, were these people doing? What did they seem to think they were doing? And what effect did they have on the course of social events in Nazi Germany?

The book is divided into three roughly equal parts, each focusing on a different element of the Nazi regime's rule, objectives and constraints. Together, the three parts illustrate with depth and irony the complexities and limits of a positive legal system. The first, introductory part is an account of the jurisprudence that governed the adjudication of labor disputes during the Nazi regime.[4] Linder focuses particularly on the regime's legal spokesmen, their attempts to dress Nazi political outcomes in conventional judicial garb, and the specifics of the labor courts. The second part reviews the Nazi reconception of labor relations.[5] Linder describes the Nazi dilemma: on the one side the authority of Germany's militant industrial capitals, on the other side intractable and open class conflict which the earlier Weimar regime had legitimated. Both to further the authority of capital and to repress class conflict, the Nazis refurbished the languishing doctrine of the "plant community." This replaced class-based bargaining rights and contract interpretation in labor relations law with feudal obligations. Finally, the third part considers the Nazi labor courts' treatment of ideologically disfavored plant-community claimants, i.e., communists, socialists, Jews and others.[6]

Linder comes to grips with the larger questions raised by historians and philosophers of law, from Radbruch, Hart and Fuller down to more recent writing, by focusing on the claims of the ideologically disfavored within the framework of general labor law doctrines and judicial rulings. Was Nazi law a total sham, or internally consistent? To the extent it was consistent, did it reflect an achievement on the part of law and its faithful or was the exercise pointless? Linder's narrative is as haunting as it is compelling. His narrative on the jurisprudential debates among Nazi legal scholars evokes a Machiavellian predisposition to law characteristic of United States federal administrators in the 1980s. There is, for instance, little to distinguish the jurisprudence of Ed Meese

3. Marc Linder, The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis (1987).

4. *Id.* at 1-94.

5. *Id.* at 95-204.

6. *Id.* at 205-90.

from that inestimable Nazi legal star, Carl Schmitt, who recommended loyalty to Hitler and party as the primary judicial qualification and the reinstitution of an "original" cultural purity as the principal end of judicial service. While a book review of this length is inadequate to do justice to Linder's book, brief elaboration of the three parts may give prospective readers an indication of the book's scope and richness.

Nazi legal scholars had a peculiar problem. While Hitler condemned "jurists and their science of law," the society's need for deliberate self-reflection "asserted itself sufficiently to preclude any attempt to eliminate the system of judge-made law."[7] The regime relied on judges to apply general rules to individual social events. Nevertheless, it had to ensure that judicial interpretation of those rules would not conflict with the needs of the Nazi political economy.[8] Generally, those needs fell into three categories: (1) legitimation of Nazi rule as a whole; (2) legitimation of judicial judgments in terms of Nazi and traditional legal principles (particularly in contrast to that Nazi shibboleth, "Bolshevik" justice); and (3) certainty in labor relations to resolve disputes arising out of "the accumulation of capital and the competition of capitals."[9] Above all, the system of rule application had to "objectify" overarching interpretive principles that would counteract subjective judicial discretion and so preserve "the purity of German blood, German honor and genetic soundness as the basic elements of Nazi private law."[10]

To secure their aims, Nazi jurists recommended two alternative strategies. First, the regime instituted controls over judicial decisions. However, Nazi lawmaking was itself idiosyncratic and its ideological content hardly "monolithic, unambiguous, authoritative and uniform."[11] Accordingly, judges tended to doubt their overseers and adhered only loosely to interpretive principles the overseers ostensibly had derived from Hitler's will or their own *Volksempfinden*.[12] Second, the regime selected judges on the basis of their devotion to the correctness of Hitler's values. In Curt Rothenberger's words, "[t]he more subjectively and exclusively the judge is bound to the ideas of Nazism, the more objective and just his adjudications will be."[13]

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7. *Id.* at 1.
8. *Id.* at 3.
9. *Id.* at 2-3.
10. *Id.* at 3.
11. *Id.* at 4
12. *Id.* at 5-6.
13. *Id.* at 4 (quoting Curt Rothenberger, Der deutsche Ricter 53-54 (1943)).

Eventually, as Linder shows through his detailed analysis of Nazi labor court appointments, early membership in the Nazi party served as the principal marker for devotion to Hitler's will and *Volksgebundenheit*.[14] Still, between arriving at the latter solution and instituting it, Nazi jurists together with their critics, addressed a variety of complex arguments about the law-like character of their system, including its legitimacy, relative autonomy and internal consistency. Much of the first part of the book describes the debates in detail and places them in their broader jurisprudential contexts; both German antecedents and more general discussions about Western law and legal systems.[15] The last part of the introduction describes the system the Nazis elaborated to confine, atomize and adjudicate labor disputes.

Once Linder has set forth the aims and premises of labor adjudication during the Nazi regime, he confronts the problem of labor law itself—namely, how did judges generate rulings in labor cases that in fact conformed to the requirements of the Nazi political economy, above all to repress class conflict. In general, the Nazis decimated collective bargaining rights statutorily and further thwarted labor radicalism through the SA and later the SS.[16] Yet, the regime had to defend against the possibility that the countless instances of plant leaders exploiting or mistreating individual workers and groups of workers would renew labor unity and prompt class warfare. In that regard, adjudication served the state by atomizing general perceptions of exploitation and treating individual claims with apparent dignity.[17]

The elaboration of a workable doctrine for securing these aims was complicated by a combination of received laws and conventions in labor relations, divisions among different classes of capitalists, and divisions between private capital and the state, both in its role as coordinator of the economy and its role as em-

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Rothenberger, like Schmitt, was an esteemed legal scholar who served in the Nazi regime. *Id.* at 6-14. The Nazi lights grappled with the contradictions of reconciling the received legal system's autonomy principles with Nazi rulers' objectives.

14. *Id.* at 64-94. Tables 3 and 4 show that by 1938 Nazi party members constituted the majority on the Supreme Labor Court and that, by comparison with German lawyers in general, most of them had joined the party relatively early in its development. *Id.* at 77-87.

15. Linder's explication of the German conception of *Rechtsstaat* within the larger context of legal positivism and rule of law is worth noting, especially the differing perspectives of three leftist anti-Nazi German exiles, Ernst Fraenkel, Franz Neumann, and Otto Kirchheimer, on the Nazi's adaptation of the *Rechtsstaat* to their own political and economic objectives. *Id.* at 31-63.

16. *Id.* at 109-10.

17. *Id.* at 119.

ployer.[18] Nazi legislation insisted upon the primacy of the plant community under the leadership of the plant manager or entrepreneur or manager.[19] In restoring the economy's faded communitarian (or feudal) ideals, the rulers expected to eradicate the self-interested, competitive values inherent in the Weimar Republic's contractual vision of labor relations. In the context of the plant community, workers had legitimate, albeit limited and residual, claims to general welfare. By continuing to perform their duties as workers without disruption, they could invoke corresponding duties on the part of plant managers to look out for workers' welfare, at least so long as the business of the plant itself was secure. These managerial duties were often the subjects of the litigation.

Linder's review of the cases suggests that the courts were surprisingly solicitous of worker claims and that Nazi labor adjudication was not altogether a sham geared toward worker exploitation.[20] At the same time, that very finding suggests how undesirably powerful a law-like apparatus may be. The labor courts' legal authenticity, especially insofar as it diminished the need for administrative interventions and SA/SS actions, apparently contributed to the Nazis' success in sustaining industrial production and maintaining order.

The work of the Nazi labor courts was also fraught with telling curiosities and ironies. Judges, for instance, quite frequently slipped back into the language of contract to resolve disputes, in part because contract doctrine had become so deeply engrained in German labor law, in part because the idea of the plant community was far less real than the combative relationships of capitalists and workers.[21] Linder also describes the cases in which Nazi leaders had to weigh the costs and benefits of judicial autonomy directly against expedience.[22] A fifteen-year-old boy claimed lost wages against the state, and the labor court, interpreting the labor code somewhat formalistically, upheld the boy's claim. The labor ministry in turn chastised the court, conceding in effect that the entire adjudication was little better than sham, since state administrators had it in their power to circumvent the court's ruling in future cases and possibly even with respect to the boy himself. Yet, in a similar case decided soon after, the very same labor minister chastised the court for acquiescing too easily in administrative decisions. Why, Linder asks, did the highest ministerial bureau-

18. *Id.* at 95-110.
19. *Id.* at 110-22.
20. *Id.* at 123-208.
21. *Id.* at 119-22, 138-60.
22. *Id.* at 175-79.

crats insist on autonomous court review of their decisions when the bureaucrats themselves "could manifestly have interpreted their own statutory intentions more reliably?"[23] Linder suggests that the Nazis' dependence on the law's relative autonomy to achieve legitimacy for their regime may have stood in the way of expedience.

Finally, Linder examines those cases in which the Nazi courts sought to reconcile the regime's antagonism toward enemies within and its preference for handling typical labor disputes consistently. The courts had to dispose of the enemies in ways that would not undermine the internal logic of their rulings or expose the whole system as sham. In large part the courts' work was eased by a range of statutes and administrative activities.[24] Still, cases did arise that put the judges to the test. Linder acknowledges that putting too much emphasis on certain of these cases may take on the appearance of "grotesque academic fiddling." He observes "in light of the world-historical murder organized by the Nazi apparatus, what purpose does it serve to examine the rearguard struggles of a handful of Jews to preserve their pension rights, holiday pay or entitlement to one month's salary when fired as a result of anti-Semitic laws or personal prejudice?"[25] Yet, the answers become painfully clear in light of the book as a whole. While Linder contributes enormously to an impression of what went on in labor adjudication during the Nazi regime and also to an understanding of why the Nazi labor courts worked as they did, the larger contribution of this work is in its graphic illustration of the power and limits of modern law.

Linder's study of the courts' treatment of the state's enemies draws a persuasive picture of professional rationality—that is, the capacity of a judicial corps to achieve quasi-autonomous and non-ideological consistency of judgment, even while the values supporting consistency have been thoroughly uprooted in the society from which the cases spring. This leads at last to what I take as the central conclusion of this book: that while law offers society tracks to smooth its ride, it cannot, even at its best, prevent the rulers from pointing those tracks toward hell.[26] Certainly, this is not a novel

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23. *Id.* at 178.

24. The pertinent chapters are arranged by "enemy" classes, i.e., Communists, Trade Unionists, Social Democrats, various anti-Nazi activists, and Jews. Each of these chapters includes a description of relevant statutes followed by the cases. *Id. passim.*

25. *Id.* at 246.

26. Linder's study takes the form of a monograph, and so ends somewhat abruptly with an analysis of the labor courts' treatment of Jewish workers. To the extent the book implicates broader conclusions, it does so through the introductory

conclusion, but few studies, historical or otherwise, have demonstrated the limits of law as we still know it so ably.

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materials, particularly its elaboration of the jurisprudential debates, and through the drifts of the cases themselves. Given the richly detailed nature of the analysis, a broader concluding chapter with an elaboration of the study's implications would have been useful.