

THE NAZI LAW
of the
Third German Reich

TOWARZYSTWO NAUKOWE
KATOLICKIEGO UNIWERSYTETU LUBELSKIEGO JANA PAWŁA II/
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Tadeusz Guz

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of the
Third German Reich

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KATOLICKIEGO UNIWERSYTETU LUBELSKIEGO JANA PAWŁA II

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Rev. Dr. habil. Mirosław Sitarz, Prof. KUL

Dr. habil. Aleksander Stępkowski (UW)

Dr. habil. Krzysztof Wroczyński, Prof. KUL

Translated by

Hanna Grygielska-Michalak & Karolina Jurak

Edited by

Stanisław Sarek

Computer-typeset by

Joanna Okoń & Stanisław Sarek

Cover designers

Marta & Zdzisław Kwiatkowscy



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TOWARZYSTWO NAUKOWE
KATOLICKIEGO UNIWERSYTETU LUBELSKIEGO
JANA PAWŁA II

ul. F. Chopina 29/11, 20-023 Lublin

tel. 81 525 01 93, tel./fax 81 524 31 77

e-mail: tnkul@tnkul.pl www.tnkul.pl

Dział Marketingu i Kolportażu / The Marketing and Distribution Section tel. 81 524 51 71

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INTRODUCTION

Although over seventy years have passed since the end of World War II, the issue of national socialism in the German Third Reich still remains the subject of scientific studies of a lot of scientists in the world and an enormous ideological challenge for the spiritual concern of a few generations of the human family in the process of the creation of culture fit for man as a spiritual and physical being, their natural and legal communities and—not infrequently—in the light of the realistic concept of natural law, fit for the personal Absolute.

The present source analysis of normative acts, philosophical-legal, judicial and supplementary literature the subject of which is the very essence of Hitlerite Nazism aims to join the huge current of those who seek the truth about that ideological system by means of instruments of the realistic philosophy of law: its *a priori* assumptions, materialistic view of reality, genesis of the existence of law, its inner causes of matter and form as well as the finality, kinds and consequences, to sum up briefly the problems of the teaching of law and the philosophy of law at the universities in the Third German Reich.

The *a priori* character of the socialist-national system was already articulated in Adolf Hitler's *Mein Kampf*. "We, national socialists, as the warriors of the new outlook on the world, must never stand on that famous 'ground of facts which are after all false'. In this case we would no longer be the warriors of a new grand idea but the backstage of today's lie."¹ Hence the vision of the worldview of the "socialist-national idea of law,"² as stated by Hans Frank, which through "VO from 28 February 1933 first deprived the Weimar Constitution of the fundamental force of law" because the socialist-national revolution" in itself is "the source of law with an immediate legal effect"³ and it is only on this principal condition, i.e.

¹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 434.

² H. FRANK, *Einführung. Nationalsozialismus und Verwaltungsrecht*, in: *Deutsches Verwaltungsrecht*, H. FRANK (Hrsg.), München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. XI.

³ *Ibidem*, p. XII.

“keeping whole nations charmed with the view of the world and shaping those nations into the fighting entities of this view” that—according to Alfred Rosenberg—“creating security” for “this new thought on the state” of the German national socialism would succeed in the sense of “its founder and Führer” as “its most beautiful incarnation.”⁴ Where does this appreciation, striking in its dimensions, of the “worldview” come from in the socialist-national movement? The explanation is that Hitler came to a conviction that the causes of the failure, or the “principal evil” in the history of Germany, still before World War I, should be sought in the “lack of the generally recognized and internally true view of the world,”⁵ whose essence is constituted by the “value of blood and race,”⁶ the “maintenance and strengthening of which should be treated as the supreme duty” in the process of “nationalization of masses” with the aim of creating a “national state” on the foundation—looking at it negatively—of “the anti-Marxist, anti-Semitic and anti-parliamentary view.”⁷

Marek Maciejewski rightly claims that “the concept of history presented in *Mein Kampf* as an expression of the nations’ struggle for their existence became one of the sources of the Nazi historical thought.”⁸ This process, on the one hand, of the Nazi “struggle” for “their race,” “nation” and “the state of the German Reich” while, on the other, of the negative “struggle” and combating all reality which—due to different reasons—opposed the ideology of the Nordic race, “was to be served by each thought and each idea, all science and all knowledge. From this point of view, everything should be examined and—according to its purposefulness—applied or rejected”⁹ in order to be faithful towards the “German truth.” “The race” “sticks in the blood” and that is why “it is impossible” “to Germanize” “those who stand below” the race of German

⁴ A. ROSENBERG, *Nationalsozialismus, Religion und Kultur*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 1, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

⁵ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I, p. 12.

⁶ *Ibidem*, p. 12.

⁷ *Ibidem*, p. 13.

⁸ M. MACIEJEWSKI, *Ruch i ideologia narodowych socjalistów w Republice Weimarskiej. O źródłach i początkach nazizmu 1919-1924*, Warszawa/Wrocław: Państwowe Wydawnictwo Naukowe 1985, p. 411.

⁹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 234.

nations, for example the Slavic peoples since “Germanization can be undertaken of land only but not of man.”¹⁰

The Führer said to Hermann Rauschning: “We, then, my Lord, we are shaking with the desire of power and we are by no means ashamed to admit it. We are obsessed with the highest good. We are fanatic in our desire of power. For us, this is not simple a bloodless lesson: this desire of power is literally the sense and meaning of our life,”¹¹ which ideally corresponds to the concept of Friedrich Nietzsche’s “Übermensch” as a typical man-desire.

A certain, maybe the shortest synthesis of the problems brought up in this thesis of the philosophy of law of the Third Reich was made—in cooperation with many Nazi scientists and politicians—by the minister of the Reich Hans Frank in the publication edited by him in 1937 *Deutsches Verwaltungsrecht* (*German administrative law*), where Justus Danckwerts states the following: “Therefore, it is the state and not the nation that stands at the beginning of analysis. The Führer is the representative of the nation. The nation acts through him. He is the highest war commander, politician, law maker, judge and administrator. Under no circumstances is he bound. Law stands above him which has been growing in the nation and has been tested in the fight of the most German members of the nation in the world of enemies and that is the reason why it is far stronger than any act of law and what is timeless. This law is the socialist national view of the world. It, meaning this view, “created the deepest and the most certain foundation of the life order of the German nation. It is the fundamental law of the nation, the unwritten constitution which determines all desire and all activity,”¹² not only of the members of the German nation itself but of each person in general because it subsists as an ailment in this one and only substantialized existence of the German Nordic race. It is here that, according to Rudolf Bechert, the seeming “necessity of socialism”¹³ has its reason for the systematic shaping and interpretation of law.

An important role in grasping the true ideological face of the Reich is played by the document of *Diaries* by Joseph Goebbels, who was one of Hitler’s closest collaborators and who probably participated significantly in the personal story of his spirit the philosophical frameworks of which are certainly defined very

¹⁰ Ibidem, p. 428.

¹¹ H. RAUSCHNING, *Gespräche mit Hitler*, Zürich/New York: Europa Verlag 1940, p. 254.

¹² J. DANCKWERTS, *Die Verwaltungsgerichtsbarkeit*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 109.

¹³ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: C. SCHAEFFER (Hrsg.), *Neugestaltung von Recht und Wirtschaft*, fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 8.

clearly, while only formulated by Goebbels. “In this context the Führer introduces a number of very interesting points of view. He begins talking about the opposition Kant-Schopenhauer-Nietzsche-Hegel again. He considers Kant to be one of the philosophers who are dynastically connected in a significant way. Schopenhauer is a born pessimist [...] but if Schopenhauer perceives the world as mentally the worst being and man as mentally deserving contempt the most, then, in fact, he would have had to draw the consequences from this and instead of writing thirteen books he should have himself vanished from this valley of misery. He did not do this. Nietzsche is more realistic and more consistent here. Although he sees the harm done by the world and mankind, he draws the conclusion of the superman’s requirements, the requirement of a more strengthened and intensive life. That is why Nietzsche is naturally closer to our concept than Schopenhauer however much we would like to especially value Schopenhauer. Hegel is by all means a philosophically bound prince’s servant; according to Hitler, he deserves a harsh and ruthless spiritual punishment of flogging, which he experiences from Schopenhauer. Pessimism does not suffice to harness human life. Human life is the matter of a constant selective struggle. He who does not fight gets disintegrated. The task of philosophy is only to strengthen and simplify life, and not cover it with a pessimistic curtain.”¹⁴

No transcendent Absolute exists and neither is any man rational but “the measure of all things is the Führer,” who “transcends himself sharply against science, which has no imagination. Philosophy, which is frightened of the ultimate consequence, also gets its share. It is only Nietzsche who makes an exception here. He specifically points at the absurdity of Christianity. In 200 years it will present only a grotesque memory. We must stop it in all areas. First of all, in vocations. [...]. The Führer’s world science is clear and evidenced but science is against,”¹⁵ as stated by Karl Löwith, on the one hand, “the faith that the history of the world is the judgment of the world,” where “law and rationality” determine the legal and moral order of a rational being, as well as

¹⁴ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941-1945*, vol. 8: *April-Juni 1943*, ed. H. MEHRINGER, München: K.G. Saur 1993, from 13 May 1943, p. 290: cf. J. HOFFMEISTER, *Die Problematik des Völkerbundes bei Kant und Hegel*, Tübingen: Morhr <Paul Siebeck> 1934; H. KIESEWETTER, *Von Hegel zu Hitler. Eine Analyse der Hegelschen Machtstaatsideologie und der politischen Wirkungsgeschichte des Rechtshegelianismus*, Hamburg 1974 [*Die organische Machtstaatsideologie Hegels. Vorbereiter oder Wegbereiter des Nationalsozialismus?*, Diss. Heidelberg]; M.Z. GALINDO, *Triumph des Willens zur Macht. Zur Nietzsche-Rezeption im NS-Staat*, Hamburg: Argument 1996.

¹⁵ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923-1941*, vol. 9: *Dezember 1940-Juli 1941*, ed. E. FRÖHLICH, München: K.G. Saur 1998, p. 117.

against “the faith in Divine Guidance and Providence,”¹⁶ which does not destroy the philosophy of the human spirit but opens to it the unfinished, eternal perspective of transcendence.

In this context it is worth to refer to Heinrich Rickert, who in 1933 called for the “scientific” status of “philosophy.” “In our times more and more often the announcements are encountered which deny philosophy the character of a science,”¹⁷ and whose “right” to be “a science should be defended against the currents of time,”¹⁸ because although “philosophy” is a certain “risk,” it “shows the whole of the world only in theory,”¹⁹ and whose lack might lead humanity to huge dramas. That is why while analyzing the thoughts of Heinrich Rickert, Aleksander Bobko proposes that “axiology be ‘entered’ and in fact the transcendental method should be transgressed”²⁰ and the primary character of ontological, epistemological and legal-moral realism should be returned to.

However, the main decision of representatives of national socialism is radically different from the classical one since—as stated by Emil Sommermann—“our way of understanding must be political” and as such it guarantees “a satisfying result”²¹ because it is only through politics that the Germanic race reaches self-consciousness and becomes a nation. “The socialist-national ethics of the nation and the state”²² can only be the “political ethics,” or “the ethics of

¹⁶ K. LÖWITH, *Curriculum vitae*, in: IDEM, *Sämtliche Schriften*, M.B. DE LAUNY (Hrsg.), vol. 1: *Mensch und Menschenwelt. Beiträge zur Anthropologie*, K. STICHWEH (Hrsg.), Stuttgart: J.B. Metzlersche Verlagsbuchhandlung 1981, p. 459.

¹⁷ H. RICKERT, *Wissenschaftliche Philosophie und Weltanschauung*, “LOGOS. Internationale Zeitschrift für Philosophie der Kultur”, vol. XXII (1933), p. 37.

¹⁸ Ibidem, p. 38.

¹⁹ Ibidem, p. 57; cf. H.F. FULDA, *Heinrich Rickerts Anpassung an den Nationalsozialismus*, “Deutsche Zeitschrift für Philosophie”, 47.Jg 1999, pp. 253-269.

²⁰ A. BOBKO, *Wartość i nicość. Teoria wartości Heinricha Rickerta ma tle neokantyzmu*, Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego 2005, p. 123.

²¹ E. SOMMERMANN, *Der Reichsstatthalter*, Erlangen: Verlag von Palm & Enke 1933, p. 3; H.-H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936; O. KOELLREUTTER, *Die Gestaltung der deutschen politischen Einheit* München/Berlin/Leipzig: Schweitzer-Verlag 1934; E. KRIECK, *Völkisch-politische Anthropologie*, Teil 1: *Die Wirklichkeit*, Frankfurt/Leipzig: Armanen-Verlag 1938; Teil 2: *Das Handeln und die Ordnungen*, Frankfurt/Leipzig: Armanen-Verlag 1937.

²² H. NEEF, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 19.

the community”²³ of the Germanic nation. ”The basis of the racist-nationalistic worldview is the natural science of the 19th century,” which above all means the “science on development, biology, the science on the race.” That is why the Nazi ethics is derived from the “notion of the race,”²⁴ but—what is worth emphasizing—it is derived from the “notion” and not from the race as a real attribute of the existence of “man,” who—according to Joseph Goebbels—“is and will remain a skunk”²⁵ and as such is not any substantial entity of law. Hence the words of the text below:

“Beautiful Earth ornamented and cleaned like the bride on the wedding day.
How beautiful it would have to be to live on you, Earth!
But man doesn’t want to and cannot, after all.
They have to have a struggle and protest and opposition.
After all, it is only opposition and friction that provide enormous power!”²⁶

This aptly reflects the spirit of the Nazi ideology, which sees each being as a contradiction of existence and non-existence, whose positive side is only the Nordic existence and the negative one is all other as non-existence, which – with the full sanction of racist law – should be put to death, like for example Poles and Jews, or enslaved, or, in case of the smallest part of mankind, Germanized, not without the greatest risk. That is why other as a nonentity in the ideology of the race is a direct danger, for example the Jewish or Gypsy nations: “We are living in the century of receding liberalism and rising socialism. Socialism (in its pure form) is the binding of an individual [!] against the good of the state and the national community. This has nothing to do with the international. A Jew is international, like a Nomad or a Gypsy are international. Are there any national Jews? I don’t believe it. From my point of view, I know only the Jews who—at the very best—stand against the nation as inte-

²³ O. KOELLREUTTER, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, p. 55.

²⁴ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, pp. 60-61.

²⁵ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923-1941*, vol. 1/I: *Oktober 1923-November 1925*, ed. E. FRÖHLICH, München: K.G. Saur 2004, from 9 May 1924, p. 134.

²⁶ Ibidem, from 7 June 1924, p. 146.

rested observers. Marx is without a heart. We put socialism as an ethical and national demand. An associate is called our neighbour, a member of the federation. For us, each neighbour in the German homeland is a member of the federation in the struggle for the right as a human being. Democracy is a devastating equation. A Jew wants to equal us to outrace us,²⁷ and this “equalization,” according to the Nazi, would be the “equalization” of existence and non-existence, which is inadmissible. So, how is it possible that cooperation arose between Hitlerism and Stalinism, which is between existence and non-existence? It is possible only thanks to the previous methodological-ontological-judicial assumption that “Bolshevism” is “healthy in its core,”²⁸ meaning in its non-existence because national socialism uses an ontologized negation which is necessarily synthesized with existence, which is with the substantialized German race as the truest existence. The thesis that Hitler “became an anti-Marxist”²⁹ is only partially right since the Führer took over the whole essence of the structure of his Nazi thought from Heglism and Marxism.

Basing on the foundations of the metaphysical method, the present study makes a systematic analysis of the existence of the law of German Nazism based on the premises of the racist dialectics in national socialism and it applies “Toposforschung”³⁰ by Otto Pöggeler, which has already been tested in numerous scientific studies of the German philosophical literature which

²⁷ Ibidem, from 10 June 1924, p. 147.

²⁸ Ibidem, from 10 June 1924, p. 162.

²⁹ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

³⁰ O. PÖGgeler, *Dialektik und Topik. Hermeneutik und Dialektik* 2, 1970, pp. 273-310 (in particular, p. 288); cf. T. GUZ, *Zum Gottesbegriff G.W.F. Hegels im Rückblick auf das Gottesverständnis Martin Luthers. Eine metaphysische Untersuchung*, in: M. BALKENOHL (Hrsg.), *MORAL-ANTHROPOLOGIE-ETHIK*, vol. 3, Frankfurt a. M.: Peter Lang GmbH. Europäischer Verlag der Wissenschaften 1998, p. 16; E. SCHWINGE, *Der Methodenstreit in der heutigen Rechtswissenschaft*, Bonn: Ludwig Röhrscheid Verlag 1930; Ph. HECK, *Rechtserneuerung und juristische Methodenlehre*, Tübingen: Mohr Verlag 1936; G. DAHM, *Der Methodenstreit in der heutigen Strafrechtswissenschaft*, as well as F. SCHAFFSTEIN, *Rechtswidrigkeit und Schuld im Aufbau des neuen Strafrechtssystems*, in: G. DAHM, F. SCHAFFSTEIN, *Methode und System des neuen Strafrechts*, Berlin 1938, pp. 1-70; K. LARENZ, *Über Gegenstand und Methode des völkischen Rechtsdenkens*, Berlin: Junker und Dünhaupt Verlag 1938; W. SAUER, *Juristische Methodenlehre. Zugleich eine Einleitung in die Methodik der Geisteswissenschaften*, Stuttgart: Ferdinand Enke-Verlag 1940.

searches for the primary meanings of concepts in “the interpreted sources themselves,” analyzing their mutual semantic-pragmatic-syntactic relations and making it possible to draw conclusions “by way of the sources” but these are the conclusions that correspond precisely with the studied subject, which means that it achieves its epistemological objectives in the form of the possibly most faithful picture of the essence of the law of the Third Reich.

All translations, especially from German, included in the present publication come originally from the Author.

*

I take the liberty to ask all Readers of this humble work for further constructive debate on this dramatic—especially for all the victims of the German national socialism—problem in the history of the spirit and the world. For this I already want to thank them from my heart.

Rev. Tadeusz Guz

Szozdy, 10 June A.D. 2013

I. FORMAL AND METHODOLOGICAL ISSUES OF NATIONAL SOCIALISM: “FÜHRER” AS THE MEASURE OF ALL THINGS¹

While answering the question on the rules of thinking, the categories and the research object as well as the method built up on this formal and logical basis, or the method of arriving at the truth, science as such is determined and this also enables to distinguish science from pseudo-science or anti-science, which is ideology, the essence of which is finally questioning both the true scientific culture and not infrequently—negating the very reality.

An important element in the discussed issue of the philosophical and legal analysis of the system of law in the Third German Reich is also a discussion of the most important legal principles determining the whole socialist-national concept of law. What concept of science is the German national socialism trying to impose, even using the physical force?

“The true science is a means of education in the context of the German “worldview,” which means it is “determined by the race”² whose form and also a sort of “spirit” is the NSDAP “party” by Krieck considered “the most dignified educational organ of the state in the sense of the socialist-national

¹ A. ARNDT, *Die Krise des Rechts*, in: W. MAIHOFFER (Hrsg.), *Naturrecht oder Rechtspositivismus?*, Darmstadt 1962, pp. 117–118; cf. an exceptionally precise analysis of ideologization of science on natural law by the racist ideology of national socialism in Germany conducted H. LIERMANN: *Rasse und Recht*, “Zeitschrift für die gesamte Staatswissenschaft” 85 (1928), pp. 285 ff. Fabian Wittreck rightly called this diagnosis “prophetic.” F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 4, ref. 12; W.R. BEYER, *Rechtsphilosophische Besinnung. Eine Warnung vor der ewigen Wiederkehr des Naturrechts*, Karlsruhe: Verlag C.F. Müller 1947, pp. 45ff.

² E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 13; cf. E. KRIECK, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934.

worldview and the order of values”³ in the state headed by the Führer. That is why “to create law” and “to interpret law” means “to grant the legal capability, will and consciousness” of the German “nation,” “the masterly expression,” i.e. “with the deeply sensitive power, examine what the national community and its state considers to be the law and judges to be lawlessness” and “apply” only this “for the necessity of a particular case.”⁴ Naturally, according to the philosophy of the socialist-national law, the existence of “the Führer” is a culmination of the legislative and interpretative systematics in law and hence the concept of the “Führer’s state.”⁵ Therefore, what are the principles that the consistently conducted ideologization of science, especially including philosophy and legal sciences, is based on?

1.1. The socialist-national “principle of the Führer” instead of the classical principles of existence, cognition and activity

The classical logic and Old Greek metaphysics determined the fundamental principles of existence, cognition and activity on the grounds of the cognitively discovered *Logos* as the pre-reason for all existence. This enables to establish the three supreme principles for those three main dimensions of the existence of man as a rational and free being endowed with the body, together with the complicated sphere of senses and feelings, namely the principles of identity, non-contradiction and excluded middle or causality.

National socialism radically breaks with the tradition of science based on the eternal and absolutely perfect *Logos* and it has its foundations both in

³ E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 13.

⁴ R. FREISLER, *Richter und Gesetz*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 17, Berlin: Industrieverlag Späth & Linde 1936, p. 12.

⁵ O. KOELLREUTTER, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, pp. 1–63.

Hegel’s contradictory dialectics⁶— Richard Nürnberger writes about Kant’s and Hegel’s idealism as a “ferment” for the whole development not only of “philosophical” sciences on the law and the state in the Third German Reich, which—especially in Hegel’s “philosophy of law” are characterized by some “exclusive [...] depth”⁷ but also on the same dialectics; however, in its materialistic and socialist interpretation by Marx and Engels, which for some reasons fascinated not only Adolf Hitler, who confessed in *Mein Kampf*: “I began my acquaintance with the authors of this science to study the basis of the movement”⁸ and “I truly arrived at the understanding of Karl Marx’s content and will of the work of life [...]. It is only now that I understood his “Capital” exactly as the struggle of social democracy against the national economy.”⁹ Joseph Goebbels writes in a similar spirit: “I’m reading Karl Marx’s *Capital*. A and Ω of the disintegrated materialism but after all the book is too strong and fascinating to do everything at the first time around. We, young Germans, must be prepared for serious spiritual struggles. Fascination will not do it by itself. We must be diligent and sincere towards each other. This is our victory. Sometimes I observe myself and then bright joy comes over me because I have a new faith and a new goal. I rambled around without any choice or norms in my spirit. Now I am strong and I arm myself to fight for the ultimate German form of existence.”¹⁰ Referring to the question about the first principles of the

⁶ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941–1945*, vol. 1: *Juli–September 1941*, ed. E. FRÖHLICH, München: K.G. Saur 1996, from 8 August 1941, p. 193. The “spirit” of the German Nazi ideology can be, for example, seen in the following passage from *Diaries* of Joseph Goebbels, who writes the following about Americans: “Our German propaganda worked well in part but in part also absolutely badly. German propaganda people do not understand how to place themselves in relation to the American mentality. An American likes listening to sensational news. They aren’t interested in the philosophical basis of national socialism, beginning with Kant or Hegel. An American is a person of facts. We also probably assess their Power of comprehending too highly. The American nation does not have too much brain. The way of talking to them must be the most primitive.”

⁷ R. NÜRNBERGER, *Kants Rechtsphilosophie in ihrem Verhältnis z Rousseau*, “Zeitschrift für die gesamte Staatswissenschaft,” vol. 104 (1944), p. 29.

⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 68.

⁹ *Ibidem*, p. 234.

¹⁰ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923–1941*, vol. 1/1: *Oktober 1923–November 1925*, ed. E. FRÖHLICH, München: K.G. Saur 2004, from 7 May 1924, p. 131.

system, this means that, faithfully towards dialectics of existence, in his idealistic-materialistic interpretation, “each philosophical principle bears contradiction in itself and that is why it aims at self-transcendence (‘Entwicklung’). This consequently overcome principle is not erased in the next system but it is only ‘raised higher’ (aufgehoben)” since—according to Theodor Litt, as a follower of Hegelian absolute idealism, the history of philosophy should be ontologized, which was also done within the Marxist current of thinking, where “generality of the philosophical idea and specificity of philosophical systems dooms philosophy for time.”¹¹ A similar, “neo-idealistic” interpretation of the principles of existence, thought and activity is represented by a philosopher of law from “Kieler Schule” Karl Lorenz, who puts a slightly stronger emphasis on a concrete “person of a member” in the process of “concretization,” or “updating” of “legal notions and legal sentences” to the wholly “changeable,”¹² community existence of the German racist nation representing what is general naturally in the racist sense. A philosopher of law Julius Binder and other philosophers and lawyers such as Friedrich Bülow, Gerhard Dulckheit, Carl August Emge, Eberhard Fahrenheit, Ernst Forsthoff, Herbert Franz, Gerhard Giese, Hermann Glockner, Theodor Haering, Heinz Heimsoeth, Alfred Klemmt, Otto Koellreutter, Werner Schmidt or Max Wundt derive from the environment of Nazi scientists basing on Hegel’s “dialectics.”¹³ Hermann Glockner, the editor of the jubilee edition of Hegel’s works, compares Hitler’s services “for politics” with Hegel’s services “for philosophy” in the “Germanic-national” spirit and from the position of a representative of racist philosophy he blames “Marxists and Jews” for the crisis or “twilight of philosophy.”¹⁴

A Nazi scientist from the University in Heidelberg Ernst Kriek emphasizes that the logical nonsense ‘movement is the state’ corresponds completely to contemporary reality: Reality stands outside the so-called laws of logic,¹⁵ which is why the “racist” law does not represent and it must not

¹¹ WEIGELIN, (review) Theodor Litt, *Philosophie und Zeitgeist*, vol. 1, Leipzig: Felix Meiner ²1935, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 498.

¹² O. v. SCHWEINICHEN, (review) *Über die Grundfragen der neuen deutschen Rechtswissenschaft*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), pp. 482–484.

¹³ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 78.

¹⁴ M. LESKE, *Philosophen im »Dritten Reich«*. Studie zu Hochschul- und Philosophiebetrieb im faschistischen Deutschland, Berlin: Dietz Verlag 1990, ref. 166, p. 284.

¹⁵ E. KRIECK, *Völkisch-politische Anthropologie*, vol. 1, Leipzig ²1938, p. 100.

represent any “logic of norms” but it “is the political order of values”¹⁶ and, therefore, it is difficult to refute the charge of “de-valuation of law” and it is difficult to perform affirmation of such an “order of law” and its seemingly “full ethical dignity”¹⁷ whose “subject” of the German nation was—according to the Führer’s promise—to be the “subject of higher ethics,”¹⁸ while in the course of history before and during World War II, provided with the cause through this moral “subject,” it relativized totally and thus caused a drama of negation to the classical principles of the logic of existence. At the same time, it externalized the “species egoism,” i.e. according to Andrzej Szostek, “an attitude of treating oneself as the criterion of the assessment of others,” meaning “racism” of the morality of the acts of thought and activity of man as a being logical by nature and endowed with untouchable “dignity of a person.”¹⁹ Therefore, how does Nazism view these most important principles?

“The principle of non-contradiction loses its sovereign meaning” since—not only according to Hegel but to Binder too—“I cannot think of existence without nothingness and vice versa,” which directly led to the acceptance of the “higher concept,” which is “becoming.”²⁰ Fabian Wittreck can consider as scientific only what possesses at least a “minimal measure of non-contradiction” and this is what the “science of law” from the period of the Third Reich lacks and that is why he is right to give a negative answer to the question: “Is there any socialist-national science of law?”²¹ The true science assumes the existence of the true *ratio*, which, for example, makes use of the principle of non-contradiction and does not negate this principle since—according to Mieczysław A. Krąpiec—“negating the basic difference at the principal moment between ‘yes’ and ‘no,’ between objectivized affirmation and negation, we deprive this manner

¹⁶ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 43; cf. H. HATTENHAUER, *Wandlungen des Richterbildes im 19. und 20. Jahrhundert*, in: R. DREIER, W. SELLERT (Hrsg.), *Recht und Justiz im »Dritten Reich«*, Frankfurt a.M.: Suhrkamp 1989, pp. 9–33.

¹⁷ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 43.

¹⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 421.

¹⁹ A. SZOSTEK, *Pogadanki z etyki 1992/1993*, in: Biblioteka “Niedzieli,” vol. 1, Częstochowa 1998, pp. 89–91.

²⁰ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 79.

²¹ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 6.

of explaining the fundamental law promoting all rational cognition—the law of non-contradiction.”²²

The principle of identity shares the fate of the principle of non-contradiction and is also dialectically transformed in its universal binding force and it functions as “identity,” at the same time being the “identity and non-identity,”²³ which is most visible in the socialist-national vision of the existence of the German nation, and—more exactly—the notion of the Germanic nation as the consequence of ideologization of the German Reich, which—substantializing its relative national-state existence—determined other nations and states as belonging to its existentially “non-existence” of its own—in the Nazi sense—identity. Such an important example of negation of the classic principle of identity is the problem of “uni-formation”²⁴ of “identity” of a broadly viewed German university with the NSDAP,²⁵ which resulted in the principal “politicization” of science in the German Reich.²⁶ Another instance of a lack of affirmation of the principle of identity, but in the dimension of the legal-moral order, is the dialectical thinking of Binder, who reduces—adequately to the chosen system—law and morality but to the existence of the “legal order,” which is also an expression of previously questioning not only the “freedom of the will”²⁷ of a concrete human person but also elimination of morality from the order of its unity with the existence of law through dialectical understanding of the principle of identity in the sense of Hegelian idealism as “identity of non-identity.”

²² M.A. KRĄPIEC, *Człowiek i prawo naturalne*, Lublin: TN KUL 1975, p. 105.

²³ G.W.F. HEGEL, *Wissenschaft der Logik*, hrsg. von G. LASSON, PhB 56, Bd. 1, Leipzig: Verlag von Felix Meiner 1951, p. 59; cf. T. GUZ, *Zum Gottesbegriff G.W.F. Hegels im Rückblick auf das Gottesverständnis Martin Luthers. Eine metaphysische Untersuchung*, in: M. BALKENOHL (Hrsg.), *MORAL-ANTHROPOLOGIE-ETHIK*, vol. 3, Frankfurt a. M.: Peter Lang GmbH. Europäischer Verlag der Wissenschaften 1998.

²⁴ Cf. J. ECKERT, *Die juristische Fakultät im Nationalsozialismus*, in: H.W. PRAHL (Hrsg.), *Uni-Formierung des Geistes. Universität Kiel im Nationalsozialismus*, Kiel 1995, pp. 51–86.

²⁵ M. SANDBERGER, *Das Nationalsozialistische Deutsche Studententum*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. 1, art. 7 d, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

²⁶ Cf. M. LESKE, *Philosophen im »Dritten Reich«. Studie zu Hochschul- und Philosophiebetrieb im faschistischen Deutschland*, Berlin: Dietz Verlag 1990.

²⁷ WEIGELIN, (review) Julius Binder, *Grundlegung zur Rechtsphilosophie*, Tübingen: J.C.B. Mohr (Siebeck) 1935, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 503.

The principle of causality, although familiar to ideological theoreticians and Nazi leaders and always applied in the contexts positive for the ideology itself,²⁸ gets rejected, which is visible in disputes of national socialism with international socialism of Marx and Engels, who is treated as the “cause” and accused of “poisoning the masses,” of “planned, one-sidedly conscious, ceaseless processing of the mass through the middle of propaganda of the press and national speeches” and due to “brutally terrorizing those thinking differently.” Moreover, “Marxist science and tactics” present “devilish purposefulness,”²⁹ as concluded by Hans Fabricius. The principle of causality is replaced by the new one, constituted around the materialistically understood dialectic “feedback of effects,” “goal and means.”³⁰ The socialist-national community will not be fully comprehended if its existence and worldview are analyzed exclusively as the Führer’s creation, while overlooking the necessary complementation and feedback of effects (Wechselwirkung), where the Führer and the nation are standing.³¹ Otto Dietrich states that “this principle of the Führer stands in a reciprocal relation with another fundamental principle of national socialism,” i.e. the principle of “politicization of the guided ones, politicization of the nation.”³² Except the Führer himself, who can do this? Dietrich answers as

²⁸ Cf. O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 8; cf. H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 50; E. FEHRLE, *Das Wesen des Volkes*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 11, Berlin: Industrieverlag Späth & Linde 1936, p. 5.

²⁹ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, pp. 6; 12.

³⁰ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 1044.

³¹ E.R. HUBER, (review) Herbet Krüger, *Führer und Führung* (Breslau 1935), “Zeitschrift für die gesamte Staatswissenschaft,” vol. 95 (1934/35), p. 744.

³² O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung*

follows: “This is reserved for the few appointed and chosen ones,”³³ which did happen at a rapid pace after Hitler got the power thanks to the so-called *Reichsstatthaltergesetz*,³⁴ which act was decisive in the NSDAP taking over complete power in the German Reich.³⁵ Then, by way of *Gesetz zur Sicherung der Einheit*

des nationalsozialistischen Staates, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

³³ *Ibidem*, p. 6.

³⁴ “Die Reichsregierung hat das folgende Gesetz beschlossen, das hiermit verkündet wird: § 1. (1) Der Reichsstatthalter ist in seinem Amtsbezirk der ständige Vertreter der Reichsregierung. (2) Er hat die Aufgabe, für die Beobachtung der vom Führer und Reichskanzler aufgestellten Richtlinien der Politik zu sorgen. § 2. (1) Der Reichsstatthalter ist befugt, sich von sämtlichen Reichs- und Landesbehörden sowie von den Dienststellen der unter Aufsicht der Reichs oder Landes stehenden öffentlich-rechtlichen Körperschaften innerhalb seines Amtsbezirks unterrichten zu lassen, sie auf die maßgebenden Gesichtspunkte und die danach erforderlichen Maßnahmen aufmerksam zu machen, sowie bei Gefahr im Verzuge einstweilige Anordnungen zu treffen. (2) Diese Rechte kann er auf die ihm beigegebenen Beamten nicht übertragen. § 3. Die Reichsminister können bei Durchführung der ihnen obliegenden Aufgaben den Reichsstatthalter unbeschadet der Dienstaufsicht des Reichsministers des Innern unmittelbar mit Weisungen versehen. § 4. Der Führer und Reichskanzler kann den Reichsstatthalter mit der Führung der Landesregierung beauftragen. In dieser Eigenschaft kann der Reichsstatthalter ein Mitglied der Landesregierung mit seiner Vertretung beauftragen. § 5. Auf Vorschlag des Reichsstatthalters ernennt und entlässt der Führer und Reichskanzler die Mitglieder der Landesregierung. § 6. Der Reichsstatthalter fertigt nach Zustimmung der Reichsregierung die Landesgesetze aus und verkündet sie. § 7. Das Recht der Ernennung und Entlassung der Landesbeamten steht dem Führer und Reichskanzler zu. Er übt es selbst aus oder überträgt die Ausübung anderer Stellen mit dem Rechte der Weiterübertragung.”

³⁵ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 15: “One of the first and most important laws is [...] the law on the governors of the Reich from 7 April 1933. It roots the power of the NSDAP in all German lands. Hindenburg appointed old socialist-national warriors to be the governors: General von Epp (Bayern) and district heads (Gauleiter) Martin Mutschmann (Sachsen), Wilhelm Murr (Württemberg), Robert Wagner (Baden), Fritz Sauckel (Thüringen), Jakob Sprenger (Hessen), Wilhelm Friedrich Loeper (Braunschweig-Anhalt), Carl Löwer (Bremen-Oldenburg), Karl Kaufmann (Hamburg), Dr Alfred Meyer (Lippe), Friedrich Hildebrandt (Mecklenburg-Lübeck). In Prussia the governor’s office is entrusted to Hermann Göring, who is nominated to be the Prussian prime minister on 11 April.”

von Partei und Staat from 1 December 1933 the “inseparable union of the state” with “the NSDAP” took place.³⁶

On the other hand, “a causality relation between the activation of the will and the consequence” of a given tort is spoken about within the space of criminal law. The concept of the “cause”³⁷ appears, which gives significant problems to the German Reich but—according to Karl Larenz—speaking of “causality, a causality relation” in the sense of “a logical-natural notion” “is valueless for the German law”³⁸ while being useful in everyday life only to a slight degree. Although the “theory of adequate causality” is effective in the “practical” dimension, according to Larenz, it does not answer the most important question of “why?”³⁹ which can be answered only from the analysis of the “essence of the attitude and responsibility,” i.e. in his opinion, “not due to the notion of the cause,”⁴⁰ while, after all, each external act is only a faithful analogy to man’s internal attitude and the quality of their responsibility. Helmut Nicolai, a racist philosopher, claims that “all externalizations of temporal existence undergo the law of a causal relation. Hence, there is no phenomenon which would not have its cause. Each person, each human act and each instance of refraining oneself also remain in an infinite chain of causes and effects. Each punishable act which is performed also returns to its cause. In accordance with the science on freedom, however, it is man who decides in this point, without having any cause to it.” On this level relativism is manifested in Nicolai’s thought in the relation of his Nazi philosophical and legal thought to man’s auto-determination on the grounds of their personal freedom when they themselves as free become the cause of their acts, and in the relation to the Cause in the sense of the Absolute as the objective Author of each miracle, that is Their free interference from the depths of the very transcendence into the immanence of the cosmos, trespassing the entitativity of the laws of nature, which is only in Their power as the Creator: “A certain kind of miracle occurs then which cannot get explained since ‘to explain’ means the discovery of the cause and the

³⁶ “§ 1. (1) Nach dem Sieg der nationalsozialistischen Revolution ist die Nationalsozialistische Deutsche Arbeiterpartei die Trägerin des deutschen Staatsgedankens und mit dem Staat unlöslich verbunden.”

³⁷ E. SCHWINGE, *Militärgesetzbuch*, Berlin: Junker und Dünnhaupt Verlag 41940, p. 8.

³⁸ K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 12.

³⁹ K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 12.

⁴⁰ *Ibidem*, p. 14.

result. Where explanation is not possible any more, each science stops. The miracle of the phenomenon which has no cause is the enemy to science. For this reason I cannot scientifically approve of the theory of the freedom of the will. It can have any place it wants in faith. The earthly life is subject to the law of cause and result,"⁴¹ which means absolute natural and racist determinism where the entity of the German race, *quasi* only the acting subject, is an unquestionable "cause" for the ontic remains as its "result." The problem of the break-down of the classical sciences on principles in national socialism is also manifested in the following principle: "The whole is something more than a sum of its parts," replaced in Nazism by the principle of "the whole as a sum of its parts." The Secretary of the Reich Wilhelm Stuckart writes as follows: "In this new legal thinking, true nationalism and noble socialism are one and the same: ultimately, both mean that the whole stands above the part and it comes from the part. Nationalism, which is not at the same time socialism, that is which does not place the good of a member of the nation inside and outside the interest of an individual is a contradiction and dishonesty in itself. Socialism which does not see its task in supporting the whole of the nation, thus not being nationalism, but puts the interest of the class or the group above the whole does harm to the whole,"⁴² because according to this Nazi ontology, the "whole" of the race "is before the part" of a particular member of this race and as a whole it "forms"⁴³ the part to its proper form of existence, which is excluded with the ideological assumption that the whole is only a sum of its parts and, besides, how can the whole viewed in his way constitute the final reason for the existence of its part if this whole itself cannot first justify its coming into being and hence it is not a being *per se*.

Therefore, if the principle of non-contradiction, identity, causality and all the others are eliminated, a question arises of what is ultimately the principle of the whole socialist-national system in the German Reich? The answer is that this "principle" binding absolutely all is the "principle of the Führer," which "is materialized where the formation of the will does not take place in a pluralistic

⁴¹ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Frz. Eher Nachf. ³1934, p. 45.

⁴² W. STUCKART, *Volk, Partei, Reich*, in: H. FRANK (Hrsg.), "Deutsches Recht," 5.Jg (1935), fasc. 15/16: *Verwaltungsrecht*, Berlin: Deutscher Rechtsverlag 1935, p. VII.

⁴³ E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

or collegial manner but only one male gives orders and the subjects realize this order.”⁴⁴ Although, as Justus Danckwerts writes, “the Führer and the nation need the help of organized institutions to realize their will of action” and “these institutions are the party and the state,” “the state is a tool in the Führer’s hand and it is him, and thus the nation, who it is to serve. To lead the state, the Führer has technically various possibilities in a double way. He can, looking to the future, establish abstract rules and subordinate a given case. In the former case, he will make use of the law while in the latter he will regularly use the form of a weaker official order,”⁴⁵ which means that the Führer on the one hand confirms the thesis that “relations between those two sources of power: the state and the party are in reality the relations between the apparent and real power,”⁴⁶ while on the other hand, Hitler makes himself the absolute since the discourse on the main principle is in fact a discourse on the Source of all principles of existence, i.e. on the Absolute, whereas discovering them also constitutes the way to Him, that is to “God, to Him who IS” and who “constitutes the foundation of all existence and the reason of its good. And it is Him who is the ‘addressee’ of all our deeds.”⁴⁷ The Nazi usurpation of being a “principle” in the definite sense is a way of eliminating the Absolute from the level of human thinking and science as well as from the state, politics, law and morality. It also constitutes the basis to an absolutely authoritarian way of exercising power over others, which in fact is the essence of dictatorship, coercion and complete instrumentalization using others, which is almost used to the final limits of the human globe by the Führer’s state of the German Reich, which is expressed in Andrzej Szostek’s thesis that “attitude towards the world—especially towards the world of persons—is in fact the attitude towards God-Creator,⁴⁸ which in the case of the Nazi representatives a significantly negative attitude.

⁴⁴ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 44.

⁴⁵ J. DANCKWERTS, *Die Verwaltungsgerichtsbarkeit*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 109.

⁴⁶ H. ARENDT, *Korzenie totalitaryzmu*, transl. M. SZAWIEL, D. GRINBERG, vol. 1, Warszawa: Niezależna Oficyna Wydawnicza 1993, p. 435.

⁴⁷ A. SZOSTEK, *Pogadanki z etyki 1992/1993*, in: Biblioteka “Niedzieli,” vol. 1, Częstochowa 1988, p. 98.

⁴⁸ *Ibidem*, p. 97.

This ideological blindness is astonishing as it treats this “dictatorship” by the Führer on the example of Carl Schmitt as “necessary and salutary.”⁴⁹ For Henkel, it is a positive process of “totalization” of the Nazi state, where “the dualism of the state and the society is overcome, the autonomy of social areas is removed, where the unity is realized in the” socialist-national “state,⁵⁰” basing on struggle and annihilation of other races analogously to the “class conflict” in accordance with the thought of Karl Marx, Frederick Engels and others, which Rudolf Stammler subjects to essential questioning because of the “correct community” which bases on the “principles” of “objective correctness,” “absolute binding” and “unconditional” or “perfect harmony,” or “undeniable alignment” of the whole into one legal order as the basis of existence of “an individual,” “a community” and “the state.”⁵¹ This voice, however, belonged to the isolated ones and in fact unsuccessful for the shape of the history of the Reich itself and the world then. What happens next inside Nazism rejecting the essentially classical principles of existence, cognition and activity with concrete legal and natural principles?

1.2. The Nazi negation of the highest natural law principles

It is worth emphasizing that articulating natural law in the human person is possible on the ground of their human existence understood in terms of identity and non-contradiction and their permanent spiritual relation with personal God, that is through their “participation” in eternal Divine reason as the Pre-source of natural law. It is on the ideological postulate of the “exclusiveness”⁵² of the party and ideology that the legal-natural science of St.

⁴⁹ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 41.

⁵⁰ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 51.

⁵¹ R. STAMMLER, *Deutsches Rechtsleben während des 19. Jahrhunderts. Lehrreiche Rechtsfälle*, in: IDEM, *Deutsches Rechtsleben in alter und neuer Zeit*, vol. II, München: Beck'sche Verlagsbuchhandlung 1932, pp. 254–255.

⁵² H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

Thomas Aquinas on the “participation of Divine law in rational nature”⁵³ breaks down because the “principia of the party,”⁵⁴ like the “dogmas for faith,” are something most important and they force their German race and all other nations not only to absolute, i.e. also passive and brainless observance of the party’s rules, which is not any more any “participation” in Divine order as a personal, and hence both rational and free, act. Therefore, how does the process of the Nazi cassation of the highest legal and natural principles proceed and what “order” is introduced in their place?

1.2.1. Not the *persona est affirmanda*⁵⁵ but the principle of the “Germanic race” as the “supreme and ultimate value”

Persona est affirmanda—Tadeusz Styczeń calls this most primary principle of natural law ethics to be the “main”⁵⁶ because of the “person”—“*bonum honestum*—, that is the “honest good,” which is the highest good among the goods of this universe, which exists as a whole just due to this rational and free human person. That is why the whole legal and moral order is directed at man as a person in the dimension of their individuality and, at the same time, the ontic communion with other persons belonging to the *homo sapiens* species.

On the other hand, and in accordance with the principles established by the party, national socialism starts “not with an individual” but “with the community” of the German nation and it is from the latter that the Nazi “science of law derives its principia and principles,” which is also the new “grounding of philosophy” as united with the ideology of the Nazi worldview.⁵⁷ The NSDAP spokesman explains in greater detail the Nazi attitude in this issue: “The obvious assumption that ‘man is a singular being’ lies at the basis of individualistic thinking. This assumption—it can be securely rooted in its general concept—is false and based on a miserable thinking error. Man does not stand in front of us in this world as a singular being but as a member of the community. In all their activities man is a collective being and it is the only way they

⁵³ *S.Th.* I–II, 94, 2.

⁵⁴ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 421933, pp. 422–423.

⁵⁵ T. STYCZEŃ, *Zur Frage einer unabhängigen Ethik*, in: K. WOJTYŁA, A. SZOSTEK, T. STYCZEŃ, *Der Streit um den Menschen. Personalener Anspruch des Sittlichen*, Kevelaer: Verlag Butzon & Bercker 1979, p. 144.

⁵⁶ *Ibidem*, p. 144.

⁵⁷ O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Breslau: Ferdinand Hirt 1935, p. 25.

can be devised so. Man is conceptually determined by living with others in a community; their life is realized only in a community. Community is the concept which all humanity is subordinated to, it is the form where human life proceeds from the cradle to the grave. Without it, this would not be possible. Actual beings that we find in the world are not individual people but race, nations, peoples. Man as an individual can be the subject of scientific studies of natural sciences. Man is the subject of humanistic studies only as a member of the community in which their life becomes and in which it actually proceeds.”⁵⁸

According to Carl Schmitt, due to questioning man as an individual person, the division into “the state and a free individual person, the state authority and individual freedom, the state and society free from the states, politics and the non-political private sphere, irresponsible and uncontrolled”⁵⁹ is of the liberal nature and thus it is necessary to overcome. Just like “annihilation” of liberalism, negation is necessary in reference to “Marxism which is hostile to the state” and which effected the act of generalization of an individual in socialism—contrary to the Nazi concept of being—which can only be done by the “Chancellor of the Reich, Adolf Hitler.”⁶⁰ In their party self-consciousness, the Nazi treated the communists—due to their *internationale* as a “deadly dangerous enemy of the German state” because of the communist socialization of man, and they radically protested against placing them with the former “on the same level.”⁶¹ One thing is certain: it is not the most proper subject that stands at the very basis of the Nazi law and the Nazi morality—not a concrete person as a substantial being and as *persona humana*, who is unconditionally affirmed due to themselves.

1.2.2. Not the *bonum est faciendum, malum vitandum* but only “the welfare of the German Reich and the German nation”

The next principle of the classically understood natural law is: “Do good and avoid evil,” which in the socialist-national ideology still exists but in a significantly different interpretation, namely although what is good does exist, meaning that which belongs to the Nordic race, strengthens the latter, develops and secures its racial existence and the whole state apparatus of the German

⁵⁸ Ibidem, p. 16.

⁵⁹ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 23.

⁶⁰ Ibidem, p. 31.

⁶¹ Ibidem, p. 37.

Reich together with its legislation serves this “goal” of “developing, renewing and reflecting again” on the Germanic race and “the new birth of the German existence and the new shaping of the whole German life.”⁶² Moreover, it defines good and evil in a radically frivolous manner. In this ideology, good is identified with the German race as the most perfect form of the developing the being of the matter—“the earthly highest value”⁶³—while the passing acceptance of Nazism towards other races or other non-German beings takes place but only due to their complete subordination distributed in time and space of the world to be exclusively used by the Nordic race, which “obviously accepts as its natural law,”⁶⁴ but in its “socialist-national German” interpretation, that is on the ground of the “socialist-national German moral order.”⁶⁵ Only a member of the Nordic race receives at birth “the right to life,” which means that “each person” of the German race “brings with themselves the social instincts which tell them how they should behave so that an ordered life will be possible with other people. This instinct, which shows what is righteous, is the conscience,” which is “the driving force of law which shows what is right and false, what is good or evil.”⁶⁶ The race is the pre-reason of good and only what serves it is good, while what does not belong to it or is against it is evil: “It appears then that the right principles, both conceptually and factually, are those

⁶² H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 4; cf. F.P. HELLER, A. MAEGERLE, *Thule. Von den völkischen Mythologien zur Symbolsprache heutiger Rechts-extremisten*: “Evolas Rassenlehre ist in einer Weise symbolisch überladen, die sie im Gegensatz zu Hitlers biologischem Rassismus unschuldignav wirken lässt,” Stuttgart: Schmetterling-Verlag ³2007, p. 62.

⁶³ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

⁶⁴ *Ibidem*, p. 12.

⁶⁵ R. FREISLER, *Richter und Gesetz*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 17, Berlin: Industrieverlag Späth & Linde 1936, p. 8.

⁶⁶ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Frz. Eher Nachf. ³1934, p. 15.

characteristic of the Germanic-German law,⁶⁷ and not those real, objective and universal ones belonging to man and their rational nature.

The state of the Reich has one criterion of “good,” namely “exclusively” what serves “the good [...] of the” German “nation.”⁶⁸ “The highest and ultimate value” in the German system of law “must” be “the good of the German Reich and the German nation,”⁶⁹ and not the common good as the good of all together as communities and each one separately as individuals. “Where the highest good of law, the good of the German nation and the German Reich finds itself in the hardest situation, each behaviour to rescue this good is—according to human estimation—necessary according to the law,”⁷⁰ which means that even depriving whole nation of their life, for example the Jewish nation, is, in the light of Nazism, legally and morally good because in this Nazi legal consciousness “not the text of the law should be the ruler but the law should be the servant to the highest good, the servant to the nation,”⁷¹ which M.H. Boehm views as “substantiality and collectivity,”⁷² which will ne the subject of analysis in the ontological aspect in the following chapter of the dissertation.

It is also worth to mention the revolutionary self-consciousness of national socialists that they made those significant changes in law in a conscious and completely premeditated manner. “We, national socialists [...] are standing in this world as revolutionaries,”⁷³ which means that Hitler’s Nazism turns to the “revolution which should destroy, destroy and remove” and remove “with the roots,” i.e. “radically,” or turn against “what is idle and spoilt,”⁷⁴ that is non-Aryan or anti-Aryan, or even Aryan, but also against what is, for example, Aryan but “hereditary ill”⁷⁵ and that is the reason why there is no question of

⁶⁷ Ibidem, p. 33.

⁶⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 421933, p. 435.

⁶⁹ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 88.

⁷⁰ Ibidem, p. 88.

⁷¹ E. SOMMERMANN, *Der Reichsstatthalter*, Erlangen: Verlag von Palm & Enke 1933, p. 3.

⁷² M.H. BOEHM, *Das eigenständige Volk*, Göttingen: Vandenhoeck & Ruprecht 1932.

⁷³ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 421933, p. 434.

⁷⁴ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

⁷⁵ *Gesetz zur Verhütung erbkranken Nachwuchses* vom 14. Juni 1933 (RGBl. I S. 529): “§ 1. (1) Wer erbkrank ist, kann durch chirurgischen Eingriff unfruchtbar (sterilisiert)

“equality”⁷⁶ with other nations since other races as other are—out of their nature—evil or imperfect and that is why they are intended for perfection or, not infrequently, for death.

1.2.3. Not the *pacta sunt servanda* but only “the consciousness of the duty for the German commonwealth”⁷⁷

To keep the agreement or a given word also belongs to the highest principles of natural law and constitutes a great cultural wealth of humanity of all nations and generations. Is there any ground which could save this rule in viewing the human law?

Unfortunately, this highest principle of keeping an agreement gains a new interpretation in Nazism since if it refers to Aryans who are mentally and physically healthy and who share the racist views, the agreement binds them absolutely. On the other hand, in case of any contradiction with the law of the German Reich, each agreement loses its force, like for example in the case of a marital contract valid in the light of classically understood natural law between representatives of the German and Jewish nations, which the legislation of the German Nazism regards as “invalid.”⁷⁸

Also, when any “threat” to the German Reich appears, this principle ceases to bind, e.g. in reference to a marital contract: “The state divorces the married cou-

werden, wenn nach den Erfahrungen der ärztlichen Wissenschaft mit großer Wahrscheinlichkeit zu erwarten ist, daß seine Nachkommen an schweren körperlichen oder geistigen Erbschäden leiden werden. (2) Erbkrank im Sinne dieses Gesetzes ist, wer an einer der folgenden Krankheiten leidet: 1. angeborenem Schwachsinn, 2. Schizophrenie, 3. zirkulärem (manisch-depressivem) Irresein, 4. erblicher Fallsucht, 5. erblichem Veitstanz (Huntingtonsche Chorea), 6. erblicher Blindheit, 7. erblicher Taubheit, 8. schwerer erblicher körperlicher Mißbildung. (3) Ferner kann unfruchtbar gemacht werden, wer an schwerem Alkoholismus leidet.”

⁷⁶ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. 1, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 13.

⁷⁷ O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Breslau: Ferdinand Hirt 1935, p. 29.

⁷⁸ RGBl. I S. 1146, par. 1: “(1) Eheschließungen zwischen Juden und Staatsangehörigen deutschen oder artverwandten Blutes sind verboten. Trotzdem geschlossene Ehen sind nichtig, auch wenn sie zur Umgehung dieses Gesetzes im Ausland geschlossen sind. (2) Die Nichtigkeitsklage kann nur der Staatsanwalt erheben.”

ples whose existence has become worthless for the national community. It is not the subjective fault of one of the spouses but the objective disintegration of the marriage which must be then a measure for a divorce⁷⁹ because a married couple in the Reich is to “give birth to children” so that the state, for example, will have enough “warriors.”

The “Enlightenment” concepts of law were also submitted to deep criticism by the Nazi theoreticians because they based on the “magna charta of an individual” bound with the principle of “the social agreement,” which allowed for the following thesis to be formulated: “law creates an act of law; an act is the only source of law. Law is equal to an act of law and an act is equal to law,”⁸⁰ which Voltaire transferred to the level of freedom: “To be free means not to depend on anything but an act of law,”⁸¹ which would mean a certain independence of law as law and, naturally, would constitute a certain independence of human existence, which is excluded in Nazism.

1.2.4. Not the *suum cuique* but the “maintenance and strengthening of the race”⁸²

One of the most relevant and even necessary ideals of natural law according to Ulpian is as follows: “The will to allot to every man his due,”⁸³ which means keep justice, i.e. affirm another one so that the good which is due to them because of being a human will become their real share. One can speak of justice and realize it where there are human persons while the negation of a human being as a person makes it impossible to realize justice as a consequence of the existence of law. Therefore, if law as the cause of justice requires the existence of a rational, free being, that is it requires a personal subject, the situation with justice is analogous.

⁷⁹ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 36.

⁸⁰ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, pp. 14–15.

⁸¹ VOLTAIRE, in: H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 17.

⁸² G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, pp. 15–16.

⁸³ Cic, book I: “Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.”

Due to the lack of man as a person in national socialism, both inside the German national existence and outside, among other nations, we have to do with the so-called racist concept of justice, which means that everything that serves the German race is just and what is not consistent with it is unjust: “Maintaining” the Nordic race and “further education”⁸⁴ is an expression of justice because Rudolf Bechter states that the race defining itself in the German nation “is [...] the measure of morality,”⁸⁵ and hence also the “measure” of justice and as such follows from the “equality of the” German “race”⁸⁶ or from the “commonwealth of the nations” as “the first value in the life of both the whole and an individual.”⁸⁷

Gustav Adolf Walz introduces a new legal principle, namely the principle of the “equality of the race as the principle of personality and community in the building of law,” which as such is “a completely different, fundamental kind of form of life.”⁸⁸ This principle means that on the one hand, “law becomes the highest criterion of the value of the living community of the race,” also called “a primary type,” while on the other, it is the most important and “only reason defining” or justifying the existence of the being of law as law is “maintaining and strengthening the race.”⁸⁹ That is why the aspiration of the Nazi system of law to “keep the race in purity as the highest legal principle”⁹⁰ is a pure consequence of the Nazi assumptions, which means that everything that strengthens the racial “purity” is just while everything that violates it is contradictory both to law and justice.

⁸⁴ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 434.

⁸⁵ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 29.

⁸⁶ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 14.

⁸⁷ W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 19.

⁸⁸ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 14.

⁸⁹ *Ibidem*, pp. 15–16.

⁹⁰ *Ibidem*, p. 35.

1.2.5. Not the community and private property but only the German common property

The notion “ownership” also follows from the personal foundation of man, which means that a human person has the right to own things which, in the light of this right to ownership, always belong or are in some way assigned to people. Their semantics is that the value of things is understood due to man and their marital and family, national, state and other communities. In principle, on the ground of the classical natural law, private property of man as an individual and social, or community property are distinguished. Both dimensions of the science on property are built on the individual-social dimension of human existence, nature and all life.

Reducing, in the racist sense, individual to collective existence in Hitler’s Nazism provides the cause to eliminate the individual dimension from the notion of “property,” which was followed by the appearance of the “principle” that “common usefulness precedes one’s own property” as “one of the fundamental principia of the socialist-national legal and state thinking.”⁹¹

1.2.6. “The principle of the Führer” as the most important legal and moral criterion

It is justified to ask the following question: what is the ultimate principle of all principles, which means where is finally the subject of this socialist-nation system in the legal and moral sense? The Secretary of the Reich Stuckart, while referring to natural sciences of the 19th century and interpreting Charles Darwin’s evolutionism from the position of the racist ideology, states that “the Third Reich must admit a harmony with the fundamental principles of nature, the main traits of the German being and its essential racial thinking“; therefore, also with the Führer thought“, which in this process of evolutionary development of the Nordic race gains a special status of some kind of pre-reason“. The principle of the Führer is he principle shaping the life of the German nation and the state. National socialism created in this way a political form of the specific German character, which has already confirmed itself in the German history. The being of the Führer’s state exists first in the the Führer standing on top and his spirit and will spiritualize and shape the state and place their mark on it. It is in him

⁹¹ W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 19.

that the highest and ultimate decision in all matters of the state is stuck. It is in his hands that finally all power lies. However, there must be one will and one will must direct,⁹² which is a thought almost directly taken from Heraclitus: “Law is the will to obey one.”⁹³ How did this principle come to be created?

It was relatively early that the Führer realized that the “ultimate rescue which remained was struggle, struggle with any kind of weapon, which can comprise the human spirit, reason and will, absolutely indifferently to who will get victory on the scales”⁹⁴; hence, like in Hegel’s and Marx’s proposition, “a life and death struggle.”⁹⁵ What specifically must a national socialist fight for? Hitler answers: “The subject of the Nazi struggle is to secure the existence and multiplication of our race and our nation, feed its children and keep the purity of blood” and he claims that “freedom and independence of homeland should be fought for so that the nation could mature to the fulfillment of the mission assigned to them by the creator of the universe.”⁹⁶ A philosopher Hermann Glockner sees the necessity for the “German philosophy” to get engaged against “not the German spirit” and that is why “philosophy goes to war.” Moreover, Glockner praises the fact of the war: “It’s good there is war”⁹⁷ and in his context he refers to the words uttered by Heraclitus about “war as father” and “king of all things.”⁹⁸ After all, Glockner is not isolated in this interpretation because a lot of philosophers of the Reich consider “Heraclitus” together with one of his main concept of *polemos*, as “the general criterion of values in the assessment of philosophical thinking.”⁹⁹ The spokesman of the NSDAP Otto Dietrich directly “calls the German spirit to arms,”¹⁰⁰ which is classified

⁹² Ibidem, p. 28.

⁹³ HERAKLEITOS, *Fragmente* 33, in: *Die Fragmente der Vorsokratiker*, gr.-dt. von H. DIELS, hrsg. von W. KRANZ, Bd. 1, Berlin: Weidmannsche Buchhandlung ⁵1934, p. 159.

⁹⁴ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. ⁴²1933, p. 68.

⁹⁵ Ibidem, p. 189.

⁹⁶ Ibidem, p. 234.

⁹⁷ H. GLOCKNER, *Vom Wesen der deutschen Philosophie*, Stuttgart/Berlin: Kohlhammer 1941, p. 49.

⁹⁸ HERAKLEITOS, *Fragmente* 53, in: *Die Fragmente der Vorsokratiker*, gr.-dt. von H. DIELS, hrsg. von W. KRANZ, Bd. 1, Berlin: Weidmannsche Buchhandlung ⁵1934, p. 162.

⁹⁹ A. BAEUMLER, *Nietzsche der Philosoph und Politiker*, Leipzig: P. Reclam, jun. 1937, pp. 63 ff.; 73 ff.

¹⁰⁰ O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Breslau: Ferdinand Hirt 1935.

by Józef M. Bocheński as “an actually annihilating struggle [...] and not childishly naive, primitive, senseless statements or the statements full of contradictions,”¹⁰¹ which was what the Nazi aimed at since the very beginning of their activity so that “the Führer would remain consistent with the question about a total war. Although attempts were made from all sides to soften him in Obersalzberg, those did not succeed. He ordered certain mitigations here and there¹⁰² which maybe were completely justified. Essentially, the Führer consistently stands on the ground of total war: “To think that the latter must always be won with fists! He who has a strong fist must always be finally right! May god be saluted, the choice is already out beyond. Now, spiritual concentration again! The result from the Reich is still unknown. A strong rise of wing parties, communists, German nationalists and peasant activists everywhere. That was predictable. This is good. Fall off peacefully from communism, we will win you only on this way. No bourgeois will come to us from the idle parties of the center. Communism wants through the international what we want through: “I only have my homeland!” Goebbels admits that in relation to the socialist-communist movements “we have a strong kinship of choice. Two equal, unequal brothers. Love to each other remains in the depths of the heart. We do harm to each other. One must save the other. Come soon, the blessed hour!”¹⁰³

1.3. On categories in the logical aspect

Nevertheless, it is worth to touch the issue of categories in the logical aspects as well, which will only enable, in another way, to get at the true face of how the Nazi viewed them.

¹⁰¹ J.M. BOCHENSKI, E.J. WALTER, G. NIEMEYER, *Philosophische, soziologische und wirtschaftstheoretische Grundlehren*, in: J.M. BOCHENSKI, G. NIEMEYER (Hrsg.), *Handbuch des Weltkommunismus*, Freiburg/München: Karl Alber 1958, p. 49.

¹⁰² *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941–1945*, vol. 8: *April–Juni 1943*, ed. H. MEHRINGER, München, e.g.: K.G. Saur 1993, from 29 April 1943, p. 215.

¹⁰³ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923–1941*, vol. 1/1: *Oktober 1923–November 1925*, ed. E. FRÖHLICH, München: K.G. Saur 2004, from 5 May 1924, p. 131.

1.3.1. One “nationalized” and “politicized” substance of the Nordic race, one “collectivist personality”¹⁰⁴

The concept of “nationalization” conceals a deep and very relevant process of substantialization of the “broad mass”¹⁰⁵ of Aryans and hence the process of reducing human individuals to a being- a member in the whole of the new substance which is *formaliter* called “the collective personality.”¹⁰⁶ “In the German thought on the community there is a state from the system of communities such as the family, cousin [...], the community of the nation,” while “the whole life of an individual member takes place in those communities. Apart from communities, there is no human life in the legal sense but only biological-vegetative life,” which means that there is no human person as a substantial being and, therefore, no entity of law and as the existential cause of each human community, i.e. there is no “singular personality” as “an individual person,” which is typical of a metaphysical, or “Romanesque thinking.”¹⁰⁷ This standpoint is explained by Hitler in his final speech during the party congress in 1935, when he states that “the starting point of the socialist-national science is not to be found in the state but in the nation [...]. That is why the trouble spot of each socialist-national consideration lies in the living substance which we, according to the historical process of becoming, define as the German nation”¹⁰⁸

1.3.2. The rest of the reality as an affliction of the German socialist-national substance

“It is only the socialist-national turn towards a racially defined nation that provided a decisive impulse to “overcome” the earlier ruling system of “think-

¹⁰⁴ WEIGELIN, (review) H. Dingler, *Das Handeln im Sinne des höchsten Zieles (absolute Ethik)*, München 1935, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/ 36), p. 501.

¹⁰⁵ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 370.

¹⁰⁶ WEIGELIN, (review) H. Dingler, *Das Handeln im Sinne des höchsten Zieles (absolute Ethik)*, München 1935, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/ 36), p. 501.

¹⁰⁷ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C. H. Beck'sche Verlagsbuchhandlung 1936, p. 20.

¹⁰⁸ A. HITLER, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C. H. Beck'sche Verlagsbuchhandlung 1936, p. 21.

ing about the equality of the races.”¹⁰⁹ Hans-Heinrich Lammers and Hans Pfundtner believe that “national socialism draws the sense and justification from the national consciousness of the German nation. It is the world outlook of the German nation in general. The Führer realizes the will of the nation and he is carried by the trust of the German nation, which, together with the state and the Führer, creates its “racial, cultural, health and spiritual German substance.”¹¹⁰

In Hitler’s ideology, the idea of a “total war” already established in the 1920’s also grows from the process of substantialization of the race, nation, law or state of the German Reich, which results in negating the entitativity of other people in their substantiality and other nations in their inviolable dignity and sovereignty. The necessity of war was dictated by the adopted principia where the other nations are viewed as “only variations” of this one “natural nation,”¹¹¹ which means only as ailments of the substantialized German nation. How to finally classify the very entitativity of Hitler.

1.3.3. Supracategorizability of the Führer’s entitativity

“The science of the nation must not [...] be an ‘apolitical’ general doctrine and science,”¹¹² since the “development of law” is based on the “national community” but “the Führer and his followers” create the core of the essence of the internal order of the community.” At the same time, “the Führer cannot exist without the followers and the followers cannot exist without the Führer.”¹¹³ This principle of “the Führer-followers” means that this is one and the same entity of “the community consisting of the Führer and the followers.”

Theodor Maunz shows the Führer as the most perfect entity of power and not only, which means that Nazism views him as the most perfect entity at all and in some sense ascribes him supracategorizability, i.e. absoluteness—also in

¹⁰⁹ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 48.

¹¹⁰ H.-H. LAMMERS, H. PFUNDTNER, *Einführung*, in: IDEM (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

¹¹¹ M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, dissertation, Hamburg: LIT 1998, p. 259.

¹¹² P. RITTERBUSCH, (review) H. Boehm, *Volkstheorie und Volkstumspolitik der Gegenwart*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 525.

¹¹³ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, pp. 42–43.

the dimension of power: “Together with gaining one and only subject of will and the subject of conduct of the national order the separation and suppression of the authorities” in their activity “were overcome.” “This ‘tri-division is replaced by ‘one division,’ built on “the Führer’s power,” and not on “a legal entity,” which—in the classical understanding—is “the state.”¹¹⁴ “The world view of national socialism as the truth and reality of our existence”¹¹⁵ is the source which gives rise to “the thought about the Führer” as the “fundamental principle of the German life of law,”¹¹⁶ which while contradicting the Weimar Constitution from 1919, where article I says that “the German nation gave itself this constitution by itself” and that “the state authority derives from the people,”¹¹⁷ but if we interpret the so-called *Ermächtigungsgesetz*, or *Gesetz zur Behebung der Not von Volk und Reich* from 24 March 1933,¹¹⁸ then by virtue of ordinary legislation Hitler as the chancellor and the chief of state could usurp this power.

1.4. Racist methodological monism: “The Führer’s method”

There is a certainly intriguing thesis that “national socialism did not develop its own legal methodology or dogmatics” but “it went far to realize its goals on the basis of philosophical-legal decisionism, which replaced the concrete legal thinking probably assigned in normativism by raising the competent decision maker.”¹¹⁹ There is no doubt about the fact of the Nazi voluntarism based on

¹¹⁴ Ibidem, pp. 42–43.

¹¹⁵ P. RITTERBUSCH, (review) H. Boehm, *Volkstheorie und Volkstumspolitik der Gegenwart*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 525.

¹¹⁶ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 41.

¹¹⁷ *Die Verfassung des Deutschen Reiches*, 11. August 1919 (RGBl. 1919, S. 1383): “Präambel: Das Deutsche Volk, einig in seinen Stämmen und von dem Willen beseelt, sein Reich in Freiheit und Gerechtigkeit zu erneuern und zu festigen, dem inneren und dem äußeren Frieden zu dienen und den gesellschaftlichen Fortschritt zu fördern, hat sich diese Verfassung gegeben.” and “Artikel 1. Das Deutsche Reich ist eine Republik. Die Staatsgewalt geht vom Volke aus.”

¹¹⁸ RGBl. I S. 141.

¹¹⁹ H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafjustiz im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, dissertation, Westfälische Wilhelms-Universität, Münster (Westf.) 1995, p. 27; cf. D. MAJER, *Grundlagen des nationalsozialistischen Rechtssystems. Führer-*

the thought of Frederick Nietzsche and his really key concept of “Wille zur Macht” as a substitute concept for “God” Himself since “God is *not* as the driving force but God as the *maximal state*, as an epoch—a point in the development of des *Willens zur Macht*.”¹²⁰ In the same work Nietzsche introduces the concept of “the Gospel of the future, i.e. *Willens zur Macht*” as “an attempt to re-evaluate all values” because—according to him—the whole existing “logic” together with “our grand values and ideals” was created from “nihilism” and “nihilism” is just “a consequence thought over to the end” of that logic, or—more correctly—Nietzsche’s dialectics. That is the reason why in the very same context Nietzsche explains his understanding of “Wille zur Macht” also as “Wille [...] zum Kriege, zur Eroberung, zur Rache,” which means “the will [...] for war, for conquest, for revenge” through “obedience, duty, love of homeland and the prince” as well as through “keeping the pride, severity, strength, hatred, revenge,” which, according to Nietzsche, “*contradict*” Christianity but are “the most ultimate measures to *keep the military state* [...] *of the highest type* of man, *a strong type*, and any *concept* which commemorates hostility and reserve of the position of the states can be sanctioned in this relationship [...], e.g. nationalism,” which can be afforded by the Nazi “*nonpersonality*,” that is “we as *the means* of the collective entity.”¹²¹ It is hard to find a more adequate parallel in the philosophical literature between some thinker and self-consciousness than in the case of the Führer and the German national socialism of the Third Reich.

On the one hand, this vision led to “cancelling the analogy” while on the other, it is essentially over-interpreted but not as an analogy in general, or not as an analogy of cognition in general which has its ultimate source in One God, but as a racist analogy having its absolute reference to the race and its highest figure, i.e. the Führer, which, e.g. in criminal law functions in this way that guilt is not established by the “compatibility of the act” with its “factuality” but “it is enough if an act deserves punishment according to the fundamental thought of criminal law and according to the healthy sensitivity”¹²² of the German nation, or—all

prinzip, Sonderrecht, Einheitspartei, Stuttgart/Berlin/Köln/Mainz: Kohlhammer Verlag 1987, p. 23.

¹²⁰ F. NIETZSCHE, *Aus dem Nachlass der Achtzigerjahre*, in: IDEM, *Werke in drei Bänden*, hrsg. v. K. SCHLECHTA, vol. III, München: Carl Hanser Verlag ⁹1982, p. 585.

¹²¹ Ibidem, pp. 634–636; cf. M. MACIEJEWSKI, *Ruch i ideologia narodowych socjalistów w Republice Weimarskiej. O źródłach i początkach nazizmu 1919–1924*, Warszawa/Wrocław: Państwowe Wydawnictwo Naukowe 1985, pp. 196–198.

¹²² E. SCHWINGE, *Militärgesetzbuch*, Berlin: Junker und Dünnhaupt Verlag ⁴1940, p. 7.

the more—of the leader himself. A Nazi theoretician of law from Kiel, Karl Larenz describes a double type of analogy, namely "a concrete analogy," which is the "analogy of the Nazi act of law," thanks to which a given case can be solved using the act regulating another case, and 'an overall analogy,' or the "analogy of law," concerning the application of "the general German legal thought,"¹²³ which found its application of the laws only in reference to a certain group of cases. Obviously, the analogy viewed in this way refers to the law understood in a racist manner.

According to Henkel, "the political value was excluded from the value of law" within the "liberal, state and legal" thought at the turn of the 19th and 20th centuries, which became a sort of "dogma of variety and a separation of both values."¹²⁴ "Insofar as it is possible inside the activity of the state, not people but norms should rule; all authority and competences of power should be kept from people as possible entities of ruling, and they can only be granted to the act of law as the basis of the essence of the state"¹²⁵; however, for example according to Rudolf Stammler, "each norm of established law (of the past, present and future) must be defined according to the method of the theoretical science of law if it should satisfy its fundamental will by providing what is right."¹²⁶ Politicization of existence in general also touches in the German Reich the problem of the method. As early as in the 1920's "indispensability of the 'political' method"¹²⁷ is emphasized by Otto Koellreutter according to Erich Schwinge¹²⁸ as an attempt to "overcome" "*the dispute about the method*,"¹²⁹ which in the German speaking area was then pervaded within legal sciences by the "positivist method" by Gerber and Laband, who aimed to "purify criminal law of everything that is political."¹³⁰ The next to speak was Hans

¹²³ K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 145.

¹²⁴ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 20.

¹²⁵ *Ibidem*, p. 40.

¹²⁶ R. STAMMLER, *Die Lehre von dem richtigen Rechte*, Berlin: J. Guttentag Verlagsbuchhandlung 1902, p. 35.

¹²⁷ O. KOELLREUTTER, *Der Staat und die Herrschaftsrechte im öffentlichen Recht*, "Österreichische Zeitschrift für öffentliches Recht," 3.Jg (1917), pp. 308 ff., 333 ff.

¹²⁸ E. SCHWINGE, *Der Methodenstreit in der heutigen Rechtswissenschaft*, Bonn: Ludwig Röhrscheid Verlag 1930, p. 16.

¹²⁹ *Ibidem*, p. 5.

¹³⁰ *Ibidem*, p. 7.

Kelsen who, “on the basis of Neo-Kantianism”¹³¹ created an extremely formalist, or normativist method of legal science, against which Erich Kaufmann turned, requiring “metaphysics” to get liberated from the formalist “one-dimensional Neo-Kantian thinking.”¹³² Rudolf Stammler was the first to apply Immanuel Kant’s “transcendental method”¹³³ in his philosophy of law. Julius Binder raised objections to it, above all claiming that it was “dualistic”¹³⁴ and “one-sided,”¹³⁵ although he also based his philosophy of law to a certain extent and very consistently on the philosopher from Kaliningrad.

According to Schwinge, Kaufmann sais something “new and revolutionary” at the conference of lawyers in Münster, namely “the state does not create law [...], the state creates acts of law; the state and the act stand beyond the law.”¹³⁶ Erich Rothacker, on the other hand, draws attention to the presence of “philosophical and worldview oppositions”¹³⁷ standing at the basis of methodological disputes within legal sciences, which is admitted by Hans Kelsen saying that “oppositions of legal theories are ultimately the oppositions of worldviews.”¹³⁸ Heller, on the other hand, attracts attention to the insufficiency of “logic and mathematics”¹³⁹ together with their methods in the general methodology of sciences as well as to the insufficiency of the methods of “natural sciences in jurisprudence.”¹⁴⁰ In the face of the one-sidedness, or “methodological monism”¹⁴¹ Schwinge proposes “*a well understood and deep relation between the philosophy of law ad life*” in order to overcome the “inaccessibility and fruitlessness of the philosophy of law,” thus enriching the discussion around the methodology of legal sciences with the “teleological” method which—apart from

¹³¹ Ibidem, p. 7.

¹³² E. KAUFMANN, *Kritik der neukantischen Rechtsphilosophie*, 1921.

¹³³ J. SZABÓ, T. VAS, *Die Bedeutung der transzendentalen Logik in der Rechtsphilosophie*, Szeged 1935, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 98.

¹³⁴ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 61.

¹³⁵ Ibidem, p. 65.

¹³⁶ E. KAUFMANN, in: E. SCHWINGE, *Der Methodenstreit in der heutigen Rechtswissenschaft*, Bonn: Ludwig Röhrscheid Verlag 1930, p. 10.

¹³⁷ E. ROTHACKER, *Logik und Systematik der Geisteswissenschaften*, 1927, pp. 21 ff.

¹³⁸ H. KELSEN, *Vorrede*, in: H. KELSEN, *Hauptprobleme der Staatsrechtslehre*, Tübingen: Mohr 1923, p. XII.

¹³⁹ E. SCHWINGE, *Der Methodenstreit in der heutigen Rechtswissenschaft*, Bonn: Ludwig Röhrscheid Verlag 1930, p. 14, ref. 24.

¹⁴⁰ Ibidem, p. 18.

¹⁴¹ Ibidem, p. 28.

the formal side—takes into consideration the “material”¹⁴² and concrete side as well. Although Karl Larenz does not treat Hegel and his absolute idealism as the “predecessor’ of the Third Reich,” he sees in the latter somebody more than only a “Prussian philosopher of state” because what he, as a “great figure of German philosophy,” meant was a synthesis of the dialectical method between “cognition” and the “life of the nation as a community,”¹⁴³ which after all is the most important ideological pillar for Hitler’s Nazism.

Carl Schmitt notices that in the aspect of the method the question is not a “simple correction of the existing positivistic methods but the passage to a new type of thinking in legal sciences which can become just for the appearing communities, orders and figures of the new century,”¹⁴⁴ and—above all—to the “thought about the Führer,” whose methodology of the “normativist-constitutioualist” type of cultivating legal sciences “cannot grasp at all.” It is the latter that “requires an oath on the constitution, on the norm instead of on the Führer.”¹⁴⁵ Why? Because according to Schmitt there is absolute dialectical identity between “law and politics” and hence “it would be misleading and dangerous to continue using the old divisions of law and politics and to pose alternative questions such as state or non-state, public or private, legal or political. Here, we face a completely new state-legal thinking.” Therefore, “courts must not interfere in any account into the internal questions and decisions of the party’s organization and break the Führer’s principle from outside” since “the party must develop its own criteria for itself” and “stand completely on itself,”¹⁴⁶ i.e. exist as a state with its additional party legislation and jurisdiction.

“Renewing the German law from the spirit of the national worldview is the task”¹⁴⁷ “of the ‘new legal thinking’ in the sense of considering the “proper spiritual possibilities of our race and our nation,” which enforces a “thorough change” of the “method of the science of law” which has to adjust itself to “its

¹⁴² Ibidem, p. 30.

¹⁴³ K. LARENZ, *Hegelianismus und preußische Staatsidee. Die Staatsphilosophie Joh. Ed. Erdmanns und das Hegelbild des 19. Jahrhunderts*, Hamburg: Hanseatische Verlagsanstalt 1940, p. 64.

¹⁴⁴ C. SCHMITT, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 67.

¹⁴⁵ Ibidem, p. 51.

¹⁴⁶ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, pp. 21–22.

¹⁴⁷ K. LARENZ, *Über Gegenstand und Methode des völkischen Rechtsdenkens*, Berlin: Junker und Dünhaupt Verlag 1938, p. 7.

subject,” that is “the law of our nation,”¹⁴⁸ whose “principles of community life” are the following: “To each what is theirs; community use before individual use; the whole before a part.”¹⁴⁹

“Führertum und Artgleichheit,” which means “leadership and equality of the race as the fundamental concepts of the socialist-national law”¹⁵⁰ cause that “all methods suitable for the liberal-democratic manner of thinking are out,” e.g. “elections” can only be viewed as “questioning the nation” and not as free elections. Also, the “old voting procedures” or “dualisms of the legislative and the executive” have no right to exist but everything is determined by the Führer’s “order,” which can be aided by “the Führer’s council,” which “must be chosen by the Führer himself.”¹⁵¹ Why? Henkel argues that because the state of the Reich is directed by the “the Führer’s personality” “by virtue of his authority,” then “the organizational form of the authoritarian state is based on the formal, commanding division; an order expressed the state’s independent and responsible activity. Though an act of law does not in any way disappear in an authoritarian state, because the state based on the Führer’s personality also needs tradition and permanent order which can be guaranteed only on the law experiencing personality and manifested in its form as an act of law,”¹⁵² which—for example—Andrzej Szostek included within “deontonomism undermining the rational basis of morality,” and as such “at the same time deprives man of their subjectivity (autonomy) and reduces them to the role of ‘a puppet’ performing others’ orders’ and in fact also “others’ responsibility,” which was confirmed during the Nuremberg Trials: “It was in Nuremberg that the words [...] ‘order is an order!’ sounded ominously. And, after all, Nazism is only one of the examples showing ‘practical deontonomism’: an inclination to give up one’s subjectivity for the benefit of others,” which has its consequences in the consciousness of many up till now” “Others’ was sometimes the Party, sometimes the opinion, sometimes it is Europe...”¹⁵³

¹⁴⁸ Ibidem, pp. 8–9.

¹⁴⁹ H.-H. DIETZE, (review) Kriek, Ernst, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 497.

¹⁵⁰ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 32.

¹⁵¹ Ibidem, p. 35.

¹⁵² H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 49.

¹⁵³ A. SZOSTEK, *Pogadanki 1992/1993*, in: Biblioteka “Niedzieli,” vol. 1, Częstochowa 1998, pp. 72–73.

Carl Schmitt writes that "The Roman-Catholic Church created a picture of a shepherd and a flock as a theological and dogmatic thought in order to gain the power of ruling over the faithful. It is significant in this picture that the shepherd of the flock remains absolutely transcendent. This is not our concept of 'leadership.'¹⁵⁴ According to Schmitt, "his concept of leadership comes from a completely different, substantial thinking of the socialist-national movement," which expresses "the direct presence, Real presence," which—more closely—means "the necessary racial equality between the Führer and the followers" and hence it "rules out" "tyranny and lawlessness of the Führer's power."¹⁵⁵

Only a member of the Nordic race is "objective" while other races "think and understand differently," which means not objectively and this, according to Schmitt, is "the objective reality of 'objectiveness'"¹⁵⁶ of the Nazi methodology of law, which, e.g. according to Stammler's philosophy of law is excluded as what is "subjective" cannot "cancel objectiveness" of "the legal order itself"¹⁵⁷ because there is no essential contradiction between the subject and the object in the existing reality; what is more, there is some strange adequacy between them which can be disturbed in the legal or moral order but only by way of abusing one or the other manner of being, and not as such.

According to Henkel, "passage from something concrete and sensual" takes place in the Enlightenment legislation, "a drive to study regularities by means of reason, which—on the one hand—led to underestimation of what is unique, personal, and—on the other—to overestimation of the possibilities for generalization that we have been given," which led to the "replacement of the consequences of personality by the consequences of what is abstract and regularities of what is general."¹⁵⁸ The Nazi German law aims at the "victory of national socialism in what is general and what refers to the view of the world."¹⁵⁹

¹⁵⁴ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 41.

¹⁵⁵ *Ibidem*, p. 42.

¹⁵⁶ *Ibidem*, p. 45.

¹⁵⁷ R. STAMMLER, *Die Lehre von dem richtigen Rechte*, Berlin: J. Guttentag Verlagsbuchhandlung 1902, p. 31.

¹⁵⁸ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, pp. 18–19.

¹⁵⁹ *Ibidem*, p. 24.

According to Karl Larenz, the “kind of” methodological “procedure” in legal sciences can be “more speculative and dialectical or more empirical and historical: it remains decisive that that the form of the nation, the unity of the nation’s spirit stood at the beginning and was not lost in continuing the analysis.”¹⁶⁰ “The way of natural sciences” “comes out from the biological fundamental elements of the nation, race,” showing themselves as a part of the evolution process whose task, according to Larenz, is to explain the roots of the historical and spiritual life in a natural way, which means complementation of the dialectical method in the sphere of the spirit and the evolution method in the sphere of the matter. This means that “the race is a biological root of the nation” and that is why “the quality of the race” determines the quality of “the existence and activity of the nation.”¹⁶¹

German national socialism wants to distinguish itself from “fascism” as a lesion “unbelievably different from the Germanic Romanesque thinking” and its grounds sees in the fact that the “party,” “state” and “nation” in Nazism preserve their property, e.g. the party preserves “its property, its own administration, its own law, its own jurisdiction,” while “the unity of the party and the state are incarnated in the Führer,”¹⁶² which is not to be found in fascism. It is even more important that “fascism” speaks for “corporatism,” which means “cooperation between the “community and an ‘individual’ and “an individual is not cancelled into a community,”¹⁶³ which is systematically done by German national socialism and that is why the NSDAP spokesman Otto Dietrich also criticizes fascism for his reason. If “the Führer” of the Third German Reich is everything and he is the supreme being, he himself decides on the most important “method” in the existence and functioning of the state, in the establishment and adjudication of the law and in the cultivation of legal sciences.

¹⁶⁰ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 131.

¹⁶¹ *Ibidem*, p. 131.

¹⁶² W. SOMMER, *Die NSDAP als Verwaltungsträger*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 169.

¹⁶³ O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Breslau: Ferdinand Hirt 1935, p. 28.

1.5. Socialist-national means supporting “the Führer’s method”

Finally, it is worth to point to a few important measures supporting the Führer and the socialist national Reich in realizing their ideological goals of conquering the humanity and the globe.

German Nazism radically rejects “patriotism,” which is “useless,” while “fanaticism” linked with “social sacrifice” is necessary¹⁶⁴ as a guarantee of the efficiency of national ideologization on the foundation of “the fierce, fanatic will and inner obligation felt as holy,” for which “national socialists” should “be ready to die”¹⁶⁵ and which will not be achieved by “half ways, by weak emphasis on the so-called point of objectivity but by ruthless and fanatic one-sided approach to the once chosen goal,” i.e. by approaching “nationalistically, with all brutality which lives in the extreme. Poison will be broken with the opposite poison.”¹⁶⁶ Looking at this historically, the Führer emphasizes that the “masses” were not carried away to revolutionary acts by “scientific cognition” but by “fanaticism spiritually permeating them, and at times by hysteria driving them into the future,”¹⁶⁷ which means that the notion of “fanaticism” is understood in Nazism as a “virtue.”¹⁶⁸ Hannah Arendt is right to remark that *de facto* “fanaticism of the elite staffs,” both political and cultural ones, in the Reich, “absolutely indispensable to the functioning of the movement, systematically does away with any real interest in concrete jobs and it creates the state of mind in which imagined activity is treated as a tool serving something completely different.”¹⁶⁹

According to Hans Fabricius, the “annihilating war” must be declared to all ideological and governmental opponents, also those who set “the same or similar goals” to make way for the victory of the socialist-national “party.”¹⁷⁰ This

¹⁶⁴ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. 1, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

¹⁶⁵ *Ibidem*, p. 51.

¹⁶⁶ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, pp. 370–371.

¹⁶⁷ *Ibidem*, p. 371.

¹⁶⁸ R. BÄCKER, *Totalitaryzm: Geneza, istota i upadek*, Toruń: Index-Books 1992, p. 76.

¹⁶⁹ H. ARENDT, *Korzenie totalitaryzmu*, transl. M. SZAWIEL, D. GRINBERG, vol. 1, Warszawa: Niezależna Oficyna Wydawnicza 1993, p. 445.

¹⁷⁰ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozia-*

is articulated in *Mein Kampf*, where Hitler wants to deprive the German “nation” of any doubts concerning the value of an “absolute attack,” meaning that “annihilation of another” is “the uncertainty of one’s own law” or a “sign of one’s lawlessness.” On the contrary, it is the proof of real “leadership of the positive struggle for one’s own goals,” which “annihilates the opponents of those goals.”¹⁷¹

It is necessary that the party members should be trained in “the highest trust in themselves” and thus one’s own party should be deprived of any trust in others, which means developing the spirit of “intolerance” towards those who “did not grow from the same land”¹⁷² because “hatred is more stable than aversion”¹⁷³ and that is why the Germans should be filled with “an extraordinary spirit of attack and sacrifice” so that prosecution and aggression from others should be treated as “the highest glory.”¹⁷⁴ Hence, the nation should be “brought up” to “iron perseverance” while failures should be overcome and treated as impulses for “the highest increase of services.”¹⁷⁵

National socialism attaches huge importance to the role of “propaganda,” where “an exclusive” criterion is not to be “aesthetics and humanitarianism” but “efficiency.” “We should speak in a populist, rough manner with ruthless openness and the unbridled power of the will, a ruthless spirit of attack must be recognized by the listeners already by the manner of speaking.”¹⁷⁶ The Führer mentions that “where nations fight for their existence,” where “the question of the fate about being and non-being” is settled, “humanitarianism and

listischen Staates, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

¹⁷¹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 371.

¹⁷² H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

¹⁷³ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 371.

¹⁷⁴ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

¹⁷⁵ *Ibidem*, p. 14.

¹⁷⁶ *Ibidem*, p. 15.

aesthetics break up in nothingness” and the “propaganda” is to serve only “the goals of the war.”¹⁷⁷ In “the ethical aspect, propaganda—contrary to the customs of opponents who searched for the rebuke of envy, cowardice, a desire for profit and other materialistic desires is to arouse in the mass the great idealistic virtues, the feeling of worship, bravery, the sense of sacrifice because it is only idealism which has secured for the human communities real existence for the future for a long time.”¹⁷⁸

Conclusions

The question about the method is settled at the central point of a given system of thinking, i.e. at the most important being of a given current. If the most important being for the German national socialism is the being of Adolf Hitler as the most perfect “incarnation of the Nordic race,” “the Führer” himself constitutes the basis, essence and the deepest sense not only of the most important “method” but it is on him that the total formal and methodological shape of the ‘science’ of the Third German Reich is determined, whose major goal is not to get to know the “truth” and shape a man of science as “good” but to “support” the German race in its existence, “secure” it and develop as well prepare the methods and means to “annihilate” other people who do not belong to the Nordic race. This means that the Nazi “science” is subordinated exclusively to ideological goals, which is the essential overlooking of the being of science as science.

¹⁷⁷ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 195.

¹⁷⁸ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 15.

II. “THE MYTH OF THE NATION,” “BLOOD,” OR “THE FÜHRER-PRINZIP,” AS ABSOLUTE *A PRIORI* OF SOCIALIST-NATIONAL MONISM

The Nazi ideology is an *a priori* principle of the whole system of national socialism of the Third German Reich because “Adolf Hitler [...] took over the racist-nationalist thought,¹ and he wrote in *Mein Kampf* that “ideology is impatient and cannot be satisfied with the role of a ‘party besides another’ but it demands as a command that it should be exclusively recognized wholly and that all public life should be presented according to its views” and—contrary to “political parties which are inclined to compromise”—“ideologies never” strike compromises, just the opposite they “proclaim their” ideological “infallibility.”² That is the reason why the philosophical-legal analysis of the German national socialism will first pose the question whether this Nazi philosophical current is of realistic or *a priori* nature.

II.1. Racist apriorism

The German national socialism is an *a priori* system of the racist kind because it is not the German race itself which is the starting point to view all reality but—as expressed by Adolf Hitler in *Mein Kampf*—its “picture of the world and the view of the world” became the “granite foundation” of all its “proceedings”³ and “political management.”⁴ Alfred Rosenberg calls this Nazi

¹ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 7.

² A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, pp. 506–507.

³ *Ibidem*, p. 21.

⁴ *Ibidem*, pp. 70 ff.

view” a newly flourishing socialist national myth,⁵ “the myth of the nation”⁶ or “the myth of blood,”⁷ which—on the ground of “negating the assumptionless cognition” or “assumptionless’ science” “consciously recognizes this spiritual-racist will as the primary phenomenon of all its” Germanic “existence. This, according to Rosenberg, is the foundation of “becoming,” “the life” of the Germanic “myth”⁸ or “national principle.”⁹ This process is totally of a *a priori* nature and that is why the “development of a socialist-national state” should be set according to the “self-consciousness” of Nazism on the ground of the “concept of the nation,”¹⁰ and not on the foundation of the real existence of the German nation, which would characterize a certain type of racial realism: “There is no other area of life which exists due to itself and which would not be included within the life of the movement and the state”¹¹ of the German Reich, which means that there is no God, no human person, no nation, including the German nation, which would have the right—quoting the words by Karol Wojtyła—to “self-determination and self-rule,”¹² at the same time maintaining its inviolable personal dignity. That is the reason why in the ideological consciousness “further activity of all spiritual values is connected with the continuation of the existence of people they originated from and they were created for. There is no abstract being and eternal life of any cultural values and services separated from the former,”¹³ but according to

⁵ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag¹⁰1943, p. 602.

⁶ *Ibidem*, p. 608.

⁷ *Ibidem*, p. 615.

⁸ *Ibidem*, pp. 628–629.

⁹ A. ROSENBERG, *Nationalsozialismus, Religion und Kultur*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 1, Berlin: Industrieverlag Späth & Linde 1936, p. 3.

¹⁰ H.-H. LAMMERS, H. PFUNDTNER, *Einführung*, in: H.-H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

¹¹ *Ibidem*, p. 10.

¹² K. WOJTYŁA, *Osoba i czyn*, in: IDEM, *Osoba i czyn i inne studia antropologiczne*, T. STYCZEŃ, W. CHUDY, J.W. GAŁKOWSKI, A. RODZIŃSKI, A. SZOSTEK (eds.), Lublin: TN KUL³1994, p. 101.

¹³ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C. H. Beck'sche Verlagsbuchhandlung 1936, p. 10.

Gerstenhauer, there are only the Germans of the Reich as the “eternal Reich of Germans” or simply “eternal Germany.”¹⁴

II.1.1. Apriority of the notion of the “Nordic race”

Robert Ley—without providing any reasons for the correctness of this thesis—speaks in the following way of the value of the race and its apriority: “We must further see that singular *I* is a member in an eternal chain of the nation and the community. It is a holy service that the chain of our nation be not broken but wrought further on. If we get to know this sense of life, we will also find the laws of our common work. The first and iron right of life is the race. This is the most certain relation which keeps us together. The right of the race is joined by the right to fight for maintaining the race. These must be joined by the light of power, the right of joy. [...] We are the first country in Europe which overcame the class conflict.”¹⁵ Ernst Kriek defines the “race” also as the “right which encompasses the body, the soul and the spirit in equal measures and it creates a certain type which gets finally perfected according to a definite order of values.” Besides, the race “unites the racially equal in a tight relationship of life” and is “constant in the process of history and it creates the fundamental character” as well as the “relation of blood in the community and a chain of generations,”¹⁶ “nationality never overlapping the race.”¹⁷

II.1.2. Apriority of the notion “German nation”

In the analysis it is difficult to question the problem of apriority of the Nazi system in reference to the German nation or the thesis that the notion of the nation shows itself as a key concept¹⁸ because according to the Führer, it is

¹⁴ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. VIII.

¹⁵ R. LEY, *Wir sind das erste Land Europas, das den Klassenkampf überwunden hat*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3.Jg, from 1.08.1935, 581.

¹⁶ E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 11.

¹⁷ Ibidem.

¹⁸ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 39.

only “the national ideology which gets to know the meaning of the humanity in its primary racial elements.”¹⁹ This “ideology” of the German race “by no means believes in equality of the races but together with their significant difference it also gets to know a higher or smaller value and through this it feels obliged—correspondingly to the eternal will which conquers this universe—to strengthen the victory of the better and stronger one” and “require subordination of the worse and weaker one. The socialist-national ideology “professes the principle of the aristocratic nature and believes in the validity of this right till the last concrete being,” each of which also has a “different value.” The German national ideology” expresses “the deepest internal will of nature” and it feels called by the former to “breed a higher” race and thus “the best humanity” in the form of “the highest race as the nation of lords” by “obtaining the ownership of this land.”²⁰ Hermann Neef thinks that “in the nation national socialism sees the indestructible eternal community created by nature itself. They (human being as its part) see in it the basis and beginning of obligations and rights which a concrete comrade of the nation as a member of the national community must fulfill and which they can demand.”²¹ Neef believes that “only a nation will live forever.”²² Gerstenhauer speaks of “the highest ethical duty” stuck in “the nation” since “each nation is god’s special thought” and “their task is set to them by god.”²³ According to Gerstenhauer, “political Catholicism” criticizing Hitler’s Nazism because of the “adoration of the race” is a “wrong lesson” and so is questioning the respect Nazism has for “law and freedom,” while “the highest law” is the “good of exactly this national community, whereas “law, honour, freedom remain the highest ideal values,” like “the highest power and management of everything” in the sense of the “legislation” of the Third Reich, “in the hands of the Führer himself,”²⁴ which is why a new notion of “freedom” appears in Nazism: “It will not be individualistic and atomistic freedom of liberalism but freedom growing from subordination to the state and true adherence towards

¹⁹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 420.

²⁰ Ibidem, pp. 421–422.

²¹ H. NEEF, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 18.

²² Ibidem, p. 19.

²³ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: M.R. IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 44.

²⁴ Ibidem, pp. 45–46.

the Führer.”²⁵ That is the reason why Karl Lorenz casts doubts on the problem of “injuring ‘freedom’” as “the ruling science understands it rightly only as the bodily freedom of movement,”²⁶ and not some inviolable attribute of the human spirit whose existence in this materialistic ideology is questioned as to its essence.

II.1.3. Apriority of the notion of the “Third German Reich”

The “Third Reich,” which as a state “became the reality—born of the socialist-national ideology and shaped by the socialist-national thought about the state,” was also viewed in an *a priori* way. Hence, “all manifestations of this state must be rooted in the socialist-national ideology in the same manner as all its activity included within the socialist-national thought about the state and its proceedings can be viewed only by it. To live in accordance with the ideological principles of national socialism and behave according to its internal law of life will be the most beautiful virtue, it will be the categorical imperative in a socialist-national state,”²⁷ which is also pointed out by Hitler claiming that “ideology” “principally notices in the state only a means to an end and determines its goal as maintaining the human racist existence” in the sense of the existence of an “Aryan” as the “highest image of the lord.” If anyone should want to “annihilate” it, thus “burying the existence of the human” German “culture,” such an act “shows itself to the eyes of the national ideology as a crime deserving the worst condemnation” because “it degraded the good Creator of this miracle and helps in expelling from paradise,”²⁸ the Führer concludes.

II.1.4. Apriority of the notion of the “Führer”

The most important “principle” not only of the German national existence, but existence in general, is also the *a priori* adopted and ideologically viewed

²⁵ E.R. HUBER, *Die Gleichschaltung im Reichsbau*, “Der Tag,” Berlin, No. 93, from 19.04.1933.

²⁶ K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 36.

²⁷ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrie-Verlag Späth & Linde 1936, p. 1.

²⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 421.

“personality” of “the Führer” together with the “spiritual energies” on which “the organization of the socialist-national movement is built”²⁹ and on which the NSDAP based all its activity related to the surrounding reality of other nations. The Nazi “ideology rejects” the Marxist “thought about democratic masses” and builds upon “the best nation, which means the best man,” while passing the “management to the best personality,”³⁰ meaning “the Führer,” which was done in the absolute sense first by *Gesetz zur Behebung der Not von Volk und Reich* (“Ermächtigungsgesetz”)³¹ from 24 March 1933 and next by *Gesetz über den Neuaufbau des Reichs*³² from 30 January 1934, which actually led to the establishment of “the Führer’s state.”³³ C.A. Emge concludes that together with the “projection” of that “*a priori* idea of the Führer to the right, the thought about the law on apersonal order must become invalid.”³⁴

II.1.5. Apriority of the notion of “law”

On so subjectivistically radically viewed ground of the socialist-national ideology, Juliusz Binder writes about “*a priori*” of its “concept of the essence of law”³⁵ and all

²⁹ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 5.

³⁰ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 493.

³¹ RGBl. 1933, I S. 141: “**Artikel 1.** Reichsgesetze können außer in dem in der Reichsverfassung vorgesehenen Verfahren auch durch die Reichsregierung beschlossen werden. Dies gilt auch für die in den Artikeln 85 Abs. 2 und 87 der Reichsverfassung bezeichneten Gesetze. **Artikel 2.** Die von der Reichsregierung beschlossenen Reichsgesetze können von der Reichsverfassung abweichen, soweit sie nicht die Einrichtung des Reichstags und des Reichsrats als solche zum Gegenstand haben. Die Rechte des Reichspräsidenten bleiben unberührt.”

³² RGBl. 1934, I S. 75: “**Artikel 4.** Die Reichsregierung kann neues Verfassungsrecht setzen.”

³³ Cf. O. KOELLREUTTER, *Der Deutsche Führerstaat*, Tübingen: Mohr (Siebeck) 1934; IDEM, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, pp. 1–63.

³⁴ C.A. EMGE, *Ideen zu einer Philosophie des Führertums*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 175.

³⁵ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. LIII.

legislation of the Third German Reich, which is defined as Nazi. Carl Schmitt, heavily burdened with the co-creation of the Nazi legal concept, classifies the system of law out of touch with reason and justice and based, for example, on the command, not as an “assumptionless legal system”³⁶ but—as rightly concluded by Hans-Eckhard Niermann—as based on the “ideological axioms of the ideology” of the system of law which in its ultimate “consequence is” the racist “ideology most deeply irrational and hostile towards people,”³⁷ whose major “notions” are “race,” “the principle of the Führer” and the “national community,”³⁸ which notions should—according to Rosenberg—permeate not only “the state’s existence but the other areas should be subjected to revolutionary reformation as well.”³⁹

II.2. Racist materialistic monism

Basing on apriorism, national socialism defines its nature more closely as being characterized by materialism at different stages of development and in reference to the dimension of the being of law manifested in various but *de facto* monistically defined “legal orders.” What is the ideology of Nazism in the light of Aristotle’s science on causes then?

II.2.1. The German race as *causa materialis*

When asking the question about the “causes” of “the nation’s death,” the answer is also given on its genesis, which are the “eternal laws of nature” and its “eternal” extension is also determined by the “will of life” of a given nation.

³⁶ C. SCHMITT, *Legalität und Legitimität* (1932), in: IDEM, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Berlin: Duncker & Humblot 1958, p. 278.

³⁷ H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafjustiz im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, dissertation, Westfälische Wilhelms-Universität, Münster (Westf.) 1995, pp. 28–29.

³⁸ *Ibidem*, p. 33.

³⁹ A. ROSENBERG, *Nationalsozialismus, Religion und Kultur*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 1, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

That is why Arthur Gütt’s thesis is that “the cause of the nation’s death is not in nature” itself but it should be reduced to “the social and cultural changes which in such a nation destroyed the relations of reproduction and life.”⁴⁰ It suffices to change the latter to be also able to cope with the fact of disintegration of the materialistically viewed human nature and in the act of death return to the general dimension of the being of the Nordic race as “eternal.”

German Nazism defends itself from the charge of materialism and that is why Hans Fabricius assures from the position of the NSDAP that “this equally primitive and conceited teaching that the world is a mercilessly working mechanism, that only the ‘material’ has reality while the spirit and the soul are only phenomena—the consequences of the material and hence no God exists,” which “national socialism leaves to Bolsheviks with no jealousy,”⁴¹ giving the impression of distancing from materialism like Eugen Fehrle claims in reference to the nation: “The nation is [...] the subject of indefinite power, reasonably incomprehensible, irrational, which determines its fate (Schickal). This driving and holding power is called the soul of the nation, the spirit of the nation; its form of manifestation is nationality.”⁴² This soul, however, fits the matter, which is like in socialism of Karl Marx, who aimed to guide the matter to its self-consciousness, which means to becoming the spirit. Eugen Fehrle argues in the following way: “The nation itself is something unshaped but still this is the only basis for all formation. The nation is something unconscious which pushes to consciousness.”⁴³ Wilhelm Stuckart and Hans Globke, as commentators of the “German racial legislation,” also try to refute the charge of materialistic understanding of the “notion of the race” since—they believe—its expresses the unity and totality of the corporal-spiritual being,” “true life” but is by no means “either an explanation of the spiritual and bodily process from the

⁴⁰ A. GÜTT, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 12, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

⁴¹ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 46.

⁴² E. FEHRLE, *Das Wesen des Volkes*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 11, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

⁴³ *Ibidem*, p. 11.

material-materialistic one or a replacement of what is spiritual by material and matter.”⁴⁴ If Hitler, however, draws the existence of “man” from the “animal” world,⁴⁵ it is difficult to find the ground for the thesis on national socialism as non-materialism.

That is the reason why Gustav Adolf Walz, on the ground of his notion of “the original type (Ursprungstypus) of the new thinking of law,” shows the “socialist national concept of the nation. The German nation, as racially defined, historically shapes and volitionally affirming the future of the community of life, is the subject of all German cultural values, and thus also the legal values.”⁴⁶ Walz does not conceal that the being of the nation is “formed” only in the course of the national history and this means that originally it is only the “:mass” of raciality, the spiritual and bodily being still not constituted by the community of people, related by the bonds of blood and the culture created by it, which Hitler calls the “permanently happening higher becoming of man” in the evolutionally understood “rush and fight of life” for the “externally visible distancing of man from the animal” which—according to *Mein Kampf*—is “taking a look at the real pre-reasons and causes of the development of human culture,”⁴⁷ which is supposed to be confirmed by still another principle discussed below.

One of the results of the developing matter and, at the same time, the basis for its further development in the national and political sense is the “unity of ‘blood and land’ [...]” which “creates the source of the power of the socialist-national movement and the basis of the state.”⁴⁸ The evident apersonality of the Nazi thinking is manifested in the final constitution of the reality where a man is conceived or born, namely the “heritable mass,”⁴⁹ about which natural sciences say that it develops by way of the evolution of the matter; however, a Nazi Johann von Leers expresses the principal uncertainty about the truth of this thesis, namely saying that “in the light of the development of the aforementioned natural sciences

⁴⁴ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C. H. Beck'sche Verlagsbuchhandlung 1936, p. 1.

⁴⁵ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 432.

⁴⁶ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 39.

⁴⁷ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 494.

⁴⁸ R.W. DARRÉ, *Blut und Boden*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 3, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

⁴⁹ *Ibidem*, p. 4.

this is not so obvious because although the line was lengthened back and it was assumed that those oldest, half-animal human groups [...] were directly derived from apes-humans, that is why the ‘missing link’ was eagerly sought which should connect man with ape-man. Today we do not see this so simply.”⁵⁰

Rosenberg also assures on the one hand that the “knowledge on the race is no materialism,” on the other hand “it is not any spiritualism either but only a sincere concord of the effect of the deepest laws of nature and a lively and joyful confirmation of this will in nature. It is only through the knowledge on the race that the German nation was presented with a new view and, consequently, new live thinking”⁵¹ in the form of “national socialism,” which—according to Frick von Leers—“the applied science on the race,”⁵² which race as the original “mass” must be subjected to the process of “nationalization”⁵³ by the Nazi “movement” with the NSDAP at the lead, which will be discussed in the next paragraph.

One of the more important philosophers of law in the Reich, Helmut Nicolai formulates very significant points of thinking of the philosophy of law in the Nazi ideology in his *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*,⁵⁴ which for the first time undertakes an “attempt” to define “philosophy of law from the point of view of the” Nordic “race.”⁵⁵ German national socialism adopts one principle of being, which is the master, which is supposed to give rise to everything by way of evolution, that is the whole reality, especially including the totality of the German race with its particular parts. According to Theodor Maunz, a false conclusion was attempted from this on the existence of an “individuum by the power of its personality out

⁵⁰ J. v. LEERS, *Rassengeschichte des deutschen Volkes*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 4, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

⁵¹ A. ROSENBERG, *Nationalsozialismus, Religion und Kultur*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 1, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

⁵² J. v. LEERS, *Rassengeschichte des deutschen Volkes*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 4, Berlin: Industrieverlag Späth & Linde 1936, p. 56.

⁵³ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, pp. 366–367.

⁵⁴ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Frz. Eher Nachf. 3¹1934.

⁵⁵ *Ibidem*, p. 4.

of nature (pre-legally) endowed with the “freedom of activity.”⁵⁶ On the contrary, “the Führer arose from the community” and remains “(objectively and subjectively) racially equal to it”⁵⁷; therefore, there cannot be any other structure but this: community—individual part, but only in the sense of a part of the whole, never as sovereign subjectivity, called for by, for example, Heinrich Rommer, claiming that “the state cannot afford so far-reaching disappearance on an individual that the latter is only a means, a tool set in motion only by a command and pressure,”⁵⁸ since “this natural nation is unconsciously a created and shaped unity,” which in fact “grows and becomes”⁵⁹ “of itself,”⁶⁰ which is articulated by Alfred Rosenberg: “Nation is the first and the last which all the rest is to get subordinated to,”⁶¹ which means being *ens a se*. Justus Dankwerts emphatically stresses that the “concept of an individual is unknown to a socialist-national state”⁶² because also according to Otto Dietrich, “national socialism does not establish ‘individuum’ or ‘humanity’ as the highest criterion but the nation as the only real and organically conjoined whole which knows life.”⁶³

In the conviction of the theoretical representative of Nazism, “never more will ‘science’ on ‘God’ and things around ‘God’ exist because the time of those sciences is long gone” due to “the birth of the time of an ideological attitude coming from the” Nordic “race” and creating “national socialism as an ideological value.”⁶⁴ If then national socialism makes use of the notion of “eternal,” this could indicate that besides the acceptance of temporarily viewed matter as the

⁵⁶ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 187.

⁵⁷ *Ibidem*, p. 43.

⁵⁸ H. ROMMEL, *Der Staat in der katholischen Gedankenwelt*, Paderborn: Bonifacius 1935, p. 13.

⁵⁹ E.R. HUBER, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg ²1939, p. 154.

⁶⁰ M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, dissertation, Hamburg: LIT 1998, p. 259.

⁶¹ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag ¹⁰1943, p. 526.

⁶² J. DANCKWERTS, *Die Verwaltungsgerichtsbarkeit*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 108.

⁶³ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

⁶⁴ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 130.

principle of any being, affirmation of spirit as eternal being *per se* takes place in national socialism. However, the concept of “eternality” in each context in Nazism is dialectically bound with the concept of “time,” which means an attempt at externalization of time since—according to Alfred Rosenberg—there exist no “Eternal Truths” which are proclaimed, for example, by old Greek metaphysics of the Roman Catholic Church. “Natural scientists,” Rosenberg claims, “proved” that there is no “eternality” and that is the reason why in his opinion this “old prejudice” of “the creation of the world from nothingness” should be rejected as, Rosenberg believes, this contradicts the “principle of free scientific research” because the science of “the Church does not derive mankind from different primary parents” and as such appears to be “the world of spirit opposing the European one” and “against of which,” Rosenberg adds, “everything which was noble and great in us was fighting since the very beginning and bled out” to destroy “this whole ecclesiastical-Roman apparatus” which “makes reason blind,” for example though performing the “wizardry of sacraments” or other religious practices and “forms stupefying the senses,” “fantasy” and the whole man, who should be “awoken.”⁶⁵

The place of the objectively understood holy ideas such as God, Church and perfect man is taken in Nazism by “the holiness of the land as the basis of the nation’s life.” Why is it holy? A few reasons determine this, namely: “the land is holy because it gives bread to the nation. It is holy because without it the German blood would spill out and get poisoned. It is holy because our fathers won it, make it suitable to inhabit, worked on it, rebuilt it and always repeatedly defended sacrificing their lives”⁶⁶ and hence Hitler gave so great importance to “the most holy human right” and at the same time “the most holy obligation” to “keep” the German “blood in purity—that was a guarantee of “maintaining the best humanity” and securing “the possibility of the noblest development of those beings.”⁶⁷ This anti-spirit of absolutization of the Nordic race gives rise to the so-called “Nürnberger Gesetze,”⁶⁸ which other nations and human races,

⁶⁵ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag¹⁰1943, pp. 625–627.

⁶⁶ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 30.

⁶⁷ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 444.

⁶⁸ *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre* from 15 September 1935 (RGBl. 1935, I S. 1146): “Durchdrungen von der Erkenntnis, daß die Reinheit des deutschen Blutes die Voraussetzung für den Fortbestand des Deutschen Volkes ist, und

especially the Jewish nation, reduce and degrade up to the point of identification with evil, thus aiming at existential elimination, which is the consequence of the monist concept of the world and this, in turn, results in the monist understanding of the being of nations and “clashes with the principles of identity and non-contradiction” and as such “cannot be considered to be rational type of explaining”⁶⁹ reality as reality.

This racist materialistic monism gives rise to socialist-national legal monism, or “statutory monism,” which accepts the German race as the only source of the existence of law and principally excludes the existence of other “sources of law”⁷⁰ by depreciating the statutory existence of other races, and especially the subjectivity of the Semite race through so-called *Reichsbürgergesetz*, which established that only “a citizen of the German state or a generically kindred blood” can be “a citizen of the Reich,”⁷¹ which had already been included in the NSDAP program, namely that “a citizen of the state can only be he who is a member of the nation. A member of the nation can only be he who is of German blood, regardless of the religion. No Jew can be a member of the nation” because they do not belong to the race. What is more, the program also said that “the right to establish the leadership and laws of the state may be assigned only to a citizen of the state.” Therefore, it was required that “each public office, whatever its kind,

beseelt von dem unbeugsamen Willen, die Deutsche Nation für alle Zukunft zu sichern, hat der Reichstag einstimmig das folgende Gesetz beschlossen, das hiermit verkündet wird: § 1. (1) Eheschließungen zwischen Juden und Staatsangehörigen deutschen oder artverwandten Blutes sind verboten. Trotzdem geschlossene Ehen sind nichtig, auch wenn sie zur Umgehung dieses Gesetzes im Ausland geschlossen sind. (2) Die Nichtigkeitsklage kann nur der Staatsanwalt erheben. § 2. Außerehelicher Verkehr zwischen Juden und Staatsangehörigen deutschen oder artverwandten Blutes ist verboten. § 3. Juden dürfen weibliche Staatsangehörige deutschen oder artverwandten Blutes unter 45 Jahren in ihrem Haushalt nicht beschäftigen.”

⁶⁹ M.A. KRĄPIEC, *Człowiek i prawo naturalne*, Lublin: TN KUL 1975, p. 105.

⁷⁰ Th. MAUNZ, *Die Rechtsmäßigkeit der Verwaltung*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 53.

⁷¹ *Reichsbürgergesetz* vom 15. September 1935 (RGBl. I S. 1146): “§ 2. (1) Reichsbürger ist nur der Staatsangehörige deutschen oder artverwandten Blutes, der durch sein Verhalten beweist, daß er gewillt und geeignet ist, in Treue dem Deutschen Volk und Reich zu dienen.” Cf. B. LÖSENER, *Staatsangehörigkeit und Reichsbürgerrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 13, Berlin: Industrieverlag Späth & Linde 1936, pp. 1–34.

whether in the Reich, the Land or the commune can be held only by a citizen of the state.”⁷² As such they must be real “members of the community. Outside the communities” of the German nationality “there is no human life in the sense of law but only biological-vegetative life [...]. Therefore, the state does not stand as something different opposite or above the members but the members of the community create the state in their totality,” which is unacceptable for the “Roman thinking,”⁷³ that is the Greek-Roman and Christian metaphysics. Walz writes that “the thinking of the state can be manifested originally only as racially defined, as a national state.” It is only in this system of Nazi thinking that the “concept of the state” gains “again its political position. It is a permanently arranged form of the nation which reached its self-determination. A national state is then the highest political objective of nationality”⁷⁴ because the uniformity of the race can within this ideology be externalized in the most perfect way in a uniform state which in principle excludes ontological and cultural co-existence with other nations. On the grounds of the adopted *a priori* assumptions those other races should be completely annihilated or enslaved so that they will serve the race of the Nordic “lords.” Therefore, an important question arises: How does the process of the formation of the German race proceed? What determines *causa formalis* in national socialism?

II.2.2. The Führer and the National Socialist German Workers’ Party (NSDAP) as *causa formalis*

A characteristic feature for the representatives of national socialism is their very precise knowledge of classical thinking, which is the reason why the problem of the formation of being such is well-known to them.

Eugen Fehrle and many other representatives of national socialism refer to Hegel’s idealistic dialectics: “The nation aims” to become “a state since it is only

⁷² *Programm der Nationalsozialistischen Deutschen Arbeiterpartei vom 24. Februar 1920*, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 8.

⁷³ W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 14.

⁷⁴ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 41.

in the state that the nation knows what they want (Hegel)⁷⁵ since “the national state is a political form of the nation’s life” or as “a form of law the state is incarnation of the nation’s community out of nature shaped according to blood.”⁷⁶ Bernd Rütters rightly notices that “the more the socialist-national ideology moped the point of gravity of power from the state to the ‘Führer,’ ‘the party,’ ‘the movement’ and ‘the same racial national community,’ the less Hegel showed himself as the suitable philosophical forefather and the crown witness of the new “Führer’s state.”⁷⁷ Nevertheless, Hegel with the most important tool of his idealistic system, which is contradictory dialectics of being, he played a significant role in the creation of Nazi dialectics.

Although the “nation” is viewed here as the “subject of the political community” and the “sense of what is political lies in the relationship with the national community as the highest earthly unity,” “in principle, the earthly possibilities of shaping in this world are only of ‘political’ nature,”⁷⁸ which is why the Nazi “state” occurs as “a mediator from man to man, it is a form and a sensual picture of the community.”⁷⁹ In this primary attention turned to man, the Nazi ideology tries in fact to distance itself from the socialism of Marx and Engels: “International socialism is only the socialism of economic goods as opposed to national socialism, which is the socialism of people,”⁸⁰ which, however, misses the very essence of man as a substantial and personal entity, which is simply absent in Hitler’s Nazism, which is drawn attention to by Bechert himself in the context of his critical argument with Roman law: “Roman law emphasized the thought of a concrete person and their exclusive power of law. This stood in a striking opposition to the German law because while Roman law draws all

⁷⁵ E. FEHRLE, *Das Wesen des Volkes*, in: H.H. LAMMERS, H. PFUNDNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 11, Berlin: Industrieverlag Späth & Linde 1936, p. 11.

⁷⁶ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 22.

⁷⁷ B. RÜTTERS, *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich*, München 1988, p. 78.

⁷⁸ O. KOELLREUTTER, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, p. 55.

⁷⁹ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 22.

⁸⁰ *Ibidem*, p. 23.

legal rules from a concrete person, the German law builds otherwise: individual rights are derived from the law of the community. While the former is kept individualistically, the latter is directed socialistically.⁸¹ This is the result of the Nazi relative substantialization of the existence of the German national community as well as substantialization of the German Reich itself as a state with simultaneous de-substantialization of human existence and reducing the latter, including man Aryan to accidental being, existing in the only substance of the Nordic race. It should be remarked that the other nations are not substantialized but subordinated as relative beings to this absolutely only German substance whose formation is reserved exclusively for the Nazi party as a really viewed form of the Nazi nation and state. What role does the Führer play in this process of forming the national “mass”?

In 1920 the NSDAP program took into consideration the “necessity of the political authority of the central parliament” and it also referred to the plural form “Führern,” i.e. “leaders,” and not “Führer,” i.e. “leader,” the latter form not appearing until December 1932, which was shortly before Hitler came to power as the chancellor of the German Reich on 30 December 1933. Therefore, “the Führer’s will replaces [...] the surrogate of the majority,” through which “a law” “is not any more an abstract norm in a significant way but the highest national value.”⁸²

Where is the ultimate reason for the being of the Führer and thus the being of the party? The NSDAP spokesman Otto Dietrich replies through “Schicksal”: “The Führer [...] was meant” to establish “the whole party as if a convent and keep the sworn community in blind obedience,” which Andrzej Szostek questions because this type of “command is not based on any reason,” which results in “depriving [...] man of subjectivity (autonomy) and reducing them to the role of a ‘pawn’ carrying out somebody else’s orders, in fact also at somebody else’s responsibility.” Szostek refers this to “Hitler’s Nazism” as “one of the examples showing ‘practical deontonomism’: inclination to give up one’s subjectivity for the benefit of others.”⁸³ What is more, as for the question about “the Führer’s succession,” the notion of “no less timeless hierarchy of the party” emerges from Dietrich’s thought, which testifies to eternalization of the party as an eternalized form of the being of the matter—after all, also ideologically eternalized. With certainty, the very being of the Führer must also be viewed in

⁸¹ Ibidem, p. 24.

⁸² G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 42.

⁸³ A. SZOSTEK, *Pogadanki z etyki 1992/1993*, in: Biblioteka “Niedzieli,” vol. 1, Częstochowa 1998, pp. 72–73.

the temporal aspect in the Nazi self-consciousness. He claims that “to inherit the crown one has to be first born, and to get the crown it is necessary to be chosen”⁸⁴ by the aforementioned “Schicksal.” Hence, the thesis does not surprise which was presented by Hans Fabricius, the ministerial councilor in the Ministry of Internal Affairs of the Reich, who refutes the interpretation of limitation of the combination of reasons why the NSDAP came to power only to the “general misery”⁸⁵ of Germany, which is almost commonly assumed because that very complicated social and economic situation was the “initial condition” but not the decisive one in the appearance and development of the party. In this context it is difficult to refer to the aforementioned statement by Hitler,⁸⁶ but this is certainly very interesting and maybe of key importance to study this issue and maybe its fundamental importance for the development of this ideology of national socialism and thus for the history of the world in an inter-disciplinary way, also with the aid of theological sciences. This certainly requires a separate scientific study. Theodor Maunz specifies the relation of the Führer—the party on the basis of that self-consciousness on the foremost position of the leader in the party as the principle-form and he mentions that “the principle of the Führer is realized where the shaping of the will does not take place in a pluralistic or collegial way but where one man subordinates and the subordinated realize this subordination”⁸⁷ because the “principle of the Führer” means “building law on concrete communities which include the Führer and his followers in themselves. The Führer and the followers are, according to it, the kernel of the essence of the internal order of the community, which is its form. A division into the Führer and the followers is the

⁸⁴ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 8.

⁸⁵ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

⁸⁶ Cf. T. GUZ, *Filozoficzny kontekst II wojny światowej*, in: T. GUZ, W. LIS, R. SOB CZUK (eds.), *Bitwy pod Tomaszowem Lubelskim w 1939 roku*, Lublin: Wydawnictwo Werset 2010, pp. 13–14; F.P. HELLER, A. MAEGERLE, *Thule. Von den völkischen Mythologien zur Symbolsprache heutiger Rechtsextremisten*, Stuttgart: Schmetterling-Verlag³2007, p. 62.

⁸⁷ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 44.

basis for the development of the community. The Führer cannot exist without the followers and the followers cannot exist without the Führer. The Führer arose from the community and is racially equal (both objectively and subjectively). His task is to walk in front of the community, determine the fate of the whole and manage the decisions of the will where the community lives. The Führer is a model of the community. The principle of the Führer understood in such a way or the principle of the community means complete reversal of our legal thinking so far, all the more so because through this the concepts of law and the sources of law also become different,⁸⁸ because according to Hannah Arendt “the principle of leadership does not promote the creation of a hierarchy in a totalitarian state, like it happens in the totalitarian movement.”⁸⁹ Dietrich, on the other hand, speaks of “the principle of will,” which was given to the German nation by national socialism. This means that “one will,” which is the will of the Führer as “incarnation of the political will in general” “created the movement of nothingness.”⁹⁰ This “power of will” “has not limits,”⁹¹ which means that it has the attribute of infinite divinity, according to Nazism capable of absolute formation of each form of matter, not only the one in the shape of the German nation, which is only the initial stage to worldwide revolution and which is manifested by the “inseparable” unity of the state and the party, established by a proper law.⁹² That is why “between the supreme authority (Führer) and the ruled there are no reliable in-between steps with the adequate part of power and duties. The Führer’s will can be incarnated everywhere and at all times and he himself is not tied to any hierarchy, even the one he could have created himself.”⁹³

⁸⁸ Ibidem, pp. 42–43.

⁸⁹ H. ARENDT, *Korzenie totalitaryzmu*, transl. M. SZAWIEL, D. GRINBERG, vol. 1, Warszawa: Niezależna Oficyna Wydawnicza 1993, p. 441.

⁹⁰ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 5.

⁹¹ Ibidem, p. 6.

⁹² *Gesetz zur Sicherung der Einheit von Partei und Staat* from 1December 1933 (RGBl. 1933, I S. 1016): “§ 1. (1) Nach dem Sieg der nationalsozialistischen Revolution ist die Nationalsozialistische Deutsche Arbeiterpartei die Trägerin des deutschen Staatsgedankens und mit dem Staat unlöslich verbunden.”

⁹³ H. ARENDT, *Korzenie totalitaryzmu*, transl. M. SZAWIEL, D. GRINBERG, vol. 1, Warszawa: Niezależna Oficyna Wydawnicza 1993, p. 442.

Lammers and Pfundtner think that originally the German “nation” is a “mass,” a shapeless mass, and it acquires its “form of the national existence from “national socialism” directed by the NSDAP as the link “forming”⁹⁴ the existence of the Germanic race. Dietrich explains this problem in greater detail and he writes that “national socialism [...] became the political form of life of the whole” German “nation” so that it could “think and feel in a political way,” which thus secures it the “strongest development” by way of which it “realized the principle of the Führer consistently,”⁹⁵ which means it took the place of the formal cause, which—according to the classical metaphysics—is the human spirit and soul, for whose reason of existence is personal Absolute, like ultimately for the matter of human body.

There is no doubt that in the Nazi ideology the classically viewed form of being of a human person is of racist nature, which means that human “soul” is a “racial soul” and, therefore, it is not a transcendent soul towards the body of a human person but—at the most—some form of sublime matter if it is essentially defined by race as—ontically viewing—an “attribute” of the human body.

The problem of the racially viewed soul is related to the question of understanding conscience. If “the racial soul is externalized in a concrete person through conscience or through feelings, then it is an inborn property, a drive, an instinct which regulates man’s outer attitude. This feeling is passed on via inheritance. This comes from the very law of life” and is “justified biologically, by the right of life and in the race. That is why we call our theory [...] the legal-racist science of law,”⁹⁶ which differs significantly from the classical understanding of conscience as practical reason, transcendent towards the body of a human person and theoretical reason as the main reason for the existence of law as law. If the form of being is of racial nature, what is being as being in the causal aspect?

⁹⁴ H.-H. LAMMERS, H. PFUNDTNER, *Einführung*, in: IIDEM (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

⁹⁵ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

⁹⁶ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Frz. Eher Nachf. ³1934, p. 28; cf. A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. ⁴²1933, p. 495.

II.2.3. The German racist socialism—collectivistic community of the existence of the Third Reich as *causa efficiens*

The German Reich recognizes itself both as the “state of law” and as a “just state” because it is the “state of the Führer” and as such it is above all the “ideological state.”⁹⁷

Helmut Nicolai emphasizes that although “the nation is a naturally given fact,” “an individual is thought but as a member of the majority of people from whom they come. No man is here for themselves but each man has their father and mother, ancestors from whom they inherited their bodily shape and their spiritual abilities.”⁹⁸ Heinz Kummer stresses that the “German legal thinking is not familiar with the concept of an individual placed on themselves, atomistically conceived, like the ancient man imaged it” because “the German legal thinking is characterized by an inclination to a functional, collective relation.”⁹⁹ Fritz Reinhardt formulates this in a clear manner: “An individual is nothing without being a member of the community and [...] a natural community is only a community of people of equal origin, equal language and equal culture—a national community.”¹⁰⁰ Generally, this is how man is interpreted in this system of thinking; it is only “membership in the whole of the nation” since “man is” exclusively a “community being”¹⁰¹ and the system assertions of Nazism, e.g. from *Mein Kampf*, prove false and even mendacious, like the one that Nazism does not only mean the “purity of the race” but also

⁹⁷ W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 18.

⁹⁸ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Frz. Eher Nachf. 31934, p. 26.

⁹⁹ H. KUMMER, *Öffentliches und privates Recht in der politischen Grundordnung*, “Zeitschrift für die gesamte Staatswissenschaft,” vol. 104 (1944), p. 33.

¹⁰⁰ F. REINHARDT, *Vom Wesen der Volksgemeinschaft*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 8, Berlin: Industrieverlag Späth & Linde 1936, p. 1.

¹⁰¹ E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 12, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

“getting to know the importance of a person,”¹⁰² but only as the racial being viewed as a relation towards one’s own race, nation and state, instead of making affirmation of “man” as “one concrete substance—subject.”¹⁰³ What method must Nazism apply to realize such an anti-human system—also in the legal aspect?

“The Führer and the community conceal their Power to blow up the existing system of law.”¹⁰⁴ Why? “Obtaining one subject of will and effect of the order of the nation was followed by overcoming the division and limitation of power,” which as absolutized were focused in the existence of the party and the Führer. That is why the “tri-“division was replaced by ‘one’-division, which is no longer divided into particular powers but is built upon concrete partial orders put into the whole of the order” as aspects of the only entity of law identified with the Nordic race, which—according to Karol Wojtyła—contradicts the classical content of the concept of “man” as “a personal subject because man as an individuum of the species is and remains man, regardless of any orders of their inter-human or social relations.”¹⁰⁵ In Nazism, the “existing ‘powers’ permeate all orders. The analysis of particular organizational entities will show in detail that there are both legislative, judicial as well as administrative tasks to be fulfilled inside a particular community. All orders exist only if they are implemented into the order of the nation. Otherwise, they are no order and they have no binding law within. Nevertheless, inside the order of the nation these powers are united in the person of the Führer; they thus become one true absolute power, the power of the Führer. It is not that state as a ‘legal person’ but the Führer that is the subject of all power since each person as a person, except one, which is Hitler, has no right to exist. All particular tasks, which might differ from each other in their content, are derived from the Führer’s power; however, they do not divide the absolute power, the latter being indivisible, and the Führer’s power is not introduced as a part of concrete tasks besides them”¹⁰⁶ because the Führer incarnates the full state power as one “legal person,” or—in other

¹⁰² A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, pp. 499–500.

¹⁰³ M.A. KRAPIEC, *Człowiek i prawo naturalne*, Lublin: TN KUL 1975, p. 159.

¹⁰⁴ Th. MAUNZ, *Das Verwaltungsrecht des nationalsozialistischen Staates*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 31.

¹⁰⁵ K. WOJTYŁA, *Person: Subjekt und Gemeinschaft*, in: K. WOJTYŁA, A. SZOSTEK, T. STYCZEŃ, *Der Streit um den Menschen. Personalener Anspruch des Sittlichen*, Kevelaer: Verlag Butzon & Bercker 1979, p. 38.

¹⁰⁶ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 42.

words—“the nation in one person” is “the state,”¹⁰⁷ that is the Third German Reich. Ernst R. Huber, on the other hand, adds: “Leadership does not stand as something independent besides those three classical powers but it acts as a connecting power above, between and in them and that is why it does not justify any division but the unity of the state’s power,”¹⁰⁸ while everything else subsists in this one and only being of the state—the Führer.

Ernst R. Huber writes about the “principle of the national whole” as “a universal revelation comprising everything and permeating everything” in the sense of the “organic totality,”¹⁰⁹ i.e. the one that includes each man on earth and each being of the cosmos since, according to Huber, “there is no personal, pre-state and supra-state freedom of an individual which is to be respected by the state. The place of an isolated individuum was taken by a member of the nation who—like a member—is assigned to the community and who—through this totality of the political nation is comprised and included in the whole of activity.”¹¹⁰ Danckwerts accused Montesquieu that in his “science he started from what is objective, which cannot be sufficiently underlined,”¹¹¹ which means from the real difference between the subject and the object and that is why, for example, he aimed at the division of power into legislative, executive and judicial ones.

As for the relation between the will of the members of the German nation, or the party, and the Führer, the theoretical and practical standpoint is clear: “Today it means the supremacy of the Führer’s will over the will of singular people-followers and if they had an idea to oppose the Führer’s will, they would exclude themselves from the community”¹¹² because they would betray the leader as the subject of all subjects. This actually means condemning such a person to nonentity, which Hitler even referred to the whole German national community when he says what corresponds to the aforementioned fragment: “if the German nation is not ready to stand for maintaining itself, this is all

¹⁰⁷ F. REINHARDT, *Vom Wesen der Volksgemeinschaft*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 8, Berlin: Industrieverlag Späth & Linde 1936, p. 3.

¹⁰⁸ E.R. HUBER, *Die Einheit der Staatsgewalt*, “Deutsche Juristenzeitung” 1934, col. 950.

¹⁰⁹ *Ibidem*, p. 158.

¹¹⁰ *Ibidem*, p. 361.

¹¹¹ J. DANCKWERTS, *Die Verwaltungsgerichtsbarkeit*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 104.

¹¹² Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 39.

right, it should disappear!”¹¹³ These words were written down by Martin Bormann’s adjutant Heinrich Heim at the Führer’s main headquarters.

Attention should be paid to the concepts of ‘nationalism’ and ‘patriotism,’ which in the view of national socialism “are not one and the same. True nationalism includes much more than [...] patriotism”¹¹⁴ as the latter was taken over from the “culture of the Mediterranean Sea” and is too narrow a concept “for us Germans”¹¹⁵ and that is why it has to be rejected.

Nazism also deals with “socialism” itself in a critical way in certain aspects and it claims that “in reality there is no nationalism or socialism but only national socialism. Everything else is either only patriotism or only day-dreaming in social phrases” since the true socialism is only this thinking current which is “compatible” with the “notion ‘national,’”¹¹⁶ but exclusively in the sense of belonging to the German race.

II.2.4. The Führer’s existence as the absolutism of the race, the nation and the state of the German Reich: *causa exemplaris* and *finalis*

According to Otto Dietrich, “Personality which is incarnated in Adolf Hitler” means “everything for the renewed birth of the German nation [...]” but “what is ultimate in this personality [...] will always remain a mystery for us.”¹¹⁷

¹¹³ W. JOCHMANN (Hrsg.), *Adolf Hitler. Monologe im Führerhauptquartier 1941 bis 1944*, Hamburg: Albert Knaus Verlag 1980, p. 239.

¹¹⁴ F. REINHARDT, *Vom Wesen der Volksgemeinschaft*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 8, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

¹¹⁵ E. FEHRLE, *Das Wesen des Volkes*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 11, Berlin: Industrieverlag Späth & Linde 1936, pp. 3–4.

¹¹⁶ F. REINHARDT, *Vom Wesen der Volksgemeinschaft*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 8, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

¹¹⁷ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

Fabricius writes about the Führer as of a “genius personality,”¹¹⁸ with whose “birth” “the history of the socialist-national movement began.”¹¹⁹ What does this mean more exactly in the ultimate, i.e. absolute references in the philosophical and religious sense, which also has a decisive value for analyses of the philosophy of law due to the question about the ultimate reason for the being of law which is posed in the metaphysics of law?

It is already in *Mein Kampf* that Hitler treats Christian religions in a pragmatic way and he notices that until the “many millions” of believers are presented with an alternative “viewpoint” one would have to be “a fool or a criminal” to try to “destroy” the “existing” state of things in religions because like destroying the “legally general basis of the state” inevitably leads to “anarchy,” the destruction of the “dogmas” of faith leads to “worthless religious nihilism,”¹²⁰ which makes a given community useless, also for the new ideology. Joseph Goebbels explains to us or in a sense defines the ideological position of the party as for the question of religion: “What is Christianity for us today? National socialism is a religion. We only miss a religious genius who will shatter the old, out-of-date formulas and will create the new ones. We miss a ritual. National socialism must some day become the religion of the state of the Germans. My party is my church and I believe that I serve the lord the best if I fulfill his will and free my oppressed nation from the chains of slavery. This is my gospel and where I encounter opposition—no matter what kind—I try to break it. That is how I reached brightness.”¹²¹ The Führer frequently discussed these problems with Goebbels and other closest collaborators in the Reich.

Causa exemplaris of Hitler’s Nazism is the “Führer.” He is the “model of the community”¹²² and that is the reason why the German Nazi made the moral quality of the Germans themselves and all people dependent on their attitude towards Hitler, which is exemplified in the interrogation of Stieff, one of the assailants from 20 July 1944, by Roland Freisler, the president of the National

¹¹⁸ H. FABRICIUS, *Die Geschichte der nationalsozialistischen Bewegung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 5, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

¹¹⁹ *Ibidem*, p. 4.

¹²⁰ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, pp. 292–294.

¹²¹ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923–1941*, vol. 1/III: Juni 1928–November 1929, ed. A. MUNDING, München: K.G. Saur 2004, p. 103.

¹²² Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 43.

Tribunal of the Reich at that time (Volksgerichtshof): “A German man is a German man and he is following the Führer. If he has become unfaithful to the Führer, he is not a German man. That is only where I want to go now: You had no relation with this nation at all,” because there is substantial identity between the nation and the Führer and hence, who betrays the Führer, he breaks the relation with the nation, too, which Freisler articulates in the further part of the interrogation: “Our Führer is Germany and we are his followers.”¹²³

What is more, the ideology of national socialism of the Third Reich is about absolutization of the Führer and his Nazi ideology as some kind of a compensation for the lost World War I, and the religion itself—especially Christian religion, but also any other, which was clearly said during the aforementioned trial of the German Reich against the assailants who attempted to kill Hitler: “Freisler: ‘I desire to emphasize it already now: Acknowledging national socialism carries a man away since this man cannot leave this challenge again and the challenge can never leave this man. Acknowledging national socialism is acknowledging the Führer, like acknowledging the Führer is acknowledging national socialism. Both are inseparable for time and for eternity [...]’.”¹²⁴ Hence his force of seeking and identifying the Führer with some “national and pseudo-socialist ideal model,”¹²⁵ which should raise Germany to create a great culture and a new faith because “this national principle of the Führer” creates “as if a religious teaching on salvation” and is an expression “of disguised mysticism,”¹²⁶ the proof of which is, for example, the Führer’s speech from 1 May 1935: “So I am asking you: On this day of the great and proud demonstration of the world, renew your declaration to your nation, our community and our socialist-national state! My will—this must be a concession of us all—is your faith! My faith is for me—like it is for you—everything in the world! However, my nation is the highest which god gave in the world! It is in it that my faith rests. I serve it with my will and I give my life to it. Let it be our common holy confessions

¹²³ R. FREISLER, in: H.W. KOCH, *Volksgerichtshof. Politische Justiz im 3. Reich*, München: Universitas Verlag 1988, pp. 354–355.

¹²⁴ *Ibidem*, p. 339.

¹²⁵ H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafrecht im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, dissertation, Westfälische Wilhelms-Universität, Münster (Westf.) 1995, p. 35.

¹²⁶ *Ibidem*, p. 36.

on the day of the German work, which is so rightly the day of the German Nation! Heil to the victory of the work of the German Nation!”¹²⁷ Therefore, the “program” of the socialist-national party is in the consciousness of its members, “always an important confession of faith,” at the same time with the “eternal content” and the “eternal value” although it is called a “temporary program.”¹²⁸ It is just in the context of their Nazi holiday of 1st May that Eugen Fehrle explains the symbolics of “Hakenkreuz,” which is a sensual picture of the revolving sun, through the solar heat every year coming back to life and at the end of the eternal life for or nation.”¹²⁹

Alfred Rosenberg also spoke in this “socialist-national spirit.” He also pointed to the sanctions of a lack of affirmation of this new absolute: “German values of character are [...] eternal and everything else is to be established according to them. Who does not want them, he gives up his new German birth and decrees a death penalty onto himself” because only he who participates in the source life, meaning the Nordic race, lives. “A man or movement that does not want to help these values in their perfect victory has the moral right not to save what is hostile. They have a duty to overcome this spiritually, let it waste away organizationally and keep in infirmity since if no desire of power comes from the political will, he should not commence any fight.”¹³⁰ It is in this very context that Rosenberg writes: “It is not Christianity which brought us edification but Christianity owes its permanent values to the German character,” which should be the subject of preaching, for example of each religious “clergyman.”¹³¹ A similar view is represented by Joseph Goebbels, when he writes in his *Diaries* that “between the extremities such as national socialism and Bolshevism there is no mediation; here one must clean up the place for the

¹²⁷ A. HITLER, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3. Jg, from 15. 05. 1935, p. 292.

¹²⁸ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

¹²⁹ E. FEHRLE, *Das Wesen des Volkes*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 11, Berlin: Industrieverlag Späth & Linde 1936, p. 11.

¹³⁰ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag ¹⁰1943, pp. 635–636.

¹³¹ *Ibidem*, p. 634.

other and the other will take its place,”¹³² so for Nazism there is no mediation to Christianity. Simply, there cannot exist two different absolutes next to each other.

Minister of the state Adolf Wagner does not leave it to doubt as to the ideological direction of the Reich: “We acknowledge Germany and Germany is Adolf Hitler”¹³³ because “immortality of the movement and thus of the German nation is closed in him,” the nation being included by the Führer as the “creator” into “the eternal current of youth.”¹³⁴ If this is to be true, this new Nazi absolute must “stand at the beginning of this socialist-national thinking [...]” i.e. “the thought of the Führer” as a “divine gift” “wanted by the creator” and that is why “the principle of the Führer is a guarantee of limited development” and as “that absolute value” it requires “unconditional yes” from each German, said Sachse.¹³⁵

Renewed conversations on Christian religion resulted from an absolute challenge for Nazism, which was systematically preparing to take the place of revealed God: “Religious debates at the table. The Führer is speaking in huge perspectives. Catholic bishops again issued a pastoral letter against us. If gods want to punish somebody, they strike them first with blindness. [...] The Führer thinks that Christianity is prepared for break-up. This cannot last long but it will come.”¹³⁶ That is why Hitler did not waste time and used each social opportunity to weaken the Christian faith in the German nation and to promote the faith in absolutized Germany. In 1935 he wrote to German craftsmen, encouraging them to “work on the unshakeable faith in eternal Germany.”¹³⁷

¹³² *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941–1945*, vol. 8: *April–Juni 1943*, ed. H. MEHRINGER, München: K.G. Saur 1993, from 25 May 1943, p. 385.

¹³³ A. WAGNER, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3.Jg, fasc. 15. 05. 1935, p. 294.

¹³⁴ O. DIETRICH, *Der Nationalsozialismus als Weltanschauung und Staatsgedanke*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 2, Berlin: Industrieverlag Späth & Linde 1936, p. 8.

¹³⁵ SACHSE, *Der Führergedanke in der Deutschen Gemeindeordnung*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3.Jg, from 1.07.1935, pp. 362–363.

¹³⁶ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923–1941*, vol. 3/II: *März 1936–Februar 1937*, ed. J. RICHTER, München: K.G. Saur 2001, from 5 January 1936, p. 316.

¹³⁷ SACHSE, *Der Führergedanke in der Deutschen Gemeindeordnung*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3.Jg, from 1.07.1935, pp. 362–363.

This symbiosis of the Führer’s personality and his absolute attributes is properly manifested in all aspects of the existence of the German Reich. In the context of the administrative reform, the Secretary of the Reich Hans-Heinrich Lammers draws attention to the necessary “synthesis of the Führer’s thought and self-government“. “The principle of the Führer” stands at the very foundations of the “decisions in administration” and “the citizen will act and not dispute”; therefore, the “formation of the will inside self-government” must take place on the ground of “the Führer’s thought,”¹³⁸ which already has absolutism guaranteed, for example described by Alfred Rosenberg, which does not leave any interpretative doubts that the German Nazism replaced “Jesus” as “a mediator between man and God” by “the Führer” as “the central point [...] of the myth of the nation’s soul and “German “dignity which binds and shapes anew.” “To serve” this Führer, Rosenberg writes, “is the duty of our generation.”¹³⁹ Analogously to such a “leader”-absolute, a selection should be made within the Nordic race itself, which is to be served by the laws regulating the relation of the Reich not only to sick Aryans.¹⁴⁰ Gerhard Grott writes on the necessity of using the hygiene of the race, which means “sterilization” so that after 100 years, according to the calculations Lenz made, out of a half of “high quality” and a half of “low quality” German nation, there would not be left “88.9% of the low-quality and only 11.1% of the high-quality ones.” If the racist hygiene is not used, this situation will change for even much worse: there will be 99.8% of the low-quality and only 0.2% of the high-quality ones,” after which the most able ones will disappear completely. Grott was of the opinion that against “the laws of personal freedom,” the rules of hygiene of the Nazi race are allowed, not for “punishment” but due to the “increasing misery of the” Nazi “community.”¹⁴¹ Hence, Robert Ley states that “leadership is not related to knowledge and old-fashioned prejudices of the time gone. National socialism is a victory of reason over non-reason. Reason is the product of feelings and thinking”¹⁴² and that is why it is only such ideological

¹³⁸ H.H. LAMMERS, *Führergedanke und Selbstverwaltung*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3. Jg, from 15.07.1935, p. 397.

¹³⁹ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag¹⁰1943, p. 624.

¹⁴⁰ *Gesetz zur Verhütung erbkranken Nachwuchses*, 14 July 1933 (RGBl. 1933, I S. 529); *Gesetz zum Schutze der Erbgesundheit des deutschen Volkes (Ehegesundheitsgesetz)* from 18 October 1935 (RGBl. 1933, I S. 529).

¹⁴¹ G. GROTT, *Rassenhygiene und Fürsorge*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3. Jg, from 15.07.1935, p. 394.

¹⁴² R. LEY, *Die große Rede von Dr. Ley*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3. Jg, from 1.08.1935, p. 442.

“reason” can be capable of such anti-rational (in the sense of the classical “ratio”) acts of crime on another person and whole nations and communities of sick and old people as well as those who suffer deeply in spirit or in body, instead of supporting and saving them, which—paradoxically—such thinkers of the German philosophical tradition as Immanuel Kant or Rudolf Syammer inspired to.

II.3. Ideological and ontological basis of the Nazi system in the categorial aspect

In national socialism, what happens with the classical science on categories? What is the understanding of “substance” and “accident” in this system? Does the ideology of Nazism negate or only re-interprets the categorial understanding of the world discovered in old-Greek metaphysics and logic and relevant also in contemporary science?

II.3.1. Desubstantialization and depersonalization of the human existence and reducing the latter to being an ailment

Classical understanding of man definitely treats the latter as a being-substance, which means being “in itself” and not as a being-accident, being “in another.” This Aristotelian science on categories principally ordered the systematic thought over man, which—as a result of extremely fruitful Christological search—also acquired the status of a being of a “person “. Man as such can create inter-human relations, i.e. marital, family, national, social, political ones, etc., but always from the moment of conception in mother’s womb, substantial being, different from any other beings. The creation of various relations with others, that is the being of accident, does not deprive man of their existence, ontically surpassing each accident, in the sense of, e.g., relations with others. Even when we say about man that they are “a part” of “nation,” “state,” etc., in the classical and scholastic metaphysics we always means man as a substantial being, never as accidental one.

In the Nazi ideology, on the other hand, man as an individual person is viewed only as a “member of the community” and not as a “person,” “individuum” since national socialism does not accept, according to the Nazi commentators of “racist legislation,” namely Wilhelm Stuckart and Hans Globke, “singular people but races, nations and peoples as actual beings of the world’s order wanted by god.” Therefore, “for national socialism there is no more

closed individual sphere, free from community” which could be kept from any interference of the state.”¹⁴³ Although Adolf Hitler makes a reservation in *Mein Kampf* that “the national ideology differs from the Marxist one principally, in that it does not only recognize the value of the race but also the importance of the person with it,”¹⁴⁴ but its view can only be properly understood in a system way after the analysis of the whole ideological context. The Führer is well aware that without specific people there is no nation, including the German nation, and that is why he needs man as a person but only in the sense of being-relation and not being-substance since the latter would contradict the major *a priori* assumptions of national socialism.

This follows from the fact of the inner system treating, or even identifying, in the sense of the racist dialectic, the German nation with “the living organism,”¹⁴⁵ which, like each live substance is composed of “parts”; however, even the simplest organism of a live being is in its totality something more than only a sum of parts, which the socialist-national ideology does not intend to accept. For this reason, Max Gerstenhauer claims that “the idea of an organic-national state of national socialism does not start with individuals, singular people but with the nation, which is a unity, a whole, and also an eternal individuum, a national personality of quite definite bodily and spiritual property where individuals are the serving members. They have no values, tasks, rights and duties for themselves as individuals but only as members of the whole.”¹⁴⁶ This is a systematic process of replacing man as an individual by a national community and, what is more, interpreting the nation as “the only” true absolute and attributing this German nation the quality of “eternity.” To spread this way of viewing humans, a Nazi Hermann Neef sees the necessity “of determining the fundamental attitude of the man” of the Reich by the overwhelming and all-pervading” Nazi “ideology.”¹⁴⁷ Also according to a philosopher of law Julius Binder, “an individual is thought to

¹⁴³ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C. H. Beck'sche Verlagsbuchhandlung 1936, p. 23.

¹⁴⁴ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 421933, pp. 499–500.

¹⁴⁵ *Ibidem*, p. 434.

¹⁴⁶ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 17.

¹⁴⁷ H. NEEF, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 18.

be a live member of the nation,”¹⁴⁸ that is—from the ontological perspective—a part of the nation and not as a substantial whole. In a very similar way, under the influence of Hegel’s absolute idealism, Ernst Huber speaks of “complete assimilation of” a substantial “individual” of man “as a political element of the nation”¹⁴⁹ of the Third German Reich, which according to Marie-Theres Norpoth, is rightly substantial “relativization of subjectiveness”¹⁵⁰ of man which is also concretized in the dimension of law.

Standing on the ground of man’s de-substantialization as a person, Karl Larenz thinks that “the basic notion of the future order of private law will not be a *person* any more, an abstractedly equal subject of rights and obligations, but a *companion of law*, who—as a member of a community has a completely defined position of rights and obligations,” which means that for “individuals,” their “being of a person generally” is not decisive but the “concrete being” in the Nazi sense, as a “member”¹⁵¹ of a common German “race.” According to Heinrich Henkel, this has far-reaching consequences for the shape of the state of Reich itself because “doing away with the separation of the state and the society corresponds, in reference to an individual, to doing away with the borders between the sphere of the citizen of the state and private existence. The state becomes the state,”¹⁵² according to Ernst Forsthoff, “through total obligation of each individual for the nation,”¹⁵³ “which suspends the private character of individual existence” of man “belonging to the nation” and “is bound with their complete destination of the nation” as the nation. The Nazi “state” is to “expect and demand from each member of the nation to be subordinated and their fate to be subordinated to the right of the state’s life.”¹⁵⁴

¹⁴⁸ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 32.

¹⁴⁹ E.R. HUBER, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg ²1939, p. 164.

¹⁵⁰ M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, dissertation, Hamburg: LIT 1998, pp. 12–13.

¹⁵¹ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 40.

¹⁵² H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 52.

¹⁵³ E. FORSTHOFF, *Der totale Staat*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 42.

¹⁵⁴ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 52.

Otherwise, even as an Aryan they have no right to live because the state is the “form,” that is the reason for the life of its citizens and that is why they are “assigned” due to their significantly existential accidentality.

According to Julius Binder, “man is man only as a being of community,” who—just through this national community—“realizes their humanity”¹⁵⁵ as something general only, which is typical of his vision of human being collective in the socialist-national sense, which does not allow singular existence and unrepeatable dimension of a human person’s existence and hence such a strong emphasis is placed on being “socialism,” which the Führer knew best from “everyday reading of socialist-democratic press.”¹⁵⁶ What is more, this singular being is principally dangerous for the Nazi system and that is why it is allowed but only as really general existence, meaning collective. Hence such systematic negation of what is individual, like for example the Polish nation, which is unrepeatable in its being.

An important issue is also whether the appearance of man in the development of nature is viewed on the ground of freedom or necessity. “Human individuals” “belong to their race and their nation of necessity”¹⁵⁷ since at their basis there is no “Divine Being,” who creates humans of its eternal freedom, which is of love, but the “absolute” necessity of a personal nature as a totally un-free being.

This has its adequate consequences for the being of law. This socialist-national “order of law does not any more define the position of an individual” from the perspective of “an individual person, but a community,” which does not mean “denying the civil and legal rights of an individual but the latter’s subordination” to “the order of the nation.” In this scheme of being, an individual person is “evaluated” as “the smallest unity of the nation and protected as a part of a whole due to the whole” and not due to the person as a person. “Rights and duties do not flow simultaneously from the fundamentally unlimited personality of a singular individual and the relations of law between this individual and the personality of the state but as the effects of an individual’s membership in the community.” It is only thanks to the community

¹⁵⁵ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 20.

¹⁵⁶ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 43.

¹⁵⁷ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 20.

that a concrete person obtains their “rights and duties towards the whole of the nation and the other members,”¹⁵⁸ which is legally regulated by *The law on changing the law on affiliation in the Reich and the state* from 15 May 1935,¹⁵⁹ *The law on civil law of the Reich* from 15 September 1935¹⁶⁰ and *The law for the protection of German blood and German honor* from 15 September 1935¹⁶¹ as the effects of “the socialist-national revolution”¹⁶² on his level. And so, “a citizen of the Reich is only that subject who is of German or kindred blood and who, through their conduct, shows that they are both willing and able to faithfully serve the German people and Reich.” It is only them who “are the only subject of full political rights”¹⁶³ because the Nazi lawmaker separated the citizenship of the Reich from the citizenship of the state. In accordance with the act on civil law of the Reich, the former gave “the right to vote in political matters and to hold a public office.”¹⁶⁴ The latter was an obligation to perform a number of duties in the state, e.g. the duty to work, to do military service or pay taxes, while its subject did not have “any political rights”¹⁶⁵ because those assumed membership in the community of blood, which significantly determined “the politically formed community of the nation.” This latter community could absolutely include the “members of the NSDAP” and others, born of German blood, and as such “members of the nation,” which—by virtue of the law—excluded “Jews”¹⁶⁶ and “Gypsies.”¹⁶⁷ “Poles, Danes” or other nationalities, on the other hand, could obtain the citizenship of the Reich on condition of making an obligation to “faithfully fulfill the civil and state duties towards the Reich such as the duty of

¹⁵⁸ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck'sche Verlagsbuchhandlung 1936, p. 24.

¹⁵⁹ RGBl. I S. 593.

¹⁶⁰ RGBl. I S. 1146.

¹⁶¹ RGBl. I S. 1146.

¹⁶² W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck'sche Verlagsbuchhandlung 1936, p. 29.

¹⁶³ RGBl. I S. 1146, par. 2–3.

¹⁶⁴ RGBl. I S. 1333, par. 3.

¹⁶⁵ W. STUCKART, H. GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck'sche Verlagsbuchhandlung 1936, pp. 50–51.

¹⁶⁶ *Ibidem*, p. 53.

¹⁶⁷ *Ibidem*, p. 55.

military service and others”¹⁶⁸ and to absolute obedience towards the Reich. Poles, for example, who opposed Nazism were sentenced to death. In addition, the law for the protection of German blood underlined the “purity of German blood” through a ban on “marriages between Jews and citizens of German or kindred blood.” “Marriages concluded in defiance of this law are void“, even if they are concluded “abroad.”¹⁶⁹ This radical character of Nazism follows from Hitler’s thesis expressed during Parteitag der Freiheit in Nuremberg, according to which “when providence,” in the sense of the inner forces of nature, “created man, it also created in them and their behaviour the goal of human behaviour. Therefore, the aim of each idea and each device in the nation can originally and naturally be only to keep the nation created by god bodily and spiritually healthy, ordered and” racially “pure.”¹⁷⁰

According to Ernst Swoboda, this ideology next penetrates legal sciences: “This definition, which is typical in the science of law, that each man is a person in the legal sense and is as such legally capable within the frameworks of the order of law, according to Egger’s statement, contained in itself ‘depersonalization of law,’ which cannot be tolerated” because “it is only in the sense of the concept of contemporary culture that it is allowed to define the concept of a person of the binding law.”¹⁷¹ According to Carl Schmitt, who has a very ambivalent,¹⁷² but also very servile attitude to the racist ideology, the notion of “personality” in reference to a concrete individual man would only be an “empty declamation” of “liberal individualism” and it concerned “only ‘man’ and did not consider a concrete German nation,” which was with the aim of “not differentiating what is racially equal and racially foreign.”¹⁷³ Konrad Larenz, professor of law from the University of Kiel, claims that the “national thinking of law does not refuse, which has to be emphatically

¹⁶⁸ Ibidem, p. 54.

¹⁶⁹ RGBl. I S. 1146, par. 1.

¹⁷⁰ A. HITLER, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 9.

¹⁷¹ E. SWOBODA, *Die aktuellen Tendenzen im öffentlichen Recht und im Privatrecht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, pp. 100–101; cf. EGGER, “*Kommentar zum Schweizerischen ZGB.*” I, pp. 142 f.

¹⁷² Cf. G. SEIBERTH, *Anwalt des Reiches. Carl Schmitt und der Prozess “Preußen contra Reich” vor dem Staatsgerichtshof*, Berlin, Duncker & Humblot 2001, pp. 26–27.

¹⁷³ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 44.

stressed, to each man, also a racially foreign one, the legal capacity and thus personality” but through birth, a concrete man acquires “a concrete personal position of a member of the race. An abstract-general ‘person’ is replaced by such ‘a member of the race’ in their definite position of a member as a member of the nation, a citizen of the Reich, etc..”¹⁷⁴ It is worth to underline the view of Rudolf Stammler, who—while deriving his ideas from Neo-Kantianism—assessed the reality of the Third Reich very aptly. It refers to the “categorical” understanding of man saying that “each man leads a life for themselves first of all, their own unity, and a life common with other people”¹⁷⁵; however, the other dimension of being with others does not eliminate their substantial subjectivity, which is not respected by the ideology of German Nazism, which is articulated by Ulrich Scheuner from Jena, for example, together with his Nazi collaborators because for him “a singular person” presents no “absolute rank.” For the socialist-national ideology, “the nation is the highest value, the subjective basis also for the life of each member of the nation. National socialism is directed towards the whole. It does not know any isolated individuum, which—free from the national relation—lives only for their own interests, but it says that man, with all their existence, is of their nature included as a member of the national community. It is only as a member of the nation, only in their subordination to the community that an individual finds their position in life, their tasks and their value,”¹⁷⁶ which again confirms that the ontological basis is the collectivist concept of human existence and hence its essential constitution by the existence of the community and the rejection of any individuality. The Nazi ideology believes that the “national community” is the “highest earthly community being.”¹⁷⁷ Also Theodor Maunz from Freiburg im Breisgau treats the “community” as a “substance,”¹⁷⁸ which

¹⁷⁴ K. LARENZ, *Über Gegenstand und Methode des völkischen Rechtsdenkens*, Berlin: Junker und Dünnhaupt Verlag 1938, p. 53.

¹⁷⁵ R. STAMMLER, *Deutsches Rechtsleben während des 19. Jahrhunderts. Lehrreiche Rechtsfälle*, in: IDEM, *Deutsches Rechtsleben in alter und neuer Zeit*, vol. II, München: Beck'sche Verlagsbuchhandlung 1932, p. 254.

¹⁷⁶ U. SCHEUNER, *Die Rechtsstellung der Persönlichkeit in der Gemeinschaft*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 82.

¹⁷⁷ GOTTL-OTTLINIENFELD, *Die Neuordnung des volkswirtschaftlichen Studiums*, in: K.A. ECKHARDT, *Das Studium der Wirtschaftswissenschaft*, in: *Der deutsche Staat der Gegenwart*, fasc. 15, Hamburg: Hanseatische Verlagsanstalt 1935, p. 27.

¹⁷⁸ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 76.

only repeats the Führer’s words on the “German nation” as—according to the “socialist-national reflection”—a “living substance.”¹⁷⁹

This is also followed by rejecting individual rights due to the lack of a singular substantial subject, which was collectivized and—as a consequence—collectivization of the being of law is undertaken: “It is not the protection of personal rights and freedoms but the maintenance and development of the national whole which establishes the fundamental socialist-national thought of the creation of law. In all areas of our life of law today renewal takes place according to the sign of overcoming individualistic rights and the protection of personal ones and freedoms aimed at the aspirations of the past through the social-national will of the community. This change is also of fundamental importance for the shaping of German administrative law”¹⁸⁰ and the other areas of the law of the Reich, which—in the name of dealing with individualistic liberalism, which—in turn—does not accept the social dimension in man and that is why views man and law individualistically, makes an opposite mistake in the form of totalitarian “socialization” of the human person. Who, then, is this “modern” Nordic man?

“A new type of German man should be created, a supreme, truly German-Germanic, Faustian, creative and heroic one.”¹⁸¹ “A new German myth,”¹⁸² which—through “education” should “immortalize the socialist-national spirit.” This can also take place via “pushing out any other ideology from the German life,” which precisely means pushing out “a Jude, a Roma, internationalism and masonry”¹⁸³ because they, for various reasons, do not base on the Nordic race. This “new” German man must also critically deal with a “sick and weak” man: “Who, however, allows reproduction without any restrictions and restraint of

¹⁷⁹ A. HITLER, *Rede zum Schluß des Parteikongresses 1935*, in: W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 15.

¹⁸⁰ U. SCHEUNER, *Die Rechtsstellung der Persönlichkeit in der Gemeinschaft*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 82.

¹⁸¹ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 128; cf. K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag 1935, p. 140.

¹⁸² *Ibidem*, pp. 128–129.

¹⁸³ *Ibidem*, p. 124–125.

what is sick and weak, who destroys the hard fought and noble racial hereditary good, he sins against god and humanity,”¹⁸⁴ which means he sins against the “new” “lord” of being, i.e. against the absolutized national and state community of Germany, which—as an absolute—cannot be harmed by any weakness. A sin is viewed here as injuring or striking the perfection of the nation. “Race and nation are not ‘natural’ orders but they are of divine origin,” i.e. “the nation (and its state) has a direct order from god.”¹⁸⁵ But what god? The answer is provided by the Führer himself, for example in 1935: “When we recognize what lasts and exists in the nation, we see the only goal in it. Its maintenance creates the condition of existence and efficiency of the idea. On the other hand, its annihilation makes it possible to see all ideas as worthless and insignificant. Religions also have this one sense which is they serve to keep the live substance of mankind alive. If, then, nations as such broke up, no religions or states as phenomena of eternity remain any more,”¹⁸⁶ which means that eternity breaks down, which is one of the proofs of erroneousness of reasoning in Nazi dialectics since “eternity” of the German race has inherent possibility of passing and death.

II.3.2. Substantialization of the existence of the Nordic race and thus also the state of the Third German Reich

The *a priori* of the socialist-national ideology means that “blood and race ultimately shape the socialist-national picture of the world and of history. The notions of blood and race are not only a result of scientific research of contemporary natural sciences but above all the fundamental elements of the ideological conviction,” the centre of which is the “nation,”¹⁸⁷ viewed in the evolutionary and substantial manner.¹⁸⁸

¹⁸⁴ Ibidem, p. 122.

¹⁸⁵ Ibidem, p. 118.

¹⁸⁶ A. HITLER, *Rede zum Schluß des Parteikongresses 1935*, quoted after: W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 15.

¹⁸⁷ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck'sche Verlagsbuchhandlung 1936, p. 12.

¹⁸⁸ Cf. M.R. GERSTENHAUER, *Volkskörper und Volkstum der Deutschen im Wandel der Zeit*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. I, Leipzig: Armanen-Verlag 1937.

The race objectively as an attribute of human existence in the substantial sense in national socialism acquires the status of substance of first-rate value, whose ailment is an individual man themselves and hurting which Hitler classifies as a “sin against blood and race,” which is the “original sin of this world and the end of the surrendering mankind.”¹⁸⁹ Why is the race so important? “The basis of the German nation is the Nordic race”¹⁹⁰ and it “determines” “the cultural enormity” of “the state,” whose task is “to keep it”¹⁹¹ since “the race” has existential priority before a concrete man and the whole “science and art, technology and inventions” as well as before “the existence of all this culture,” also “perhaps” before “nations.” This doubt of Hitler’s was later on changed into certainty. “The race” is just “original.”¹⁹² Hitler draws the conclusion from his thesis that “the true founder of culture on earth is an Aryan himself” and it is on him that the “becoming, acting and passing”¹⁹³ of culture is dependent. That is why “the national state’s highest goal is to care about and keep those original elements which—while creating culture—create the beauty and dignity of supreme mankind”¹⁹⁴ in the sense of Nietzsche’s “Übermensch” and this “divine value, like for example the worship that can get essentialized in the soul of the Nordic race, maybe cannot do the same in the Jewish or Negro soul.”¹⁹⁵

From the position of mythically defined Nazi ideology, Alfred Rosenberg postulates doing away with “man’s” substantiality as a being “in itself” and introducing it as an ailment of “the organic row of forefathers of thousands of” German “generations.”¹⁹⁶ This “original feeling” should only be “metaphysically re-built.”¹⁹⁷ How precisely to do it? If the “race” is seen here as a “natural substance of the common origin,”¹⁹⁸ then “a race is a group of people which

¹⁸⁹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 272.

¹⁹⁰ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 7.

¹⁹¹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 432.

¹⁹² *Ibidem*, p. 316.

¹⁹³ *Ibidem*, p. 320.

¹⁹⁴ *Ibidem*, p. 434.

¹⁹⁵ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 71.

¹⁹⁶ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag 1⁰1943, p. 634.

¹⁹⁷ *Ibidem*, p. 634.

¹⁹⁸ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 69.

differs from any other group of people by its own unification of bodily properties and spiritual attributes and it always gives birth to those who are equal to it.”¹⁹⁹ That is why Carl Schmitt and other Nazi theoreticians think that “the proper substance must be secured in any definiteness and it stays in the relation of the nation and the equality of the race of each man acquainted with the presentation, interpretation and application of German law,”²⁰⁰ according to which “man stands in their deepest, unconscious instincts of the minds but also in the smallest particles of the brain in the reality of affiliation with the nation and the race.”²⁰¹ It is no accident that the Secretary of the Reich Roland Freisler²⁰² thanks Schmitt for this paper and does it with the words so characteristic of socialist Nazism: “This brochure is a salvation! [...] Finally clear since ideologically subjectivized, truly scientifically justified testimony to overcome the Weimar Constitution! Finally, a striking scientific proof of the full independence of socialist-national basis.”²⁰³ The effect of the ideology of the race was “The law for the protection of German blood and German honor” from 15 September 1935, the so-called Nuremberg “law on the protection of blood,” which was inspired not only by the administration of justice of the Reich but by “the NSDAP and the political leadership,”²⁰⁴ which was sanctioned due to the “injury to the science of the race” even by “death penalty.”²⁰⁵ The jurisdiction of the Reich, another form within the NSDAP besides the judiciary, also spoke for racist legislation and so, for example, Landgericht Königsberg decreed in a court verdict that “contracting a marriage between a Jew and an Aryan woman is a contradiction towards the German concept of law.”²⁰⁶ “The disintegration of the race of the German nations must be counteracted by the German courts with strict punishments.”²⁰⁷

¹⁹⁹ H.F.K. GÜNTHER, *Rassenkunde des deutschen Volkes*, München 1930, p. 14.

²⁰⁰ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 44.

²⁰¹ *Ibidem*, p. 45.

²⁰² Cf. H. ORTNER, *Der Hinrichter: Roland Freisler, Mörder im Dienste Hitlers*, Steidl 1995.

²⁰³ R. FREISLER, in: C. Schmitt, *Staatsgefüge und Zusammenbruch des Zweiten Reiches. Der Sieg des Bürgers über den Soldaten*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 51.

²⁰⁴ L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 864–865.

²⁰⁵ Cf. A. ROSENBERG (Hrsg.), *Das Parteiprogramm. Wesen, Grundsätze und Ziele der NSDAP*, München: Zentralverlag der NSDAP ²¹1941, pp. 15 f.

²⁰⁶ Entscheidung des Landgerichts Königsberg from 26.8.1935.

²⁰⁷ Reichsminister der Justiz, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 114.

Because of the elimination of an individual substance, national socialism poses a thesis on an unavoidable process of substantialization of the being of the German nation, which means that in its Nazi structure of thinking it cannot do without substance. All theoreticians of Nazism, e.g. Karl Larenz, classify “the nation” as a category of “substance.”²⁰⁸ “The nation is a community which rests on the existing and racial equality of races. Racial equality comes from the equality of the race and the national destination. A political nation is created in the last equality of will which grows from the consciousness of the existing racial equality. Consciousness of the equality of the race and national affiliation is made up-to-date above all in the ability to get to know the racial diversity and to distinguish a friend from an enemy. The point is to get to know racial diversity where it is visible without any greater effort by membership in a foreign nationality, e.g. in a Jew.²⁰⁹ It is only “this *community* which is this directly conscious and acting racial equality basic in all areas of human efficiency; therefore, it is a felt, conscious and wanted as a necessarily viewed equality of the being and affiliation on the basis of this racial equality.”²¹⁰

According to Ernst Forsthoff, “who touched the territorial space of life or nationality, the spirituals space of the nation’s life,” independently of “the good or bad will and well or badly viewed disposition has become an enemy and as such had to be disposed of.”²¹¹ “Nation [...] is a being that leads its own life and observes its own laws, which possesses its powers and develops its own specificity,” that is “language and morality, history and culture” and creates “a historically becoming community of blood,” which is “related” to other races but develops its specific kind, of course not by way of “liberal” or “Marxist thinking,” which means either “summing up individuals” or “summing up [...] the masses,” which “is not a nation but a mass without any form.”²¹² The Nazi refer to Goethe’s distinctions between the existential priority of “Volkheit,” i.e. “nationality” as something general before “Volk” as the “nation,” i.e. on the level of law “the legislator and the rulers [...] must listen to nationality and not

²⁰⁸ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 130.

²⁰⁹ E. FORSTHOFF, *Der totale Staat*, Hamburg 1933, pp. 37 f.

²¹⁰ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 20.

²¹¹ E. FORSTHOFF, *Der totale Staat*, Hamburg 1933, pp. 37 f.

²¹² W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 2.

the nation. The former always says the same, it is reasonable, permanent, pure and true. The latter, on the other hand, never knows [...] what it wants. And it is in this sense that the law should and can be the generally expressed will of nationality which the crowd will never utter, which—however—a reasonable one will notice, which a thinking one knows how to satisfy and which a good one satisfies willingly.”²¹³

One should defend themselves against the “introduction of a foreign kind of blood to one’s own” because this—in the light of Nazism—“leads to the changes harmful for the body of the nation,” after which, according to the “science of the race and social science” “the spiritual balance in the part that receives it is disturbed” and this contributes to the ‘weakening of one’s own power of the nation.’”²¹⁴ In the beginning, this ideology of the race did not state that this racial difference means “revaluation of one race over another” but “only diversity of races,”²¹⁵ which Hitler manifested in his speech from 30 January 1934 in Berlin, namely that “the socialist-national thought of the race [...] does not lead to a lack of respect and a decrease of the value of other nations but, to much more, to the knowledge of the tasks established only to purposeful maintenance and further development of the life of one’s own nation.”²¹⁶ Karl Larenz accuses Hegel’s disciple, Erdmann, that although he “speaks of the nation, the wonderful nature and spirit, he loses the racial foundation and the historical self-formation” of “the national spirit.” After all, Hegel also wrote—according to Larenz—about “the forming unity and community in the state—as the state-nation,” which means that “for Hegel the first is the nation,” developing to be “a moral community and a historical personality in the state as a state.”²¹⁷ That was the “realization of the nation’s spirit, the political form of the nation,” while for Erdmann the German nation becomes a “unity” through “the state,” which—according to Larenz—means “absolutiza-

²¹³ J.W. v. GOETHE, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 21.

²¹⁴ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 5.

²¹⁵ Ibidem, p. 6.

²¹⁶ A. HITLER, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 6.

²¹⁷ K. LARENZ, *Hegelianismus und preußische Staatsidee. Die Staatsphilosophie Joh. Ed. Erdmanns und das Hegelbild des 19. Jahrhunderts*, Hamburg: Hanseatische Verlagsanstalt 1940, p. 33.

tion of the state in relation to the spirit of the nation”²¹⁸ and that is why from the Nazi position it is unacceptable.

“The nation is the highest value, law must serve it, the state must serve it”—this is the explanation of the thesis of the formation of the socialism of race saying that “a lawyer” should be “rooted in the” German “nation,”²¹⁹ or more precisely “in the German general national life,”²²⁰ where “nature is ‘a visible spirit,’” while “spirit means ‘invisible nature,’” which means reconciliation of the “idealistic-organic concept of nature”²²¹ and not only idealistic in the sense of German idealism or exclusively evolutionary materialism in the sense of natural science, which *realiter*, according to Larenz, was shaped in the course of a very long historical space as “an act of communitarisation.”²²² Hence, the “spirit of the nation” is treated by Larenz as the “creative reason and substance” and as such in the sense of “community as organic unity of life” is the “fundamental category of the philosophy of law” and “not a person, individuum as an atom of social life or existing for themselves, ethically free personality.”²²³ Rudolf Stammmler recalls the historical aspect of the creation of uniform German law which is very relevant to his issue of absolutization of the German nation in the law-making context, namely the fact that at the beginning of the 18th c. “there was no possibility of uniform creation of law at all. Reference to *the national association* or *common customs* is here as inadequate as emphasis on *earlier community of law*. An attempt to consider nation as an alleged thing of nature to be the creator of law must break here: that only one legally bound group of people also allows the further possible formation of law to show up.” The problem is that really, due to the lack of national unity in German states “there was no uniform possibility for the development of law” and only later did they get united “into a German association of sovereign states.”²²⁴

²¹⁸ Ibidem, p. 35.

²¹⁹ J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 139.

²²⁰ Ibidem, p. 137.

²²¹ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag 1935, p. 132.

²²² Ibidem, p. 136.

²²³ Ibidem, pp. 165–166.

²²⁴ R. STAMMLER, *Deutsches Rechtsleben während des 19. Jahrhunderts. Lehrreiche Rechtsfälle*, in: *Deutsches Rechtsleben in alter und neuer Zeit*, vol. II, München: Beck'sche Verlagsbuchhandlung 1932, p. 113.

In the context of speaking for the reform of penal law of the Reich from the position of the NSDAP, and not from the position of the government of the Reich, Hans Frank said on 22 March 1935 that “the state for national socialism is only a means to achieve the aim of realizing it. This thesis was uttered by the Führer many times. It is an unquestionable good of the thought of the socialist-national program.” For Frank, the NSDAP is “a guarantee of the idea,” “a significant critical organ of the German nation.”²²⁵ The Führer states that he “cannot confirm the doctrine ‘law must remain law; even when the whole life of the state was to break up’²²⁶ since this could also strike its trespassing law as law. Hans Frank—from the position of “the socialist-national ideology”—wants to “develop the German-inclined life of law,” which means that according to him, “there is no reform of the code of penal law, the code of civil law or the code of commercial law but there will be the socialist-national penal law, socialist-national code of national law and a great socialist-national constitution of German law of economic life” since “the socialist-national movement and its leading warriors,”²²⁷ are appointed to create the new law” and they *de facto* and consistently made it impossible to publish both Volksgesetzbuch (VGB), whose project was prepared in 1942, and Reichsstrafgesetzbuch (RStGB), prepared for acceptance in 1938. But it was the NSDAP as the consciousness of the national spirit which rules with the help of “a number of special laws.”²²⁸

This was what Hitler referred to in *Mein Kampf*, where he spoke of “the highest task” in the racist or national state, consisting in “maintaining and supporting the resources of our nationality, the whole world, which remained unhurt and the noblest” or in saving and developing “the most valuable resources of the original racial elements.”²²⁹ According to Adolf Hitler, “the state does not present the content but the form,”²³⁰ which is the “vessel” for “the race as the content” and the nation shaped on its foundation: “This vessel has a sense only if it can keep and protect the content” of the race itself; “otherwise, it is without any value.”²³¹ Julius Binder also develops this thought

²²⁵ H. FRANK, in: L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 768.

²²⁶ A. HITLER, in: *ibidem*, p. 826.

²²⁷ H. FRANK, in: *ibidem*, p. 752.

²²⁸ *Ibidem*, p. 753.

²²⁹ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 439.

²³⁰ *Ibidem*, p. 436.

²³¹ *Ibidem*, p. 434.

and claims that “the state is a form of existence of natural and spiritual unity, which we call a nation,” which “gives to itself” this “form to be able to act in the external world.”²³² Kriek speaks in a similar manner: “The Reich is a form of nation becoming a unity.”²³³ It is something “awkward” to say that there is “one truth” or “one God”; after all, there are “different deities of blood.”²³⁴ “Race, therefore, is not something purely bodily (‘blood’), which is contrary to spirit, but race itself is a spirit. Nothing changes because this spirit is acquired through inheritance, which is bodily, and it is connected with a bodily object. Spirit is not anything existing for itself” but “it is only expressed in bodily forms,” that is in the “hereditary mass which is not anything purely bodily or material,” being—according to a Nazi thinker Gerstenhauer—“the power breeding life, the essence and the principle of development” but it is the “soul,”²³⁵ but always in the sense of Nazi materialism the souls of the national matter and not the soul as another ontic element, essentially different from matter as matter. What is more, according to the Nazi theory, “God” himself is expressed in it: “This power inherent and acting in the German nation is a German thought, a German or Germanic spirit, a German being, it is god in us in the German form. This is the German national soul, which is in the German national body, the whole of its talents and abilities of spirit and soul. For the German nation as a whole and for all concrete Germans this German-Germanic spirit, the German being, the principle of development of the German nationality is reliable: to live in accordance with it, as a nationality, to act in the German way, to love the nation and homeland is the moral duty, a command of the racist ethics,²³⁶ which has no universal, objective principles binding each man as a person, but lawlessly defined ones, which contradicts both the universal natural law and the social dimension of human existence. Rudolf Stammler

²³² J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 21.

²³³ E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 24.

²³⁴ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, pp. 64–65.

²³⁵ *Ibidem*, p. 65.

²³⁶ *Ibidem*, p. 67.

recalls an old German saying, how adequate from the position of the philosophy of law: “Lawlessness breaks the law of the city, the law of the city breaks the law of Land and the law of Land breaks the general law.”²³⁷

Conclusions

Summing up, it should be said that the socialist-national apriorism is a dispute about what is absolutely “First” in being, in cognition and acting. What is more, what is objectively “First” is not principally questioned in this ideology but it only is usurped in contradiction with the truth and law by its theoretical and practical representatives. The German Nazism aims then to usurp the right to be “First” in permeating the reality of cosmos with itself, the consequence of which on the level of existence is an attempt at making being in general absolutely dependent on the Nordic race, and on the level of law at unlimited arbitrariness in determining the legal and moral order between people as unique and human persons and their basic communities such as marriage, family, nation or a commonwealth of nations. German national socialism in its “self-consciousness” turns out to be an attempt to take over the truly absolutely first ontic position of personal God and to reserve exclusively for itself His truly Divine creative and redemptive powers, which a true human being in their original human nature learns to accept as a “gift” undeserved, existentially, legally or morally (John Paul II, Tadeusz Styczeń, Andrzej Szostek), but not as a means to “fight” against the revealed Absolute and the world. On the contrary, man conscientiously getting to the being is really so metaphysically “delighted: (Aristotle) with the richness of even this simplest reality that their attitude focuses on cognition, affirmation and possible transformation of the encountered existence, should it be necessary. Also, in experiencing the physical or moral “evil,” man—searching for the truth and other ideals—looks for their primary cause and tries to overcome this evil, without making any pacts with it, i.e. without “fighting against” anybody but always in “struggling for them,” where the national socialism of the German Reich proves to be evident contradiction since in the “fight against” others it consciously agrees even to annihilate its own German existence.

²³⁷ R. STAMMLER, *Deutsches Rechtsleben während des 19. Jahrhunderts. Lehrreiche Rechtsfälle*, in: IDEM, *Deutsches Rechtsleben in alter und neuer Zeit*, vol. II, München: Beck'sche Verlagsbuchhandlung 1932, p. 111: “Willkür (Geding) bricht Stadtrecht, Stadtrecht bricht Landrecht, Landrecht bricht gemein Recht.”

Rudolf Stammler experienced the development of the ideology of German Nazism from a very close perspective and he came to the conclusion that the principle of causality must be necessarily kept, which at certain stages of his thinking he also relativized and his thought of philosophy of law puts forward an astonishing postulate that while asking the “question about *national* law,”²³⁸ by some considered to be only a “mystical experience,” it is claimed that “it is scientifically unacceptable. It contradicts the principle of cause and effect. According to him, each cause is itself the effect of another cause, preceding it. The cause without any cause does not exist for natural sciences. Romanticism viewed it as such in putting the “nation’s spirit,” which does not mean that there are “no national properties” but they are of “relative importance” and must be treated in the context of other “nations,” whereas “a dream about one political being on the whole earth is but a chimera.”²³⁹ For Stammler, “man” should keep their “personality” as the “goal in itself”—also in the context of their “legal relations”²⁴⁰ in the community. According to Rudolf Stammler, in cultivating philosophy and the science of law as well as in creating, interpreting and executing the “facts of law it is necessary to accept the rule of “causes and effects.” In his opinion, it is only on this basis that it is possible to establish personal rights in the science of civil law and the legal consequences in criminal law, for example, “punishments” for “a man responsible for the occurring harm.”²⁴¹

This dispute on the importance of the principle of causality is ultimately a dispute about the ultimate reasons for being and the ultimate destination, that is the definite finality of the whole cosmos, which determines the depth of the principle of being, thought and cognition, which is so useful and indispensable in the cultivation of science and in the process of creating a just political system of the state and in the establishment of law which is worthy of man as a single person and a social being at the same time. Representatives of the Nazi ideology possess a splendid knowledge on the classic understanding of the principle of causality and they apply it with iron consistence towards their ideological “enemies,” while through absolutization of their racial existence making themselves *causa sui*, but as different from that which is

²³⁸ R. STAMMLER, *Rechtsphilosophische Grundfragen. Vier Vorträge*, Bern: Verlag von Stämpfli & Cie 1928, p. 103.

²³⁹ *Ibidem*, pp. 104–105.

²⁴⁰ *Ibidem*, p. 105.

²⁴¹ R. STAMMLER, *Theorie der Rechtswissenschaft*, Halle A.D.S.: Buchhandlung des Waisenhauses ²1923, p. 179.

constituted by eternally perfect Personal God as *Creator* and *Redemptor*, it is *contradictio in adiecto* in its thinking and acting.

The process of national socialism, on the one hand reducing man as a substantial personal being to an ailment of the race, nation or state of the Third German Reich, while on the other realizing substantialization of those objectively relative beings led to the essential crisis and breakdown of any ontic order in the categorical aspect, which caused a hecatomb of suffering and dramas of deaths of over 50 million human beings, which is really a consequence of replacing the personal “revolution of love understood as a choice of truth inherent in man’s existence and discovered via self-knowledge” by the “revolution of self-creation, the revolution of auto-creation,” where the Führer, a former “discoverer of truth [...], is proclaimed the auto-creator”²⁴² and creator of all reality, thus lawlessly changing himself from an accidental being into an absolute “measure” of any legal and moral order.

²⁴² T. STYCZEŃ, *Wprowadzenie do etyki*, Lublin: TN KUL ²1995, p. 175.

III. GENESIS OF LAW: FÜHRER AS THE ULTIMATE SOURCE OF THE EXISTENCE LAW

There are, in a sense, three stages of understanding the sources of law in the Third Reich after Hitler's rise to power in January 1933 until German capitulation in May 1945: the first, very short period when the Weimar Constitution of 11 August 1919 was in force, from the appointment of Adolf Hitler to be the Chancellor of the Reich on 30 January 1933 to 24 March 1933; the second period after the enactment of the *Gesetz zur Behebung der Not von Volk und Reich* ("Ermächtigungsgesetz") of 24 March 1933,¹ the act transferring power to the constitutional government of the Reich, and thus to the NSDAP, and the third period since the enactment of the *Gesetz über das Staatsoberhaupt des Deutschen Reiches* of 1 August 1934,² the Act on the combined offices of President and the Chancellor of the Reich until Hitler's death on 30 April 1945.

Differences of these steps of the national socialist reign are secondary because primarily and essentially, they all have in common the ultimate source of law which is the man as a representative of the German nation, the ruling group and the Nazi party or the Führer.

It is worth noting that during the so-called different periods in the history of the German Reich, the Nazi theoreticians and practitioners are acting in the field of law whose statements refer to previous periods or prepare the advent of the accidental modification. What are the characteristics of the Weimar period?

¹ RGBl. I S. 141.

² RGBl. 1934 I S. 747: "Die Reichsregierung hat das folgende Gesetz beschlossen, das hiermit verkündet wird: § 1. Das Amt des Reichspräsidenten wird mit dem des Reichskanzlers vereinigt. Infolgedessen gehen die bisherigen Befugnisse des Reichspräsidenten auf den Führer und Reichskanzler Adolf Hitler über. Er bestimmt seinen Stellvertreter. § 2. Dieses Gesetz tritt mit Wirkung vom Zeitpunkt des Ablebens des Reichspräsidenten von Hindenburg in Kraft." One day after the law has been adopted, President Hindenburg died and Hitler received control in the country.

III.1. The Weimar Constitution: “Nation” as the source of power and law

The preamble to the Constitution clearly states: “The German people, united in all their racial elements, and inspired by the will to renew and strengthen their Reich in liberty and justice, to preserve peace at home and abroad and to foster social progress, have established the following constitution. The German Reich is a Republic. Political authority emanates from the people.”³ On one hand, this is the result of a strong influence of socialism on the then Germany, and on the other hand, the increasing national tendencies due to the Germans’ disapproval of the Treaty of Versailles, violated by Hitler in 1936 with an increase of almost 80% of the army and its special equipment, and occupation of Rheinland.

The tradition of metaphysics of law from Socrates through St. Augustine to Aquinas teaches that, as formulated by the Apostle Paul, “there is no authority except from God.”⁴ Even if the state is a democracy and people materially select their representatives, God alone formally gives the power to anyone who exercises it.

The national socialist form of the immanent vision of this issue is a substrate for an adequate definition of law, which Rudolf Bechert formulates as follows: “Law (Recht) is not a thought that falls from the sky, but similarly to nation, or space, it is one of the facts of the human community established by the life,”⁵ which means “it is created in the community” as “the source of law.”⁶

It is far from enough for Thomas Aquinas’s theory of law because, according to him, “therefore all laws proceed from the eternal law,”⁷ that is from God. In spite of the acquaintance of this classic tradition Karl Larenz, a philosopher of law, claims that “as the law owes *its genesis and importance* to the community, it

³ RGBL. 1919, S. 1383: “Das Deutsche Volk, einig in seinen Stämmen und von dem Willen beseelt, sein Reich in Freiheit und Gerechtigkeit zu erneuern und zu festigen, dem inneren und dem äußeren Frieden zu dienen und den gesellschaftlichen Fortschritt zu fördern, hat sich diese Verfassung gegeben. Erster Hauptteil. Aufbau und Aufgaben des Reichs. *Erster Abschnitt. Reich und Länder. Artikel 1.* Das Deutsche Reich ist eine Republik. Die Staatsgewalt geht vom Volke aus.”

⁴ Romans 13:1

⁵ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 18.

⁶ *Ibidem*, p. 21.

⁷ *S. Th.* I–II, 93. 3: “Ergo omnes leges a lege aeterna procedunt.”

serves primarily the community life"⁸ while "the legal order recognizes individuals as far as it is binding to them through their responsibility for the community"⁹ as its members: "A legal entity, a member of the law, a member of the nation can only be the one whose legal conscience, which is the source of every law, is not distorted."¹⁰ This occurs when conscience is guided only by the racist ideology, which is an obvious *circulus vitiosus* of this argument. In spite of the commonly known plea, Theodor Maunz of Freiburg im Breisgau called the "thinking of order" a "real study of the sources of law."¹¹ For the same reasons, the Neo-Kantian interpretation was not fully accepted, and Stammler's philosophy of law was accused of not knowing "the nation as the source, content and purpose of law."¹²

Since the "legal belief of the entire nation" is the "source of law," "in our national socialist state, the will of the nation manifesting itself in the Führer is more important than the will of the Führer itself,"¹³ as Nazism makes the "will," identified with an "instinct" rather than with the spiritual power transcendent vis-à-vis body, subject to the act of lawmaking and the interpretation of law.

The German nation becomes the basis for the unity of law that is the Germanic law: "National legal thinking is not of [...] some further source of law except for those previously recognized" because "there is only one order of the nation,"¹⁴ regardless of whether it is "formed" or "unformed law" which taken together give the national law in its entirety."¹⁵ According to the Nazi beliefs, "it is

⁸ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, pp. 8–9.

⁹ *Ibidem*, p. 9.

¹⁰ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Frz. Eher Nachf. ³1934, p. 47.

¹¹ Th. MAUNZ, *Das Verwaltungsrecht des nationalsozialistischen Staates*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 45.

¹² E. HIRSCH, *Recht und Religion*, "Archiv für Rechts- und Sozialphilosophie," vol. XXIX (1935/36), p. 228.

¹³ A. LOBE, *Gesetztes und ungesetztes Recht*, "Archiv für Rechts- und Sozialphilosophie," vol. XXIX (1935/36), pp. 24–25.

¹⁴ K. LARENZ, *Über Gegenstand und Methode des völkischen Rechtsdenkens*, Berlin: Junker und Dünhaupt Verlag 1938, p. 11.

¹⁵ *Ibidem*, p. 15.

not the rules” of, for example, an objective and divine natural law that “create an order” of existence, thought or action, but “the order creates” the legal “rules,”¹⁶ in which a strange belief in the ability to regulate everything by the positive law manifests, or it expresses a propensity to “violence,”¹⁷ which was not acceptable to the Augustinian and Thomistic theory of law because “human law does not meddle with”¹⁸ everything, and if it does, it is for “friendship towards another.”¹⁹

According to Reinhard Höhn, if law as law originates from “the national community,” the “application of law and lawmaking”²⁰ also originates from it. This means that the “source of law is the belief of the national community.” However, “because of the unity of law and the continuation of law it needs positivisation”²¹ in the form of acts of the state. The “national state” is a “state in which the same nation is the source of all primary law”²² and the “derived sources of law,” whilst the act and the regulation of the Führer are no primary sources of law for the administration. The primary source of law is the order of life of the national community. The act and the regulation of the Führer are not binding because of [...] the decision itself, but because of their compliance with the order of national life.” Therefore, “the guardian of law is the national community,” which implies “law” as the basis of “acts” and “regulations.”²³ The nation is a measure of morality: Rudolf Bechert states that “the national state, which is associated with the community, is the moral state because the community is [...] an original reason for human morality and a measure of morality.”²⁴ It would be

¹⁶ Th. MAUNZ, *Das Verwaltungsrecht des nationalsozialistischen Staates*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 44.

¹⁷ *S.Th.* I–II, 93, 3, ad 2.

¹⁸ *S.Th.* I–II, 93, 3, ad 3.

¹⁹ *S.Th.* I–II, 99, 1, ad 3.

²⁰ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 16.

²¹ H. HENKEL, *Die Unabhängigkeit des Richters in ihrem neuen Sinngehalt*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 28.

²² J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 15.

²³ Th. MAUNZ, *Die Rechtsmäßigkeit der Verwaltung*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 65.

²⁴ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 29.

possible if the German nation was the Absolute because the Absolute alone can identify the law with the act. This is not the case for human as a complex being. There is a difference between human being and human action. Hence, there is a need to maintain the real difference between the law within man and his moral acts because law and morality create duality which aims at unity.

The emphasis was deliberately shifted from the legal personality of the German nation to the legal personality of the Third Reich relatively quickly (1933). Hedemann says that “the natural base for us, all of us who live and all who came before us, is expressed by the double word ‘blood and earth.’ The current of thought leads from blood to race, then from the concept of race through the theory of inheritance to the concept of heritable health. The road leads from the land to food and housing, from there to reign and property, and from there to the state and law.”²⁵ Therefore, the Nazi ideology relates to the “living and impossible to resign” “joint effect between the law and the nation”²⁶ because, according to Hans Frank, “there must be *unity* between the soul of *law* and the soul of *nation*.”²⁷ Thus, “the law comes from the people, depends on the people, but it shall be separated from the people as a child from the mother’s body and become an independent entity. It is also a place where the state suddenly appears.”²⁸ This is the Nazi state. What is it for the history of law in contemporary Germany?

III.2. The government of the German Reich and NSDAP

The immediate transfiguration of the government of the Reich into the most appropriate constitutional body deepened and exacerbated the process of ideologization of law. “The national socialist party and its organizations became actors of this new political community, and therefore also the subjects of a new idea of law and the state which were rooted in the community

²⁵ J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. Staff, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 137.

²⁶ *Ibidem*, p. 138.

²⁷ H. FRANK, in: J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 138.

²⁸ J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 137.

thinking”²⁹ in which the community represented only a substrate out of which the Nazi party emerged, headed by the Führer.

The German nation received assurance from the supreme authorities in the country, such as Hans Frank. He says that the concept of the national socialist law comes from “the national law.”³⁰ Carl August Emge also believes that the legal “imperative” comes “from the above-positive source,”³¹ which, naturally, is understood as an national entity.

In describing “the NSDAP program” in terms of the genesis of law, Hans Fabricius states that “National Socialism,” which “considers all the earthly things” in the light of German “nation,” “must reach fundamentally new evaluation of all human behavior.”³² For this reason, the party feels compelled to reject “the materialistic law after the collapse of Rome” and opt for “the German law which will make the thought of community, the good of the nation, blood and the earth, the national honour and social justice, the turning points of its teachings and activity.”³³ Furthermore, it does not prevent the party from creating its own law that is beyond the state law, although it is emphasized externally that an unquestionable “source of customary law is the legal conscience of the nation, or the spirit of the nation which receives its specific form from the racial base.”³⁴

Therefore, Helmut Nicolai, based on his principle of “racial purity,” postulates that knowledge of law is not gained through learning. It is not wisdom coming from other people. It is a property of blood. Therefore, not everyone can know the law. Only the man of a pure race, who was conceived in a true marriage of members of the race, and whose whose tree of life is clean from

²⁹ O. KOELLREUTTER, *Der nationalsozialistische Rechtsstaat*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, Art. 16, Berlin: Industrieverlag Späth & Linde 1936, p. 5.

³⁰ H. FRANK, *Nationalsozialismus im Recht*, ZAKDR 1934, p. 8.

³¹ C.A. EMGE, *Ideen zu einer Philosophie des Führertums*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 180.

³² H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, Art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 33.

³³ *Ibidem*, p. 35.

³⁴ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. ³1934, p. 51.

foreign admixtures," is able to know the law. As a result, the Reich sets up the so-called "Nuremberg Laws" that exclude Jews and the sick from the right to marry. "For this reason, the law can be known, constituted, proclaimed, and interpreted only by Nordic Aryan man. [...] Only [...] Nordic man [...] can be a judge, legislator, and the Führer of the community of members of the nation,"³⁵ although at this stage of development of the Reich legislation, the government and the party still retain the advantage.

However, in 1934, the absolutization of the Führer was further crystallized: "the will of the executive, regardless of the form in which it was expressed, whether by law, regulation, decree, a single command, a holistic command, regulation of organization and competence, created the new law and changed the existing law."³⁶ That reciprocal coupling of the community and the executive is still emphasized because instrumentalization of the German nation must be done slowly so as not to lose the nation as the most important tool in the conquest of the world and other nations: "It is not the will of the individual that one would start from, but the order of the community. It is not the norm that is the law which limits the sphere of freedom of individual entities of law, but the law is, as formulated by Carl Schmitt, the specific order living in the community. The Community and the law determine each other. The law is the actual order of the community formed by the leadership of the community,"³⁷ which, after gaining all power by Hitler, tend towards the realization of lust for dominion, not limited by any legal and moral order.

III.3. Führer's "Wille zur Macht"

Hermann Rauschnig of the then Danzig had many conversations with Hitler, and in one of them Führer explained his understanding of subjectivity: "Providence had predestined me to be the greatest liberator of humanity. I release man from coercion of the spirit which has become a goal in itself; from the dirty and degrading self-accusatory 'conscience' and 'morality' of known chimera and

³⁵ Ibidem, p. 15.

³⁶ J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985, pp. 390–391.

³⁷ H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, pp. 84–85; cf. C. SCHMITT, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 15 f.

challenges of freedom and personal independence to which only very few can become mature enough. [...] The dogma of substitutionary suffering and death of the Divine Savior, is replaced by the substitute life and behavior of the new legislator, the Führer, who frees the mass of believers from the burden of free choice.”³⁸ For what reason? Is it to do good and guide people towards the other as a person, and ultimately towards God on the basis of the good law and the legitimate rights? Of course not. In reference to the “lust for power,” the Führer has no objections saying: “My Lord, we are immediately excited about the lust for power and are not ashamed in any way to admit this. We are possessed by the supreme good. We are fanatical in our lust for power. For us, the lust for power is not just a bloodless science, but, literally, the meaning and content of our lives.”³⁹ What a misunderstanding and contradiction with the classical doctrine of law it was, in every respect, where a reason for law is the “right reason,” not blind lust, and the doctrine of power as a means to an end which is the personal good as an end in itself: both human good and truly supreme Divine good. Only the way of good and human self-realization based on good leads man to the “eternal friendship with God.”⁴⁰

Ernst R. Huber is convinced that the Nazi “legislation is not a function separated from the supreme power of the Führer, [...] but it is a direct result of this supreme power.”⁴¹ Therefore, “the decrees of the Führer, equally with the act, play the decisive role as a source of law,”⁴² based on the ideology of National Socialism because “the national socialist ideology is a basis for interpretation of all sources of law as it is expressed most notably in the program of the party and the externalizations of the Führer.”⁴³ Accordingly, *de lege ferenda* and *de lege lata* have the same source and the same goal which is implementation of the Nazi program objectives⁴⁴ and, above all, the Führer as the supreme legal and statutory source: “Today, it is not the act, but the will of the Führer that is the

³⁸ H. RAUSCHNING, *Gespräche mit Hitler*, Zürich/New York: Europa Verlag 1940, p. 217.

³⁹ Ibidem, p. 254.

⁴⁰ *S.Th.* I–II, 99, 1, ad 2.

⁴¹ E.R. HUBER, *Das Staatsoberhaupt des Deutschen Reiches*, “Zeitschrift für die gesamte Staatswissenschaft,” vol. 95 (1934/35), p. 220.

⁴² H. FRANK (Hrsg.) *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 164.

⁴³ H. FRANK, in: H. SCHORN, *Der Richter im Dritten Reich. Geschichte und Dokumente*, Frankfurt a.M.: V. Klostermann 1959, pp. 78–79.

⁴⁴ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 16.

reason and the source of all the activities of officials” and therefore, according to Adolf Schüle of Berlin, we should speak of the “primacy of the Führer” and the “order”⁴⁵ of the nation’s existence based on it, in the context of National Socialism. “Anyhow, the Führer alone decides about the main executive regulations for the public according to the rule and in the form of the act, and therefore there is no doubt that the act is authoritative direction line of the activity of an administration officer or judge even in the new state.”⁴⁶

Conclusions

Developing the Nazi awareness on the genesis of law, from the socialist conception in the sense of nationality in the first few months of existence of the Third Reich through shifting the legislative subjectivity to the government and the NSDAP party to the process of self-absolutisation of the Führer, is an expression of the loss of the horizon of the transcendence of law in the German state, its divine origin and ultimate focus on good as good, which had to necessarily lead to the great drama of many nations of the world and a fundamental crisis in the legislation, as programmed by the Nazis. As extremely positivist, the legislation of the Third Reich turned out to be completely erroneous, which does not allow to say that it was “the rule of law.”⁴⁷

⁴⁵ A. SCHÜLE, *Das Problem des Verwaltungsaktes*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 323.

⁴⁶ *Ibidem*, p. 323.

⁴⁷ M. ZMIERCZAK, *Kształtowanie się koncepcji państwa prawnego (na przykładzie niemieckiej myśli polityczno-prawnej)*, in: J. KOWALSKI, *Państwo prawa. Demokratyczne państwo prawne. Antologia*, Warsaw: Oficyna Wydawnicza Wyższej Szkoły Handlu i Prawa im. Ryszarda Łazarskiego 2008, pp. 196–197.

IV. THE ESSENCE OF LAW

What is the existence of law within the legal ideological framework of the National Socialism in the German Reich? Is *recta ratio* (the term used by Cicero) as the spiritual power the cause of the existence of law? Is the Nazi law actually a “norm and measure”¹ for the acts pursuant to *dignitas humana* and its personal or legal communities?

Does it have a character of the obligation towards good and not-binding the acting man with evil? What determines the finality of law in “the state of the Führer?”²

IV.1. Towards an attempt at a definition of socialist-national law

Julius Binder advocates the “*a priori*” concept of “the essence of law,”³ which is a characteristic feature of the national socialist vision of the order of the legal and moral being. According to Fabricius, “the law is the order of life, established for the nation”⁴ and therefore it is a racist being, namely the “German

¹ *S.Th.* I–II, 90, 1.

² Cf. O. KOELLREUTTER, *Der Deutsche Führerstaat*, Tübingen: Mohr (Siebeck) 1934; IDEM, *Der Aufbau des deutschen Führerstaates*, in: H.-H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, pp. 1–63; M. BROZAT, *Soziale Motivation und Führer-Bindung im Nationalsozialismus*, “Vierteljahrshefte für Zeitgeschichte”, 18, 1970, pp. 392–409; G.L. MOSSE, *Ein Volk, ein Reich, ein Führer. Die völkischen Ursprünge des Nationalsozialismus*, Königstein/Ts.: Athäneum 1979.

³ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. LIII.

⁴ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsoziali-*

law.”⁵ Binder says that “we need to be or become a transpersonalists to be able to be personalists.” This means that “the state is a living community of the nation”⁶ and, therefore, in fact, only “the German people deserve German law. This is, briefly said, the fundamental political and legal demand”⁷ which was already expressed in the program of the National Socialist German Workers’ Party of 24 February 1920 in Munich: “We demand Roman law serving the materialistic world order to be replaced by German Community law.”⁸ In Nazism, Roman law is understood as “materialistic” as it was founded upon individual people and their communities. The legal awareness of the Reich resigned from the people as individuals, and identified dialectically the “race,” “nation” and “the state” with the party apparatus to the extent that the following adage became real: “The party is here, it persists and is the same as Germany. As long as Germany lives, the party lives.”⁹ The adage expresses contradiction and does not respect

stischen Staates, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 33; cf. E. RIEZLER, *Naturngesetz und Rechtsordnung*, “Archiv für Rechts- und Staatsphilosophie” 34 (1940/41), pp. 149–167; F. von HIPPEL, *Die nationalsozialistische Herrschaftsordnung als Warnung und Lehre. Eine juristische Betrachtung*, Tübingen 1946; K. HEYER, *Wenn die Götter den Tempel verlassen. Wesen und Wollen des Nationalsozialismus und das Schicksal des deutschen Volkes*, Freiburg: Novalis Verlag 1947, ³1991.

⁵ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 35; cf. P. RITTERBUSCH, (rec.) H. Boehm, *Volkstheorie und Volkstumspolitik der Gegenwart*, “Archiv für Rechts- und Sozialphilosophie”, vol. XXIX (1935/36), pp. 524–526.

⁶ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 335.

⁷ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. ³1934, p. 7; G. THULFAUT, *Kriminalpolitik und Strafrechtslehre bei Edmund Mezger (1883–1962)*, Baden-Baden: Nomos Verlag 2000; T. MASON, *Der Primat der Politik. Politik und Wirtschaft im Nationalsozialismus*, “Das Argument”, 41, 1966 [*The Primacy of Politics. Politics and Economics in National Socialist Germany*, in: S.J. WOOLF (Hrsg.), *The Nature of Fascism*, New York 1968].

⁸ *Programm der Nationalsozialistischen Deutschen Arbeiterpartei vom 24. Februar 1920*, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 9.

⁹ R. LEY, *Die große Rede von Dr. Ley*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik”, 3. Jg, fasc. 1. 08. 1935, p. 443; cf. H. KERRL, *Rede des Reichsministers Hanns Kerrl auf der Sondertagung des Hauptamtes für Kommunalpolitik in Nürnberg*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik”, 3. Jg, fasc. 1. 08. 1935, pp. 582–584; K. FIEHLER, *Partei, Staat, Gemeinde*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik”, 3. Jg, 1.10.1935,

the existence separateness. This means that the argument is false because Lay would have to provide proof of the mutual causality in existence, which is simply impossible. This understanding of law is indeed a revelation, but rather in a negative than a positive way. Therefore, Julius Binder wrote in 1934 about a “miracle of the real revolution” which had become a share of the “living spirit of the German people” who may now feel “hidden in the hands of the Führer” as a “genius” creating “through Adolf Hitler’s political ingenium” “the true national state and the German national state” as liberation from a “night of madness and self-alienation.”¹⁰ Only such a “State” is “the State of justice,”¹¹ and “our act is the national socialist act”¹² which “is the highest performance and form of the national socialist revolution as the national socialist rule of law.”¹³

pp. 550–555; W. STUCKART, *Volk, Partei, Reich*, in: H. FRANK (Hrsg.), *Deutsches Recht*, 5. Jg. (1935), fasc. 15/16: *Verwaltungsrecht*, Berlin Deutscher Rechtsverlag 1935; A. ROSENBERG (Hrsg.), *Das Parteiprogramm. Wesen, Grundsätze und Ziele der NSDAP*, München: Zentralverlag der NSDAP ²¹1941; D. MAJER, *Grundlagen des nationalsozialistischen Rechtssystems. Führerprinzip, Sonderrecht, Einheitspartei*, Stuttgart/ Berlin/ Köln/Mainz: Kohlhammer Verlag 1987.

¹⁰ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, pp. 4–6; W. SAUER, *Die nationale Revolution im rechts- und staatsphilosophischen Lichte*, “Deutsche Juristen-Zeitung” 1933, kol. 597–598; IDEM, *Nationale Revolution und nationalsozialistische Rechtsphilosophie*, “Rechts- und Preußisches Verwaltungsblatt” 1933, pp. 441–443; M. LEY, *Holocaust als Menschenopfer. Vom Christentum zur politischen Religion des Nationalsozialismus*, Münster: LIT Verlag 2002; A. GÖRLAND, *Das Prinzip des politischen Stils in der nationalsozialistischen Revolution*, “Geisteskultur. Monatshefte der Comeniusgesellschaft für Geisteskultur und Volksbildung”, 43/10–12, 1934; K. LENK, *Militante Mythensetzung. Zum Verhältnis der “konservativen Revolution” zum Nationalsozialismus*, in: W. ABENDROTH (Hrsg.), *Antifaschismus oder Niederlagen beweisen nichts, als daß wir wenige sind*, Köln 1983, pp. 75–82 (*Dialektik. Beiträge zu Philosophie und Wissenschaften*, 7); R.H. DRAKE, *The Children of the Sun*, in: *The Revolutionary Mystique and Terrorism in Contemporary Italy*, Indiana University Press 1989, pp. 114–134; R. HÖHN, *Revolution-Heer-Kriegsbild*, Darmstadt: L. C. Wittich Verlag 1944.

¹¹ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 8; H. BARTH, *Rechtssicherheit und Gerechtigkeit*, in: National-Sozialistischer Rechtswahrer-Bund (Hrsg.), *Deutscher Juristentag 1936*, Berlin 1936, pp. 137–148.

¹² K. FIEHLER, *Partei, Staat, Gemeinde*, “Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik”, 3.Jg, fasc. 1. 10. 1935, p. 553.

¹³ O. KOELLREUTTER, *Der nationalsozialistische Rechtsstaat*, in: H.H. LAMMERS, H. PFUNDT-

In Nazism, the concept of “the rule of law” is measured by purely racist German criterion.

Alfred Rosenberg understands the “idea of racist law” as a moral way to know the material legislation of nature,¹⁴ due to the materialistic premises of the Nazi system. To Binder who stems from the tradition of German idealism, the “law” appears “not” as a natural law, first-inscribed in the “nature” of man because it would be, according to him, a way thinking typical of the natural sciences, rather than of spirit as spirit. According to him, it is a “manifestation of the community will.” It is not conditioned upon some laws of nature, but upon a transcendental idea of law and the empirical purpose.¹⁵ This means

NER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 16, Berlin: Industrieverlag Späth & Linde 1936, p. 11.

¹⁴ A. ROSENBERG, *Der Mythos des 20. Jahrhunderts. Eine Wertung der seelisch-geistigen Gestaltenkämpfe unserer Zeit*, München: Hoheneichen-Verlag ¹⁰1943, p. 597; cf. W. SAUER, *Recht und Volksmoral im Führerstaat*, ARSP 28 (1934/35), pp. 230–274.

¹⁵ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 1008; cf. E. KRIECK, *Das Naturrecht der Körperschaften auf Erziehung und Bildung. Zur Neubegründung des Naturrechts*, Berlin: Widerstandsverlag 1930; J. SAUTER, *Die philosophischen Grundlagen des Naturrechts. Untersuchungen zur Geschichte der Rechts- und Staatslehre*, Wien: Springer 1932; R. EBERHARD, *Modernes Naturrecht. Ein rechtsphilosophischer Versuch*, Rostock 1934; H.H. DIETZE, *Naturrecht aus Blut und Boden*, “Zeitschrift der Akademie für deutsches Recht” 1936, pp. 818–821; IDEM, *Naturrecht in der Gegenwart*, Bonn: L. Röhrscheid Verlag 1936; H. ROMMEN, *Die ewige Wiederkehr des Naturrechts*, Leipzig: Hegner 1936, München: Josef Kösel ²1947; E. WOLF, Buchbesprechung von H.-H. Dietze, *Naturrecht in der Gegenwart*, 1936, “Historische Zeitschrift” 156 (1937), pp. 108–110; H. FEHR, *Die Ausstrahlung des Naturrechts der Aufklärung in die neue und neueste. Vortrag gehalten am internationalen Historiker-Kongress in Zürich 1938*, Bern/Leipzig 1938; H. KRÜGER, *Naturrecht in Gegenwart und Vergangenheit*, “Zeitschrift für die gesamte Staatswissenschaft” 99 (1939), pp. 543–554; H. KRUPA, *Gierkes Kampf gegen Positivismus und Naturrecht. Otto von Gierke und die Probleme der Rechtsphilosophie*, “Archiv für Rechts- und Staatsphilosophie” 32 (1938/ 1939), pp. 454–485; H. RYFFEL, *Das Naturrecht. Ein Beitrag zu seiner Kritik und Rechtfertigung vom Standpunkt grundsätzlicher Philosophie*, Dissertation, Bern 1944; A. ARNDT, *Die Krise des Rechts (1948)*, in: W. MAIHOFFER (Hrsg.), *Naturrecht oder Rechtspositivismus?*, Darmstadt 1962, pp. 117–140; H. WELZEL, *Naturrecht und materiale Gerechtigkeit*, Göttingen ⁴1962; IDEM, *Naturrecht und Rechtspositivismus*, in: W. MAIHOFFER (Hrsg.), *Naturrecht oder Rechtspositivismus?*, Darmstadt: Wissenschaftliche Buchgesellschaft 1962, pp. 322–338; H. KELSEN, *Die Grundlage der Naturrechtslehre*, “Österreichische Zeitschrift für öffentliches Recht N.F.” 13 (1964), pp. 1–37; H.D. SCHELAUSKE, *Naturrechtsdiskussion in Deutschland. Ein Überblick über zwei Jahrzehnte: 1945–1965*, Köln: J. P. Bachem Verlag

that in the latter aspect, the law is “a correlate of the remaining cultural structure of the nation, as an expression of its moral, aesthetic, religious, and scientific culture,” which exactly is a throwback to the materialistic argument because culture is derived from the materialistically defined race. Otherwise, human law would come from outside the naturally and culturally justified existence of the Nazi state and outside the space, which would in turn conflict with the horizon of the existence of thinking, limited to the Nordic race. Binder notes that “the idea of community is actually much more deeply recognized and more richly developed in the Germanic laws than in Latin countries”¹⁶ because both “the idea of law” and “the development of law” as a concrete act of lawmaking are, also according to Otto Koellreutter, “only the realization of the national life” of the Germans on which the state of the Third Reich as “the rule of law”¹⁷ is built.

A philosopher of law, Karl Larenz, when defining the law in the national and socialist spirit, fights accusation of lawlessness: “According to the German concept, the law is not a thing of lawless arbitrariness nor of external purpose-

1968; U. KALBHEN, *Die NS-Rechtstheorie als Herrschaftsideologie. Logische Struktur und soziale Funktion naturrechtlicher Konstruktion im Nationalsozialismus*, Dissertation, Universität Heidelberg 1969; D. GASMAN, *The Scientific Origins of National Socialism. Social Darwinism in Ernst Haeckel and the German Monist League*, London/New York: American Elsevier Inc 1971; D. MAYER-MALY, P.M. SIMONS (Hrsg.), *Das Naturrechtsdenken als Prüfstein des Naturrechtsgedankens heute und morgen. Gedächtnisschrift für R. Marcic*, Berlin: Duncker & Humblot Verlag 1983; J. EBBINGHAUS, *Kants Rechtslehre und die Rechtsphilosophie des Neukantianismus*, in: Julius Ebbinghaus: *Philosophie der Freiheit. Praktische Philosophie 1955–1972*, hrsg. v. G. GEISMANN, H. OBERER, (Gesammelte Schriften. Bd. 2), Bonn 1988, pp. 231–248; T. GUZ, *Über das Naturrecht bei Thomas von Aquin*, in: IDEM, *Historisch-systematische Beiträge zur Anthropologie*, in: *Schriftenreihe der Gustav-Siewerth-Akademie*, vol. 16, Weilheim-Bierbrunn: Gustav-Siewerth-Akademie 2000, pp. 55–116; IDEM, *Rückkehr oder Abkehr vom Naturrecht bzw. Naturgesetz?*, in: IDEM, *Historisch-systematische Beiträge zur Anthropologie*, in: *Schriftenreihe der Gustav-Siewerth-Akademie*, vol. 16, Weilheim-Bierbrunn: Gustav-Siewerth-Akademie 2000, pp. 117–122; IDEM (Hrsg.), *Das Naturrecht und Europa*, in: IDEM (Hrsg.), *Ad fontes. Schriften zur Philosophie*, Bd. 3, Frankfurt a. M.: Peter Lang Verlag 2007.

¹⁶ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, pp. 1044–1045.

¹⁷ O. KOELLREUTTER, *Der nationalsozialistische Rechtsstaat*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 16, Berlin: Industrieverlag Späth & Linde 1936, p. 3; C. SCHMITT, *Nationalsozialismus und Rechtsstaat*, “Juristische Wochenschrift” 1934, p. 713 f.

fulness and utility. It is the order of life, closely associated with the moral and religious life of the community which meets individuals requesting their own significance and binds them internally.”¹⁸ But then, if the law, morality and religion are essentially lawless, or subjectivist, Larenz does not have an appropriate ontological foundation as a certain criterion of legal and moral objectivity to maintain the validity of his argument.

In the aspect of content, namely the formal aspect, “the relationship between the law and the community means that the content of a particular positive law must be adequate for the spirit of the nation, moral consciousness and customs of the nation.”¹⁹ “The community as a whole lives *in* its law, *by* its law and *with* its law,” and therefore “every law as a manifestation of the life of the community is *conditioned* ethnically,”²⁰ and as such is “a constant process of realization of itself” in “the legal community” through the “*form of obligation, or norm.*”²¹ According to the aforementioned, the ideologically formed “concept of law is subordinated to the notion of the national community law. The Authority does not act arbitrarily, but it sticks to this law rooted in a national community!”²² To be “officially” righteous means: to exist and act in compliance with the national entity specified in its contents by the NSDAP, but so as not to give in to formalism: The correct way of creating new German law leads from formalism to reflection upon the content of that law. The supreme and ultimate value, and thus the basis for every German legal system is not a formal concept of the state, but the idea of the German blood community filled with the

¹⁸ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 5.

¹⁹ *Ibidem*, p. 9; IDEM, *Volksgeist und Recht*, “Zeitschrift für deutsche Kulturphilosophie” 1935, p. 40 f.; Th. LITT, *Philosophie und Zeitgeist*, vol. 1, Leipzig: Felix Meiner ²1935; WEIGELIN, (rec.) Theodor Litt: *Philosophie und Zeitgeist*, vol. 1, Leipzig: Felix Meiner ²1935, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), pp. 497–498; O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Dresden 1935; A.-M. VON LÖSCH, *Der nackte Geist*, Berlin: Mohr Siebeck Verlag 1998/99, pp. 405–426; A. FLITNER (Hrsg.), *Deutsches Geistesleben und Nationalsozialismus*, Tübingen: Rainer Wunderlich Verlag 1965.

²⁰ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 20.

²¹ *Ibidem*, p. 22.

²² A. SCHÜLE, *Das Problem des Verwaltungsaktes*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 338.

contents. The term 'state' has a meaning only if it expresses the value of the contents, not destroys that value. The form must not violate the content. On the contrary, it has to serve the content. Similarly, the state has to serve the nation."²³ The problem lies in the fact that the monistic concept as one being is not able to co-exist with the other being, but it has to undertake reductionist actions, by which the other being is eliminated ontically. The nation and the state should be expressed in their own forms. This means the duality of the nation and the state, which would be the basis for the different types of relationship worthy of both beings. This issue arises precisely from the Nazi theoreticians and practitioners of law' analysis of "the formal and the material" aspect of law. "This opposition is relative. [...] German law serves the German people. The German blood community is the foundation and, at the same time, the supreme, or the ultimate value which is the starting point of all the German legal thinking. The existence and the good of the German people give the last criterion of content for the problem of law and lawlessness. The German nation has found its proper type of organization in the form of the national socialist state. However, it identified with the national socialist state to the extent that those two became one entity, whereas they should form a single cohesive unit that consists of two different entities. The national socialist ideology, as largely expressed in the party's program and the speeches and writings of the Führer, gives concrete criteria for law and lawlessness. In many crucial questions, it is clearly defined in terms of content, what is harmful and what is useful for the community of the nation, and thus for the national socialist state."²⁴ Anyway, the German nation objectively and truly known in its real existence, and not its national socialist "vision," should lay down the form and interpretation of law. Shortly before 1933, with reference to Anschütz, Carl Schmitt drew attention to the need to maintain this duality in the formal and material aspect, both in relation to the understanding of the law, and the relationship between the nation and the state: "The German theory of the state from before the War (World War I) recognizes not only the concept of substantive law, but also the concept of formal law,"²⁵ without which one can not understand "either the

²³ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 92.

²⁴ *Ibidem*, p. 58.

²⁵ C. SCHMITT, *Legalität und Legitimität (1932)*, in: IDEM, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Berlin: Duncker & Humblot 1958, p. 279.

theory or practice”²⁶ of law, since “the act in the material sense is a legal norm or principle of law.”²⁷ “The content rather than the form”²⁸ of the Nazi law is decisive which is created by the Germanic race.

“The act and the law are no opposites,” and “the law is the enriched circle.”²⁹ This is a reference to, among others, Erich Kaufmann who, during a period impacted by the monistic trends in the legal sciences, emphasized the real difference between the law and the act, which was partly accepted by Nazism: “*National Socialism puts the law above the act*” because, according to Nazism, the law is “given along with the nation. It was born with the nation and is related to the nation. The law can not be created by an individual act of will.” “It lives in the community of the nation and can be binding without normalization.”³⁰ The very existence of law is sufficient. The law is absolutely identical with the Germanic nation. “In contrast, the act is a temporarily conditioned expression of the national existence,” designed to “solve individual tasks. This means, first, that the law is not an act of the will of the individual, but an act of the community which is expressed in the Führer’s conduct. Then this means that the act is not this form of law, but a direction of the development of law.”³¹ This initial trend of national socialist positivism has been gradually evolving after the takeover of power by Hitler. This was partly confirmed by the claim of Theodor Maunz who said that the national socialist “law” would “no longer exists in the relationship between the legal subjects”³² because, according to the

²⁶ G. ANSCHÜTZ, *Die gegenwärtigen Theorien über den Begriff der gesetzgebenden Gewalt*, Tübingen/Leipzig ²1901, p. 33.

²⁷ C. SCHMITT, *Legalität und Legitimität (1932)*, in: IDEM, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Berlin: Duncker & Humblot 1958, p. 279.

²⁸ E. SOMMERMANN, *Der Reichsstatthalter*, Erlangen: Verlag von Palm & Enke 1933, p. 3.

²⁹ Th. MAUNZ, *Neue Grundlagen des Verwaltungsrechts*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 20.

³⁰ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 15.

³¹ *Ibidem*, p. 15.

³² Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 19; H. KRÜGER, *Volksgemeinschaft statt subjektiver Rechte*, “*Deutsche Verwaltung*” 12 (1935), pp. 37–41; K. LARENZ, *Rechtsperson und Subjektives Recht – zur Wandlung der Rechtsgrundbegriffe*, in: G. DAHM, E.R. HUBER, K. LARENZ, K. MICHAELIS, F. SCHAFFSTEIN, W. SIEBERT (Hrsg.), *Grundfragen der neuen Rechtswissenschaft*, Berlin: Junker und Dünhaupt Verlag 1935, pp. 225–258; Th. MAUNZ, *Das Ende des subjektiven öffentlichen Rechts*, ZgS 96 (1936), p. 71 f.; K. WOJTYŁA, *Person: Subjekt und Gemeinschaft*, in: K. WOJTYŁA, A. SZOSTEK,

ideology of Nazism, they are no longer independent but exist as accidents of of the substantialized nationality.

In the Nazi criminal law, it is defined what the criminal law in the German Reich is and what it should be: "The criminal law is no longer a closed, or limited area that is static because of the barrier of statutory facts. Because of the law of life, it is the entirely permeated order, inside of which the unwritten standards of customs, religion, morality develop a lively result in the fulfilling of the values of the statutory terms, in their part. For the formation of criminal law, this means even more free development of the facts, the judge's indication on the notions of values functioning in the state, the commitment to the act, considered not as fixing limits of the verbal interpretation, but as a commitment to the spirit and the deliberate targeting of the act, so that the free disposal of the interpretation of the act, and the use of any aids, can enable a criminal conviction which corresponds to the legal opinion of the public and is carried by the spirit of the existing legislation."³³ Taking the view of the constantly evolving Nazism as a variable process in its very essence, Henkel argues as follows: "as the principle of life of the individual can be determined by the regularities of the whole nation, the concept of security of law can be considered as a function of the order of law which is based on the existence of the whole nation.." The most important task of "the national socialist criminal law" is therefore "preserving and strengthening the Germanic nationality,"³⁴ the "legal conscience," or "legal beliefs," of which become a "deeper, less formally bound justification" of "the judgment."³⁵

Hans Fabricius identifies significant ideological discrepancies in the Nazi criminal law: the existing German criminal law [...] was founded on individuals and their human rights. The protection it gave, involved individuals and the formal notion of the state, emptied of the contents."³⁶ This is opposed to the Nazi concept of criminal law, according to which "the criterion of moral value

T. STYCZEŃ, *Der Streit um den Menschen. Personalener Anspruch des Sittlichen*, Kevelaer: Verlag Butzon & Bercker 1979, pp. 11–68.

³³ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 52.

³⁴ *Ibidem*, p. 65.

³⁵ *Ibidem*, p. 68.

³⁶ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 33.

is not free or non-free personality of the individual, but his interaction with the national community,” so that for the Nazi legislator, “it is irrelevant” for what reasons he will be punished or whether “he does penance because of the free act,” or not. Also, “the question of freedom of will is not essential for the national socialist criminal law,”³⁷ since there is no sovereign individual entity.

“The lifting of analogy of prohibition” in the “criminal law”³⁸ was made by the adoption of the thesis that “all laws should be ‘interpreted by the Nazi ideology,’³⁹ according to which “the essential task” of “the order of criminal law” is to bring “the national law” to its bindingness. The essence of the Nazi ideology is “to express legal views of the national community typically belonging to the criminal law as fully as possible.”⁴⁰ Lothar Gruchmann believes that for the Reich, the “authoritarian” “criminal law” is not about the restoration of the order of “justice,” or “improvement” of the criminal, but about the “protection of the national community”⁴¹ by “intimidation,” or even “immediate deletion,” namely the killing of

³⁷ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 46; H. SCHWARZ, *Wille und Rassenseele*, NSMH, fasc. 88 (1930).

³⁸ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 15; cf. H. KRÜGER, *Rechtsgedanke und Rechtstechnik im liberalen Strafrecht*. Promotion an der Friedrich-Wilhelms-Universität Berlin bei Eduard Kohlrausch, 1934; IDEM, *Zur Problematik der teleologischen Begriffsbildung im Strafrecht*, Leipzig 1934; G. DAHM, *Der Methodenstreit in der heutigen Strafrechtswissenschaft* i F. SCHAFFSTEIN, *Rechtswidrigkeit und Schuld im Aufbau des neuen Strafrechtssystems*, in: G. DAHM, F. SCHAFFSTEIN, *Methode und System des neuen Strafrechts*, Berlin 1938, pp. 1–70; G. DAHM, *Gemeinschaft und Strafrecht*, Hamburg 1935; §§ 2, 2b RStGB; E. SCHMIDT, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen: Vandenhoeck & Ruprecht ³1965; H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafjustiz im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, Dissertation, Westfälische Wilhelms-Universität, Münster (Westf.) 1995.

³⁹ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 15; cf. § 1 Steuer-Anpassungsgesetz.

⁴⁰ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 47.

⁴¹ L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 924; cf. E. SCHMIDT, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen: Vandenhoeck & Ruprecht ³1965, p. 436 f.

the one who has committed a crime against the German nation. According to Roland Freisler, “achieving this protection for decades at a cost of a great effort of the fully valuable members of the nation and very costly institutions”⁴² is worthless.

“The rejection of the sentence *nulla poena sine lege* (no punishment without law) which was the existing criminal *principium*,” mentioned by Ulpian in *Digesta Iustiniani*, is made allegedly on “other bases,” namely within “the Nazi state,”⁴³ where, according to Heinrich Henkel, “the national socialist renewal of criminal law starts deliberately from the unity of the political and legal values.”⁴⁴ Franz Schlegelberger, who essentially agrees with Hitler about the necessity of adjusting the law to the inner national relationships, mentioned, however, in the presence of the Führer that “this principle is not applicable to Russia, China and a few small cantons in Switzerland.”⁴⁵

The philosophers of law in Kiel such as Georg Dahm and Friedrich Schaffstein think that the German theory of criminal law should be aimed at the idea of National Socialism⁴⁶ with the use of Edmund Husserl’s phenomenological method.⁴⁷ On the other hand, Erich Schwinge and Leopold Zimmerl of the University of Marburg who were concerned about “the new creation of the German theory of law,”⁴⁸ believed that phenomenology contain errors and show its “evident” “inadequacy” to solve the scientific and legal tasks.⁴⁹ However, Dahm and Schaffstein are strongly in favor of “a new interpretation of the state law from the perspective of both specific and holistic thinking,”⁵⁰ and a turning away from abstract, general concepts.⁵¹ Dahm be-

⁴² R. FREISLER, *Gedanken zum rechten Strafmaß*, “Deutsches Strafrecht” 1939, p. 335.

⁴³ H. HENKEL, *Die Unabhängigkeit des Richters in ihrem neuen Sinngehalt*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 5; cf. IDEM, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934.

⁴⁴ *Ibidem*, p. 23.

⁴⁵ F. SCHLEGELBERGER, in: L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 826.

⁴⁶ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 9.

⁴⁷ Cf. E. KEMPERMANN, *Die Erkenntnis des Verbrechens und seiner Elemente. Ein Beitrag zur Revolution der strafrechtlichen Dogmatik*, 1934.

⁴⁸ E. SCHWINGE, L. ZIMMERL, *Vorwort*, in: IDEM, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937.

⁴⁹ IDEM, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 15.

⁵⁰ G. DAHM, *Gemeinschaft und Strafrecht*, 1935, p. 17.

believes that the phenomenological “overview of the essence of law,” or the comprehensive consideration of the essence” of law will help to consolidate the Nazi theory of law. For Dahme, “the act” is not “a general norm, but an expression of the substantial reality of life, the living order of the German nation and the order of the Führer.”⁵² If they were something general, they would apply to all the people, even of another race, and it is not possible here.

Therefore, Theodor Maunz believes that “there are no legal standards other than those established by the state.”⁵³ Schwinge and Zimmerl say, in turn, regarding the question of the proper interpretation of the nation and law as law, that “what today’s German theory of law lacks” is “*a philosophical attitude that has been saturated with experience and matured through experience.*”⁵⁴ However, it needs to be completely different from all the previous philosophical attitudes: “In the future, the correlation between science and

⁵¹ F. SCHAFFSTEIN, *Deutsches Strafrecht*, vol. 2, 1935, p. 101, 472; M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, Dissertation, Hamburg: LIT 1998.

⁵² G. DAHM, *Grundfragen der neuen Rechtswissenschaft*, Berlin: Junker und Dünnhaupt Verlag, p. 62 f.

⁵³ Th. MAUNZ, *Neue Grundlagen des Verwaltungsrechts*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 9.

⁵⁴ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 13; cf. E. KAUFMANN, *Kritik der neukantischen Rechtsphilosophie. Eine Betrachtung über die Beziehungen zwischen Philosophie und Rechtswissenschaft*, Tübingen: Mohr 1921; Anonym, *Nietzsches Philosophie unter nationalsozialistischer Blickrichtung*, “Mitteilungsblatt des Nationalsozialistischen Lehrer-Bundes”, Gauverwaltung Tirol-Vorarlberg, Beilage 121, 1942; A. KAUFMANN, *Rechtsphilosophie und Nationalsozialismus*, H. ROTTLEUTHNER (Hrsg.), *Recht, Rechtsphilosophie und Nationalsozialismus. Vorträge aus der Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie in der BRD vom 11. und 12. Oktober 1982 in Berlin*, Wiesbaden 1983, pp. 1–19; M. LESKE, *Philosophen im »Dritten Reich«*. Studie zu Hochschul- und Philosophiebetrieb im faschistischen Deutschland, Berlin: Dietz Verlag 1990; D. AZUÉLOS, *Der Nationalsozialismus aus der Sicht der exilierten Philosophen, Sozial- und Wirtschaftswissenschaftler (1933–1945). Ein Beitrag zur Entstehung des Totalitarismusbegriffs*, “Saeculum. Jahrbuch für Universalgeschichte”, 50/1, 1999; W. KERSTING, *Neukantianische Rechtsbegründung. Rechtsbegriff und richtiges Recht bei Cohen, Stammler und Kelsen*, in: R. ALEXY, L.H. MEYER, S.L. PAULSON, G. SPRENGER (Hrsg.): *Neukantianismus und Rechtsphilosophie*, Baden-Baden: Nomos-Verlag 2002; C. DETTELBACHER, *Im Maulbeerhain: Die Lehre von den 4 Weltzeitaltern: Einführung in die Spuren der zyklischen Zeit. Rezeption, Schnittstellen, Geschichtsphilosophie – mit ständiger Rücksicht auf Julius Evola*, BoD, Norderstedt 2008 (Erweiterte Diplomarbeit an der Universität Wien).

philosophy of law has to be different, defined less dogmatically. The aim is *concrete, inner philosophy of law* that respects the limits of the both disciplines and preserves their independence,” so that law sciences had indeed “philosophical character,” and could be developed according to their own principles and requirements, “in their own area,” that is “free from philosophical caring power.”⁵⁵ This means that “opposing early and today’s legal thinking by using the pair of terms ‘abstract-concrete,’”⁵⁶ is “false and contradictory” because the Nazi theory of law fights accusation of one-sidedness and, in the Nazi sense, opts for both individuality, and the universality of concepts,⁵⁷ but always understood in the Nazi way. Dahm is clear that: “The concept and the term of factual status should disappear from the dogmatics of criminal law,”⁵⁸ and “there are no general rules, but only an interpretation of individual phenomena. [...] Wherever the offender can be described in one word, noun—a traitor, murderer, thief, liar, or stalker—the essence is, as a rule, the ‘will.’”⁵⁹ However, a fundamental problem arises: “A thief is not any person ‘who deliberately robs us of a moving object which does not belong to him, expropriating it illegally, but only the one who is a thief, according to his very essence,’”⁶⁰ so the person who expropriates something that belongs to the German nation, or even if it does not belong to the German nation objectively, it is the subject of acts of the will of a German. “Apart from the deciding content-law questions when answering which, first, the ideological and political considerations are authoritative, any technical and legal questions lose their significance.”⁶¹ This means that a theoretical analysis is essential which objectively determines the epistemological and moral truth about law. Otherwise, national and socialist legal constructivism occurs, where “the legislator creates facts by abstraction. For the question about how he creates them, the ideological and political attitude” is important, according to the material and formal perspective. Hence, the essence, meaning and purpose of the criminal

⁵⁵ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, pp. 16–17.

⁵⁶ *Ibidem*, pp. 16–17.

⁷ Cf. P. HECK, *Rechtserneuerung und juristische Methodenlehre*, 1936, p. 36.

⁵⁸ G. DAHM, *Grundfragen der neuen Rechtswissenschaft*, Berlin, Junker und Dünnhaupt Verlag, p. 89.

⁵⁹ *Ibidem*, p. 89.

⁶⁰ *Ibidem*, p. 102.

⁶¹ *Ibidem*, p. 80.

law in the Third Reich shall be decided by the ideology of “Nazism” from “the material aspect” and the idea of safety or justice, depending on the ideological base, from the formal aspect,⁶² but understood in a national and socialist way, for example, “the so-called principle of guilt (no punishment without guilt).”⁶³ For the above reasons, “a formal way of understanding” “the difference between lawlessness and guilt” “says nothing”⁶⁴ because “the criminal law” in the Reich “does not serve the protection of abstract norms,” nor “the protection of society,” but only the maintenance and protection of the race,” that is “the protection of the racially specified order of the nation,”⁶⁵ rather than the most important effect of law as the cause, that is the principle of justice. This means that if we define the law as follows: “the law is the order of racial conflict,”⁶⁶ such conception of law involves fighting the other to gain the rights for the German race, which opposes both law as law, and its result—justice that, conversely, gives to each “what is due.”

IV.2. The right reason and freedom or “fantasy” or “feelings” as the cause of the existence of law?

Doctor Angelicus used to say that “the law is a question of reason,”⁶⁷ since “reason is the norm and measure of human deeds,” and is at “the origin” of human conduct and action. Reason plays an important role of “directing towards objectives.”⁶⁸ The issue is “a common objective” which is implementing “the common good” considered as “the good of the whole community.”⁶⁹ The free “will” of the human person participates actively in “moving” our “reason,” and the reason can reason concerning the will. The will may want the reasoning,⁷⁰ which is actualized also in the process of lawmaking, and, with the help of

⁶² *Ibidem*, p. 79.

⁶³ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 35.

⁶⁴ *Ibidem*, p. 33.

⁶⁵ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 43.

⁶⁶ G. STIER, *Das Recht als Kampfordnung der Rasse*, 1934, 13 f.

⁶⁷ *S.Th.* I–II, 90, 1: “Ergo lex est aliquid rationis.”

⁶⁸ *S.Th.* I–II, 90, 1.

⁶⁹ *S.Th.* I–II, 90, 2, ad 3.

⁷⁰ *S.Th.* I–II, 17, 1.

practical reason,”⁷¹ applied in the specific acts of our human conduct that is rooted in the realm of the spirit and the soul, transcendent in relation to the human body, and becoming an ontological unity, as one entity.

Immanuel Kant denies the possibility of theoretical reason to understand the essence of truth, but in the sphere of law, morality and religion, opts for “metaphysics” as a science that would protect theoretical reason from “the desolation” caused by its “lawlessness.” According to Kant, “metaphysics is the culmination of all the culture of human reason, which is essential”⁷² to man. Aleksander Bobko rightly points out that due to the aporetics on the level of theoretical knowledge of the truth “the past century certainly was not a favorable time to thinking oriented to the problems of existence”⁷³ in which, in a sense, Kant’s subjective idealism also played a negative role.

Does German National Socialism, which often uses the concepts of “spirit” and “soul,” understand these terms as the classical interpretations of the spiritual existence of the human person?

“The myth of legality” consists in accepting the thesis that “integrity must be distinguished from reason, objectivity and justice of the acts of the administration,”⁷⁴ which is what the classical theory of law says that our reason is a reason of law etc. The Nazi theorists criticize Plato for the primacy of the intellect over the endeavour sphere of thinking. For example, Hermann Schwarz advocates the primacy of will: “The will, not the intellect, is the essence of our thinking.”⁷⁵ In Nazism, the will can not be understood as a power of the spirit different from the body. Therefore, Lothar G. Tirala admits that German thinking is indeed “irrational”⁷⁶ because, according to Otto Dietrich, “the core of the German nature is a irrational conceptualization of the world in the experience” rather than “a rational attitude to the world.”⁷⁷ What is the position of the Führer on this, who determines the existence of the Third Reich?

⁷¹ S. Th. I–II, 90, 2, ad 2.

⁷² I. KANT, *Kritik der reinen Vernunft*, in: IDEM, *Werke in sechs Bänden*, hrsg. v. W. WEISCHEDL, vol. II, Darmstadt: Wissenschaftliche Buchgesellschaft 1983, p. 708.

⁷³ A. BOBKO, *Wartość i nicość. Teoria wartości Heinricha Rickerta ma tle neokantyzmu*, Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego 2005, p. 127.

⁷⁴ Th. MAUNZ, *Die Rechtsmäßigkeit der Verwaltung*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 55.

⁷⁵ H. SCHWARZ, *Wille und Rassenseele*, NSMH fasc. 88 (1930), p. 3.

⁷⁶ L.G. TIRALA, *Rasse und Weltanschauung*, NSMH 1934, pp. 944–949.

⁷⁷ O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Breslau: Ferdinand Hirt 1935, p. 21.

In the context of the analysis of the significance of propaganda for spreading the Nazi ideology, Hitler gives a very precise answer to the question about the existence of a classically understood spirit with its powers: reason, free will and memory. He refers to the fact of death, in order to explain his understanding of the issue, in the perspective of the limits of human existence. According to the Führer, man's "passing away annihilates [...] notions, for nature does not know them." This means that, according to National Socialism, the human person as a product of nature has only "images" coming "from the fantasy," which by nature are "feelings" and are annihilated by the death of their "creator and subject," that is, man as a "part of nature,"⁷⁸ as they disappear without a trace into "nothingness." The Führer often calls his own nation a "mass" or a "herd"⁷⁹. This is a faithful following of Friedrich Nietzsche and his understanding of a "herd animal," or "a man" who has no intellect and is guided by instinct, which, as written by Nietzsche, "shall count among our faults" that we "equalize" "people" "with animals": "we are not able to do it otherwise because this is where our new knowledge lies."⁸⁰ Moreover, according to Nietzsche, "causing the development of a herd animal" means stimulating the development of the animal of the Führer,⁸¹ which, Hitler, who had read and studied extensively, certainly referred to himself, as Joseph Goebbels writes in his *Diaries*: "We come to the deep philosophical considerations of Kant, Schopenhauer and Nietzsche. Kant is considered by the Führer to be a philosopher related to the state and nobility, Schopenhauer—a kind of nihilist, who is highly valued, and Nietzsche—the philosopher who is as close as possible to our whole world of thoughts and feelings. He is not quite modern, but he is close to modernity. The Führer thinks what Nietzsche prepared, Rosenberg would have to complete."⁸²

According to the Nazi legal theory, our feelings, not our reason, is a reason for the law: "The idea of justice is determined by the legal feeling of the nation"

⁷⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. ⁴²1933, p. 195.

⁷⁹ *Ibidem*, p. 429.

⁸⁰ F. NIETZSCHE, *Jenseits von Gut und Böse*, in: F. NIETZSCHE, *Werke in drei Bänden*, hrsg. v. K. SCHLECHTA, vol. II, München: Carl Hanser Verlag ⁹1981, p. 659; cf. D. GASMAN, *The Scientific Origins of National Socialism. Social Darwinism in Ernst Haeckel and the German Monist League*, London/New York: American Elsevier Inc 1971.

⁸¹ F. NIETZSCHE, *Aus dem Nachlass der Achtzigerjahre*, in: IDEM, *Werke in drei Bänden*, hrsg. v. K. SCHLECHTA, vol. III, München: Carl Hanser Verlag ⁹1982, p. 451.

⁸² *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941–1945*, vol. 7: *Januar–März 1943*, oprac. E. FRÖHLICH, München: K.G. Saur 1993, 23 January 1943, p. 181.

and “the feeling of the safety of law,” which the legal order guarantees all members⁸³ of the nation, and not every citizen of the state, as it is in the case of the classically understood law.

How is the concept of freedom conceived here? “Individual freedom” leads to “individualism.”⁸⁴ The “Führer” is “a compound of all authorities that can be thought”: the authority of the state, legislation, administration and judiciary,” but having their source in the Nazi “nation and movement” because “the community position of the Führer and concentration of all power in him” determine “his essence.” Therefore, according to Höhn, the allegation that “the foreign-language literature tries to explain the legal and public position of the Führer of the Third Reich using the concept of the dictatorship”⁸⁵ was unfounded. This is confirmed by Gerstenhauer who writes that the state of the Führer can be governed in an ‘authoritarian’⁸⁶ way. “Freedom [...] shall be determined in the socialist-national order of law according to the accuracy of the whole nation and the state,⁸⁷ namely the position of a member of the family, community, or profession”⁸⁸ etc. Dietrich clearly says that individual freedom is not something given to man by nature. The awareness of the community and his responsibility towards the community in which he was born, is given to

⁸³ O. KOELLREUTTER, *Der nationalsozialistische Rechtsstaat*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 16, Berlin: Industrieverlag Späth & Linde 1936, p. 3.

⁸⁴ R. HÖHN, *Frankreichs Demokratie und ihr geistiger Zusammenbruch*, Darmstadt: L.C. Wittich Verlag 1940, pp. 24–25.

⁸⁵ IDEM, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 23; J.M. BENEYTO, *Apokalypse der Moderne. Die Diktaturtheorie von Donoso Cortes*. Klett-Cotta, Stuttgart 1988; J.D. CORTÉS, *Über die Diktatur. Drei Reden aus den Jahren 1849/50*, hrsg., aus dem Spanischen übertragen und kommentiert von Günter MASCHKE, Wien: Karolinger Verlag 1996; W. NIPPEL, P. LANDAU, *Rechtsphilosophie unter der Diktatur. Drei Beispiele deutschen Rechtsdenkens während des Zweiten Weltkriegs*, Baden-Baden 2002, in: H-Soz-u-Kult 18.09.2002; B. RÜTHERS, *Überlebende und überlebte Vergangenheiten. Zwei Starjuristen einer Diktatur unter sich*, “Zs. Myops. Berichte aus der Welt des Rechts,” fasc. 4, 2008, pp. 67–75.

⁸⁶ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 22.

⁸⁷ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 66.

⁸⁸ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 52.

him by nature. The individualistic concept of freedom, however, requires the individual to be released from the obligation towards the community.”⁸⁹ In the light of the above, it is clear that National Socialism as materialism means impetuosity and emotionality founded upon the human sensual sphere by the terms: “freedom” and “will.” In this sense, the so-called Nazi voluntarism can be interpreted, which is expressed in the thesis: The law and the state are, in essence, the *will*,”⁹⁰ This gives rise to a philosopher of law Julius Binder’s definition of law as “the objectification of the will of the community.”⁹¹ And Karl Larenz states that “the law does not originate [...] from the will of the individual, but the will of the general public.”⁹² In the materialistic Nazism, the law-act is not derived from the spiritual reason, nor from the spiritual free will of the legislator, but from the sensual instinct and the same corporeality. Therefore, National Socialism significantly differs from the conception of man as a person, entire nations and true legal and moral finality as *bonum commune*. What is the human conscience according to this ideology? Is there such thing as a human conscience at all?

IV.3. Meanders of the human conscience inside and outside the Third German Reich

The German-Soviet Nonaggression Pact, a pact with the Soviet Union, where Christianity was forbidden, seemed permissible to Hitler,⁹³ which is interestingly commented by the Israeli diplomat Yehiel Iksar. This introduces the problem of conscience which plays an important role here. What does the conscience mean

⁸⁹ O. DIETRICH, *Die philosophischen Grundlagen des Nationalsozialismus. Ein Ruf zu den Waffen deutschen Geistes*, Breslau: Ferdinand Hirt 1935, p. 29.

⁹⁰ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 21; H. KRÜGER, *Einheit und Freiheit, Die Strukturprobleme der Verfassungstypologie*, Hamburg: Hanseatische Verlagsanstalt 1944.

⁹¹ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 965.

⁹² K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 6.

⁹³ I. YEHIEL, *Religiöse Sprache und Antisemitismus auf Hitlers Weg zur Macht*, “Freiburger Rundbrief. Zeitschrift für christlich-jüdische Begegnung” 13. Jg, fasc. 3 (2006), pp. 186–187.

to the Führer? In his conversation with Hermann Rauschning of Danzig, Hitler states: "Conscience is a Jewish invention. [...] Every act is full of meaning. On the contrary, any passivity, or unwittingness is meaningless, as they are the enemies of life. Thus, the Divine law exists so as to destroy what is unwitting. One can not trust the spirit and the conscience, and must have confidence in their instincts,"⁹⁴ which corresponds with the statements of the Führer's book *Mein Kampf*, that "the spirit" is "the animal instinct."

Gerstenhauer's argumentation is similar, although seemingly more theological. Nevertheless, it should be noted that, according to him, the concept of "god" is a product of the development of the German race: "The conscience is a voice of god in man. 'God in us,' and 'a spark' of the mystics [...] are essentially the same. [...] Morality is, however, only where there is the commandment of god, guilt, duty, distinguishing good from evil, always in relation to god, and where it is a matter of improving human will and action. God's commandment is here; this is the 'inner voice,' the voice of a god that requires man to reject human imperfection, avoid what is less valuable, vicious, inferior, or evil, and choose what is superior, better, good."⁹⁵ All of this "is 'immanent' to man, that is to say, it is in the human nature. Thus, man is different from animals and the human soul is related to god. Rationalist 'morality without god' does not correspond to the German Nordic essence. God is the primary reason for morality"⁹⁶ However, the racist "god" stems from the German blood. He is not objectively true God, since the immanence of the world is his cause. Rauschenberger is ecstatic at "the idea of love of truth, honesty, justice, fortitude, self-control, fulfillment of the obligation as "the stars guiding his conduct,"⁹⁷ but all these concepts of the Nazi authors, although they are in a syntactic symbiosis with the classically understood natural law, are not such in their content. Hence, the true conscience is obliged towards "the truth: about itself, and about the world, or God." Thus, the "conscience is the voice of reason." It is

⁹⁴ H. RAUSCHNING, *Gespräche mit Hitler*, Zürich/New York: Europa Verlag 1940, p. 210 f.

⁹⁵ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 67.

⁹⁶ Ibidem, p. 68; cf. H. SCHWARZ, *Gottestum im Volkstum*, Verlag H. Beher 1928; H. PORTMANN, *Kardinal von Galen. Ein Gottesmann seiner Zeit*, Münster Westf.: Verlag Aschendorff¹³1974.

⁹⁷ RAUSCHENBERGER, in: M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 68.

a judgment about “what I am supposed to do currently, which corresponds to the truth about the good.”⁹⁸

Extremely profound dramaturgy of manipulating the human conscience is reflected in the jurisprudence of Nazism, especially in the case of exercising power as a judge. Who is a judge in the light of the socialist-national ontology? A judge has to follow the ideology of the German Reich he has chosen by saying: “I am only a part of the whole, I serve”⁹⁹ In the then Germany, attempts have been made “to direct the criminal law towards the absolutized ideal of the socialist-national state.”¹⁰⁰ On the other hand, there was a fundamental mistrust because the judiciary was created double: of the state and of the party: “The judiciary of the party is independent of the state judiciary. Given the unity of the party and the state, it is probably self-evident” because both “the law of the party and the law of the state originate from one source.” Therefore, “the contradiction” is in fact impossible. The different interpretations of the same facts” are another thing, although, in general, the “lawful judgments should be binding for both sides,”¹⁰¹ which, unfortunately, occurred very rarely.

What is the ultimate ontic justification for the judge? “The judge’s position is derived from the supreme power of the Führer”¹⁰² and, therefore, according to Hans Frank, the judge shall have no right to control the terms of the decision of the Führer which take the form of a law or regulation.”¹⁰³ Theodor Maunz says that “securing the independence of the judge” in the law of the Reich is almost “superfluous,” or even “harmful” because it would undermine the absolute authority of “the Führer.”¹⁰⁴ The judge is not an individual subject of the state power, who has to impose the order of legal coercion on members

⁹⁸ A. SZOSTEK, *Pogadanki z etyki 1992/1993*, in: Biblioteka “Niedzieli,” vol. 1, Częstochowa 1998, pp. 137–138.

⁹⁹ J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 139.

¹⁰⁰ L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 925.

¹⁰¹ W. SOMMER, *Die NSDAP als Verwaltungsträger*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 173.

¹⁰² H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 173.

¹⁰³ H. FRANK, in: H. SCHORN, *Der Richter im Dritten Reich. Geschichte und Dokumente*, Frankfurt a.M.: V. Klostermann 1959, p. 79.

¹⁰⁴ Th. MAUNZ, *Die Staatsaufsicht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 50.

of the nation, or general visions of values on individuals by logical knowledge,” but he as a judge is “the personality of the community,” that is only the said “part,” and not the substance, and as such “is to preserve the life of the community itself.”¹⁰⁵ “The Nazi judge” is “bound” only by the “ideological grounds” as an “*obvious condition* of being a judge and, it results in *the special position of the judge in the nation*.”¹⁰⁶ In 1934, Heinrich Henkel asked whether “National Socialism would preserve the independence of the courts” and the “independence of judges,” as the “firm foundation” of “the rule of law,” which was guaranteed by Article 102 of the Weimar Constitution. And he answers, that on one hand, “the independence of the judiciary remains a mechanism, but as such is only a form for new contents, namely for the Nazi conception of the law and the state,” an outcome that brings about something “essentially new.”¹⁰⁷ In 1936, Roland Freisler calls on the Nazi judges: “Do not be, as judges. proud of your formal independence, but be proud of the fact that your personality is rooted in your nation as a whole.” He asks professors of law who educate and bring up new judges, to promote “the independence of the judge” in the area in which the judge “is bound by the will of executives, and is allowed to fulfill a significant task in this parade of the nation.”¹⁰⁸ This made the Nazi judge completely dependent on the will of the state-Führer. His “freedom got lost in the orders of executives”¹⁰⁹ because they were founded upon “the program and ideology of National Socialism.”¹¹⁰ This means that the judges had to “interpret and apply the law” in “our spirit,” as written by Freisler, which is “the spirit of National Socialism.”¹¹¹

¹⁰⁵ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 15.

¹⁰⁶ *Ibidem*, p. 16.

¹⁰⁷ H. HENKEL, *Die Unabhängigkeit des Richters in ihrem neuen Sinngehalt*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 8.

¹⁰⁸ R. FREISLER, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg 1964, p. 145.

¹⁰⁹ I. STAFF, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg 1964, p. 145.

¹¹⁰ H. SCHORN, *Der Richter im Dritten Reich. Geschichte und Dokumente*, Frankfurt a.M.: V. Klostermann 1959, p. 76.

¹¹¹ R. FREISLER, *Die Stellung des Richters zur kriminellen Erbschaft der Novemberrepublik*, “Deutsche Justiz” 1934, p. 302.

According to Henkel, the liberal state concerns the “individual freedom,” and, as a result, the “freedom and independence of the judge,” which is “a means”¹¹² to an end that is the individual freedom. The Nazi judge’s sentence is not based on “finding and acquiring the law. It is determined by “the spiritual, political and remaining content of the whole,” that is, by “general,” “national awareness of the law,” and not by an objective fact, which should be judged in the light of the objective law because the judge remains in “the inner relationship”¹¹³ with the Nazi community which completely redefines the concept of “self-reliance” and turns it into “self-reliance in the relationship.”¹¹⁴ Hence, his attitude can not rely on the right “reason,” which National Socialism does not take into account, or “the nature of things.”¹¹⁵ It must remain in the service of the national idea” or “the protection of life of the nation,” which is the Nazi state of the Führer,¹¹⁶ giving “laws the form” that, according to the judge, is “a binding rule of values” in determining “his sentences” because “the political value” can not be separated from “the legal value.”¹¹⁷ Moreover, on the basis of “Nazism,” the judge shall give “effective support to the will of executives,”¹¹⁸ namely to the Führer. “Objectively,” the judge should keep only the Nazi “idea of law,” and no other references, for example, there can be no objective human rights or economy, but it shall take into account only the Nazi principles of economic governance.”¹¹⁹ Only “a free commitment of the judges to governance of the state is a guarantee of the interpretation of law that is bound to both the national legal awareness, and the unity of the state law.”¹²⁰ According to Schwinge, legal “positivism” is “absolutely” binding through the created law. This means that “the judge is also bound by the immoral laws,”¹²¹ which is contrary to the well-conceived unity, but also to the separateness of the orders

¹¹² H. HENKEL, *Die Unabhängigkeit des Richters in ihrem neuen Sinngehalt*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 12.

¹¹³ *Ibidem*, p. 17.

¹¹⁴ *Ibidem*, p. 18.

¹¹⁵ *Ibidem*, p. 20.

¹¹⁶ *Ibidem*, p. 21.

¹¹⁷ *Ibidem*, p. 22.

¹¹⁸ *Ibidem*, p. 31.

¹¹⁹ *Ibidem*, pp. 32–33.

¹²⁰ *Ibidem*, p. 34.

¹²¹ E. SCHWINGE, *Der Methodenstreit in der heutigen Rechtswissenschaft*, Bonn: Ludwig Röhrscheid Verlag 1930, p. 23.

of law and morality, and consequently leads to “the legal threat in the nation” and the relativized “judiciary” and “judicial office.”¹²² In order to achieve this goal, “case law in the Nazi sense” allows for each measure, including the violation of law.¹²³ Larenz writes: “The judge is obliged to accept and apply any act as the law that takes effect by the will of the Führer. Nevertheless, he has to use them in the spirit of the Führer, adequately to the contemporary will of law, and the specific idea of community law,¹²⁴ which was probably shared by the vast majority of the judges who “felt obliged to National Socialism. It was a group of fanatical followers of the socialist-national ideology who did not want to serve the implementation of law, but political terror, and, in fact, they did. There were also those who “were guided by their conscience in their activities and regarded defending the law as their primary judicial duty, with the brave and right attitude.” They “maintained their independence” at the cost of “any risks for themselves and their families” and refused to be subdued by the terrorist methods of the socialist-national regime causing the decay of law. They were obedient to “the supreme law of each legal system” and made it “the maxim of their life,” to “obey God rather than men.” There was also a group of judges characterized simply by “the human misery.”¹²⁵ The socialistic-national media played a very negative role in relation to the judges: “Schwarzes Korps,” “Stürmer” or the “SA-Mann” that “intimidated judges with the attacks almost every day” while not avoiding humiliation of the respect of a single judge.” To refuse them meant “heroism in the truest sense of the word.”¹²⁶ The judges of Jewish origin were especially persecuted. Some of them “were transported to the concentration camps” and “died”¹²⁷ there. The Nazi legislation regarded the racist origins of the judge as a *conditio sine qua non* of the essence of his mission. Bechert called the judge “a founder and creator of the law” who as such must be a member of the nation and race, and thus must be bound with

¹²² Ibidem, p. 25.

¹²³ I. STAFF, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg 1964, p. 51.

¹²⁴ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 36.

¹²⁵ H. SCHORN, *Der Richter im Dritten Reich. Geschichte und Dokumente*, Frankfurt a.M.: V. Klostermann 1959, pp. 4–5.

¹²⁶ Ibidem, pp. 82–83.

¹²⁷ Ibidem, p. 85; cf. Ch. DÜRR, *Jenseits der Disziplin. Eine Analyse der Machtordnung in nationalsozialistischen Konzentrationslagern*, Wien 2003.

the legal belief of the nation through his blood.” Only then he can fulfill “the important moral task of the judge”¹²⁸ and apply the Nazi law.

In Nazism, conflicts of conscience arise everywhere. It is due to shifting the semantics of both the reality of cosmos, and the language. Here, one example is the concept of “murder”—“killing”: “The term ‘murder’ emphasizes the feeling more forcefully than the term ‘killing.’ That is why the latter is suitable for designating a concept free from values in the scientific language,”¹²⁹ and yet the legislation of the Reich clearly defined the murder and imposed the sanction the “death”¹³⁰ penalty on the perpetrator of the crime, if committed “intentionally” and “thoughtfully.”

In 1920, there was a proposal of the legislation of the Reich in which the person who witnessed a crime or “knew something about it,”¹³¹ was obliged to inform the relevant authorities and those who were in danger. It resulted in the common practices of euthanasia and mass killing of the mentally ill in the Reich, not to mention more than 50 million victims of the German socialistic-national terror, that were crimes in the light of the applicable laws of the Third Reich.¹³² The then Bishop Clemens August Graf von Galen spoke publicly against them and called the ideology of killing the innocent “a cruel science that intends to justify the murder of innocents which essentially allows the brutal killing of those who are no longer able to work (invalids, cripples, terminally ill, old people)”¹³³ despite a written assurance from Hans Frank that

¹²⁸ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 32.

¹²⁹ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 87.

¹³⁰ RStGB § 211: “Whoever intentionally kills another person is guilty of murder.” Over the period 1937–1945, 5243 people were executed. Cf. H. ORTNER, *Der Hinrichter. Roland Freisler-Mörder im Dienste Hitlers*, Wien: Zsolnay 1993, p. 337.

¹³¹ RStGB § 139: “Whosoever fails to report an offence [...] shall be punished.”

¹³² Cf. F. SCHAFFSTEIN, *Das Verbrechen als Pflichtverletzung*, in: G. DAHM, E.R. HUBER, K. LARENZ, K. MICHAELIS, F. SCHAFFSTEIN, W. SIEBERT (Hg.): *Grundfragen der neuen Rechtswissenschaft*, Berlin, Junker und Dünnhaupt Verlag, 1935, pp. 108–142.

¹³³ C.A. VON GALEN, *Predigt in der Lambertikirche zu Münster am 3. 8. 1941*, in: H. PORTMANN, *Kardinal von Galen. Ein Gottesmann seiner Zeit*, Münster Westf.: Verlag Aschendorff 1974, p. 355; cf. I. MÜLLER, *Furchtbare Juristen. Eine unbewältigte Vergangenheit unserer Justiz*, München: Kindler-Verlag 1987, p. 135: “In August 1942, the action was officially completed, after more than 70 000 people had been murdered. This informally cultivated ‘wild euthanasia’ was given another 100 000 people. The experienced ‘euthanasia staff’ dealt with the later mass crimes and concentration camps in Poland.”

“the criminal law of the Reich represents courageously the authority of law” and would not turn into the absolute authority of prosecutorial power,” “criminal violence,” “the giant of law made of condemnation, completely devoid of defense.”¹³⁴ It was feared that in case of the attack on the bishop von Galen,¹³⁵ the *Lion of Münster*, during the trial “the state secret may be passed on by the information about euthanasia.” On the other hand, the possibility of transporting the bishop to “the concentration camp,”¹³⁶ or even, according to Tießler, sentencing him to death [...] by hanging,¹³⁷ has been considered. However, it was important to avoid confrontation with the Catholic Church during the war. Therefore, the Führer announced on 4 July 1942, that after the war the final dealing with the bishop von Galen will take place.¹³⁸ In his *Diaries*, Joseph Goebbels wrote about this issue in the context of the distribution of the Bishop’s forged letter: “The falsified pastoral letter from the Bishop Galen of Münster is distributed anonymously on leaflets. In this pastoral letter, the bishop calls allegedly to sabotage and lay down the arms. I shall do nothing against this forgery but give priority to this episcopal traitor of the country. The more people believe that the letter is genuine, the better for us because that Church fanatic has been rightly discredited and will no longer be respected.”¹³⁹ As we know, Bishop von Galen survived the war, became the Cardinal of the Church and still remains a true national hero of Germany.

Cf. D. MAJER, “Fremdvölkische” im Dritten Reich. Ein Beitrag zur nationalsozialistischen Rechtssetzung und Rechtspraxis in Verwaltung und Justiz unter besonderer Berücksichtigung der eingegliederten Ostgebiete und des Generalgouvernements, Boppard a.R.: Oldenbourg Verlag 1993, p. 184 and E. KOGON, H. LANGBEIN, A. RÜCKERL, *Nationalsozialistische Massentötung durch Giftgas. Eine Dokumentation*, Frankfurt a.M. 1983, p. 57 f.; T. PIETRZYKOWSKI, *Etyczne problemy prawa. Zarys wykładu*, Katowice: Naukowa Oficyna Wydawnicza 2005, pp. 180–181.

¹³⁴ H. FRANK, “Zeitschrift der Akademie für Deutsches Recht,” fasc. 2, 1941, p. 25.

¹³⁵ G. LEWY, *Die katholische Kirche und das Dritte Reich*, München: Piper Verlag 1965, p. 92; cf. L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 521.

¹³⁶ A note of ORegR by dr. Gasta of the Reich’s Propaganda Ministry on 27 October 1941, in: L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 521.

¹³⁷ TIEßLER, in: H. PORTMANN, *Kardinal von Galen. Ein Gottesmann seiner Zeit*, Münster Westf.: Verlag Aschendorff¹³1974, p. 191.

¹³⁸ Cf. H. PICKER, *Hitlers Tischgespräche im Führerhauptquartier 1941–1942*, Bonn 1951, p. 374.

¹³⁹ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941–1945*, vol. 2: *Oktober–Dezember 1941*, oprac. E. FRÖHLICH, München: K.G. Saur 1996, p. 328.

It is worth mentioning yet another, a third sphere of struggle of conscience in the Third Reich: “According to Beling, a soldier fighting in the war realized simply a fact of killing that is free from values because the realization of the fact is not illegal. There is no question of guilt, and thus question of whether it is “murder, fatal blow or careless killing”¹⁴⁰—“involuntary lawlessness”—that is so “often” in “the criminal law system.”¹⁴¹ Karl Larenz thinks that “murder and theft are not abstract concepts,” that would “involve all the people,” as “the natural law” says. According to him, “they receive their determination only by each particular order,” or are arbitrary in essence. However, when separated from such a specific order they are deprived of any content determination,” which means they become semantically “empty,” or “formal.”¹⁴² The same is true also for such concepts as “freedom, justice, equity, common good.”¹⁴³ This means that the Decalogue and the classically understood natural law become completely revitalized, which was the cause of breaking many millions of human consciences during the reign of the dictatorship.

IV.4. Is there *adaequatio* between *dignitas humana* and the socialist-national law and state?

These issues are resolved at the very systemic foundation of each mental stream. Therefore, Nazism clarifies its ideological position in this regard, especially in relation to socialism, communism and liberal capitalism: according to Julius Binder, “Socialism as Marxism, social democracy and communism” and “economic” and “political” liberalism or “Moloch capitalism” are “wrong” because, on one hand, “the true national state” can not be an undifferentiated mass of political atoms” in the socialist-communist sense, and, on the other hand, there can be no consent to the capitalist-liberalist “enslavement

¹⁴⁰ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 86.

¹⁴¹ *Ibidem*, p. 86.

¹⁴² K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 153.

¹⁴³ *Ibidem*, p. 153; cf. E. WOLF, *Richtiges Recht im nationalsozialistischen Staate*, Freiburg i.Br. 1934; K. ANRATH, *Die richtige Gestaltung des Strafverfahrens des Dienstverfahrens und des Ehrengerichtsverfahrens entwickelt aus dem Wesen des menschlichen Denkens*, 1934.

of man, in general, not only of worker.”¹⁴⁴ Nazism expresses it in the ideological name of German socialism’ or ‘National Socialism,’ which, in contrast to Marxism, is genuine socialism.”¹⁴⁵ What does it mean for the above question of the systemic relation to the inviolable dignity of the human person?

Friedrich Nietzsche says very consistently: if according to “socialism” “everyone is equal, we no longer need ‘law.’”¹⁴⁶ The same legal belief is expressed by National Socialism. This relativization of the “absolute rights” of the human person in the Nazi legislation, which for Larenz are the so-called ‘absolute rights,’¹⁴⁷ is indeed a fact. If the human “subject” followed a very long path from lower to “higher development,” namely from “subconsciousness” to self-awareness of the “subject” by fighting other animals,¹⁴⁸ he has no rights.

The German Nazis note that “the principle of equality” is not implemented in France before the war because of “the deep division into two [social] classes,”¹⁴⁹ the rich and the poor. For this reason, the Nazis simulate a change in the direction of “racial thinking”¹⁵⁰: “National Socialism means a shift away from the liberal principle of equality of all people, and from the subsequent theory of the majority ability to shape the environment.”¹⁵¹ According to the

¹⁴⁴ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, pp. 26–29.

¹⁴⁵ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 36; cf. H. ROTTLEUTHNER (Hrsg.), *Recht, Rechtsphilosophie und Nationalsozialismus. Vorträge aus der Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie in der BRD vom 11. und 12. Oktober 1982 in Berlin*, Wiesbaden: Steiner Verlag 1983; J.D. CORTÉS, *Essay über den Katholizismus, den Liberalismus und den Sozialismus*, herausgegeben und übersetzt von Günter Maschke, Weinheim 1989. (The original title: *Ensayo sobre el catholicismo, el liberalismo y el socialismo*); P. ALTER, *Nationalsozialismus*, Frankfurt/M. ²1993.

¹⁴⁶ F. NIETZSCHE, *Jenseits von Gut und Böse*, in: F. NIETZSCHE, *Werke in drei Bänden*, hrsg. v. K. SCHLECHTA, vol. II, München: Carl Hanser Verlag ⁹1981, p. 660.

¹⁴⁷ Cf. K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937, pp. 104–105.

¹⁴⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. ⁴²1933, pp. 494–495.

¹⁴⁹ R. HÖHN, *Frankreichs Demokratie und ihr geistiger Zusammenbruch*, Darmstadt: L.C. Wittich Verlag 1940, p. 26.

¹⁵⁰ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C. H. Beck'sche Verlagsbuchhandlung 1936, p. 13.

¹⁵¹ *Ibidem*, p. 3.

Nazi theoretician Reinhard Höhn, “the majority rule, once a proud formula of the democratic revolution, the new god to whom it has to pay respects after the old gods have been dethroned,” is subject to “the prevalence of despair” “in its validity” and now is considered the most dangerous democratic principle,¹⁵² and “the abyss of corruption.”¹⁵³ “In the legal system of National Socialism, the equal measure” is understood only by the criteria of the Nazi state as “a whole constituted by the nation and the state”¹⁵⁴ of the Third Reich. This dooms it to failure because, as Joseph Barthélemy believes, “any system of government dies, if there is no elite.”¹⁵⁵ Do the socialist movements—also in their Nazi form—not seek to have their own elites? Braunias fights the accusation: “Bolshevism denies the value of its own nation, Fascism merges the nation with the state, the German freedom movement subordinates the state to the aims of the nation and puts the emphasis on what is racial. The common feature of these three currents is to deny the absolute individual freedom and equality, and to endeavor to form an elite,”¹⁵⁶ which, according to Nazism, is the socialist-national party headed by the Führer whose subject of activity is not the protection of human dignity in the individual and social dimension, but the implementation of the Nazi ideology in the material and formal aspect. The existence of the so-called hierarchy of “states” in the Third Reich confirms this thesis: “the state of peasants, the state of industrial workers, the state of teachers, the state of lawyers, the state of doctors etc.” are “unity in diversity,” headed by “the NSDAP as an appropriate sphere of executive, the state of warriors and conquerors.”¹⁵⁷ In Germany, “the socialist-national movement introduced a new concept of lawyer,” whose task, according to Carl Schmitt, is “to eliminate and overcome the current positivist split between law and

¹⁵² R. HÖHN, *Frankreichs Demokratie und ihr geistiger Zusammenbruch*, Darmstadt: L. C. Wittich Verlag 1940, p. 22.

¹⁵³ *Ibidem*, p. 24.

¹⁵⁴ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 66.

¹⁵⁵ J. BARTHÉLEMY, *La crise de la démocratie contemporaine*, Paris 1931, p. 141.

¹⁵⁶ K. BRAUNIAS, *Nationalgedanke und Staatsgestaltung im 19. und 20. Jahrhundert. Akademische Antrittsvorlesung*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 106, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 47.

¹⁵⁷ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 31.

economy, law and society, law and politics. Every German member whose work is focused on application or further education of the German law in public life, the state, the economy, or local government, and who is rooted in the German life of law, should belong to the new state construct of German lawyer.”¹⁵⁸ For this reason, the National Socialist League of German Jurists and the Academy for German Law, founded in 1933, the president of which was Hans Frank, were established within the Reich. The so-called “elites” of the Nazi state were actually called to destroy the dignity of man as a person, or even the dignity of the German nation, which is possible through conscious and systematic rejection of the classical doctrine of natural law that is based on the human person and assigns the law to the human person. How does it work for the Nazi legislation? Karl Larenz rejects the classically understood natural law, also in the sense of materialism of the Franco-German Enlightenment, idealism and positivism because “the idea of law does not mean an abstract norm that is equally important to all times and nations, but the awareness of the value of [the Aryan] community”¹⁵⁹ as the exclusive legal norm because “the existence of law never belongs to a single individual as such, but to the community.” In this concept, the law is “*the existing form of life* of the community which is not imposed on the community from the outside, but experienced by the community that keeps manifesting itself in it”¹⁶⁰ because the “law” is not merely a “regulation.” It is the real order of life of the nation.” Hence, the German nation has “a measure and an act of conduct” in “itself.”¹⁶¹ For this reason, “all positive law must come from these foundations and comply with them in order

¹⁵⁸ C. SCHMITT, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 65.

¹⁵⁹ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 18; cf. A. WEGNER, *Stammler Rechtsphilosophie und die Überlieferung der christlichen Völkergemeinschaft*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/ 36), pp. 320–336; K. WOJTYŁA, *Person: Subjekt und Gemeinschaft*, in: K. WOJTYŁA, A. SZOSTEK, T. STYCZEŃ, *Der Streit um den Menschen. Personaler Anspruch des Sittlichen*, Kevelaer: Verlag Butzon & Bercker 1979, pp. 11–68.

¹⁶⁰ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 19.

¹⁶¹ IDEM, *Über Gegenstand und Methode des völkischen Rechtsdenkens*, Berlin: Junker und Dünhaupt Verlag 1938, p. 27.

to be truly law,¹⁶² namely to exist outside “the natural law and positivism,”¹⁶³ as Karl Larenz believes. Why? According to Larenz, both legal concepts are “abstractions” and do not take into account “the national and historical individuality of law and justice”¹⁶⁴ in the Nazi sense.

How does Nazism deal with identifying the main issues of civil law, for example, of marriage and family law, where the issue of human dignity is resolved? The perfect indissolubility of marriage appears to me as “immoral and repulsive.” The marriage must divorce if its continuation is immoral. In the view of Julius Binder, this means that the marriage “leads to the annihilation of personality,” instead of “improving it.”¹⁶⁵ The Nazi ideal is not love as the deepest relationship between two persons, which is a matter of concern for the just legal system of the state in order to guarantee the personal dignity. Gerstenhauer believes that National Socialism is not based “on love. The relation of followers to the Führer is built upon honor,”¹⁶⁶ Therefore, if “honor” of one of the spouses was hurt, it is sufficient to marriage (or family) annulment, which is contrary to the natural law concept of marriage as an indissoluble relationship, if it has been validly and lawfully concluded.

Similarly, fundamental relativisation is made “in family law” of the German Reich, where “the idea of community, and not the idea of formal gender equality, is relevant; it assigns each spouse and each member of the family his specific tasks, rights and obligations” and views “the marriage and the family” to be “*the basic units of the national community.*” The latter determines “their value” depending on their position in “the national community” which must also take into account “the socio-political and hygienic-national aspects”¹⁶⁷ of family law. What is the full instrumentation of family, being only “a part” of the functionally understood racial community? Julius Binder emphasizes “the

¹⁶² Ibidem, pp. 27–28.

¹⁶³ IDEM, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag ²1935, p. 150.

¹⁶⁴ IDEM, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag ²1935, p. 151.

¹⁶⁵ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 461.

¹⁶⁶ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 138.

¹⁶⁷ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, pp. 40–41.

essence of the community as over-individual unity which implies multiplicity and retains it in itself, so that an individual is not annihilated in the community, but on the contrary, he is acknowledged and improved,” however, only in the sense of accidents of the Reich, and not of substance. “From this position, a driving force of nature, which is focused on coexistence and transmission of life, gains its significance and moral justification because the personality of its individualization transcends itself, so that the driving force is justified to bring an individual to perfection and preserve his personality and thereby to put him at the service of the objective of reason” which Nazism has reduced to “instinct,” so it is an articulation of the same drive. “Then, the marriage is a conscious and free” implementation of this objective of reason by man—also in the Nazi sense: as the affirmation of driving force as driving force—through the justification for the perfect community of life of both genders becoming a family. The marriage is therefore one of the main terms used in the law, which are grounded in the very idea of law, and in one of the important elements of law, namely the idea of personality” as a “member of the German nation.” “Herein lies the problem” that the community of genders and transmission of life are only one side of the community of marriage—its primitive base, which admittedly does not need to be overcome, but should be completed and improved, and that the driving force to the community of genders and transmission of life is the lowest level in the development of what creates a sense of the marriage community. The love of genders, at which the driving force of nature is aimed, means a lot more than a simple need for sexual intercourse [...]. This means the drive pursuit for the permanent community, the permanent spiritual sacrifice and unity, that is the most perfect communion of life.” This practically “justifies the driving force. The objective of the community is achieved even if the drive to sexual intercourse declines,”¹⁶⁸ which is a kind of the Nazi law attempt to the self-transcendence of family as an accidental drive that is ultimately impossible to realize because the being-drive does not have such a real potency of existence to be able to transcend itself. This requires the transcendent personal spirit and the human soul to create a sacramental *communio personarum* of man and woman¹⁶⁹ as appropriate to the dignity of their humanity. National Socialism does not the

¹⁶⁸ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 456.

¹⁶⁹ I.E. KOROTIN, “Am Muttergeist soll die Welt genesen“. *Philosophische Dispositionen zum Frauenbild im Nationalsozialismus*, Wien: Böhlau Verlag 1992.

concepts of spirit and soul, therefore achieving a level of existence typical of people is impossible, which is manifested by the understanding of property.

Nazism breaks with the classical understanding of property law as assigned to the rights of the human person, derived from the ontic dignity: “Both the abstract concept of person and the abstract concept of thing lose their importance: the relation between the thing and the tasks of the community is crucial for the legal interactions with other things.”¹⁷⁰ In 1925, Julius Binder wrote that the essence of property “should be all that is left to dispose freely by a legal entity in the legal order.” It is obvious that the entity was “the idea of a person.”¹⁷¹ “All property as a way of developing the fundamental idea of our national order”¹⁷² must be understood nationalistically. This means that all the property is not individual and general, but only “general.” It is the property of the nation, similarly to the man himself as an individual. This “relationship between property and the national agenda puts an obligation on the forefront” in order to “use the property in the sense of community,”¹⁷³ which is a violation of the order of property according to the inviolable dignity of the human person.

It follows that the concept of “expropriation law” must be renewed, the center of which is a community of race because “the Führer himself” considered property [...] as rooted in the national community of national,¹⁷⁴ and belonging to the national community, which Hitler had already announced in his party program of April 13, 1928, although, according to Erich Schwinge of Bonn, the classic concept of property as “a historical concept”¹⁷⁵ was in force. Thus, if the plan of expropriation is incorporated in “the plan and the will of the Führer,”¹⁷⁶

¹⁷⁰ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 40.

¹⁷¹ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 473; cf. E. WOLF, *Das Rechtsideal des nationalsozialistischen Staates*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXVIII (1934/35), pp. 348–363.

¹⁷² K. LARENZ, *Über Gegenstand und Methode des völkischen Rechtsdenkens*, Berlin: Junker und Dünnhaupt Verlag 1938, p. 51.

¹⁷³ Th. MAUNZ, *Die Enteignung im Wandel der Staatsauffassung*, Freiburg i.Br.: Fr. Wagner-sche Universitätsbuchhandlung 1939, p. 19.

¹⁷⁴ *Ibidem*, p. 15.

¹⁷⁵ E. SCHWINGE, *Teleologische Begriffsbildung im Strafrecht. Ein Beitrag zur strafrechtlichen Methodenlehre*, Bonn: Ludwig Röhrscheid Verlag 1930, p. 11.

¹⁷⁶ Th. MAUNZ, *Die Enteignung im Wandel der Staatsauffassung*, Freiburg i.Br.: Fr. Wagner-sche Universitätsbuchhandlung 1939, p. 17.

a member of the race community has no objection to that, or even considers it as significant because “the plan and the will of the Führer manifest themselves regularly in the circle of the state law in the form of legislation.”¹⁷⁷ In this way, “the socialist-national concept of expropriation law” “freed from the rigid forms of the classical concept of expropriation law of the peaceful bourgeois-public-legal” era and its message could be expressed in the words of the the head of the German Reich lawyers: “Arise, comrades, in the faith and power of our eternal Germany.”¹⁷⁸ Tießler of the Ministry of the Reich Ministry of Propaganda made a note of a meeting of Hitler and Goebbels, who mentioned Hitler’s words about the upcoming reform of property: “The Führer announced when providing great social projects, that after the war, all property of the Churches would belong to the German nation”¹⁷⁹ in such a way that the property, which belongs to a German family as the foundation of life in one part of the land, must be sacred and inviolable” due to “the holiness of the land.”¹⁸⁰ “In a more superior sense, all the land belongs to the nation”¹⁸¹ and not to a particular family or the Church, which, if wanting to exist in the Third Reich, must belong completely to the Nazi whole as its part. Forsthoff, and some others Nazi theorists of German law have changed their stance on the inviolability of “the substantial content of property,”¹⁸² but it was only after World War II because such legal solution corresponds to the person’s dignity and the dignity of marriage and family.

According to a professor of law at the University of Breslau Heinrich Lange, “the right to inheritance must [...] correspond with the sound ideology.” This means that “the supreme value must be given to the nationality” and this

¹⁷⁷ Ibidem, p. 18.

¹⁷⁸ Ibidem, p. 26.

¹⁷⁹ TIEßLER, in: H. PORTMANN, *Kardinal von Galen. Ein Gottesmann seiner Zeit*, Münster Westf.: Verlag Aschendorff ¹³1974, p. 192.

¹⁸⁰ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. 1: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. 1, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 30.

¹⁸¹ Ibidem, p. 31.

¹⁸² E. FORSTHOFF, *Lehrbuch des Verwaltungsrechts*, vol. 1: *Allgemeiner Teil*, München: C.H. Beck’sche Verlagsbuchhandlung ¹⁰1973, p. 340; cf. W. SCHMIDT *Das Eigentum auf den ältesten Stufen der Menschheit*, vol. 1–3, Münster: Aschendorff 1937–1942; G. MAUZ, *Ernst Forsthoff und andere...*, in: K. CORINO (Hg.): *Intellektuelle im Bann des Nationalsozialismus*. Hamburg: Hoffmann und Campe 1980, pp. 193–203.

national garment should be imposed on “the new law of succession”¹⁸³ in the socialist-national sense. Lange says that “the state destroyed the great family and took its place” and therefore “the foreground of the legal thinking is the entire community of people”—also in terms of “property and wealth,” the acquisition and maintenance of which is protected”¹⁸⁴ by the national community mentioned above. The Nazi concept does not protect the property of family in the personal sense and in accordance with the inherent dignity of persons in the family. In the light of the classical concept of natural law, the family has the right to the spiritual or material goods and can keep them as the family legacy.

“The idea of justice” as the result of law in the personal sense “leads, according to Henkel’s individualistic concept of legal certainty,” to the individualization of law at the expense of overlooking the act,”¹⁸⁵ the reason, essence and purpose of which is the good of a race as something general, and which, by its collectivist nature, can not “care” for the individual members as agents with personal dignity. The implementation of law because of justice is an evidence of respect for human dignity in a legislative system, which does not occur in Nazism.

Another condition of respect for human dignity is to stick to the agreement between natural or legal persons. What the relation between Nazism and the agreement? Larenz considers the agreement first as “a process” that leads to “the agreement,” as well as “the contractual relationship” based on “the application,” or any “relationship of life of the participating members of law. ‘The natural order’ of the small must be introduced to the better organized order of the whole nation in order to exist. Also, the content of the specific agreement will not belong directly to ‘the national order.’”¹⁸⁶ However, “the agreement

¹⁸³ H. LANGE, *Die Ordnung der gesetzlichen Erfolge. 2. Denkschrift des Erbrechtsausschusses der Akademie für Deutsches Recht*, Tübingen: J.C.B. Mohr (Paul Siebeck) 1938, p. 17.

¹⁸⁴ *Ibidem*, pp. 56–57.

¹⁸⁵ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 63; cf. H. BARTH, *Rechtssicherheit und Gerechtigkeit*, in: National-Sozialistischer Rechtswahrer-Bund (Hrsg.), *Deutscher Juristentag 1936*, Berlin 1936, pp. 137–148; H. WELZEL, *Naturrecht und materiale Gerechtigkeit*, Göttingen 1962; F. WITTECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008.

¹⁸⁶ K. LARENZ, *Vertrag und Unrecht*, Teil 1: *Vertrag und Vertragsbruch*, Hamburg: Hanseatische Verlagsanstalt 1936, p. 23; cf. K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937.

considered as a means of shaping the legal process, is important. It is not as a relationship between two people.” It has to be seen in its function within the order of the nation. Therefore, it has to be regarded as the realization of the tasks of the community.” First of all, Larenz intended to “avoid separation between the agreement as a process that belonged to ‘the real world’ or facts, and the contractual relationship as a legal relationship that belonged ‘only to the conceived real world,’ which Larenz regarded as one of the most dangerous consequences of normativism, existential conflict and obligation. “The conclusion of the agreement, its implementation and development of the contractual relationship belong much more to the same reality of life of the community and must be included in the unity of their consequences and relationships.”¹⁸⁷ Karl Larenz treats “breach of contract” as “a violation of law, of an obligation of agreement, or an obligation of law, namely a way of conduct which strikes not only at the other members of the agreement, but also the order of the community”¹⁸⁸ This means that Nazism is obviously against the “breach of contract,” but only because of violation of the collectivist order and collectivist good, and not because of violation of the dignity of the other natural person or in another sense, the dignity of the legal person, which is not provided neither by the concept of Nazi law, nor by the notion of Nazi contract.

Analogous rules apply in the case of the broadly understood socialist-national administrative law: “In Nazism, the principle of the adequacy of administration to law is quite differently interpreted, as it is not about the compatibility of individual legal acts with the applicable law, but “the will of the Führer.” Hence, administrative law is not “a clarified command” but “a state of clarification. The rules of law are derived from it—but not *vice versa*—because they are formed by the Führer of the nation.”¹⁸⁹ Theodor Maunz believes that “the concept of administration” is generally “linked to time and nation,” and in the case of the Third Reich, it is “the German concept linked to contemporaneity”¹⁹⁰ for which the division of power can no longer be the basis.”¹⁹¹ By definition, it can be said that “administration regarded as activity is

¹⁸⁷ K. LARENZ, *Vertrag und Unrecht*, Teil 1: *Vertrag und Vertragsbruch*, Hamburg: Hanseatische Verlagsanstalt 1936, pp. 11–12.

¹⁸⁸ *Ibidem*, p. 166.

¹⁸⁹ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 39; J. DANCKWERTS, *Die Verwaltungsgerichtsbarkeit*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, pp. 99–120.

¹⁹⁰ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 15.

¹⁹¹ *Ibidem*, p. 15.

the shaping of social life by the work of the appointed authorities and offices, according to a plan of the Führer of the community, in the tangible position. Administration as organizing is precisely an expansion of offices in a particular community.¹⁹² In the context of the socialist-national concept of administration, it should be emphasized that it is created “with the orders of the communities, into which the nation is divided, and the orders which have no community character,” differently from the classic understanding of administration “as a relationship of the person of the state, as a public authority, to its subsidiaries.”¹⁹³ It is interesting to note that after World War II, the Nazi legal theoretician Ernst Forsthoff understood the significance, or even the necessity of respecting “the demands” of “natural rights” in the broader administrative law.¹⁹⁴

IV.5. The issue of man’s duty or restraint from activity

Georg Dahm rejects the classical ontic unity and diversity of “Sein and Sollen.” Instead, he introduces the aforementioned structure of racial life in which “normativity and existentiality”¹⁹⁵ are mutually interdependent and overlap each other in the sense of racist legal and moral monism. Höhn believes this is necessary to overcome the duality of “idea of justice and positive law” because the law is an expression of the order of the community.” This means that law is absolutely identical with morality, and therefore “justice is not beyond the realm of law.” In a more detailed way, “the German theory of law is on the concept of race,” which, according to the Nazi ideology, is “the reality of every unity of ideal and life.” Here, “*the sharp distinction between law and morality*”¹⁹⁶

¹⁹² Ibidem, p. 11.

¹⁹³ Ibidem, p. 19.

¹⁹⁴ E. FORSTHOFF, *Lehrbuch des Verwaltungsrechts*, vol. 1: *Allgemeiner Teil*, München: C.H. Beck’sche Verlagsbuchhandlung 1973, p. 221; cf. F. MEINEL, *Der Jurist in der industriellen Gesellschaft: Ernst Forsthoff und seine Zeit*, Berlin: Akademie-Verlag 2011, 2. Aufl. 2012; H. WELZEL, *Naturrecht und Rechtspositivismus*, in: W. MAIHOFER (Hrsg.), *Naturrecht oder Rechtspositivismus?*, Darmstadt: Wissenschaftliche Buchgesellschaft 1962, pp. 322–338.

¹⁹⁵ Cf. G. DAHM, *Verbrechen und Tatbestand*, in: G. DAHM, E.R. HUBER, K. LARENZ, K. MICHAELIS, F. SCHAFFSTEIN, W. SIEBERT (Hrsg.), *Grundfragen der neuen Rechtswissenschaft*, Berlin: Junker und Dünnhaupt Verlag 1935, pp. 62–107.

¹⁹⁶ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 13.

disappears. Alfred Rosenberg interprets it to mean that "law and lawlessness are not self-evident but law is what Aryan people recognize as law and lawlessness is what they reject."¹⁹⁷

However, Rudolf Stammler claims, and rightly so, that in every moral theory and religious consideration there is a significant request to teach and to feel what is right,¹⁹⁸ which is unfounded in the Nazi legal theory, since there is no absolute right and thus there is no criterion for what is right. Moreover, there is no substantial difference between the man and the nation. There is another difference—the nation is a substance, and the man is its accident. Hence there is a need to distinguish law from morality that is a substantialized way of existence of substantial personality, similar to the nation. Rudolf Bechert stresses that the equivalence of "law and morality" which are existentially "the same" comes from the essence of the Nazi law. He argues that: "What the law demands, corresponds to the conviction of law and, therefore, is moral, even if it is not the act"¹⁹⁹ because in the self-awareness of the Nazi theory of law, "we see that no law can exist if the ethical basis for the Germanic-German ideology and the criterion of legislation, and the life of law are not guaranteed."²⁰⁰

Theodor Maunz very precisely captures the socialist-national "spirit" of the Third Reich on the issue of the relationship between the law and the act in the context of the analysis of the nature of administrative law. As appropriately conceived, it would mean the affirmation of the natural law order, but is this really the case? "The rule of law of administration starts from the entirely new concept of the act. The act is a formed plan of the Führer, and thus an expression of the national order of life. The formed plan of the Führer is the supreme order of law. It would be completely erroneous today to compare the act and the law and regard only the 'idea of law' as decisive, and the act as one of many guidelines for what the law is. To consider the law and the act of the same national community as opposites, in which the judge is to decide according to his individual conscience, what is and what is not the legitimate right, is

¹⁹⁷ A. ROSENBERG, *Gestaltung und Idee*, 21936, p. 227.

¹⁹⁸ R. STAMMLER, *Die Lehre von dem richtigen Rechte*, Berlin: J. Guttentag Verlagsbuchhandlung 1902, p. 30.

¹⁹⁹ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 21.

²⁰⁰ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. 31934, p. 32.

as individualistic as identifying the state law with law as law, at which a decision on the legitimate right is offered to the legislator. The opposition between the law and the act can not exist in the community of the German people” because it would undermine the dialectical identity of the people of the German race. “The Law and the act emerge from the national community of life. Only the way of self-education and the form of learning are different for the unformed national law and the formed act. The formed act reveals the will of the Führer because the Führer is called to know, announce and execute the law before all others. It is the act that is a decision which content is national law, against which there can be no appeal to the authority of a further instance,”²⁰¹ as the Führer and thus the law are the most perfect “incarnation” of being, in general, to the socialist-national consciousness. The act and morality are one thing, namely “Sein und Sollen” achieve the peak of their united existence, which should result in the same good of thoughts and deeds. In fact, it is difficult to understand and imagine a greater discrepancy in one man than it was in the case of Hitler who was capable of the extreme bestiality of history. Does Nazism have the tools to disqualify the internal legal and moral contradiction of human acts and attitudes?

The solutions to this issue are strongly conflicting in the ideology of Nazism that represents racist decisionism²⁰² and moral and legal situationism: “The distinction between facts and conflict with the law” is “of a technical nature” and therefore it should not be overestimated. On the contrary, what is called the “*distinctive thinking*,”²⁰³ for example, distinguishing between “law and ethics,”²⁰⁴ should be evaluated negatively, for which, according to Schwinge and Zimmerl, philosophers of law unfairly opt, including the Nazi philosophers of Kiel, Dahm and Schaffstein,²⁰⁵ with a return to “thinking-in-itself,”²⁰⁶ that is thinking about

²⁰¹ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 40.

²⁰² H. ROTTLEUTHNER, *Substantieller Dezisionismus. Zur Funktion der Rechtsphilosophie im Nationalsozialismus*, in: H. ROTTLEUTHNER (Hrsg.), *Recht, Rechtsphilosophie und Nationalsozialismus. Vorträge aus der Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie in der BRD vom 11. und 12. Oktober 1982 in Berlin*, Wiesbaden: Steiner Verlag 1983, p. 20 f.

²⁰³ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 85.

²⁰⁴ *Ibidem*, p. 84.

²⁰⁵ Cf. J. ECKERT, *Was war die “Kieler Schule“*, in: F.J. SÄCKER (Hrsg.), *Recht und Rechtslehre im Nationalsozialismus*. Baden-Baden: Nomos-Verlag 1992, pp. 37–70; IDEM, *Die juristische Fakultät im Nationalsozialismus*, in: H.W. PRAHL (Hrsg.), *Uni-Formierung*

the essence of being, namely a legal fact, which is a shift to the classical metaphysics of substantial entity that bears responsibility for the quality of its actions. According to Karl Larenz, “a way of conduct contradicts the law, if it does not comply with its sense and purpose that are objectively determined in accordance with the demands of the community. It is culpable, if it is sufficient for the agent to become guilty because of his subjective approach. Moreover, the attitude of the mentally ill and insane may be regarded as objectively contradictory to the law,” These persons belong to the community. They are subjects, not objects, by their general nature. Therefore, “their attitude might be judged according to their objective character, similar to other persons.”²⁰⁷ This means that the system on the basis of relativity of good and evil, completely playfully judges the other, even, for example, the mentally ill. For classical ethics, they are considered to be innocent, even if they committed objectively evil acts because they are not aware of the evil, nor are they free in their acts because of being determined by the disease, which, according to its progress, is an adequate reason of justification. Rudolf Stammler calls for it when he says that “all positive law is an attempt to be a legitimate law” because “the purpose of an objective analysis of the science and art” is “the legitimate cognition”²⁰⁸ considered as realistically possible.

Not: “you should,” but “I will.”²⁰⁹ according to the law, the calling into the public service can not be carried out through a bottom-up choice, but only a top-down nomination. “A statement” of consent of the nominee is not always required, but only when “the Führer and the Reich Chancellor nominates the head of the district to the district governor. His nomination is valid even without the statement of consent. Why? “Because the relationship of fidelity of the political head of the party community takes place of such a statement. The same flows from the community of defense and loyalty to the Führer and Chancellor of the Reich as the supreme commander of the defense forces,”²¹⁰

des Geistes. Universität Kiel im Nationalsozialismus, Kiel: Malik Regional Verlag 1995, pp. 51–86; K.-D. ERDMANN, *Professoren unter Hitler—Dargestellt am Beispiel der Universität Kiel*, FAZ, 16.06.1965, p. 15 f.

²⁰⁶ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 83.

²⁰⁷ K. LARENZ, *Vertrag und Unrecht*, Teil 2: *Die Haftung für Schaden und Bereicherung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 19.

²⁰⁸ R. STAMMLER, *Die Lehre von dem richtigen Rechte*, Berlin: J. Guttentag Verlagsbuchhandlung 1902, p. 31.

²⁰⁹ J. BINDER, *Philosophie des Rechts*, Berlin: Verlag von Georg Stilke 1925, p. 749.

²¹⁰ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, pp. 274–275.

namely the Führer alone decides about the subjectivity of such an official. “The municipality must not stand in political opposition to the Nazi state. It has to fully comply with its objectives.”²¹¹ Therefore the representation of the municipality is not directly elected by people, but it is proposed by the local representative of the NSDAP. This does not mean abandoning the principle of self-government. NSDAP is a representation of the municipal nation. Hence, it is a natural consequence that it proposes the municipal councilors,²¹² what could be called a “deformation,”²¹³ or more gently the “socialist-national additives,”²¹⁴ as written by Ernst Forsthoff in the 70s of the twentieth century. “Local government in the legal sense” considered as “apolitical” is a “mistake”²¹⁵ because its essence is to represent the Nazi state in all its activities, in the formal and material aspect.

Similarly, the center of an administrative procedure is not a man as man. Therefore, the judiciary is not to protect the individual against the state,” but to “maintain and strengthen the community of the nation,”²¹⁶ which is related to “the concept of legal certainty” as an “important part of the general part of the legal order,”²¹⁷ which in the socialist-national state is guided by “its own correctness of the whole of the nation and the state.”²¹⁸

The distinction between the public law and the private law²¹⁹ that Ulpian understood as *ius publicum* and *ius privatum*, according to Ernst Svoboda, is “too sharp and, as such, “is not contrary not only to the old Germanic idea of the

²¹¹ IDEM, *Die Staatsaufsicht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 72.

²¹² Ibidem, pp. 72–73.

²¹³ E. FORSTHOFF, *Lehrbuch des Verwaltungsrechts*, vol. I: *Allgemeiner Teil*, München: C.H. Beck'sche Verlagsbuchhandlung ¹⁰1973, p. 579, 586.

²¹⁴ Ibidem, p. 528.

²¹⁵ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 131.

²¹⁶ Ibidem, pp. 204–205.

²¹⁷ H. HENKEL, *Strafrichter und Gesetz im neuen Staat*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 56.

²¹⁸ Ibidem, p. 66.

²¹⁹ Cf. H. KRÜGER, *Volksgemeinschaft statt subjektiver Rechte*, “Deutsche Verwaltung” 12 (1935), pp. 37–41; K. LARENZ, *Rechtsperson und Subjektives Recht – zur Wandlung der Rechtsgrundbegriffe*, in: G. DAHM, E.R. HUBER, K. LARENZ, K. MICHAELIS, F. SCHAFFSTEIN, W. SIEBERT (Hrsg.), *Grundfragen der neuen Rechtswissenschaft*, Berlin: Junker und Dünhaupt Verlag 1935, pp. 225–258; Th. MAUNZ, *Das Ende des subjektiven öffentlichen Rechts*, ZgS 96 (1936), p. 71 f.

‘unity of law,’” but also to “our modern thinking, in which ‘the nation and all the strict communities and unions’ form what is “general,” namely a “large whole,”²²⁰ which is the exclusive and acting Nazi legal entity.”²²¹ This results in the negation of private law in the legislation of the Third Reich, in which the very foundation is the negation of a person. In 1936, Roland Freisler, the Secretary of the Reich and Doctor of Laws, said: “There is no private life outside the realm of public obligations, or outside the national community; who humiliates the race of the German people is the enemy that we must destroy.”²²² Therefore, Roland Freisler proposed the renewal of civil law. In 1937, Franz Schlegelberger of the University of Heidelberg demanded the renewal of law of the *Bürgerlichen Gesetzbuch*,” on behalf of the Führer. This means to essentially “rework the BGB including the deletion of its general part regarded as “a dumping ground for the bloodless concepts,”²²³ namely those which do not correspond with the socialist-national Act of “Blood and Soil,” and not, as proposed by Gürtner, to keep “a large amount of legal norms, which have been tested in this area for decades in the past, unaffected.”²²⁴ It is all done in order to fit the whole law of the Reich to its ideological “shift from individualism to the idea of community” as an essential purpose of the renewal.”²²⁵ And, although after the annexation of Austria, Hans Frank announced, the creation of the “*Volksgesetzbuch der Deutschen*” in place of the BGB, the outbreak of World War II prevented from doing so, and changes were made by the individual acts or regulations.”²²⁶

²²⁰ E. SWOBODA, *Die aktuellen Tendenzen im öffentlichen Recht und im Privatrecht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, pp. 91–92.

²²¹ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag ²1935, p. 148.

²²² R. FREISLER, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg 1964, p. 11.

²²³ F. SCHLEGELBERGER, *Abschied vom BGB. Vortrag, gehalten in der Universität Heidelberg am 25. Januar 1937*, Berlin 1937, in: L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, pp. 928–929.

²²⁴ See Bericht Neues Recht in der Bayerischen Staatszeitung of 28 October 1933.

²²⁵ F. SCHLEGELBERGER, *Abschied vom BGB. Vortrag, gehalten in der Universität Heidelberg am 25. Januar 1937*, Berlin 1937, in: L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 929.

²²⁶ Cf. L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, pp. 928–930.

“The public law of the socialist-national state” is strictly determined by *the Führer principle* because the Führer’s “personality embodies the will of the whole,” in which, namely in the Führer, the “individual is eliminated,” while “the Führer [...] is not obedient to the norm, oriented at him, but to the principle of community life, which was gained by his flesh and blood. His will is one of the community, as a private man in him was completely destroyed and he does not want anything but a common interest. He shall bear all the liabilities because the community is the liveliest reality,”²²⁷ namely the absolute, for him and through him. Therefore, according to Huber of the “Kieler Schule,” the new concepts of the supreme law replace the classically understood “public law and private law” by their total submission to “the Führer-versus-his-followers order” and “the cooperative and national law” as a “side order.”²²⁸ According to Theodor Maunz, “the socialist-national German state can not maintain the separation of the community sphere and the individual sphere, and the opposition between these two spheres.” Therefore the so-called “subjective public rights”²²⁹ as the rights “derived [...] from the sphere of individual freedom”²³⁰ of the human person in the administrative law of the Third Reich have become obsolete, along with the displacement of individualistic thinking by community thinking,²³¹ whereas “the essentially new subjective public rights” appeared, in the sense of membership position of the community personality.” The issue is to locate each as a part of the whole, or as “a member of the nation” in “the national community.” Even if there was such a division between people: a “particular” man as a natural “person” and “the state as a legal person,”²³² there would be the division within the socialist-national state in the sense of “subordinate-versus-public authority,” and thus, according to Nazism, an opposite of “division” between “the whole-the state and individual member-

²²⁷ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 44.

²²⁸ Cf. E.R. HUBER, *Neue Grundbegriffe des hoheitlichen Rechts*, in: G. DAHM, E.R. HUBER, K. LARENZ, K. MICHAELIS, F. SCHAFFSTEIN, W. SIEBERT (Hrsg.), *Grundfragen der neuen Rechtswissenschaft*, Berlin: Junker und Dünnhaupt Verlag 1935, pp. 143–188.

²²⁹ Th. MAUNZ, *Neue Grundlagen des Verwaltungsrechts*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 29.

²³⁰ IDEM, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 48.

²³¹ IDEM, *Neue Grundlagen des Verwaltungsrechts*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 28.

²³² Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 51.

free individual,” but such a case can not occur in the socialist-national state” because there can be no individual rights, nor sub-communities towards the political Führer. This would completely oppose to a specific legal construct called the ‘Führer’” which “is not an entity similar to other political sub-commanders or governors.”²³³ The socialist-national “administrative law” completely “excludes” “the sphere of the protection of individual freedom”²³⁴ from its area. In the administrative law of the Reich, “the political Führer” is “a central legal construct” and nothing “can hinder” his actions in the process of the absolutely independent “implementation of law”²³⁵ as law. Hence, it is not surprising when Maunz states that “the forming of the fair and efficient administrative law is less important than the victory of the new legal and administrative thinking in general.”²³⁶

“The connection between the law and the nation as a uniform and racially own being, rather than with the individual,” or from a communistic point of view, with the “society” is the “governing principle of law.”²³⁷ Therefore, “if the entity has been central point of the currently conscious will, the national community becomes the principle of maintenance of the theory of law. Krick rightly says that this novelty, to which philosophy of law has to lead, is a shift to the active shaping of law.”²³⁸ According Norpoth, in Nazism, “an individual is not entitled to the subjective rights towards the state, but on the contrary, his ‘legal position’ is derived from the role that he plays in the state, administration, or family. ‘A member of the nation’ receives his legal position through the state. He is not regarded as an indivisible individual, but in the perspective of the state: as a subject of different roles. He becomes consequently the subject of the ‘legal position.’”²³⁹ It clearly formulated by Ernst R. Huber who states that, “similarly to other areas of law, the national legal position is not only the

²³³ IDEM, *Neue Grundlagen des Verwaltungsrechts*, Hamburg: Hanseatische Verlagsanstalt 1934, pp. 30–31.

²³⁴ Ibidem, p. 48.

²³⁵ Ibidem, p. 55.

²³⁶ Ibidem, p. 60.

²³⁷ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag 1935, p. 130.

²³⁸ H.-H. DIETZE, (review) Krieck, Ernst, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 497.

²³⁹ M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, dysertacja, Hamburg: LIT 1998, p. 271.

'legal attitude' within the public administration, namely the opposite of rights and obligations between the two bodies of law. The new administrative law broke with this notion, from which the subjective public law arose."²⁴⁰ According to Heinz Kummer, this happened because "the starting point" of the Nazi "scheme of the law" was "the opposition between public law and private law," which was adopted "*a priori*."²⁴¹ Kummer agrees that "the separation between public and private law" is "a political struggle of the opposing orders of life, the state and society"²⁴² because "in the socialist-national state, any law is the law of the community" and is related to the national community" which "lives"²⁴³ according to it. Therefore, the "law of the community" can be identified with the "law of the member of the nation" that binds or entitles him"²⁴⁴ because he is existentially the same as the nation and the state as their ontic "part." Bechert believes that the identification of public law and private law "in the socialist state" is "the unification" of these laws in "a uniform community law,"²⁴⁵ which would negate theoretically and practically the objective individual rights of the human beings as the substantial legal persons. However, from the position of the Nazi "primitive type" as "an individual," he appears as "a racially determined member of the community" and, therefore, the existence of "private law"²⁴⁶ irretrievably loses its meaning. What's more, Walz says, paradoxically, that the need of "reification" of "private law," including "family law" and "personal law," is a "process" of more "personal determination"²⁴⁷ and guidance of the legislation.

In the theory of law of the Reich, "there is no longer [...] any difference between stronger and weaker norms, between constitutional law and decrees, between private and public law"²⁴⁸ simply because "the norm of the state" as the state is

²⁴⁰ E.R. HUBER, *Die volksgenössische Rechtsstellung in der Verwaltung*, "Zeitschrift der Akademie für Deutsches Recht", 4. Jg. (1937), p. 324.

²⁴¹ H. KUMMER, *Öffentliches und privates Recht in der politischen Grundordnung*, "Zeitschrift für die gesamte Staatswissenschaft", vol. 104 (1944), p. 29.

²⁴² *Ibidem*, p. 38.

²⁴³ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 43.

²⁴⁴ *Ibidem*, p. 44.

²⁴⁵ *Ibidem*.

²⁴⁶ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 34.

²⁴⁷ *Ibidem*, p. 35.

²⁴⁸ J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985, p. 390.

the superior human norm.”²⁴⁹ Such a model act for the totalitarian Nazi law is the *Law to Remedy the Distress of People and Reich* of March 24, 1933,²⁵⁰ (originally: *Ermächtigungsgesetz*)²⁵¹ that makes “the Parliament a tool in the hands of government”²⁵² and becomes, in fact, “the interim constitution of the German revolution”²⁵³ or “the first ‘constitution’ of the Third Reich”²⁵⁴ which considers “the legislative dimension of the Weimar Constitution as worthless,” using the method of “terror” and “lies,”²⁵⁵ which, in consequence, is “a turning of Hitler’s presidential cabinet into the regime of dictatorship.”²⁵⁶ The Führer says: “We, the national socialists, never maintained that we represented the democratic position, but we clarified that we used the democratic measured only in order to gain power, and that after assuming power we would refuse our enemies all those measures which were granted to us during the opposition...”²⁵⁷ Hitler

²⁴⁹ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 133.

²⁵⁰ *Gesetz zur Behebung der Not von Volk und Reich*, RGBl. I S. 144.

²⁵¹ Cf. J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985, pp. 265–403.

²⁵² E. SOMMERMANN, *Der Reichsstatthalter*, Erlangen: Verlag von Palm & Enke 1933, p. 16.

²⁵³ C. SCHMITT, *Das Reichsstatthaltergesetz*, Berlin: Carl Lehmanns Verlag 1933, p. 8; cf. W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 7: “Das Gesetz zur Behebung der Not von Volk und Reich vom 24. März 1933 is a basis for further development. This is the first new constitution for the breakthrough. The so-called ‘Ermächtigungsgesetz’ marks the end of the virtually experienced and no longer usable forms of the parliamentary system. It removes practically irresponsible parliamentarism out of the Reich and puts the responsible management of the Chancellor and the government headed by him, in its place.”

²⁵⁴ I. STAFF, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg 1964, p. 51.

²⁵⁵ *Ibidem*, p. 51.

²⁵⁶ J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985, p. 266; cf. completely different understanding of dictatorship in the thought of J.D. CORTÉS, *Über die Diktatur. Drei Reden aus den Jahren 1849/50*, hrsg., aus dem Spanischen übertragen und kommentiert von Günter MASCHKE, Wien: Karolinger Verlag 1996.

²⁵⁷ A. Hitlers Rede am 14. Dezember 1930 in München, in: H.W. KOCH, *Volksgerichtshof. Politische Justiz im 3. Reich*, München: Universitas Verlag 1988, p. 69.

adds: “For us, Parliament is not an end in itself but a means to an end. In principle, we are not a parliamentary party because we would contradict our whole concept. However, we are forced to be a parliamentary party, and, what compels us to apply such measures, is the Constitution”²⁵⁸ because its very “nucleus”²⁵⁹ has become the so-called “Führer Principle.”²⁶⁰

In 1933, Carl Schmitt wrote that “the Weimar Constitution could not be a basis for the socialist-national state in the content-material way, nor in its formal power of constitutional law. The Weimar Constitution was no longer valid. All the rules and regulations that were ideologically and organizationally relevant to the constitution, were repealed with all its conditions”²⁶¹ by the Act of 24 March 24 1933²⁶² and the Act of 14 July 1933.²⁶³ According to Carl Schmitt, we should avoid talking about the aforementioned Act “Ermächtigungsgesetz” as, in

²⁵⁸ A. HITLER, “Völkischer Beobachter,” 12.11.1930, pp. 1–2; H. NICOLAI, *Grundlagen der kommenden Verfassung. Über den staatsrechtlichen Aufbau des Dritten Reiches*, Berlin: Verlag R. Hobbing 1933; O. KOELLREUTTER, *Volk und Staat in der Verfassungskrise*, Junker und Dünnhaupt: Berlin 1933; H. KRÜGER, *Der Aufbau der Führerverfassung*, “Deutsches Recht: Zentralorgan des Bundes National-Sozialistischer Deutscher Juristen”, Berlin 5.Jg (1935); R. HÖHN, *Verfassungskampf und Heereseid. Der Kampf des Bürgertums und das Heer (1815–1850)*, Leipzig: S. Hirzel Verlag 1938; H.H. DIETZE, *Rechtsgestalt der Hitlerjugend. Eine verfassungsrechtliche Studie*, Berlin 1939; E.R. HUBER, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg 1939; H.H. DIETZE, *Vom deutschen Verfassungsrecht zum europäischen Verfassungsrecht*, “Deutsches Recht” (A) 1941, pp. 801–813; C. SCHMITT, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Berlin: Duncker & Humblot 1958; E. FORTSHOFF, *Deutsche Verfassungsgeschichte der Neuzeit*, Berlin: Junker und Dünnhaupt 1940; Stuttgart/Berlin: Kohlhammer 1972; U. STOROST, *Staat und Verfassung bei Ernst Forsthoff*. Frankfurt am Main: Peter Lang Verlag 1978; J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985; E.H. HUBER, *Deutsche Verfassungsgeschichte seit 1789*, 8 Bände, Stuttgart: Kohlhammer Verlag 1957–1991; M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, Dissertation, Hamburg: LIT 1998.

²⁵⁹ E.R. HUBER, *Die Gestalt des Deutschen Sozialismus*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 35.

²⁶⁰ M.-T. NORPOTH, *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*, dysertacja, Hamburg: LIT 1998, p. 192.

²⁶¹ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 5.

²⁶² RGBl. I S. 175.

²⁶³ RGBl. I S. 479.

fact, “the ‘authorizing act’ became a new constitution of the new Germany,” which was caused by the election of 5 March 1933 “when the German people recognized Adolf Hitler, the Führer of the socialist-national movement, as the Führer of the German nation.”²⁶⁴ In 1932, Carl Schmitt wrote, and rightly so, that “if the concept of law is deprived of any content connection with our reason and justice and, at the same time, the state establishing the law will be maintained, with its specific concept of legality, concentrating all authority and dignity of the state in the law, any regulation or step, any order given to an officer or soldier, and any individual reference to the judge may be taken legally under ‘the rule of law’ and by the legal resolution of the Parliament or of other instances participating in the legislative process. What is ‘purely formal,’ is reduced to empty words and the same label of ‘law’ and loses its connection with the rule of law,”²⁶⁵ the status that is reserved for the socialist-national system of the Third Reich. The Nazi legislation of the Reich takes place of the conception of man as a person, and even of the German people. Therefore, it deprives them of their natural subjectivity, which contradicts the “natural law.”

Conclusions

The socialist-national law of the Third Reich is determined “*a priori*” and called the “German racial law” which is derived from the “political and legal request” of the NSDAP and which is the other side of the materialistically understood “legislation of nature.” The reason for this concept of law of the “socialist-national revolution” is not our reason nor free will, transcendent towards the legislator of the Reich, but the “animal instinct” or racial German “fantasy,” and therefore our reason and free will that objectively exist in every human, can not be the ultimate “norm and measure of human conduct.” This is manifested in the Nazi negation of personal rights of man as “the existence and good of the German people give the ultimate content criterion for the problem of law and lawlessness.” The “German nation” is conceived as a “mass” or a “herd,” which means it is understood as non-personal collective of the Nordic race, the “spirit” and the “peak” of development of which is the figure of the “Führer” as

²⁶⁴ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 7.

²⁶⁵ IDEM, *Legalität und Legitimität (1932)*, in: IDEM, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Berlin: Duncker & Humblot 1958, p. 278.

the most perfect embodiment of the racial and state-legal entity in the German “Führerstaat,” both at the level of civil and criminal law because the socialist-national party, and above all its “most perfect” incarnation—the “Führer,” in self-awareness of the socialist-national German Reich, is “a compound of all thinkable powers: the state, legislative, administrative and judicial power.” However, because of the depersonalization of human as a person it is deprived of human rights, and as merely a “part” of the race, or “the German nation” it has commitments to the “racial” community.

V. FINALITY OF THE EXISTENCE OF LAW: NOT *BONUM COMMUNE*,
BUT GOOD AND EVIL AS THE GOAL OF LAW
IN “FÜHRERSTAAT”?

The value of our existence concerns finally its purposefulness which, according to Aristotle, is the most important reason for being as being. What was the *causa finalis* of the classical theory of law, and what is it according to the Nazi interpretation of the theory of law? Let us begin our analysis with recalling the metaphysical-Christian understanding of legal finality.

V.1. *Bonum commune* as the classic causa to realize the concept
of entity of law

In the *Nicomachean Ethics*, Aristotle wrote that “the laws primarily regulate, what is advantageous for life as a whole” in the “national community” on its way to “happiness.”¹ St. Thomas Aquinas defined the “law” in terms of its finality, “as a road that leads to happiness,” and this is the “*bonum commune*.”² The concrete good of every human person as an individual, of all human persons in general, and, in its deepest dimension, of the Divine Persons, belongs to the very essence of the *bonum commune*.

Also in the old legal culture of the German legislation, there were the so-called “general clauses,” namely “fidelity and faith, the common good, public safety and order,”³ which summarized the final character of German law to a large extent, until in the German Reich, the National Socialists headed by

¹ ARISTOTELES, *Nikomachische Ethik*, in: IDEM, *Philosophische Schriften*, vol. 3, übers. v. E. ROLFES, bearb. v. G. BIEN, Darmstadt: Wissenschaftliche Buchgesellschaft 1995, 1129 b.

² *S.Th.*, I–II, 90, 2.

³ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 38

Adolf Hitler gained power, which was probably the most perfectly expressed by the “Deutsche Bundes-Akte” of 8 June 1815, starting with the words: “in the name of the Holy an Indivisible Trinity.”⁴

v.2. “The German race” as the goal in itself

In his *Mein Kampf*, the Führer defines the purposefulness of the Nazi state and “puts the race in the center of general life. It is to take care of the racial purity.”⁵ Hitler understands the law in a similar way. Its aim is to ensure the existential “safety” of members of the Nordic race. Helmut Nicolai adds that “the role of law is to keep a pure race, to protect pure raciality, and, simultaneously, to keep the sense of law, the legal conscience, and thus the source of law” because “according

⁴ www.verfassungen.de: “Die 39 deutsche Staaten auf dem Wiener Kongress beschlossen einen staatenbündischen Zusammenschluss, den Deutschen Bund, der nach dem Beitritt weiterer Staaten aus 41 Mitgliedern bestand. Seine Gründung geht wesentlich auf die Initiative des österreichischen Kanzlers Clemens Lothar Fürst von Metternich zurück. Das Territorium des Bundes umfasste nur die ursprünglich zum Deutschen Reich gehörenden Gebiete, so dass der größere Teil Österreichs und die drei östlichen Provinzen Preußens nicht Bestandteil des Bundes waren. Dagegen waren der König von Dänemark als Herzog von Holstein, der König der Niederlande als Großherzog von Luxemburg und seit 1839 als Herzog von Limburg und bis 1837 der König von Großbritannien als König von Hannover am Bunde beteiligt. Die Deutsche Bundesakte, ein völkerrechtlicher Vertrag, war die ‚Verfassung‘ des Deutschen Bundes. Die territoriale Neugliederung Deutschlands und Europas wurde erst durch die Wiener Kongressakte vom 9. Juni 1815 bewirkt, die aber in ihren Artikeln 53–63 die Bundesakte enthielt. Dadurch fiel die Bundesakte unter die Garantie der Signatarmächte der Kongressakte. Durch Beschluß der Bundesversammlung vom 12. Juli 1848 wurden deren Befugnisse auf den Reichsverweser des Deutschen Reiches übertragen und die Tätigkeit der Bundesversammlung eingestellt. Die Bundesakte trat hiermit faktisch außer Kraft, wurde jedoch nach dem Scheitern der Revolution, der Ablehnung der Reichsverfassung und der Erfurter Union durch die Olmützer Punktation (Übereinkunft zwischen Österreich und Preußen) vom 29. November 1850 wieder hergestellt und die Bundesversammlung nahm ihre Tätigkeit wieder auf. Der Deutsche Bund endete mit dem preußisch-österreichischen Krieg von 1866. Durch Artikel 2 des Vorfriedens von Nikolsburg vom 26. Juli 1866 anerkannte der Kaiser von Österreich ausdrücklich die Auflösung des Bundes. Der Friedensvertrag von Prag vom 23. August 1866 bestätigte diese Auflösung in seinem Artikel 6. Die Bundesversammlung hielt am 24. August 1866 in Augsburg unter Beteiligung von 7 Bevollmächtigten seine letzte Sitzung ab.”

⁵ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 446.

to that, the law is only what serves to support life, or to support race.” In contrast, the processes of “crossbreeding of the races” “hit the natural moral foundations of law and show apparent or incorrect law, or lawlessness.”⁶

According to Rudolf Bechert, “the purpose of the state is to maintain race and nationality,”⁷ and since there is no significant ontic difference between the state and the law, the aim of the law is also to protect the German nation understood as the citizens of the Reich (Reichsbürger), not the citizens of the state (Staatsbürger). The Führer more forcefully emphasizes that according to him, “the most important task” of the state is to “support and strengthen the German race,”⁸ if Germany is a “nation of culture,” and not only the “nation of the state”⁹ because different races are allowed to exist within the structure of the Reich—but certainly only temporarily—the representatives of whom can be treated even as the “citizens of the state,” but not as the citizens of the German Reich. “In this part of the land, human culture and civilization are inseparably linked with the existence of an Aryan” and the destruction of the Aryan would be tantamount to the burial of the resources of human culture.”¹⁰

In contrast, “the highest purpose of the national state” lies in keeping and supporting the nation composed of materially and spiritually equal living beings,¹¹ to “create a better humanity,”¹² as written in Hitler’s *Mein Kampf*. “The state does not offer any purpose, but a means”¹³ for the Germanic “nation” as “an end in itself,”¹⁴ while the “content” of the state is a “race.” “The idea of the Führer arises necessarily from the idea of race. Therefore, the national state must be the state of the Führer.”¹⁵ In this context, Karl Larenz’s thesis about “philosophy of

⁶ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. ³1934, p. 33.

⁷ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 27.

⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. ⁴²1933, p. 430.

⁹ *Ibidem*, p. 429.

¹⁰ *Ibidem*, p. 421.

¹¹ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 7.

¹² A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. ⁴²1933, p. 434.

¹³ *Ibidem*, p. 431.

¹⁴ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag ²1935, p. 148.

¹⁵ W. STUCKART, H. GLOBKE, *Einführung*, in: STUCKART=GLOBKE, *Kommentare zur deutschen Rassengesetzgebung*, München/Berlin: C.H. Beck’sche Verlagsbuchhandlung 1936, p. 13.

nationality” as a condition of “philosophy of the state”¹⁶ is understandable. It is a matter of substantialization of the nation that objectively is a relational being. This is defined by, among others, Karl Larenz that in the “German” concept, “community is an independent entity determined by the natural and spiritual abilities and vital and fruitful in the process of shift of generation, *with its own tasks and objectives that are not derived from the interests of individuals.*”¹⁷ The concept of the socialist-national community is related to the concept of the “will of community,” which Larenz defines as “the will of life of the community, which is primarily focused on the existence of the community due to itself, and then noticing the interests of the individuals that belong to the community.”¹⁸ This reversal of the ontic order is not unintentional.

“The basic values of national life are not external values, but ‘properties of the essence of the necessity of life of the nation.’” This means that Nazism replaces the “*individualistic concept of legal good legal concept*” by the “socialist concept of legal good”¹⁹ as the good of the German nation because the “idea of the legal good of the nation of the Nazi state is *the idea related directly to the German national community.*”²⁰ This “*targeting the law at the community and imbibing the case-law by the spirit of National Socialism*” is the foundation of the idea of the good law, that has to be preserved, but at the same time “the individualistic attitude of the spirit” has to be removed.”²¹ Karl Larenz writes that “the highest legal good is neither freedom nor good of the person, but *the nation and the state* as the unity of will shaped by blood and soil, culture and history of the national community.”²² Hence, it is total submission of the case-law to the German national community. Rudolf Bechert explains: “According to National Socialism, the supreme criterion for application of the law is a fo-

¹⁶ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 130.

¹⁷ IDEM, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 7.

¹⁸ Ibidem, p. 7.

¹⁹ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 73.

²⁰ Ibidem, pp. 72–73.

²¹ Ibidem, pp. 64–65.

²² K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 43.

cus on the community of the nation. The socialist-national application of the law does not take into account economic issues and will of the person in his moral views, as far as this contrasts with morality embodied in the community of the nation.”²³

In 1934, Karl Larenz wrote: “The socialist-national state decided to renew and revive our law. The purpose of the renewal of the law is to close the gap between the nation and its law, and creating a law that corresponds to the moral views of our nation, as well as its needs of life, and may be named, according to its content and form, the true *German law*,”²⁴ which is to “define a new historical epoch” in the history of the world and as Nazism becomes the sole “interpreter and promoter of the living spirit of the law of his nation,”²⁵ which, can not be regarded as permanent due to its continuous variation, namely during its official bindingness as the national being, is in a process in which everything is the material for development of the same German race. For this reason, “National Socialism analyzes the state, the law, and, in particular the state constitution, not as things in themselves. According to National Socialism, they are justified with the promotion of the good of nations, even more than all forms of phenomena in the life of the nation.”²⁶ This concept of a “thing in itself” indicates a certain stability of being which is simply not present in this system, and is to be ensured permanently by the NSDAP. Therefore, in the view of contemporary German lawyer, the “separation” of “the so-called *problems of law* [...] and the political problems is unnatural and impossible to realize at many levels,”²⁷ since the party and politics are understood as beings of the form of the reality.

²³ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 31.

²⁴ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 3.

²⁵ *Ibidem*, p. 38.

²⁶ E. SOMMERMANN, *Der Reichsstatthalter*, Erlangen: Verlag von Palm & Enke 1933, p. 2.

²⁷ Th. MAUNZ, *Die Staatsaufsicht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 73.

Karl Larenz regards Hegel as a typical “political thinker”²⁸ who claimed that the third epoch had begun with the “Reformation” the “Germanic spirit of the nation,”²⁹ which undoubtedly had an impact on the appearance and shape of the political acts of the Third German Reich.³⁰ What is the Nazi finality in the political aspect?

V.3. Not strengthening the good of human personal and community unity but “securing the political unity” of the German nation

Since in the legal awareness of the Nazi theorists, “legal security” is a “political value in the national state”³¹, National Socialism makes a view that “securing the political unity belongs first to the law in the substantial sense”³² prevalent in the legal awareness of the Germans because in National Socialism, “the law is [...] continuously political by its very essence.”³³ This means that it is striving for “unity of the political nation and the political state,” while in “liberalism it reaches as far as the opposition between the non-political nation and the non-political state.”³⁴ What kind of “unity” is discussed in Nazism, if a number of human substances creates one Nordic race or German nation, or the Third Reich, or the law? Yes, we can talk about unity here, but only in the form of existential composition of substance and accidents. The latter is defined by Nazism as a particular man who is understood as a part-number. Together

²⁸ K. LARENZ, *Hegelianismus und preußische Staatsidee. Die Staatsphilosophie Joh. Ed. Erdmanns und das Hegelbild des 19. Jahrhunderts*, Hamburg: Hanseatische Verlagsanstalt 1940, p. 9.

²⁹ *Ibidem*, p. 13.

³⁰ Cf. T. GUZ, *Zum Gottesbegriff G.W.F. Hegels im Rückblick auf das Gottesverständnis Martin Luthers. Eine metaphysische Untersuchung*, in: M. BALKENOHL (Hrsg.), *MORAL-ANTHROPOLOGIE-ETHIK*, vol. 3, Frankfurt a. M.: Peter Lang GmbH. Europäischer Verlag der Wissenschaften 1998; N. FRIEDRICH, T. JÄHNICHEN (Hrsg.), *Sozialer Protestantismus im Nationalsozialismus. Diakonische und christlich-soziale Verbände unter der Herrschaft des Nationalsozialismus*, Münster 2003.

³¹ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 100.

³² C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 15.

³³ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 142.

³⁴ *Ibidem*, p. 147.

with the whole German nation and other nations of the earth, is summed up in the existence of the Reich. Such an act is not an affirmation of the good of unity as a unity, but an act of massive evil of crimes against millions of people. “Political unity” consists of three parts: “the state, the movement, and the nation,”³⁵ whereby each of these three words can be used [...] to describe political unity. Schmitt says that each of these words expresses “a particular side and a special element of the whole. Thus, the state allows to comprehend itself, in the strict sense, as a political-static part, the movement as a political-dynamic part, and the nation as a non-political part, which flourishes in the shade and protection of political decisions.”³⁶ The system of party pluralism was abolished by the Law to Safeguard the Unity of Party and State of 1 December 1933, and its place was taken by the National Socialist German Workers’ Party, which was the total politicization of the German people by the Nazi group—“inextricably”³⁷ linked to the Reich. According to Schmitt, the German nation is “different, but not separated” from the state and the movement [of the party], It is related to the state and the movement, but they are not amalgated into one entity.”³⁸ However, it can not be proven when assuming such ontology of the state and the Nazi political party because, as Carl Schmitt claims, this is one entity, having different “sides”: “of the state, of the movement, and of the nation,”³⁹ although in the Act (paragraph 3), the order is as follows: “Führer, Volk, Staat.” According to Bechert, “the act should be essentially an external form of revealing the law that reflects the legal belief”⁴⁰ of the German nation. How to avoid a conflict or “split” between the existence of the “law” and the

³⁵ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, p. 11.

³⁶ *Ibidem*, p. 12.

³⁷ Paragraph 1. (1) states that: “Nach dem Sieg der nationalsozialistischen Revolution ist die Nationalsozialistische Deutsche Arbeiterpartei die Trägerin des deutschen Staatsgedankens und mit dem Staat unlöslich verbunden. Cf. the amendments that were introduced to the Act: RGBL. I S. 529; RGBL. I S. 295; RGBL. I S. 733 and Law No 1 of the Allied Control Council of 20 September 1945 signed by: B.L. Montgomery, Feldmarschall, L. Koeltz, Armee-korps-General, V.D. Sokolovsky, General der Armee, Dwight D. Eisenhower, General der Armee.

³⁸ C. SCHMITT, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hamburg: Hanseatische Verlagsanstalt 1933, pp. 20–21.

³⁹ *Ibidem*, p. 12.

⁴⁰ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 19.

existence of the “act”? In Bechert’s opinion, one should constantly strive to ensure that “lawmaking (legislation) and application of law (case-law) was cultivated by the members of the nation,” if both the “law” and the “act” are derived from “the legal belief of the racial community. Otherwise, a “conflict”⁴¹ occurs and the so-called “Nürnberger Gesetze” is right in this conflict.

“The idea of separation of powers in the State-Führer is fully overcome, the most important principle of which” is “unity of the state power, embodied by the Führer. However, there are three basic forms of the state activity: legislation, case-law and administration.”⁴² The case-law of the Reich proved that “the legislation, administration and judiciary are different activities of the same organism”⁴³ because, according to Hans Frank, “the doctrine of separation of powers has been overcome. The separate authorities do not exist. The socialist-national state power is unity. Also, the socialist-national state can not be a judge of himself,”⁴⁴ otherwise it would be understood as “inorganic.”⁴⁵ The “Ermächtigungsgesetz” “removes Montesquieu’s separation of powers dividing the state power on: government, legislation and judiciary, when it actually unites government and legislation in one hand” and “gives the government of the Reich, and thus the Chancellor [...] most independence from the Reichstag and its party.

Anyhow, this law permits to formal existence of “the old and complicated legislative process of the Weimar Constitution, but it places, side by side, almost exclusively the executive law of the authorities. The authorities of the Reich may establish and sanction the laws which are allowed to deviate from the Constitution,”⁴⁶ or even be significantly contrary to the Constitution.

⁴¹ Ibidem, p. 21.

⁴² H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 82.

⁴³ Urteil des Hamburgischen VerwGs of 7 October 1935.

⁴⁴ J. DANCKWERTS, *Die Verwaltungsgerichtsbarkeit*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 108.

⁴⁵ Ibidem, p. 104.

⁴⁶ W. STUCKART, *Nationalsozialismus und Staatsrecht*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 15, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

“Overcoming the subjective public law by the principle of the community personality” shall constitute “grounds for the reform of administration.”⁴⁷ This new principle of “the community personality” is defined by “the idea of the Commander and his followers.”⁴⁸ In place of “the state-subordinates” relation, the “principle of community and leadership law” is introduced and, therefore, “the leadership as a concept of law is gaining its utmost importance. The law is not an implication of the state power, but an act of leadership. Being the Führer of the movement and nation, the Führer and Chancellor of the German Reich is also a head of the State.”⁴⁹ The term “Führen” refers to a leader considered as the “cause.” The Führer’s “followers” are his “effects.”⁵⁰ The “stage of leadership” depends on that. The more dynamic the Führer is, the “less independent”⁵¹ his followers are. According to Emge, the Führer’s “charm”⁵² is extremely important. In his opinion, the Führer should be seen from the perspective of “the community as a whole.”⁵³ For example, the nations should be seen from the perspective of the Führer. This means the question of a German must be at the forefront,⁵⁴ but the German is considered only as a part of the nation-state.”⁵⁵

“Excellent politicization of the nation should therefore gradually give way to a state of the national community.”⁵⁶ “The idea of the Führer” is transformed into the existence of the “law,” with the help of the “eternal content” of the socialist-national “movement.” This means “depersonalization” because “the law

⁴⁷ H. FRANK, *Einführung. Nationalsozialismus und Verwaltungsrecht*, in: *Deutsches Verwaltungsrecht*, H. FRANK (Hrsg.), München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. XIII.

⁴⁸ *Ibidem*, p. XII.

⁴⁹ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 22.

⁵⁰ C.A. EMGE, *Ideen zu einer Philosophie des Führertums*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 179.

⁵¹ *Ibidem*, p. 181

⁵² *Ibidem*, p. 183.

⁵³ *Ibidem*, p. 185.

⁵⁴ *Ibidem*, p. 186.

⁵⁵ H.-H. LAMMERS, H. PFUNDTNER, *Einführung*, in: *IIDEM* (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

⁵⁶ C.A. EMGE, *Ideen zu einer Philosophie des Führertums*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 189.

is a process of following the individual will,”⁵⁷ namely the Führer. “General skepticism in relation to democratic institutions” and their “fundamental democratic principles,” once regarded as “eternal truth, is “the most severely criticized” because “the only virtue” of parliamentarians” is “loyalty to the Nazi party.”⁵⁸ According to the constitutional-law specialist Émile Giraud, “the greatest concern of Members of Parliament is to keep their position and, if possible, to get promoted,”⁵⁹ hence “the escape into the authority is unconditional.”⁶⁰

Carl Schmitt believes that the formation of the state institutions is a implementation of the idea of the inseparable link between leadership, discipline and honor,” allegedly in order to “overcome normativism, founded upon the existing principle of separation of powers.”⁶¹ Henkel contests the objection of complete state monopoly of justice,⁶² citing alleged judicial pluralism, in which both the Nazi party and the state local administration have their own judicial systems, which, however, are bound to one judicial principle, namely “the Führer Principle.” For example, regarding the division of power, “the judiciary has to be separated from the executive” or the “administration has to be separated from justice,”⁶³ which, in Schmitt’s opinion, is unacceptable for the Nazi concept of law. According to Rudolf Stammeler, “one of the conditions and pillars of the rule of law” is “the independence of the judiciary.”⁶⁴ However, it can not take place in Nazism, since the “order of the nation” in its “authorities” is “united by the Führer,” not separated substantially from all members of the German nation because it is their sum, but in terms of “overall power,”⁶⁵ which according to Ernst R. Huber, “remains a closed unity despite the factual

⁵⁷ Ibidem, pp. 190–192.

⁵⁸ R. HÖHN, *Frankreichs Demokratie und ihr geistiger Zusammenbruch*, Darmstadt: L.C. Wittich Verlag 1940, pp. 28–29.

⁵⁹ É. GIRAUD, *La Crise de la Démocratie et le Renforcement du pouvoir exécutif*, Paris 1938, p. 56.

⁶⁰ R. HÖHN, *Frankreichs Demokratie und ihr geistiger Zusammenbruch*, Darmstadt: L.C. Wittich Verlag 1940, p. 47.

⁶¹ C. SCHMITT, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 63.

⁶² H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 83.

⁶³ C. SCHMITT, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 51.

⁶⁴ R. STAMMELER, *Deutsches Rechtsleben während des 19. Jahrhunderts. Lehrreiche Rechtsfälle*, in: IDEM, *Deutsches Rechtsleben in alter und neuer Zeit*, vol. II, München: Beck’sche Verlagsbuchhandlung 1932, p. 250.

⁶⁵ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 42.

diversity of its specific functions that, as a whole, is in the hands of the Führer,”⁶⁶ despite the fact that the “legal order” in the Reich is constituted first by “the right of political leadership,” then by “the order of partial communities of life” and finally by the “social (or cooperative) law.”⁶⁷

V.4. The Nazi civil law not in the service of the objective *bonum commune* but being absolutely subordinated to the internally contradictory “Führer’s principle”

The new state and administrative law” was defined by “the Führer principle,”⁶⁸ as written by Carl Schmitt of Berlin, which was made by the legislature of the Third Reich on April 7, 1933 through the adoption of the *Gesetz zur Wiederherstellung des Berufsbeamtentums*,⁶⁹ through which all the elements of judiciary that were suspicious to the national socialists—the social-democratic judges, the judges who emphasized excessively their religious affiliation, and, of course, Jewish judges” were, in fact, “excluded from the state services”⁷⁰ by the act because paragraph 1 of the act referred to the “professional national civil service administration” (“nationales Berufsbeamtentum”). After 1933, about 90 to 95% of the judges of the Frankfurt am Main belonged to the NSDAP, but all the judges of the Reich had to make the following oath: “I swear: I will keep the law faithfully and obediently towards the Führer of the German Reich and the nation, Adolf Hitler, and fulfill conscientiously the duties of my office, so help me god.”⁷¹ The judges who did not want to make this oath were the exception. They were able to stand up at the Ministry of Justice of the Reich for the

⁶⁶ E.R. HUBER, *Das Staatsoberhaupt des Deutschen Reiches*, “Zeitschrift für die gesamte Staatswissenschaft” 95 (1934/35), p. 216.

⁶⁷ G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 38.

⁶⁸ C. SCHMITT, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 63.

⁶⁹ RGBl. I S. 175.

⁷⁰ I. STAFF, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 125.

⁷¹ *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 126: “Ich schwöre, ich werde dem Führer des Deutschen Reiches und Volkes, Adolf Hitler, treu und gehorsam sein, die Gesetze beachten und meine Amtspflichten gewissenhaft erfüllen, so wahr mir Gott helfe”.

mentally ill who had been killed by the SS. For that reason, the judge Lothar Kreyssigi (the member of the Bekennende Kirche) was threatened with sending to a concentration camp, which, however, has never been done because of social reasons.⁷² Even before the war ended, Ernst R. Huber was convinced that “the Führer principle” was correct. According to Huber, the Führer principle rightly “exalts the Führer as the most important of the nation from the area subordinated to him, while the strictest limitation of powers and responsibilities must be important to everyone in the state, so that the authorities of the state was downgraded” to the role of “an instrument of atomistic dilettantes of lawlessness.”⁷³ Constitutional and the more “normal form of lawmaking in the German state of the Führer is the governmental law.”⁷⁴

Marek Maciejewski writes that “the establishment of the ‘Führerprinzip’ meant in practice the elimination of internal democracy and collegial management model. From now on, a higher-level supervisor was entitled to appoint leaders of the individual cells of the Nazi party.”⁷⁵ “Führer”—the so-called “Führer principle”: “The authority of each Führer goes to the bottom, and his responsibility goes to top”⁷⁶—the supreme law of the Third Reich, namely according to Julius Binder, “a model and reality of the new Reich,” as “the Führer assumes to have those directed by him;” Führer is the one who understands himself as a conscious will and the idea of those led by him” and “whom they recognize and accept as a leader.”⁷⁷ Those who are directed are primarily the members of the National Socialist German Workers’ Party (NSDAP), who, according to Hitler’s speech of January 1934, should be the “*perfect order of*

⁷² Cf. I. STAFF, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 126.

⁷³ E.R. HUBER, (review) Hans FRANK, *Technik des Staates* (Berlin, Leipzig, Wien 1942), “Zeitschrift für die gesamte Staatswissenschaft” 102 (1941/42), p. 741.

⁷⁴ O. KOELLREUTTER, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, p. 48.

⁷⁵ M. MACIEJEWSKI, *Ruch i ideologia narodowych socjalistów w Republice Weimarskiej. O źródłach i początkach nazizmu 1919–1924*, Warszawa/Wrocław: Państwowe Wydawnictwo Naukowe 1985, p. 129.

⁷⁶ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 4²1933, p. 501.

⁷⁷ J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 39.

leadership”⁷⁸: “For the new German Reich [...], where the plan and the will of the Führer is the supreme order of law, and the Constitution’s central theme is not freedom of the subordinates, but the attitude towards the Führer,”⁷⁹ the Führer does not use his power against the national community. He uses persuasion towards the community and sets the example himself. The state does not have such a power as “the Führer of the community,” who “is not a legal organ of the state” because the core of his position is the nation and the movement” and this is “the new constitutional principle.”⁸⁰ “The subjective theory of interpretation is supported by the idea of the Führer,” which corresponds to “the primacy of political leadership”⁸¹ in the creation and interpretation of the Nazi law. “The socialist-national theory of the state law distinguishes between the subsidiary orders of the Führer which were created under the Act and served to carry out and complete these norms, and the independent orders of the Führer which took the place of the law. They have the same rank and the same effect as law. For this reason, they have been identified as the Führer’s decisions equal to laws or his forming constitutional acts.”⁸² For Hannah Arendt, “the consequence of the absolute primacy of the movement not only over the state, but also over the nation, the people and the positions of power held by the rulers themselves”⁸³ is “striking.” She also emphasizes that “clever tools of totalitarian governments with their absolute and

⁷⁸ A. HITLER, in: J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 39, note 2.

⁷⁹ Th. MAUNZ, *Die Staatsaufsicht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 50.

⁸⁰ R. HÖHN, *Volk, Staat und Recht*, in: R. HÖHN, Th. MAUNZ, E. SWOBODA, *Grundfragen der Rechtsauffassung*, München: Im Verlag Duncker & Humblot 1938, p. 23.

⁸¹ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, p. 75; cf. STOLL, *Juristische Methode*, 1934, p. 17; H. HILDEBRANDT, *Rechtsfindung im neuen Deutschen Staat*, 1935, p. 49 f.; FRANZEN, *Gesetz und Richter*, 1935, p. 70 f.; Ph. HECK, *Rechtserneuerung und juristische Methodenlehre*, 1936, p. 15 f.; H. MAYER, *Das Strafrecht des Deutschen Volkes*, 1936, s. 118; L. ZIMMERL, *Festschrift für Graf Gleispach*, p. 174.

⁸² J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im nationalsozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: Lit-Verlag 1985, p. 391; cf. E.R. HUBER, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg ²1939, p. 252.

⁸³ H. ARENDT, *The Origins of Totalitarianism*, Cleveland and New York: World Publishing Co., Meridian Books, 1958, p. 412.

unparalleled concentration of power in the hands of one man have never been tried before.”⁸⁴

“The idea of the Führer provides a foundation for the “ultimate unity” of the legal order in the Nazi state, which is no longer based on “the will of the majority, as in the case of democracy, but on the will of the Führer who is related to the nation and aware of his responsibility,”⁸⁵ as written by Sommermann. “The Chancellor of the Reich determines the directional lines of policy” of the Nazi state because “the centers of power such as the Reichstag and the president of the Reich” are weakened or the office of Chancellor is strengthened to almost “absolute” power, which is the legal definition of the Führer principle.”⁸⁶ “Führer is the supreme master of the judiciary. He does not use the executive means of a specific indication in relation to the case-law, but the law”⁸⁷ because “the will of the nation and the will of the state” gain an absolute “unity” in the “idea of the Führer.” Therefore, “the Führer alone can make a final decision on whether a particular regulation should apply. He does not need any guarantee for the preservation of justice, because he is, by his leadership, the ‘guardian of the Constitution’ and this particular unwritten idea of the laws of his nation. Hence, the law derived from his will is not subject to any judiciary control”⁸⁸ because “leadership is free from ‘norms.’ However, it is not free from the law or responsibility. It establishes the acts, but not the law. It forms the acts of law and reconciles them with the law,”⁸⁹ the ultimate source of which in the ideology of Nazism is the Germanic nation. Hence, Maunz claims that “the state does not establish the law. The national order arises from blood and soil,” which is why not the state, but the nation is essential for the idea of the socialist-national state.”⁹⁰ The decree of the Reich President of 28 February 1933⁹¹ “meant the end of the rule of law in the German Reich and the beginning of a

⁸⁴ Ibidem, p. 447.

⁸⁵ E. SOMMERMANN, *Der Reichsstatthalter*, Erlangen: Verlag von Palm & Enke 1933, p. 4.

⁸⁶ Ibidem, p. 25.

⁸⁷ H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 173.

⁸⁸ K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 34.

⁸⁹ Th. MAUNZ, *Neue Grundlagen des Verwaltungsrechts*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 17.

⁹⁰ Ibidem, p. 18.

⁹¹ RGBl. I S. 83.

permanent state of emergency under the socialist-national system.” This had resulted in arresting approx. 10 000 people by 15 March, 1933. “It remained in force to 8 May, 1945.”⁹² The decree of 21 March 1933⁹³ concerned the “death penalty” for members of the SA and the SS, if they represented—in uniform—“restless” (agitating) attitude,” and the main aim was to “prevent possible attempts to seize the SA and the SS by opposition groups,”⁹⁴ “the Führer and Chancellor of the Reich is the supreme judge of the Wehrmacht.”⁹⁵

Thodor Maunz of Freiburg im Breisgau believes that “there is no subjective public right to self-governance”⁹⁶ because, according to him, “the municipality is a part of a larger entirety. The municipality and “the administration are tools in the hands of the Führer.”⁹⁷ The concept of “self-governance” is completely different from the classical natural law concept, where the management of public affairs” has taken place through “separate legal entities under public law.” In National Socialism, “persons” are no longer substantial beings, and therefore, according to Maunz, a legal person is only the “outside facade” and as such is “secondary” to “the essence of administration.” Hence, Nazism returns to the natural concept of self-governance derived from the nation” considered as the acts and processes, and “responsibilities” of the same “municipalities” as “municipalities.”⁹⁸ In his opinion, “the centralist (concentrated) administration is an important pillar of the strong power of the Reich.”⁹⁹ This was expressed in the act of setting up the Administrative Court of the Reich of 3 April 1941.¹⁰⁰ What form does the socialist-national purposefulness take in the field of criminal law?

⁹² J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im national-sozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985, p. 253.

⁹³ RGBl. I S. 135.

⁹⁴ J. BIESEMANN, *Das Ermächtigungsgesetz als Grundlage der Gesetzgebung im national-sozialistischen Staat. Ein Beitrag zur Stellung des Gesetzes in der Verfassungsgeschichte 1919–1945*, Münster: LIT-Verlag 1985, p. 265.

⁹⁵ *Verordnung über das militärische Strafverfahren im Kriege und bei besonderem Einsatz (Kriegsverfahrensordnung)* vom 17. August 1938, par. 1.

⁹⁶ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 142.

⁹⁷ *Ibidem*, p. 140.

⁹⁸ *Ibidem*, p. 131.

⁹⁹ *Ibidem*, p. 80.

¹⁰⁰ RGBl. I S. 201.

V.5. A contradictory vision of the purposefulness of the Nazi penal law science

Since there is no place in the socialist-national civil law for realization of the common good as the most important purpose of the law and the state in the socialist-national civil law, the question arises whether it is possible to pursue the common good from the position of the Nazi criminal law?

From the point of view of the philosophy of criminal law, Helmut Nicolai states that “the purpose of the criminal law, and the purpose of the law in general, is to protect the nation against the perversions that are hostile to life, harmful to the law and manifest themselves in unhealthy tendencies.”¹⁰¹ This refers to all unkindness towards the German nation and the Third Reich, namely treating their dialectical unity as non-absolute, which becomes apparent in all areas of our understanding of the reality of criminal law, completely determined by the content of the Nazi ideology.

In 1931, Mezger wrote that a person is found “guilty” if his conduct is legally an expression of reprehensible personality. Thus, the criminal guilt means overall conditions of penalty, which refers to the acting person.”¹⁰² This theory can not be maintained without considering the philosophical doctrine of freedom of the human will, from which neither the legislator nor the law can free themselves.”¹⁰³ If, however, National Socialism substantially contests the existence of person because it speaks only about “the position of a person as a member of the ‘national relationship,’”¹⁰⁴ the relationship between the person and the guilt is also relativized, and yet “there is no guilt without lawlessness. Therefore, since all the criminal lawlessness is an individual deed, all

¹⁰¹ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. ³1934, p. 46.

¹⁰² E. MEZGER, *Strafrecht. Ein Lehrbuch*, München/Leipzig: Verlag von Duncker & Humblot 1931, pp. 247–248.

¹⁰³ Edmund Mezger believes, however, that the “criminal law” concept of “guilt” may be used only “in the legal sense” and the question of guilt does not have to be available to the “ethical” understanding of guilt. He says that the concept of “guilt” is “independent” of the problem of the so-called freedom of will, which proves that he understands the issue in the neo-Kantian way. Cf. E. MEZGER, *Strafrecht. Ein Lehrbuch*, München/ Leipzig: Verlag von Duncker & Humblot 1931, p. 251.

¹⁰⁴ U. SCHEUNER, *Die Rechtsstellung der Persönlichkeit in der Gemeinschaft*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 86.

criminal guilt must be the guilt of the individual deed,”¹⁰⁵ namely a specific personal subject.

“No penalty without a law”¹⁰⁶ is a principle based on the law considered as the interpersonal relationship. Transgressing the law, that is, performing unlawful acts, causes the property of guilt, which is penalized, even if a deed which is contrary to the law, for example, a murder of the other person is committed on the request of that—“killed”—person because the “clear and serious request of the murdered person does not change the fact that it was unlawful,”¹⁰⁷ according to the StGB (paragraph 216). That question was related to the issue of euthanasia. For example, M.E. Meyer “wanted to make an exception” while analyzing euthanasia, but “he did not find any support” for his efforts in the effective act.”¹⁰⁸

The content-legal concept of guilt “shall be created, indicating that in future, the law and ethics should not be regarded as opposites,” and that “individual ethics” should be replaced by “social ethics” and it should be thoroughly investigated why “an act is harmful to the German community of the nation,” and what sort of personality the perpetrator has that causes this harm.”¹⁰⁹ This means that both “the notion of lawlessness” and “the notion of guilt” are “ideologically justified” in the sense of “Nazism.”¹¹⁰ “Full adequacy between criminal law and ethics is [...] excluded.”¹¹¹ According to Julius Binder, “the law and so-called morality are not different, but they are essentially one” because in Nazism it is assumed *a priori* that “there is no contradiction between custom, morality and the law,”¹¹² which is a proof of the legal and moral monism. Gruchmann believed that the legislation of the Reich “did not distinguish between the law and morality, and the conformist attitude to the regime was

¹⁰⁵ E. MEZGER, *Strafrecht. Ein Lehrbuch*, München/Leipzig: Verlag von Duncker & Humblot 1931, p. 254.

¹⁰⁶ *Ibidem*, p. 259.

¹⁰⁷ *Ibidem*, p. 213.

¹⁰⁸ *Ibidem*, p. 215.

¹⁰⁹ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, pp. 58–59.

¹¹⁰ *Ibidem*, p. 57.

¹¹¹ *Ibidem*, p. 50.

¹¹² J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 21.

identified with morality.” Hence, the criminals who thought in different way, were not only punished, but also deprived of honor and insulted.”¹¹³

In his *Mein Kampf* (1924), Hitler calls for the creation of the “German National Tribunal.” His call was implemented at the meeting of the authorities on March 23, 1934, in the form of the “Act against the betrayal of the state and the country” of 24 April 1934, although there was the “National Tribunal” in Bavaria, which had previously sentenced Hitler to imprisonment. There was also a Tribunal in the Weimar Republic, but it was called “the State Tribunal.” The Tribunal provided for a death sentence for the betrayal of the Reich or the Länder, or for crimes against the life of the German national community.”¹¹⁴ Moreover, the same “processes” were used by the National Tribunal—with the help of “the mass media”—to “intimidate”¹¹⁵ the whole society of the Reich, which has taken place mainly through the “newspapers, but also in the form of posters” and “reports,”¹¹⁶ since the motto was to “judge by the ‘report’”¹¹⁷ of the media.

Heinrich Henkel of the University of Breslau believes that “the socialist-national revolution [...] is reflected in all areas of law, particularly in the legislation of criminal proceedings” which is “partly of the revolutionary significance”¹¹⁸ because, according to Hans Frank, “the soul of every legal norm and, at the same time, the criterion of its value” “as a sentence that is binding for the national order, is its compatibility with the ideology and political ideas of National Socialism,” which is a spiritual-historical revolution,”¹¹⁹ as written by the Minister of the Reich Hans Frank, and on which the effectiveness of the socialist-national ideology depends at the practical shaping of German life,”¹²⁰

¹¹³ L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 925.

¹¹⁴ E. LAUF, *Der Volksgerichtshof und sein Beobachter. Bedingungen und Funktionen der Gerichtsberichterstattung im Nationalsozialismus*, Opladen: Westdeutscher Verlag 1994, pp. 15–25.

¹¹⁵ *Ibidem*, p. 42.

¹¹⁶ *Ibidem*, p.285.

¹¹⁷ *Ibidem*, pp. 154–163.

¹¹⁸ H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 107.

¹¹⁹ H. FRANK, *Einführung. Nationalsozialismus und Verwaltungsrecht*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. XIV.

¹²⁰ W. FRICK, *Geleitwort*, in: H. FRANK, *Einführung. Nationalsozialismus und Verwaltungsrecht*, in: IDEM (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. V.

as emphasized by Wilhelm Frick (Reichstag und Preußischer Minister des Innern). The Nazi purposefulness in commercial law also depends on National Socialism as “the solution to all economic problems lies [...] in mentality” and “depends on” whether the economy is “driven in accordance with the socialist-national ideology or not.”¹²¹

These “new legal views and necessities of life” are “not only the task of the legislator, but also of the higher courts, especially the courts of the Reich” which are paving the way for the development of criminal procedural law from the old to the new law,¹²² namely the Nazi law, or “are responding to the sound national opinion.”¹²³ “The phrase ‘in dubio pro reo’ is misleading which is binding for the law of evidence, and not for the interpretation of the law.”¹²⁴ “Process mechanisms largely depend on the ideological and political evaluative judgments prevailing in the community,” and not. Kaspar Anrath is wrong to assert that “the scientific determination of shaping the criminal process is completely independent of the overall philosophy of the state because it is the task of the theory of the general procedural law.”¹²⁵ Anrath’s thesis is essentially criticized by Henkel who, from the position of the Nazi ideology, suggests that regarding the “attempt’ in the doctrine of criminal procedural law as “independent of philosophical-legal and political-public considerations” is “wrong.”¹²⁶ “The idea of community is the only reference point which is of a relative importance for all the process-criminal regulations. A criminal proceeding takes place in the community, by the community and for the community,”¹²⁷ so it is not based on, nor seeks to implement the principles of justice as a guiding principle of the legal-penal process. It is based on the Nazi ideology of the Germanic “community.”

¹²¹ A. REYKOPP, *Die Stellungnahme der Deutschen Gemeindeordnung zu der wirtschaftlichen Betätigung der Gemeinden*, Die nationalsozialistische Gemeinde. Zentralblatt N.S.D.A.P. für Gemeindepolitik, 3.Jg, of 1 August 1935, p. 591.

¹²² H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 113.

¹²³ *Ibidem*, p. 116.

¹²⁴ *Ibidem*.

¹²⁵ K. ANRATH, *Die richtige Gestaltung des Strafverfahrens des Dienstverfahrens und des Ehrengerichtsverfahrens entwickelt aus dem Wesen des menschlichen Denkens*, 1934, p. 2.

¹²⁶ H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 123, note 1.

¹²⁷ *Ibidem*, p. 125.

The concept of “defense” changes significantly in the Nazi criminal procedural law because the “defender” is a protector of the community and a servant of the Nazi law,¹²⁸ not a “protector of the interests of the individual”¹²⁹ and his rights, as claimed by, for example, Kaspar Anrath. The main goal of a stricter criminal law in the Reich was the protection of the socialist-national regime and implementation of its reign” rather than “counteracting offenses, which is necessary in each country.”¹³⁰ With regard to Poland, the criminal law was applied to Poles and Jews in the eastern areas that were annexed to the Reich¹³¹ on the basis of the following legal acts: the RGBl. I S. 844 of 6 June 1940; the RGBl. I S. 907 of 13 June 1940; the RGBl. I S. 759 of 4 December 1941; and the RGBl. I S. 52 of 31 January 1942. The following passage demonstrates this issue: “The German courts and the German prosecution have been introduced to the General Government (Poland), which apply the German law. The citizens of the state and all the persons who belong to the German nation are subject to the German judiciary because of all the offenses, and others due to the offenses through which German interests have been directly affected. In other cases, Polish jurisdiction is allowed which operates in criminal matters only if the German prosecution passes it on to the Polish office.”¹³² In the same German Reich, “a special value should be put on cleansing the courts and the offices of the Jews.”¹³³

The classic notions that define the existence and mission of the police such as: security, order and danger” are unhelpful (unbehelflich) in the Nazi state.”¹³⁴ “In general, the activity of the police is related, by the will of the legislator, to the statutory limits, but in the area of the order of the protection of the nation, is not related to that.”¹³⁵ This means that police is not bound by the legal norms, for example, “in case of the defense against the actions that threaten the

¹²⁸ Ibidem, p. 227.

¹²⁹ K. ANRATH, *Die richtige Gestaltung des Strafverfahrens des Dienstverfahrens und des Ehrengerichtsverfahrens entwickelt aus dem Wesen des menschlichen Denkens*, 1934, p. 10.

¹³⁰ L. GRUCHMANN, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, München: R. Oldenbourg Verlag 1988, p. 925.

¹³¹ H. HENKEL, *Das deutsche Strafverfahren*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 113.

¹³² Ibidem, p. 113; cf. VO des Generalgouverneurs vom 19. II. 1940 (VOBlatt d. Gen.-Gouv. I, 57 i 64).

¹³³ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. 31934, p. 58.

¹³⁴ Th. MAUNZ, *Gestalt und Recht der Polizei*, Hamburg: Hanseatische Verlagsanstalt 1943, p. 55.

¹³⁵ Ibidem, pp. 22–23.

state.”¹³⁶ Since, in Regulation of 18 March 1938, both the head of the SS and the head of the German Police as a whole police of the Reich could act to “maintain security and order” in the region of the Alps and the Danube “beyond the specific legal boundaries”¹³⁷ of the German Reich. The “acts of the Nazi police” in its two major formations of the SS and the German Police could be—and actually were—independent of norms because they were based on the implementation of the will of the leadership of the Reich, acting within the national order,¹³⁸ which is expressed by Best as follows: “As long as the police do the will of the executives, it acts lawfully; if the will of the executive is exceeded, the police no longer acts, but its follower commits a breach of his administrative duty,”¹³⁹ as the supreme authority of the police, and each supreme authority, rests with the Führer and Chancellor of the Reich.”¹⁴⁰ Theodor Maunz believes that regardless of whether the “Führer” or “the certain specified persons” may give “the police commands in the form of legal orders,” which is “the legal basis for the operation of the police,” “the place of the former law” is taken by “the will of the Führer.”¹⁴¹ This changes the legal modus for the operational activities of the police. On one hand, the “Führer” can specify his will in the “form of an act,” or “announce it in very general terms,” but both ways of communicating the legal will of the Führer are “a task for the police” due to the fact that the “command of the Führer” is a “central part of the legal regime,” regardless of whether it is “associated with its deepest inner core,”¹⁴² or not. Therefore, the Führer provides to the heads of police an “institutional strengthening,” given to the police via the Head of the General Staff so that the police could act “independently of norms, but “not independently of the law” because this would have, according to Maunz, far-reaching negative effects. However, “the police action” must remain “rooted in the legal system,”¹⁴³ which is the Nazi subjectivism and relativism due to the unpredictability of the Führer’s orders and the ambiguity of his general instructions to the

¹³⁶ Urt. V. 25. 10. 34, RVerwBl. Bd. 56, p. 147

¹³⁷ Cf. SIEVERS, *Deutsche Verwaltung*, 1940, p. 247.

¹³⁸ Th. MAUNZ, *Gestalt und Recht der Polizei*, Hamburg: Hanseatische Verlagsanstalt 1943, p. 26.

¹³⁹ BEST, *Die Deutsche Polizei*, p. 20.

¹⁴⁰ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 251.

¹⁴¹ IDEM, *Gestalt und Recht der Polizei*, Hamburg: Hanseatische Verlagsanstalt 1943, p. 27.

¹⁴² *Ibidem*, p. 27.

¹⁴³ *Ibidem*, pp. 27–28.

police. This causes incalculable consequences in specific operations of the police, especially in cases of exceeding or violating the law by the same police. This means the so-called “torts of the police or of the administration” which should be subject to the “general norms of criminal law”¹⁴⁴ of the Nazi state, while “the eastern areas are subordinated to the Reich Commissioner.”¹⁴⁵

Moreover, “the police is a kind of activity the aim of which is to include the person to the national community”¹⁴⁶—even against the free will of man himself, as shown by, among others, the acts of deportation and processes of germanization of thousands of the Zamojskie Children, forcibly conscripted into the German Reich. “The state concentration camp inspector is directly subordinated to the office of the secret state police,”¹⁴⁷ which dispels the myth of widespread ignorance about the German concentration camps and their oppressing activity, or the German death camps. From the very beginning of his political activity, Hitler had no problem in acknowledging that “peace is justified by the full victory of the sword of the nation of masters taking the world in the service of a higher culture,”¹⁴⁸ which is based on the ideology of enslavement and far-reaching extermination of other people due to their existential otherness: “For the “movement” it was more important to demonstrate that it was possible to fabricate a race by annihilating other “races” than to win a war with limited aims.”¹⁴⁹

The Nazi revolution causes the existence of law, which results in an adequate notion of the purposefulness of law, as written by Roland Freisler: “Once again, we freed the law of National Socialism to socialism [...] as a uniform regulation, aimed at thinking and wanting every single member of the nation in the whole of the nation it self, learned and rooted in the nation so that the regulation is considered by the people as the basis and purpose of the national life of the community.”¹⁵⁰ Therefore, materialistic socialism is the

¹⁴⁴ E. MEZGER, *Strafrecht. Ein Lehrbuch*, München/Leipzig: Verlag von Duncker & Humblot 1931, p. 7.

¹⁴⁵ H. HIMMLER, *Die Aufgaben des Reichskommissar zur Festigung des deutschen Volkstums*, RVerwVl, 1941, p. 261.

¹⁴⁶ Th. MAUNZ, *Verwaltung*, Hamburg: Hanseatische Verlagsanstalt 1937, p. 235.

¹⁴⁷ *Ibidem*, p. 254.

¹⁴⁸ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 421933, p. 438.

¹⁴⁹ H. ARENDT, *The Origins of Totalitarianism*, Cleveland and New York: World Publishing Co., Meridian Books, 1958, p. 412.

¹⁵⁰ R. FREISLER, *Richter und Gesetz*, w: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die*

foundation and goal of the Nazi legal revolution. What is the reason for the orientation of this type of socialism towards the “Germanness”?

German socialists give a clear answer to the question: “Only the national state can solve the task of the greater development of nationality, the care of their own national kind, the physical and spiritual ability of the nation,”¹⁵¹ regarding themselves as the exclusive incarnation of a deity. “In the area of law,” National Socialism derives from “the whole nation, the life and development of which is the finality and purpose of the order of law,”¹⁵² provided that the concept of “wholeness” is relative, since it refuses the right to exist to those Aryans who are opponents of the Nazi system. “The socialist-national concept of law and the state is not internally associated with formal positivism of the liberal theory of law.”¹⁵³ According to Frank, this means that the content and the task of administration is not determined by the law, but by fulfilling the objectives of the community of the whole nation,¹⁵⁴ defined entirely ideologically, and not in accordance with the innate dignity, and thus inherited rights of man as a person.

V.6. The Nazi ideologization of the natural law concept of the finality of the law of the nations

Carl Schmitt stipulates that “what we negate on the basis of our scientific deliberations on the law of nations, is not the real purpose of the community of nations, but a specific method. The reason of negation is its vague, unreal fusion of the Geneva League of Nations with the universal order of the world. Its institutionalization, federalization and concretisation of the decision on law and lawlessness of war is considered to be incorrect. The Geneva League of Nations and the universal order of the world are not something ‘better than

weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates, gr. II, art. 17, Berlin: Industrieverlag Späth & Linde 1936, p. 7.

¹⁵¹ M.R. GERSTENHAUER, *Das ewige Deutschland. Idee und Gestalt*, in: IDEM, *Grundzüge einer deutschen Staats- und Volkskunde*, vol. II, Leipzig: Armanen-Verlag 1940, p. 15.

¹⁵² *Ibidem*, p. 27.

¹⁵³ H. FRANK, *Einführung. Nationalsozialismus und Verwaltungsrecht*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. XI.

¹⁵⁴ *Ibidem*, p. XI.

nothing' to us. They undermine the true community of nations."¹⁵⁵ Schmitt criticizes the community of nations for applying the "discriminatory concept of war"¹⁵⁶ to Germany after World War I. As a result, Germany failed because the country existed "in a constitutional duality of soldier and citizen." Moreover, there was "essential, ideological and total opposition between the government and the nation, as well as "mortal opposition between the army and the homeland, soldier and laborer. Therefore, Germany have collapsed."¹⁵⁷ In 1934, Carl Schmitt wrote about "rescuing Germany" "by the German nation, or the socialist-national movement, headed by a German soldier, and, at the same time, a "political soldier, Adolf Hitler appointed to the position of Chancellor of the German Reich. [...] By the fact that the Führer was given all the public authority of the German Reich, the first step towards a new constitutional ground was done. Now the way is open to make clear domestic political decisions, free the German people from the century-old dispersion, and realize the revolutionary work of the German legal order, instead of normative facades."¹⁵⁸

Theodor Maunz of the University of Freiburg im Breisgau writes: We are first and foremost given, naturally and necessarily, not only what is national—the national community and national self-determination, but also—and because of that—the core of our legal system. In the law of nations, we have to recognize the future primacy of the nation and its appropriate national group, which was not the law of nations. It is not attributable to the state."¹⁵⁹ Furthermore, the primacy implies humiliation, rejection or even killing of other nations.

"The national principle of the right of nations" becomes, "according to the socialist-national theory," of, among others, Gustav Adolf Walz and Paul Ritterbusch, "the beginning, the origin of the norms of law of nations and the area of its bindingness."¹⁶⁰ Why? Due to the Nazi ontological assumptions made about the Germanic nation as the primary cause of any kind of being, which results in the absolutization of Germanness in the socialist-national law

¹⁵⁵ C. SCHMITT, *Die Wendung zum diskriminierenden Kriegsbegriff*, München: Duncker & Humblot 1938, p. 53.

¹⁵⁶ *Ibidem*, p. 2.

¹⁵⁷ C. SCHMITT, *Staatsgefüge und Zusammenbruch des Zweiten Reiches. Der Sieg des Bürgers über den Soldaten*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 40.

¹⁵⁸ *Ibidem*, p. 49.

¹⁵⁹ Th. MAUNZ, *Geltung und Neubildung modernen Kriegsvölkerrechts*, Freiburg i.Br.: Fr. Wagnersche Universitätsbuchhandlung 1939, p. 15.

¹⁶⁰ *Ibidem*, p. 16.

of nations, at the level of cognition of nations. The notion of “the Reich” is close to the people. It is rational, similarly to the term “great space” as a new dimension of the German order of the “law of nations”¹⁶¹ must be of the Nazi nature. This means that it is not a man as a person and a member of the nation, as correctly claimed by the representatives of the classical natural law concept concerning the right of every nation to adequate space, but the “nation of German masters” that defines it in a totalitarian way and thus essentially deforms the law of nations.

“Neither the living space as such, nor the substance of the order of the foreign nations living in it, can be” the most important question in the context of the war. It is “the German nation. Its law must be a criterion of the right to a large space.”¹⁶² Therefore “the war of the Reich for the existence of the living space of the nation can not be wrong, from the legal and national point of view.” On the contrary, “this must be a just war which is a struggle not of countries but of the nations for their very last goods.”¹⁶³

“The time has come for the birth of law of nations and martial law of nations of the great German Reich” because, according to Maunz, the “rational” theory of martial law of nations can be formed only due to the “national principle” and the “national law principle of large space.” Why? Because “the nation, its order, and space are given by the creator,” while “the western theory” of law of nations is only a “legal construction,” which is unfamiliar to life. Similarly, the “fictional community” is a community which connects the enemies of the Reich, and which can be “swept” by a “decisive assault.” Only “the blood community of the German nation remains, along with its right and its land,” which are “neither fictions nor figures of thought.” They are a “reality” that will “persist.”¹⁶⁴ This corresponds to the genesis of law of nations in the Nazi interpretation. Nicolai defines it as follows: “Both the domestic law and the law of nations come from the spirit of the nation. [...] However, compliance with the feeling of law is only possible as far as there is the species equality of the feeling which is linked to the racial species equality. [...] The close community of the states and nations is possible only in Germanic nations.”¹⁶⁵ Other nations are denied the very act of being considered as real and inviolable because of ideological reasons.

¹⁶¹ Ibidem, p. 18.

¹⁶² Ibidem, p. 19.

¹⁶³ Ibidem, p. 18.

¹⁶⁴ Ibidem, pp. 19–20.

¹⁶⁵ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. 31934, p. 48.

Reinhard Höhn writes about the Reich as “a representative of the new political order and a preacher of the new social ethos and, at the same time, [...] a subject of the new idea of power in the future Europe.” The understanding of this new socialist-national ethos is based on “power,” which “is nothing other than permanently exercised violence tending to break the opposite will, if needed.”¹⁶⁶ This is one of the reasons why the Third Reich is derived from the German “nation,” and the essence of its unity lies in the “unification of blood and soil of the German nation.”¹⁶⁷ The Reich “originated from the struggle against the views and the life forms of liberalism, Marxism and Bolshevism,”¹⁶⁸ and not the fight against the essence of materialistic or historical dialectics which is socialist dialectics. “A new political vision of the world was created out of the Reich, on the basis of principles of life, race, soil and adequately to race: leadership and alliance.”¹⁶⁹ Heinrich Heyse writes about the Reich as “the unity of myth and reality, of idea and existence,”¹⁷⁰ and in the “marriage of the Logos and life, idea and existence, the new Reich has been created which is called to start a new era.”¹⁷¹ The essence of Nazism is “creation of the Germanic-German nation through the birth and fate of certain beings, the inseparable connection, the eternal relationship with god manifesting himself in the law of the world.”¹⁷² This is confirmed by the thesis of Herman Rauschnig that, according to National Socialism, [...] “true faith in the new myth, replacing Christianity, which is salutary and necessary, is effective when it comes to rejuvenation of the nation”¹⁷³ in the sense of the ideology of German racism.

On 26 December 1934, Adolf Hitler said: “We will slowly raise our standard of living, and Weihnachtsfest will come finally which will be described by us all as Weihnachten. The happy national community is the goal we have set for ourselves. [...] In the end, we will also achieve this goal. Providence allowed us

¹⁶⁶ R. HÖHN, *Reich, Großraum, Großmacht*, Darmstadt: L.C. Wittich Verlag 1942, p. 101.

¹⁶⁷ *Ibidem*, pp. 83–84.

¹⁶⁸ *Ibidem*, p. 85.

¹⁶⁹ *Ibidem*.

¹⁷⁰ H. HEYSE, *Die Idee der Wissenschaft und die deutsche Universität. Über Geschichte und Wesen der Idee des Reichs*, Königsberg: Gräfe u. Unzer 1934, p. 16.

¹⁷¹ *Ibidem*, p. 20.

¹⁷² *Ibidem*, p. 22.

¹⁷³ H. RAUSCHNING, *Rewolucja nihilizmu. Kulisy i rzeczywistość Trzeciej Rzeszy*, trans. by S. ŁUKOMSKI, Warszawa: Rój 21939, p. 75.

to fight for 15 years. It has challenged us on many occasions to become convinced that today's Germany is worth to be blessed."¹⁷⁴ Rudolf Hess also addresses the socialist-national thought while speaking during the aforementioned Weihnachtsfeier on 26 December 1934. On behalf of "all Germans," he speaks to the Führer as a "man determined by the fate to be the creator of a new German nation—the nation of honor. The gift, which we Germans once again bring Adolf Hitler, is trust. We entrust him with our fate as a token of gratitude, and, at the same time, an oath. If Weihnacht is here in Germany once again, we can be proud, happy and grateful to have him as the Führer. We thank him that in Germany, a country in which peace prevails, children would sing the song about silent and holy night."¹⁷⁵ This statement of Hess contrasts with the drama of children that were bestially murdered in Lviv. They were shot by one of the SS-men of the first escort, when they ran onto the streets, with flowers in their hands.

On 26 April 1935 Joseph Goebbels spoke to the environment that was ideologically close to Nazism: "on this day (May 1), workers, peasants and soldiers want to take an oath to stand together, supporting the policy of Adolf Hitler, the aim of which is to strengthen the honor and safety of the German nation and create a solid base of the entire work of German expansion."¹⁷⁶ In contrast, the Reich Minister Hanns Kerrl drew attention to the dimension of the total submission to the Führer and said: "We have only one goal: for all the activities of our lives, to reflect, whether something happens completely in the sense of the one who re-opened our eyes to the significance of life and made our lives great; whether what I do is in accordance with what I think, and whether I act according to the will of my Führer, Adolf Hitler."¹⁷⁷

¹⁷⁴ A. HITLER, *Die nationalsozialistische Gemeinde*. Zentralblatt N.S.D.A.P. für Gemeindepolitik, 3. Jg, of 1 January 1935, p. 51.

¹⁷⁵ R. HEß, *Die nationalsozialistische Gemeinde*. Zentralblatt N.S.D.A.P. für Gemeindepolitik, 3. Jg, of 1 January 1935, p. 51.

¹⁷⁶ J. GOEBBELS, *Die nationalsozialistische Gemeinde*. Zentralblatt N.S.D.A.P. für Gemeindepolitik, 3. Jg, of 15 May 1935, p. 290.

¹⁷⁷ H. KERRL, *Rede des Reichsministers Hanns Kerrl auf der Sondertagung des Hauptamtes für Kommunalpolitik in Nürnberg*, *Die nationalsozialistische Gemeinde*. Zentralblatt N.S.D.A.P. für Gemeindepolitik, 3. Jg, of 1 August 1935, p. 584.

Conclusions

The socialist-national understanding of the origin and nature of law brings about the contradiction of the existence of law, and thus the total relativization of the purposive nature of law as law. Although the same law of the Third Reich is aimed at “absolutizing” their own legal system and reducing all other legislations, including the right of nations, to an accident of German law, and thus at reducing or totally negating the rights of others as individuals and the national communities or the state communities, such as the Polish and Jewish nation, or negating the Republic of Poland. However, by this serious mistake the German Reich no longer reflects—or, what is worse—tries to destroy an objective, universal and absolutely binding purpose of law in the form of *bonum commune*, considered as the good of the human persons and the Divine Persons, and of the same German community, the personal existence of which (in the sense of individual and community personalness) has been reserved by the Führer in the Führerstaat.

VI. THE CONSEQUENCES OF LAW

The existential analogy shall inspire to adopt adequacy between the law and its consequences. If the right reason is a reason for the classically understood law, it is clear that, as Stagirite taught, “the will of each legislator is to make citizens good.”¹ It is really possible, provided that reason, free will and the human spirit and soul exist. Man, upgraded by the divine Creator, creates a solid statutory law in several precise objectives, according to, among others, *Doctor Angelicus*.

“The tyrannical law is not a law, since it is not compatible with our reason (and the rightness). It is the shattering of the law. If, however, it has something of the law, it tends to make citizens good.”² René Dupuis criticizes the process of self-communication of National Socialism in which the notion of human was lost, and personal life of the community: “Democrats have occupied the state, therefore it never ceases to oppress the people. The only difference is that now it is happening in the name of the nation, freedom, people, and human reason which were deified, and no longer in the name of the ‘Divine law.’ They are no longer ‘tyrants’ and ‘aristocrats’ who made power a machine to persecute people, but a caste of politicians and financiers. The change is purely an external one,”³ and therefore, in this context, the gentle spirit and soul of the human being is needed to understand the effects of law, for which the Führer is the most important point of reference in Nazi theory of law.

¹ ARISTOTLE, *Nichomachean Ethics*, trans. by W.D. Ross, Batoche Books: Kitchener 1999, 1106 a, 15.

² *S.Th.* I-II, 92, 1.

³ R. DUPUIS, *Um das Wort Rewolution*, L'Ordre nouveau, fasc. 41, 1937.

VI.1. “To make citizens good”?

The law has this effect when it is so good that it either “makes someone an essentially and truly good man,” or “makes him good only in terms of the benefits of the legislator,” when ruled by a “regime,”⁴ not to mention the rule of the socialist-national tyranny which uses the law to oppress, or even kill people, if they contests the principles of the ideology of the ruling party. In the Nazi law, a fundamental problem appears, whether this is possible, since Nazism questions the existence of the Divine Good, and thus relativizes the law itself, which results, *eo ipso*, in the loss of the same person in relation to the good as an objective of each act.

VI.2. Duties towards the entity of the German race as the Nazi order of law

The law “requires”⁵ doing good deeds because this helps the human being to express himself fully as a person. This kind of being is required for the great ideals, or “virtues,” and it should lead the legal entity to good, because every law as law is good.

“A member of the nation does not face the nation with the independently specified laws, but he becomes a member of the national community and can not have the subjective right to it, but only the legal position in it” because this is a consistent assignment of man as a person to the substantialized law. “This concept does not mean in any case that the individual’s position in the community is not be legally determined and secured. The position of the member of the nation is much more protected and regulated because it is a part of the order, within which he stands as one of its members.” National Socialism is striving to enslave man so that he could not be aware whether he acts as a thoughtful and free person. “Legal shaping and securing this order includes the protection of its legal position. This legal position is not, as the subjective law, the sphere of freedom in relation to the community, but it represents one part of the order of the community itself, and is sharply defined by the specific tasks of the individual in the community. This legal position differs fundamentally from the subjective public law because the fact of being a member of

⁴ *S.Th.* I–II, 92, 1, answer.

⁵ *S.Th.* I–II, 92, 2.

the community not only implies rights, but also obligations.” This means that man as an individual has no rights, but only obligations. Also responsibilities necessarily belong to the content of the legal position that are derived from the individual’s tasks in the community (as a member of the family, the state, business community, nation), and that appear as inextricably linked to the rights in today’s legal thinking.”⁶ In Nazism, there is no absolute order to “do good and avoid evil,” so it can be concluded that each obligation is only a responsibility to the German people, but not to every man as a man.

VI.3. Prohibition

St. Thomas Aquinas teaches that “some acts are evil by nature; and these are faulty deeds”—“the law prohibits them”⁷ because doing them violates a person’s essential being that develops and should be prohibited from evil actions.

The legislation of National Socialism applies prohibition as prohibition, but only in relation to the nation and the state, not to “harm” them. A violation of this prohibition is punishable by death penalty. Other people as nations have been prohibited to exist, which is contrary to the natural law considered as supportive and protective by nature to the human person as a subject. German National Socialism understands the prohibition as contradictory in itself.

VI.4. Permission

St. Thomas Aquinas teaches that “the law permits the deeds that are not too evil or indifferent,” so that there were no worse acts than, for example, “idolatry of pride.”⁸ The reason of the effect of law, similarly to other beings, should be our reason, and not “arbitrariness” because the person entitled to permit would be “imprudent; unfaithful to his reason, and, above all, to the common good which would be lost. In some cases, “different persons can be measured by the different yardstick,” which is not “partiality,” but an expression of the

⁶ W. SCHEUNER, *Die Rechtsstellung der Persönlichkeit in der Gemeinschaft*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 83.

⁷ *S. Th.* I–II, 92, 2.

⁸ *S. Th.* I–II, 97, 3, ad 2.

“special grace.”⁹ According to the *Doctor Angelicus*, “a dispensation from the highest and general principles of natural law may no be granted.”¹⁰

In the Reich, the issue of permission is essentially problematic because based somewhat on the animal world, the Reich permits even mass murder, theft, rape and the acts of brutality against women and men, children and the elderly, the sick and the helpless and millions of innocent people which is difficult to understand. Hence, the Nazi concept of permission is contradictory.

VI.5. Punishment

The same happens with the issue of punishment, which, on the basis of the classical natural law, is good and should be supported by Nazism, but it is also pushed into fundamental crisis because of the fundamental contradiction of punishment as punishment in the German Reich. “The new law of the Reich shall indicate severe penalties for offenses and crimes of Poles and Jews in the occupied territories. It turned out to be necessary” to keep everything in the Nazi governance. Otherwise “no order would be kept.”¹¹ Therefore, Alfred Rosenberg formulated the Nazi concept of punishment: “Punishment [...] is simply getting rid of foreign types and perverted natures.”¹²

“The socialist state does not punish for some abstract ideas associated with the supernatural world,” namely for the guilt, but for “the retaliation, or the national justice. Hence, criminal law reflects the moral obligation of the individual in the community.”¹³ Moreover, this is continued by Friedrich Nietzsche’s conception, according to which “punishment” and “penalty duty” should be “abolished” as a result of “herd morality.” Nietzsche raises the following question: “Why still punish? The same punishing is terrible.”¹⁴

⁹ *S. Th.* I–II, 97, 4, ad 2.

¹⁰ *S. Th.* I–II, 97, 4.

¹¹ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil II: *Diktate 1941–1945*, vol. 2: *Oktober–Dezember 1941*, oprac. E. FRÖHLICH, München: K.G. Saur 1996, p. 328.

¹² A. ROSENBERG, in: W. JOHE, *Die gleichgeschaltete Justiz*, Frankfurt a.M.: Europäische Verlagsanstalt 1967, p. 39.

¹³ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 45.

¹⁴ F. NIETZSCHE, *Jenseits von Gut und Böse*, in: F. NIETZSCHE, *Werke in drei Bänden*, hrsg. v. K. SCHLECHTA, vol. II, München: Carl Hanser Verlag 1981, pp. 658–659.

The legislation of National Socialism includes a penalty as the effect of law in the context of the “fight against criminality” until “its annihilation” because “a healthy feeling of justice of the nation requires severe punishment as retribution and redress.”¹⁵

Otto Koellreutter, a law professor, supports the institution of concentration camps and gives his reasons for this important issue: “The value of safety of law must be respected and protected in the national state. Of course, there are new limits to the concept of public law in demanding absolute securing of the national order of life, in the state in which the new idea of the state has won a revolutionary victory. It would be senseless to say that, for example, the concentration camps would be public-legal institutions. However, they are necessary to secure new bases of the state and the law, as long as the foundations of the national state are threatened by attacks...”¹⁶

During the hearing of Peter Graf Yorck of Wartenburg, one of the potential assassins of Hitler on 20 July 1944, Roland Freisler said: “The general act of conduct in our community is that the betrayal of the nation, the Führer and the Reich must be eradicated and annihilated in certain circumstances.”¹⁷ During 12 years of existence of the German Reich, especially from 1939 to 1945, this resulted in “more than 16,500 death sentences,”¹⁸ and it is very likely that there were many more.

According to the law against perfidious attacks on state and party and for the protection of uniforms of 20 December 1934, offending the socialist-national party was penalized with “imprisonment,” and or, “in severe cases, even death penalty”¹⁹ because “our socialist-national revolution,” as Hitler said

¹⁵ H. FABRICIUS, *Das Programm der NSDAP*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 6, Berlin: Industrieverlag Späth & Linde 1936, p. 33.

¹⁶ O. KOELLREUTTER, *Der Deutsche Führerstaat*, Tübingen: Mohr 1934, p. 21.

¹⁷ R. FREISLER, in: H.W. KOCH, *Volksgerichtshof. Politische Justiz im 3. Reich*, München: Universitas Verlag 1988, p. 429.

¹⁸ H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafjustiz im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, dissertation, Westfälische Wilhelms-Universität, Münster (Westf.) 1995, p. 13.

¹⁹ § 3 (2) Wer die Tat in der Absicht begeht, einen Aufruhr oder in der Bevölkerung Angst oder Schrecken zu erregen, oder dem Deutschen Reich außenpolitische Schwierigkeiten zu bereiten, wird mit Zuchthaus nicht unter drei Jahren oder mit lebenslan-

on 30 January 1935, “is the most bloodless and yet one of the most decisive revolutions in the history of the world.”²⁰ The essential disorientation or deliberate misleading of global public opinion on the assessment of Nazism that was a criminal system punishing even for the objective good, is revealed by the fragment of the article published in the “Daily Mail:” “Hitler filled his nation with indestructible morality and unchanging faith in the fate of Germany. He proved that he was not a demagogue, but a statesman and a true reformer. Europe must not forget that it owes him that communism, which in 1932 threatened to prevail in the European continent by the bloody uprising, was decisively and finally defeated.”²¹

Conclusions

The antinomy of the Nazi legal system causes that there are no reasons for the existence of the objective effects of law, such as: “make man good,” order, prohibition, permission and punishment because they are based on the contrariety legal dialectic of National Socialism in the Third German Reich.

gem Zuchthaus bestraft. In besonders schweren Fällen kann auf Todesstrafe erkannt werden. (3) Nach diesen Vorschriften kann ein Deutscher auch dann verfolgt werden, wenn er die Tat im Ausland begangen hat. Cf. the amendment to the Act of 29 May 1941 (RGBl. I S. 295).

²⁰ A. HITLER, *Die nationalsozialistische Gemeinde*. Zentralblatt N.S.D.A.P. für Gemeindepolitik, 3. Jg, of 15 February 1935, p. 105.

²¹ “Daily Mail,” citing “*Die nationalsozialistische Gemeinde*. Zentralblatt N.S.D.A.P. für Gemeindepolitik,” 3. Jg, of 15 February 1935, p. 117.

VII. NOT DIFFERENT KINDS BUT THREE ASPECTS OF ONE RACIST GERMAN LAW

In the Nazi legal and juridical awareness, according to the idealist-socialist dialectic, there is an absolute principle of racist identity of non-identity between the eternal law as the Divine law, the natural law and the positive law of the legislation of the Third Reich. Hence there is no question of the existence of three different types of law. There is only one law, although contradictory in itself, but seeking to the Nazi identity of non-identity. This is a racist law, culminating in the Führer as the principle of this type of legal monism. What are the dimensions of the German law?

VII.1. The racist-divinist aspect of the Führer's law in the place of the classical eternal law

“There are no eternal laws. There are no eternal truths. There are eternal principles. These are the laws of nature,”¹ as written by Joseph Goebbels, with reference to the contradictory Marxist-Engelsian attempt to perpetuate the substance of matter. According to National Socialism, it is interpreted as a Nordic race, from which the allegedly eternal German nation emerges. There is, however, no adequate proof for the thesis that this race is a being per se, and its mortality is a clear proof of its non-eternity.

The main ideologist of the Reich, Alfred Rosenberg, concludes on the basis of the Nordic race ideology that “the alleged ‘eternal’ laws [...], which went down from above to cover all nations,”² are products of the human imagina-

¹ *Die Tagebücher von Joseph Goebbels*, E. FRÖHLICH (Hrsg.), Teil I: *Aufzeichnungen 1923–1941*, vol. 1/1: *Oktober 1923–November 1925*, ed. E. FRÖHLICH, München: K.G. Saur 2004, July 1924, p. 168.

² A. ROSENBERG, *Eine neue deutsche Rechtsphilosophie*, *Zeitschrift der Akademie für Deutsches Recht* (1934), p. 47.

tion, and, in particular, the Catholic religion and the French Revolution. Indeed, there is a “timeless legal unity”³ and this is the German nation in the ideological self-consciousness. The same “fantasy” is a power that is unable to conclude, since it can only keep the species *sensibilis* of cognitive process, carried out by our reason as a spiritual power.

Ernst Krieck, a theoretician of law and Nazi education at the University of Heidelberg, interprets National Socialism as a “national-political realism,” which is opposed to “pure idealism,” “individualism” and communist “collectivism.” According to him, “there is no absolute reason.” Moreover, no reason can transcend the perceived reality, which is confirmed by legal materialism of National Socialism of the German Reich. In Krieck’s opinion, every science is essentially “dependent” on the type and location of the perceiving subject and time.⁴ Hence, Krieck defines the representative of the human race as a “man of modern times,” who “meets the life of the nation and brings the spirit of the community into all relationships of life.”⁵ Fabian Wittreck notes the Nazis pursue to “modernity” and “novelty.”⁶ The existence of race is the best—or even the only rational—way, in the sense of the materialistic ideology. Since the current reality is the “national-racial community,” everything else (the whole reality) needs to be subordinated to it as a “unifying principle.” This new Nazi paradigm in science must permeate both the humanities and the natural sciences: “Hence the modern natural law is not a natural law of ‘free’ individuals, but the natural law derived from the specific orders, this is to say, the community”⁷ of the German race. It is not natural, but *a priori*. Therefore, Wittreck correctly argues that, in general, Nazism is afraid of indi-

³ R.W. DARRÉ, *Blut und Boden*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 3, Berlin: Industrieverlag Späth & Linde 1936, p. 2.

⁴ Cf. E. KRIECK, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934.

⁵ H.-H. DIETZE, (review) Krieck, Ernst, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), pp. 496–497.

⁶ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 24.

⁷ H.-H. DIETZE, (review) Krieck, Ernst, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/ Leipzig: Armanen-Verlag 1934, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 497.

vidualism”⁸ which questions its racial collectivism from the socialist-national point of view.

Hans Frank says that “to see the eternal natural law behind the paragraphs is a great thing.” Frank and Hedemann claim that “nature is beaming like a mother-provider and educator.” “A lawyer has no power, if he lacks the experience of soil.”¹⁰ Therefore, a concrete man as an individual is not the most appropriate legal entity. On the contrary, “the law” “should not serve a single man” because “only the community gives rise to the law,”¹¹ or, as expressed by Hans Frank, “the sum of the individual knowledge of law is created by the national community.”¹² Hence, there is a Nazi protest against “universalism”¹³ in both the classical concept of natural law and the Christian ecclesial doctrine on the existence of entity called “the Eternal law” which is absolutely identical with the Absolute.¹⁴

Admittedly, Karl Larenz “rejects legal positivism,” but this does not mean that his socialist-national concept of law “returns to the natural law.” Furthermore, he criticizes the “Catholic doctrine of natural law” for treating the “principles” of natural law as “eternal and generally binding,” even though he shares the view on the existence of “human longing for absolute cognition of legislation,” which is expressed in the “theory of natural law” in order, to have “certain immutable and undoubted, absolute criteria,”¹⁵ which the Nazi ideology usurps entirely playfully: “*ius divinum* [...] definitely exists, which is opposite in content to the variable positive legal orders,”¹⁶ to establish the

⁸ F. WITTECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 25.

⁹ H. FRANK, in: J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 137.

¹⁰ J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 137.

¹¹ *Ibidem*, p. 138.

¹² H. FRANK, in: J.W. HEDEMANN, *Juristen im Schulungslager*, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg: Fischer Bücherei 1964, p. 138.

¹³ F. WITTECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 25.

¹⁴ AUGUSTINUS, *Der freie Wille*, übers. v. J. PERL, Paderborn 1941, vol. I, 18.

¹⁵ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag 1935, p. 152.

¹⁶ H. ROEDER, *Die Untrennbarkeit von Sittlichkeit und Recht*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 43.

“absolute leadership”¹⁷ of the Nazi legal system. However, it is racist, and as such is false and not affirmable by the objectively thinking and righteous man.

VII.2. The racist-socialist aspect of law in the place of the classical science on natural law

Rudolf Bechert speaks about the “inborn right” and describes it as “primary national and racial right,” that shall be preserved as a ‘belief about what is right,’ but the “changes in the blood of nations transform their legal beliefs” and hence he concludes that the “general claim of the binding, immutable natural law presupposes equality of all the people. However, the equality of the essence is a mistake, as it is undermined by natural facts,” such as different understanding of “property.”¹⁸ A difference within the understanding of law of nature is revealed in the context of determining the source of natural law. For Bechert that are, among others, “family, property,” or “freedom and inviolability of person, an attitude towards the world (religion) and such.”¹⁹ These are all immanent relationships in the universe while there is no transcendent relationship between the human being and the Absolute as the ultimate Giver of natural law. Moreover, God as the Supreme Lawgiver is totally contested in His absolute Being, which is certainly the biggest mistake of the socialist-national ideology in the German Reich.

Helmut Nicolai, a leading representative of the legal racism in the Third Reich, denies that there is an objective, absolutely binding and universal law in every human being, and in every nation on earth because, according to him, “the prevailing view is that there is no binding law for all nations and all times. Different kinds of law are much more appropriate for different races, and different nations,”²⁰ and ultimately only the law of the German racism is accepted by the Nazis.

¹⁷ H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafjustiz im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, dysertacja, Westfälische Wilhelms-Universität, Münster (Westf.) 1995, p. 35.

¹⁸ R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 19.

¹⁹ *Ibidem*, p. 19.

²⁰ H. NICOLAI, *Die rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, München: Verlag Franz Eher Nachf. 31934, p. 32.

In 2008, Fabian Wittreck, a professor of public law at the Westfälische Wilhelms-Universität in Münster, stated that “there is no clear idea of the relationship between National Socialism and the natural law.”²¹ According to him, the previous attempts at interpreting this issue require deeper research because definitions such as: the Nazi law is a “new kind of game of natural law,”²² “the Nazi natural law”²³ or “identifying the legislation of the Third Reich with the doctrine of natural law, need a far-reaching, or even basic adjustment.”²⁴ It is necessary in the case of Uwe Kalbhen’s treatise that “morbidly” identifies “the ideologically overloaded Nazi law” with the law of nature,²⁵ which was rightly criticized by, among others, Christian Tilitzki.²⁶

Niermann believes that the legislation of the German Reich was not based on “the generally applicable natural law, assuming the equality of all men,”²⁷ but on the concept of the Nordic race. In his Nazi philosophy of law, Nicolai said that the Roman law was a “racial mixture of ancient nations and for this reason it was inaccurate. “The anti-spirit of Marxism and liberalism” could not be an ideological basis for law. “The ethically right Nordic spirit” alone embeds the “entire socialist-national theory of law in the conception of race”²⁸ that

²¹ F. WITTRECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 5.

²² I. MÜLLER, *Gesetzliches Recht und übergesetzliches Unrecht*, Leviathan. Berliner Zeitschrift für Sozialwissenschaft 7 (1979), p. 320.

²³ H. LAU, *Naturrecht und Restauration. Zur Kritik eines Legitimationsmusters in Justiz und Rechtstheorie der Neuzeit*, Egelsbach 1994, p. 8.

²⁴ Cf. D. MAYER-MALY, P.M. SIMONS (Hrsg.), *Das Naturrechtsdenken als Prüfstein des Naturrechtsgedankens heute und morgen. Gedächtnisschrift für R. Marcic*, Berlin 1983, p. 437, 438, 450; H.-J. KERKAU, *Der Naturrechtsgedanke in der Rechtssprechung des Bundesgerichtshofs in Strafsachen*, dissertation, Kiel 1966, p. 37 f.; O. LEPSIUS, *Die gegensatz-aufhebende Begriffsbildung*, 1994, p. 286 f.; U. KALBHEN, *Die NS-Rechtstheorie als Herrschaftsideologie. Logische Struktur und soziale Funktion naturrechtlicher Konstruktion im Nationalsozialismus*, Dissertation, Universität Heidelberg 1969, p. 7.

²⁵ F. WITTRECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 5.

²⁶ Ch. TILITZKI, *Die deutsche Universitätsphilosophie in der Weimarer Republik und im Dritten Reich*, Berlin 2002, p. 1044, note 484.

²⁷ H.-E. NIERMANN, *Die Durchsetzung politischer und politisierter Strafjustiz im Dritten Reich. Eine Analyse ihrer institutionellen, personellen und strafrechtlichen Entwicklung, aufgezeigt am Beispiel des OLG-Bezirks Hamm unter schwerpunktmäßiger Zugrundelegung der Jahre 1933–1939*, dissertation, Westfälische Wilhelms-Universität, Münster (Westf.) 1995, p. 34.

²⁸ H. NICOLAI, *Der Neubau des Reiches nach dem Reichreformgesetz vom 30.1.1934*, Berlin 1934, p. 76.

creates the German law. Ernst R. Huber leaves no doubt to the thesis of the fundamental negation of natural law. He claims that “there are no innate, inviolable political rights that would be the rights of an individual as such and would tend towards restricting the role of the executive. A member of every true political community has his own legal position that is given to him by the Führer, and makes him the Führer’s follower.”²⁹ This also makes Hitler, who is the head of the Nazi party, the main source of racist law.

Helmut Dietze considers the “concept of ‘natural law’ as a scientific formula for the will of the Führer.”³⁰ Therefore, in the light of the original research of the Nazi concept of law, it is difficult to prove that the “exception” in the ideologisation of reality is an “attempt to justify the new order with the tradition of natural law,”³¹ as National Socialism consistently uses the Nazi concept of being, thought and action, constructing these concepts on the basis of completely different understanding of nature, law and the entire real being in terms of their causality, as well as their existence and finality. Nevertheless, the representatives of the conception often say: “National Socialist is a natural lawyer.”³² Thus, for example, Karl Larenz places the law “outside the natural law and positivism”³³ because: “We know today that positivism, and the negation of the idea of law as a power shaping the law, is as little accurate, as an abstract adoption of the existing natural law.”³⁴ Julius Binder, who was also influenced by Hegelian idealism, wrote in a similar style: “The subject of the philosophy of law is not the so-called natural law or the law of reason [...]. Such a law can not exist.”³⁵ In turn, Carl Schmitt considered the law established by the Reich as the only valid law and rejected any other kind of law as “many states have failed because of reliance on any other law that was different from the state order—the

²⁹ E.R. HUBER, *Verfassungsrecht des Großdeutschen Reiches*, Hamburg 21939, p. 367.

³⁰ H.-H. DIETZE, *Europa als Einheit*, Zeitschrift für Völkerrecht 20 (1936), p. 324.

³¹ F. WITTECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 19.

³² H. KRAUS, *Das zwischenzeitliche Weltbild des Nationalsozialismus*, Juristische Wochenschrift 1933, p. 2418.

³³ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 21935, p. 150.

³⁴ IDEM, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgen und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934, p. 37.

³⁵ J. BINDER, *Grundlegung zur Rechtsphilosophie*, Tübingen 1935, p. 5.

natural law, the law of God [...]”³⁶ Therefore, he was in favor of “the concrete way of thinking”³⁷ for which he was criticized in the same journal because his conception was supposed to be “the newly awakened idea of the natural law.”³⁸ Falk Ruttke believes in the non-admissibility of natural law in the legislation of the Third Reich. He claims that “National Socialism rejects any incoming external evaluation, and thus any abstract or concrete natural law,” but it derives “its value criterion from their own kind of Nordic-Phalic race formed for thousands of years”³⁹ and its racial rationality. It does not use “rationality”⁴⁰ of Greek or scholastic metaphysics because “the individualistic right of the Enlightenment reason” and “the religious and ethical natural law of the Christian teaching”⁴¹ do not take into account the “individualities” understood as parts of the nationality.⁴² Therefore, the Nazi theorists criticize “the Catholic doctrine of natural law” and “reject” it.⁴³ For example, in the “Deutsche Hitlerjugend,” Dietze criticizes the Catholic tradition of the doctrine of natural law. The reason for his critique is that “the word and doctrine of the Christian-Catholic ‘natural’ law is [...] one of the greatest usurpations by which the Church has ever been at fault.”⁴⁴ Furthermore, Larenz reduces the Catholic teaching on natural law to “naive generalizations of the time-sensitive views of the Weimar era.”⁴⁵

³⁶ C. SCHMITT, *Nationalsozialismus und Rechtsstaat*, Juristische Wochenschrift 1934, p. 713.

³⁷ IDEM, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg: Hanseatische Verlagsanstalt 1934, p. 11.

³⁸ REUß, (review.) C. Schmitt, *Nationalsozialismus und Rechtsstaat*, Juristische Wochenschrift 1935, p. 1606.

³⁹ F. RUTTKE, *Rasse und Volk*, in: National-Sozialistischer Rechtswahrer-Bund (Hrsg.), *Deutscher Juristentag 1936*, 1936, p. 83.

⁴⁰ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 25.

⁴¹ H. KRUPA, *Gierkes Kampf gegen Positivismus und Naturrecht*, Archiv für Rechts- und Staatsphilosophie 32 (1938/1939), p. 471.

⁴² Ibidem, p. 472.

⁴³ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 28.

⁴⁴ H-H. DIETZE, *Rechtsgestalt der Hitlerjugend. Eine verfassungsrechtliche Studie*, Berlin 1939, p. 204 f.

⁴⁵ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 152.

The few representatives of the Nazi legal theory recognized “a close connection”⁴⁶ between the concept of “common good” and the concept of “authority.”⁴⁷ On the Catholic side, such convergence was emphasized by, among others, Lies Rommen at the level of labor law and Michael Schmaus at the level of the Catholic doctrine of natural law’s protest against individualism and rationalism, similarly to the German National Socialism.⁴⁸ However, shortly after this unfortunate lecture at the University of Münster, Schmaus changed his opinion from the position of an ideological convergence of Catholicism and National Socialism. He joined the opponents of the Nazi system, who saw a fundamental difference of doctrine, for example, in the theory of the equal dignity of every person before God in the light of the objective, essentially unchanging and “universal natural law of the Catholic Church.”⁴⁹ This inability to connect the Catholic doctrine of natural law with the Nazi ideology was emphasized by a Protestant theoretician of evangelical law, Hans Liermann.⁵⁰

According to Fabian Wittreck, the natural law concept of the Church’s teaching on the “sanctity of life”⁵¹ has eventually become the apple of discord. In his treatise *Blut und Boden*, Helmut Dietze rejected the thesis that “to make a man infertile violates the ‘Divine natural law’ and hence is lawless.”⁵² On the contrary, Ernst Riezler claims that “sustaining the weak and hereditarily ill children, the legal protection of life of the terminally ill, the legally regulated care for the mentally ill [...], all this would have fundamentally reject the policy of the law which would be the highest law, fully fitting to the zoological and biological viewpoints.”⁵³ In turn, Heinrich Rommel refers to the natural

⁴⁶ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 30.

⁴⁷ H.-H. DIETZE, *Naturrecht in der Gegenwart*, Bonn: L. Röhrscheid Verlag 1936, p. 105.

⁴⁸ M. SCHMAUS, *Begegnungen zwischen katholischem Christentum und nationalsozialistischer Weltanschauung*, Münster: Aschendorff 31934.

⁴⁹ E. RIEZLER, *Naturgesetz und Rechtsordnung*, Archiv für Rechts- und Staatsphilosophie 34 (1940/41), p. 149; cf. M. MÜLLER, *Ein Rückblick—nebst einigen Bemerkungen zum Begriff der Totalität*, Werkblätter 6 (1933), p. 151.

⁵⁰ H. LIERMANN, *Rasse und Recht*, Zeitschrift für die gesamte Staatswissenschaft 85 (1928), p. 293.

⁵¹ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 34.

⁵² H.-H. DIETZE, *Naturrecht aus Blut und Boden*, Zeitschrift der Akademie für deutsches Recht 1936, p. 820.

⁵³ E. RIEZLER, *Naturgesetz und Rechtsordnung*, Archiv für Rechts- und Staatsphilosophie 34 (1940/41), p. 154.

law as absolutely binding to each man as man, indicating that “contempt of the natural rights to life [...] is unfair, no matter by whom, and under what circumstances they are violated.”⁵⁴

There is one exception among the Nazi philosophers of law—Wilhelm Schwister. Before 1933, he was a strong opponent of the theory of natural law. However, in 1934, after he had experienced the reign of Nazism and met professor Felix A. Holldack forcibly retired after gaining power by the Nazis, he became not only an advocate, but in a sense, a “follower”⁵⁵ of the natural law theory.

In the Nazi ideology, there are several proposals of the natural law concept. Raimund Eberhard proposed a plan of the absolute-relative natural law, where “the legal sentences” such as the acts “are derived [...] from the blood of the noble German race. It is the biological, legal-racial natural law.”⁵⁶ On the other hand, Eberhard believes that it is inadequate and there is a divine, eternal, law above it which is, in a sense, the primary and absolute natural law.⁵⁷ What is divine, is derived from the existence of the ideologically understood German “blood,” and can not objectively claim to be truly Divine law.

Hans-Helmut Dietze proposes a “novelty” which is neither Catholic nor Protestant, but German as it is the “new socialist-national natural law.”⁵⁸ It is to be the “collectivist-voluntaristic” natural law of the community,⁵⁹ constituted by the “essential will” characterized by “thinking.”⁶⁰ This means that, according to “this new natural law, every German has the natural law written in his soul. Each member of the nation can decide with his legal sensibility about good and evil, law and lawlessness,”⁶¹ but only due to the Nazi principle of “blood and

⁵⁴ H. ROMMEL, *Die ewige Wiederkehr des Naturrechts*, Leipzig: Hegner 1936, München: Josef Kösel 21947, p. 262.

⁵⁵ W. SCHWISTER, *Gesetz und Richteramt*, Deutsche Juristen-Zeitung 1934, column 1435.

⁵⁶ R. EBERHARD, *Modernes Naturrecht. Ein rechtsphilosophischer Versuch*, Rostock 1934, p. 22.

⁵⁷ *Ibidem*, pp. 35–38.

⁵⁸ H.-H. DIETZE, *Naturrecht in der Gegenwart*, Bonn: L. Röhrscheid Verlag 1936, p. 107.

⁵⁹ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 38.

⁶⁰ H.-H. DIETZE, *Naturrecht in der Gegenwart*, Bonn: L. Röhrscheid Verlag 1936, pp. 37–41.

⁶¹ *Ibidem*, p. XII.

soil." In 1938, Hans Fehr coined the phrase "isolated natural law"⁶² to essentially leave all other concepts of natural law behind, including the metaphysical concept, as well as the Christian concept in the scholastic sense, which allows to uniquely identify the racist ideology "aversion"⁶³ to other nations.

A number of the Nazi authors use terms that are very similar to the classical terminology of the natural law such as "statutory-lifelong," "statutory-natural,"⁶⁴ "the eternal law of the nation."⁶⁵ Erik Wolf writes about the "natural laws of race and nationality,"⁶⁶ but these concepts should be understood in the "spirit" of the then Nazi ideology and the resulting system of the ideology of race. Otherwise, the syntactic approach may lead to major abuses of interpretation such as Helmut Nicolai's conclusion that the German law of the Third Reich is the "law of life, where morality reached its peak."⁶⁷

It is difficult to share Wittreck's opinion that "the socialist-national theory of law is [...] a kind of game of defective natural law, regarding its main figures; it is a kind of measure, which is used by the system, but with which the system is unwilling to be measured."⁶⁸ His interpretation stems from the fact that the understanding of reality has been redefined by the Nazi ideology. This is even more dangerous as it causes the total relativisation⁶⁹ of the objective, universal and absolutely binding natural law, which demonstrates the need for further analysis of the ideological system in this dimension.

⁶² H. FEHR, *Die Ausstrahlung des Naturrechts der Aufklärung in die neue und neueste. Vortrag gehalten am internationalen Historiker-Kongress in Zürich 1938*, Bern/Leipzig 1938, p. 26.

⁶³ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 42.

⁶⁴ For example, H. NICOLAI, *Rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, NS-Bibliothek, fasc. 39, München 1939, p. 3.

⁶⁵ H. BARTH, *Rechtssicherheit und Gerechtigkeit*, in: *National-Sozialistischer Rechtswahrer-Bund* (Hrsg.), Deutscher Juristentag 1936, Berlin 1936, p. 137.

⁶⁶ E. WOLF, *Richtiges Recht im nationalsozialistischen Staate*, 1934, p. 27; cf. IDEM, *Rechtsideal des nationalsozialistischen Staates*, "Archiv für Rechts- und Sozialphilosophie," vol. XXVIII (1934/35), p. 348.

⁶⁷ H. NICOLAI, *Rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, NS-Bibliothek, fasc. 39, München 1939, p. 21.

⁶⁸ F. WITTRICK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 55.

⁶⁹ Cf. G. GEISMANN, *Naturrecht nach Kant. Zweite und letzte Replik zu einem untauglichen Versuch, die »klassische« Naturrechtslehre—besonders in ihrer christlich-mittelalterlichen Version—wiederzubeleben*, "Jahrbuch für Politik" 5 (1995), pp. 141–177.

VII.3. The racist-positivistic aspect of the law in the place of the classical established law

“A great revolution is always marked by philosophy of law and social philosophy. In 1789, it was the natural law, and in 1933, it was the theory of race and society.”⁷⁰ Thus, Roland Freisler believes that “the law is rooted in the nation. It grows up directly with its essence, and its blood; but even more it grows out of the experience as a rational cognition. It is the product of life, not a product of distillation.”⁷¹ Therefore, the law of the Reich is derived from the German race understood in an *a priori* way.

Bechert speaks about the “positive law,” which “changes over time and the history”⁷² of the nation, understood as a product of developing and unplanned force of nature. Due to the postulated intrinsic variability of nature, a permanent variability of positive law is postulated. The positive law is regarded as the only law which is absolutely binding.

It is generally recognized that the Führer hated the law—even the positive law derived from the existence of the Nordic race: “Hitler’s legal Nihilism hates anything that could be used to measure his activity with the requirement of bindingness even if it is supposed to be the ‘national’ law that has grown out of blood and soil.”⁷³ The Führer himself is an absolute lawgiver, and, therefore, there is no legislator superior to him.

Conclusions

Although the ideology of the Third Reich discussed different types of law: divine, natural and human law, it affirmed the latter as the only kind of law. The

⁷⁰ W. SAUER, *Nationale Revolution und nationalsozialistische Rechtsphilosophie*, “Rechts- und Preußisches Verwaltungsblatt” 1933, p. 441.

⁷¹ R. FREISLER, *Rasse als Ursprung, Träger und Ziel deutschen Volksrechts*, National-Sozialistischer Rechtswahrer-Bund (Hrsg.), Deutscher Juristentag 1936, Berlin 1936, p. 149.

⁷² R. BECHERT, *Grundzüge der Nationalsozialistischen Rechtslehre*, in: *Neugestaltung von Recht und Wirtschaft*, C. SCHAEFFER (Hrsg.), fasc. 4, Leipzig: Verlag W. Kohlhammer 1938, p. 19.

⁷³ F. WITTECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, pp. 54–55.

precise understanding of this issue is extremely relevant, not only for epistemological reasons regarding National Socialism, but also for a number of fundamental decisions in today's legislation in Poland and worldwide.

VIII. A FEW REMARKS ON UNIVERSITY, SCIENCE AND TEACHING OF LAW IN THE THIRD GERMAN REICH

The precise knowledge about the origin, nature and finality of the university has existed in the self-awareness of Hitler's Nazis from the beginning. The "prototype of the German universities originates from Germanic-Christian medieval times, which, according to its structure, evolved out of Germany and grew out of the universality of the Roman Catholic Church. Theology was the foreground of all other professional areas. It was a worldview link connecting the beginning and the end of the cognitive attempts."¹ Nazism rejects theology as a science, and this, in turn, necessitates the "transformation of the educational institutions, since the university is in the process of renewal. However, the external changes are insufficient. The spiritual content, namely focus on the national-political idea forms the essence,"² as written by Hans-Helmut Dietze. What is the basis for the Nazi university in the German Reich?

VIII.1. Total politicization of university and science

In 1930 the Führer emphasized the central place of science and university in the socialist-national ideology: "Nothing can give me more faith in the victory of the idea than the success of National Socialism at the university!"³ The "socialist-

¹ M. SANDBERGER, *Das Nationalsozialistische Deutsche Studententum*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 7 d, Berlin: Industrieverlag Späth & Linde 1936, pp. 4–5.

² H.-H. DIETZE, (review) Krieck, Ernst, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934, "Archiv für Rechts- und Sozialphilosophie," vol. XXIX (1935/36), p. 497.

³ A. HITLER, in: M. SANDBERGER, *Das Nationalsozialistische Deutsche Studententum*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staats-*

national” or “racial-national-political idea” becomes the foundation, essence and purpose of “all knowledge and cognition, all scientific research and teaching” and the “unity of sense in the plurality” of “university,”⁴ and as such is considered to be the “greatest educational work that humanity has ever undertaken.”⁵

Under the Act of 1 December 1933 and Regulation of 2 December 1933, every official, including university professors, had to take an oath “to the nation and homeland,” and under the Act of 1 August 1934—an oath “to the Führer of the German Reich and the nation,” which “made the official personally attached to the Führer” as “his supreme master and supervisor. The oath included a commitment to sacrifice his own life for the good of his country. The duty of loyalty was not related to the office, but to a specific person. And it was binding even if the officer left his office. According to the socialist-national ideology, a retired officer was also bound by the duty of loyalty and was not just a private man who could do whatever he wanted.”⁶

The “theory of law” in the German Reich should go the third way, namely do not go only “the positive law way,” nor “the natural law way,” but if it “reflects on the proper essence of the law” in the sense of “nationality” and with the help of “the national spirit of law,”⁷ it will recognize the “relationship between the law and the spirit of the nation regarded as its internal idea and substance.” Moreover, it provides the “third position,” which is a position outside the law of nature and positivism, a philosophical character.⁸ “The law regarded as a concretization of the national spirit of law unifies idea and reality,”⁹ which is typical for monism. This means that the “act as an expression of the will of the executive will be shared in its existence, not only as a duty.”¹⁰

rechtlichen Grundlagen des nationalsozialistischen Staates, gr. I, art. 7 d, Berlin: Industrie-
verlag Späth & Linde 1936, p. 4.

⁴ E. KRIECK, *Nationalistische Erziehung*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 21.

⁵ *Ibidem*, p. 28.

⁶ H. SEEL, *Das Beamtenrecht des Dritten Reiches*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 161.

⁷ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünnhaupt Verlag 1935, p. 154.

⁸ *Ibidem*, p. 155.

⁹ *Ibidem*, p. 156.

¹⁰ *Ibidem*, p. 155.

However, “the executive is characterized by a personal way of conduct emerging from the super-personal substance” that has the “creative,” divine power of “auto-creation and auto-formulation.”¹¹

In spite of the fact that there was a totalitarian approach to science in the Reich, Otto Koellreutter’s conception gives the impression of scientific freedom. He wrote: “These criteria do not affect in any way the properly understood ‘freedom of science.’ The abovementioned reveals there is no non-notional and independent science in the sense of unnatural liberalism,” which led to the destruction of the spiritual powers of the nation. First of all, German science must always be aware of its organic relation to the life of the nation and the state. Hence, it has to be a true political science. It has to keep the freedom of scientific research and the objective attitude in the German State of the Führer. The objectivity of science is dependent on the political reality. Nevertheless, it is aimed at the creative dedication to its own subject.”¹² Since the Nordic race is a cause for the vision of reality, an “ideal worthy to obtain by the modern German theory of law is in regard to the living connection between abstract theoretical truth and the reality of national life.”¹³

The “socialist-national science” and the “socialist-national theory of administrative law” determine “the legal-administrative practice, legislation, case-law and administrative development of the particular case” when “implementing the socialist-national leading ideas into the law and the decision.”¹⁴ Hans Frank continues: “I regard creating a scientific basis for the socialist-national German administrative law, as political and legal commitment and the most necessary scientific-legal task of the present times.”¹⁵ As a result, man becomes completely dependent: “today, we should reflect on what the institute of law practically

¹¹ Ibidem, p. 164.

¹² O. KOELLREUTTER, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, vol. 62.

¹³ H. FRANK, *Einführung. Nationalsozialismus und Verwaltungsrecht*, in: IDEM (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. XIV.

¹⁴ H. FRANK, *Vorwort*, in: IDEM (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. IX.

¹⁵ Ibidem.

represents and whether it may be the most important legal criterion that is superior to the idea of National Socialism.”¹⁶

Rosenberg claims that “National Socialism has never oppressed the freedom of science. It has only caused the expulsion of a number of academics who turned the freedom of scientific research on freedom of insulting the German national values.”¹⁷ On the other hand, Bernd Rütters says that the “new holders of power pushed through a radical change of professorship in Kiel. Only one of all senior professors remained. The Faculty of Law experienced a total breakdown of personnel. Only one of the earlier heads of departments remained in the office. The ministerial guidelines for students were as follows: ‘You should favour the faculties of law in Kiel, Breslau and Königsberg, which were selected as a political strike groups (!).’ The university of Kiel played an exemplary role of the fully politicized University under the leadership of the legal rectors: Dahm (1935) and Ritterbusch (1937–1941).”¹⁸

In 1933, Gerhart Husserl, a philosopher of law, was expelled the University of Kiel because of his Jewish origin, and the party appointed Karl Larenz in his place. At the beginning of the summer semester of 1933, Larenz started teaching philosophy of law, and later also civil law. In the teaching of law, he avoided the use of the very concept of law, and his famous saying was: “A member of the law is the one who is a member of the German nation.” Therefore, in 1934, Felix A. Holldack, a historian of law and legal philosopher, was forcibly retired.”¹⁹

Helmut Nicolai, a philosopher of law of the NSDAP, published the following books: *Rassengesetzliche Rechtslehre. Grundzüge einer nationalsozialistischen*

¹⁶ E. SCHWINGE, L. ZIMMERL, *Wesensschau und konkretes Ordnungsdenken im Strafrecht*, Bonn: Ludwig Röhrscheid Verlag 1937, pp. 97–98.

¹⁷ A. ROSENBERG, *Nationalsozialismus, Religion und Kultur*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 1, Berlin: Industrieverlag Späth & Linde 1936, p. 6.

¹⁸ B. RÜTTERS, *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich*, München 1988, p. 42 f.; cf. J. ECKERT, *Was war die Kieler Schule*, in: F.J. SÄCKER (Hrsg.): *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, pp. 37–70; J. ECKERT, *Die juristische Fakultät im Nationalsozialismus*, in: H.W. PRAHL (Hrsg.), *Uni-Formierung des Geistes. Universität Kiel im Nationalsozialismus*, Kiel 1995, pp. 51–86; cf. K.-D. ERDMANN, *Professoren unter Hitler—Dargestellt am Beispiel der Universität Kiel*, FAZ of 16 June 1965, p. 15 f.

¹⁹ F. WITTECK, *Nationalsozialistische Rechtslehre und Naturrecht. Affinität und Aversion*, Tübingen: Mohr Siebeck 2008, p. 28, note 32.

Rechtsphilosophie (1932, 3rd ed. 1934), and *Grundlagen der kommenden Verfassung. Über den Aufbau des staatsrechtlichen Dritten Reiches* (5 editions, 1933). The latter was dedicated to Adolf Hitler. The essence of Nicolai's conception is the legal mediation of race as a race through culture. This means that the race is the ultimate source of law. Although almost all Nazi ideologues claim to create the "race science,"²⁰ it is difficult to defend their alleged scientific status, which is contested in the light of systematic analysis because of the total—with some exceptions—ideologization of education in the Third Reich.²¹

VIII.2. The teaching of legal science and the philosophy of law and the process of the Nazi education

On May 5, 1933, Professor Karl Reinhardt wrote a letter to the then Nazi minister of education, where he stated that "he was not able to continue teaching on "the spirit of the tradition of German humanism." The changes which had occurred required so much "sacrifice," that it was "beyond the strengths of his spirit" to hold his office."²² The majority of professors argued in favor of the Nazi system. Ernst Forsthoff, a professor of law wrote about the "big political names of recent times: Adolf Hitler, Mussolini, Lenin and Stalin. [...] A New Europe was being created. No European nation could protect themselves from the laws of the time."²³

Professor Otto Koellreutter claimed that the educational process should be based on the "Führer:" "Education and training of young lawyers must be

²⁰ Cf. H. NICOLAI, *Rassengesetzliche Rechtslehre. Grundzüge einer nationalistischen Rechtsphilosophie*, NS-Bibliothek, fasc. 39, München 1939; E. FISCHER, *Der völkische Staat, biologisch gesehen*, Berlin: Junker & Dünnhaupt 1933; R. DEISCH, *Rasse und Recht*, in: H. FRANK (Hrsg.), *Nationalsozialistisches Handbuch für Recht und Gesetz*, München: Zentralverlag der NSDAP 21935, p. 45; G. STIER, *Das Recht als Kampfordnung der Rasse*, 1934; R. FREISLER, *Nationalsozialistisches Recht und Rechtsdenken*, Berlin 1938.

²¹ Stolleis and Kaufmann deny the existence of the socialist-national philosophy of law: M. STOLLEIS, *Gemeinwohlformeln im nationalsozialistischen Recht*, Berlin 1974, p. 39; A. KAUFMANN, *Rechtsphilosophie und Nationalsozialismus*, in: H. ROTTLEUTHNER (Hrsg.), *Recht, Rechtsphilosophie und Nationalsozialismus. Vorträge aus der Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie in der BRD vom 11. und 12. Oktober 1982 in Berlin*, Wiesbaden 1983, p. 1.

²² K. REINHARDT, in: *Justiz im Dritten Reich. Eine Dokumentation*, hrsg. v. I. STAFF, Frankfurt a.M./Hamburg 1964, pp. 160–161.

²³ E. FORSTHOFF, *Der totale Staat*, Hamburg 1933, p. 21.

placed in the German state- Führer on other grounds. I know that many may be scared, if I say that the public-political education is to be the Alpha and Omega for young lawyers in the German state-Führer, while the legal-technical training is secondary and needs the foundation to occur. Lawyer in the German state- Führer must be first a 'political' man because the idea of the state and the idea of law, politics and law are different aspects of the national unity" and "what we need, is a political, or socialist-national man. To raise him in the spirit of the Führer and thus make the cornerstones of the foundation of the German state-Führer, is, in my opinion, the most important task of all German academic teachers. Heil Hitler!"²⁴ Reinhard Höhn, a professor of law, wrote: "The sentence: 'Law is what Aryan people feel as law' reveals that the law in its very essence is not an individual lawmaking, but a direct expression of the community of blood of the nation."²⁵ According to Larenz, teaching philosophy of law and legal sciences in the era of the reign of National Socialism is the same because they form an inseparable "unity." They both analyze "law" as a result of the "national spirit of law,"²⁶ and therefore, according to the "German conception," "every applied science" "includes philosophy" and the "German law science" as a whole is both philosophical and historical-political.²⁷ In his opinion, we need to "distinguish" between the "philosophy of law" and the "theory of law," for which the former is a "particular center," "an internal unity" and, in a sense, a science "as a whole." Therefore, the "philosophy

²⁴ O. KOELLREUTTER, *Der Deutsche Führerstaat*, Tübingen: Mohr 1934, p. 20 f.

²⁵ R. HÖHN, *Rechtsgemeinschaft und Volksgemeinschaft. Ein Beitrag zum Neubau des Staatsrechts*, Hamburg: Im Verlag Hanseatische Verlagsanstalt 1935, p. 78.

²⁶ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 169; cf. W. SAUER, *Nationale Revolution und nationalsozialistische Rechtsphilosophie*, Rechts- und Preußisches Verwaltungsblatt 1933, p. 441 f.; IDEM, *Die nationale Revolution im rechts- und staatsphilosophischen Lichte*, Deutsche Juristen-Zeitung 1933, p. 597 f.; C.A. EMGE, *Die Aufgaben einer neuen Rechtsphilosophie*, Juristische Wochenschrift 1933, p. 2014 f.; K. LARENZ, *Deutsche Rechtserneuerung und Rechtsphilosophie*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, No. 109, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934; J. BINDER, *Der deutsche Volksstaat*, in: *Recht und Staat in Geschichte und Gegenwart. Eine Sammlung von Vorträgern und Schriften aus dem Gebiet der gesamten Staatswissenschaft*, nr 110, Tübingen: J.C.B. Mohr <Paul Siebeck> 1934; W. SAUER, *Recht und Volksmoral im Führerstaat*, w: ARSP 1934/35 (z. 28), s. 230 n.

²⁷ K. LARENZ, *Rechts- und Staatsphilosophie der Gegenwart*, Berlin: Junker und Dünhaupt Verlag 1935, p. 171.

of law” is a philosophy regarded as a part of cognition aimed at the total understanding of the world [...] At the same time, it is a law science because it is a concrete specification of philosophy.” Moreover, it is “metaphysics,” inquiring about “the national spirit” in the “process of its creation in the community.” Hence, “the law science is philosophical in its essence, and the philosophy is essentially related to the nation and the state. It is necessarily a philosophy of law and the state,” analyzing the nation and the state in their mutual relations and in relation to a person.” According to Friedrich Schönfeld, science appears as a “self-awareness of the nation of the world,” or as “self-reflection of the national spirit, and its knowledge, seeking to preserve itself in an element of truth,” which is a remnant of the Hegelian notion “aufgehoben.” In the “*Universitas*, philosophy of law and the state brings together the theory of law and the state, and philosophy, which results in the living, concrete unity.”²⁸

Giorgio Del Vecchio claims that “the expulsion” of “the philosophy of law” as a science from the “academic teaching programs” was “wrong.”²⁹ However, the Nazi concept of law does not remove philosophy, but it causes a philosophical-legal re-evaluation.” “The new philosophy of law recognizes and evaluates the law as a political decision, or the noble reality which is constantly active, not passive,”³⁰ as happens in the classical philosophy of law, where it is assumed that the personal Absolute is a Creator of law, and the task of man and his law communities is to know, define, adopt and promulgate the law.

“An important task of the rector as the Führer, and each Führer in general, is the formation and education of man in the sense of movement. An official should be brought up and educated in the sense of the socialist-national movement.”³¹ He should be a “servant of the nation” because “his service is the greatest and most beautiful task that can be assigned to him as a German and that he may do with pride. The service to the nation is the greatest commitment”³² because there can be only one education for the nation and the state in

²⁸ Ibidem, pp. 172–173.

²⁹ G. DEL VECCHIO, *Die Krise der Rechtswissenschaft*, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 15.

³⁰ H.-H. DIETZE (rec.) Krieck, Ernst, *Wissenschaft, Weltanschauung, Hochschulreform*, Frankfurt/Leipzig: Armanen-Verlag 1934, “Archiv für Rechts- und Sozialphilosophie,” vol. XXIX (1935/36), p. 497.

³¹ R. HÖHN, *Führung und Verwaltung*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 73.

³² H. SEEL, *Das Beamtenrecht des Dritten Reiches*, in: H. FRANK (Hrsg.), *Deutsches Verwaltungsrecht*, München: Zentralverlag der NSDAP, Franz Eher Nachf. 1937, p. 165.

the German state of the Führer, which is closely related to all the positive forces of life of the nation and the state.”³³ This attitude was represented by Gustav Walz, a professor of international law and rector of the University in the former Breslau, when, according to Marek Maciejewski, in 1935 he said that it would be incompatible with the ‘National Socialist renewal’ to allow universities to ‘exist in private, away from the great transformations.’³⁴

In the 1920s, the National Socialists inspired the establishment of the “National Socialist German Students’ League.” As the “students of the socialist-national ideology,” they set themselves the following tasks: a) research (working on specific problems of National Socialism), b) propaganda (spreading the socialist-national ideas at the university) c) education (training successors to the leaders of the NSDAP). The purpose of the issue was as follows: the NSDStB was fighting for social justice and national liberation of the Third Reich,” since its objectives were identical with those of the NSDAP.”³⁵

Each student learns 10 new words which are likely to replace the Decalogue, as the basis of the order and the responsibility of students and academics in general: “You can not light a fire if you do not burn. Have the courage to fascinate and to be hungry for honor! What does not kill you, makes you stronger. Let it be hail what makes you tough! Let it be one in thought and action! Live by the Führer!”³⁶ According to Ernst Krieka, he became a “preacher of the socialist-national education” “for all mankind,” which made the political thought merged together with the educative thought.”³⁷ Politics

³³ O. KOELLREUTTER, *Der Aufbau des deutschen Führerstaates*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. II, art. 18, Berlin: Industrieverlag Späth & Linde 1936, p. 61.

³⁴ M. MACIEJEWSKI, *Doktryna rewolucyjnego konserwatyzmu wobec narodowego socjalizmu 1921–1945*, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego 1991, p. 305.

³⁵ M. SANDBERGER, *Das Nationalsozialistische Deutsche Studententum*, in: H.H. LAMMERS, H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 7 d, Berlin: Industrieverlag Späth & Linde 1936, pp. 3–4.

³⁶ *Ibidem*, p. 25.

³⁷ E. KRIECK, *Nationalistische Erziehung*, in: H. PFUNDTNER (Hrsg.), *Grundlagen, Aufbau und Wirtschaftsordnung des nationalsozialistischen Staates*, vol. I: *Die weltanschaulichen, politischen und staatsrechtlichen Grundlagen des nationalsozialistischen Staates*, gr. I, art. 9, Berlin: Industrieverlag Späth & Linde 1936, p. 4.

has become a way of raising and education man. Moreover, it has become the very essence and supreme goal of science and the Nazi university.

Conclusions

The total subordination of the university, science and the process of raising and teaching youth to the socialist-national ideology brings scholars and learners to the so-called “German truth,” that is, the concept of the radically politicized science, which prevents the realization of objective truth and acquiring by a student the attitude of love of the truth, and not the blind—totally detached from reality—obedience” to the Führer as the highest principle of science and teaching not only of German lawyers, but also of other people, practicing other disciplines, and creating all areas of the culture of the human spirit.

FINAL CONCLUSIONS

No coincidence that the resolution agreed at the last meeting of the Reichstag on 26 April 1942, at the time of Germany's "to be or not to be" in World War II, Adolf Hitler was named with the following titles: the Führer of the nation, the supreme Commander to the Wehrmacht, the head of government and the holder of the supreme executive power, the supreme judge and the Führer of the party.¹ Therefore, the Nazi legal thinking "openly proclaimed its political and biological origin," and even regarded the creative policy of racist safety of instinct" as "the highest forms of all biological expressions of life."² This means that there actually was a "compromise between National Socialism and the theoretical idealism" in the system of National Socialism, which according to a philosopher of Berlin, Alfred Baeumler, was based on the *a priori* "idea"³ as an *a priori* foundation of the Nazi legal system. This is a process of "justifying sciences" by the "socialist-national ideology,"⁴ which implies the justification of the existence and activity of the Third Reich.

The Nazi apriorism became the cause of negation of all the highest principles of the classical understanding of natural law, as good, contract, justice, since the most important "principle" of the visible cosmos, namely the persona humana, is negated. The human person is, at the same time, a "non-person,"⁵ which means that being is non-being. Man as a person is annihilated, which

¹ RGBL I S. 247.

² G.A. WALZ, *Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechts*, Hamburg: Hanseatische Verlagsanstalt 1938, p. 49.

³ A. BAEUMLER, *Philosophie*, in: *Deutsche Wissenschaft. Arbeit und Aufgabe. Zum 50. Geburtstag Adolf Hitlers*, Leipzig 1939, pp. 32–33.

⁴ E. KRIECK, *Philosophie*, in: *Deutsche Wissenschaft. Arbeit und Aufgabe. Zum 50. Geburtstag Adolf Hitlers*, Leipzig 1939, pp. 29–31.

⁵ A. BAEUMLER, *Philosophie*, in: *Deutsche Wissenschaft. Arbeit und Aufgabe. Zum 50. Geburtstag Adolf Hitlers*, Leipzig 1939, pp. 32–33.

makes the socialist-national system totally unreliable, and fundamentally false for the existing contradictions. Theodor L. Haering, a professor of philosophy at the University of Tübingen, believes that the method of Nazism is “dialectical.”⁶ This means that it is a combination of contradictions resulting in the existence of race, nation or the Nazi state, which is dialectical in itself. An example is the racist thought of Houston Stewart Chamberlain, who “is rightly regarded as one of the ‘prophets’ of the Nazi Reich.” He claims that “there is an inexorable struggle between races for global leadership,”⁷ that is both Hegelian and Marxist-Engelsian. This is a battle “unto death.” In the German Reich, the existence of matter undergoes a process of “nationalization” and “politicization” of all its elements—the full instrumentation of man and the monistic vision of his humanity occurs because “totalitarian domination, however, aims at abolishing freedom, even at eliminating human spontaneity in general, and by no means at a restriction of freedom no matter how tyrannical.”⁸

The process of substantialization of the race, the German nation or the state is compatible with the process of desubstantialization of man and this is the biggest problem in the categorical structure world. This introduces a new paradigm of the racist ideology. The Führer appears as the only super-categorical entity and, at the same time, as a method of “salvation” of the world (cf. “Heil Hitler!”), used even by Martin Heidegger, the rector of the University of Freiburg im Breisgau, who, as written by Marek Maciejewski, “used his authority as a respected philosopher to support the authorities of the National Socialist [...]” and “argued that not ‘scientific claims’ but the ‘leader,’ namely Hitler, should become a ‘principle’ of the German existence. [...] According to Heidegger, the ‘world spirit of the nation is not a superstructure of culture,’ but it is ‘a power of the highest efficiency of its earthly and blood-related forces as the power of the most internal stimulation and far-reaching existential shock.’”⁹

The source of law is neither the God of Christian Revelation nor the “God” of ancient Greek metaphysics. It is neither the Constitution nor the authorities of the Third Reich. It is the “Führer” and his “lust for power.” Hence, the thesis

⁶ Th.L. HAERING, in: M. LESKE, *Philosophen im »Dritten Reich«*. Studie zu Hochschul- und Philosophievertrieb im faschistischen Deutschland, Berlin: Dietz Verlag 1990, p. 277.

⁷ E. KUNDERA, M. MACIEJEWSKI (ed.): *Leksykon myślicieli politycznych i prawnych*, Warszawa: Wydawnictwo C.H. Beck 2009, pp. 315–316.

⁸ H. ARENDT, *The Origins of Totalitarianism*, Cleveland and New York: World Publishing Co., Meridian Books, 1958, p. 405.

⁹ M. MACIEJEWSKI, *Doktryna rewolucyjnego konserwatyzmu wobec narodowego socjalizmu 1921–1945*, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego 1991, p. 305.

of a total politicization of the nation is justified. Parents realize—especially in the context of raising and educating their children—that originally, race as race does not own itself. Only by a man of the German race, it comes to its self-awareness, mainly due to the Nazi ideology.

In fact, the Nazi law is not subjectivized in the sphere of reason, as there is no reason, but only in the sphere of senses. This means that the reason of law is no longer a reason for the law. The law created and interpreted in the Reich has implications for both the German state and the rest of the world, as shown by the history of the world during the Nazi period. As the intellect was not recognized as a power of the immortal human spirit and the ideologization of Germany and the rest of the world was necessary, Hitler founded the Nazi Party as a formal cause of the process of ideologization. Why? Because the Nazi ideology was based on the world of workers (which is why the Nazi party was called “the German Workers’ Party”) and, according to Hitler, “the executive itself was decisive,” and the “mass of people” as “members” were expected to “obey” the Führer “in a disciplined manner” and “follow him” blindly, of which the “associations of ‘intellectuals’” were not capable by nature due to their great and independent spirituality.”¹⁰ Therefore, “German workers” were chosen. It was the only group that could “be committed to each other,” and thus to the party, and guarantee an ideological struggle”¹¹ for National Socialism.

The dimensions of human existence, such as conscience, were annihilated because they became internally contradictory due to the inconsistency of Nazism, seen as the fundamental criterion of what is right or wrong. A question of dignity also became just a matter of arbitrariness and the Sollen area, which was possible only on the basis of the reasonably defined law.

Since Nordic race was understood—and it considered itself—as the supreme goal of all beings, the *bonum commune* was gradually being destroyed, and thus the conception of man as man collapsed because man could not ultimately decide what was right, both in the Nazi civil law and in the criminal law, which caused martyrdom and unbelievably cruel spiritual and physical suffering of many millions of people. Thus, it is difficult to challenge the following thesis of German philosopher Karl Jaspers: “This time, it is undeniable that the Germans planned and started this war.

It wasn’t like in the case of the World War I. Germany was not to blame for the war in general, but for this very war. And this war is something else, some-

¹⁰ A. HITLER, *Mein Kampf*, München: Verlag Franz Eher Nachf. 421933, p. 510.

¹¹ *Ibidem*, p. 511.

thing that has happened for the first time in the history of the world.” It “was induced and maintained with criminal cunning and unscrupulous despotic lust for destruction.”¹²

All the classically understood effects of law such as to “make citizens good” in the state, “order, prohibition, permission, punishment,” were not aimed at the good of man as a person, but only the playfully and subjectively defined “good” of the Nazis and the Third Reich, although not of the Aryans, who acted against Nazism. The latter usually shared the fate of the victims of Nazism. In the Reich, there were no three different types of law, but only three different aspects of one Nazi law considered as a monistic entity. Therefore, the law of the Third Reich proved to be anti-divine and anti-personal, which was particularly reflected in the German concentration camps as death camps.

This led to the total formula of politicization of university and science, which culminated in the so-called Nazi “science” on expulsion of all Jews¹³ and the “German” truth. Science, instead of becoming an articulation of objective truth, has become the most important ideological instrument in the Reich: “The Nazi regime regarded scientist [...] as servants to the social, political and cultural purposes defined by the Nazis. As a rule, their role was post-rationalisation or even apotheosis of arbitrary decisions of the executive.”¹⁴

The adopted research methods in the sense of Otto Pöggeler’s *Toposforschung* proved to be extremely useful and fruitful, and enabled noticing a number of the philosophical-legal aspects which have been analyzed above, in the hope of enriching the discussion on the shape of the legislation of the Third Reich as the cause of World War II and the architect of the concentration camps where millions of men have lost their lives, as the dispute remains unresolved.

¹² K. JASPERS, *Zróżnicowanie niemieckiej winy (1946)*, in: *Po upadku Rzeszy. Niemieccy intelektualiści a tradycja narodowa*, ed. J.W. BOREJSZA et al., trans. K. PIESOWICZ, Warszawa: Czytelnik 1981, pp. 118–119 [115–145].

¹³ M. LESKE, *Philosophen im »Dritten Reich«. Studie zu Hochschul- und Philosophiebetrieb im faschistischen Deutschland*, Berlin: Dietz Verlag 1990, pp. 24–25.

¹⁴ M. MACIEJEWSKI, *Doktryna rewolucyjnego konserwatyzmu wobec narodowego socjalizmu 1921–1945*, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego 1991, p. 297.

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ABBREVIATIONS

Abt.	Abteilung
ARSP	Archiv für Recht und Staatsphilosophie
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen
BNSDJ	Bund Nationalsozialistischer Deutscher Juristen
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
Cic	<i>Corpus iuris civilis</i>
DGO	Deutsche Gemeindeordnung
DJ	Deutsche Justiz
DJZ	Deutsche Juristenzeitung
DR	Deutsches Recht
FAZ	Frankfurter Allgemeine Zeitung für Deutschland
FoR	Forum Recht
G	Gesetz
Gestapo	Geheime Staatspolizei
GSTP	Geheime Staatspolizei
HGB	Handelsgesetzbuch
HJ	Hitlerjugend
Jg	Jahrgang
KPD	Kommunistische Partei Deutschlands
KSSVO	Kriegssonderstrafrechtsverordnung
KStVO	Kriegsstrafverfahrenordnung
KWVO	Kriegswirtschaftsverordnung
KZ, KL	Konzentrationslager
LG	Landgericht
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei
NSDStB	Nationalsozialistischer Deutscher Studentenbund
NSF	Nationalsozialistische Frauenschaft

OLG	Oberlandgericht
ORegR	Oberregierungsrat
PRO	Public Record Office
RAD	Reichsarbeitsdienst
RFSS	Reichsführer SS
RG	Reichsgericht
RGBl.	Reichsgesetzblatt
RGSt	Entscheidungen des Reichsgerichts in Strafsachen
RGZ	Reichsgerichtsentscheidungen in Zivilsachen
RKF	Reichskriegsgericht
RM	Reichsmark
RMG	Entscheidungen des Reichsmilitärgerichts
RMI	Reichsministerium des Inneren
RMVP	Reichsministerium für Volksaufklärung und Propaganda
RStGB	Reichsstrafgesetzbuch
RStPO	Reichsstrafprozessordnung
RVerwBl	Reichsverwaltungsblatt
SA	Sturmabteilung der NSDAP
SD	Sicherheitsdienst des Reichsführers SS
SG	Sondergericht
SPD	Sozialdemokratische Partei Deutschlands
SS	Schutzstaffel des NSDAP
VB	Völkischer Beobachter
VerwG	Verwaltungsgericht
VGB	Volksgesetzbuch
VGH	Volksgeschichtshof
VO	Verordnung
VOBl.d.Gen.Gouv.	Verordnungsblatt des Generalgouverneurs
WE	Willenserklärung
ZAKDR	Zeitschrift der Akademie für Deutsches Recht
ZfDR	Zeitschrift für deutsches Recht
ZfP	Zeitschrift für Politik
ZgS	Zeitschrift für die gesamte Staatswissenschaft
ZPO	Zivilprozessordnung

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