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## Litigating Genocide: A Consideration of the Criminal Court in Light of the German Jew's Legal Response to Nazi Persecution, 1933-1941

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# LITIGATING GENOCIDE: A CONSIDERATION OF THE INTERNATIONAL CRIMINAL COURT IN LIGHT OF THE GERMAN JEWS' LEGAL RESPONSE TO NAZI PERSECUTION, 1933-1941

*Jody M. Prescott*

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# LITIGATING GENOCIDE: A CONSIDERATION OF THE INTERNATIONAL CRIMINAL COURT IN LIGHT OF THE GERMAN JEWS' LEGAL RESPONSE TO NAZI PERSECUTION, 1933-1941

Jody M. Prescott\*

## I. INTRODUCTION

After years of negotiation, a majority of the nations of the world have agreed to create an International Criminal Court.<sup>1</sup> It will be given jurisdiction over three core types of offenses: genocide, crimes against humanity, and war crimes.<sup>2</sup> With regard to war crimes, however, nations that join the court may take advantage of an "opt-out" procedure, whereby the court's jurisdiction over these offenses may be rejected for seven years after the court comes into existence.<sup>3</sup> For various reasons, a small number of nations, including the United States, have refused to sign the treaty creating the court.<sup>4</sup> While heralded as a breakthrough in the protection of individuals and minority groups from crimes against humanity,<sup>5</sup> it remains to be seen how effective the court will be against the worst of such crimes, geno-

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1. See Alessandra Stanley, *U.S. Dissents, But Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

2. Rome Statute of the International Criminal Court, July 17, 1998, art. 5, para. 1(a)-(c), 37 I.L.M. 999, 1003-4 [hereinafter Rome Statute]. The court was also given jurisdiction over the crime of aggression, see *id.* at art. 5, para. 1(d), 37 I.L.M., once a provision defining the offense is decided upon under the amendment procedure found in the Statute. See *id.* at art. 121, paras. 1-3, 5, 37 I.L.M. 1067.

3. See *id.* at art. 124, 37 I.L.M. 1068.

4. One hundred twenty countries voted in favor of the new court as finally negotiated, seven voted against it, and 21 abstained. Countries which voted no include the United States, China, Israel, India, Iraq, and Libya. See Alessandra Stanley, *U.S. Dissents, But Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3; George Melloan, *In Rome, U.S. Realism Trumps Illusions*, WALL ST. J., July 28, 1998, at A19. While the U.S. was concerned that the court as structured would interfere with military operations abroad and subject U.S. servicemembers to frivolous investigations, see Neil King, Jr., *Nations Create War-Crimes Court Despite U.S. Protest*, WALL ST. J., July 20, 1998, at A16 [hereinafter *U.S. Protest*], other countries were concerned that the court could become involved in their domestic affairs, or that the West would dominate the court. See Neil King, Jr., *Plans for Permanent War-Crimes Court Face Big-Power Dispute on Jurisdiction*, WALL ST. J., June 16, 1998, at A14.

5. See *U.S. Protest*, *supra* note 4, at A16.

cide. Although the International Criminal Court is still in its infancy and untested, this Article seeks to shed light on this question through a case study of the German Jews' legal response to Nazi persecution between 1933 and 1941.

Part I of this Article will briefly describe the development of international human rights law and its enforcement mechanisms. Part II will set out the historical background of the German Jews' legal response in the Third Reich and those areas of Germany under League of Nations administration. Part III will describe the legal response in the Third Reich, while Part IV will focus on the legal response in the League of Nations areas and compare it with the response in Germany proper. In conclusion, Part V considers the International Criminal Court in light of the experiences of German Jewish litigants before the various national and international fora, and suggests that although international courts can have an impact on the prevention of genocide, their positive effect is more pronounced when genocide's precursors are adjudicated rather than its aftermath.

## II. THE DEVELOPMENT OF HUMAN RIGHTS LAW AND ENFORCEMENT MECHANISMS

Beginning with the Convention for the Prevention and Punishment of the Crime of Genocide of December 9, 1948,<sup>6</sup> one of the most important trends in the development of international law since the atrocities of World War II has been the creation of a new international order of human rights through numerous treaties, conventions, and multilateral declarations.<sup>7</sup> The development of domestic law in many nations has mirrored this trend. Canada, since 1970, has prohibited the advocacy of genocide<sup>8</sup> and the public communication of statements which either incite hatred against "identifiable" groups and are likely to breach the peace,<sup>9</sup> or willfully promote hatred against such groups.<sup>10</sup> Germany has enacted similar legislation.

6. 78 U.N.T.S. 277. Genocide is defined as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

*Id.* art. II, at 280. Article 6 of the Rome Statute adopts this definition. See Rome Statute at art. 6, 37 I.L.M. 1004.

7. See, e.g., International Bill of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., Part I, Resolutions at 71 U.N. Doc. A/810 (1948), reprinted in 2 UNITED NATIONS RESOLUTIONS, at 135 (Dusan J. Djonovich ed., 1973); Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316(1966), reprinted in 11 UNITED NATIONS RESOLUTIONS, at 165 (Dusan J. Djonovich ed., 1975); The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1975), reprinted in 15 UNITED NATIONS RESOLUTIONS, at 531 (Dusan J. Djonovich ed., 1984).

8. See Canadian Criminal Code, R.S.C., ch. 11, § 281.1 (1st Supp. 1970). For a description of the application and effect of the Canadian race-hate laws, see Ronda Bessner, *The Constitutionality of the Group Libel Offences in the Canadian Criminal Code*, 17 MAN. L.J. 183 (1988).

9. See Canadian Criminal Code, R.S.C., ch. 11, § 281.2(1) (1st Supp. 1970).

10. See *id.* at § 281.2(2).

The German Penal Code prohibits incitement to hatred "in a manner apt to breach the public peace" against segments of the population,<sup>11</sup> as well as the dissemination or exhibition of writings which incite hatred.<sup>12</sup> These provisions are supplemented by the offense of criminal insult,<sup>13</sup> which, as of 1985, no longer requires that those insulted bring a petition themselves, so long as those persons were members of a group that suffered Nazi persecution.<sup>14</sup> Although the United States lacks federal legislation equivalent to the Canadian and German statutes, almost all of the states now have some form of hate-crime legislation.<sup>15</sup>

It is one thing to develop new law; it is often quite another to enforce it, particularly in the international arena. A unique example in this regard is the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>16</sup> which has established perhaps the most rigorous set of enforcement mechanisms to protect individual and group rights. The European Convention guarantees all people within the respective jurisdictions of the signatories due process of law, freedom from torture or inhumane treatment, the right to liberty and security of person, and the freedom of thought and expression, among other rights.<sup>17</sup> The European Convention allows signatories, organizations, and individuals to petition the European Commission of Human Rights as to alleged violations of the convention by any member state.<sup>18</sup> If a solution is not obtained through the Commission's conciliation process,<sup>19</sup> a case may be brought before the European Court of Human Rights by the Commission itself, a signatory whose national is an alleged victim, the country that referred the case to the Commission initially, or the country against which the case has been brought.<sup>20</sup> The rigor of the European Convention is enhanced by provisions which make the European Court's decisions binding on the parties, and by the requirement of six months' notice of any member's denunciation of the Convention.<sup>21</sup>

11. See Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies,"* 85 MICH. L. REV. 277, 322 (1986) [hereinafter Stein] (quoting art. 130 StGB).

12. See *id.* at 322-23 (citing art. 131 StGB).

13. See *id.* at 323 (citing art. 185 StGB).

14. See *id.* (citing art. 194 StGB).

15. See Rorie Sherman, *Hate Crime Statutes Abound*, NAT'L L.J., May 21, 1990, at 3. Although criminal libel laws are not per se unconstitutional in the United States, see *Beauharnais v. Illinois*, 343 U.S. 250 (1952), Supreme Court decisions with regard to the scope of the First Amendment have cast doubt on the validity of such laws. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Garrison v. Louisiana*, 379 U.S. 64 (1964). The differences between the German and the American jurisprudential systems in this regard is well illustrated by the trial of Gary Lauck before a Hamburg criminal court in 1996. Lauck, a U.S. citizen, was tried for the distribution of anti-Semitic and Nazi materials in Germany via the mails, although they had been legally produced in the United States. See Alan Cowell, *German Court Begins Hearing Case of American Neo-Nazi*, N.Y. TIMES, May 10, 1996, at A5.

16. Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. See also J. SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM*, 112-24 (1981).

17. See European Convention, *supra* note 16, arts. 1-15 at 224-34.

18. See *id.*, arts. 24-25, at 236-38.

19. See *id.*, arts. 28-32, at 238-42.

20. See *id.*, art. 48, at 246.

21. See *id.*, arts. 53, 65(1), at 248, 252. The ultimate guarantor of European human rights, however, will likely prove to be the ever increasing economic integration brought about under the European Union.

The concept of an international criminal court to enforce criminal violations of international law is not new. In 1937, the League of Nations adopted a convention on international terrorism which included an international criminal court.<sup>22</sup> A sufficient number of nations failed to ratify the convention, however, and it failed to come into effect.<sup>23</sup> After the conclusion of the international military tribunals in Nuremberg and Tokyo following World War II, the United Nations again took up the development of a standing international criminal court.<sup>24</sup> Concerns among many members as to the definition of "aggressive war" and the possible infringement upon national sovereignty through the international court's supervision of national court systems stalled the project indefinitely.<sup>25</sup> It was not until 1993, however, in the wake of the large scale atrocities against Croats and Muslims in the former Yugoslavia by Serbs, that another international criminal court actually came into being.<sup>26</sup> The creation of the International Criminal Tribunal for the Former Yugoslavia,<sup>27</sup> followed a year later by the creation of a similar tribunal for Rwanda,<sup>28</sup> supplied an impetus to the successful efforts to finally bring about agreement between nations to create a standing international criminal court.

### III. HISTORICAL BACKGROUND

Genocide has been a fairly common occurrence during this century, from the Turkish persecution and slaughter of its Armenian minority during World War I,<sup>29</sup> to the Nazi "Final Solution" to the "Jewish question" in World War II, to the Serbian "ethnic cleansing" during the breakup of the former Yugoslavia.<sup>30</sup> While each occurrence of genocide is an individual product of various interacting factors,<sup>31</sup> their respective developments seem to fit the general pattern described by noted

22. See Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICKINSON J. INT'L L. 223, 225 n.14 (1992).

23. See *id.* at 225.

24. See *id.* at 226-27.

25. MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 15 (1997).

26. See Statute of the International Tribunal, reprinted in 32 I.L.M. 1192 (1993); Abner Katzman, *First War Crimes Tribunal Opens Since World War II*, ASSOCIATED PRESS, Nov. 17, 1993, available in WL4567498.

27. See Katzman, *supra* note 27.

28. See James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison On Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sep. 5, 1998, at A4.

29. See Marjorie Housepian, *The Unremembered Genocide*, GENOCIDE AND HUMAN RIGHTS: A GLOBAL ANTHOLOGY 99 (Jack Porter ed., 1982) [hereinafter GENOCIDE AND HUMAN RIGHTS]; Leon A. Chorbajian, *Massacre or Genocide: An Essay in Personal Biography*, GENOCIDE AND HUMAN RIGHTS 116.

30. See SCHARF, *supra* note 25, at 29-60. Muslim Bosnians and Croats were also guilty of atrocities during the war, but their offenses do not appear to have been on the same scale as the Serbian actions. See *id.* at 71; Paul Watson, *Digging For Truth in Sarajevo*, LOS ANGELES TIMES, Nov. 27, 1998, at A1.

31. There are a number of factors which appear to be common to most occurrences of genocide since 1900. These factors include an on-going armed conflict, an essentially one-party government, and a dominant nationalistic and discriminatory ideology. See NORMAN CIGAR, *GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING"* 21-83 (1995); GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 45-76, 172-238 (1995); GENOCIDE AND HUMAN RIGHTS, *supra* note 29, at 25; JOHN BARRON & ANTHONY PAUL, *MURDER OF A GENTLE LAND: THE UNTOLD STORY OF COMMUNIST GENOCIDE IN CAMBODIA* 40-76 (1977).

Professor and Holocaust historian Raul Hilberg in his studies of the Holocaust. Hilberg found the Nazi destruction of the Jews to be a four-stage process consisting of the following: first, defining, and thereby isolating, the targeted group; second, expropriating their assets; third, concentrating the targeted group; and finally, exterminating them.<sup>32</sup> Progression through the first three stages of the process does not necessarily mean the fourth and final stage will occur, and the time frame within which each step occurs can be very compressed.<sup>33</sup> Under the right set of political, social, and economic circumstances, however, the oppressing group may see the final stage as a natural progression of the first three, as Nazi Germany did with the Jews.<sup>34</sup>

What sets the Holocaust apart from other genocides, among other things, is the fact that its precursors steadily evolved during the dismantling of a democracy in a modern industrial state, a state in which the rule of law prevailed. As the thrust of Nazi persecution moved from forcing Jewish emigration to setting the stage for their eventual extermination, the German Jews were gradually stripped of all their rights in a technically legal fashion. Because of the gradual pace of this divestiture, and the increasingly basic nature of the rights involved, there was a significant amount of litigation by German Jews concerning the loss of these rights. To appreciate the legal and political climate within which the German Jewish legal response began, and the factors which were to influence its course, it is useful first to briefly review the German court system prior to 1933. Next, this Section will examine the events which occurred, and the laws which came into being, after the Nazi Party came to power in the early spring of 1933, as well as the resulting impacts upon the German legal system. Lastly, for purposes of comparison, this Section will briefly describe the circumstances of the court and mediative systems in the German areas administered by the League of Nations.

#### A. *The German Court System*

The civil law German court system was composed of several different and co-existing judicial hierarchies, each with its own subject-matter jurisdiction.<sup>35</sup> Cases of private and criminal law were handled by judicial courts, while issues of public law were brought before "administrative" courts.<sup>36</sup> The separate subject-matter jurisdictions of the various courts were strictly protected, to the extent that a decision of a court lacking proper subject-matter jurisdiction was null and void.<sup>37</sup> In addition to having different jurisdictions, each hierarchy also had its own appellate structure and procedure, with a corresponding senate of the national Supreme Court as its forum of last resort.<sup>38</sup>

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32. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS, REVISED AND DEFINITIVE EDITION* 53, v.1 (1985) [hereinafter *REVISED EDITION*].

33. For example, the treatment of Japanese-Americans by the United States during World War II came uncomfortably close to meeting the first two stages, but never progressed toward the extermination phase. See generally PETER IRONS, *JUSTICE AT WAR* (1983).

34. See *REVISED EDITION*, *supra* note 32, at 54.

35. See Ernst Fraenkel, *Introduction* to FRIEDA WUNDERLICH, *GERMAN LABOR COURTS* 4 (1946).

36. See *id.* Under German law, at that time, a state agency need only be "subject to the law and only the law," not superior officials to be a court. *Id.*

37. See *id.* at 6.

38. See FRIEDA WUNDERLICH, *GERMAN LABOR COURTS* 64 (1946).

German judges were, as they are now, regarded primarily as civil servants. Unlike their American counterparts, for whom "becoming a judge [was a] reward for a long and successful practice as a member of the bar,"<sup>39</sup> German judges were ordinarily career jurists, who had chosen that particular career track at a very early point in their professional lives.<sup>40</sup> Although judges were independent with regard to the decisions they rendered, their actions were always supervised by superior officials within their particular judicial hierarchies.<sup>41</sup> The careers of young associate judges were very dependent upon the reports they wrote, for in contrast to the American system, decisions were anonymous and dissenting opinions were not published.<sup>42</sup>

German courts also used a large number of laypersons as associate judges. At the trial level in cases of criminal, administrative, and commercial law, learned and lay judges together formed the court.<sup>43</sup> Ordinary private law cases, however, were decided by courts composed solely of learned judges.<sup>44</sup> The appellate courts of some subject-matter jurisdictions also contained lay judges; but of the highest courts,<sup>45</sup> only the Supreme Labor Court had lay members on its bench.<sup>46</sup>

Questions of fact and law were decided by a majority vote of the court, for the German judicial system made little use of juries.<sup>47</sup> The jury trial in criminal cases was abolished in 1924 after only forty-seven years of use, and juries had not been used in private law cases since the early 1800s. Because of the reliance on bench trials, there was little need for the development of formal rules of evidence. Under German law, it was within the discretion of the court, and in large part the presiding judge, to decide whether matters would be admitted into evidence.<sup>48</sup> As with the Anglo-American common-law system, there was a strong tendency to concentrate evidence at the trial level. Dissimilarly, parties before appellate courts in private, criminal, and certain administrative law cases could introduce new evidence and ask the courts to reexamine witnesses.<sup>49</sup> The respective senates of the Supreme Court, however, were restricted solely to questions of law.<sup>50</sup> Precedent, of course, played a very different role in the deliberative process of a German

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39. See I. FORRESTER & H. ILGEN, *THE GERMAN LEGAL SYSTEM* 23 (1972).

40. See Fraenkel, *supra* note 35, at 14.

41. See *id.*

42. See MARC LINDER, *THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISFRUDENTIAL ANALYSIS* 91 (1987).

43. See Fraenkel, *supra* note 35, at 8.

44. See *id.*

45. Because private law had been codified by federal statute in 1900, appeals from the state courts of appeal to the Supreme Court were possible in nearly all cases, so long as a jurisdictional amount requirement was met. See WUNDERLICH, *supra* note 35, at 206 n.3; see also REVISED EDITION, *supra* note 32, at 67 Table 4-2.

46. See Fraenkel, *supra* note 35, at 10.

47. Although trial by jury had been introduced into the Rheinland-Palatinate as early as 1798 as a result of its occupation by French revolutionary forces, it was not until the passage of the Court Organization Act in 1877 that the jury trial was once again available in Germany. See JOHN P. RICHERT, *WEST GERMAN LAY JUDGES: RECRUITMENT AND REPRESENTATIVENESS* 53, 58 (1983). The Emminger Reform of 1924 eliminated the trial by jury, and in its place instituted a court composed of three learned judges and six lay judges. See *id.* at 60.

48. See Fraenkel, *supra* note 35, at 8.

49. See *id.* at 10.

50. See *id.*



court than its Anglo-American counterpart. Even decisions of the "supreme courts did not create law and were not binding except in the particular case at issue."<sup>51</sup> The various senates of the Supreme Court were bound by each others' decisions; and although courts could theoretically disregard Supreme Court decisions, their lines of reasoning were generally followed by the inferior courts.<sup>52</sup>

### B. *The Boycott*

In late January 1933, after a lengthy period of parliamentary stalemate and increasing civil unrest, the Nazi Party was given the opportunity to form a government out of the fractured and polarized German legislature, the *Reichstag*.<sup>53</sup> Adolf Hitler, as head of the Nazi Party, assumed the position of Chancellor in a coalition cabinet, and immediately sought new national elections to solidify the party's position.<sup>54</sup> After a rough and bitterly contested electoral campaign, the Nazi Party coalition government emerged victorious in the March 5, 1933, national elections.<sup>55</sup> In the wake of the Nazi victory, Nazi critics and Jews alike were subjected to vicious attacks and beatings by Nazi supporters in many areas of Germany,<sup>56</sup> and local units of the *Sturmabteilung* (SA), the primary Nazi paramilitary organization at that time, began an "unofficial" and often violent boycott of German Jewish merchants and professionals throughout Germany.<sup>57</sup> Jewish judges and attorneys in many cities were forcibly removed from courthouses by SA units,<sup>58</sup> and those who attempted to enter the courthouses were often threatened with bodily harm.<sup>59</sup> While the SA resorted to street violence to harass Jewish legal professionals, the *Schutzstaffeln* (SS), Hitler's elite bodyguard unit, incarcerated many Jewish lawyers in its newly created concentration camp at Dachau.<sup>60</sup>

As the boycott progressed, the bureaucracies of the German states began to act against Jewish legal professionals. Several states removed Jewish judges from the criminal divisions of their court systems and placed them in civil divisions, or convinced them to take indefinite leaves.<sup>61</sup> While the various state restrictions

51. WUNDERLICH, *supra* note 38, at 110.

52. *See id.* at 111.

53. *See* CALVIN B. HOOVER, GERMANY ENTERS THE THIRD REICH 93 (1933).

54. *See id.* at 97, 108.

55. *See id.* at 122-23.

56. *See* MARTIN GILBERT, THE HOLOCAUST 33 (1985).

57. *See* HOOVER, *supra* note 53, at 102-03. The office signs of Jewish attorneys in certain cities were defaced, and placards bearing the word "Jew" were stuck over them, for example. *See Boycott of Jews*, TIMES (London), Apr. 3, 1933, at 14. Although the Nazi government distinguished between "unofficial" boycott actions and an official boycott which was held on April 1, 1933, the only real difference appears to be that there was more anti-Jewish violence on that day in more places throughout Germany than just before or after it.

58. *See Nazis Oust Jews from Law Courts*, N.Y. TIMES, Apr. 1, 1933, at 10, col. 7; *Nazi Boycott Of Jews*, TIMES (London), Apr. 1, 1933, at 10; Frederick Birchall, *Boycott Spreads Throughout Reich*, N.Y. TIMES, Mar. 30, 1933, at 12; *Opening Of New Reichstag*, TIMES (London), Mar. 20, 1933, at 11; *Germany Under Nazi Rule*, TIMES (London), Mar. 10, 1933, at 13.

59. Interview with Frederic M. Alberti, Esq. (Aug. 17, 1985) [hereinafter Alberti Interview].

60. *See* GILBERT, *supra* note 56, at 32, 40. Between April and October 1933, at least four Jewish lawyers were among those killed at Dachau. *See id.* at 37-38, 41.

61. *See* RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 86 (1961). These states included Baden, Bavaria, Hessen, Prussia, Saxony, and Wuerttemberg. *See id.* at 86 n.4.

were often quite similar in content, their implementation in the beginning was not uniform. For example, some states, like Bavaria, issued piecemeal decrees restricting Jewish lawyers and judges in stages throughout March and early April 1933.<sup>62</sup> Other states, such as Prussia, issued comprehensive decrees, simultaneously suspending notaries,<sup>63</sup> banning Jewish prosecutors and court officials, and limiting the number of Jewish lawyers with a *numerus clausus* simultaneously.<sup>64</sup>

### C. The Judiciary and Courts after 1933

At the national level, the Nazi government began translating its gains in the national election into the power to rule as it saw fit. After the *Reichstag* reconvened on March 24, 1933, one of its first acts was to approve the "Law to Remove the Distress of the People and State," better known as the Enabling Act.<sup>65</sup> This law authorized the national cabinet to enact legislation free from practically all controls, and by doing so gave the Nazi Revolution the force of law by ensuring its continued implementation in a technically legal fashion.<sup>66</sup> Because of its scope, the Enabling Act was by its terms a constitutional amendment, and its passage by a two-thirds vote of the *Reichstag* conformed with the constitutional amendment procedure.<sup>67</sup> On the basis of the Enabling Act, and the later National Reconstruction Act, "legislation" increasingly consisted of decrees passed by the cabinet without any consideration by the *Reichstag*.<sup>68</sup> These decrees frequently contained only general principles, the elaboration of which was left to subordinate authorities.<sup>69</sup>

Thus began what German attorney and legal historian Ernst Fraenkel described as a "dual state,"<sup>70</sup> that is, a normative state and a co-existing and superior prerogative state. Despite its dominant position, the Nazi Party could not exercise its authority over every aspect of German life, nor could the state function if it did. By necessity, the Nazi Party was forced to rely upon the existing bureaucracies to

62. See *Boycott of Jews*, *TIMES* (London), Apr. 3, 1933, at 14; *Germany Under the Nazis*, *TIMES* (London), Mar. 27, 1933, at 11.

63. See AMERICAN JEWISH COMMITTEE, *THE JEWS IN NAZI GERMANY* 36 (1982).

64. See *Nazis Oust Jews from Law Courts*, *N.Y. TIMES*, Apr. 1, 1933, at 10. German notaries received the same legal education as lawyers or judges, but were specially licensed to draft and authenticate legal documents such as wills and contracts. See Letter from Hans J. Frank, Esq., to Major Jody M. Prescott (Nov. 13, 1985); see also Alberti Interview, *supra* note 59. Interestingly, the Prussian Ministry of Justice Commissar, Hans Kerrl, also decreed a stay against judgments in default in cases in which the Jewish attorneys had been prevented from appearing because of the boycott. See *Goering Wins Fight to Rule in Prussia, Replacing Papen*, *N.Y. TIMES*, Apr. 9, 1933, at 2.

65. See LOUIS L. SNYDER, *HITLER'S THIRD REICH* 106-07 (1981).

66. See *id.*

67. See HOOVER, *supra* note 53, at 116.

68. See WUNDERLICH, *supra* note 38, at 152.

69. See *id.*

70. Fraenkel described Germany as being ruled by two simultaneous states; a prerogative state characterized by the exercise of "unlimited arbitrariness and violence unchecked by any legal guarantees," and a normative state, which was an "administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of courts, and activities of the administrative agencies." ERNST FRAENKEL, *THE DUAL STATE* xiii (1941). The normative state was still needed to administer the country, but its benefit was restricted to "constructive elements." See *id.* at xvi. Fraenkel emphasized that for purposes of his analysis, the two states were not to be confused with the state and Nazi Party bureaucracies. See *id.* at xiii.

continue the efficient functioning of the government, including the courts.<sup>71</sup> Here, the Nazi Party faced a particularly thorny problem, for unlike more typically administrative bodies, the courts had a long tradition of independence and impartiality which made it difficult to merely substitute one set of decisional criteria for another. However, by changing the substantive and procedural law which the courts applied, purging the courts of "undesirable" personnel, and shrinking the normative jurisdiction of the courts, the Nazi government eventually eliminated the courts as an obstacle in its quest for complete power over Germany.

### 1. Jurisprudence

Although anti-Jewish decrees tended to be interpreted strictly at first, over time Nazi Party dogma and the pronouncements of Nazi officials increasingly became the rules of decision in most cases involving Jews, even when a specific anti-Jewish statute did not apply to the case under consideration.<sup>72</sup> For example, in 1935 a Jewish man and his "Aryan"<sup>73</sup> fiancée sought a marriage license from the Bad Salsa registry office, and were refused. The man brought suit against the registry office clerk, and the court found for the defendant. The court noted that although there was no legal ban on marriages between Jews and Aryans, no official could be compelled to authorize a marriage that would adulterate Aryan blood, and therefore render it useless to the nation for all time.<sup>74</sup>

Further, important safeguards were eliminated as judicial procedures were streamlined and simplified. For example, in late 1938, a decree which invalidated Jewish drivers' licenses was not submitted to the official register as required by law, and instead was only published in a newspaper. The legality of the decree was contested in court, and the case eventually reached a senate of the Supreme Court. The Supreme Court held that because other government agencies were aware of the regulation and had not challenged it, the unusual method of publication did not invalidate the decree.<sup>75</sup> Perhaps one of the most important normative safeguards done away with in the devolution of German law under the Third Reich was the concept of equality of the parties before the law. Enemies of the state were denied

71. See LINDER, *supra* note 42, at 1. By its nature, efficient bureaucratic operation requires consistency and reliability, both in the decision-making process and in the decisions themselves. It is therefore no surprise that the various bureaucracies tended to interpret and apply the generally phrased Nazi statutes restrictively at first, and only where the statutes expressly changed existing law. See FRAENKEL, *supra* note 70, at 59 n.187. This tendency must have been reinforced by the fact that on average, over half of all senior civil servants had graduated from law school. See RICHARD GRUNBERGER, *THE 12-YEAR REICH* 117 (1971).

72. See WUNDERLICH, *supra* note 36, at 169.

73. The term "non-Aryan" was defined in the Regulation of April 11, 1933, as pertaining to any person who had a Jewish parent or grandparent. The parent or grandparent was presumed to be Jewish if that person adhered to the Jewish faith. See HILBERG, *supra* note 61, at 45. The word "Aryan" is of Sanskrit origin, and originally denoted the group of Indo-European people who occupied the Iranian plateau in prehistoric times, and from whose speech the Indo-European languages are derived. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 125 (1965). For purposes of clarity in discussing Nazi laws and court decisions, "Aryan" as used in this article will refer to non-Jewish Germans.

74. See *Jew Forbidden To Marry "Aryan,"* TIMES (London), July 13, 1935, at 11.

75. See REVISED EDITION, *supra* note 32, v. 3, at 995-96.

the laws' protection, while Nazi officials received a great deal of deference before the courts, both as parties and as attorneys.<sup>76</sup>

## 2. Personnel

On April 7, 1933, the Nazi government issued the "Law for the Restoration of the Civil Service" (Civil Service Law).<sup>77</sup> Under its provisions, government and "indirect" officials (executives of certain corporations and businesses that had a quasi-public function) of non-Aryan descent were to be retired.<sup>78</sup> As a concession to President von Hindenburg,<sup>79</sup> however, an exemption was made for non-Aryan officials who had seen front-line service in World War I, who had lost a father or a son in that conflict, or who had been in office before 1914.<sup>80</sup> The Civil Service Law also provided that officials who "indicated by their previous political activity that they [would] not exert themselves for the national state without reservation" were to be dismissed, and those officials whose absence would "simplify administration" were to be retired.<sup>81</sup> Although a significant number of Jewish judicial officials fell within the Civil Service Law exemptions, the Nazi government used these additional provisions of the statute to dismiss many of them.<sup>82</sup> Finally, all actions taken by the government in restructuring the civil service were final, with no allowance for recourse by affected individuals.<sup>83</sup>

Those Jewish judicial officials who remained in office were excluded from adjudicating criminal cases, and were often reassigned to inferior courts.<sup>84</sup> Even in these reduced circumstances, however, Jewish judges continued to experience great difficulty in carrying out the functions of their positions. On March 5, 1934, for example, a Berlin Court of Appeal held that it was proper for a party to reject the use of a Jewish judge because "it was contrary to [the litigant's] National Socialist view of life."<sup>85</sup> Similarly, on November 10, 1935, a Berlin District Court

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76. See WUNDERLICH, *supra* note 38, at 167-68. A significant number of Jewish litigants apparently took advantage of the preferential treatment accorded Nazi officials by the courts, for the Nazi Party issued a nationwide decree on September 13, 1935, forbidding all Party officials and the higher officials of subordinate organizations from acting as attorneys for Jews or for Jewish firms. See *Three Anti-Semites Jailed*, N.Y. TIMES, Sep. 14, 1935, at 5. "While certain Nazis refused to take the money of Jewish clients, this arrangement was consistent with fascist ideology. The *Rechtswahrer* (German law guardian), it was argued, could never share 'Jewish interests,' so it was impossible for any conflict of interest to occur." Udo Reifner, *The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy*, 32 MCGILL L.J. 96, 118 (1986).

77. SNYDER, *supra* note 65, at 111-12.

78. See *id.*

79. A translation of the correspondence between President von Hindenburg and Chancellor Hitler in this regard can be found in Y. ARAD ET AL., *DOCUMENTS ON THE HOLOCAUST* 37-39 (1981).

80. See SNYDER, *supra* note 65, at 111-12. As of June 30, 1933, all non-Aryan lay assessors and commercial judges were removed from office without exception. AMERICAN JEWISH COMMITTEE, *supra* note 63, at 144-46. Jewish law clerks were also removed from their positions. LETTER, *supra* note 64.

81. See SNYDER, *supra* note 66, at 111-12.

82. See HILBERG, *supra* note 61, at 56.

83. See SNYDER, *supra* note 66, at 111-12.

84. See OSCAR I. JANOWSKY & MELVIN M. FAGEN, *INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES* 202 (1937), citing *Juristische Wochenschrift (J.W.)*, at 442 (1934).

85. See *id.*, citing *J.W.*, at 1,178 (1934).

held that a Jewish judge was incompetent to try a case brought by a Nazi Party member against a Jewish debtor because the judge lacked the "necessary impartiality" by virtue of his religion.<sup>86</sup> Finally, under the Nuremberg Laws of 1935, all Jewish officials were prohibited from serving in positions of public or quasi-public employment, and the few remaining Jewish judicial officials were retired as of December 31, 1935.<sup>87</sup>

Non-Jewish judicial personnel were subject to strong pressure to conform to the new regime from sources both within and outside the judicial bureaucracies.<sup>88</sup> An anti-Nazi attitude was not only not conducive to promotion, it was also grounds for dismissal from office.<sup>89</sup> Although the content of judicial decisions was not grounds for dismissal, it was indicative of political reliability.<sup>90</sup> Judges were expected to demonstrate political reliability in ministerial matters as well. As early as June 1933, judges could be dismissed if they gave appointments to Jewish lawyers to represent indigents or to act as executors.<sup>91</sup> Unofficially, decisions inconsistent with the Nazi Party program were often criticized in Nazi Party subordinate organizations' newspapers, like the SS official organ, *Schwarzes Korps*.<sup>92</sup> These critiques were taken so seriously that the Ministry of Justice began officially publishing replies to SS criticisms of controversial court decisions in 1939.<sup>93</sup>

### 3. Jurisdiction

The states of the Weimar Republic, and of the German Empire before that, bore the primary responsibility for the administration of justice. Under the Third Reich, however, the responsibility for the administration of justice was gradually assumed by the national government.<sup>94</sup> In so doing, the Nazi government increasingly limited the area of activity to which the normative legal concepts of traditional German jurisprudence would apply by restricting the jurisdiction of the regular courts. Certain matters were placed within the jurisdiction of newly created courts, to be dealt with from a Nazi point of view. Social Honor Courts were established to regulate the conduct of members of the various professions and trades,<sup>95</sup> and the People's Court was created in 1934 to deal with "treason"<sup>96</sup> and political ac-

86. See *id.*, citing *J.W.*, at 442 (1934).

87. See *id.* at 169 n.37. These judges, notaries, and other judicial officials may have been unofficially "retired" as of early October, 1935. Otto Tolischus, *Nazis in New Drive on Jews in Trade*, N.Y. TIMES, Oct. 8, 1935, at 13, col. 2.

88. On the whole, little pressure was required to cause much of the German judiciary to begin to *gleichschalten* ("coordinate") with the new regime. See WUNDERLICH, *supra* note 35, at 186; Alberti Interview, *supra* note 59. Interestingly, a number of judicial officials avoided "coordination" by leaving the civilian judiciary and joining the legal departments of the armed services, which apparently retained most of their independence from the Nazi Party throughout the war. A. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU, 1939-1945* 22-23 (1990).

89. See SNYDER, *supra* note 65, at 111-12.

90. See WUNDERLICH, *supra* note 38, at 167.

91. See *Racial Barriers In Berlin—New Rules For Lawyers*, TIMES (London), July 5, 1933, at 13, col. d.

92. See GRUNBERGER, *supra* note 71, at 119.

93. See *id.*

94. See WUNDERLICH, *supra* note 38, at 154.

95. See *id.* at 143, 146, and 149.

96. "Treason" as construed by the People's Court included having a "hostile attitude" toward National-Socialism. See FRAENKEL, *supra* note 70, at 49.

tivities directed against the state.<sup>97</sup> The Nazi Party also made use of Party Courts to discipline and expel transgressing Party members for acts which normally would have been adjudicated by normative courts.<sup>98</sup> The jurisdiction of the normative courts was further constricted by the use of administrative fiat to issue decrees in special cases, and the removal of the "political sphere" of government and Nazi Party activity or matters of state security from judicial review. For example, a Jewish attorney who had emigrated from Germany after 1933 requested that he be issued a birth certificate. When the Secret State Police, *Gestapo*,<sup>99</sup> forbid the registrar to issue the certificate, the applicant brought suit in a local court to compel its issuance. The municipal court ordered the certificate to be issued, but its decision was reversed by a court of appeal. Finally, in 1936, a senate of the Supreme Court upheld the court of appeal's decision, noting that the *Gestapo* claimed that any issuance would involve matters of state security, and that the action taken at the *Gestapo*'s direction was, therefore, not subject to judicial review.<sup>100</sup>

#### D. The Bar

As with the judiciary, the German Bar presented a significant threat to the totalitarian ambitions of the Nazi Party. Likewise, the Nazi Party acted quickly to eliminate any potential resistance from the bar by eliminating opposition lawyers and centralizing the bar's operation and administration. As a result of these changes and the changes in the judicial system, those Jewish attorneys who were allowed to practice found it increasingly difficult to represent their clients effectively.

##### 1. Membership<sup>101</sup>

The bar membership of many Jewish lawyers was revoked by the "Law Regarding Admission to the Bar" (Bar Admission Law), issued on April 17, 1933.<sup>102</sup> The Bar Admission Law was similar to the Civil Service Law, and it also granted exemptions to front-line fighters.<sup>103</sup> Later decrees eliminated non-exempt patent

97. See WUNDERLICH, *supra* note 38, at 228 n.77.

98. See D. MCKALE, *THE NAZI PARTY COURTS: HITLER'S MANAGEMENT OF CONFLICT IN HIS MOVEMENT* 165-66 (1974). In the aftermath of the *Kristallnacht* Pogrom of November 1938, for example, the Supreme Party Court tried 30 Nazi Party members who had committed "excesses" in the course of the riots. The 26 defendants who had killed Jews were generally exonerated and retained in the Party, while four men who had sexually assaulted Jewish women were expelled from the Party and tried by normative courts for the offense of *Rassenschande* (race pollution). See *id.*

99. "*Gestapo*" is the German abbreviation for *Geheime Staatspolizei*.

100. See FRAENKEL, *supra* note 70, at 44 n.140.

101. The German bar was very stable and relatively prosperous through the early 1920s, but by 1927 it was facing a trend of reduced demand for legal services as a result of judicial reforms eliminating the use of lawyers in some courts. See WUNDERLICH, *supra* note 38, at 121. The trend was also partially due to an increase in bar membership of 33 percent between 1923 and 1933, despite the steadily worsening economy at the beginning of the Great Depression. See Kenneth C. H. Willig, *The Bar in the Third Reich*, 20 AM. J. LEGAL HIST. 1, 4 (1976).

102. A HOLOCAUST READER 40-41 (L. Davidowicz ed.) (1976).

103. See *id.* As with the Civil Service Law, the Bar Admission Law officially became effective in June 1933. See Interview with Hermann E. Simon, Esq. (Jan. 24, 1989) [hereinafter Simon Interview].

attorneys on April 22, 1933,<sup>104</sup> and tax advisors on May 6, 1933.<sup>105</sup> The Bar Admission Law disbarred approximately 1,500 of the estimated 4,000 Jewish attorneys outright,<sup>106</sup> and on the basis of the political reliability prong of the law, the German bar associations began a purge of their membership by expelling "political undesirables," Jews, and women.<sup>107</sup> New bar regulations prohibited Aryan attorneys from entering into partnership arrangements with the remaining Jewish attorneys.<sup>108</sup> The economic and professional segregation of Jewish lawyers from their Aryan colleagues was made complete by the Law on Abuse of Legal Services of December 1935, which required Aryan attorneys to dissolve all business arrangements with Jews by April 1, 1936.<sup>109</sup> This law had a major impact upon many disbarred Jewish attorneys who had worked as legal advisors to Aryan attorneys at reduced rates.<sup>110</sup> Finally, on November 30, 1938, the licenses of all remaining Jewish lawyers were revoked by the Fifth Decree Supplementing the Reich Citizenship Law of September 27, 1938.<sup>111</sup> This law allowed a small number of former Jewish attorneys to practice as "consultants," who could only advise Jews or Jewish concerns.<sup>112</sup>

## 2. Structural Reorganization

At the direction of the Nazi German Jurists Association, the National Bar Association was replaced by the more official National Lawyers' Chamber in 1935.<sup>113</sup> The formerly self-governing regional bar associations were replaced by regional chambers, which were under the supervision of the national chamber and attached to the respective state courts of appeal.<sup>114</sup> The officers of both the national and the regional chambers were appointed by the Ministry of Justice after consultation with the head of the Nazi German Jurists Association.<sup>115</sup>

This reorganization led to the creation of the Legal Social Honor Court system, with lower courts at the regional chamber level, and an appeals court at the national level.<sup>116</sup> In contrast to the old professional discipline system in which a

104. See AMERICAN JEWISH COMMITTEE, *supra* note 63, at 139-40.

105. See *id.* at 149-50.

106. See Reifner, *supra* note 76, at 117.

107. See *Racial Barriers In Berlin—New Rules For Lawyers*, TIMES (London), Jul. 5, 1933, at 13; 'Aryan' Lawyers Forbidden to have Connections with Jews, N.Y. TIMES, Jul. 1, 1933, at 16.

108. See *Reich Bar Closed to Jews*, N.Y. TIMES, Feb. 11, 1936, at 4. Certain exceptions were permitted, however. In the important commercial port of Hamburg, for example, those firms with an extensive commercial practice were not required to comply with this law. See Reifner, *supra* note 76, at 118.

109. See Reifner, *supra* note 76, at 119.

110. See *id.*

111. See I THE HOLOCAUST 146-55 (J. Mendelsohn ed. 1982). This Act was supplemented by a special decree on November 3, 1938, which barred all Jewish patent attorneys from practice after November 30, 1938. *Jewish Patent Attorneys Barred*, N.Y. TIMES, Nov. 4, 1938, at 4.

112. See THE HOLOCAUST, *supra* note 111, at 146-55. Interestingly, the average income of a German lawyer only rose from 9,940 reichsmark in 1933 to 10,849 reichsmark in 1939, despite the greater legal monopoly granted by the Nazi government and a 24 percent reduction in the number of practicing attorneys during that time period. See Reifner, *supra* note 76, at 121.

113. See Willig, *supra* note 101, at 6.

114. See *id.*

115. See *id.*

116. See *id.* at 7.

special senate of the Supreme Court heard disbarment actions,<sup>117</sup> the lower courts were given the power to fine, suspend, and even disbar attorneys.<sup>118</sup> New standards of professional behavior were promulgated to complement the new disciplinary mechanisms. For example, disciplinary actions were brought against attorneys who criticized judges or laws,<sup>119</sup> or who neglected to demonstrate the proper political attitude through failure to give the Hitler salute.<sup>120</sup>

Disbarment and acts such as the bringing of "spurious" claims before the honor courts carried with them the threat of future criminal proceedings against the individuals involved.<sup>121</sup> In 1936, a Jewish lawyer complained to a regional bar chamber about the insulting courtroom manner of one of its members, an opposing Nazi counsel who had sought to have the Jewish lawyer excluded from court on "racial grounds." A Magdeburg court sentenced the Jewish lawyer to one month's confinement, holding that the question was wholly one of general principle, and not personal libel. The Jewish attorney's complaint against the "deserving party member" was therefore unfounded, and as such, it called for severe punishment.<sup>122</sup>

### 3. Impediments to Practice

Jewish attorneys remained prominent targets of SA terrorism even after passage of the Bar Reorganization Law,<sup>123</sup> and often found themselves ridiculed by the Nazi media.<sup>124</sup> The Nazi German Jurists Association also acted through the Nazi media to publicly harass the clients of Jewish attorneys. For example, the names of people who had not been ashamed to use the services of Jewish lawyers were published in the August 28, 1933 edition of *Die Hessische Volkswacht* by the head of the Kassel branch of the Nazi German Jurists Association.<sup>125</sup>

Clients who continued to use Jewish lawyers met with a cool reception in many courts. For example, successful parties were often denied attorneys' costs if they had been represented by Jewish lawyers.<sup>126</sup> Further, many courts declined to recognize the exempt status of the remaining Jewish attorneys, and refused to allow these attorneys to practice before them.<sup>127</sup> Aryan clients in particular met with unexpectedly harsh results when represented by Jewish attorneys. On February 4, 1936, a social honor court sitting in Harburg-Wilhelmsburg refused to "give the usual consideration" to a Jewish attorney's request that he be allowed to plead for his Aryan client. The court also enjoined the defendant from acting in any executive capacity in the future, because he had "failed to think like a National-

117. *See id.*

118. *See id.*

119. *See* Reifner, *supra* note 76, at 112.

120. *See* Willig, *supra* note 101, at 8.

121. *See id.*

122. *Reich Jails Lawyer Resenting Race Slur*, N.Y. TIMES, Jan. 17, 1936, at 3.

123. A prominent Jewish attorney in Chemnitz, for example, was kidnapped from his home on April 10, 1933, by men in Nazi uniforms. His body was found the next day along a country road. Officially, the police suspected the culprits to have been "disguised anti-Nazis." *Prominent Jewish Lawyer Slain*, N.Y. TIMES, Apr. 12, 1933, at 6.

124. *See* Reifner, *supra* note 76, at 107-08.

125. *See Nazis Hit at Jewish Lawyers*, N.Y. TIMES, Aug. 29, 1933, at 4.

126. *See* Reifner, *supra* note 76, at 118.

127. *See* LINDER, *supra* note 42, at 271-72.



Socialist or show due respect for racial principles" by appearing in court with a Jewish attorney.<sup>128</sup>

### *E. The League of Nations Administered Areas*

Under the Treaty of Versailles following World War I, many areas of the former German Empire were removed, either fully or in part, from the jurisdiction of the new German Republic. Some countries, such as Poland, France, and Belgium, received German territory outright.<sup>129</sup> On the new German borders, certain small enclaves were established under the auspices of the League of Nations, which itself had been created by the Treaty of Versailles.<sup>130</sup> These areas, specifically the Saar, Upper Silesia, and Danzig, were placed under varying degrees of supervision by the League of Nations, and were given different international administrative and legal regimes to complement the existing or newly created domestic systems of government. The reasons for the creation of these enclaves varied widely. In the case of the Saar, the League of Nations' trusteeship was a means by which France assumed control of the regions' rich coal mines as a partial reparation for the damage done to captured French coal mines under German occupation during the war.<sup>131</sup> In Upper Silesia, the League of Nations played a less direct role in the administration of the region, and focused upon the protection of minority rights in that rich mining and industrial district during a transition period to full German and Polish sovereignty in their respective parts of the region.<sup>132</sup> Danzig, with its excellent harbor, was made a nearly autonomous city-state in order to allow Poland a non-German outlet to the Baltic Sea without putting a large, concentrated population of Germans under Polish rule.<sup>133</sup> The populations of these areas remained ethnically and politically German in large part, and were therefore strongly influenced by events in Germany, including the rise of the Nazi Party. Because of the availability of international fora, rather than just domestic German courts, however, the results of the Jewish legal response to Nazi persecution in these areas were for a time quite different from the results obtained in the rest of Germany.

## III. THE GERMAN JEWISH LEGAL RESPONSE

### *A. Labor Law*

The field of labor law was among the first areas of German jurisprudence to experience the effect of anti-Jewish litigation. Because of the gradual nature of Nazi employment restrictions, and the extensive scope of the field itself, Jewish litigation involving labor relations continued into the early part of World War II.<sup>134</sup>

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128. *Reich Court Bans Jew*, N.Y. TIMES, Feb. 5, 1935, at 7.

129. See RICHARD M. WATT, *THE KINGS DEPART: THE TRAGEDY OF GERMANY: VERSAILLES AND THE GERMAN REVOLUTION* (1968).

130. See *id.* at 59-62.

131. See *id.* at 90-97.

132. See GEORGES KAECKENBEECK, *THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA: A STUDY IN THE WORKING OF THE UPPER SILESIAN SETTLEMENT 1922-1937*, at 25 (1942).

133. See WATT, *supra* note 129, at 346, 361.

134. For the organizing concept of this subsection, I am indebted to Professor Marc Linder for his thorough treatment of the German Jewish legal response in his fine study on the Supreme Labor Court. See LINDER, *supra* note 42.

*1. Civil Service Law Phase, April 1933-September 1935**a. Trial Courts*

Whether it was applicable or not, Jewish plaintiffs appear to have had little success in the labor trial courts after the promulgation of the Civil Service Law. In a rare example of organized Jewish litigation, fifty Jews who had been dismissed from Nazi controlled industries and businesses without notice brought suit against their former employers. On May 5, 1933, a Berlin labor court held that the firms in question were entitled to dismiss Jewish employees without notice.<sup>135</sup> Although it is unclear from the report, these dismissals were either based on the Civil Service Law prohibition against non-Aryan "indirect" officials, or the "spirit" of the law as applied to private firms. If the former is true, it is unlikely that the court ever reached the merits of the case, because of the no-appeal provision of the Civil Service Law. In other early cases, private dismissals were upheld on grounds of impossibility of cooperation between a Jewish employee and a newly "coordinated" physician's organization;<sup>136</sup> and the possible economic destruction of a pharmacy by means of a professional boycott unless the Jewish employee was dismissed.<sup>137</sup> Interestingly, in 1934, a Wuerzburg trial court was presented with a case in which both parties were orthodox Jews. The plaintiff-employee's apprenticeship contract was dissolved as a result of the boycott of the employer's store and its subsequent sale to a non-Jew. The court found the dismissal justified on grounds that the employer could not be expected to continue in an unprofitable business merely to benefit the plaintiff.<sup>138</sup>

*b. Appeals Courts*

Jewish litigants often met with more success at the court of appeals level during this time period, however. In fact, in a decision issued by a Dortmund Labor Court of Appeal, Nazi ideology was used to reach an outcome favorable to the Jewish litigant. The appellant, a supervisor in a department store, was discharged by his employer without notice in April 1933, and subsequently sued for six months' salary. The court first noted that renunciation of a contract without notice could only be justified if observing the contract's terms would constitute sabotage of the national revolution. The possibility that the employer might suffer inconvenience and some financial loss did not meet this standard, especially since neither the law nor government policy appeared to require such action by the employer. The court also noted that the commercial expansion of department stores historically had been at the expense of other independent businesses, without regard for the negative effects such activity had on the public welfare. Accordingly, it was a policy of

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135. See *Right of Nazis to Oust Jews from Jobs Upheld by Court*, N.Y. TIMES, May 6, 1933, at 8. Possibly another exception to the general lack of organized litigation is the legal bureau opened by the Central Federation of German Citizens of the Jewish Faith to provide legal advice to Jews with regard to Nazi actions. See Guido Enderis, *Nazis Press Policy on Racial Purging*, N.Y. TIMES, Mar. 18, 1933, at 6.

136. See LINDER, *supra* note 42, at 258.

137. See *id.*

138. See *id.* at 259.

the Nazi Party to limit such businesses; a policy which would not be bolstered by letting department stores burden the welfare system of the state by discharging employees in this fashion.<sup>139</sup> In areas where the Nazi Party was seeking to restrict Jewish employment, however, Nazi ideology was applied in the fashion the Party desired. In late 1933, a Prussian Labor Court of Appeal approved the summary dismissal of a Jewish movie director, basing its decision upon speeches by Chancellor Hitler and Propaganda Minister Joseph Goebbels that dealt with the need to repress Jewish influence in German culture.<sup>140</sup>

Several early appellate cases even held that employers were under an obligation to resist outside pressure to dismiss Jewish employees without notice when such actions were mandated neither by statute nor by Nazi-inspired general clauses.<sup>141</sup> In one case, a defendant-employer who was an SA reservist was ordered by the SA to discharge the Jewish plaintiff without notice. In 1934, the Darmstadt Labor Court of Appeal overturned the trial court's finding that it was incompetent to review the order, holding instead that the government's efforts to restrain such actions in the sphere of private enterprise authorized review of the order.<sup>142</sup>

By 1935, intermediate appellate decisions began to reflect an ever increasing reliance on Nazi ideology. Terminated by her employer with notice in 1935 because the local Nazi organization threatened a boycott, a Jew brought suit in the Wiesbaden Labor District Court for wrongful dismissal. The plaintiff argued that no law required the dismissal of Jews from private employment, and that the Nazi Party's action was an unjustified interference in private business. The court found the dismissal to be legal, because it had been motivated by the need to protect "against loss of business."<sup>143</sup> The lower court's decision was affirmed by the Frankfurt Labor Court of Appeal. With regard to appellant's argument that her dismissal was void as *contra bonos mores*, the appellate court held that under the current conception of *bonos mores*, dismissal of a Jewish employee by her Christian employer so as to hire an unemployed "Christian Volk-comrade" would not be considered unconscionable.<sup>144</sup> Similarly, the dismissal of a Jewish kindergarten teacher was upheld on the basis that it was no longer acceptable for a female non-Aryan to watch over Aryan children in a kindergarten.<sup>145</sup>

### c. Supreme Court

The first case to come before the Supreme Labor Court after the promulgation of the Civil Service Law involved not a civil servant, but instead a store manager who was dismissed without notice by his private employer. At issue "was whether [the] plaintiff's Jewishness was an important cause for immediate dismissal within the meaning of" section 626 of the *Buergerliches Gesetzbuch* (Civil Code).<sup>146</sup>

139. See *id.* at 260-61.

140. See *Oustings of Jews Curbed by Seldte*, N.Y. TIMES, Jan. 7, 1934, at 28.

141. See LINDER, *supra* note 42.

142. See *id.* at 261.

143. See AMERICAN JEWISH COMMITTEE, *supra* note 63, at 54-55.

144. See LINDER, *supra* note 42, at 261-62.

145. See *id.* at 262. This decision was handed down just four days before the Nuremberg Laws went into effect. See *id.*

146. See *id.* at 254 n.39. Section 626 allowed either party to terminate an employment relationship without notice for an important cause. See *id.*

The Court held that an employee's Jewishness could constitute a cause for dismissal, but that this was not a *per se* rule. Because the employer had not proven that he would suffer actual or potential economic damage as a result of retaining the appellant for the contractual period of notice, and because of the high regard that the store's customers had for the appellant, the Court held that the employer was required to give the appellant notice before dismissal. The Court also noted that despite the current situation in Germany, the personal relationship between the parties might justify maintaining the contractual relationship even at the risk of the employer incurring financial hardship.<sup>147</sup>

In another dismissal-without-notice case before it the next month, the Supreme Labor Court remanded the case to a lower court to determine whether the employer's fear of harm resulting from observing the required notice period had an objective basis, or whether the employer had instead acted upon mere subjective conjecture in terminating a Jewish employee. The Court noted that the lack of anti-Jewish laws in the private sector precluded employers from discharging employees solely because they were Jewish, but that the current "clarified" views with regard to Jewry were factors to be considered in deciding such cases.<sup>148</sup> This point in the devolution of German law under the Third Reich is very significant, for it serves as a benchmark in the application of normative legal concepts to cases involving Jews. When a branch of the German Supreme Court decides that personal characteristics of a plaintiff are a factor to be considered in deciding whether an action against a plaintiff is proper, it represents a turning point in the course of the entire legal system. The next likely step in this devolution becomes apparent: Jewishness is no longer just a factor, but is instead the predominate factor upon which adjudication of a case is based. As will be seen below in the discussion of the various League of Nations legal systems, this point serves as an objective tool by which to measure the continued application of normative legal concepts in the respective systems.

Interestingly, Jewishness was not held to be a factor in all cases, however. In December 1934, the Supreme Labor Court decided a case in which both the employee-appellant and the employer-appellee were Jewish. The appellant had been dismissed without notice upon the urging of local Nazi Party officials. Although the Court noted that the officials' actions were illegal, it also held that the risk of economic harm to the firm as a whole that might result from appellant's continued employment could justify his dismissal. The case was remanded for findings as to whether the employer had made reasonable efforts to determine whether there was objective evidence of the possibility of harm.<sup>149</sup>

## 2. *The Nuremberg Laws Phase, September 1935-November 1938*

### *a. Appeals Courts*

The so-called Nuremberg Laws of 1935 excluded Jews from public or quasi-public employment, but not from private businesses operated for profit.<sup>150</sup> This

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147. *See id.* at 253-54.

148. *See also* JANOWSKY & FAGEN, *supra* note 84, at 216 n.63; *Oustings of Jews Curbed by Seldte*, *supra* note 140, at 28.

149. *See* LINDER, *supra* note 42, at 256-57.

150. *See* *Curbs Discharge of Jews*, N.Y. TIMES, Nov. 28, 1935, at 25.

statutory distinction was frequently without effect in practice, for many private concerns used the spirit of the Nuremberg Laws as a pretext for dismissing Jewish employees. Accordingly, the labor courts increasingly upheld very subjective and functional justifications for the dismissal of Jewish employees. On February 14, 1936, the Weimar Labor Court of Appeal upheld the dismissal of a private Jewish employee on the basis of the Nazi Party policy of seeking to bring about a separation of Jews and Aryans in the same business and in economic life in general, and to especially prevent Jews from being in a position of authority of influence over Aryans. The court noted that it was not its role to render a decision in opposition to what the Nazi Party and its subordinate organizations had determined was correct.<sup>151</sup>

In a case in which the Jewish plaintiff had been dismissed from his job as a technical laboratory assistant at a university, the Breslau Labor Court of Appeal agreed with the plaintiff that the Nuremberg Laws did not require the discharge of non-Aryans in public, non-tenured positions. Despite this acknowledgment, the Court held that public employers, as role models for private enterprises, by necessity must conduct their affairs in accordance with Nazi principles. Accordingly, an explicit statutory mandate was unnecessary in this case.<sup>152</sup> Many dismissals of Jewish employees were upheld when their continued employment was found to be contrary to the employers' best interests.<sup>153</sup> One court went so far as to find that the dismissal of two Jewish employees was in the interest of both parties, for this would allow their migration to non-Aryan concerns, and vice versa.<sup>154</sup>

#### *b. Supreme Court*

Even after the promulgation of the Nuremberg Laws, the Supreme Labor Court continued to hold that non-Aryan employees could not be discharged from private employment without compensation merely because they were non-Aryan. In a decision on November 28, 1935, the Court held that if the discharge involved issues of "truth and loyalty," however, the Court would then determine whether compensation was required.<sup>155</sup>

The eventual denial of traditional judicial protection for German Jews was foreshadowed by a Supreme Court decision on June 27, 1936. In February 1933, a Jewish playwright and director signed a contract with a large German film company to direct a film. The contract provided for the termination of the relationship only in the event of "sickness, death, or similar causes rendering the stage manager's work impossible."<sup>156</sup> After the Nazi Party came to power in 1933, the company

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151. See *New Nazi Action Against Jews—Race As Reason For Dismissal*, TIMES (London), Feb. 15, 1936, at 11.

152. See LINDER, *supra* note 42, at 271.

153. A Saalfeld District Labor Court, for example, upheld a textile firm's dismissal of a Jewish employee in response to a Nazi Party threat to withdraw its patronage. The court found the dismissal justified on grounds that retention of Jewish employees would result in financial hardship and a loss of Nazi Party confidence in their employers. See THE DUAL STATE, *supra* note 70, at 92 n.285.

154. See *id.* at 92, n.286.

155. See *Curbs Discharge of Jews*, *supra* note 150.

156. *Marlene Dietrich Denounced By Nazi*, N.Y. TIMES, Oct. 7, 1937, at 31.

abrogated the contract and refused to pay the director his salary.<sup>157</sup> The director brought suit against the film company, and the case eventually wound its way to the Supreme Labor Court. The Court dismissed the complaint, holding that:

[T]he former (liberal) theory of the legal status of the "person" made no distinction between races . . . . The National-Socialist philosophy, however, requires that German law recognize only persons of German origin or those who by law are declared equal to them and that only Aryans should enjoy all legal rights and privileges. It is merely a renewal of old principles to distinguish between groups having all legal rights and those who have only a limited number of rights. The complete deprivation of all rights is described as a 'civil' death: the case before this court permits an analogy. Since the contract in this case could be dissolved only if 'sickness, death, etc.' prevented the plaintiff from fulfilling his obligations the analogy to 'civil death' is regarded as unqualifiedly applicable because the racial characteristics of the plaintiff were equated with sickness and death.<sup>158</sup>

In another decision the same day, however, the Supreme Labor Court found for the Jewish plaintiff, a traveling salesman employed by a firm which had been sold by its former Jewish owners under Nazi pressure. The salesman gave notice after the firm had sought to reduce his compensation. During the notice period, and after the Nuremberg Laws were enacted, the salesman was discharged without notice because he refused to work solely for commissions or to restrict his business solicitations to Jewish firms. The Court found that while it was true that most Aryan firms no longer received Jewish salesmen, this had been the case for some time before the firm had attempted to renegotiate the appellant's contract. By choosing not to discharge appellant on that basis then, the firm was foreclosed from using it as a justification for dismissal without notice later. The Court rejected the firm's argument that the Nuremberg Laws had an affect on this case. The Court concluded that it had failed to raise the issue before the lower courts and that the firm had been obligated to examine the validity of appellant's continued employment long before those laws were enacted.<sup>159</sup>

Later that year, the Supreme Labor Court was presented with the opportunity to interpret the Nuremberg Laws in a case involving a collective bargaining agreement which the dismissed Jewish appellant had entered into in 1929. Under the terms of the agreement, non-German permanent employees could be deprived of their pensions if discharged, despite having accumulated as much as ten years seniority. The Duesseldorf Labor Court of Appeal found for the employer, on grounds that appellant was no longer a German citizen under the Nuremberg Laws.<sup>160</sup> The Supreme Labor Court reversed, finding that the distinction those laws made between German citizens and German nationals had not existed at the time the agreement had been entered into, and that the purpose of the provision was to cause non-

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157. *See id.*

158. *THE DUAL STATE*, *supra* note 70, at 95-96 (quoting the *Reichsgericht*). The German company had contracted with a Swiss firm to produce the film, and had made an advance payment of 130,000 reichsmark. The contract was to be voided if the director died or was incapacitated. After the German Supreme Court's decision in its favor, the German company sued for a refund of the advance payment. In October 1937, the Swiss Supreme Court held the German decision was without effect in Switzerland, and that the Swiss firm was therefore not required to refund the advance payment. *See Marlene Dietrich Denounced By Nazi*, *supra* note 157.

159. *See LINDER*, *supra* note 42, at 264.

160. *See id.*

Germans to seek a remedy from their own governments. Accordingly, the Court found the distinction to be meaningless, because German Jews were not prohibited from receiving pensions.<sup>161</sup>

A permanent municipal employee, who had fought in the front lines in World War I, contested the validity of his dismissal without notice, an event which would preclude him from receiving both pre- and post-retirement age compensation. The

Cologne Labor Court of Appeal held that it was reasonable for the employer to meet the termination period requirements.<sup>162</sup> The Supreme Labor Court remanded the case back to the lower court for consideration of the employer's allegation that public unrest had occurred because of the employee's continued employment.<sup>163</sup> The lower court again found for the employee, holding that in light of his long and loyal service, the willingness of his co-workers to continue to work with him, the singular nature of the event alleged by the employer, and the unusually harsh consequences of discharge without notice in this case, the incident did not constitute an important cause justifying dismissal without notice. The Supreme Labor Court affirmed the lower court's decision, on grounds that it could not overturn that court's factual findings as a matter of law.<sup>164</sup>

In the summer of 1937, the Supreme Labor Court held in favor of a Jewish traveling salesman who had been terminated by his employer when it was discovered that he was Jewish. In response to the appellee's advertisement, the appellant had agreed to work as an independent agent selling a line of fur coats. Upon being notified that appellant was Jewish, the firm terminated his contract and returned his orders to him unfilled and without compensation. The appellant subsequently sued for the outstanding commissions on the orders. The Supreme Labor Court affirmed the lower courts' decisions in favor of the salesman, finding that the appellant could not have known under the circumstances that the firm did not wish to hire Jews; and that, although Aryans were to be hired before Jews, Jews could still assume they could be hired.<sup>165</sup>

As late as 1938, the Supreme Labor Court reversed a lower court's decision in favor of an employer who had refused to grant a widow a pension because she was Jewish and because the promise to pay her the pension had been in the form of a non-binding gift. The Court found both of these reasons to be invalid.<sup>166</sup> In a case involving the interpretation of the Nuremberg Laws two months later, however, the Court found that because the decrees made pursuant to the statutes were clearly intended to discriminate against Jewish supervisory doctors in public hospitals with regard to pension entitlements, equitable considerations were inapplicable even in cases involving special hardships.<sup>167</sup>

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161. *See id.* Although the employer attempted to discharge the appellant again the next year, the Supreme Labor Court upheld the Duesseldorf Court of Appeal's decision invalidating the discharge. *See id.* at 264-65.

162. *See id.* at 265.

163. *See id.*

164. *See id.* Interestingly, in March 1937, the Supreme Labor Court had upheld the dismissal without notice of a front-line veteran who was a municipal employee, noting the duty of local governments to foster Nazi ideas. *See id.* at 265-66.

165. *See id.* at 267-68.

166. *See id.* at 270.

167. *See id.*

3. *The Decree Pertaining to the Elimination of Jews from German Economic Life Phase, November 1938-September 1941*

Soon after the Nazi coalition government came to power in January 1933, Jewish businesses were increasingly pressured to sell out to Aryan firms. Such buy-outs, termed "Aryanizations,"<sup>168</sup> were usually accomplished at bargain prices,<sup>169</sup> for the targeted Jewish firms generally had little choice in the course of these transactions.<sup>170</sup> Jews were also subject to increasing commercial restrictions through the later 1930s,<sup>171</sup> but comprehensive prohibitions on Jewish economic activity were not enacted until after the *Kristallnacht* pogrom in November 1938. The subsequent Decree Pertaining to the Elimination of Jews from German Economic Life (Economic Elimination Decree) and the regulations which followed it prevented Jews from working in the majority of business areas which were still available to them, and denied many of those rendered unemployed pension or significant welfare payments.<sup>172</sup> These measures, in conjunction with the post-*Kristallnacht* punitive tax on Jews, allowed for the almost complete expropriation of remaining Jewish assets through Aryanization or thinly veiled confiscation, and foreshadowed the annihilation of the Jews themselves in the coming Holocaust.

A review of Supreme Labor Court decisions during this period reveals that Nazi ideology had become firmly enconced in German jurisprudence by this time even at this highest level. In July 1939, in a case involving three Jewish apprentices who had had their contracts terminated by the new owner of their Aryanized plant, the Court held that economic harm to the enterprise was no longer the primary factor in determining whether an employer was justified in terminating contracts without notice when unforeseen circumstances arose. Rather, in light of the socially recognized significance of the concept of race, Nazi racial principles were now the most important factor in such determinations.<sup>173</sup>

With regard to the proper interpretation of anti-Jewish laws, the Supreme Labor Court held in early 1940 that they were no longer to be strictly construed as exceptional measures. They were instead to be viewed as systems implementing certain aspects of the Nazi Party's program, which was constitutional in nature.<sup>174</sup> However, in another pension reduction case the next month, the Supreme Labor Court clarified its holding by finding that "the Jew still participates in general legal intercourse," in the absence of statutes specifically prohibiting such action. In this case, the Court found that despite her Jewishness, the plaintiff was entitled

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168. See HILBERG, *supra* note 61, at 95.

169. See *id.* at 133.

170. See *id.* at 95. See generally RAUL HILBERG, DOCUMENTS OF DESTRUCTION 26-29 (1971), for a translation of an Aryanization contract.

171. See LINDER, *supra* note 42, at 249 nn.20, 21.

172. See *id.* at n.23. See generally ARAD, *supra* note 79, at 115-16 for a translation of the regulations. Government assistance was granted only in situations where Jewish welfare agencies were unable to provide support, and only under very stringent conditions. See LINDER, *supra* note 42, at 249 n.24.

173. See *id.* at 274. During the same month, however, in the first case decided under the economic elimination decree, the court held that the defendant's contractual obligation to pay a pension to a Jewish employee was unaffected by the decree. See *id.* at 275.

174. See *id.* at 277-78. The court noted that the economic elimination decree was not intended to be punitive, rather only to effect the segregation of Jews and Aryans. See *id.*



to an "adequate" pension from her former employer.<sup>175</sup> As a result of the Nazi government's discriminatory wage policy which denied certain payments to Jewish workers,<sup>176</sup> several German firms refused to pay wages to Jewish workers for legal holidays in late 1939.<sup>177</sup> Suits brought by Jewish workers were initially successful at trial, but were resolved inconsistently at the appellate level. The Koblenz Labor Court of Appeal overturned a trial court decision in favor of the Jewish plaintiff, holding that because the holidays were political in nature, and Jews could not participate in this aspect of the political process, they were not entitled to the benefit of the holidays.<sup>178</sup> Three months later, however, a Berlin Labor Court of Appeal upheld the decision of the trial court granting a Jewish demolition worker holiday pay, finding the legislative silence on the issue indicative of the drafters' intent not to make racial or other distinctions in the applicability of the holidays.<sup>179</sup>

Although the Berlin court did not allow an appeal to be taken in this case, the Supreme Labor Court decided two similar cases in July 1940.<sup>180</sup> The Court held that because they were racially predisposed to promote personal interests and to attain economic advantages, Jews were outside the German labor community. Accordingly, when the state made an exception to the principle that wages were paid only for work actually performed, only those within the community (Aryans) were to benefit.<sup>181</sup>

One of the last Supreme Labor Court cases involving Jewish litigants shows all too clearly that by early 1941, Jews could no longer expect to receive any normative treatment before German courts. A Jewish laborer was discharged in the middle of a work day, and contrary to the pertinent construction industry regulations, was given neither the full day's wages nor the requisite amount of severance pay. The workman sued for these amounts, but the trial court found that public law applied by virtue of the plaintiff's employment being controlled by the local employment office; and, as a matter of public law, such payments were not required. The appeals court, however, recognized that the workman was one of several non-local individuals on the particular work crew who had not been under the supervision of the local employment office, and had allegedly been discharged because the employment office only intended to hire local Jews in a public-law obligatory relationship. Accordingly, the appeals court held that private law applied to the case. The Supreme Labor Court reversed, accepting the municipality's argument that considerations of state security, namely, the segregation and supervision of Jewish workers, were controlling.<sup>182</sup> This finding was not based on any statutory authority, instead the Court held that this was a "special case . . . which in view of

175. *See id.* at 279.

176. *See* LINDER *supra* note 42.

177. *See* HILBERG, *supra* note 61, at 99.

178. *See* LINDER, *supra* note 42, at 279-80.

179. *See id.* at 280.

180. *See id.*

181. *See id.* at 281. Similarly, a Kassel labor court found the withholding of holiday pay proper because Jews had "no inner tie" to the performance of labor and regarded it only as a commodity. The court found the withholding also justified on grounds that Jews had no loyalty to their employers. *See* HILBERG, *supra* note 61, at 99.

182. *See id.* at 282.

its element of state and racial politics must follow its own legal rules, which if necessary, must be inferred from law in the making."<sup>183</sup> Ironically, ordinary (as opposed to slave) Jewish labor was in demand during the early part of World War II due to labor shortages. Because Jewish employees had a clearly inferior status by this time, however, the labor courts were no longer deemed necessary to resolve conflicts involving Jewish workers. Special judges were assigned to such cases, and their decisions were not subject to appeal.<sup>184</sup>

### B. Commerce

The Nazi boycott severely disrupted Jewish commerce, and legal efforts to abate its effects were not particularly successful. In 1935, for example, the Jewish owner of a driving school attempted to obtain an injunction restraining the local Nazi Party organization from continuing to post on a wall near the petitioner's place of business a list of Jewish concerns to be boycotted, among which was the name of petitioner's business. The Municipal Court of Eberwalde denied the petition, holding that in light of the "prevailing conditions in Germany, every German had a right to learn whether or not a firm was Jewish."<sup>185</sup>

Although the boycott accentuated the pressure on Jewish businesses to Aryanize quickly, the exact way in which Aryanization was to occur became the subject of considerable conflict within the Nazi government at the policy level. The Ministry of Economics preferred to keep the expropriation process orderly, so as to minimize the loss of Jewish entrepreneurial talent, which it viewed as essential for the proper functioning of the German economy.<sup>186</sup> Conversely, the Nazi Party had little regard for Jews, commercially skilled or not, and sought to eliminate all Jewish influence in the German economy as quickly as possible.

In the early years of the Third Reich, Aryanization could sometimes be accomplished on terms not entirely unfavorable to the Jewish owner. One such Aryanized business in which the former Jewish owner apparently retained some degree of control was the Tietz department store chain, which became the Aryanized Westdeutsche Kaufhof, A.G., of Cologne. In August 1934, an article in the Nazi newspaper *Der Westdeutsche Beobachter* warned its readers not to buy from the firm's stores because it was a "Jew shop in disguise." The firm sought an injunction, arguing that there were no longer any non-Aryan directors, and although the former owner had been retained as the general manager, this was with the consent of banks controlled by the Nazi government (which may have financed the Aryanization). The newspaper justified its actions on the grounds that the Nazi Party had not given up the fight against Jews, even though the Nazi government had prohibited certain actions against department stores. The court deferred judgment.<sup>187</sup>

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183. *See id.*

184. *See* WUNDERLICH, *supra* note 35, at 232 n.109.

185. JANOWSKY & FAGEN, *supra* note 84, at 205.

186. *See id.* at 22. *See also* ARAD, *supra* note 79, at 73-75, for a translation of the minutes of the August 20, 1935, cabinet meeting, in which the Minister of Economics, Hjalmar Schacht, details the problems experienced by his ministry in the wake of anti-Jewish violence, and the pragmatic considerations which affected the Ministry of Economics' policy toward Jews.

187. *See Multiple Stores In Germany—Suit Against Newspaper*, *THE TIMES* (London), Aug. 15, 1934, at 9.

Jewish businesses were also pressured to Aryanize by the application of discriminatory commercial regulations. For example, non-Aryan firms were not allowed to accept relief vouchers and were excluded from receiving public contracts.<sup>188</sup> Sensitive to the negative effect that extensive restrictions on Jewish commerce might have on the recovering German economy, however, the Nazi government often restrained the scope of anti-Jewish measures in this area. For example, even though Jewish lawyers were no longer allowed to be partners with Aryan practitioners as of July 1933, certain firms in Hamburg, the major German port city, were exempted from this requirement if they had a large commercial practice.<sup>189</sup> Accordingly, German courts continued to grant Jewish businesses a measure of normative protection for a significant length of time. In 1935, the Cologne Administrative District Court upheld a restraint on Jewish commerce, finding it justified by Nazi economic theory with regard to the dishonesty of Jewish merchants. Noting that the theory expressed the "general conviction of the nations," the court held that "official bodies must respect it."<sup>190</sup> This decision was reversed by the Prussian Court of Appeal, which held that Jews were to be dealt with according to the law in order to protect the principle of entrepreneurial freedom.<sup>191</sup>

Litigation under the Law Governing Unfair Competition<sup>192</sup> demonstrates how, when apparently convenient to further Nazi aims, legal interpretations which favored Jews might still be rendered. As early as 1934, the Supreme Court held that use of a company name which did not clearly indicate the "non-Aryan" origin of the owners constituted unfair competition.<sup>193</sup> Similarly, the Prussian Court of Appeals held in 1935 that a firm owned by Jews or employing Jews had no right to call itself a "German business," and that it would be unfair competition for such a firm not to include that information in its advertising.<sup>194</sup> In 1936, however, in a case involving the economically important insurance industry, the Supreme Court found the circulation of a list of the directors of a firm whose names appeared to be Jewish by one of its competitors to be illegal. The Court held that "[t]o refer to the Jewish character of a firm is to adduce facts which are totally irrelevant to the commercial merits of an insurance company. . . . Nor can the defendant claim that the National-Socialist philosophy requires the protection of the rural population from Jewish influences."<sup>195</sup>

By 1937, however, the economists had lost their fight with the Nazi Party over control of the economy, a result which spelled even quicker ruin for the remaining Jewish enterprises. In one case, upon the dissolution of a partnership, a Jewish businessman requested his Aryan partner to provide him with monthly reports, as was the Jewish partner's right by law. When the Aryan refused, the Jewish partner brought him to court. The defendant argued that his actions could not constitute

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188. See JANOWSKY & FAGEN, *supra* note 84, at 179.

189. See Reifner, *supra* note 76, at 117-18.

190. THE DUAL STATE, *supra* note 70, at 90 n.278.

191. See *id.*

192. See *id.* at 89.

193. See JANOWSKY & FAGEN, *supra* note 84, at 206-07.

194. See *id.*

195. THE DUAL STATE, *supra* note 70, at 89-90 (quoting JANKOWSKY & FAGEN, *supra* note 84, at 206-07). The court overruled its own decision in February 1939. See *id.* at n.276.

grounds for a judgment against him because the Nazi Party had forbidden him to communicate with the plaintiff. The court found for the defendant.<sup>196</sup>

Even actions as seemingly non-political as a recovery upon a debt became risky for Jewish businessmen. In 1937, a Jewish merchant in Berlin brought suit against a Nazi Party member to recover payments for goods that the member's wife had bought on credit. In August 1937, a German court held that because at the time the purchases were made that it was recognized as unseemly for Germans to buy from Jews, the husband could not possibly be bound by the contract.<sup>197</sup> Beyond the risk of not being able to recover upon a debt, the bringing of such a suit could even give rise to an action against the Jewish plaintiff. As early as June 1935, the Court of Appeals of Marienwerder held that a cause of action for slander would lie against a Jewish merchant who alleged that a prominent Nazi had bought an overcoat at his shop, if it was proven that the merchant actually made the statement.<sup>198</sup>

### C. Property

The supposed bond between the German peasantry and the land was a concept of major importance in Nazi ideology.<sup>199</sup> An early Nazi decree gave this concept effect by restricting the inheritance of farmland to farmers who could prove they had no Jewish ancestors back to 1800.<sup>200</sup> Although Jews were not expressly prohibited from owning other types of real estate until 1938,<sup>201</sup> in 1933 a Rostock court upheld the decision of a lower court forbidding the sale of a parcel of land to a Jew. The court held that the Nazi Party program was valid law, and according to it a Jew could not buy land because only Germans by blood should be owners of German soil.<sup>202</sup> In line with this reasoning, on January 5, 1935, the Nuremberg Court of Appeals refused to compel an Aryan debtor to satisfy an uncontested debt to a foreign Jew. The court held that:

According to the actual purified conception of the law, a debtor is entitled to refuse the execution of an obligation even if the performance thereof is contrary neither to law nor to morals, but yet would have the effect of bringing parts of the national property, especially real property, into the hands of a "non-Aryan" foreigner, thereby harming the national community.<sup>203</sup>

The official Nazi policy of forcing German Jewish emigration during the early years of the Third Reich had the indirect result of transferring large amounts of Jewish money to the state. As of 1931, everyone emigrating from Germany was

196. *See id.* at 91.

197. *Wife's Debt To Jew Not Recoverable—German Court Ruling*, *TIMES* (London), Aug. 20, 1937, at 9.

198. *See* JANOWSKY & FAGEN, *supra* note 84, at 205.

199. *See* ADOLF HITLER, *MEIN KAMPF* 138, 390, 652 (1925).

200. The law's operation is described in LUCY S. DAVIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*. The first decree for the execution of this law restricted Jews from acting as judges of inheritance courts and from appearing as attorneys before such courts. *See* AMERICAN JEWISH COMMITTEE, *supra* note 63, at 87-88.

201. *See* THE JEWISH BLACK BOOK COMMITTEE, *THE BLACK BOOK* 106 (1981).

202. *See Burgomaster of Berlin—Expulsion from Nazi Party*, *TIMES* (London), Nov. 25, 1935, at 13.

203. JANOWSKY & FAGEN, *supra* note 84, at 208 (citing *Deutsche Justiz* at 403 (June 29, 1935)).

required to pay a special emigration tax, unless the emigration was in the best interests of the German people or the German economy.<sup>204</sup> Certain Jews brought suit to have the emigration tax declared inapplicable to them on the basis of this exemption, because the Nazi government had repeatedly declared that Jews and Jewish influences posed a threat to German society, and it would therefore be in the Reich's best interests to have Jews leave Germany. The Supreme Finance Court held otherwise, noting that even though Jewish emigration might be beneficial, such emigrants would be unlikely to promote German ideas and concepts abroad. The departure of German Jews from the Reich was therefore "not considered particularly beneficial to the national economy."<sup>205</sup>

As the focus of official Nazi policy against the German Jews moved from forced emigration to complete destruction, new legislation was promulgated to effect the complete expropriation of Jewish-owned property. In April 1938, for example, a decree required registration of all Jewish-owned property valued over 5,000 reichsmark.<sup>206</sup> One means of avoiding the property decree was to marry a foreigner and then petition a court to change the registration of the property into the foreign spouse's name. Later that year, the Municipal Court of Ebreichsdorf, Austria,<sup>207</sup> denied such a petition on grounds that the marriage was invalid because the Jewish spouse had contracted the marriage for commercial purposes. It was not, therefore, a marriage in fact, and the registration of the property could not be transferred.<sup>208</sup>

#### D. Landlord-Tenant Relations

Under German law prior to the Nazi Revolution, tenants could not be evicted unless their rents were in arrears or they had violated their respective leases.<sup>209</sup> Although a law preventing Aryan landlords from renting to Jews was not in effect until April 1939,<sup>210</sup> the question as to whether Jews could be protected by the tenancy laws from unwarranted eviction was raised in German courts in the beginning of 1938. In several early cases, municipal courts held the laws protected Jewish as well as Aryan tenants. In response to criticism of these decisions in the Nazi press, the courts moved away from a literal interpretation of the law to a Nazi view of the issues.<sup>211</sup> On March 9, 1938, the municipal court of Berlin-

204. See *Simon Interview*, *supra* note 103; JANOWSKY & FAGEN, *supra* note 84, at 209. The emigration tax amounted to 25 percent of the value of the emigrants' property in Germany. See *Simon Interview*, *supra* note 103; JANOWSKY & FAGEN, *supra* note 84, at 225. This tax netted the Reich almost 900 million reichsmark, the vast majority of which was paid by emigrating Jews. See HILBERG, *supra* note 32.

205. JANOWSKY & FAGEN, *supra* note 84, at 209-10.

206. See SNYDER, *supra* note 66, at 284-85. On the basis of this registration, the Ministry of Finance was able to assess a 25 percent punitive "atonement" tax against the property of German Jews for the assassination of the German diplomat Vom Rath in Paris by a young Jew whose family had suffered from Nazi persecution. HILBERG, *supra* note 32, at 135-38. This tax netted the Reich over one billion reichsmark. See *id.* at 138.

207. Austria was annexed by Germany in March 1938.

208. See *Telegrams In Brief*, *TIMES* (London), Jul. 25, 1939, at 11.

209. See *THE DUAL STATE*, *supra* note 70, at 93.

210. See *JEWISH BLACK BOOK COMMITTEE*, *supra* note 200.

211. See *THE DUAL STATE*, *supra* note 70, at 93.

Charlottenburg denied Jews access to public housing on grounds that such housing was reserved for the German ethnic community, from which Jews had been excluded.<sup>212</sup> The Berlin-Schoneberg municipal court dropped all pretense of legal grounding in its decision of November 7, 1938, when it declared that "the question before the court is not a problem of the law of landlord and tenant, but a question involving a fundamental outlook on life." The court also found incorrect the proposition that the Nazi government had to order or allow through legislation every action against Jews. As the court noted, "[i]f this were the case, it would not be permissible to interpret the law to the disadvantage of the Jew and the Jew would enjoy the protection of law. It is obvious that this makes no sense."<sup>213</sup>

### E. Inheritance Law

As early as October 1933, a Berlin District Court held that a Jew could not act as a referee for the administration of an estate or as an executor of a will. Although no legislation prohibited Jews from acting in such capacities, the court held that "[i]t is the first fundamental principle of the new law to expel all persons of alien race from public offices and functions, such as the office of an Executor of a will, who has to rule upon the fate of German men."<sup>214</sup>

This principle was applied by a surrogate court in 1935 in litigation involving the attempted appointment of a Jewish executor. In 1900, a trust of 5,000,000 marks had been set up by a Jewish testator to encourage agriculture and artisanship. Under the terms of the will, a board of directors and a group of executors, all Jewish, were appointed by the testator. The will stipulated that the surrogate court should "appoint a suitable person from the members of the board of directors, or from other members of the Jewish community" to the position of executor upon the death of any of the executors. Despite the terms of the will, the court looked to the anti-Jewish laws promulgated by the Nazi government and determined that, since they did not explicitly permit Jews to be executors, such a right apparently did not exist. The court's decision not to appoint the Jewish nominee was upheld on appeal to the Ministry of Justice, which served as the forum of last resort for appeals involving trusts and endowments.<sup>215</sup>

Nazi dogma was also applied by the courts to block transfers of personalty. Although there were no laws or decrees expressly prohibiting Jews from receiving property from Aryans through devise at the time, in 1936 a Leipzig court found a will providing for a Jew to inherit over an Aryan testator's next of kin to be invalid, because it was contrary to good morals, sound national sentiment, and the prevailing national consciousness.<sup>216</sup>

### F. Mischlinge

One of the most disturbing aspects of the German Jewish legal response to Nazi persecution arose from the operation of Nazi "racial" theory; namely, the

212. *See id.* at 93 & n.289.

213. *Id.* at 94 & n.290.

214. JANOWSKY & FAGEN, *supra* note 84, at 203.

215. *See id.* at 204.

216. *Bequest By "Aryan" To A Jew—Will Declared Invalid*, *TIMES* (London), Oct. 19, 1936, at 13.

classification of people as *Mischlinge*, or part Jews. Early Nazi legislation, such as the Civil Service Law, discriminated against those of "non-Aryan" origin, which was defined as being descended from a Jewish parent or grandparent, who were presumed Jewish if they had adhered to the Jewish faith.<sup>217</sup> This definition was adequate for Nazi purposes to "purify" the civil service, but its use outside the bureaucracies was awkward because it included many people who were at least half-Aryan, and therefore of value to the Nazi state.<sup>218</sup>

The Nuremberg Laws of 1935 discriminated against "Jews". The Interior Ministry defined "Jew" in the Nuremberg context to mean anyone who had two or more Jewish grandparents and was married to a Jew as of September 15, 1935, or who adhered to the Jewish faith.<sup>219</sup> An individual descended from two Jewish grandparents ("half-Jew") who was neither married to a Jew as of September 15, 1935, nor a member of the Jewish faith; or a person with one Jewish grandparent ("quarter-Jew") who did not adhere to the Jewish faith, were not considered Jews under the Nuremberg Laws.<sup>220</sup> Such people were known as *Mischlinge* of the first and second degree, respectively.<sup>221</sup> From this point on, the *Mischlinge* were separated from the Jews in terms of the destruction process. Although *Mischlinge* could not be civil servants, lawyers, or military officers, and were discriminated against in education, they were spared dismissal from private employment, and, in the long run, annihilation.<sup>222</sup>

A significant amount of litigation, therefore, occurred in attempting to determine whether people who were arguably Jewish actually adhered to the Jewish faith. In resolving this issue, the courts looked beyond the conduct of the individual to determine the intention behind the behavior, and specifically focused on whether the people involved actually considered themselves to be Jewish.<sup>223</sup> In 1941, for example, the Supreme Administrative Court denied a petition from a half-Jew to be classified as a *Mischlinge*. Although the petitioner had not been raised as a Jew and had never affiliated himself with a synagogue, evidence showed that the petitioner had designated himself as a Jew in filling out forms and official documents. This created an impression with the authorities that the petitioner was Jewish, which he did not attempt to correct. This apparent affirmation of his status was sufficient to classify him as a Jew.<sup>224</sup>

A case brought before a Berlin municipal court that same year reveals a dark side to the German Jewish legal response. The Jewish community organizations in

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217. See HILBERG, *supra* note 61, at 45.

218. See *id.* at 47.

219. See *id.* at 48.

220. See *id.*

221. See *id.*

222. See *id.* at 52 & 52 n.30. Despite Nazi agitation, the labor courts did not apply the Nuremberg Laws to *Mischlinge* employees. *New Nazi Action Against Jews: Race As A Reason For Dismissal*, TIMES (London), Feb. 15, 1936, at 11.

223. See HILBERG, *supra* note 61, at 50. The so-called "racial" principles of the Nazi movement were not the basis of the Nuremberg Laws; whether one was Jewish was a question of religion. For example, half-Jewish people who displayed perfunctory adherence to the faith were categorized as *Mischlinge*. See *id.* at 51. On the other hand, some Germans who were Aryan in every sense, except they had accepted the Jewish faith upon marriage, were held to be Jewish. See *id.* at 52.

224. See *id.* at 50-51 n.24.

Germany had, by this time, been given the responsibility for administering social welfare programs for the increasingly impoverished Jewish communities.<sup>225</sup> As part of this effort, the Berlin community organization demanded personal financial information from a half-Jew who had left his synagogue in 1929 when he married a Christian woman. The man refused, and the community organization went to court to establish that he was Jewish because he adhered to the Jewish faith, and therefore required to provide the information. The court found for the defendant, noting that because the Jewish religious community had no legal personality or public law status, quitting one's synagogue was equivalent to leaving the Jewish religion. Other evidence, such as the defendant's membership in Nazi organizations, showed that the defendant no longer considered himself Jewish, and he therefore was not. This decision was affirmed on appeal.<sup>226</sup>

### G. Summary and Evaluation

When examined within context, a significant amount of Jewish litigation in response to Nazi persecution probably appeared to the Jewish litigants as having a reasonable chance of success. The intensity and scope of anti-Jewish actions were not uniform throughout Germany during the early years of the Third Reich. In the area of commerce, for example, Nazi interference was not only restrained to a degree, but limited exemptions were granted to Jewish concerns in certain cases. Further, the conflicting aims of normative German law and Nazi statutes often created apparent loopholes which Jewish litigants attempted to exploit to their advantage.

The courts may have provided Jewish litigants with some encouragement, because in many cases courts chose not to follow the Nazi Party line at first, and applied normative concepts instead.<sup>227</sup> Another factor that may have influenced Jewish litigants to go to court was the great publicity the Nazi propaganda machine gave to cases in which the rights of Jews were vindicated. For example, in November 1935, an Aryan was convicted by a Karlsruhe court of having spread a false rumor that a certain Jew was having sexual relations with a maid in his household. The trial court sentenced the offender to eight months' imprisonment, holding that he could not slander residents of the Third Reich merely because they were Jewish.<sup>228</sup> The official German news agency cited this case as proof that Jews still had rights in Germany, and attacked reports of Nazi persecution in the international press as "lies."<sup>229</sup>

225. See INSTITUTE OF JEWISH AFFAIRS OF THE JEWISH AMERICAN CONGRESS, *HITLER'S TEN-YEAR WAR ON THE JEWS* 18, 25 (1943) [hereinafter *TEN-YEAR WAR*].

226. See HILBERG, *supra* note 61, at 51, 52 n.27. Under the decree of March 29, 1938, Jewish relief organizations lost their tax exempt status. See HILBERG, *supra* note 32, at 145.

227. The Central Federation of German Citizens of the Jewish Faith published a number of articles in 1933 in its newspaper that excerpted court decisions in which the outcomes were favorable for Jews. See LINDER, *supra* note 42, at 259 n.43.

228. See *Plight of Jews in Germany: Prison for Slanderer*, *TIMES* (London), Nov. 14, 1935, at 3.

229. See *id.* at 13. Similarly, in late January 1936, a Giessen court convicted an Aryan of attempting to extort money from a Jew. Although the accused attempted to justify his actions on the basis that Jews were proscribed in Germany, the prosecutor argued that Germany's reputation abroad was harmed by such actions, and therefore acts like the accused's should be "vigorously repressed." The trial court sentenced the defendant to two months' confinement. See *Threats To German Jewess: "Aryan" Sent To Prison*, *TIMES* (London), Jan. 29, 1936, at 9.



It is significant to note that most of the suits did not directly contest Nazi statutes and regulations, but instead resulted from parties taking advantage of their status in the new regime to deny Jews rights previously accorded to them. The German Jewish litigation consisted primarily of suits brought by individuals to redress individual grievances, and usually to get immediate, short-term relief. Given the nature and the overall effect of Jewish litigation, one could argue that it not only failed to mitigate the course of the Holocaust, it instead drained resources and attention away from the consideration of more forceful methods of response that may have proved more effective. By the late 1930s, however, the increasingly aged and impoverished German Jewish population had ever fewer means of redress available to them.<sup>230</sup> Although litigation did not carry with it a great likelihood of success, neither did it result in Nazi reprisals like those engendered by other forms of resistance.<sup>231</sup>

#### IV. THE GERMAN JEWS' LEGAL RESPONSE IN AREAS UNDER THE SUPERVISION OF THE LEAGUE OF NATIONS

##### A. *The Saar*

Under the terms of the Versailles Treaty, the League of Nations administered the Saar as a trusteeship, and was represented in this capacity by an executive body, the Governing Commission, whose five members were chosen by the League of Nations Council.<sup>232</sup> Although France assumed control of the region's coal mines as a partial reparation for the damage done to captured French coal mines in World War I,<sup>233</sup> a plebiscite was to be held in 1935 to determine whether the Saar would rejoin Germany or become part of France.<sup>234</sup> The Versailles Treaty allowed the Bavarian and Prussian civil and criminal courts which existed in the region to continue to operate within their old jurisdictions, but the Governing Commission was given the authority to create a Supreme Court to hear appeals from decisions of these courts, and to hear matters which were outside their jurisdiction.<sup>235</sup> The

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230. The German-Jewish population in 1933 numbered approximately 550,000, or slightly less than one percent of the total German population of approximately 67 million. See GRUNBERGER, *supra* note 71, at 460; TEN-YEAR WAR, *supra* note 225, at 8; 1938 BRITANICA BOOK OF THE YEAR 60 (1938). In 1925, 40 percent of the German Jewish population was over 40 years of age; by 1941, primarily through emigration, this figure increased to 70 percent. TEN-YEAR WAR, *supra* note 225, at 9.

231. See MCKALE, *supra* note 98, at 162-63, for a description of the *Kristallnacht* Pogrom which followed the assassination of vom Rath. In one case in November 1941, however, the Jewish litigants who had successfully fought a fine levied on them by a Berlin food rationing office were immediately sent to a death camp. See HILBERG, *supra* note 61, at 102-03.

232. See W. R. BISSCHOP, THE SAAR CONTROVERSY 22-24 (1962).

233. See *id.* at 18 n.2. The Saar mines contained 25 percent of the total known German coal reserves and more coal than all the French mines combined. See WATT, *supra* note 129, at 425.

234. See BISSCHOP, *supra* note 232, at 18-19 n.2.

235. See *id.* at 31; see also SARAH WAMBAUGH, THE SAAR PLEBISCITE 60 (1940). The Supreme Court established by the treaty sat at Saarlouis, and took the place of the Bavarian court of appeal in Zweibruecken and the Prussian district court in Cologne. See *id.* at 77. A High Administrative Court of Appeal was also established at Saarlouis as the appellate authority for the local administrative courts. See *id.* at 78.

Court had eleven members: three Swiss, two Saarlanders, two French, one Belgian, one Dutch, one Luxembourger, and one from Czechoslovakia.<sup>236</sup> Throughout the fifteen years of the Court's existence, the Chief Justice was always Swiss.<sup>237</sup>

During the course of the League administration, public sentiment in the region remained overwhelmingly in favor of complete reunification with Germany.<sup>238</sup> As an example of the Allies' and the League of Nations' dismemberment of Germany, the Saar figured prominently in the Nazi Party's political program, which encouraged agitation against the League of Nations administration.<sup>239</sup> After the March 5, 1933 German national elections, the Nazi press in the Saar began attacking Jews.<sup>240</sup> In response to this libelous campaign, the Governing Commission suspended the publication of the main Nazi Party organ, *Die Saarfront*, for a two-week period in April 1933, and permanently banned *Der Stuermer* from being distributed in the region.<sup>241</sup> Although the Governing Commission also declared the Nazi Party's anti-Jewish boycott to be illegal, Nazi groups continued to agitate for and to surreptitiously impose discriminatory measures on the Jewish inhabitants of the Saar.<sup>242</sup>

As in Germany, the judges of the local Saar courts found themselves under pressure from Nazi organizations, and quite likely their parent Bavarian and Prussian judicial bureaucracies, to conform their decisions to Nazi policies.<sup>243</sup> Many judges began showing an obvious degree of leniency toward Nazi Party members and sympathizers in their decisions.<sup>244</sup> The French government formally proposed use of neutral judges in such cases,<sup>245</sup> but the strong pro-Germany feelings of the overwhelmingly German populace prevented any action on this suggestion.<sup>246</sup> A pro-Nazi attitude infected other areas of the judicial system as well, but Jewish lawyers could occasionally use this bias to their client's advantage. In 1934, a Polish Jew who worked as a metal salvager was convicted on dubious theft charges and sentenced to a year's imprisonment. The Jewish defense attorney approached the prosecutor afterward, and taking note of Chancellor Hitler's stated desire to expel all Jews from Germany, offered to arrange for the defendant and his family to leave Germany completely if the prosecutor would agree to release the man. The prosecutor had the defendant released, and the defense attorney led the man and his family across the border into France that very day.<sup>247</sup>

236. *See id.* at 77.

237. *See id.* at 77-78.

238. *See id.* at 132. The Saarlanders were thoroughly Germanicized, having been under French control for only 23 years of their history. *See also* WATT, *supra* note 129, at 426.

239. *See* WAMBAUGH, *supra* note 235, at 131-32.

240. *See id.* at 132. Prior to 1933, the Jewish population of the Saar was approximately 4,000, or 0.5 percent of the total population. *See id.* at 15.

241. *See id.* at 132-33.

242. *See id.* at 133. Of the 109 lawyers in the Saar as of January 1, 1933, 20 were Jewish. *See* TEN-YEAR WAR, *supra* note 225, at 34. The Saar Bar Association voted down a proposal by member Nazi lawyers to restrict its membership to Aryans. The 35 Nazi members then withdrew from the association and formed their own organization. *See id.* at 35.

243. The judges of the existing courts had been allowed to stay there by their respective state governments. *See* WAMBAUGH, *supra* note 235, at 161-62.

244. *See id.* at 161.

245. *See id.*

246. *See id.* at 162.

247. *See* Alberti Interview, *supra* note 59.

As the time for the plebiscite neared, preparations began for the administration of the registration and voting procedures. The Saar was divided into eight electoral districts, and the plebiscite arrangements in each district were supervised by a voting bureau appointed by the League of Nations.<sup>248</sup> Decisions and acts of the voting bureaus could be appealed to their respective district plebiscite tribunals.<sup>249</sup> Further, certain specified offenses involving plebiscite matters were placed within the jurisdiction of the district plebiscite tribunals.<sup>250</sup> The appellate authority for the district tribunals was a newly created Supreme Plebiscite Court, which sat in Saarbruecken.<sup>251</sup> The Supreme Plebiscite Court had a President, a Vice-President, six judges, and an examining magistrate.<sup>252</sup> Five members constituted a quorum, and decisions were made by a majority vote.<sup>253</sup> None of the officials of the plebiscite tribunals could be French, German, or Saarlanders.<sup>254</sup>

During the tense period that preceded the plebiscite, both the Saar Supreme Court and the plebiscite tribunals proved to be fora in which the rights of Jewish Saarlanders could be vindicated. When the pro-Nazi *Der Deutsche Kumpel* published an article attacking a particular Jewish merchant, the Saarbruecken tribunal sentenced the editor to a fine of 1,000 francs or twenty days' confinement.<sup>255</sup> In December 1934, the Nazi newspaper, *Das Westland*, published a list of Jewish Saarlanders whom it claimed had contributed money to the organizations that sought to have the Saar kept under League of Nations control. Subsequently, the listed individuals were subjected to a boycott. On December 5, 1934, the Saar Supreme Court enjoined the further distribution of the particular issue of the newspaper containing the list under pain of a 5,000 franc fine.<sup>256</sup> As a measure of the continued application of normative legal concepts, it is important to note that in these cases, as compared to German Supreme Court decisions as early as 1933, the plaintiffs' Jewishness was a factor only in the sense that it established they were the individuals subjected to the libelous attacks. The fact that the plaintiffs were Jewish was irrelevant in deciding whether the libels were somehow justified.

During the course of the plebiscite negotiations, Germany agreed to allow the Supreme Plebiscite Court to remain in operation for one year after the plebiscite to hear complaints of discrimination by official decision or legislative act against individuals having the right to vote.<sup>257</sup> The Supreme Plebiscite Court was autho-

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248. See WAMBAUGH, *supra* note 235, at 175.

249. *See id.* at 230.

250. *See id.* at 176.

251. *See id.* at 230. Each of these courts was composed of one judge, although others might be attached to the courts depending upon the situation. *See id.* at 176.

252. *See id.* at 175.

253. *See id.* at 175-76.

254. *See id.* at 176.

255. *See id.* at 249 n.126.

256. *See id.* at 274-75.

257. *See id.* at 179. On May 14, 1934, a committee of Jewish delegations requested that the League of Nations extend the system of minority treaties to the Saar. The committee also requested that Germany agree in advance to protect minority rights in the event the plebiscite was in its favor, including the right to appeal to the Council of the League of Nations. *See Geneva Publishes Hungary's Charge*, N.Y. TIMES, May 15, 1934, at 12. Germany adamantly refused to consider such an arrangement. *See TEN-YEAR WAR*, *supra* note 225, at 35.

rized to issue final judgments in such cases and to award damages as appropriate.<sup>258</sup> In the Franco-German Agreement of Rome, signed on December 3, 1934, Germany also agreed to let those who wished to leave the Saar after the plebiscite freely dispose of their property, and not to implement discriminatory measures until March 1, 1936.<sup>259</sup>

Ninety percent of the voters in the plebiscite were in favor of the Saar returning to German control.<sup>260</sup> Although the plebiscite was a major foreign policy victory for the Nazi government, it was by necessity a victory with conditions favorable to Jews. It is doubtful that France would have as easily agreed to relinquish control over the Saar without securing guarantees protecting minorities, and at this point the Nazi government still desired the legitimacy engendered by good publicity.<sup>261</sup> One guarantee under the Rome Agreement of great practical value to many Jews was the exemption of emigrants from payment of the emigration tax.<sup>262</sup> Further, Nazi leaders were anxious to avoid adjudication of the Rome Agreement, and often went to great pains to remind all government officials to adhere to the agreement so that cases would not be brought before the Supreme Plebiscite Court.<sup>263</sup> In fact, Jewish attorneys could sometimes use the threat of a suit to force recalcitrant Nazi officials to perform their duty under the agreement.<sup>264</sup>

The majority of prosperous Jews left the Saar during the spring of 1935, but a great number of poor refugees remained in the territory when the Nazi anti-Jewish laws went into effect on March 1, 1936.<sup>265</sup>

### B. Upper Silesia

The original draft of the Versailles Treaty provided that the Prussian district of Upper Silesia was to be unconditionally ceded back to newly reconstituted Poland.<sup>266</sup> In the face of strong German protests against the complete cession of the region<sup>267</sup> and ethnic violence between German and Polish Upper Silesians, however, the Allies agreed to hold a plebiscite to determine the future of the region instead.<sup>268</sup> The plebiscite was held in late March 1921, and a new German-Polish frontier was to be fixed on the basis of the results.<sup>269</sup>

Attempts to draw a mutually satisfactory boundary according to the plebiscite vote were frustrated by the dense and interdependent industrial development of the

258. See WAMBAUGH, *supra* note 235, at 180.

259. See SNYDER, *supra* note 65, at 201-05; see also Arnaldo Cortesi, *France and Reich Agree on a Saar Payment Plan; Pact Protects Minorities*, N.Y. TIMES, Dec. 4, 1934, at 1.

260. See WAMBAUGH, *supra* note 235, at 306.

261. See HAJA HOLBOR, *A HISTORY OF MODERN GERMANY, 1840-1945* 766 (1969).

262. See Alberti Interview, *supra* note 59.

263. See *Chief Warns Saar Nazis*, N.Y. TIMES, Aug. 9, 1935, at 10. In fact, after the plebiscite, the Supreme Plebiscite Court's jurisdiction actually expanded, and dealt with complaints of persecution and reprisal as well. See WAMBAUGH, *supra* note 235, at 312.

264. See Alberti Interview, *supra* note 59.

265. See *id.*; see also WAMBAUGH, *supra* note 235, at 315 & n.35.

266. See KAECKENBEECK, *supra* note 132, at 3.

267. See *id.* at 5-7.

268. See *id.* at 5.

269. See *id.* at 6. The results of the plebiscite were 707,605 votes in favor of remaining united with Germany, and 479,359 votes in favor of union with Poland. See *id.*

region,<sup>270</sup> as well as the existence of large, isolated pockets of Germans and Poles scattered throughout the region.<sup>271</sup> In 1922, under the auspices of the League of Nations, Germany and Poland finally negotiated a geographical division of the area. The sovereignty of each country within its portion of Upper Silesia was to be restricted by a complex international legal regime which was intended to ensure a peaceful transition to full sovereignty of both states in their respective parts of the region over a fifteen-year period.<sup>272</sup>

The Geneva Convention of May 15, 1922, contained detailed guarantees of both individual and minority rights on each side of the new border, as well as provisions governing the scope of legislative activity allowed to each state within its respective portion of Upper Silesia.<sup>273</sup> To oversee the implementation of these provisions, the Geneva Convention established two international supervisory organs, the Mixed Commission and the Arbitral Tribunal.<sup>274</sup> The Mixed Commission was given jurisdiction over public law questions, such as economic or administrative disputes between the two governments, and was composed of two Germans and two Poles, each from Upper Silesia, as well as a president of another nationality.<sup>275</sup> Although the Mixed Commission's function was primarily diplomatic, like the more judicially oriented Arbitral Tribunal, the Mixed Commission was also authorized to obtain evidence and determine its own procedure.<sup>276</sup> The President of the Mixed Commission was empowered to issue non-binding opinions with regard to minority matters, which were forwarded to the representatives of the pertinent state.<sup>277</sup> The State Representatives were required to transmit such opinions to their respective governments without delay.<sup>278</sup>

The Arbitral Tribunal had jurisdiction over private law questions arising under the Convention, and was composed of one arbitrator appointed by Germany and another appointed by Poland, and a president of another nationality.<sup>279</sup> Although the Arbitral Tribunal published its important decisions, the holdings of which were binding upon the regular German and Polish courts and administrative authorities in Upper Silesia,<sup>280</sup> its authority, like that of the Mixed Commission, was undermined by its emphasis on conciliation in its decision-making process.<sup>281</sup> Beyond the supervisory organs, the Geneva Convention also gave minorities the right to petition the League of Nations' Council directly, or to go through a local

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270. Upper Silesia was at that time the second largest German industrial district after the Ruhr, *see* HOLBORN, *supra* note 261, at 601-602, and accounted for over 20 percent of German coal production. *See id.* at 376.

271. *See* KAECKENBEECK, *supra* note 132, at 6.

272. *See id.* at 11-12, 25.

273. *See id.* at 25. The Convention also covered the areas of labor organization, the rights of choice of nationality and residence, and economic policy. *See id.*

274. *See id.* at 27.

275. *See id.*

276. *Id.* at 29, 482-83.

277. *See id.* at 29-30.

278. *See id.* at 30.

279. *See id.* at 27.

280. *See id.* at 28.

281. *See id.* at 79.

procedure geared toward conciliation, with ultimate appeal to the Council.<sup>282</sup> The local procedure was often ineffective, however, because considerations of national politics tended to prevent amicable settlements.<sup>283</sup>

After the Nazi electoral victory in March 1933, anti-Jewish measures were extended to German Upper Silesia, and "unofficial actions," such as the boycott of Jewish merchants and professionals, were also instituted.<sup>284</sup> Jews apparently challenged the boycott before the Mixed Commission quite early, because the President of the Mixed Commission issued an opinion, published in the official gazette of the local German government in the spring of 1933, prohibiting the boycott.<sup>285</sup> After the passage of the German statute forbidding the use of kosher slaughter methods, German Jewish Upper Silesians and Polish Jews residing in German Upper Silesia challenged the statute before the Arbitral Tribunal.<sup>286</sup> Through negotiation, the President of the Mixed Commission arranged for a satisfactory settlement, allowing the Arbitral Tribunal not to be forced to make a decision.<sup>287</sup>

Despite the President of the Mixed Commission's declaration that the application of the German anti-Jewish statutes was inconsistent with Germany's obligations under the Geneva Convention,<sup>288</sup> his opinion appears to have been initially frustrated in the German Upper Silesian Courts as well as the Convention organs.<sup>289</sup> Finally, under the direct appeal provision of the Convention, Franz Bernheim, a German Jewish Upper Silesian, petitioned the Council of the League of Nations on May 12, 1933.<sup>290</sup> Although his individual claim for damages was based upon his dismissal from his job under the German anti-Jewish laws, Bernheim's petition also noted the dismissal of Jewish officials, the restrictions on Jewish professionals, and the Nazi boycott of Jewish concerns which had also occurred in Upper Silesia.<sup>291</sup> Germany strongly objected to the petition at the League of Nations,<sup>292</sup> but the Council found the German laws and administrative actions at issue violated the Geneva Convention.<sup>293</sup> In early June 1933, Germany agreed to suspend

282. *See id.* at 230. Under the local procedure, a petition was first sent to a Minorities Office, one of which existed in each part of the plebiscite territory. If the office could not satisfy the petitioner, the petition was then sent to the Mixed Commission. The President then issued an opinion which was forwarded by the responsible Minorities Office to the competent authorities. The Minorities Office would then inform the President of the Mixed Commission of the respective government's decision whether to take his opinion into account. If the government's action was unsatisfactory to the petitioner, the petitioner could then appeal to the League of Nations' Council. *See id.*

283. *See id.* at 231.

284. *See Reich Retreat On Silesian Jews*, N.Y. TIMES, May 22, 1933, at 9.

285. KAECKENBEECK, *supra* note 132, at 359-60.

286. *See id.* at 79 n.1.

287. *See id.*

288. *See id.*; *Reich Retreat On Silesian Jews*, N.Y. TIMES, May 22, 1933, at 9.

289. *See* KAECKENBEECK, *supra* note 132, at 266.

290. *See id.* at 262; *Treatment Of Jews In Upper Silesia: Petition To League Council*, TIMES (London), May 22, 1933, at 13.

291. *See* KAECKENBEECK, *supra* note 132, at 262.

292. *See* Clarence Streit, *Nazi Regime Yields on Jews in Silesia; will Modify Laws*, N.Y. TIMES, Jun. 7, 1933, at 1.

293. *See* KAECKENBEECK, *supra* note 132, at 266.

those laws in conflict with the Geneva Convention.<sup>294</sup> Bernheim's petition was then referred back to the local minority procedure, where a settlement was reached with his former employer.<sup>295</sup>

On the basis of the Bernheim case, many cases brought before the Mixed Commission by former Jewish employees, officials and professionals who had been dismissed on the basis of anti-Jewish statutes were settled in a similar fashion through the local procedure.<sup>296</sup> While public officials and private employees generally were unable to secure reinstatement, four of the lawyers and eleven of the doctors who applied to the Mixed Commission were allowed to practice again.<sup>297</sup> At least forty-nine petitions were filed with the Mixed Commission by Jews challenging the administrative actions of individual officials as discriminatory, but because of the difficulty involved in proving this sort of discrimination, these petitions were largely unsuccessful.<sup>298</sup> Jewish litigants did enjoy some degree of success in stopping the libelous attacks of the Nazi media, however. In February 1934, Jewish Upper Silesians brought a petition before the Mixed Commission protesting the distribution of *Der Stuermer*. On the basis of an opinion by the President of the Mixed Commission finding favorably for the petitioners, the local representative of the German government prohibited the distribution of the newspaper throughout German Upper Silesia.<sup>299</sup> Although this was a decision of a mediative body rather than a court, it is evidence of the continuing application of traditional normative concepts of law in the League of Nations system in Upper Silesia.<sup>300</sup>

Upon expiration of the Geneva Convention on July 15, 1937, all German laws, including the Civil Service Law, the Bar Admission Law, and by this time, the Nuremberg Laws, were put into force in Upper Silesia. All Jewish officials, non-exempt lawyers, and notaries were retired by August 31, 1937, and all such *Mischlinge* were retired by December 31, 1937.<sup>301</sup>

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294. See Streit, *supra* note 292. Despite this official undertaking by Germany, it was not until August 8, 1934, that the German government representative in Upper Silesia issued a proclamation in its official gazette that all laws and orders promulgated after April 1, 1933 and all future anti-Jewish laws would be invalid in Upper Silesia. See KAECKENBEECK, *supra* note 132, at 252.

295. See KAECKENBEECK, *supra* note 132, at 266. The German Minorities Office found that Bernheim had been dismissed from his job with a private firm because of his "communistic tendencies" and the poor quality of his work, not because of any official action by the German authorities. Bernheim's former employer, however, settled the matter for 1,600 marks. See *id.*

296. See *id.*

297. See *id.* at 266 n.2. The majority of the cases were settled by some sort of payment to the petitioners. See *id.*

298. See *id.* at 253, 253 nn.1-7.

299. See *id.* at 359-60.

300. This decision must be considered in context of the Bernheim case, however. The finding that Bernheim had been dismissed because of his "communistic tendencies" rather than because he was Jewish is arguably pretextual.

301. See *Reich Anti-Jewish Laws Extended To Silesia*, N.Y. TIMES, Jul. 4, 1937, at 16. Of the 9,228 Jewish inhabitants of German Upper Silesia in 1933 (0.7 percent of the population), approximately 7,700 remained in the region by the end of 1936. See TEN-YEAR WAR, *supra* note 224, at 37-39.

## C. Danzig

Under the Treaty of Versailles, the Prussian port city of Danzig was separated from Germany and made a free city.<sup>302</sup> Although Danzig was much like a sovereign state in many ways,<sup>303</sup> its special relationships with Poland and the League of Nations limited the scope of its international authority and independence. Poland was given formal control of Danzig's foreign affairs, it shared authority with the Free City over administration of the harbor, and it had actual control over the railroad system.<sup>304</sup> The League was represented in Danzig by a high commissioner, through whom governments and private bodies could appeal to the Council of the League of Nations for redress.<sup>305</sup> Although Danzig's constitution could be amended by a two-thirds majority vote of its legislature, the *Volkstag*, such amendments could only go into effect after having been approved by the League of Nations.<sup>306</sup>

The Great Depression's effects on Danzig were exacerbated by an on-going trade war with Poland.<sup>307</sup> Coupled with the strong anti-Polish sentiment of the primarily German population, the economic crisis provided the impetus for the Danzig Nazi Party's rise to power. In the *Volkstag* elections of May 28, 1933, the Danzig Nazi Party received slightly over fifty percent of the popular vote, and a corresponding absolute majority in the *Volkstag*.<sup>308</sup> Although the Danzig Nazi government at first only enacted discriminatory legislation against Jews which did not violate the letter of the constitution,<sup>309</sup> The *Danzig* Nazi Party unofficially did not hesitate to attack minority Danzigers, such as by commencing a boycott of Jewish commerce and harassing the Polish population.<sup>310</sup>

In 1935, through the high commissioner, the Jewish community presented the League of Nations Council with two petitions concerning the discriminatory acts of the Danzig Nazi Party and the government.<sup>311</sup> The petitions specifically challenged the anti-Jewish boycott, the dismissal of Jewish civil servants, the forced dismissal of Jewish employees, and new legislation which restricted the entry of Jews into the various professional organizations.<sup>312</sup> A committee of jurists ap-

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302. See HERBERT S. LEVINE, *HITLER'S FREE CITY: A HISTORY OF THE NAZI PARTY IN DANZIG, 1925-39* 10 (1973).

303. See *id.* at 3.

304. See HANS L. LEONHARDT, *NAZI CONQUEST OF DANZIG* 23 (1942).

305. See *id.* at 26. The High Commissioner could render formal decisions in cases involving Danzig and Poland. When constitutional issues were raised by private bodies, the High Commissioner could "deal with them upon their merits as sources of information on the situation in Danzig;" and within his discretion, could refer the more serious matters to the League of Nations Council. See *id.* at 29.

306. See *id.* at 57.

307. See LEVINE, *supra* note 301, at 13, 65-66.

308. See *id.* at 54.

309. See *id.* at 67; see also TEN-YEAR WAR, *supra* note 225, at 41.

310. See LEVINE, *supra* note 301, at 64-65. The Jewish population of Danzig in 1929 was approximately 10,500. See *id.* at 127.

311. See *id.* at 133. Many petitions were brought before the High Commissioner, but because he functioned primarily as an arbitrator, results were usually sought at the local level, and not all petitions were forwarded to the League of Nations. See *id.* at 109.

312. See LEONHARDT, *supra* note 303, at 149.



pointed to study the petitions found several aspects of the Danzig government actions and new legislation to be contrary to the Danzig constitution, but their findings were basically ignored by the Danzig government.<sup>313</sup> For example, the regulations governing the civil service, the judiciary, and the bar were amended to not specifically bar Jews, but candidates were required to be acceptable "with regard to [their] personality."<sup>314</sup> This obvious pretextual device shows that a person's Jewishness was already the most significant factor in determining whether one would receive the benefit of traditional normative concepts of law at this point. In this sense, the state of the law in Danzig was quite similar to that of the Third Reich by 1935.

The record of the German Jewish legal response to Nazi persecution in Danzig courts is not well documented in English, but does not appear to have been any more successful than in Germany proper. For example, in 1936 the Danzig Supreme Court dismissed a suit brought by Jewish litigants to remove anti-Jewish posters in public places. The Court held that the complaint failed to show a violation of the Jews' rights, and that the anti-Jewish boycott was legitimate because it was the policy of the ruling Danzig Nazi Party. The plaintiffs' subsequent protest to the League of Nations was apparently unsuccessful.<sup>315</sup>

While practical economic considerations<sup>316</sup> and the League's influence in Danzig delayed the promulgation of severe anti-Jewish laws for a significant length of time, the Danzig Nazi Party was finally strong enough in 1938 to introduce legislation patterned after the Nuremberg Laws.<sup>317</sup> In the face of ever-increasing discrimination, the majority of Jewish Danzigers emigrated, and only about 1,700 remained in the Free City when it was militarized by units of the German Army and the Danzig SS Home Defense Force on September 1, 1939.<sup>318</sup>

#### D. Summary and Evaluation

The three separate and different international court and mediative systems established in the respective League of Nations enclaves led to very different results for the Jewish litigants who brought cases before them. In Danzig, the mediative role of the high commissioner and the absence of international fora to which the Jews could easily appeal caused Jewish litigants to experience a pattern of results quite similar to that experienced in the Third Reich. In Upper Silesia, where the League commission and tribunal process was buttressed by the Geneva Convention between Germany and Poland, Jewish litigants fared better than in Ger-

313. *See id.* at 201.

314. TEN-YEAR WAR, *supra* note 225, at 42. Interestingly, although they had been transferred to less important courts after the Danzig Nazi Party came to power, two Jewish judges remained on the bench until 1937, when they were persuaded to resign. *See* LEONHARDT, *supra* note 303, at 325.

315. *See Danzig Court Backs Boycotting of Jews*, N.Y. TIMES, Aug. 5, 1936, at 7.

316. One petition to the High Commissioner in 1935 concerned anti-Jewish demonstrations by Danzig and German Nazis, and an organized attack on Polish Jewish merchants at a trade fair. The demonstrations stopped after Danzig tourism officials asked the German Foreign Office to exert pressure through the German Nazi Party upon Danzig Nazi officials. *See* LEVINE, *supra* note 301, at 129.

317. *See* LEVINE, *supra* note 301, at 129-33.

318. *See id.* at 138, 150.

many proper or in Danzig. Further, the quick resort to the League of Nations appeal process in the *Bernheim* case<sup>319</sup> appears to have had a positive systemic impact on German participation and acquiescence in the commission and tribunal processes. However, both the German and the Polish members of the commission and tribunal systems displayed intransigence throughout the life of the League regime based upon concerns of national interest and mutual antagonism rather than the merits of the cases before them. Most important, the fact that the League system was set to expire at a definite point in time had an impact upon the Jews' legal response to Nazi persecution.

Of the three systems, the regime established in the Saar afforded Jewish litigants the best chance for a meaningful legal response, albeit for a limited time. First, in concert with the governing commission, the court system was given effective enforcement power, unlike the system in Upper Silesia which required the often reluctant cooperation of the national administrative organs of the two member states to effectuate its decisions. Second, even though the court system would encourage mediation between the parties before it, it did not rely upon mediation to the extent that the Upper Silesian system did to come to a decision. Third, the international character of its personnel ensured disinterested adjudication of cases before it under traditional concepts of normative law. Finally, the judicial rigor of the League court system appeared to have an impact on local Nazi officials' actions, encouraging them to settle matters with possible litigants so that cases would not come before the courts. As in Upper Silesia, however, the limited life of the court system was a glaring, although politically unavoidable, defect.

#### V. CONCLUSION

It is still too early to tell what the eventual impacts of the Yugoslavian and Rwandan International Criminal Tribunals will be, to say nothing of the nascent International Criminal Court. Advocates of the tribunals recognize that, as criminal courts, the tribunals' most likely effect on the enforcement of human rights is that of deterrence.<sup>320</sup> Grant Niemann, lead prosecutor before the Yugoslavian International Criminal Tribunal in its first case, that of Dusko Tadic, has stated, "deterrence has a better chance of working with these kinds of crimes than it does with ordinary domestic crimes because the people who commit these acts are not hardened criminals; they're politicians or leaders of the community that have up until now been law abiding people."<sup>321</sup> Unfortunately, even a quick review of genocide in this century suggests that by the time a situation has reached the point

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319. See *supra* note 291 and accompanying text.

320. See SCHARF, *supra* note 25, at 218-19. Successful prosecutions may also bring a sense of closure to the victims of these crimes. See Sara Darehshori, *Inching Toward Justice in Rwanda*, N.Y. TIMES, Sep. 8, 1998, at A29.

321. SCHARF, *supra* note 25, at 219. Yugoslavia's violent oppression of its ethnic Albanian population in Kosovo, despite the International Criminal Tribunal's continuing jurisdiction, suggests that even direct deterrence may have a limited impact on whether crimes against humanity are commissioned. See *The International Criminal Tribunal for the Former Yugoslavia, The Prosecutor of the Tribunal v. Milosevic et al.* (visited June 3, 1999) <<http://www.un.org/icty/indictment/english/24-05-99milo.htm>>; see Jane Perlez, *War Crimes Panel Seeks A Way For Kosovo Survivor To Testify*, N.Y. TIMES, Oct. 1, 1998, at 1.

where an oppressor is considering such extraordinary measures as extermination of a targeted group, the oppressor's decision making process may not give such deterrence much weight.

Although it did not prevent the Holocaust, nor was it intended to, a review of the German Jews' legal response to Nazi persecution suggests that if there is a time in the genocide process where legal means are most likely to have an impact in preventing genocide, it is during the isolation, concentration, and expropriation stages. As the German Federal Supreme Court noted in 1959 in upholding the seizure of an anti-Jewish writing to be valid:

When the legislature . . . expressly and especially protected the prohibition of arbitrary acts as a constitutional principle, it proceeded from the experience with the crimes of the National Socialist violent and arbitrary dominance. . . . But it is necessary to counteract even the beginning of such occurrences, before new racial persecutions, in which violence and despotism appear under the guise of a law or an administrative act, again poison public life.<sup>322</sup>

Given the scope of the International Criminal Court's jurisdiction, it is not likely to have the opportunity to address the impact of violative legislation or acts immediately, as the modern German Supreme Court has found necessary to effectively stop the precursors of genocide in Germany. By the time criminal offenses are likely to be adjudicated by the court, the extermination phase of the genocidal process has probably already begun. This does not mean that an international judicial regime would be without positive effect, however. As the experiences of Jewish litigants in the League of Nations' court and mediative systems in the Saar, Upper Silesia, and Danzig demonstrate, international tribunals can be very useful in protecting human rights. Relatively uninfluenced by local politics or the procedures in the local courts, the international staffs of the League courts in the Saar continued to effectively apply the law according to normative standards up until the time they ceased operation. Importantly, the League court and mediative systems did cease operation; for then, as now, considerations of national sovereignty usually restrict quite strongly the lives and jurisdictions of international or multinational courts and mediative bodies. Over time, widespread acceptance of the principles contained in agreements like the European Convention could generate norms in international law which transcend notions of national sovereignty with regard to human rights.<sup>323</sup> Based upon the extensive participation of practically the entire international community in the negotiations leading up to the creation of the International Criminal Court, and its acceptance by most of the participating countries, it is fair to say that the court represents a realization of this trend.

As shown by the German Jews' legal response to Nazi persecution, however, the erosion of a targeted groups' rights can be very gradual and non-criminal in a traditional sense. Nonetheless, such an erosion can have increasing systemic impacts within a legal system over time, and can make it easier for the next round of discriminatory measures to occur. By the time a criminal court, particularly an extraterritorial international criminal court, could have jurisdiction over a case of an individual accused of committing genocide, it may simply be too late. If comple-

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322. Stein, *supra* note 11, at 321 n.173.

323. See Hauer v. Land Rheinland-Pfalz, 1979 E. Comm. Ct. J. Rep. 3727, 3744-45.

mented by more standing international bodies that mediate, and if necessary, adjudicate, cases of discrimination that do not rise to the level of international crimes,<sup>324</sup> as well as by enforcement mechanisms to bring defendants before it when international crimes do occur,<sup>325</sup> the International Criminal Court would stand a better chance of playing an effective part in the enforcement of human rights.

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324. See *The Alliance's Strategic Concept, Press Communique NAC-S(99)65*, ¶¶ 10, 20, 24, 31, 48 (visited Apr. 27, 1999) <<http://www.USIA.gov/topical/POL/NATO50/Text99042411.htm>>. The new NATO strategic concept formalizing its decision to intervene outside the NATO area when the abuse of human rights and human suffering are having an impact upon the stability of the NATO area of interest is a welcome and significant development in this regard. While the NATO actions in both Bosnia and Kosovo have demonstrated that military force is a very effective means to stop an oppressor's genocidal activities, using a military force as a police force to compel a defendant's presence before a criminal tribunal is an expensive and politically complex proposition.

325. See SCHARF, *supra* note 25, at 228.

