

DEPARTMENT OF JUSTICE

WASHINGTON 25, D. C.

August 27, 1943

MEMORANDUM FOR MR. CORWIN EDWARDS

Re: Market Regulating Organizations and Enterprises and International Law.

I. Introduction.

This memorandum deals with the problem whether under international law, cartels or other market regulating organizations, whether or not established, managed or controlled by government, are part of the "legitimate power" in the country to be occupied, their rules part of its law, and finally, their property public property and therefore subject to the administration, rules and decisions of the occupying power.

Out of the great number of problems which are bound to arise the following may be mentioned:

1. The production and distribution of textiles and articles made from textiles within Germany or within Italy are subject to the rules of market regulating organizations. Even if, for instance, the Reichvereinigung Textilveredlung should be deprived of any governmental character, this group, as well as the cartels belonging to this group, would have the entire production and marketing under their ruling power. Our army and the civilian population would be affected by their rulings.

2. The same situation may arise in a field such as nitrogen, in which I. G. Farben has an almost complete monopoly within Germany.

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3. In an increasing number of cases, for instance in the rayon field, indication exists that the Germans tried to give to citizens of or corporations in countries at present occupied, the title to industrial enterprises including monopolistic industrial enterprises. Serious conflict is bound to arise between the interests of these citizens or corporations and the United Nations.

A clarification of the legal situation seems to be urgently necessary, especially for three reasons:

1. As the basis of an understanding between the United Nations.
2. As the basis for proper instructions to our military governments.
3. To clarify what powers not now existing under international law must be obtained by virtue of the armistice conditions.

The principles of the Hague Convention respecting the laws and customs of war on land of 1907, especially the "annex" to this convention, the "Regulations Respecting the Customs of War on Land" provide:

1. The occupying power obtains "the authority of the legitimate power." (Art. 43).
2. The laws in force in the occupied country remain in force, unless changes are necessary for the protection of public welfare. (Art. 43).
3. Private property is protected, except "depots of arms" and "all kinds of munitions of war." (Art. 53).\*

In 1907 when this convention was made no other "legitimate power" existed in the signatory nations but the power of the state represented by its government. The relation between government and private individuals or corporations and their property was based on the almost uniform idea that

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\* The pertinent articles of the Hague Convention are attached hereto as Ex. 1.

the state can only interfere with property or with freedom of persons on the basis of a statute lawfully enacted, and that such interference was constitutional only if domestic security or national defense required it. The "regulation" of the economy was a guaranteed non-regulation; free competition was almost a part of an international constitution. The "legitimate power" was the rule of the game established by the principles of free competition.

The social changes which have occurred since 1907 are obvious. In the beginning of this war, at the 25th annual meeting of the Grotius Society in London, the opinion was expressed that social developments since 1907 are so far-reaching that the whole convention is obsolete under the rule of "clausula rebus sic stantibus", often attacked and often relied on. The chairman of the society expressed skepticism in regard to the position taken by the speaker. The attitude of the chairman and of the majority was clearly based on understandable anxiety as to what may happen to rules of international law, especially with respect to prisoners of war, if we should take the position suggested by the speaker. Since this speech of Nov. 21, 1940, the belligerents have referred repeatedly to the convention, thereby impliedly recognizing its continued validity. Under these conditions one must take it for granted that the rules of the Hague Convention are in force.

II. Interpretation of the rules on the basis of their purpose and their language.

The purpose of the provisions of the Hague Convention relating to occupation is to give the occupying army all legitimate power existing in the occupied country with the understanding that in the exercise of all such powers the occupying army shall be bound to preserve the interests

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of the individuals and of the institutions of the occupied country so far as possible. Each provision of the convention relating to occupation is based on the assumption that there can be no other "legitimate power" within the occupied country but the occupying army and the country which it represents. A "legitimate power" within the definition of the Hague Convention is any authority to issue rules binding the public or an undetermined number of people, or which, by any kind of ruling power, establish facts. It does not make any difference whether this "power" is of first or of secondary degree, as for instance, the power of municipalities as compared with the power of the state, or whether any other "legitimate power" can overrule the particular agency exercising the power. Since all "legitimate power" in the occupied country is subject to the occupying army, our problem is whether market regulating organizations or enterprises are "legitimate powers" in the European countries. This question of fact is discussed under IV of this memorandum.

If this question is answered in the affirmative, market regulating organizations and enterprises may be administered by the occupying army under Art. 43 and all their instrumentalities, including their property, are beyond the protection afforded to private property by the provisions of the Hague Convention.

III. Approach to the problem of other "legitimate powers" but state power, from point of view of common law,

Under the principles of common law prevailing in a great number of countries participating in the Hague Convention, especially in our own country, questions may arise whether "legitimate power" may include any power except that of the state.

We are accustomed to consider as "law" only rules and regulations issued by governments or other representatives of the political state or expounded by the courts established by the state. But is this limitation inherent in the nature of law? Roscoe Pound, one of the more "state-minded" lawyers, comes to the following conclusion: (Sociology of Law and Sociological Jurisprudence, Vol. 5, Univ. of Toronto Law Journal, p. 19, 1943) -

"Gurvitch complains that I 'believe in the necessary and a priori preeminence of the state over other groups.' What I have said is that since the sixteenth century it has had a legal paramountcy, using legal in the lawyer's sense. I do not arrive at this a priori. In the Prior of Castleacre's Case, the court of common pleas in 1506 held that parliament could not 'make any temporal man to have spiritual jurisdiction,' for this could only be done by the pope. (Prior of Castleacre v. Dean of St. Stephens, Y. B. 21 Hen. VII, 1). Since the reformation the kind of spiritual jurisdiction which divided the administration of justice between the state and the church has come to an end. The paramountcy of the state in that domain is unquestioned."

For Roscoe Pound, for whom "common law" is the historical development of the judicial approach, state law is not a priori the only law, but as a matter of experience within a certain historical period, the only law in existence. Pound recognizes the possibility of other developments. This memorandum will shortly prove that they occurred in Europe. At this point of the discussion it is sufficient to state that our common law approach is not inconsistent with an interpretation of the Hague Convention to the effect that "legitimate power" and "law" in the countries to be occupied are not identical with states and their rules.

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It may be argued that any other ruling power but the state ruling power is finally subordinated to the decision of the state and therefore indirectly to the ruling of the occupying power. Such argument may refer to the article of Hans Kelsen in Harvard Law Review, Vol. 55, p. 44 (1941)\* and his theory stated there, or to Roscoe Pound's statement made in the article cited above - "It is equally clear today that every other form of social control, by household, church, fraternal, or social organization, professional association or trade union, is subject to legal scrutiny and goes on within legally prescribed limits, enforced by the tribunals or officials of the state." From these statements it may follow that the occupying power has no other right but to "scrutinize legally" the rules of the association and to find out if they are within legally prescribed limits or not.

The Hague Convention clearly contemplates that the constitution of the occupied country shall decide what the legitimate power is. We have to learn from this constitution whether cartels and other market regulating organizations exercise "legitimate power" of first degree or of second degree or if they have only rights possessed by every individual or corporate person. In the last alternative the occupying power has no right; in the second alternative the rulings of organizations which control markets are subject to the power of the occupying army to overrule or instruct; while in the first alternative the occupying power takes over administration of market regulating organizations.

IV. Interpretation of the pertinent rules of international law under the principles of government of the occupied country.

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\* Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", Harvard Law Review (1941), Vol. 55, p. 44.

In the whole of Europe the principle of free competition as an international economic constitution has been definitely abolished. The former principle that the whole field of economy is administered by actions of merchants within the rules of the game of free competition does not operate any more and the field of economy is subject to positive administration under the rules of groups, associations, individual and state agencies. While under the old principle regulation of commerce was the result of private action of each merchant who was only bound by his conscience, his interest and the rules of the game, the merchant now acts under instructions or within the scope of instructions. The consumer interested in the purchase of certain articles cannot make a choice between different offers which are determined by the will of the merchants making them. Merchants and consumers are instructed.

This power to instruct either consumer or merchant or industrialist is ruling power not based on the exercise of private rights or property. An occupying army restricted to exercise of the governmental powers which existed in 1907 would become itself subject to acts of other "legitimate powers" within the occupied country. The occupying power and its interests would be threatened and bound to come in conflict with the market regulating forces. The "legitimate powers" outside of the sphere of influence of the "military government" might try to serve purposes contrary to those of that government or might come to understandings with private organizations within the occupying country or elsewhere, which organizations might follow other aims than those of the supreme commander of the occupation army.

This risk is inherent in the power of market regulating organization regardless of whether it arose as a free cartel or a compulsory cartel, and regardless of who manages it and how the management is supervised by other

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organizations or agencies. The significant question is whether any agency has the power to instruct others or control their action, which practically amounts to a power to administer the society of the occupied country - a responsibility of the occupying army.

The analysts discussing National Socialist and Fascist systems of government usually stress that under these systems the state takes over all important social action. The conclusion from this allegation usually is that the few matters not administered and decided by the state are not part of the institutions of the Fascist or National Socialist government. Another conclusion is that as soon as the Fascist or National Socialist form of government is abolished certain economic organizations established by these systems become private, or at least may be transformed by private agreement into organizations outside of the public sphere and hence not subject to any rule of the occupying power. Since the concern of military government can only be substance and not form, this allegation must be wrong.

As a matter of fact, in National Socialist and Fascist theory the state is not the only exclusive and legitimate power. Instead, in these theories the "state" as an entity does not exist. Their central concept is the "nation", which expresses itself in different forms one of which is the state. Other organizations which exercise a part of the national power are equal to the state. They are, like the state, an expression of the national will. The element unifying all forms of associations and organizations in which the will of the nation is expressed is Party and Fuehrer. His will and the will of the party are superior to the will of each of the organizations expressing the will of the nation and administering society. Such is the theory of Fascist and National Socialist society.

The organization of the economy is entrusted to different organizations, partly organized by the government (compulsory cartels), partly supervised by the government (Reichvereinigungen, Gemeinschaften, etc.), partly independent and only subject to a general supervision of the party and some state agencies (monopolistic enterprises). These are the powers which substitute their authority for the rule of free competition. They plan the economy and instruct the merchant and industrialist what to produce and what to sell, how to produce and how to sell. They instruct the consumer what he can have and under what condition he can buy. They exercise "legitimate power" over society.

In all pertinent pronouncements of European statesmen and lawyers, especially of the National Socialist Government lawyer Carl Schmidt, the German constitution is interpreted as a constitution not of the state, but of society. Statutes, rules, ruling powers and decrees, from whatever source, are interpreted as acts of administration and as expressions of the will of the nation. They are of public legal character and nothing else.

The rules of the Hague Convention, under the existing economic constitution of Europe, must be interpreted so that all rules and decisions by which a merchant or industrialist is "instructed" or by which the consumer is ruled are an exercise of the "legitimate power" in the scope of Art. 43 of the "Regulations Respecting the Laws and Customs of War on Land."

Conclusions:

1. The occupying army has not only the right but the duty to exercise all powers entrusted to organizations or enterprises regulating the market of the occupied country.

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2. All property of these organizations is "public" property, like the property of governmental agencies, under the definition of the Convention of 1907, and therefore subject to the rules of articles 53 and 55.

3. As far as articles 53 and 55 leave any doubt about the rights of the army of occupation to utilize the technology of the industry of the occupied countries or as far as transfer of equipment into territories outside of the occupied country seems to be necessary, suitable provisions designed to modify the rules of the Hague Convention should be included in the armistice terms. That is especially the case in regard to the power to dissolve organizations of a market regulating character.

A great number of problems of international law which are bound to arise out of the development of monopolistic organizations and their influence on international organizations should be governed by the principle expressed in this memorandum.

HEINRICH KRONSTEIN

EXHIBIT 1.

(From the Hague Peace Conference of 1907)

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Article 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of state, depot of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 55. The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.