

SWITZERLAND AND NATIONAL ANTI-COMMUNIST MEASURES

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Recent decisions of the Supreme Court of the United States have forced people to ask themselves once again the perennial question, "How do democratic nations, while keeping faith with the basic principles of their democratic institutions, cope with subversive organizations whose aim it is to destroy these institutions?" The following article in Comparative Law by an American professor of Constitutional Law who has lived for a considerable period in Switzerland and in France may cast some light on this difficult question.

In the 1930's Switzerland manifested increasing fear and alarm in the face of the spectre of Communism. In reacting to this menace, the tiny Republic proved that neither its tradition of neutrality nor its spirit of democracy were obstacles to the taking of the most uncompromising steps to curb the Communists and all their works and pomps.

The long list of measures adopted by the National Government were all in the form of executive decrees issued by the Federal Council, Switzerland's collegiate Executive consisting of seven members.¹ It is highly interesting to note, that the Swiss National Legislature itself has passed no specific anti-communist laws. In 1927 and in 1939 it delegated extensive powers in the general area to the Federal Council in two pieces of broad legislation which, however, made no explicit mention of Communism itself. The pertinent part of the law of June 30, 1927 reads as follows:

'It is forbidden to civil servants to have a part in an association which promotes or utilizes the strike of civil servants, or which, otherwise, pursues goals or employs means illicit or dangerous for the state.'²

The application of this interdiction was put under the exclusive jurisdiction of the Federal Council according to article 13 of the law. It was this law of June 30, 1927 which formed the legal basis for the first measure against Communism taken by the Federal Council on December 2, 1932. It read thus:

The Federal Council ascertains that the Communist Party of Switzerland falls within the scope of Article 13, paragraph 2 of the law concerning the ordinance of civil servants. In consequence, it is forbidden to all civil servants, employees and workers of the Confederation to belong to the Communist Party or to participate in a communistic organization.³

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1. The Federal Council is chosen for a four year term by the bicameral legislature.

2. 43 *Recueil Officiel des Lois et Ordonnances Federales* [hereinafter cited as R.O.] 459, 462 (1927).

3. 48 R.O. 800 (1932).

Article 3 of the executive decree stipulated that those functionaries and employees of the Confederation who had not broken their ties with the Communist organization were to be dropped from the service.

This initial step taken against Communism was followed four years later, on February 16, 1937, by a supplementary order of the Federal Council which listed a series of associations judged to be communistic.^{3a} The list contained, amongst others, *Les Amis de l'Union Sovietique* et *Le Secours Rouge International*. Civil servants who were touched by this provision and who still wanted to remain in the government's service, were given fourteen days to sever relations with the Communist organizations. In addition it was necessary for them to make a written promise that they would abstain in the future from participating openly or secretly in such organizations.

Three months earlier, on November 3, 1936, the Swiss Executive voted a measure aimed at communistic propaganda. It read thus:

Article 1. The Public Minister of the Confederation is entrusted, in association with the customs authorities and the administration of the post office, telegraph and telephone, with the duty of confiscating all the newspapers, writings and other material of propaganda imported into Switzerland which present a communistic, anarchistic, antimilitaristic or antireligious character.

Article 2. Every political activity is forbidden to the organization called "*Secours Rouge Suisse, section du Secours Rouge International*." . . . The agents of *Secours Rouge* are obliged to give all information demanded and to produce documents relative to the activity of the organization. The Federal Council will dissolve the "*Secours Rouge*" if the information is refused, if false information is given or if a political activity or an illegal act is reported.

Article 3. Courses of initiation to communistic propaganda and tactics are forbidden. The police authorities of the Cantons are charged with forbidding or suppressing courses of this kind.

Article 4. Cantonal authorities are to forbid communistic meetings and demonstrations when they are likely to disturb public order or put the country's safety in danger.⁴

In the spring of the next year, on May 27th, 1938, the Federal Council issued a decree "instituting measures against subversive propaganda" which differed little from the one quoted above. Article 1, for instance, said that:

The Public Minister of the Confederation is charged with the duty of seizing all objects brought into Switzerland which are able to serve as communistic, antimilitaristic or antireligious, or other propaganda, if they are of such a nature as to put in peril the internal or external security of the Confederation, in particular the country's independence and neutrality, democratic institutions or interests of national defense.⁵

3a. 53 R.O. 101 (1937).

4. 52 R.O. 843 (1936).

5. 54 R.O. 249 (1938).

The same article put the confiscation of this propaganda material under the jurisdiction of the Federal Council. Article 2 of the decree stipulated that confiscation would also be made of these materials which were produced in Switzerland itself.

On December 5th, 1938 the Federal Council promulgated an important decree "suppressing acts contrary to public order and instituting measures for the protection of democracy."⁶ Article 1 stipulated that a punishment of imprisonment for one year or a fine of 2,000 francs maximum were to be meted out to the following:

Anyone who shall have undertaken to overthrow or to put in danger in an illegal manner the order established under the constitution of the federation or of a Canton, and anyone who, in particular, shall have fostered foreign propaganda tending to modify the political institutions of Switzerland.⁷

Article 2 of this decree provided a punishment of three months in jail or a fine of 2,000 francs for anyone who "should have interfered with the prohibition against publishing a newspaper banned by the Federal Council, or with measures taken against communistic intrigues or subversive propaganda."

Article 5 authorized the Federal Council "to dissolve the groups or enterprises which endanger the external or internal security of the country, or to limit or forbid their political activity and to confiscate their property." According to article 6, the Federal Council was likewise permitted to take measures against newspapers or periodicals which aided the execution of forbidden acts. Article 7 stated that the Cantons were charged with the obligation of "forbidding demonstrations, in particular meetings and parades where there was reason to assume that there would be an occasion for an infraction of the present decree or for a provocation of such an infraction."

According to article 3 of this order, the suppression of infractions was to be under the jurisdiction of the Federal Penal Authority. However, the Federal Department of Justice and of the Police was permitted to delegate investigations and the power of decision to the cantonal authorities.

On the eve of the Second World War, August 30, 1939, the Federal Assembly conferred very extensive powers upon the Federal Council by an order "concerning measures proper to assure the security of the country and the maintenance of its neutrality."⁸ Resting upon the authority thus granted, the Federal Council promulgated a number of diverse decrees directed against the Communist menace.

On December 4th, 1939, it issued an executive order "forbidding in the army propaganda contrary to the public order."⁹ It forbade "the manufac-

6. 54 R.O. 880 (1938).

7. *Id.* at 881. The 2,000 franc fine is approximately \$460.

8. 55 R.O. 781 (1939).

9. 55 R.O. 1509 (1939).

ture, the delivery, the sending or the distribution of propaganda material dangerous for the state, and the formation of associations (cells etc.) having as their aim subversive propaganda."¹⁰

In the year following, August 16, 1940, the Federal Council handed down another executive decree "instituting measures contrary to Communist and Anarchist activity."¹¹ Article 1 read as follows:

It is forbidden to the Communist Party, to auxiliary organizations connected with it or to anarchistic groups or affiliates of the Fourth International (Trotskistes) to exercise any kind of activity. The same prohibition is to be applied to organizations substituted for the parties, movements or groups in which there is a forbidden activity.

According to article 2 of the above decree, the punishment for violation was to be a maximum prison term of three years and a maximum fine of 1,000 francs. The same article stipulated that the punishment could be meted out to "one who, under any form whatsoever, shall have engaged in communistic or anarchistic propaganda, or who shall have promoted such propaganda." In addition foreigners guilty of this offense were to be expelled from the country according to Article 3, and, according to the same article of the decree, Swiss citizens could be deprived of the exercise of their civic rights. Here again it was the Federal Penal Authority which, in general, was given the competency to recognize the infractions envisaged in this decree. However, the federal Department of Justice and Police was authorized in article 4 to delegate the investigation and the decision of the cases to the cantonal authorities.

Up to this date no action taken by the National Government had made the Communist Party illegal in Switzerland. Thus members still able to participate in the government, and, indeed, even to sit with the Legislative and the Executive Council. The decisive step was taken on November 26, 1940 when the Federal Council promulgated a decree "concerning the dissolution of the Communist Party in Switzerland."¹² Article 1 read as follows:

All Communist organizations in Switzerland are dissolved; all their activity is forbidden. The interdiction includes also groups which might be substituted for the dissolved organization. Communists may not be members of a federal, cantonal or communal authority."¹³

The punishments to be applied according to article 2 of the decree of November 26, 1940 were the penalties provided by the decree of August 6, 1940. It was on the basis of this decree that four deputies of the Grand

10. *Ibid.*

11. 56 R.O. 1397 (1940).

12. 56 R.O. 1931 (1940).

13. *Ibid.*

Council of Geneva (State Legislature) were expelled from the cantonal legislative body as being members of the Communist Party.¹⁴

On December 17th, 1940, the Federal Council issued a new decree "assuring the execution of the decree of the Federal Council which concerns the dissolution of the Communist Party in Switzerland."¹⁵ Article 2 of this decree prescribed that "the Federal Public Minister will confiscate the communist writing of any nature whatsoever belonging to the dissolved organizations." Article 3 stipulated that their property would likewise be confiscated. Article 4 read as follows:

The Federal Authorities, Cantonal or Communal, who have Communist members amongst them, will pass upon their expulsion. The Federal Council reserves to itself the power to review the decision of the Cantonal or Communal Authorities."

Several deputies excluded from the Grand Conseil of Bâle-Ville and Geneva by reason of these last two decrees appealed both to the Federal Council and the Federal Tribunal (the Supreme Court of Switzerland), but they received no comfort from either of these two organs of government.¹⁶

The decree of the Federal Council of December 17, 1940, confided to the Federal Department of Justice and Police the task of designating (upon the proposal of the Public Minister of the Confederation) organizations which fell under the ban of the November decree. The same article 1 reserved to the Federal Council the power of determining for itself other organizations to be dissolved.

In executing the authority granted to it, the Federal Department of Justice and Police issued two ordinances "concerning the dissolution of communistic organizations," the first on January 27, 1941,¹⁷ the second on the 5th of September, 1941.¹⁸ Chapters one to three of the January ordinance placed a large number of communistic organizations under the ban, notably: *Le Secours Rouge Suisse*, *Les Amis de l'U.R.S.S.*, *La Jeunesse Socialiste Suisse et ses sections*, in particular the group of socialistic students.

On May 27, 1941, the Federal Council, employing its reserved authority, acted independently of the Department and issued a decree "concerning the dissolution of the Swiss Socialist Federation."¹⁹ Article 1 of this order stipulated that, "given its communistic nature, the Swiss Socialist Federation falls under the ban of the decree of the Federal Council of the 26th

14. See *infra* n. 43 where this case is treated.

15. 56 R.O. 2082 (1940).

16. The records of these appeals have never been printed. The Geneva case was finally disposed of on March 18, 1941. The case of Bale-Ville was completed on October 10, 1941. For a complete account, see Dossier 26090 and Dossier 26259 in Archives, Tribunal Federal Lausanne.

17. 57 R.O. 84 (1941).

18. 57 R.O. 1040 (1941).

19. 57 R.O. 696 (1941).

of November, 1940 concerning the dissolution of the Swiss Communist Party".

This decision put an end to a long and prolonged controversy, and it had wide political repercussions. The Swiss Socialist Federation had detached itself in 1939 from the Swiss Socialist Party, and now counted a fairly large number of adherents in the Cantons of Vaud and Geneva. Many were actually members of the cantonal legislature and four of them had seats in the National Council, the lower house of the federal legislature. Application of the last three decrees of the Federal Council deprived all these deputies of their official positions.

It was on June 11th, 1941 that four national deputies affiliated with the Swiss Socialist Federation were reached by the sharp thrust of these executive orders.²⁰ Before expelling them from the legislative chamber, the National Council gave the four representatives the right to offer a defense. The official report of the proceedings for that day make highly interesting reading. The accused not only protested the application of the expulsion order to themselves, but they questioned the very constitutionality of the diverse decrees of the Federal Council against communist groups.

Speakers contended that the "equality before the law" clause of article 4 of the Constitution²¹ was infringed by bans and restrictions aimed at particular groups only.²² They also argued²³ that the decrees of the Federal Council had breached the right of association guaranteed by article 56.²⁴ Even liberty of conscience, enshrined in article 49, was invoked by the socialist members to forestall the application of the expulsion order.²⁵ Article 36 of the Constitution states that "the postal and telegraph service belongs under the federal domain." The same article states that, "The inviolability of the secrecy of letters and of telegrams is guaranteed." It was argued that this sacred guarantee had been trampled underfoot by government agents probing into political organizations.²⁶

Turning to their own cantonal Constitution,²⁷ the deputies from Geneva protested that the government's decrees ignored liberty of the press²⁸ and the guarantee against confiscation of the property of accused persons.²⁹

20. BULLETIN STENOGRAPHIQUE OFFICIEL DE L'ASSEMBLEE FEDERALE 171 (1941).

21. "Tous les Suisses sont egaux devant la loi. Il n'y a en Suisse ni sujets, ni privileges de lieu, de naissance, de personnes ou de familles."

22. *Supra* n. 20, at 172.

23. *Ibid.*

24. "Les citoyens ont le droit de former des associations, pourvu qu'ils n'ait dans le but de ces associations ou dans les moyens qu'elles emploient rien d'illicite or de dangereux pour l'Etat. Les lois cantonales statuent les mesures necessaires a la repression des abus."

25. "La liberte de conscience et de croyance est inviolable." The rest of article 49 speaks of specific religious guarantees. Note that the decrees of the Federal Council had banned "communitistic" and "antireligious" propaganda. *Supra* nn. 4, 5.

26. *Supra* n. 20, at 17.

27. *Ibid.*

28. "La liberte de la presse est consacree." CONSTITUTION OF THE CANTON OF GENEVA art. VIII.

29. "La Confiscation generale des biens ne peut etre etablie; Le sequestre des accuses et condamnes contumaces ne peut avoir lieu."

Enlarging on the latter point, one of the Socialists complained of a constitutional violation whereby "many little people" who had invested in a print shop now lost all their savings.³⁰ Article 5 of the executive decree of December 5, 1938 and article 3 of that for December 17, 1940 both provided for such confiscation of outlawed organizations.³¹

The aggrieved Socialists also had hard words for what they termed the "*dossier secret*" which had formed the basis for the decision to expel them from the National Council.³² They contended that it contained lies and misrepresentations of a disgruntled and vindictive aspirant to the Swiss Socialist Federation whom the Party had rejected.³³

In a final maneuver to parry the thrust of the Council's expulsion order, the Socialist deputy appealed to the political prudence of his fellow legislators. "Given our diplomatic ties with Russia," the various anti-communist decrees constituted "*une supreme inelegance!*"³⁴

All the above appeals fell on deaf ears. By an overwhelming vote of 138 to 3, the determined deputies decided to deprive the four members of the Swiss Socialist Federation of their seats in the National Council.³⁵

All the above anti-communist measures were taken by executive decree; however the Swiss Penal Code also contains provisions clearly aimed at the Communist menace. Finally the Code was put into effect in 1942, after being accepted by popular vote of the Swiss people. Title 13 of book 2 is entitled "Crimes and Misdemeanours against the State and the National Defense." Many of the provisions therein contained were undoubtedly inspired by fear of Communist activity. Article 265, for instance, reads as follows:

He who shall have committed an act tending to modify by violence the federal constitution or the constitution of a canton or to overthrow by violence the legal authorities established under the constitution, or to make the exercise of their power impossible, . . . will be punished by seclusion or by imprisonment for one to five years.³⁶

The decrees and ordinances discussed above constituted the legal weapons which the National Government had at its disposal to defend the country against the Communist menace.³⁷ The arsenal was fairly well stocked by 1939, but upon the outbreak of World War II, and for two years thereafter, the Federal Council made additions to its legal stockpile of arms.

Some have contended³⁸ that the Federal Assembly's grant, in September 1939, of emergency powers to the Federal Council and their actual use by

30. *Supra* n. 20 at 174.

31. *Supra* nn. 6, 15.

32. *Supra* n. 20, at 174.

33. *Id.* at 175.

34. *Id.* at 176.

35. *Id.* at 178.

36. CODE PENAL SUISSE 265 (edition Romande, 1942).

37. The Cantons also passed similar anti-communist laws. *Infra* n. 71.

38. HUGHES, THE FEDERAL CONSTITUTION OF SWITZERLAND 169 (1954).

the latter body were unconstitutional. Such critics argue that the Constitution was violated by the exercise of cantonal powers by the central government, that the Assembly unconstitutionally delegated legislative powers to the Executive, and that constitutional rights of citizens were suspended.³⁹

Whatever substance there may be to these charges, it is safe to say that no ruling on the matter will ever be made by the Supreme Court of Switzerland. The Federal Tribunal has no power to review acts of the Legislature.⁴⁰ Hence, the Federal Assembly is the sole judge of its constitutional right to delegate authority to the Executive. Article 113 of the Constitution, after treating the court's jurisdiction, says that, "In all the aforementioned cases, the Federal Tribunal will apply the laws voted by the Federal Tribunal and the decrees of this assembly which have a general aim." Hence the court *applies* federal law, and it does not *question* it.

As for acts of the Executive, it is possible that they could be challenged by the Federal Tribunal, but this is not likely.⁴¹ In 1941, the court was asked to review a case involving alleged violations of constitutional rights of citizens by cantonal authorities acting as charged by an executive decree.⁴² The judges professed lack of jurisdiction,⁴³ observing that the decree stated that, "The Federal Council reserves to itself the revision of cantonal and communal authorities."⁴⁴

Whatever may be the correct judgment on the constitutional point here raised, no one can misread the mind of the Swiss federal authorities on the subject of Communism. During World War II and the years immediately preceding, they viewed it as a monstrous menace and with grim determination addressed themselves to the task of preventing a communistic avalanche of the tiny Republic.

On February 27, 1945, when the outcome of the world-wide conflict was no longer in doubt, the Federal Council began to modify some of the strictures placed upon the Communists by prior executive decrees.⁴⁵ On August 8, 1945, as the last defenses of Germany crumbled before the allied onslaught, the Federal Council dismantled more of the heavy machinery that it had employed during the war years to combat the Communist threat.⁴⁶

It would seem that Switzerland laid to rest most of its specific anti-communist measures as soon as the war came to an end in order to help foster the era of good feeling which all people so devoutly hoped would dawn upon the termination of the world-wide conflict. However there still re-

39. *Ibid.*

40. CODDING, *THE FEDERAL GOVERNMENT OF SWITZERLAND* 110 (1961).

41. *Supra* n. 38, at 124.

42. *Supra* n. 16.

43. *Ibid.*

44. *Supra* nn. 15, 16. For an authoritative treatment of the power of the Swiss Executive in these matters, see GIACOMETTI, *SCHWEIZERISCHES BUNDERSTAATSRECHT* 135-138 (1949).

45. 61 R.O. 111 (1945). The decree abrogated a series of previous anti-communist measures, notably the order dissolving the Party.

46. 1 RECUEIL SYSTEMATIQUE DES LOIS ET ORDONNES, 1848-1947 82.

mains a considerable number of general prescriptions of subversive groups or groups tending to endanger the domestic or the external safety of Switzerland. Thus if the peril had ever again become imminent, Switzerland would have been sufficiently armed to assume a strong posture of defense.

As a matter of fact, Switzerland actually appears to have strengthened its legal defenses against Communism as soon as it became apparent that Russia was determined to continue its domination of Eastern Europe and to spread its influence as far west as possible. In 1947, when the gloom of disillusionment was deepest, the Federal Council issued a decree,⁴⁷ which, while not mentioning Communism specifically, must surely have been inspired by threats from this source. The decree reads thus:

Article 1. He who shall have committed an act tending to modify or to put in danger in an illicit manner the order founded upon the Constitution of the federation or of a Canton, [and] he who shall have engaged in propaganda tending to modify or to endanger in an illicit manner the order founded upon the Constitution of the Confederation or of a Canton . . . will be punished with imprisonment for three years maximum and a fine of 10,000 francs maximum.

The punishments provided by this decree are surprisingly severe when compared with those contained in the executive order of December 5, 1938 aimed at "propaganda tending to modify the political institutions of Switzerland."⁴⁸ For such acts the 1938 decree provided a year in prison and a 2,000 franc fine.⁴⁹

The remaining articles of the 1947 decree read thus:

Article 2. He who, publicly, in an offensive and repeated manner, shall have disparaged the political institutions of the Confederation or of the Cantons, in particular the democratic principles or those which are at their base . . . will be punished with one year imprisonment and a fine of 5,000 francs.

Article 3. He who shall have acted against the rules established by the federal authorities on the subject of foreign political groups, will be punished with six months imprisonment and a fine of 5,000 francs.⁵⁰

Article 4 provides for a "deprivation of civic rights for one to five years if the offense indicates a base character or if it constitutes a particular serious attack at the Constitutional order."⁵¹

On October 29, 1948, the Federal Council issued another decree "re-enforcing the penal provisions for the protection of the state."⁵² Article 1 was aimed at anyone "who shall have established relations with . . . a foreign

47. 63, R.O. 139 (1947).

48. *Supra* n. 7.

49. *Ibid.* Inflated prices alone can hardly explain the increase in fine from \$460 to \$2,500 (approximately).

50. *Supra* n. 47.

51. *Ibid.*

52. 64 R.O. 1063 (1948).

state or with its agents for the purpose of provoking a war against the Confederation."⁵³ The same article stated that the judge "will be permitted to pronounce reclusion for life" against offenders. Article 2 reads as follows:

He who, for the purpose of supporting enterprises or political intrigues from abroad against Switzerland, shall have entered into relations with a foreign state, or with foreign parties or with other organizations from abroad, or with their agents, will be punished to five years imprisonment"⁵⁴

Communism is not mentioned in these decrees, but one does not need any unusual power of clairvoyance to decide what motivated the Federal Council in its 1947 and 1948 orders. Prudence, perhaps, dictated the omission of a word that might have compromised Switzerland's neutrality and embarrassed the efforts of the western powers to find some kind of accommodation with the new power from the east. But the legal weapon provided by the decrees is as sharp as ever. Thus, although the Communist Party is no longer illegal, the Swiss government seems determined to continue its careful surveillance of any of its activities that could endanger the country's political institutions.

A word should be added about the position of the Federal Tribunal. As mentioned above,⁵⁵ the Supreme Court of Switzerland does not enjoy the power of judicial review of the laws passed by the National Legislature. It would seem to enjoy some right to control acts of the Executive,⁵⁶ but it has never questioned an executive action taken as an exercise of emergency powers delegated by the National Assembly.⁵⁷ In the case discussed above,⁵⁸ the court had an opportunity to review some of the constitutional issues raised by the application of an executive decree, but the Tribunal disavowed any jurisdiction in the matter.

The Federal Tribunal did, however, speak its mind on the Communist threat and on the government's program to control Communist machinations. It did this through the mouth of the criminal division of the court which heard the cases of several persons prosecuted by the Public Minister of the Confederation for violating executive decrees.

On the first of February, 1943 a group of Communists were prosecuted

53. *Ibid.*

54. *Ibid.*

55. *Supra* n. 40. In 1939 an initiative was presented which would have amended the Constitution and invested the court with this power, but the people defeated the proposal by an overwhelming vote. 1 *FEUILLE FEDERALE* 161 (1939). Hence article 113, paragraph 3, remains as before and enjoins the Tribunal to "apply laws voted by the Federal Assembly".

56. *Supra* n. 41.

57. *Ibid.*

58. *Supra* n. 16. For the constitutional issues urged by appellants, see matter discussed in text, *supra* nn. 20-23. In this case, the Tribunal, while disclaiming any right to review the case itself, wrote an "advisory opinion" urging the Federal Council to do so. The Council agreed, but was not obligated to follow this advise. *Supra* n. 16.

before the Federal Tribunal⁵⁹ for violating a decree of August 6, 1940, forbidding the Party to engage in "any kind of activity whatsoever."⁶⁰ The court included in its opinion an extensive review of material to prove the essential evil of the Communist movement and the peril which it presented to Switzerland.⁶¹ It referred to Communist literature and to statements made by federal authorities concerning the ends and the means used by Communists in their pursuit of revolution by violence.⁶² Quoting with approval an official statement of the Federal Council, the court observed that this body "finds 'that the Communist Party of Switzerland depends, in its goals and its organization, upon an international committee . . . which obliges . . . the national parties to promote in all countries revolution by violence in order to establish the dictatorship of the proletariat.' "⁶³

The judges underscored that part of the decree of August 6, 1940 which forbade "every activity" of the Communist Party.⁶⁴ Thus, since the interdiction clearly extended to brochures and other printed works, the Court found all the accused guilty as charged.⁶⁵

On March 18th, 1943 the federal Public Minister was again successful in prosecuting a group of Communists for violating the same decree. In its opinion, the court observed, amongst other things, that the Public Minister was fully within his rights in confiscating the books of the accused Communists.⁶⁶

The case of June 16, 1944 is highly interesting for what the court had to say about the clear and present danger presented by the Communist menace.⁶⁷ In finding the accused guilty as charged, the judges said:

X is accused of an attack against the independence of the Confederation Article 37 and Article 266 of the Swiss Penal Code forbids putting in danger this independence. The notion of danger does not assume that the author brings immediate harm to the good protected; it suffices that, after the ordinary course of events, the situation created tends, with or without the assistance of the authors, to develop up to the point where it involves such harm In making use of the expression "tending to bring harm to the independence of the Confederation, or to endanger this independence," the law also meant to curb those preparatory acts, insofar as they are apt, according to experienced judgment, to produce in a future more or less near, one or another of these results. Members of extreme political groups, for example, will be held culpable of acts of this nature who, being in connection

59. *Ministre public de la Confédération contre Hofman*, 69 *Arrets du Tribunal Federal* [hereinafter cited as *A.F.T.*] IV, 12, (1945).

60. *Supra* n. 15.

61. *Supra* n. 59, at 19.

62. *Supra* n. 59, at 20.

63. *Ibid.*

64. *Ibid.*

65. *Id.* at 29-30.

66. *Ministre public federal contre Seiler, Inanen Seiger et Neuf coaccuses*, 69 *A.T.F.* I, 30 (1943).

67. *Ministre public de la Confédération contre X et coaccuses* 70 *A.T.F.* IV, 139 (1944).

with world organizations having the same tendency, should have received from them instructions or money, in view of or in the chance of producing in Switzerland the will throughout the country for a change of the constitutional order.⁶⁸

The final words of the above citation are extremely strong. The court softened them considerably later on in its opinion when it said that "they act in an illicit manner, when they try to change the constitution by other means than those provided for in the constitution itself and notably through violence."⁶⁹

The above decisions do not, of course, constitute an endorsement by the Federal Tribunal of all the Government's anti-communist program. They are, however, highly indicative. It is also pertinent to note that the division of Public Law of the Court (which reviews cases from Cantons involving cantonal laws and rights of citizens) did uphold state laws very similar to anti-communist measures of the National Government.⁷⁰ One might reasonably conclude, therefore, that this seven-member body would also have given its approval to the executive decrees, if Swiss law provided for judicial review.⁷¹

In spite of what has been said above, it would be incorrect to assume that no restraining hand could be laid upon the Executive's shoulder in its exercise of emergency powers. On August 30, 1939, the Federal Assembly did, indeed, invest the Federal Council with most extraordinary authority; but at the same time, it stated clearly that the ultimate decision was to rest in its own hands. The following words of the legislative order of that year testify to both of these points:

Article 3. The Federal Assembly grants to the Federal Council the power and the duty to take the measures necessary to maintain the security, independence, and neutrality of Switzerland, to safeguard the credit and economic interests of the country, and to secure its supply of food.

Article 4. The credits necessary for this purpose are granted to the Federal Council. In addition the power is granted to the Federal Council to contract the necessary loans.

Article 5. The Federal Council shall furnish the Assembly at its July and December sessions with a report upon the measures it has taken in pursuance of the present order.

68. *Id.* at 141-142.

69. *Id.* at 144.

70. 65 A.T.F. 236 (1939); 63 A.T.F. I, 281. The author cited above, *supra* n. 38, contends that the executive decrees issued under the "emergency powers" grant was unconstitutional, partly, because they suspended the constitutional rights of citizens. Presumably he would make the same charge as respects some of the measures taken by the Cantons, in spite of the fact that the Federal Tribunal upheld these laws in every case presented to it for review except in an early 1932 case. For this latter decision, see Humbert-Droz contre Conseil d'Etat neuchatelois, 58 A.T.F. I, 84 (1932).

71. The 28 judges of the Tribunal never sit as a body to decide cases.

For a discussion of the decisions of this tribunal in cases involving anti-communist laws of the Cantons, see the author's article, *Anti-Communist Laws in the Swiss States* (publication pending).

It is for the Federal Assembly to decide whether such measures shall continue in force.⁷²

In accordance with these provisions, the Legislature passed a resolution on December 6, 1945 restricting the emergency powers of the Federal Council and calling upon it to abrogate all measures not absolutely necessary.⁷³

Four years later, on September 11, 1949, the people availed themselves of the initiative procedure to amend the Constitution so that both the Executive and the Legislature would henceforth be more closely controlled in their use of emergency powers.⁷⁴ In virtue of this amendment a time limit is now placed on all decrees issued under such powers, and the people are given greater freedom to challenge measures thus taken. The amendment deserves to be quoted in full:

Universally binding Federal decrees which cannot be delayed may be put into immediate operation if the majority of the total number of members in each Council (the two legislative bodies) so resolve: the time for which they are to be in force should be limited.

When a votation is demanded by 30,000 voters or eight cantons, Federal decrees enacted under the emergency procedure shall go out of force from the date on which they were passed by the Federal Assembly unless they are sanctioned by the people before the end of that period. They cannot be re-enacted.

Federal decrees enacted under the urgency procedure which infringe the Constitution must be sanctioned by the People following their adoption by the Federal Assembly. If they are not so sanctioned then they go out of force at the end of this period, and cannot be re-enacted.

This Amendment, read in conjunction with the Assembly's decree of August 30, 1939, indicates that in times of crises, the Legislature can grant complete law-making power to the Executive,⁷⁵ subject to a veto of individual measures by the Assembly. The judiciary is excluded entirely from this framework; the people themselves act as the body competent to resolve constitutional issues by popular vote.

The words of the Amendment, "decrees . . . which infringe the Constitution" ("Les arretes federaux . . . qui derogent a la Constitution"), are somewhat disturbing. Perhaps the highly realistic Swiss are fully aware that in periods of war and at times of like crises, they cannot expect to enjoy all of the ordinary constitutional guarantees. But, if such a state of affairs should come to pass, the Swiss voters themselves are determined to have the final word.

Amendment 89 reflected war-weariness—and wariness—on the part of the Swiss people relative to their government's use of emergency powers

72. *Supra* n. 8.

73. *Supra* n. 38, at 171.

74. I FEUILLE FEDERALE 337 (1949); II FEUILLE FEDERALE 6, 8, 585 (1949). SAUSER-HALL, GUIDE POLITIQUE SUISSE 120 (6 1956).

75. Bridel, *Precis de Droit Constitutionnel et Public Suisse*, deuxieme partie, 149 (1959).

during the preceding decade. But the Assembly was not thus rendered less resolute in its determination to oppose the continued communist menace. Only seven months after 89 bis was added to the Constitution, the Legislature undertook a revision of several articles of the Penal Code which greatly strengthened the government's hand in its battle with revolutionary forces. The protracted debates which took place in early spring 1950 before the National Council, reveal that the deputies were alarmed by the communist coup in Prague two years earlier and totally disenchanted by the general manifestations of Soviet duplicity and deceit.⁷⁶

Proponents of the stricter provisions argued that previous measures were inadequate in the light of the new devious tactics adopted by the communists. One deputy spoke thus:

Recent events, which have come to pass in certain countries have opened eyes to the refined methods utilized to place a government at the mercy of a stroke of the hand of a determined minority assisted in case of need from abroad. It would be unpardonable if we were to ignore or minimize a like danger.⁷⁷

In this sharp rebuttal, a communist member of the National Council exclaimed that "for our part, we receive no orders from a foreign power; we have said this already in this chamber and we repeat it. Our masters in political matters are the Swiss workers . . ." ⁷⁸ Laughter greeted this remark.⁷⁹

The objections of several speakers were aimed at the vagueness of the proposed laws.⁸⁰ Even some supporters of the new measures took exception to portions of the laws on this score.⁸¹ But proponents argued that communists were so astute in escaping from a precise interdiction (by changing party tags, for instance) that the government must be given a bigger net to entrap its quarry.⁸²

The leader of the tiny knot of communist deputies and the most insistent opponent of the new penal provisions had these interesting observations to add.

Little by little we are slipping to this. Instead of indicting criminal acts, we are directing accusations at tendencies, ideas, and doctrines. This is what is happening in the United States where a trial recently took place of twelve leaders of the Communist Party. Of what were these twelve accused? Not of willing the overthrow of the government but of spreading the works of Lenin and Stalin . . . Well, indeed, the twelve were sentenced to heavy punishments in prison; even their lawyers were condemned because they were judged to have made themselves complices of their

76. BULLETTIN STENOGRAPHIQUE OFFICIEL DE L'ASSEMBLEE FEDERALE 1495 207 (1950).

77. *Id.* at 151.

78. *Id.* at 153.

79. *Ibid.*

80. *Id.* 152, 216.

81. *Ibid.*

82. *Id.* 151, 217-18.

clients by the fact of defending them. If this is the kind of democracy you are proclaiming, it would be well to proclaim it!⁸³

Article 266 drew the speaker's fire because of such words as "for the purpose of." The article reads thus:

He who, for the purpose of inciting or of supporting enterprises or political intrigues from abroad against the security of Switzerland shall have entered into relations with a foreign state, or with foreign parties, or with other foreign organizations from abroad, or with their agents, or shall have released or spread inexact or tendentious information, will be punished with imprisonment for five years maximum."

In serious cases, the judges may pronounce solitary confinement with hard labor (reclusion).⁸⁴

The word "tendentious" ("informations inexactes ou tendancieuses") evoked a fairly long discussion on linguistics. Even non-communists suggesting that a substitute be found.⁸⁵ The expression "tending to" was also judged too vague by the communist as used, in other measures. For instance, article 275 punishes with five years in prison "anyone who shall have committed an act tending to disturb or modify in an illegal manner the order founded upon the constitution of the Confederation or of a canton."⁸⁶ Article 275 states that imprisonment or a fine could be meted out to persons engaged in "foreign propaganda tending to overthrow by violence" the constitutional system.⁸⁷

In spite of the anguished protestations of the communists, the proposals were all voted into law by an overwhelming majority.⁸⁸ (As a parting volley, the communist leader exclaimed: "Well indeed, gentlemen, we shall continue to fight this law, even if it is adopted here."⁸⁹)

On October 5, 1950, it was formally proclaimed that seven laws had been added to the Penal Code.⁹⁰ There they remain today as testimony to the Swiss reaction to communist intrigues in the five years after the war.

Before drawing this study to a close, it will be interesting to present a few facts and figures touching upon the strength—or weakness—of the communist movement in Switzerland.

Prior to the outbreak of World War II, the communists had only registered as many as two percent of the vote in any national election.⁹¹ (It is

83. *Id.* 217. There is reference to the trial of eleven communists in the District Court in New York, January 20 to September 23, 1949. *Dennis v. United States*, 341 U.S. 494 (1951).

84. CODE PENAL SUISSE 75 (1962). Note, that, with important changes, this is the same as the decree of the Federal Council for October 29, 1948. *Supra* n. 54.

85. *Supra* n. 82.

86. *Supra* n. 84, at 77.

87. *Ibid.*

88. *Supra* n. 76, 214-219. Of some 120 voters, not more than six were against any of these measures.

89. *Id.* at 219.

90. 67 R.O. 1, 11-14 (1951).

91. ANNUNAIRES STATISTIQUES DE LA SUISSE 529 (1965).

possible, however, that some communists, were elected under a different party label.) In 1939, 2.6 percent of the electorate, representing 15,962 ballots out of 618,533 cast, gave the communists five seats in the National Council.⁹² The lower house was composed of 187 members at that time. (None have ever sat in the *Conseil d'Etat*, the 44 member senate.)

After it was banned in 1940, the Party was unable to run candidates in the 1943 election. But in the first national contest after removal of the interdiction—the election of 1947—the communists demonstrated that they flourished remarkably well after seven lean years of travail, toil and trouble with the law. Statistics prove that they actually doubled their strength, registering 5.1 percent of the total vote,⁹³ and gaining seven seats.⁹⁴ In absolute numbers, this represented 49,353 votes compared with their previous high mark of 15,962.⁹⁵

Their success was short lived. Four years later, they were able to score only 2.7 percent or 25,659 out of nearly a million votes cast for national deputies.⁹⁶ Undoubtedly they had been seriously hurt by manifestations of Soviet perfidy, culminating in the Prague coup d'etat of 1948. Even the 1951 figures may overstate their real strength. In that year they dropped the communist label and ran as the *Parti du Travail*, a tactic that may well have deceived some voters. However, they still managed to retain five seats in the Legislature.⁹⁷

There was a minuscule recovery in the 1959 election,⁹⁸ and then, in 1963, a decline to 2.2 percent or 21,088 votes, the lowest figure recorded since 1935.⁹⁹ Currently, four communists, under the banner of the *Parti du Travail*, sit with 200 deputies of the lower chamber of the Legislature; two represent the canton of Geneva, two the canton of Vaud.¹⁰⁰ Since its origin in 1919, the Party has had the most minimal success in other parts of Switzerland. Only in three other cantons, has it ever succeeded in gaining seats in the National Legislature—in Zurich, Schaffhouse, and Bâle-Ville.¹⁰¹ It is a matter for reflection, that the cantons of Geneva and Vaud, areas of the communists greatest conquests, show the poorest turnouts on election day.

In 1963, 66.1 percent of the registered Swiss voters went to the urns to cast ballots in the national election.¹⁰² In Geneva and in Vaud, the figures

92. *Id.* 528, 529.

93. *Id.* 529.

94. *Id.* 535.

95. *Id.* 528.

96. *Id.* 528, 529.

97. *Id.* 535.

98. *Id.* 528, 529.

99. *Ibid.*

100. *Id.* 535. *ANNUAIRE DES AUTORITES FEDERALES* 130 (1965). In 1941, Geneva found that 27 members of the outlawed Swiss Socialist Federation sat in its legislature. They were expelled. 127 *LOIS DU CANTON DE GENEVE* 76 (1941).

101. *Supra* n. 91, at 533, 534.

102. *Id.* 528.

were 44.1 and 42.9 percent respectively. Only one other canton had such a disinterested electorate.¹⁰³

It should be noted that women do not enjoy the vote in Swiss national elections. When the franchise was extended to them in France and in Italy after the late war, it was observed that women in these two countries tended to vote more solidly against the communists than did men. Thus it is reasonable to assume that far less than two percent of the adult Swiss population actually favor the communist movement.

In the light of these facts and figures, one may be inclined to judge that the government manifested misdirected zeal in seizing such lethal weapons in its pursuit of an insignificant band of miserable merchants peddling unwanted wares. The retort may be that they were kept insignificant only because of the strong measures taken by the government. It might also be urged that given the unusual world-wide crises between 1939 and 1950 and the highly vulnerable geographic locale of Switzerland, no band of 15,000 revolutionists and spies could be considered insignificant. But this is not the place to pass judgment upon the wisdom of the course pursued. The present article has confined itself to a simple presentation of the legal and constitutional aspects of the program adopted by the Swiss national government to combat communism. The article's purpose are no more.

103. *Ibid.*