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**IN THE BELLY OF THE BEHEMOTH: A STUDY ON LAW AND
NONLAW IN THE CONTEXT OF *THE KINDLY ONES*,
BY JONATHAN LITTELL**

RAFAEL TOMAZ DE OLIVEIRA¹

TRANSLATED BY FELIPE ZOBARAN

ABSTRACT: This article is based on the novel *The Kindly Ones*, by Jonathan Littell, and its main objective is to explore the experiences of its main character, Maximilien Aue, a Nazi officer, an SS member, a jurist, and a juris doctor, who on several occasions assumed the condition of executioner in one of the Einsatzgruppen that acted in the rear of the German front during the War against the Soviet Union. This study seeks to explore the relationship of this character with a political regime marked by authoritarianism and the erosion of the legal forms that characterize a Rechtsstaat – metaphorized in the figure of the Behemoth, in the interpretation given by Franz Neumann. The methodological structure is guided by strategies of approximation between law and literature, in order to allow, from the construction of a common hermeneutic situation, different ways of relating to the truth established in these two fields of knowledge to access new interpretations in order to analyze the intricate relationship between law and authoritarianism. The outcome, starting from Max Aue's tragic experience, illuminated the fate reserved for those who, as people or individuals, had awakened the Erinyes from their benevolent sleep.

KEYWORDS: *The Kindly Ones*; Jonathan Littell; National Socialism; Rechtsstaat; Behemoth.

¹ Master's degree and Ph.D. in Public Law at Universidade do Vale do Rio do Sinos (UNISINOS-RS). Professor of the Program in Law at Universidade de Ribeirão Preto (UNAERP-SP), at Master's and Ph.D. levels. Ribeirão Preto (SP), Brazil. ORCID: <https://orcid.org/0000-0001-7270-4718>. CV Lattes: <http://lattes.cnpq.br/8793661579762486>. E-mail: rtoliveira@unaerp.br.

1 INTRODUCTORY NOTES

Why reflect on National Socialism and its atrocious consequences for the human condition today, in the second decade of the twenty-first century? This is the question with which we open the reflections hereby presented. Here goes a preliminary answer: because thinking about the Rule of Law – and its political and legal developments – must (or should) be manifested as a perennial, inexhaustible task. But it's not just about that. In our current context, we have observed a growing wave of radicalism in an alarming diversity of places. Such movements have created an environment of irrationalism within which authoritarian and autocratic positions tend to assert themselves with the support of the masses. The practical result, known to all, appeared in the coming to power of political leaders with such characteristics – who, to a greater or lesser extent, held in the electoral disputes (in the cases in which they occurred) platforms that were not very committed to the Rule of Law and to democracy – in Turkey, Hungary, the United States and Brazil. Of course, there are mobilizations by intellectuals involved in Political Science and Law who seek to analyze this problem in different ways. In the case of the United States, for example, in 2018 a book was published with the suggestive title *Can it Happen Here? Authoritarianism in America*, which brings together essays by several authors, coordinated by Cass Sunstein. In the introduction, Sunstein says the discussions in the book go “well beyond President Trump”, or even “left-wing extremists”. They would seek to shed light on questions that are critical to the contemporary debate, such as: “Is a powerful central government a threat to liberty – or a safeguard against it?”; or “If a president wants to be a dictator, what steps would he take?”; more, “Can populism produce authoritarianism?”; and, finally, “What's the Deep State, and should we worry about it?” (Sunstein, 2018, p. 436).

Despite the importance of such questions, it is possible to say that they all seem to refer to two even more essential questions: what is the Rule of Law and to what extent can it be defiled nowadays? In other words, how can the networks of constriction and organization of the exercise of political

power be manipulated or put aside by political regimes, even if they have achieved power through the constitutional rules of the democratic game?

Certainly, these questions do not claim – as a first impression might imply – to create a favorable climate to assert that the leaderships and regimes that have come to power in these last years in those countries mentioned above emulate Hitler and his entourage of coreligionists to replicate some sort of hideous political project, similar to the one that swept Germany in the 1930s, leading to its destruction at the end of World War II. The method here is another. In order to reflect on the Rule of Law and its weaknesses and ambiguities in dealing with indecent and usurper powers, we seek to “open a clearing”² of thought from a “frontier situation”, that is, an approximation to the paroxysm of instrumentalization of the bureaucratic forms created by modernity to erode the democratic order and the *Rechtsstaat*, the Third Reich.

The current state of history bears resemblance to those troubled years between the wars: growth of undemocratic phalanxes; propagation of irrationalist philosophies; a magical model of thought that desperately attempts to re-signify words and historical facts; a context of praise for autocracy and dictatorship; hateful voluptuous speeches against “enemies” – defined from abstract or invented categories; tendency for the proliferation of conspiracy theories that, in the end, have some kind of proclamation of “national salvation”. Of course, these similarities do not indicate – let alone authorize to affirm – an “eternal return to the past”. Historical times are unique in their singularity, in their respective spaces of experience and horizons of expectation.

² Lenin Streck, based on Heidegger, seeks to present a way of reflecting on the law that goes beyond the illusions of transparency and that can allow a renewed access to the basic task of the jurists that is the work of obtaining norms (concretization). In the author’s words: “establish a clearing in the Law; unhide (new) paths; disguise the (lost) paths long hidden by the common theoretical sense of jurists (a daily and inauthentic way of interpreting Law), which hinders the possibility for the jurist to say new things” (Streck, 2011, p. 342).

In any case, even if we do not simply want to convey a framework of analysis generated by one historical time to another, the fact is that the approximation of the National Socialist dictatorship and the way in which it manipulated the law and the structures of the State in the construction of totalitarianism represent a relevant way to approach the present days in order to reflect on the destinies of the Rule of Law.

In addition, the proposal is to think about these issues through the lenses of the Law and Literature movement. Indeed, a thought about the political and juridical structures of National Socialism demands a kind of approach that, more often than not, goes beyond the limits of the technical-scientific discourse (be it defined by a historian, a political scientist, or a jurist). The ambiguities and difficulties of analysis that were posed for the contemporaries of the regime cannot be reproduced in the narrowness of scientific narrative. In this case, the intersection between legal-political narrative and fictional narrative may contribute to the acquisition of a broader perspective for interpretation. In this sense, we approach Paola Mittica, who, when analyzing some of the methodological possibilities for the interdisciplinary interaction between law and literature, states: “it is not a question of understanding only the image that the law or the legal system provides of itself, but of penetrating the construction of the common legal imaginary: where the legal narratives are changed, expectations are born, struggles are initiated and shared, functions that the law cannot always fulfill or that remain latent are seen” (Mittica, 2015, p. 29)³. And if we bear in mind that the human consequences generated by the Third Reich are not a problem restricted to the Germans, the Jewish community or Europe, but rather belong to humanity, the level of depth demanded by reflection increases significantly. It is a matter of understanding that a superficial

³ The contribution here referred to is due to the writings by André Karam Trindade and Luiza Bernsts on the methodological and theoretical deficiency that marks the Brazilian experience in the field of Law and Literature (Trindade; Bernsts, 2017, p. 225-257). In order to avoid incurring the scientific ingenuity pointed out by these authors, we seek here an approximation that transits between the literary canon (exemplarily represented by the works of Georg Steiner) and the juridical one, with the objective to explore the experience brought to life by literature (in the case *The Benevolent*, by Jonathan Littell) from categories and concepts that are between the legal theory and the literary theory.

approach which simply seeks to point out guilt and make judgments contributes little to a more adequate interpretation of this completely intriguing phenomenon that the twentieth century experienced. As Jean-Luc Nancy put it, on the occasion of the repercussion of Heidegger's *Black Notebooks*,

what we are debtors today belongs above all to analysis, not because we should forget about moral judgment (political and philosophical), but because, up to now, we have not driven *the thought of the deep reasons for our condemnations* far enough. After two-thirds of century after the extermination, we have not yet sufficiently dealt with what has happened to *us*, the European humanity made fully world-wide in time and in the movement of events (Nancy, 2017, p. 22).

That is to say, the task of hermeneutic repetition is necessary; that is, of the interpretive (re) placement of memories and stories; or how the events unfolding in the political-juridical context of National Socialism – which become immeasurably obscene with mass murder and the political use of extermination camps – affect the human condition. The standard posture of blaming and producing judgments that took place during the first decades of the postwar period does not comprehensively reflect the impact of such extreme political experience on us, and in many ways is superficial. As Stolleis (2016, p. 144-145; p. 306-317) states, in the case of the legal environment, many of the jurists who openly supported the regime – including in terms of intellectual production, for example Theodor Maunz – were reused in academic circles of the German Federal Republic and continued to influence an entire generation (which, we may add, extend beyond the territorial limits of Germany if we think of the influence that authors such as Ernst Forsthoff, Karl Larenz, Franz Wieacker and Wilhelm Canaris produced in Portuguese-Brazilian legal thinking). Obviously, it is not a question of proscribing such authors or of spreading an index of books that should not be read because they are “too Nazi”. Rather, it is a question of trying to find an interpretative route that allows us to better understand how authors of recognized intellectual scope so quickly abandoned the postulates of the *Rechtsstaat* and surrendered themselves to the siren song of National Socialism.

This essay certainly has no claim to produce “the” proper interpretation to answer these grave questions. It represents only an attempt to construct an alternative way of access – a clearing, as Streck states (2011, p. 341 *et seq.*) –, which is expected to illuminate the anthropological aspects, so to say, of the questions raised here.

The literary work on which these reflections are based already represents, in some way, an attempt to offer a more comprehensive interpretation for these phenomena. Published in 2006, *The Kindly Ones* [*Les Bienveillantes*, in the French original], by the French-American author Jonathan Littell, deals almost entirely (as a novel with more than 900 pages) with the number of operations during the war in Eastern Europe, narrating events that occurred after the Nazi deflagration of *Operation Barbarossa*, in July 1941. It is a fiction book, written in the form of a novel, but which has a significant number of very precise historical references, which indicate the meticulous research work by Littell. In the same sense, the narrative contemplates fictional characters – such as the protagonist himself, the *SS-Obersturmbannführer* (equivalent to the post of Lieutenant-Colonel) Maximilien Aue – and real ones, who participate in actions and dialogues, among them Adolf Eichmann, Rudolf Höss, Heinrich Himmler, Albert Speer and Adolf Hitler himself (in an extremely unusual scene), among others.

The text is a narrative monolith, composed by the memories of Max Aue, which mixes facts that occurred during the war with earlier memories, related to his childhood, upbringing, the beginning of his relationship with the regime and his finally joining the SS. From a structural perspective, the book is organized from a *narrating self*, which produces an interpretation of events through personal experience. In addition, the events that make up the narrative occurred at a different historical time from the one in which Aue, the narrator, is situated at the moment of enunciation. As already mentioned, it is his memories that are narrated. Here it seems that there is a resource for gaining an interpretive perspective: the character who leads the entire text does not describe an immediate experience, but rather

recovers an old experience, deposited in memory, which therefore has ambivalent effects of temporal distance at the moment of establishing the interpretation in the written text. It is not known exactly what time period the discursive production is situated in. It is only known that, with the German surrender in May 1945, Max Aue emigrated clandestinely to France (taking advantage of his French ancestry to be a French worker performing tasks in Berlin), having escaped any trial that could assess his responsibility for the acts he practiced. We also know, from the first chapter of the book, that Aue graduated in law, having taken his studies to the doctoral level. This trait of personality is interesting to us because, in Aue's case, in addition to having "theoretical" contact with legal issues, he also participated in some of the worst actions perpetrated by the regime and, on several occasions, his *Doktor* skills were to assist in ignoble decisions. All this contributes to the production of a very rich panel that reveals the character's interaction with this inhospitable and, in many ways, unhealthy environment. In addition, this environment reflects on his psychic and character traits, as well as his ability to produce moral judgments, to perceive responsibility in the actions he was called to practice and the difficulty of relating – on a psychological level – with all these elements.

Perhaps that is what our main interest in the book is: Aue's experience offers us a platform – almost as some kind of fundamental anthropology – to think about the relationship of people who dealt with law and who had been educated within a certain perspective of values, as in the horrible Nazi regime. It is certain that this "anthropology" cannot reveal to us the most beautiful aspect of the human being. In the best Nietzschean tradition of a "too humane human", the fundamental milestones we can find throughout the narrative unveils the bestial elements that are situated underground in our condition of beings that produce speech, read texts, improve intellectually, organize ourselves in complex political forms that tend to produce some prosperity and which, above all and in spite of all this (or would it be because of all this?), make War.

The analysis is divided into three parts: a) the *persona*; (b) the regime; and, c) the War.

Our essay has to necessarily begin with Aue because, as recorded above, it is he who conducts the whole narrative of the novel and somehow all the threads are joined by him. It is his memories that bring to light the shadowy world of National Socialism. Here we seek first to explore his character as *a man without qualities*. One who, in a certain way, like Robert Musil's Ulrich, is an inhabitant of the twentieth century, who has an amorphous, transient personality, whose definition of will and of action are produced by exploiting opportunities, which, in turn, are linked to their possibilities. In addition, we are interested in identifying his relationship with law and what his way of speaking reveals of his legal training. At the end of this first part, we try to reflect a little on the way in which Aue is involved, on a psychological level, with some notion of responsibility.

In the part about the regime, Aue remains, in some way, our guiding thread. Nonetheless, we allow ourselves to take a more political-legal approach to the subject. In this case, we seek to increase the angle of interdisciplinary research in order to search historiographical elements in dialogue, either in the perspective of the history of law; either from a policy perspective. In this field, we use the works of Michael Stolleis, Bernd Rüthers, Franz Neumann, Ernst Fraenkel, Ian Kershaw, among others. Thus, in addition to the notorious racial laws and other ostensible acts that offend any sense of justice and equality, we seek to investigate what kind of law prevailed throughout the regime; if it was possible to speak in this context of a “dominant legal theory” and, perhaps most importantly, how the regime dealt with the inherited law of the Empire and the Weimar era.

In the third and final part, a reflection on the war and how, through Aue's lens, it is possible to relate the Behemoth – which represents the political structure or model of the regime – and a kind of “blindness of will” that led Germany to the most obscure dimensions of the human soul and to the material decline, through the destruction of war that struck

over its main cities. In addition, and to conclude, there is a kind of closing of Littell's "moral tale" here: an element – although not necessarily good – that makes evident the humanity that exists in Aue; a kind of common destiny, which is, sooner or later, a reckoning with *The Kindly Ones*.

Finally, a brief word about the title of this essay. Its inspiration comes from the confluence of three works. In addition to *The Kindly Ones*, are also present the *Behemoth* by Franz Neumann and *Recht im Unrecht*⁴ by Michael Stolleis. For Neumann, the National Socialist regime could not be cataloged in any available political theory or philosophy; it is not even be possible to call it "State". For him, the possible representation – as opposed to Hobbes's *Leviathan* (which would represent the guarantee of order by the monopoly of force) – would be the *Behemoth*, which Thomas Hobbes himself uses as a metaphor in reference to the Book of Job, to describe not order, but the state of civil war and rebellion. In this sense, the purpose of this article is to penetrate the innards of this animal (which, in the biblical tradition, only God was able to control) and try to live to tell what we see. Max Aue is thus a kind of guide to this unusual journey of ours.

2 PERSONA: J. D. MAX AUE

2.1 An "absolute tragedy"?

Georg Steiner proclaimed the death of tragedy as a literary style still in the 1980s (Steiner, 2010a). It is highly probable that such an affirmation was a need in the face of the authority of "effectual history" which made mankind experience the tragedy in a way that no author, male or female, would have ever had before. Steiner himself, in a text written after the publication of *The Death of Tragedy*, posed the question about

⁴ The title of Stolleis' book explores a rich semantic field, which carries a diversity of meanings expressing a paradoxical relation (and which inspires the subtitle of this essay). The expression could be translated into English as "law in the nonlaw". However, it would also accept the translation "law in injustice". And indeed, in the texts that compose the work, Stolleis explores questions that could be framed both in the first translation and in the second. There would still be other possible denotations. The official English translation, for example, chooses to use the expression for law and Despotism (Stolleis, 1994, p. 257). Independently, the questions that are implicit in the paradoxical title of the book – and which are of interest to our investigation – are: what are the possibilities of, and in what way would it be possible, to speak of "law" within a political regime that was, by definition, "anti-legal" and "unfair"?

the (literary) possibility of the “absolutely tragic” and recognized in the experience of the Holocaust a concrete representation of what would be an abstract paradox; a “negative ontology” (Steiner, 2010b, p. 2233-2237). For Steiner, the absolute tragedy, in form of literature, would be almost unbearable for human understanding⁵. The human needs, at least, gusts of hope (the destiny of the living is, in the final analysis, to find sense in life and existence itself). To this extent, “Original sin, be it Adamic or Promethean, is not a tragic category. It is charged with possibilities of both motivation and of eventual redemption” (Steiner, 2010b, p. 2233). On the other hand, in absolute tragedy, the simple human act of existing is already a crime: “it is the crime of a man that he is, that he exists. His naked presence and identity are transgressions” (Steiner, 2010b, p. 2233). Europe, under the influence of Nazi rule, experienced this situation with regard to the mortal persecution of Jews, Gypsies, homosexuals, Bolsheviks, etc. The *Shoah* – the Holocaust – represents a non-fictional experience of the absolute tragedy, stuck in the middle of the twentieth century⁶.

⁵ It is possible that the so-called “death of tragedy” (Steiner, 2010a) also finds some indication of what Henriete Karam describes as the difficulty we have in the present of “suspending our Manichaeic view, whose origins lie in the Judeo-Christian tradition, and to abstain to the maximum of the malaise that these crimes provoke in our civilized morality [...]. It is imperative to understand that, for the Greek man, it is in the context of inexorable choice that tragedy is inscribed at its highest power” (Karam, 2016, p. 84). In fact, the “civilizing process” (in the expression consecrated by Norbert Elias) throws down on us tons of meanings that also compose what we can bear in terms of the radicalism of the fall; of this act of “going-in-direction-to-nothingness”, which is the characteristic of tragedy, of suffering. On the other hand, Steiner states that, in the *Oresteia*, in particular, although there are passages that approach the “absolute tragic”, the main point of the work is redemptive. Indeed, after a whole load of sorrowful events, at some point the narrative undergoes a turning point, so that a conciliatory environment, coinciding with the apex of the play and with the personal and political redemption of the characters, emerge. In any case, one of the elements that allows Steiner to speak of the “death of tragedy” is that, even though it is used as a dramatic style, contemporaneously, many of the plays come from ancient mythology itself. “Any record of the contemporary tragic theatre reads like a primer of Greek myths” (Steiner, 2010a, p. 4260).

⁶ In *The Poetry of Thought*, Steiner describes this situation in a stony way: “The truths of torture, mass extermination, sadistic humiliation, methodical subtraction of every identity recognizable to the human mind and body, millions of women, men and children reduced to ‘living dead’, have defied intelligible articulation, let alone the logic of understanding. There is no ‘why’, boasted the butchers. Only silence can aspire to the lost dignity of meaning” (Steiner, 2012, p. 209).

However, in literature, Steiner argues that absolute tragedy would be something very rare because it would be seen as “scarcely endurable”. Quoting Pascal – who asked mankind to keep vigil because “Christ is in agony until the end of time” – Steiner reminds us that “[the] mankind goes mad without sleep” (Steiner, 2010b, p. 2237). That is, we cannot endure for a long time to look directly at the experience of nothingness. We need less extreme moments so we can breathe and thus exist. In this way, if only absolute nothingness would be free from the error of existing, “formally considered, we ought to retain no evidence, no manifest of consciousness and sensibility absolutely tragic” (Steiner, 2010b, p. 2237). Hence, one who has the radical conviction of this existential misery does not write, does not sing, does not paint. In the face of absolute nothingness there is only one possible behavior: silence. The tragic drama would therefore be a tragicomic manifestation, and by “comedy”, Steiner claims the connotation that is imposed on the term by Dante Alighieri, that is, as a narrative that moves from misery to redemption. So, with the exception of a few plays – perhaps Shakespeare’s *King Lear* might be among them – there is nothing tragic from one end to the other. Even *Oresteia* (whose role in the conception of *The Kindly Ones* is marked by the title) would be, according to Steiner, a tragicomedy: “The *Oresteia* is, in the exact and compendious sense given to that word by Dante, a commedia. It leads towards, it ends in, redemptive absolution and personal-political hope” (Steiner, 2010b, p. 2272-2276). It is, therefore, in a “pendular movement” between torture and hope that one weaves life and, thus, the literary drama.

In *The Kindly Ones*, Jonathan Littell seems to attempt to push Steiner’s argument to the limit. Indeed, anyone who ventures to face the more than nine hundred pages that make up the immense soliloquy of Maximilien Aue certainly experiences at various moments the impression of an absolute tragedy. Perhaps this is an inherent condition of the work itself: to tell a story that is marked, in its broad aspects, by the holocaust, calls into question the very possibility of art. That is to say: if it is impossible – or practically impossible – to make absolutely tragic literature, what would be the possibility of trying to create a literary work

from a historical experience that represents the tangible form of the absolute tragedy? Of course, there is Primo Levi's most distinguished work – and all the subgenre known as testimony literature – which painstakingly portrays the experience of the survivors of the real-world tragedy.

However, in the case of *The Kindly Ones*, there is still the aggravation of not being a testimony of victims. On the contrary, the narrator – and the guiding thread of the whole text – was one of the executioners. As a Heinrich Himmler's *Schutzstaffel* (SS) official and linked to Reinhard Heydrich's *Sicherheitsdienst* (SD), Max Aue is a fully-involved Nazi regarding the *Endlösung der Judenfrage* (final solution to the Jewish question). Much of the book is dedicated to the narrative of Aue's memoirs as a member of the *Einsatzgruppen IV* (tragic history: this was the squad responsible, among other things, for the Babi Yar massacre in Kiev, Ukraine, between 1941 and 1942), although the text also deals with memoirs from prior to the War and descriptions of facts related to Aue's approximation to the high patent members of the SS and to the big businessmen that gave support to the National Socialist regime (already in its decline, after the turnaround provoked by the Battle of Stalingrad, in February 1943).

The reception of the work was characterized by extremes: the French literary community, practically in unison, hailed the book as “the new *War and Peace*” (which was later contested by Littell himself, who stated that the author of such praise probably did not know Tolstoy or *The Kindly Ones*⁷). The book and its author were then awarded the two main awards in French literature: the *Goncourt Prize* and the *French Academy Award*, both in 2006. Translated into English in mid-2009, the critiques and the reception of the work by the British-American audience appeared different: *The New York Times* published some reports and reviews that, in general, evaluated the novel in negative ways. In a review written by

⁷ Jonathan Littell interview given to Caderno Mais, Folha de São Paulo, on 11/19/2006, published in Brazil. During this interview, Littell also discussed his impression on the reception of the work. Among other things, he said: “Novelesque truth is of a different order from historical or sociological truth. [...] When they judge that my executioner is unbelievable and insane, they are right. There would never be a book if I had chosen Eichmann as a narrator”.

David Gates, the novel was called “pretentious”, claiming that Littell was unable to convince the reader of the “truth” of the moral dilemmas faced by a character who is “as implausible as he is grotesque”⁸. Another comment went so far as to claim that the success found “for this kind of novel” served as an example of the “occasional perversity of the French taste”, and also demonstrated “a measure of how drastically literary attitudes toward the Holocaust have changed in the last few decades”⁹.

In the end, the controversy generated by the novel came to resound the question, so well posed by Steiner, about the possibility of tragedy in the field of literature; that is, on the possibility of narrating – through fiction and not simply in historical-social accounts – experiences that approach us, as if by means of an unbearable close-up, of the existential misery that the 20th century bestowed upon us. To paraphrase Littell himself, if Aue was Eichmann, *The Kindly Ones* would not be a book of literature, but, most likely, an article on history. Literature should be able to lead us to places that the historical-social narrative cannot achieve. In the specific case of Max Aue and *The Kindly Ones*, this means exploring the basements of existence; that dimension of experience that the twentieth century experienced and that all of us would desire, if we were allowed to choose, to live without. However, this possibility is closed to us, because such events affect us as humanity. As Gumbrecht says, we may not face it, but, regardless, it – this terrible experience – will continue *there*, in a state of *latency*, giving rise to our present (Gumbrecht, 2014).

In Brazil, the novel by Littell generated an adaptation for the theater. In the publicity of the play, the name of the work was added with a subtitle: *an anatomy of evil*. The description, however, is not entirely correct. Thus, as a half-truth, it ends up making the grave error of

⁸ Review by David Gates, published under the title “The Monster in the Mirror”, in The New York Times on 03/05/2009, which reads, among other things: “Aue is simply too much of a freak, and his supposed childhood trauma, too specialized and contrived, for us to take him seriously”.

⁹ Review of Michiko Kakutani, published under the title “Unrepentant and Telling of Horrors Untellable”, in The New York Times, 02/24/2009. The passage reproduced in the text was taken from the following passage: “That such a novel should win two of France’s top literary prizes is not only an example of the occasional perversity of French taste, but also a measure of how drastically literary attitudes toward the Holocaust have changed in the last few decades”.

distorting a text that is extremely polycentric: it gives the impression that the narrative constitutes a kind of dissection of evil. There is no good reading key here. It would be more correct to say that the book explores the terrible dimensions of the human (evil, in that sense, is just one of them); something like a trip to the “dark side of ourselves”, in remembrance of Elisabeth Roudinesco’s book (Roudinesco, 2008). Not for a banal sadism or for distilling an incomprehensible nihilism. Perhaps the most important thing is to find a way to access such a negative experience so that we can say responsibly: never again! Not as a mere expression of empty purposes; but rather as a representation of an intense, original truth.

Is *The Kindly Ones*, in portraying Aue’s experience, an absolute tragedy? Yes and no. Yes, because it describes one of the moments when, in the twentieth century, humanity came closer to absolute nothingness. No, because the narrative has its moments of relief in which, knowing that it would be impossible for the human being to remain forever in the waking state, Littell allows us to sleep a little, to regain the feeling, though precarious, of sanity. Not that there are any indications of redemption there for Aue. But, perhaps, there is for us, as humanity. The provocation made by Aue at the beginning of his narrative “I am human like you!” may have this implication: after we have cleared up everything that has happened, what can we (or should we) do? If the fate of Aue has already been sealed by the Kindly Ones, ours, on the other hand, is still open.

2.2 A man without qualities?

Max Aue seems a lot like the *Man without qualities*. Not that he necessarily possesses the same moral contours as Ulrich, the real *Man without qualities* of Robert Musil, but from the point of view of the configuration of a *self*, he does not present a fixed form; his identity is affirmed somewhat by traces still manifested in his childhood and, on the other hand, by means of contingent events, which occurred rather than by chance, throughout his existence. Max struggles to seek an “essence of himself”, but never finds anything very convincing. Apparently, his most original desire, in professional terms, would be to dedicate himself to the study of the written language, especially to literature. But how would that

be? Was he a literary critic? A writer? It is not clear. The fact is that Aue does not seem to present a center around which his interests and his claims of himself gravitate. He almost seems to be a lawyer; by some period impulse – levered by some *völkisch* paternal reminiscences – he ends up subscribing to the NSDAP; by a completely random conjunction of factors, he ends up as a member of the SS and joins the SD, already as a career officer.

In addition to literature, he also cultivates a taste for music. He has a special fondness for Bach, but he is very enthusiastic about the French composer Rameau (an enthusiasm he maintains, probably to avoid questions about his “Germanicity”). Of music, however, he exhibits only amateurish pleasure: he cannot play any instrument. It is possible to note some degree of frustration, since, on several occasions, he mentions with some regret the fact that he does not know how to play the piano. There is also some relation here with the duality *looking X doing*. National Socialism presented itself as an ideology that stimulated initiative; individual willing; desiring. But Aue, in situations he seemed to understand as the most decisive ones, did not act; he just watched. There are times when he seems to make the responsibilities of the observer and the author of the action equivalent; in others, he seems to split and relativize the importance of each. For his medical friend Hohenegg, he excused himself from the responsibility for the murder of the “poor and defenseless”, stating that he did not act: “I observe, I do nothing, it is my favorite posture” (Littell, 2012, p. 4235)¹⁰. For his sister, on the other hand, he said that the sensation of shooting was the same as that of observing: “I believe that looking is as much a part of my responsibility as doing” (Littell, 2012, p. 8003).

His best friend is Thomas Hauser, who functions as a kind of *alter ego*. He is exactly what Max is not, that is, decidedly opportunist, careerist, and completely cynical about the “job” that, as SS and SD officers, they were required to do.

¹⁰ This is symptomatic: after uttering the phrase we transcribe in the text, Aue receives the return of Hohenegg: “I would have been a bad doctor, then. Observation without practice is not worth much”; to which Max responds: “That is precisely why I am a lawyer” (Littell, 2012, p. 4236).

The narrative seems to inherit from the Greeks, for the composition of the main character, the dramas and tragic aspects that involve crimes of family. There is the mysterious disappearance of the father. The mother, later (very little later by Aue's evaluation), marries again, considering the husband as absent (probably dead). Max, at this point, seems to interpret the act of the mother as if she had murdered her own husband (would this be his personal manifestation of the "stabbing at the back", his "November 1918"?¹¹). Then, when his mother was already married to a "foreigner", the seemingly innocent "playing" with his twin sister ends up manifesting as incest and are discovered. The mother and the stepfather, horrified by the situation, send the two to different boarding schools. Aue is sexually abused by priests and sodomized by colleagues. Over time, in these relationships he ends up finding a sense of continuity in relation to the games he played with his sister; he then recognizes himself as a homosexual and conjectures that such a choice would come from this constant desire to be with her, his sister (who he states throughout the narrative to have been the only woman he actually love. In the face of her absence, he thought these feelings manifested themselves through a need to feel what she felt; it was supposedly the way he had found to be with her always, that is, by being her (his sister, who is called, eloquently, Una).

From very early on, his personal fate and the fate of Germany seem to find support in myths and archetypes that resemble each other.

¹¹ The terms "stabbed at the back" and "never again will it be November 1918" were commonplace in the Hitlerite diatribes and conveyed what would probably be the first fake news uttered by the Nazis. The end of the first war for the Germans was intriguing: they lost the war, but they did not have the territory invaded. Soon a legend started to be told– encouraged by the high rank of the Army – that Germany had not been defeated militarily, but that the armistice of November 11, 1918, had been negotiated by forces that, taking advantage of the internal agitation of the moment, wanted to install democracy in the country to occupy the space of power left free by the fall of the monarchy. These forces, therefore, would have betrayed the motherland by imposing defeat on the Army itself and delivering Germany into the hands of the allied powers that produced the treaty-destroyer who put an end to the war. But, as Kershaw says, "in reality there was no betrayal, no stab at the back. This was pure invention of the right, a legend that the Nazis used as a central element of their propaganda arsenal. The upheaval in Germany was a consequence and not the cause of military failure. Germany had been militarily defeated and close to the limits of its forces – although nothing had prepared its population for capitulation" (Kershaw, 2008, p. 1466).

It is very clear that the canon used by Littell to compose his Max Aue dates back to the Orestes of Aeschylus, bringing with it a whole catalog of mythology that was common to the Greeks, but here they appear repaginated. It is not Orestes because there is no redemption; is not a man without qualities because, in moments of decision, Aue becomes visible and shows who he is. Ulrich, in his many possibilities, is always an open case. In addition, the incestuous relationship between Ulrich and Agatha – his younger sister – is never fully explicated. It is insidious and presupposed between the lines, but it does not materialize and is not explored with expressive descriptions, as in the case of Aue.

Moral relativism and some degree of cynicism, however, are common to both characters. In a conversation with Agatha, in the innumerable dense dialogues that make up the second part of the book – which is characterized by describing Ulrich and his sister's involvement with crime; fraud; conjectures about murder etc. – Ulrich says things like: “I myself do not take much interest in the fact that something is good or bad, but I cannot give you any rules to guide us” (Mussil, 2018, p. 13007); or that “the morality of our time, whatever it may be, is that of achievement. [...] Success makes us forget the rest” (Mussil, 2018, p. 13844). There is also the following passage: “You say that if I demanded of you some moral effort you would disappoint me. I tell you that if you ask me for moral advice, I will disappoint you” (Mussil, 2018, p. 13876). What Mussil describes, by the mouth of Ulrich, is a kind of diagnosis of time. Although written for most of the author's lifetime, every action of the *The Man without Qualities* takes place before the war, in the context of the erosion of the Austrian-Hungarian Empire and the outbreak of a mass society within which bourgeois standards of taste and behavior begin to take their place in the *ethos* of a decadent aristocracy. The shadowy future that loomed over Europe – with which, in many ways, Mussil lived – was already there. Aue, in turn, reveals these elements in various ways in his confessions – apparently – devoid of repentance. There are many significant passages in this regard. For example, the description of some actions (and reactions of Nazi soldiers and officers) subsequent to the so-called *Führerbefehl*

(“Führer order”) consisting of instruction directed to all *Einsatzgruppen* in action on the Soviet front for the total extermination of the entire enemy population (read: Jews, Bolsheviks, Gypsies, including women and children). On this, Aue states:

Especially with women and children, our work was sometimes almost impossible, disgusting. The men complained non-stop, especially the older ones, those who had family. Before those defenseless people, those mothers who were obliged to witness the death of their children without being able to protect them, who could not but die with them, our men were victims of an extreme sense of impotence, feeling equally defenseless. ‘I just want to stay uncorrupted, a young Sturmmann from the Waffen-SS told me one day, and although I understood this desire well, I could not help him (Littell, 2012, p. 1788).

Here the character shows a deep discomfort with what he was involved with. However, he responds to this feeling with paralysis or fatalism. Moral relativism in Aue is a cowardly retreat in the face of his immense inability to rebel against something which, at heart, he knows wrong. In another passage, a little long but significant, Aue reveals the moral and degrading swamp in which he seems to flounder:

From the beginnings of human history, war has always been perceived as the greatest evil. Now we had come up with something to which war was to be clean and pure in comparison, something which many sought to escape by taking refuge in the elementary certainties of war and the front. Even the demented carnage of the Great War, experienced by our parents or some of our older officers, seemed almost clean and fair along with what we had brought into the world. I thought that was extraordinary. I sensed something crucial that if I could understand, then I would understand everything and could finally rest. But I could not think, my thoughts collided, reverberated in my head like the crash of subway cars passing in stations one after another, in every direction and on every level. In any case, no one suspected my thoughts. Our system, our state, was deeply mocking the thoughts of its servants. It was indifferent to it whether we killed the Jews because we hated them or because we wanted to be promoted or even, on a certain scale, because we enjoyed it. Just as it was indifferent to it that we hated the Jews, the Gypsies, and the Russians whom we killed, and that no-one took pleasure in killing them, no pleasure whatsoever. It was even indifferent to it that we should refuse to kill them, no punishment to be decreed, for it knew full well that the stock of available killers was inexhaustible, that it could fish men at will,

and that we could be equally destined to other tasks, more in line with our talents (Littell, 2012, p. 2180).

But the crimes of Aue – certainly far more serious and numerous than Ulrich’s – are not restricted to the thousands of murders committed in the ravines and forests of Russia and Ukraine. There are also “crimes against the family”. The incestuous relationship with the sister is explicit and detailed. Matricide and the murder of the stepfather are likely. But there is no clear conclusion in this regard. Littell, in this respect, seems to want to emulate *Oresteia*, retaking the idea of atoning guilt in the face of fatal error – by which all family members were contaminated (Karam, 2017, p. 82). Max, at some point, directly associates his personal dilemma with that of Germany: “at bottom, the collective problem of the Germans is the same as mine; they also struggled to free themselves from a painful past, to make a clean slate, and to start new things” (Littell, 2012, p. 8741). For Max the painful past referred to childhood: the disappearance of the father; to the “betrayal” of the mother; to the violent separation of the sister. For Germany, the spot was capitulation in the Great War; the “traitors” who founded the Weimar Republic; the humiliation of the Treaty of Versailles... There was therefore a dense and sticky stain – which would spread to the family nucleus of Aue and which would involve, in a more general plan of meaning, the whole of Germany in the constitution of a common destiny.

3 *FACT AND FICTION: THE LAW AND THE REGIME (IN ITS CIRCUMSTANCES)*

3.1 The Weimar heritage and its violation

The arrival of the Nazis to power in January 1933 was not accompanied by a radical upheaval in relation to the current law. The political regime, on the other hand, was quickly subverted; and only a few months after taking over the Reich Chancellery, Hitler already had the prerogatives of the Enabling Act (*Ermächtigungsgesetz*), transforming what was a shabby parliamentary democracy – already deeply shaken by the fragmentation of the party system and the recurrent use of authoritarian powers of the President of the Reich based on the infamous

Article 28 of the Weimar Constitution – into Dictatorship. However, the legal order in force, in general, remained (and thus appeared) that one inherited from the Weimar era. From the point of view of the law, therefore, the regime had received in bulk the legal material produced during times of democracy (Stolleis, 2016, p. 10).

This finding, however, does not authorize the assertion that this legal material apparently “accepted” by the new holders of power continued to be operationalized according to the standards in force during the Weimar Republic¹². It is likely that the Nazis soon realized that the task of substituting the whole of the existing law, replacing it with a “purified” one in the terms of the National Socialist *Weltanschauung*, would be in the eyes of the new rulers, in addition to a rather daunting task: such an action would frighten the economic and financial elite that by then supported the Hitler party and government. Indeed, as Stolleis (2016, p. 22-26) reminds us, the Nazis had a great need to maintain the appearance of “normality” and at least a thread of hope that, overcoming the spurred moments of “necessity”, the economic and social relations would restore a civil *Rechtsstaat*. This was because the economic bourgeoisie and the civil servants who offered some sort of political support to the incipient National Socialist regime were not at ease with explicit terror or with sudden and unnecessary ruptures with bureaucracies and some free market selective rules. They were all nationalists, enemies of parliamentary democracy, and wished for a strong German state, provided that this did not produce a sudden and unexpected turn in relation to the prevailing order (Stolleis, 2016, p. 9-10).

On the other hand, the creation of general and abstract laws could convey the message that the government, at some level and with some sense, was committed to complying with them. And the commitment to some sort of prior compromise was all that the regime did not want. As

¹² Bernd Rüthers highlights the great influence exercised by legal practices – especially doctrine and jurisprudence – in the juridical consolidation of National Socialism. After stating that, under the prism of positive law, the National Socialist “legislator” kept the Norms from the Weimar era in force (especially in relation to Private Law), Rüthers warned: “That does not mean that rulers were inclined, with respect to those laws in force, to leave things as they were, to accept the legal contents received. On the contrary, the program that guided the legal policy of Nazism was that of a complete ‘popular legal renewal’ based on National Socialist ideology” (Rüthers, 2016, p. 51).

Franz Neumann notes, National Socialism could not be defined from a theory (political or legal) or consistent practice. In fact, if there was something that defined it, this something was the radical instrumentalization of everything that served, in any way, to offer a fictional foundation for the actions of the party and the state. There is much talk about the vagueness and gigantic ambiguity that characterized the National Socialist ideology, but in a way, this fit like a glove in the hands the regime's leadership: anyone who wants to establish a radical dominion must have mechanisms to adjust the facts at their will. Vague and ambiguous guidelines serve this purpose with perfection, in that they allow an individualized adjustment and the use of a specific measure for each situation presented.

Last but not least, the Nazis also realized that it would be much easier than destroying the existing law by replacing it with new ones, to widen the interpretative margins of the judges and of the courts. To this element, they favored policies of “cleansing” of ideological enemies that were eventually lodged within the judiciary, as well as an effective ideological indoctrination that served as guidance for the “friendly” judges in the filling of these spaces of interpretation. Indeed, the technique that became known in the emblematic Bernd Rüthers (2017) as “unrestrained interpretation” (*unbegrenzte Auslegung*) was used in a persistent way during the National Socialist regime and helped to pulverize the few debris of juridicity, or some reminiscences of an old *Rechtsstaat*, that still could exist during that period. The Weimar heritage was thus violated.

3.2 The mystical resignification and the ideological devices of legal manipulation

Max Aue can be seen as the archetype of the legal mindset that emerged in the midst of these transformations. His doctoral thesis, defended at the University of Kiel, was led by Werner Best, as well as a student of Reinhard Höhn and Otto Ohlendorf, dealing with the “reconciliation of positive state law with the notion of *Volksgemeinschaft*” (Littell, 2012, p. 7855). It is curious – and at the same time disturbing – to

see how, through these porous and highly indeterminate terms, such as “community of the people” (*Volksgemeinschaft*), “coordination” (*Gleichschaltung*), (*Führerprinzip*), anything could be processed and re-signified, in order to give it some kind of “interpretation consistent with the regime’s wishes”.

An illustrative experience in this sense arises from Aue’s description of a dialogue that had already taken place at the time of the War, at a dinner in the house of none other than Adolf Eichmann (the man in charge of the “management” of the “final solution” and that when he was tried in Jerusalem, he merely replied to the charges, saying that he had only followed orders. In this dialogue, also witnessed by other members of the party and SS officers, the Kantian categorical imperative was discussed – in a paradoxical way. The discussion would have been ironically provoked by Eichmann himself who, after confessing some difficulty of understanding in the face of the absence of a “university education”, said that he had reflected much on the question. He then turns to Aue and says: “I am sure that you agree with me when I say that every honest man should live according to this imperative” (Littell, 2012, p. 9390). Aue, for his part, said that he agreed, remarking that he might realize that Eichmann was wondering whether the “work” he carried out (which consisted basically of mass extrajudicial detention and later murder of people simply because they were born) would be guided by the Kantian imperative. But Eichmann was not content with such a direct and immediate interpretation of his philosophical anxieties, and then sought to adjust the meaning of his real intention: “It is not so. But one of my friends, who is also interested in this kind of question, states that in times of war, by virtue, say, of the state of exception arising from danger, the categorical imperative is suspended, as, of course, what we wish to do to the enemy we do not want the enemy to do to us, and therefore what we do must not become the basis of a general law” (Littell, 2012, p. 9390).

The problem that Eichmann intended to put, therefore, was to the level of basic law; it was of a more general order, rooted in the question of moral obedience to norms. Perceiving this detail, Aue then produces a rather peculiar interpretation, in order to “nazify” the Kantian imperative:

However, I think it is very simple. We all agree that in a National Socialist state the ultimate foundation of positive law is the will of the Fuehrer. It is quite widespread principle of *Führerworte haben Gesetzeskraft*. Of course, in practice we recognize that the Führer is not able to take care of everything and therefore others should legislate on his behalf. Strictly speaking, this idea had to be extended to the whole Volk. Along these lines, Dr. Frank, in his constitutional law treaty, extended the definition of the *Führerprinzip* as follows: *Act so that the Führer, if he knew your actions, would approve them*. There is no contradiction between this principle and Kant’s imperative (Littell, 2012, p. 9394).

The whole thing is certainly out of reality. However, Eichmann and his guests seemed to have appreciated Aue’s performance. They might even feel comforted. Enthusiastic at the success of his argument before that “select” audience, Aue then encourages himself to put a catch on his “reasoning”:

your friend’s mistake is to resort to a wholly mythical supranational law, an aberrant invention of the French Revolution. Every law must rest on a foundation. Historically, this has always been fiction or abstraction, God, the King or the People. Our great advance was to base the juridical concept of Nation on something concrete and inalienable: the *Volk*, whose collective will is expressed by the Führer who represents it (Littell, 2012, p. 9411)

It was not only in the field of moral philosophy that the machine of resignification put into operation by the National Socialist mentality operated. The Law – or what was left of it – was constantly subjected to this work of permeable significant reconstruction according to the diffuse elements of the National Socialist ideology. The work of promoting “popular legal renewal” was openly stimulated. The way in which it was to be processed was not necessarily clustered around clearly organized and homogeneous theoretical or methodological nuclei. On the contrary, as Bernd Rüthers states:

under Nazism there were several and different legal doctrines and methodological conceptions that competed for that goal of ‘popular legal renewal’. Sometimes the differences in their contents are considerable. We must also look at the competition between the different schools and between the authors when winning the favor of the rulers and to assert the supposed closeness and fidelity of their respective theories to the National Socialist ideology (Rüthers, 2016, p. 52).

This description of law is in line with the overall mode from which Franz Neumann seeks to define the structure of the National Socialist political practice (Neumann, 2009, p. 459 et seq.). In theoretical or philosophical terms, says Neumann, National Socialist action is neither informed by a pure model (much has already been discussed about the alleged Hegelianism of the National Socialist state, or about the Nietzschean inspirations of biological racism that supposedly founded Hitler's ideology); nor could it be explained by a syncretic model, which contemplated several philosophical paradigms at the same time¹³. In fact, according to Neumann, National Socialism and the totalitarian regime that he constructed cannot be described by any philosophical or theoretical model available in the field of politics. What would come closest, not as an explanation, but as a device for understanding the functioning of the National Socialist apparatus, could be the Renaissance approach – with Machiavelli ahead, but emblematically exploited by Arnold Clapmar – on the *Arcana imperii* and the *Arcana dominationis*¹⁴. Nonetheless, this observation does not authorize the conclusion that National Socialism can be seen as “Machiavellian” (whatever that means). On the contrary, what could be concluded again is that this regime was characterized by the instrumentalization of theories, world conceptions and methods of approach at very high levels; that is, anything was good! The important thing was that *will* triumphed. And for this, one must remain in power and dominate the masses that are under its yoke.

¹³ For Neumann – and we agree with him – “no philosophy can be held responsible for National Socialism” (Neumann, 2009, p. 463).

¹⁴ The study by Clapmar is also explored by Carl Schmitt in his Dictatorship (Schmitt, 2014, pp. 11-16), a book prior to the National Socialists' arrival in power, but which describes much of the elements that would compose, later, the political ethos of the regime. With respect to the developments that Clapmar's analysis can project in the interpretation of the structure of Hitler's regime, Neumann states: “National Socialism has revived the methods current in the fourteenth century, when the first modern states, the Italian city states, were founded. It has returned to the early period of state absolutism where ‘theory’ was a mere arcanum dominations, a technique outside of right and wrong, a sum of devices for maintaining power. The leaders of the Italian city states in the fourteenth century: Machiavelli, the early seventeenth-century German lawyers (like Arnold Clapmar); were masters of this art. A study of Arnold Clapmar's *De arcanis rerum publicarum* (1605) will reveal striking similarities with National Socialism in the transformation of thought into propaganda techniques” (Neumann, 2009, p. 465).

In the midst of this strategy of domination, “National Socialism has transformed institutional democracy of the Weimar Republic into a ceremonial and a magic democracy” (Neumann, 2009, p. 464). This was due, among other things, to the fact that instances of democratic mediation were drastically modified to become environments of plebiscitary acclamation or instruments of direct pseudodemocracy, which would emerge on the principle of leadership. The passage of *The Kindly Ones* lines above echoes this environment when it places the Führer as the maximum (and rightful!) representative of the *Volk*. The magical character of such an arrangement is self-evident. One curious aspect of the “leadership principle” (*Führerprinzip*) is that it established a kind of open control of mentalities. Although it removed from the Fuehrer his legitimacy, such a principle was also directed to every agent of the *Volk*, stimulating them to action; initiative. It was a regime that preached obedience to leadership, but at the same time implanted in people the need to work for leadership from open, indeterminate commands. Ian Kershaw, Hitler’s biographer, called it “working for the Führer”¹⁵.

In *The Kindly Ones*, Thomas – the friend/*alter ego* – explains to Max the functioning of the system:

that the orders are always vague, is normal, even deliberate, and this follows from the logic of the *Führerprinzip* itself. It is up to the recipient to acknowledge the intentions of the sender and act on it. Those who insist on having clear orders or want legislative measures have not understood that it is the will of the boss, not his orders, that counts, and it is up to the receiver of orders to know how to decipher and preferably anticipate this will (Littell, 2012, p. 9087).

In the field of law, Bernd Rüthers explains how this operation of “working for the Führer”, in the line of the *Führerprinzip*, was published in legal journals that circulated at that time. According to Rüthers, in 1934, the 31st issue of the journal *Juristische Wochenschrift* (something

¹⁵ In the words of Kershaw: “by working for the Führer, initiatives were taken, pressures were created, laws were instigated, all in a way aligned with what was supposed to be Hitler’s objectives and without the dictator necessarily having to dictate” (Kershaw, 2008, p. 6405).

like “legal weekly”) published the following passage in matters related to civil law: “you decide quickly, as a *Führer*, you decide clearly, as a *Führer*, and you decide in such a way that until the last one perceives you had spoken the law” (Rüthers, 2016, p. 53).

One particularly incisive way in which the Nazis manipulated the law was the so-called *General Clauses* (*Generalklausen*). This point is particularly important because one of the dimensions of law that are remembered as relatively untouched by the regime is civil law. And indeed, from the legislative point of view, the Code (*BGB*) remained in force until the end of the war, just as it was during the Weimar era. Stolleis informs that in the early 1940s they considered creating a “German Civil Code of the German People” (*Volksgesetzbuches*), whose text would be adjusted to National Socialist “standards”. However, this project never went beyond the stage of an outline (Stolleis, 2016, p. 26). Perhaps because it has never been necessary to reach such a point. Rüthers’ “interpretive enlargement” did very well the work of circumstantial adaptation to the interests of the regime, transforming “applied” civil law into something other than what was “legislated”. The general clauses were the gateway to this mutation; and the judiciary, its vehicle¹⁶. In preaching such a model, Rüthers recalls some of Carl Schmitt’s “parallel publications”, in which the jurist – who a year before had worked in the office of Chancellor Von Papen – established five “new guidelines for legal practice”. Rüthers transcribes what would be the “fourth guideline” in the following terms: “for the application and

¹⁶ Stolleis describes the case mentioned in the text as follows: “Im Bürgerlichen Recht, das seinen normativen Bestand im wesentlichen behielt, verschoben sich die Gewichte vor allem durch Rechtsprechung und Rechtswissenschaft. Die Generalklausen (§§ 138, 157, 226, 242, 826 BGB), vor denen kurz zuvor noch gewarnt worden war, wurden jetzt als ‘Einbruchstellen’ für die nationalsozialistische Weltanschauung empfohlen. Betonung des ‘Gemeinschaftgedankens’, Reduzierung der Ansprüche gegenüber den Pflichten, Ethisierung und Vulgarisierung des Rechts führten sowohl zu Verlusten an dogmatischer Rationalität und Rechtssicherheit als auch zur Bildung neuer dogmatischer Figuren” (2016, p. 25-26). Translation: “In Civil Law, which in general maintained its normative nucleus, the weights have changed, above all, through legal science and jurisprudence. The general clauses (paragraphs 138, 157, 226 and 826 of the Civil Code) against which the Nazis had warned were now seen as ‘entry points’ for the National Socialist worldview. The emphasis was on ‘community thinking’, which reduced rights in favor of duties; in the infusion of morality in law and its vulgarization: all this led to the loss of doctrinal rationality and legal security, as well as the construction of new dogmatic figures”.

management of general clauses [...] one must be fully and exclusively adapted to the foundations of National Socialism” (2016, p. 54).

3.3 Digression: about nazism and the “obedient judges”

All these elements of analysis demonstrate that the commonly held thesis that the judges, at the time of the National Socialist regime, were bound by a closed and oppressive legality; or that by their “positivist” formation, they had no theoretical or methodological tools to deconstruct Nazi laws, is, if not completely false, at least partially true. Of course, the most visible injustices produced by the regime were based on laws or normative acts produced by “law-givers” (which could be the parliament, the Führer, the cabinet of the Reich Chancellery, the Party, the SS, etc.). However, it is important to realize that even in those niches within which a clear “legislative action of the regime” could not be observed, the law has been violated. In fact, what was seen in terms of “law” and legal practices during that period was exactly the constant deflating of the legality and structures of a *Rechtsstaat*.

Even the so-called “islands of juridicity” which, from an abstract point of view, could exist within this extremely unjust regime (one of the possible meanings for Stolleis’s expression *Recht im Unrecht*) were somehow invaded by the ideological mechanisms of the regime.

As Lenio Streck points out – which, incidentally, has always highlighted the antidemocratic character of theoretical and doctrinal positions that stimulated judicial activism or protagonism – those who defend the interpretative freedom of the judges could not understand the problem in its entirety. As dangerous as explicit authoritarianism, which propagates terror and violence through clear ruptures with the rule of law, is one that is expressed in an invisible way, penetrating the open paths of legal practices.

In 2011, Streck submitted his work to a kind of self-analysis and has since ceased to refer to post-war constitutional models as an expression of *neoconstitutionalism*. In fact, although he had never defended judicial protagonism or interpretive relativisms, the fact is that sometimes the

term had been previously present in its texts. The revision took place because, by then, it was clear that the proposals included in this *neococonstitutionalism* – of strengthening an “open normativity”, with the emphasis being placed on the privileged form of application of the law and the “constitutionalist” impetus to rampantly invade the specific disciplinary fields, often driven by the enthusiasm of part of the doctrine with respect to “general clauses” – were increasingly distancing themselves from the guiding poles of a democratic law, produced within the criteria of a Rule of Law, then navigating seas of the murky waters of irrationalism and autocracy, and becoming – sometimes deliberately – a judicial dictatorship (Streck, 2011, p. 35-47). However, in the present day, especially in Brazilian legal thinking, the *neoconstitutionalist* imaginary is the heir of this “magical thinking” that manifested itself during these turbulent years of National Socialism¹⁷.

On the other hand, Streck’s work is also important to demystify another thesis that seeks to criticize hermeneutical approaches to the Law, since, in alerting to the authority of tradition, hermeneutics would be a “conservative” strand in the field of thought and one that could flirt with authoritarian or aristocratic political models. Hermeneutics, however, does not produce the sort of instrumentalist relativism necessary to maintain domination in regimes such as those which struck Germany at the time of National Socialism. As Streck notes, hermeneutics is not expressed as irrationalism, nor does it allow us to conclude that interpretation is a free activity, from which it would be possible to say “anything about anything” (Streck, 2011b, p. 231 et seq.).

¹⁷ This is not to say, it is good to note, that neoconstitutionalism is a theoretical model of the Nazis. As already highlighted in the text, there is simply no “Nazi theory”. What may be there are descriptions or methodological positions articulating formulas for “obtaining norms” – to use a Friedrich Müller expression – permissive with respect to the application or materialization of law that do not respect the postulates of the rule of law or of a Rechtsstaat. That is, even if unconsciously, they end up expressing an authoritarian legal model. It is in this sense that, here, we criticize some elements present within the legal imaginary that makes up this theoretical movement - which has some significant expression in Brazilian law – that is neoconstitutionalism.

And more than that, taking for example the discussion that we have established here about the re-signification imposed by the National Socialism of the law inherited from the Weimar Republic, we have that the hermeneutics would point to the opposite direction of the one wanted by the regime. Indeed, the constant impulse to give juridical forms a new meaning – by creating a kind of juridical newspeak – it violates language; goes against the historical and intersubjective constitution of words and concepts. Under the pretext of recovering an essentially Germanic element, of deep Teutonic origins, National Socialism tainted the tradition. Nazism, in this sense, was not a movement that paid reverence to tradition; on the contrary, it was a movement that destroyed “treasures of culture” (in the right expression of Erich Rothacker): the *Rechtsstaat*; the separation of powers; federalism; civilized criminal law¹⁸ etc., to stay only in these. New words or with reconstructed meanings have shaken the structures of these past legal monuments: “community of the people” (*Volksgemeinschaft*), “coordination” (*Gleichschaltung*), “leadership principle” (*Führerprinzip*), are perhaps the most significant examples.

3.4 Was there “law” in the national socialist regime? What theory?

In short, one can point out an answer to this question with Franz Neumann:

Does such a system deserve the name of law? Yes, if law is merely the will of the sovereign; definitely not, if law, unlike the sovereign’s command, must be rational in form or in content. The National Socialist legal system is nothing but a technique of mass manipulation by terror. Criminal courts, together with the Gestapo, the public prosecutor, and the executioners, are now primarily practitioners of violence. Civil courts are primarily agents for the execution of the commands of monopolistic business organizations (2009, p. 457).

And if Neumann asserts that no philosophy can be held responsible for National Socialism, it is possible to say the same about theories of law.

¹⁸ As Bernd Rüthers points out: “before: no penalty without law. Now: no criminal without his penalty” (2016, p. 53).

In fact, it is not the commitment to a theory that defined the actions of the regime. On the contrary, what characterized it was precisely the theoretical vacuum and the instrumentalization – with contours of a magical thought – of any argument that could instruct and “legitimize” action in ideological terms. National Socialism produced a set of political practices without compromise with theories. Bernd Rüthers stated that there was a “hostility to the Law”; Stolleis, concludes that it would be useless to try to identify, at the level of State Theory, a consistent “system” or theoretical model, since “no system would ever exist”, because “if the decision-making power was concentrated from the mystical transfiguration of a person, any kind of system would have the effect of creating commitments and obligations, which is all that the ruler does not want” (2016, p. 141-144).

Aue’s memoirs helped us to have a somewhat closer experience with these singularities that characterized the relationship of the National Socialist regime to law. It remains for us to continue our tour through the bowels of the Behemoth, accompanying Aue on the stage for the apotheosis of his tragedy: the War.

4 THE WAR: THE BEHEMOTH AND THE BLINDNESS OF WILL

Aue never understood how National Socialism really worked. Thomas was always his counterpoint: he knew the secrets of power like no one else. This conclusion does not authorize any kind of acquittal or even complacent judgment given the magnitude of the crimes committed by Aue. However, it serves to indicate the confused and highly irrational environment that dominated the regime’s political landscape. Still in 1933, Carl Schmitt wrote the text, of sad fame in the face of the explicit enthusiasm for the recently installed National Socialist regime, entitled *State, movement, people* (*Staat, Bewegung, Volk*). In it, Schmitt established a tripartite approach to describe the meaning of an authentic political regime, free from the weaknesses and ills that characterized, according to him, the Weimar Republic. This structure is relatively well-known: the “State” would represent the static dimension, bringing together the bureaucratic instruments that would enable the action of decision-makers; the

“movement” would represent the dynamic dimension, acting and deciding (the almost self-evident indication here would be that the concrete expression of the movement would correspond to the NSDAP, that is, the party); the “people” – which would not have the same meaning here in the context of bourgeois revolutions, or of the limpid democracies between the wars, but would follow *völskish* inspiration, in the manner of National Socialism – would not constitute a category but a mass that should be protected by the state. The movement, in this context, should do the political mediation, encouraging the politicization of both the state and the people.

In his *Behemoth*, on the other hand, Neumann asserts that the “constitutional form” of National Socialism implies the unification of four – and not three – coexisting (and in some cases competing) instances of power, namely, the Party, the Army, Bureaucracy (the State) and Industry. What unifies these four instances of power is the charismatic leadership exercised by the Führer. In the redefined “democracy” of National Socialism, the people was a political force (contrary to what Carl Schmitt asserted) that would have direct participation in the designs of the State and of the party (that would be “servants” of this Volk), but it was not clarified how this political participation could take place. In practice, the people were just a mass to be dominated by the four instances that shared and competed for power. That constellation of terms – some new, some newly recaptured – such as race, blood, people, community, all involved in a dense haze of irrationality, were, as Neumann put it, “devices for hiding the real constellation of power and for manipulating the masses” (2009, p. 464)¹⁹.

Leadership, as we have seen, was a required quality of all “true National Socialists”. Whoever is able to lead, triumphs with his will. The propaganda film of 1935, which is directed by Leni Riefenstahl and celebrates – in the Nazi way – the coming to power, is called *Triumph of Will (Triumph des Willens)* not by chance. Nazism, then, was a political

¹⁹ In the words of the author: “We have tried to show on many occasions that the so-called non-rational concepts, blood, community, folk, are devices for hiding the real constellation of power and for manipulating the masses” (Neumann, 2009, p. 464).

movement that preached that the will should overlap with the facts themselves. That is why we speak here in “blindness of the will”: nothing that reality presents to me and that does not conform to my sovereign will must serve me. The “leadership principle” (*Führerprinzip*) also involves the perception of this element.

4.1 A paradigmatic example of blindness of will

Aue’s first contact with the war, however, took the form of a refusal. After a promising start in the SD, because his first reports were well received by the SS leadership, Aue is sent, under orders from none other than Reinhard Heydrich, to France, in order to produce a more satisfactory report than those which the Reichsführer had been receiving, about the intentions of the Western powers. The task was to assess the moods of the French about a possible war. This journey comes at the end of 1938, after the *Anschluss* and the annexation of Czechoslovakia, and the question that he should answer was the possibility of a declaration of war from France towards Germany in the case of a possible invasion of Poland by the latter. Aue then produced a report which he classified as “pessimistic but lucid”, asserting that although the French right wing was against the war, its political weight was small. Moreover, the French government, “influenced by the British Jews and plutocrats, had decided that German expansion, even within the limits of its natural *Grossraum*, was a threat to France’s vital interests; it would go to war not properly in the name of Poland, but in the name of its guarantees to Poland” (Littell, 2012, p. 944).

In a later conversation with Werner Best, his former advisor and co-recipient of the document he drafted (the other addressee would be Heydrich himself), Aue receives the following assessment: “it is quite possible that you are right [...] but this is not what they *want* to hear” (Littell, 2012, p. 944, emphasis added). And, in fact, his report was not well liked by the ruling elite of the SS. As a result of the poor acceptance of the simply realistic positions he had presented in the document he wrote, Aue was assigned to insignificant bureaucratic jobs at the SD offices in Berlin, losing the chance to participate in the “action” in Poland. This situation, in

terms of career, implied the following: stagnation. Promotional opportunities and prizes were all in Poland.

Around the same time, Thomas had been given a similar assignment. When they learned of the common designs, Thomas was enthusiastic; Aue, worried: he did not know how to deal with it, nor did he have the dimension of what that “mission” could bring him of benefits. Thomas, on the other hand, always knew that this was an opportunity for career advancement. Back in Germany, Thomas wrote a report whose content was diametrically opposed to that of Aue, but at the same time completely disconnected from what might be considered “the French warmongering spirit”. However, its content said exactly what the public high *wanted* to hear. Aue’s appreciation of this document is as follows: “He had written the exact opposite [of what Aue had written, we add]: that French industrialists were opposed to war in the name of their exports, and therefore the French Army too, once again the government would bow to this concrete fact” (Littell, 2012, p. 949). Aue then objected: “but you know very well that this is not going to happen this way”, to which Thomas replied: “who cares what will happen? [...] The Reichsführer wants only one thing: to reassure the Führer that he can take care of Poland as he wishes. Whatever happens, we’ll see later” (Littell, 2012, p. 950).

The conclusion of Aue for all this insane body of events is presented as follows:

I soon realized that in the interminable *National Socialist circus shows* I had seriously miscarried, had misinterpreted the ambiguous signs from above, had not correctly anticipated the will of the Führer. My analyses were accurate, and Thomas’s were wrong; he had been rewarded with an enviable appointment plus opportunities for promotion, and I had been relegated (Littell, 2012, p. 953, italics in the original).

Although this is not said thoroughly clearly, the truth is that, from there, Aue seeks to find “better opportunities”. The internal struggle that he suffers between reason and will is never done. But he becomes more open to seizing opportunities, even if it means a break with the truth – and, of course, deeper moral issues. Thus, when in the near future he is invited to join the, at that time, newly formed *Einsatzgruppen* who would act in the

rear of the Soviet front, especially, at first, in Ukraine, he does not hesitate to accept.

4.2 The absolute tragedy

Of all the brutal insanities and terror that the second war allowed humanity to experience, nothing compares in matters of depth and intensity with what occurred in the actions of these *Einsatzgruppen*. One of the most unspeakable forms that throw us in the face of the “nothingness” of which Steiner reminds us, along with the experience of concentration camps and gas chambers, is certainly the mass and collective slaughter that took place in the ravines and forests of Ukraine and, later, in various cities of Russia and Belarus such as Kursk, Smolensk, Karkov etc... Aue tells events that are linked to the Babi Yar massacre in Kiev, Ukraine, among other *Grosse aktion* carried out with the same methodology. Aue was present in all of them. As an observer, in most of them. But as an officer, he also had several times to carry out shots of “mercy” (an expression that completely loses meaning in a context like this) to pacify those who, although struck by the executioners’ bullets, had not been shot to any lethal region of the body. That is, he acted as an executioner. These are thorough descriptions, capable of generating in the reader pain, perplexity, sympathy, revolt, terror, repulsion, and a series of sensations and feelings that, at this moment, we cannot find words to describe.

We will not report such memories of Aue here, but it is important to note that they exist. Obviously, the complexity of the issues involves a great deal of parallel themes. It is not just the “blindness of will” that presents itself as a reading key to approach the abominable dimension of uncontrol, violence and death that the National Socialist Behemoth produced throughout the War. However, if it is not the only one, it can be presented as an interesting access route.

The “blindness of will” accompanied the Behemoth at all times of the war. Even in cases where the National Socialist “re-signification machine” was put into operation to try to give some ornament of rationality to

heinous acts, desire in its most perverse and obscene dimension would exceed these minimal and undemanding standards of rationality.

We have already seen that Littell makes Aue a highly strange and bizarre personality to our more settled moral standards as if to shield the reader from a feeling of empathy for the executioner. And, definitely, there is no salvation for him. He himself confesses this at the end, when he becomes entangled by the Kindly Ones. But there is some level of ambiguity in Aue, though it often manifests itself in the underground of his consciousness, which makes him realize how insane he is in all that he has observed in his experience of National Socialism. He then has constant reflux; he vomits whole meals; he has diarrhea and many other cases of physiological manifestations that – without being aware of it – arise from the self-repulsion he felt in the face of all that tragic brutality.

His indecision – probably generated by some element of rationality stemming from his apparently solid intellectual formation – will lead him to suffer damaging consequences, even after the episode of his report on France in 1938.

4.3 An infamous court

In charge of determining the racial status of a group of people living in the Caucasus mountains, Aue will again take actions that confront the “blindness of will” that feeds the Behemoth. The point was this: as the war began to turn against the Germans, the SS and the Army (*Wehrmacht*) began to produce different views on the fate of the peoples living in the conquered territories. The Army wanted to harness them as labor force or soldiers to the battlefield; the SS wanted to annihilate them (the pretext was to guarantee the security of the *front*, but it hovered in the air that the real intention was to increase the number of dead enemies – especially Jews and Bolsheviks – to the reports of the *Einsatzgruppen* leaders, in order to gain prestige and possible career benefits).

The leaders of the Army and SS decide then to proceed to a sort of “judgment” – on the basis of “scientific” criteria – to determine whether that group of mountain dwellers would be *Bergjuden* (literally, mountain Jews), or whether, on the contrary, they would be members of some race of

Caucasians. That is, they constituted a tribunal to judge whether that people had committed the crime of being born: if the decision were to determine their nature of *Bergjuden*, the fate of all would be the common grave; on the other hand, if they were Caucasians, they would be “harnessed” by the Army.

The SS appoints Aue to present a detailed and specialized report on its behalf. The instructions are clear: plead before this court the “interests of the SS”. On the day for the discussion of the reports, Aue is once again inconclusive (or, rather, unconvinced about the thesis that, even if it were contrary to the facts, it was what the SS wanted). Result: The thesis of the Army prevails.

The reprimand applied to Aue – by virtue of his demonstration of “will-weakness” – is a designation to act as an intelligence officer on the Stalingrad *front* (at a time when the German forces were overwhelmed by the Red Army).

5 FINAL THOUGHTS

The experience in Stalingrad marks Aue (literally) for life. After being shot in the head, he undergoes surgery and is evacuated in haste with the last airplanes that left the *Kessel*, before the surrender of the sixth Army (his status as an officer – and Thomas, always near – helped him in that).

After this, and a period of recovery from his injuries, Aue returns to Berlin, where he will remain until the arrival of the Red Army in May 1945. There are many important events that have occurred in the meantime (between the period of post-Stalingrad and the German defeat). But they will not be possible to detail here. As far as their relationship with the regime was concerned, Max advanced in his positions in the same proportion as the German defenses on the front deteriorated. He then starts working in the link between the interests of the SS and the industry (not always conflicting when it came to visceral and biological anti-Semitism) and came to work directly with Minister Albert Speer. At the end of the war, after Nuremberg, Speer receives a “benevolent” Nazi fame,

due to signs of regret and for lack of elements that would put him in direct relation to the mass murders. But Aue seems to want to deconstruct this thesis. Speer, in addition to knowing what was going on there – in that open, coded language that characterized the National Socialist chain of command – had no “humanitarian” intent at all. On the contrary, he wanted the captives to be used more intensely as a labor force for war efforts. In the personal aspect, the period is marked by the visit to his mother in the still occupied France, which culminates with her murder of the stepfather. He was at the scene of the crime, all indications point to him, but the memory of the act is not present to him. He was investigated, but in the face of the chaos that reigned in the last years of the war, he was able to escape the process. He met with Hitler in the last days of his Bunker, to receive an award, and in a scene that could be in a clown act, Max bites the Führer’s nose. But the set of all the acts that make up the novel is too heavy for it to be funny. Before the flight to France, he still committed one last murder. This last vile act, however, will not be revealed here.

Anyway, it does not matter. Aue’s fate was sealed long before the Red Army crossed the Brandenburg Gates. The Kindly Ones invoke, here, not only the violation of personal persecution in the face of the crimes committed by them. This invocation also brings to light the collective breakdown of institutions that, since Aeschylus, have characterized political justice. We could refer to this as the “political cultivation of justice”, characterized by the establishment of courts that produce conciliatory judgments, imbued with a sense of rationality and justice. In Aeschylus, the Erinyes (Furies) are transmuted into the Eumenides (Kindly Ones), after the conciliatory action of Pallas Athena. But that does not mean that the Furies have disappeared; it only means that they have been “tamed”. If, while acting, they are “rationalized” and managed by some principle of retribution and restoration; in potency, they are maintained as those that may come to persecute the men and women who committed murders and crimes against the family. Aue committed both. But in this tragic apotheosis, the intensity and virulence of these crimes transcend the individuality of Aue, to reach Germany, Europe, and

Humanity... The peace pact symbolized by the serene performance of Pallas Athena was broken; the crimes were perpetrated against “human brothers”, as Aue states at the beginning of his long soliloquy.

Thus, as in Hobbes, the state of nature does not disappear in the face of the institution of the State (it is only kept under control, thanks to the state monopoly of violence), here too there is a resumption of relentless fury. Of course, as an infringement of punishments, whether physical or political, this interpretation is very limited. But if we imagine it as a sort of fate that falls upon all of us, perhaps, it will make a little more sense. There is, in fact, a transcendental condemnation given to Aue. But it, paradoxically, is shared by all humanity: the suppression of the right to forget and the obligation to always remember.

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