

# THE SWISS CANTONS AND ANTI-COMMUNIST LAWS

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*The presence of communistic and other subversive groups within the borders of the western democratic nations has for years presented governmental authorities with a disturbing dilemma: How can they be faithful to the great guarantees of freedom of speech and freedom of association and at the same time maintain responsible vigilance lest these freedoms be employed to destroy all freedom?*

*Federal countries like Canada, Australia, Switzerland, and the United States are confronted with an additional problem: Is the right to control such groups exclusively a national right or may the member states be permitted a concurrent jurisdiction in the matter?*

*The author explains how Switzerland has addressed itself to the complexities of these problems during the twenty-five year period beginning immediately before World War II.*

## I

In Canada, the power to pass anti-communist law has not yet developed as a problem of "paramountcy" of Dominion legislation over provincial legislation, but rather as a problem of original distribution of legislative power under the B.N.A. Act. In *Switzman v. Elbling*,<sup>1</sup> for instance, the Supreme Court struck down as ultra vires Quebec's Communist Propaganda Act<sup>2</sup> because it related to criminal law over which the Parliament of Canada has exclusive legislative authority.<sup>3</sup> In the United States, on the other hand, the validity of anti-communist legislation has been considered as a problem of federal "pre-emption." Thus, in June, 1956 the United States Supreme Court reversed the conviction of a citizen of Pennsylvania found guilty of violating an anti-communist law of that state;<sup>4</sup> Congress had pre-empted the field by reason of its own anti-communist legislation of 1940,<sup>5</sup> thereby abrogating state laws of the past and preventing future state legislation upon this federal preserve. Ten years later, on April 4, 1966, the court, relying upon this ruling, again reversed the conviction of a man who had violated

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<sup>1</sup> [1957] Sup. Ct. 285, 7 D.L.R.2d 332.

<sup>2</sup> QUE. REV. STAT. c. 52 (1941).

<sup>3</sup> B.N.A. Act § 91(27).

<sup>4</sup> *Pennsylvania v. Nelson*, 76 U.S. Sup. Ct. 477 (1956). Justice Reed, speaking for the minority of three, protested that the majority had read into the law a legislative intent which went against the real mind of Congress.

<sup>5</sup> Popularly known as "The Smith Act," 54 Stat. 670 (1940).

a state law passed to protect the *state* government against subversive activity.<sup>6</sup> In annulling the measure, the court underscored the limited interest that the states have in this field by reason of the act of national "pre-emption."

This article is not a critical analysis of these decisions. It confines itself to the presentation of the anti-communist measures taken from 1932 to 1942 by the states (cantons) in the Republic of Switzerland,<sup>7</sup> a country whose federal structure of government and democratic traditions closely resemble those in North America. This presentation will also include the leading decisions of Switzerland's highest court on the constitutional issues raised by these state measures. Thus it is hoped that an interesting framework will be provided for a profitable discussion in comparative law on the subject of anti-communism.

## II

The decade between 1932 and 1942 was a period of intense activity on the part of the national government of Switzerland to counter-attack the growing communist menace.<sup>8</sup> Acting upon the authority of broad and comprehensive powers delegated by the legislature,<sup>9</sup> the Swiss federal executive issued a series of decrees which expelled communists from federal government posts,<sup>10</sup> forbade communist writings,<sup>11</sup> prohibited communist meetings and speeches,<sup>12</sup> and, finally, made the Party illegal in Switzerland.<sup>13</sup>

The Swiss cantons<sup>14</sup> were not slow to take their cue from the central authorities and began to adopt concurrent measures designed to crib, cabin and confine communist agents within their borders. Indeed, two of the cantons were well in advance of the federal government, and in 1937 and 1938 even added amendments to their constitutions making the Party illegal. In the Canton of Geneva a proposal to this end was made by several deputies before the Grand Council of Geneva<sup>15</sup> on April 7, 1937.<sup>16</sup> After this

<sup>6</sup> *DeGregory v. New Hampshire*, 86 U.S. Sup. Ct. 1148 (1966). Three of the nine judges dissented from the court's opinion written by Mr. Justice Douglas.

<sup>7</sup> Most commonly called "confederation," which, however, does not mean a mere alliance of states. Actually, the central government of Switzerland seems to be invested with considerably more power than its counterparts in the United States and Canada.

<sup>8</sup> The present article confines itself to cantonal laws. The author hopes to publish in the near future an article on the treatment of national anti-communist laws.

<sup>9</sup> Law of June 30, 1927, 43 *Recueil Officiel des Lois et Ordonnances Fédérales* 459, at 462 (1927) [hereinafter cited as R.O.].

<sup>10</sup> Decree of December 2, 1932, 48 R.O. 800.

<sup>11</sup> Decree of May 27, 1938, 54 R.O. 249. Decree of December 5, 1938, 54 R.O. 880.

<sup>12</sup> *Ibid*; see also Law of August 6, 1940, 56 R.O. 1937.

<sup>13</sup> Decree of November 26, 1940, 56 R.O. 1931.

<sup>14</sup> There are 22 States or cantons in the confederation. Article 3 of the federal constitution reads: "The Cantons are sovereign insofar as their sovereignty has not been limited by the federal constitution, as, as such, they exercise all the powers which have not been delegated to the federal authority."

<sup>15</sup> This is the unicameral legislative body of the canton. The executive is a collegiate body called "Council of State."

<sup>16</sup> *Recueil des Constitutions Fédérales et Cantonales*, 1147, 1150 (5th ed. 1937); 2 *Feuille Fédérale* 617 (1937); 54 *Recueil Officiel des Lois et Ordonnances Fédérales* 138 (1938).

legislative body had approved the proposal, it was sent to the people who adopted it by popular vote on June 12 and 13, 1937. 18,337 people voted "Yes", whereas 12,092 voted "No."<sup>17</sup> The amendment reads as follows :

The activity of associations or organizations affiliated directly or indirectly to international communism being dangerous for the State and for the public order, these associations and organizations are forbidden in the territory of the canton. Also forbidden, in the territory of the canton, is the activity of such associations and organizations established outside the canton. Every other association and organization affiliated directly to an international or foreign organization, whose activity shall be considered as dangerous for the state or for the public order may be forbidden by decision of the Grand Council upon a proposal of the Council of State. The law will determine the penalties applicable to those who violate this interdiction and to those who interfere with the prescriptions of the laws of execution.<sup>18</sup>

On the same date an addition was made to article 23 of the Constitution of Geneva.<sup>19</sup> This article contains the list of citizens to whom the exercise of political rights in the canton are forbidden. Article 23 was amended so as to read that political rights were to be forbidden to "those who are affiliated to international communism or organizations which depend directly or indirectly on it, or to every other international or foreign organization, whose activity is dangerous for the state and for public order."<sup>20</sup> Justifications for the amendments were found in article 56 of the federal constitution, which grants to citizens the right to form associations "provided there is nothing in the aim of these associations or in the means which they employ illicit or dangerous for the state."

Article 8 of the Constitution of the Canton of Vaud reads as follows : "The right of association is guaranteed. Assemblies whose end and whose means are not contrary to public order and to good morals are not to be restricted nor to be forbidden."

A group of citizens in the Canton of Vaud, disturbed by the communist menace, made use of the popular initiative and proposed to amend article 8 of the constitution.<sup>21</sup> On January 29 and 30, 1938, the people of the canton balloted in favour of the proposal by a resounding vote of 34,862 to 12,780.<sup>22</sup> Thus, by virtue of article 8 the Constitution of Vaud explicitly banned the Communist Party and its works and activities.

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<sup>17</sup> 123 Recueil Officiel des Lois et Actes du Gouvernement de la République et Canton de Genève 102 (1937).

<sup>18</sup> See note 13 *supra*. Note that on the cantonal level, the people themselves or the legislative bodies adopted these measures. On the national level every specific action against communism was by executive decree. No national laws were passed. See notes 9-13 *supra*.

<sup>19</sup> Note 17 *supra*.

<sup>20</sup> *Ibid.*

<sup>21</sup> [1935-1937] Recueil Officiel des Lois et Décrets du Canton de Vaud 150; [1938] *Id.* 44-45.

<sup>22</sup> *Ibid.* For communist strength in Vaud and Geneva, see *infra* notes 113, 115.

The Federation Constitution of Switzerland demands that new amendments to the constitution of the cantons receive approval of the Federal Council as well as of the Federal Assembly.<sup>23</sup> The approval of the two amendments to the Constitution of Geneva was given on March 31, 1938.<sup>24</sup> Article 8 of the Constitution of Vaud likewise received federal sanction by a decree of November 9, 1938.<sup>25</sup> In giving its approval to the latter amendment, the Federal Council observed "that the Communist Party of Switzerland depends for its organization and for its goals upon an international committee... which obliges... the national parties to foster revolution by violence in all their countries in view of instituting the dictatorship of the proletariat."<sup>26</sup>

There is nothing either in the action or in the words of the federal authorities to indicate that they believed that the national government had already pre-empted the field or that cantonal legislation touching upon the problem of communism might interfere with a national program encompassing the same goals.

The citizens of Geneva also voted to add article 91 to the Penal Code of the canton. The vote was 18,412 to 11,988.<sup>27</sup> The addition to the code reads as follows :

Whosoever shall have participated knowingly in the reconstruction, under whatsoever form, after they shall have been forbidden, of an association or an organization affiliated directly or indirectly with an international or foreign organization whose activities are dangerous to the state and for public order will be punished with imprisonment up to two years to which might be added a fine of up to 5,000 francs.<sup>28</sup>

On September 20, 1941, Geneva took additional action against the Communist Party in virtue of article 35 of the Penal Code entitled "Reconstruction of Illicit Associations."<sup>29</sup> On November 21, 1938 Vaud also adopted an all-encompassing law aimed at communist groups and affiliated associations.<sup>30</sup> Such groups "whatever be their denomination, their means and their apparent goals" were declared illegal and banned from the territory of Vaud. These groups were excluded from "every activity whether political or other, public or private."<sup>31</sup> Article 2 of this law was especially

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<sup>23</sup> CONSTITUTION FÉDÉRALE DE LA CONFÉDÉRATION SUISSE art. 85, chs. 7, 8, and art. 102, ch. 3. Once this approval has been obtained, no one could contest in court the constitutionality of the amendments, for the Swiss federal judiciary enjoys no power to review acts of the national assembly. As for its power to review acts of the federal executive — a power seldom used — see GIACOMETTI, SCHWEIZERISCHES BUNDESSTAATSRECHT 135-138 (1949), HUGHES, THE FEDERAL CONSTITUTION OF SWITZERLAND 124 (1954).

<sup>24</sup> 54 Recueil Officiel des Lois et Ordonnances Fédérales 138 (1938).

<sup>25</sup> *Id.* at 772.

<sup>26</sup> 2 Feuille Fédérale 436 (1938).

<sup>27</sup> See note 17 *supra*.

<sup>28</sup> *Id.* at 65.

<sup>29</sup> 427 *Id.* at 113.

<sup>30</sup> [1938] Recueil Officiel des Lois et Décrets du Canton de Vaud 185.

<sup>31</sup> *Ibid.*

comprehensive. It forbade "the offer, the sale, the delivery, the sending, the exposition, the posting and circulation of all newspapers or other writings, pictures, cards or emblems emanating from these organizations, associations and groups, as well as the use by them of every means of publication." Article 4 stated that the exercise of an administrative, judicial, teaching or other public function was "irreconcilable" with affiliation to one of the banned groups. This article also stated that it was "equally irreconcilable with the exercise of a public function" for a person to engage in any kind of activity in favour of one of the forbidden groups even though he himself did not attach himself to such a group.

The Canton of Neuchâtel passed a law<sup>32</sup> on February 23, 1937, as all-embracing as was the law of the Canton of Vaud. Article 3 of this act reads that "the exercise of a public commission and of an administrative post or a pedagogical function is declared incompatible with the fact of being a member of the Communist Party or of an organization which attaches itself to it or takes its inspiration from it." The same article included persons who, even though not attaching themselves to a forbidden organization, engaged in any kind of activity destined to promote "doctrines aiming at or involving the overthrow, by violence, of democratic institutions." Article 4 provided for fines of up to 5,000 francs or imprisonment of up to two years. In addition, it stated that loss of civic rights up to ten years "will be pronounced in all the cases as an accessory penalty."

During this same period, three other cantons passed anti-communist laws. The laws of the Cantons of Uri<sup>33</sup> and of Schwyz<sup>34</sup> provided, as did the Constitution of Geneva, that the cantonal parliament could, upon the proposal of the Council of State,<sup>35</sup> forbid other subversive organizations and associations. The laws of Uri<sup>36</sup> and of Schwyz<sup>37</sup> also banned in a most comprehensive manner the distribution of all communist literature whatsoever. The law of the Canton of Bâle-Ville did not extend to such activities.<sup>38</sup> It satisfied itself with an interdiction placed upon civil servants of the canton, of the communes and of public establishments against belonging to the Communist Party or to communist organizations or to other groups whose end

<sup>32</sup> 6 Recueil Officiel des Lois et Décrets de la République et Canton de Neuchâtel 295-96 (1934-1939). The long reach of this legal arm can be measured when one considers the words of paragraph 2 of article 3 which forbids government posts to all who belong to organizations associated with the Communist Party or "which are inspired by it." Paragraph 3 reaches even further. It reads: "Persons, who without attaching themselves to an illegal organization, devote themselves to any activity whatsoever designed for propagandizing Communism, anarchism, or other doctrines recommending or allowing for the overthrow, by violence, of democratic institutions, fall within the scope of the incompatibilities provided in the present article."

<sup>33</sup> 10 Landbuch des Kantons Uri 505 (1930-1939).

<sup>34</sup> 12 Gesetzsammlung des Kantons Schwyz 5-6 (1937).

<sup>35</sup> The Collegiate executive of the canton.

<sup>36</sup> Law of June 2, 1938, art. 3 in authority cited note 33 *supra*.

<sup>37</sup> Law of Nov. 4, 1937, art. 3 in authority cited note 34 *supra*.

<sup>38</sup> 38 Sammlung der Gesetze und Beschlüsse wie auch der Polizeiverordnungen 124-125 (1938).

and whose means were dangerous to the state.<sup>39</sup> In this canton the only penalty was dismissal for the offending civil servant.<sup>40</sup>

Most cantons provided for similar penalties : a maximum fine of 5,000 francs, and a maximum imprisonment of two years.<sup>41</sup> The Canton of Schwyz provided for a prison sentence of up to three years.<sup>42</sup> Foreigners who violated any of the laws were generally subject to expulsion from the canton concerned.<sup>43</sup>

The Canton of Geneva provided for depriving violators of civic rights and for possible expulsion from its territory.<sup>44</sup> The maximum prison term of two years could be changed by a judge into the penalty of expulsion lasting for three times that period, or part thereof, if the violator was a foreigner from another country or a citizen of another canton. Article 45 of the federal constitution permits such actions on the part of the cantons. It guarantees that "every Swiss citizen has the right to settle any place whatsoever in Swiss territory"; but it also reads that "establishment can be refused or withdrawn from those who, following a penal sentence do not enjoy their civic rights." The same article permits a canton to withdraw the right of establishment from "those who have been punished repeatedly for serious offenses." Thus, chronic trouble-makers from another canton can be sent home as a punishment. Geneva made use of these provisions of the federal constitution to rid itself of political agitators.

The other sixteen cantons in the confederation took no legislative action against the communists, either because they believed there was actually no danger from subversive forces within their boundaries or because they felt sufficiently protected by federal law. However, it is common in Switzerland for cantonal authorities to administer federal law, and many of the federal decrees noted above<sup>45</sup> made specific delegations of authority to the cantons. The executive order of December 5, 1938, for instance, imposed upon the cantons the obligation to forbid such activities as parades, meetings and demonstrations which might provoke the violation of federal prescriptions.<sup>46</sup> Thus all the cantons, whether by virtue of their own laws or not, were involved in the enforcement of anti-communist measures.

It would not be correct to say that only backward and unenlightened areas were engaged in what is often designated as witch-hunting. The Cantons of Geneva and Vaud appear to have been the most zealous of the

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<sup>39</sup> Law of Sept. 1, 1938, art. 1.

<sup>40</sup> *Id.* at art. 2.

<sup>41</sup> See note 33, at art. 4 and note 34, at art. 4 *supra*.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Law of Sept. 20, 1941, arts. 5, 6, 127 Recueil Officiel des Lois et Actes du Gouvernement de la République et Canton de Genève 108, 113.

<sup>45</sup> See authorities cited notes 10-13 *supra*.

<sup>46</sup> See note 8 *supra*.

cantons in their pursuit of communists; yet these two cantons, with their great international and cosmopolitan cities, must be considered to be the most enlightened and sophisticated within the entire confederation.

### III

Mention must be made of the features of the Swiss Supreme Court which considered the measures taken by the different cantons against the communist menace. This organ of the national government is the only federal court in Switzerland.<sup>47</sup> No inferior courts exist, but the tribunals of the cantons apply federal law and act as federal courts of the first instance. The court consists of 28 members,<sup>48</sup> and is divided into sections which hear different types of cases. No section is more supreme than another.

The court does not enjoy any power of judicial review of laws and acts of the legislative body of the national government.<sup>49</sup> In 1939 a proposal was made to the voters to give this power to the court, but the people rejected the initiative quite overwhelmingly.<sup>50</sup> As respects laws of the cantons, the court does exercise the power of judicial review. Its jurisdiction, however, is less ample than that of its American counterpart. Article 27 of the federal constitution, for instance, contains several guarantees in school matters, including the important guarantee of religious freedom in public institutions of instruction. The federal court, however, is not empowered to entertain appeals against alleged violations of this article on the part of the cantons.<sup>51</sup> All questions touching school matters have simply been reserved for the Federal Council, the seven-member executive of the confederation. Other limits to the court's jurisdiction, pertinent to the subject here under discussion, will be pointed out in the course of the following review of legal cases.

In 1929 the court upheld a law of the Canton of Fribourg which had forbidden the public display of the red flag.<sup>52</sup> The court thus justified the

<sup>47</sup> The court is located in Lausanne, whereas the other two branches sit in Berne, the capital of the confederation. This arrangement was made partly to underscore the independence of the judiciary, partly to satisfy the French-speaking section of the country.

<sup>48</sup> The judges are chosen by the bicameral legislature for terms of seven years. Re-election is so general that their terms are actually for life.

<sup>49</sup> Article 113(3) of the federal constitution reads: "In all the aforementioned cases, the federal Tribunal will apply the laws of the federal Assembly and the decrees of this Assembly which have a general bearing...." Thus the court sits to apply federal law, not to question it. This article does not mention acts of the executive. Therefore, it can be argued that the court has the power to subject them to judicial scrutiny. On this point, see HUGHES, *op. cit. supra* note 23, at 124, 169.

<sup>50</sup> 2 Feuille Fédérale 161 (1939).

<sup>51</sup> Article 107(2) of the federal constitution states that: "The law determines the organization of the federal Tribunal...." In using the authority thus granted, the legislature excluded the tribunal from questions arising under article 27, reserving their review to the executive. *Loi Fédérale d'Organisation Judiciaire* arts. 84(a), 125, 126(a) (1943). For further information on this point and for a discussion of cases involving article 27, see O'Brien, *The Engel Case From a Swiss Perspective*, 61 MICH. L. REV. 1069 (1963); O'Brien, *Church and State in Switzerland: A Comparative Study*, 49 VA. L. REV. 904 (1963).

<sup>52</sup> *Parti Socialiste contre Conseil d'Etat de Fribourg*, 55(I.) Recueil Officiel des Arrêts du Tribunal Fédéral 228 (1929) [hereinafter cited A.T.F.]. The law, as interpreted by Fribourg's

decision of local authorities who had deemed that the display of such a symbol of socialism and subversive activity was calculated to provoke disorder in the area concerned. This was not, of course, a case touching the Communist Party but it deserves mention here as belonging in the general area of the subject herein under review. In its decision, the court did, however, reverse the Conseil d'Etat of Fribourg on the second point concerning the suppression of subversive literature; such material could be forbidden, the judge agreed, but review by a judicial organ of the canton not by an administrative body, must be allowed.<sup>53</sup>

The first case<sup>54</sup> involving the communists arose in 1932 and in their decision the judges showed themselves little disposed to admit any exceptions, even limited ones, to the principle of "liberty of association" proclaimed in article 56 of the federal constitution. This article reads as follows: "The citizens have the right to form associations, provided that there is nothing in the end of these associations or in the means which they employ which is illicit or dangerous for the state. Cantonal laws will proclaim the measures necessary for the repression of these abuses."

In this case, the court annulled a decree of the Council of State of the Canton of Neuchâtel which had forbidden "upon the territory of Neuchâtel, every public meeting organized by the communist Jules-Frederic Humbert-Droz or in which the Communist speaks."<sup>55</sup> In its consideration of the case, the court stated that, "according to the principles currently ruling the public law of Switzerland, propaganda for any doctrine whatsoever, by the press or by the spoken word, is permissible insofar as it does not degenerate into illegal acts."<sup>56</sup> The court then went on to conclude that "thus it is not permissible to oppose Communist propaganda, if it remains within the limitations of an exposé of the doctrine and of an attempt to gain new adherents without inciting them directly to give themselves over to acts of immediate violence."<sup>57</sup>

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authorities, did not forbid the display of the red flag in every instance, but only when, because of certain circumstances, disturbance of the peace and disruption of traffic were likely to follow. *Id.* at 235-36. The court noted: "In this matter, it is not possible to specify and to limit the cases where the display of the red flag will be or will threaten to be a source of trouble calling for police intervention. All depends on the situation in the concrete case. Given the calm and disciplined character of the Swiss people in general, the exhibition of the red flag will without doubt put public order in danger only in exceptional cases. But the Federal Tribunal does not have the mission to determine the detailed rules to be followed by the police authority."

The tribunal concluded that the local authorities who passed the law or issued the decree were within their right in allowing for the interdiction in certain cases; the court was authorized to decide the constitutionality of an actual exercise of previous restraint only after the event. They would then review the facts to see if a perfectly constitutional law or ordonnance had been applied in an unconstitutional manner. *Id.* at 240.

<sup>53</sup> *Ibid.* The Conseil d'Etat is Fribourg's collegiate executive.

<sup>54</sup> Humbert-Droz contre Conseil d'Etat Neuchâtelois, 58(I.) A.T.F. 84 (1932).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Id.* at 94.

<sup>57</sup> *Id.* at 95.



It is to be observed that this decision of the court was handed down seven months before the national government took its first decisive steps aimed at curbing the Communist Party,<sup>58</sup> and four and a half years before the Federal Council had charged the cantons with the obligation of prohibiting communist meetings, demonstrations and parades which were calculated to provoke violation of federal decrees touching the communist menace.<sup>59</sup>

Within three and a half years the court manifested a definite change of opinion. In its judgment of September 20, 1935, it rejected an appeal protesting the ban placed by the Council of State of the Canton of Vaud on the organizing of courses in Marxism.<sup>60</sup> It thus upheld action against the same individual who had escaped from the effects of the decree in Neuchâtel through the grace of the court's 1932 decision.<sup>61</sup>

Pointing out that since 1932 circumstances had changed, the judges wrote :

Without doubt, in one case as in the other, the speaker has not pressed his hearers to acts of immediate violence and undoubtedly the decision of 1932 insists upon this fact. But this [judgement] sprang from the fact that at that time the new communist tactics [described, above, as a work of mining and of internal disintegration of the army and as a tactic of deceit and treason] was not yet generally known, nor under discussion. Otherwise the tribunal would not have limited itself to a distinction between the theory of revolution and the practice of revolution consisting in acts of violence committed by insurgents acting in mass. It would have spoken of illicit acts in general. In effect what is important in deciding on the justification for the interdiction, is the finding that it is not a matter of a simple exposé of the doctrine of the communist party, but a provocation to an illicit attitude immediately for communist soldiers enrolled in the army.<sup>62</sup>

The court pointed out that the appellant, Graber, did not merely present the doctrine of communism as a professor of economics might present the principles of his subject, but that he aimed at making militants out of his hearers.<sup>63</sup> Likewise, said the court, it was not a question of acting in the uncertain future but of encouraging his hearers to act as soon as possible.<sup>64</sup> Consequently, concluded the court, it was difficult to distinguish theory from practice. Touching upon this same point, the court observed that the "public order established in the country demands for its maintenance, not only the intervention on the part of police to prevent acts which disturb the peace and the public security, but likewise the prevention of the commission of other illicit and harmful acts."<sup>65</sup>

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<sup>58</sup> In the Decree of December 2, 1932, the Federal Council ordered the expulsion of communists from all positions in the federal government. See note 10 *supra*.

<sup>59</sup> See note 11 *supra*.

<sup>60</sup> Graber contre Conseil d'Etat vaudois, 61(I.) A.T.F. 264 (1935).

<sup>61</sup> See case cited note 54 *supra*.

<sup>62</sup> See case cited note 60, at 270 *supra*.

<sup>63</sup> *Id.* at 265, 270.

<sup>64</sup> *Id.* at 269.

<sup>65</sup> *Ibid.*

The defendants in this case relied not only upon the right of association guaranteed by article 56 of the federal constitution but also upon the guarantee found in article 4 which reads: "All Swiss are equal before the law."<sup>66</sup> It is interesting to record that the Canton of Vaud took its action against the communists three years before it had modified its constitution or passed any specific law aimed at the communist threat. In its action in this case, the canton relied upon the qualification to the right of free association found in article 56 of the federal constitution,<sup>67</sup> and upon the general qualification found in the original article 8 of its own constitution. This article provides: "The right of association is guaranteed. The assemblies whose end and aims are not contrary to the public order and to good morals, cannot be restricted nor forbidden."

As mentioned above, the Canton of Neuchâtel had outlawed the Communist Party in February, 1937.<sup>68</sup> In December of the same year, a group of communists who had felt the heavy hand of this law appealed to the Supreme Court of Switzerland.<sup>69</sup> In upholding the law, the court observed that the legislature of the Canton of Neuchâtel had grounded its action upon the finding that "the communist party [is] amongst the subversive organizations prohibited because communism is today a subversive movement in the sense that it tends to overthrow of the government by violence and by other illicit means."<sup>70</sup> In conclusion, the court observed, "to convince oneself that this is the case, it is sufficient to have recourse to the diverse documents found in the dossier."<sup>71</sup>

On July 12, 1940 the court upheld a decree issued by the Council of State of the Canton of Vaud, for December 11, 1939, against a certain communist Nicole.<sup>72</sup> In agreeing that the defendant was truly an adherent of the Communist Party, the judges observed that "Nicole consistently supports Russia's policies."<sup>73</sup> Pointing out specifics, the court underlined the fact that Nicole had upheld the Soviet-German pact, and that he had supported Russia's military aggression against Finland.<sup>74</sup>

The opinion stated that thus Russia might well be led to believe that all small nations would yield to military attack. It also noted that speeches like those made by Nicole could easily weaken the will of the Swiss people to oppose such aggression.<sup>75</sup> The judges spoke of Nicole as a revolu-

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<sup>66</sup> *Id.* at 264-65.

<sup>67</sup> See text accompanying note 54 *supra*.

<sup>68</sup> See note 32 *supra*.

<sup>69</sup> *Barraud contre loi neuchâtelaise interdisant le parti communiste*, 63(I.) A.T.F. 281 (1937).

<sup>70</sup> *Id.* at 284.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Nicole contre Conseil d'Etat vaudois* (July 12, 1940) (Unpublished opinion of the court on file in the Archives of the court in Lausanne).

<sup>73</sup> *Id.* at 14.

<sup>74</sup> *Id.* at 16, 19.

<sup>75</sup> *Id.* at 24.

tionary agitator inspired by communism whose essential role was to excite the masses in order to create trouble and to overthrow the established order by violence.<sup>76</sup> The court also observed that Nicole frequently departed from his prepared text and thereby made control difficult on the part of public officials.<sup>77</sup> Insofar as the general subject of anti-communist legislation was concerned, the court made the point that since the Communist Party and dependent organizations could be forbidden because their goals make them dangerous for the public order, so also "the same interdiction can legitimately strike at individual propaganda inspired by communism."<sup>78</sup>

Addressing itself to the question of clear and present danger, the Swiss Supreme Court made the following important remarks :

It is not necessary . . . that there should be an established fear that such an individual demonstration threatens to cause any disturbances immediately. Just as for the prohibition of communist organizations as such, it is sufficient, in order to forbid communist propaganda, that this movement aims at a systematic undermining of the established order so as to prepare for its overthrow as soon as the work of sapping shall have been sufficiently advanced and that it does not propose a theoretical goal which might be realized in the distant future.<sup>79</sup>

To underscore the sharp change of view on the court's part, the above words of this 1940 opinion should be contrasted with utterances of the court in a 1932 decision reversing the ban placed on a communist speaker. The judges in that year stated that "propaganda of any doctrine whatsoever" was to be permitted "insofar as it did not degenerate into illegal acts."<sup>80</sup> Thus, in 1932 the court would allow speeches exposing communist doctrine to audiences if it did not excite them "*directly* to give themselves over to acts of *immediate* violence."<sup>81</sup>

Quite clearly the catastrophic events that shook Europe to its foundations between 1932 and 1940 registered in the chambers of the high tribunal. In 1939 the court upheld the constitutionality of the law of the Canton of Bâle-Ville which closed all government positions to members of the Communist Party.<sup>82</sup> In doing so the court remarked that "Cantons may forbid civil servants from belonging to associations which prevent or are able to prevent these employees from obeying their duty of fidelity towards the state and defending conscientiously the public interests, even outside of service."<sup>83</sup>

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<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id.* at 22-23.

<sup>79</sup> *Id.* at 23.

<sup>80</sup> See note 56 *supra*.

<sup>81</sup> See note 57 *supra*. (Emphasis supplied.)

<sup>82</sup> National Front contre Basel-Stadt, 65(I.) A.T.F. 235 (1939).

<sup>83</sup> *Id.* 240.

As pointed out above, many federal laws are applied by cantonal officials, and some of the specific legislation taken against the communist menace specifically mentioned the delegation of the power of enforcement to authorities of the member states.<sup>84</sup> In 1942 the Swiss Supreme Court considered a case<sup>85</sup> involving such enforcement by the Canton of Aargau.<sup>86</sup> In its comprehensive opinion, the court noted that to suppress communist propaganda it was not necessary to prove that the propaganda explicitly excited to violence.<sup>87</sup> As a matter of fact, the court said that writings could be forbidden even when they did not in any way urge violence but only solicited money for libraries, for books or for courses in communism.<sup>88</sup> Furthermore, the court justified the right to confiscate all such materials of propaganda. None could escape the thrust of the law, as the court expounded it in the following terms: "If the tracts of propaganda for communism are printed, all the successive operations in view of the printing, notably the annotation of the manuscript for the typographic composition, constituting objectively acts of participation which favour the communist propaganda,"<sup>89</sup> can be prohibited.

On October 13, 1944, the court admitted that individual motives of Party members might well differ; that some may be attracted to the movement in the hope of assisting the poor, while others may be moved by the basest of reasons.<sup>90</sup> But, as the court noted, penal legislation aims at the general, and that since the Communist Party as such had as its goal the overthrow of governments by violence and other illicit ends, the individual who joined the Party must be assumed to embrace such objectives as his own. In other words, "motives of idealism are not an extenuating circumstance in anti-communist laws."<sup>91</sup>

It should be pointed out that the above case also involved the application of a federal law<sup>92</sup> by the local officials of the Canton of Zurich, that the trial took place in a cantonal court of first instance, and that the words quoted above are from the Court of Cassation, the division of the federal court authorized to hear appeals in criminal cases.

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<sup>84</sup> See authorities cited notes 10-13 *supra*.

<sup>85</sup> *Singer contre Aargau*, [1942] *Journal des Tribunaux* 4.

<sup>86</sup> Article 3 of the federal executive decree provided a three-year prison sentence and a fine of 5,000 francs for anyone "who, under any form whatsoever, shall have promoted communistic or anarchistic propaganda, or shall have favored such." Article 4 allowed for the delegation to cantonal authorities of enforcement powers. Decree of August 6, 1940, 56 R.O. 1397.

<sup>87</sup> See note 85, at 5 *supra*.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 11.

<sup>90</sup> *Meier contre Ministère public de Zurich*, 70(IV.) A.T.F. 181 (1944).

<sup>91</sup> *Ibid.*

<sup>92</sup> Decree of August 6, 1940, 56 R.O. 1397.

## IV

An interesting case developed in late 1940. In April, 1937, the Canton of Geneva had taken uncompromising action against communist organizations by prohibitions written into its constitution. But instead of retreating from the battle, several communists simply changed their party affiliations and were successful in having themselves elected to the legislature of the Canton of Geneva in November, 1939 where they sat as bona fide members until December 7, 1940. When it became apparent to all that they were "Reds" in socialist clothing, the Grand Council of Geneva deprived them of their seats by legislative decree. This action on the part of the legislature of Geneva was grounded on the decree issued on November 26, 1940, by the Federal Council which dissolved the Communist Party and all groups which might be substituted for it throughout all the territory of Switzerland.<sup>93</sup> The decree explicitly stated that communists could no longer hold positions in the federal, cantonal or communal governments.

The four communists stripped of their seats by the action of the legislative body of Geneva appealed to the federal court in Lausanne, but the judges gave them no comfort.<sup>94</sup> The Swiss Supreme Court protested that it lacked jurisdiction in the matter, grounding itself on a Federal Council's decree of December 17, 1940.<sup>95</sup> The executive order issued on that date charged the cantonal authorities with the duty of excluding communists from their public bodies. However, the decree stated that: "The Federal Council reserves to itself the power to revise the decision of cantonal or communal authorities." In virtue of these words the Swiss Supreme Court informed the communists that it had no power to review the decision taken by the legislation body of the Canton of Geneva.

Determined to find a sympathetic ear some place, the communists now turned to the Federal Council, but the executive body of the confederation decided on January 14, 1941 that it would not hear the appeal.

At this juncture the judges of the court came back into the picture. Dissatisfied with the action taken by the Federal Council, they addressed a long advisory opinion<sup>96</sup> to the latter body expounding upon the Council's right to take the appeal in this case. The opinion argued that merely because the law mentioned nothing explicitly about appeals did not indicate that the Federal Council had yielded all powers to cantonal authorities in such affairs. As a matter of fact, urged the court, the very wording of the decree of the Federal Council of December 17, 1940 clearly indicated that the Federal Council intended to review decisions of cantonal authorities.

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<sup>93</sup> Decree of November 26, 1940, 56 R.O. 1931.

<sup>94</sup> The case is unreported. See case of Huissord contre Genève, Conseil d'Etat, Dossier 26090, March 18, 1941 on file in the Archives, federal tribunal, Lausanne.

<sup>95</sup> 56 R.O. 2082 (1940).

<sup>96</sup> See note 94 *supra*.

Furthermore, in the judges' view, serious constitutional questions had been raised by the complaining communists and it did not seem proper that all avenues of appeal should be closed.

The Federal Council answered that it was still of its original opinion that it should not review the case. However, perhaps in light of the court's protestations, the executive body reluctantly agreed to hear the appeal.<sup>97</sup> It confined itself to a simple review of the matter purporting to prove that the complaining deputies of Geneva were still members of the Communist Party. Having concluded that the evidence left no room for doubt, the Federal Council upheld the decision by the legislative body of the Canton of Geneva.<sup>98</sup> The case was finally disposed of on March 18, 1941.

An identical case developed involving deputies from the Canton of Bâle-Ville.<sup>99</sup> On March 7, 1941, the court rejected the appeal by the complaining deputies from this canton, and on October 10, 1941 the Federal Council disposed of the case by upholding the decision of the cantonal authorities.

These two cases bring out in bold relief the great power that had been vested in the executive by reason of the two broad delegations of authority made by the Federal Assembly in 1932 and 1939. Thus the Federal Council not only ordered the cantons to exclude communists from posts in their governments, but, with a stroke of the pen, closed the path to the court usually open to citizens alleging violations of constitutional rights. Article 113 of the federal constitution explicitly reads: "The federal Tribunal... recognizes... complaints for the violation of the constitutional rights of citizens."

One wonders if the Council could have assumed authority to slam judicial portals in the face of every person claiming a constitutional grievance because of the application of any one of its restrictive decrees. Of course, the federal legislature can and has provided organs other than the judiciary with the competence to hear appeals in claims of the violation of constitutional rights. Article 27, for instance, enshrines such things as parental rights in education and religious liberty in public schools. But according to federal law, it is the Federal Council, not the court, which has the power to hear appeals from citizens claiming a violation of these rights by cantonal action.<sup>100</sup> People reared in the Anglo-Saxon tradition

<sup>97</sup> The Federal Council was of course under no obligation to follow the urgings of the court, and there is no mention in the constitution of advisory opinions.

<sup>98</sup> See the brief opinion of the Council for March 18, 1941, note 94 *supra*. Two months later, May 27, 1941, the Federal Council dissolved the Swiss Socialist Federation. 57 R.O. 696 (1941). By reason of this decree, Geneva, on June 21, 1941, expelled 27 deputies adhering to this party from its own Grand Conseil. 127 Recueil Officiel des Lois et Actes du Gouvernement de République et Canton de Genève 76 (1941).

<sup>99</sup> Grieder-Rychen contre Basel-Stadt, Dossier 26259, March 7, 1941, on file in the Archives, federal tribunal, Lausanne.

<sup>100</sup> Loi Fédérale d'Organisation Judiciaire arts. 84(a), 125, 126(a) (1943).

find it difficult to understand how many questions in Switzerland go to political rather than to judicial bodies for their settlement.<sup>101</sup>

But the question pertinent to the matter here under discussion is whether the Federal Council itself acting *sua sponte* may so limit the court's jurisdiction in the face of the unqualified words of article 113 of the constitution. Not only did the Council assume the court's power of review in the highly important matter of constitutional rights of citizens, but it apparently believed it could completely refuse any right of appeal from a decision taken by cantonal authorities applying its anti-communist decrees.

Of course, the Council was not acting completely on its own; it issued its decrees under a grant of emergency power from the Assembly, which apparently could have registered an effective protest by disapproving of any decrees or provisions thereof at any time. One might, thus, assume that the constitutional question received a conclusive answer in a country where the government rests on the principle of parliamentary supremacy. On the other hand, if one is hardy enough, he might protest that the court had not only the right but the constitutional duty to hear appeals from cantonal decisions regardless of the Council's attempt to suppress that duty.

This is not the place to give a definite answer to the delicate question: Did the use of emergency powers violate the constitution, procedurally, by upsetting the distribution of powers as spelt out in the basic document, substantially, by the actual infringement of the constitutional rights of citizens? One authority, at least, has answered that question with an unequivocal "Yes."<sup>102</sup> Suffice it to say, without entering into the dispute, that the magnitude of the communist menace, as seen by the Swiss, can be measured by the fact that such severe counter actions were ever taken and that they apparently received general approval by the other branches of government, as well as by the people.<sup>103</sup>

## V

When hostilities had ceased, many of the cantons abrogated the measures they had adopted specifically against communism. On February 9 and 10, 1946, the people of Geneva voted<sup>104</sup> to repeal the 1937 amendments to their cantonal constitution outlawing the Communist Party.<sup>105</sup>

<sup>101</sup> On this point, see HUGHES, *THE FEDERAL CONSTITUTION OF SWITZERLAND* 124, 125 (1954).

<sup>102</sup> *Id.* at 169.

<sup>103</sup> Note the overwhelming popular vote in the Cantons of Geneva and of Vaud in favor of anti-communist measures. See text accompanying notes 17, 22 *supra*. Note also that after 1935 the federal tribunal appears to have upheld every anti-communist measure of the cantons that came before it for review.

<sup>104</sup> 131 *Recueil Officiel des Lois et Actes du Gouvernement de la République et Canton de Genève* 310 (1945); 132 *id.* 13 (1946). Only 48% of the registered voters went to the polls, but 64% of the ballots were for repeal. In 1937, 62% voted; of these 60% favored the anti-communist amendments. 123 *id.* 102 (1937).

<sup>105</sup> See authorities cited notes 16-17 *supra*.

The Canton of Vaud took similar action<sup>106</sup> on November 22, 1946, when it voted 33,146 to 31,398 to remove article 8. The high number of negative votes testifies to the fact that there was a strong residual anti-communist sentiment among the people. On December 17, 1947, a law was passed which once again permitted communists to hold public office.<sup>107</sup> However, the comprehensive law of November 21, 1938, circumscribing all communist activity, remains on the statute books.<sup>108</sup> Thus, while Party members may hold official government positions in Vaud, they may not engage in any Party activity or propagandize for the communist cause.

Most of the other cantons which had adopted measures against communism also repealed them after World War II. The central government set an early example even before the allies had brought Germany completely to its knees. The first act of repeal came in a decree of the Federal Council issued February 27, 1945.<sup>109</sup> On August 7, 1945, when the last embers of Nazi power were burning themselves out in the bunkers of Berlin, the Council abrogated most of the remaining specific anti-communist decrees.<sup>110</sup> With peace assured, Switzerland perhaps believed it could live without such strictures; or perhaps the government merely thought it more diplomatic for a country professing neutrality not to maintain an arsenal of legal weapons aimed specifically at one of the great conquering powers.

The cantons followed the example of the central government, even though their action came when the perfidy of the Soviets was being established beyond any doubt. It is suggested that the cantons became convinced that general measures against subversive activity were just as effective, and more diplomatic, than the specific ones previously adopted against the menace from the East. The Swiss Penal Code, applicable throughout Switzerland at all levels of government, which went into effect in 1942, contains a number of such general provisions and could easily be utilized if the peril demands. Article 265, for instance, reads: "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."<sup>111</sup>

<sup>106</sup> 143 *Recueil Officiel des Lois et Décrets du Canton de Vaud* 350-52 (1946).

<sup>107</sup> 144 *id.* 493 (1947). On October 15, 1949 Geneva abrogated its 1937 law against anyone who "shall have participated in the reconstruction . . . of organizations affiliated . . . to an international or foreign organization whose activity is dangerous to the state." 137 *Recueil Officiel des Lois et Actes du Gouvernement de la République et Canton de Genève* 165 (1949). The restrictive anti-communist law of Neuchâtel was suspended on March 16, 1945. 10 *Recueil Officiel des Lois et Décrets de la République et Canton de Neuchâtel* 1954-1962, at 1469.

<sup>108</sup> See statute cited note 30 *supra*.

<sup>109</sup> 61 R.O. 111 (1945).

<sup>110</sup> *Recueil systématique des Lois et Ordonnances Fédérales 1848-1947*, at 82. In virtue of these two 1945 decrees, there is no longer a federal prohibition against communists being in government positions.

<sup>111</sup> *CODE PÉNAL SUISSE* 75 (Romande ed. 1962).



In 1947 and 1948 the federal government adopted measures which greatly strengthened "the penal provisions for the protection of the State."<sup>112</sup> These acts probably reflect the general disillusionment that settled upon Europe in the two years since 1945.

As mentioned above, Vaud still retains a law specifically directed against communist activity. Other cantons are free to adopt similar measures. In the future, however, the cantons may be satisfied with the weapons stored away in the Swiss Penal Code, a code which their own authorities would apply, if need arises, against communists or other groups attempting to undermine legal authority in Switzerland.

## VI

There is however, considerable evidence that this arsenal will remain locked unless something quite unforeseen should shatter the current era of good feeling.<sup>113</sup> This spirit of forget and forgive was most palpable on April 14, 1966 when, amidst great pomp and circumstance, Vaud convened its 39th legislature since 1803.<sup>114</sup> Among the 197 deputies who marched in formal attire to the swearing-in ceremonies were 16 members of that Party which until recent times had been the marked object of such relentless pursuit by cantonal officials.<sup>115</sup> Most striking was the fact that the eighty-four-year-old leader of the communist delegation was accorded the privilege (solely because of the seniority rule) of walking side by side with the Chancellor of State at the head of the deputies.

The irony of the situation was doubly underscored inside the walls of the Protestant Cathedral where the spiritual and the secular were joined in an impressive oath-ceremony. Again it was the red dean who had the honor of standing beneath the pulpit and of reading for his colleagues the

<sup>112</sup> Law of March 7, 1947, 63 (I.) R.O. 139; Law of Oct. 29, 1948, 64 (I.) R.O. 1063. It was in March, 1948 that the communists staged their successful *coup d'état* in Prague, a blow which awakened even the most obtuse to the true Soviets' designs for western Europe.

In 1950, the Federal Assembly stiffened the penal laws against subversive groups. The legislative debates demonstrate clearly that the deputies were motivated by the alarm sounded by such events as the Prague *coup*. [1950] BULLETIN STÉNOGRAPHIQUE OFFICIEL FÉDÉRAL 149, 207.

<sup>113</sup> On the national level the communists have consistently failed to register any striking success. In 1966, 2 Party members from Vaud and 2 from Geneva represent their districts in the 200-member National Council. No other Canton is represented by a member of this group, which, since 1951, bears the name of the *Parti du Travail*. From 1919 to 1956, Zurich, Schaffhausen and Bâle-Ville occasionally sent a communist to the Parliament.

In 1947, 7 communists were elected to the national legislature and a high 5.1% of the electorate cast their votes for the Party. In the last election, 1963, their support declined to 2.2% or 21,038 votes. Most of their strength has always come from Geneva and Vaud. ANNUAIRE STATISTIQUE DE LA SUISSE 528, 529, 533-35 (1965).

<sup>114</sup> For the account of this event, see the newspapers, Feuille d'Avis de Lausanne, April 14, 1966, pp. 10-11; Gazette de Lausanne, April 14, 1966, p. 13; Tribune de Lausanne, April 14, 1966, p. 3.

<sup>115</sup> The Party scored impressive gains in the 1966 legislative elections. In 1962 they won only 10 seats, but in March 1966 they gained an additional 6. Most of the communist strength comes from Lausanne, the capital city, sometimes referred to as the home of ex-kings and ex-queens. [1962-1963] ANNUAIRE OFFICIEL DU CANTON DE VAUD 36-42; MEYNAUD, LES PARTIS POLITIQUES VAUDOIS 23-24 (1966). Most people interpret this gain merely as a protest vote against rising prices, insufficient housing, and other economic problems in a country where remarkable prosperity abounds.

long pledge of fidelity to independence and constitutional government; after which, each deputy pronounced the words "*je le promets.*" That is, all except the communist leader himself and his fifteen confrères. Refusing on principle to take the oath in the cathedral, they were allowed to pledge themselves afterwards in the legislative chamber where only the secular reigned.

The crowning piece of irony was the opening session of the 39th Parliament. Once again it was the white-haired red patriarch who was privileged to preside and to deliver what had many aspects of a State of the Union message! What is more, the speaker felt fully free to flaunt the Party's banner before the assembled legislators although, in public, the name *Parti Ouvrier et Populaire* is used to conceal its true political credo. In reference to his remarkable health in spite of advanced age, he began by saying: "I am a red who stays green because I've never been black." The assembled parliamentarians responded to this sally with good-humoured laughter and they displayed a large measure of benevolence to the communist message in general.

But all is not completely rosy for the reds; in some areas they are still refused a green light by people who continue to see them — if not black — at least deep grey. Just five days after the ceremonies in Vaud, those members of the Association of the Swiss Press residing in the Canton of Bern were polled on the question of admitting communist journalists to the national organization.<sup>116</sup> Of the 241 members, 129 responded to the written questionnaire; only 18 pronounced themselves in favor of lowering barriers in this respect. Negative votes totaled 102. Apparently a considerable number of Swiss have not forgotten Poland, Finland, Prague, Hungary, Berlin, and other places which have seen the ultimate of Soviet perfidy and intrigue. Nor, apparently, do they consider it insignificant that the Swiss *Parti Ouvrier et Populaire* sent its delegation to Moscow as late as April, 1966 for the 23d Congress of Communist Parties.

Such unpurged sentiments could possibly generate a demand for renewed legal sanctions against the communists, or could be utilized to refuel the legal machinery which already exists but remains largely inoperative. As mentioned above, Vaud still retains stiff anti-communist measures on its statute books.

One might think that in tiny Switzerland, a single uniform policy dictated by the central authorities would be imperative especially since the maintenance of neutrality and independence in this country surrounded by big jarring powers requires the same delicate hand as does fine Swiss horology. This, however, has not been the case. On the contrary, the

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<sup>116</sup> Feuille d'Avis de Lausanne, April 19, 1966, p. 5, col. 1.

central powers, who adjust the main spring and regulate the balance wheel of Swiss foreign policy, openly invited the cantons to pass concurrent anti-communist legislation during the war years. What is more, in many instances, federal authorities entrusted the enforcement of national legislation to cantonal officials. Apparently, they did not fear that the rough hands of local officers might jar and damage the mechanism of the anti-communist weapons they had wrought.

If, in the future, the federal government should ever deem it more fitting to pre-empt the field in anti-communist matters, such a decision would have to come explicitly from either the legislature or the executive. It is unthinkable that the Swiss judiciary would ever pronounce a policy of cantonal incompetence in default of such an express decision on the part of the other branches of the national government.