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LAW, METHOD AND IDEOLOGY: LESSONS FROM THE HISTORY OF THE NATIONAL-SOCIALIST LAW

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ABSTRACT: History, Philosophy and Literature open ways for a deeper reflection on the multiple dimensions of the legal phenomenon. On the interconnection between these different types of knowledge, this paper proposes to analyze the visible tensions between the legislated law and its constituent practice, focusing on the ideological differences that the legal area encompassed during the National-Socialist regime. Based on the reading of references from the Nazi judiciary, and from the work by Helmut Ortner *The Executioner*, the intention was to understand the ideological setting of a legal order, on the one hand, and the possibilities of transforming it through the potential instrumentalization in the heuristic and hermeneutic scopes of the legal methodology, on the other hand. Also, this research had the purpose of exploring the traditional association between legal-positivistic ideas and the actions of the jurists who were historically linked to the National-Socialist doctrines.

KEYWORDS: National-Socialist Law; *Volksgeist*; Roland Freisler; legal methodology; interpretation.

1 MOTIVATIONS

In 2018, the Portuguese company *Alma dos Livros* published the translated edition of *Der Hinrichter*, under the title *O Executor* (translates to *The Executioner*), by the German author Helmut Ortner (2018). The publication is about the political and professional history of Roland Freisler, one of the most sinister characters in the recent Legal History. It

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is a thorough description of the transformations in the legal and jurisprudential culture from 1933 to 1945[2], during the rule of the Third Reich in Germany.

Freisler was an important jurist in the National Socialist elite and a devotee ideologists of the Nazi Party, having performed different jobs and assignments in the hierarchy of justice and in the Nazi legal system during his long active time. However, it is as President Judge of the infamous People's Court (*Volksgerichtshof*), a position he claimed in 1942, which would grant him with the most notoriousness, when it comes to politics and history[3].

The research developed by Ortner goes beyond developing a biography of Freisler, as it describes the whole context of the political and legal scopes in National Socialist Germany. The narrative emphasizes the deeds of the Nazi magistrate as an eminently involved with the propaganda of the Nazi ideology, and as the leader of the People's Court. In order to do so, Ortner's research transcribes a series of excerpts from articles, some of scientific-doctrine nature, other with a more journalistic tone, written by Freisler and other people of the party, committed to its ideology. It also gathers a great amount of legal decisions and sentences signed by Freisler during his sinister involvements as the President Judge of the People's Court.

As it is certainly not an academic or scientific text, and as it does not have any particular critical or reflective qualities, the reading of *The Executioner* partly inspired the investigation of this paper. Ortner's text awakened in us the ancient interest in better knowing and understanding one of the most enigmatic periods of Legal History in the twentieth century. It turned out to be a stimulating starting point for a series of

[2] Different versions of the text were published in German, the first one in 1993. The German publication of the original text that served as the basis for the translation, by WBG (*Wissenschaftliche Buchgesellschaft*), was published in 2013.

[3] As a prominent member of the Nazi Party, to which he joined in 1925, Freisler became Secretary of State for the Prussian Ministry of Justice in 1933, and Secretary of State for the Reich's Ministry of Justice the following year. Chosen as President Judge of the People's Court in 1942, after his predecessor, Otto Thierack, was appointed as Minister of Justice, he performed these functions until the date of his death in 1945, when an aerial bombardment hit the Court building where he was presiding over a session.

reflections that seem essential nowadays, especially on the connections between Law and ideology, and their consequences for the Legal Theory and Methodology. We should apologize for the incipience of our investigation, which could be seen as the curiosity of a neophyte about an endless fountain of resources, research and discovery for the history of culture and the legal thought. And for the adequate understanding of the role the judiciary plays within the studies of the Law (and in the Rule of Law).

There is no particularly original aspect in the writings by Ortner, either regarding what he accounts about the life of Freisler, or about how the People's Court worked and what it did. His work's merit is, above all, recovering an overwhelming array of documents, accounts from those times, with the purpose of portraying the performance of that magistrate and that institution, in order to make it possible for us all to further reflect and research on all of that. Thus, *The Executioner* was a starting point for us to deepen an issue that still causes enormous perplexity, even today, among all the jurists of the Occident. How was it possible, within a nation known by the high-class and sophistication of its thinking and its legal and judicial institutions, to implement a justice model like the one of the Nazi? Regarding this issue, there can be no easy judgments, given the very temporal distance that separates us from those who had to live that concrete period of totalitarianism. On the other hand, Ortner's work also served as a stimulus to reflect on another important and controversial discussion, even for today standards: the affinities of that same model of justice with positivist perspectives of Law, and the recurrent possibilities of association between the two paradigms. Historical association, indeed, whose credibility is greatly thanks to the post-war writings by Gustav Radbruch.

The fact is that our interest in that particular moment in the History of Law has intensified, as has the awareness of the *presentness of the past* (Ortner, 2018, p. 9). And so has the importance of his study for the proper dealing with present-day issues. In the same way, our conviction of the legal-methodological importance has been revitalized, considering the

proper maintenance of the Law, and the importance of fostering jurists' critical debate about doctrines for the practical application of the Law, as a means to preserve the Rule of Law.

2 THE PRESENTNESS OF THE PAST

One of the reasons why Freisler's writings made us uncomfortable was the similarity that, at given moments, it seemed possible to establish with a discourse we often use nowadays to justify kindness, legitimacy, and nature, when discussing the Law. Notions such as the idea of law, the duty of conscience, collective morality, the sense of decency, all of them are constantly brought up as the main focus of the Law, and this was also done not only by Freisler, but by other representatives of the Nazi legal area. They also criticize strict normativism, and propose the need of adapting the sternness of the general, abstract law to the dynamism of social circumstances and to the same supra-positive idea of the Law[4]. This adaptation is in the scope of the Judiciary Power, which needs to put into practice a plethora of methodological resources. In general lines, it comes to the very relation between the written Law, constituent of the State, expressed in the laws, and this idea of the Law. Or, between the Law that is crystalized in the written form, and the judicial decision or sentence. We do not have the intention nor the pretension of addressing this issue with the care it deserves. However, it will always be said that these relations, which have been debated with accuracy in the period in question, constitute, as Bernd Rüthers very well observes, a lasting problem of any system with written laws, and the lack of attention, namely academic, towards the evolution of the legal system of Nazi Germany between 1933-

[4] As an example, see the words of Otto Thierack in one of the open letters he addressed to the judges in 1942, after his period as Minister of Justice of the Reich: "A body of magistrates must not be supported without critical sense on the crutches of the law. He will not look in the law, fearfully, for something that protects him, but, responsibly and within the scope of the law, he shall get to the decision that best helps the organization of the life of the community of people" (Ortner, 2018, p. 110, translated). Regarding his doctrine of concrete thought, and showing his consonance with legal-institutional thinking, Carl Schmitt makes even more critical comments regarding normativism. See, e.g., Bernd Rüthers (2016 *maxime* p. 82 *et seq*.). The many things we could say in this regard will have to wait for another occasion...

45 constitutes an "unused opportunity to learn" (Rüthers, 2016, p. 191-192, translated).

The generic replacement of the idea of legality by that of juridicity advocated by ideologues of National Socialism[5] is equally relevant in present days. It brings forth ideas such as the potential manipulation and complete alteration of discourse and of the principles and values we consider fundamental for the Law and juridicity. Principles and values which, in our opinion, this normative reality has to obey in order to effectively receive that name. This also raises numerous questions, which fuel until nowadays the liveliest discussions. The Hart-Fuller debate, centered on the archetypal discord of the relationship between Law and Morality, continues today as alive as it was in 1957, when they clashed with their arguments (Hart, 1958; Fuller, 1958).

3 THE CONCEPT OF VOLK IN THE NATIONAL-SOCIALIST LEGAL DOCTRINE

A) THE PEOPLE'S COURT

In order to understand the context, it should be noted that the People's Court was created in 1934, after the *Reichstag* fire, with the purpose of assuming the jurisdiction of the Supreme Court in matters of first instance, and becoming, in practice, the court of first and last instances for political crimes, especially of high treason (Ortner, 2018, p. 27-38; Lippman, 1997, *maxime* p. 251 *et seq*.). In an article published on the occasion by *Völkischer Beobachter*, the Nazi Party Newspaper, by its editor-in-chief, Wilhelm Weiss, "... the People's Court is an organic creation of the National Socialist State and an expression of basic National Socialist conceptions in the scope of jurisprudence" (Ortner, 2018, p. 36, translated). It was a political court, nonetheless, which made itself the main judicial mechanism to punish political dissent (Lippman, 2000, p.

[5] This idea is expressly stated by Theodor Maunz in relation to Public Administration, but it seems clearly transversal to the whole "renewed" German legal system according to the National Socialist political philosophy (a common expression of the respective propaganda was the need for a "popular legal renewal"). See Rüthers (2016, p. 33).

205). The fact is that, throughout National-Socialist regime, an increasing number of behaviors was classified as treason, or internal subversion, so that a substantial number of cases were gradually transferred from ordinary criminal courts, and from the special courts themselves, to the People's Court (Sfekas, 2015, *maxime* p. 198 *et seq*.) [6]. Any behavior, or suspicion thereof, capable of constituting a disagreement with National Socialist policies or with the Führer, fell under the jurisdiction of the People's Court, and was considered an offense punishable by death penalty. The very name of this division is sinisterly demagogic, since it intends to convey the centrality, in the respective decisions, of the vote and the popular will. It was, in fact, the only Court that, after the beginning of the Second War, maintained popular participation, through the incorporation of variable number of lay judges. These judges were chosen from among Party members, or from the notorious secret police, Gestapo, or from the army. Their presence there was justified only as an ideological mechanism to legitimize a criminal judicial system that wanted to be the supreme judicial expression and a mechanism for maintaining the well-being of the German people[7].

Explanation is needed in this regard. Especially because it was precisely the references to this notion of *Volk*, and their multifaceted dimension, that initially aroused our interest. Throughout the doctrinal texts by the Nazi jurists, it is constant to find mentions of the spirit of the People, with their sense of justice, inculcated in the depths of the community, of the ancestral cultural and moral values inherent to that

[6] On the competences that, in practice, were the responsibility of the People's Court, see also the extraordinary document, which is the 3rd volume of *Trials of War Criminals before the Nuernberg (sic) Military Tribunals under control council n.º10* (USA, 1951, *maxime* p. 38-39). This third volume corresponds to transcripts of the so-called *Judgment of Jurists*, or *Judgment of Justice*, in the official designation *The United States of America vs* Altstötter*, et al.*. On the establishment of special courts, by decree of 1933, and their powers, see Karl Lowenstein, (1936, *maxime* p. 808 *et seq*.). The author recalls, on p. 806, that article 105 of the Weimar Constitution prohibited the constitution of exceptional courts. The People's Court, initially constituted as a special court, sees its statute become ordinary by a Law of April 18, 1936. A classic work on the history of this Court, especially under the presidency of Roland Freisler, is the one by H.W.Koch (1989), himself a member of the Hitler Youth Group.

[7] On the popular participation in German courts, throughout the 19th and 20th centuries, and especially in the National-Socialist period, see, for example, the text by Markus Dirk Dubber (1995, *maxime* 260 *et seq*.).

community. Those references seem to recall Savigny, its Historical School of Law, and all the contradictions present in the brilliant theoretical constructions by the eighteenth-century jurist. And these references also appear in contemporary cultural and multicultural studies of the Law, under the idea of overcoming the formalist and legalist models. But that, in fact, not only go far beyond the understanding that the nineteenth century in general, and Savigny in particular, had of this idea of *Volk*, but they actually have nothing to do with the current references, perhaps of a sociological and ethnological matrix, made to the idea of community.

B) THE CONCEPT OF *VOLK* IN THE NINETEENTH CENTURY

The Concept of *Volk* was particularly "revered" in the nineteenth century, although it was used with different meanings and in different contexts. At that time, Germany was experiencing a strong revitalization of the Romanticism movement, which brought with it the appreciation of a strong nationalism, visible in the most diverse cultural, literary, political, and legal manifestations. Indeed, legal science also discovers, at this time, its true vocation, placing research and knowledge at the service of the "national awakening", the will and the spirit of the people. But throughout the nineteenth century, the ubiquitous concept of *Volk*, as a cultural community of individuals who share a common language, a common law, a common history ("or, more dramatically, a common destiny"), does not necessarily have a special ontological statute (Dubber, 1995, p. 243). It would only be explored by the National-Socialist ideology. During this period, two fundamental versions of the idea of people, of community, are confused. One is the conception that we could call empirical, identifying the set of individuals that live in an organized nation-community, sharing a set of common cultural, practical and psychic manifestations, and the other is a metaphysical conception, in which individuals cease to make sense in order to be fully absorbed by the whole, which gains a truly organic, autonomous, and superior meaning. What each notion substantiates is a specific understanding of the notion of community, and only one of them is fully compatible with the defense of individual rights (Dubber, 1995, p. 228).

During the first half of the century, the influence of Hegel's ideas in the Philosophy of Law and History is clearly visible, as it touches Savigny, Puchta, and the theorists of the Free Law, such as Kantorowicz or even Isay. As pointed by Dubber, Hegel's idea of *Volk* is beyond the concept of general will by Rousseau, because the former refuses the latter's idea, since it portrays general will as a common element between the desires of individuals, and not as a different conceptual entity "That makes the will of the State rational in itself" (Dubber, 1995, p. 246, translated). The idea of *Volksgeist*, as a real and organic entity, gains central importance, and Savigny sees it as the true source of all law. It should be noted that the Free Jurists themselves (who intended to oppose the legalistic formalisms of the increasing legal positivism), argued that judges depend on and must depend on their sense of justice, which in turn must reproduce the legal conscience of the *Volk*. Savigny, in turn, defended the theory that jurists played the role of modern representatives of the *Volksgeist*, of the essence of the people, which makes the development of the Law fully dependent of the legal science (Savigny, 1878, p. 29-33; 47-53)[8].

C) THE CONCEPT OF *VOLK* IN THE NATIONAL SOCIALISM

Getting to the twentieth century, the Weimar Constitution did embrace the achievements of the Enlightenment and German liberalism, thus enshrining the fundamental principles of the Rule of Law – the separation of powers, the independence of judges and their subordination to the law, respect for constituted rights, freedom of economic and professional movement, a charter of individual rights as a guarantee against violations by the Executive and the Legislative Powers. However, it still embodies that revitalization of the (Romanticist) metaphysical concept of *Volk*, which would become a hallmark of Nazi ideology.

[8] On how Savigny makes the concept of Volksgeist his own, integrating it into his legal scheme, see Francisco Contreras Peláez (2005, p. 72 *et seq*.). A concept that would be widespread in the intellectual atmosphere of the nineteenth century, thanks to authors like Montesquieu, Burke or Herder. Understanding that Savigny's notion of customary law departs from the idea of *Volksgeist*, see Federico Fernández-Crehuet López (2008, p. 178 *et seq*.).

What it did was to cut any ties that might have existed between the metaphysical concept of *Volk* and the people who were supposed to be part of this entity. The conflict between the metaphysical and empirical concepts was solved in favor of the former, installing Hitler as the ultimate interpreter of the will of the *Volk*, with harmful consequences for the individual rights of those who, empirically, constituted the group. This all-encompassing and all-powerful concept of *Volk* engulfs the individual, who becomes, first and foremost, a member of the *Volk* community, with no rights beyond those that corresponded to the interests of that *Volk*.

Neo-Romanticism fueled by the National-Socialist ideology, as shown by Karl Lowenstein, also proved to be the driving force behind the promotion of the racial myth, on which the very order and spirit of the people was founded: German law must consider the soul and the nature of the Germanic people. Instead of that "soulless legal machinery of liberalism with a Romanist root", which was formalistic and individualistic, the elements of blood, soil and race are now called upon. According to the author, the law does not constitute a science or a technique, and is seen as something innate, transmitted only through blood, so that "only the ones who enjoy the appropriate racial heritage have the creative spirit of the Law" (Lowenstein, 1936, p. 785-786, translated). Thus, Dubber tells us of an amendment proposed to the German Civil Code, in 1935, by the eminent scholar of Law Karl Larenz, with the intention of excluding from the German legal community those who were considered undesirable: "The comrade in Law is only one who is a comrade of the People: the comrade of the People is one who is of German blood" (Dubber, 1995, p. 260, note 216)[9].

[9] Karl Larenz, still today one of the most important references in the scope of Legal Methodology, was one of the most prominent jurists who defended and served the Nazi Party. Like others, for example Carl Schmitt himself, or Franz Wieacker, he strove, after 1945, to move away from that ideology. In the prologue that García Amado writes for the work of Bernd Rüthers referred to before, the Spanish scholar is dedicated to making a step-by-step comparison of the texts published before and after 1945 by Theodor Maunz, another jurist actively committed to the Nazi ideology, until its defeat. As García Amado states, "it is very striking how quickly the totalitarian past of these characters fell into oblivion, and with what skill they managed to make a blank slate out of it, and, above all, be accounted in the 50s and 60s as champions of democratic constitutionalism [...], supporters of the most sacred fundamental rights and fierce defenders of the principles that make up the moral substrate of contemporary constitutions" (2016, p. 16, translated).

Also Freisler thought the new German law should be based on a biologically justified idea of people. Present in all his conception of Law, Criminal in particular, are the ideas of soil and blood, "most established German values", which allowed him to defend a biological conception of Law from which the objectives of the Reich's justice would be determined. "The biological perspective is typical of National Socialism. National Socialism views the people, and their internal and external development, from a biological perspective. And to a National Socialist, Law is biological" (Ortner, 2018, p. 80 *et seq*., translated)[10]. Likewise, Carl Schmitt, who would become the great author of Nazi jurisprudence, would postulate the primacy of a metaphysical concept of the community over the real people, stating that "we know, not by intuition, but by basing ourselves on the most rigorous scientific knowledge, that all law is the law of a particular people. It is a truth of knowledge that only those who, when integrated into a series and in a manner determined by race, form part of a community that creates law and belongs to it existentially" (Ortner, 2018, p. 62, translated)[11]. From the moment when the will of the people is demagogically equated with the will of the Führer, the law ceases to be an objective norm and becomes a spontaneous emanation of Hitler's will. This same idea is present in the legitimation by Schmitt of the purge that followed the Night of the Long Knives, in 1934, in which the alleged culprits were summarily executed without any kind of legal process. The positive law would only be valid insofar as it corresponded to the political intentions of the leader, who was the incarnation of that metaphysical conception of the community (Lowenstein, 1936, p. 311).

Neither Hegel nor Savigny established this ontological primacy of the community over its members. As Dubber observes, in Hegel's universe, the *Volk* and the individual are, ultimately, on equal footing, in the sense that none of them is but a manifestation of the *geist*. On the other hand, the author stresses, none of these thinkers had been limited to

[10] In addition to the unequivocally racist definition of people that was developed, this biological perspective, shared by the National Socialist Criminal Law, allowed a return of theories such as those of the born-criminal, using here the jurists of collaboration with colleagues from Medicine Schools to establish an "insidious criminal typology" (Ortner, 2018, p. 64-66, translated).

[11] Ortner's quote from Schmitt is taken from Walther Hofer (1957, p. 102).

talking about the German *Volksgeist*, as they actually mentioned the most fundamental *Weltgeist* or *Menschengeist*. The spirit of the world and the spirit of man. The history of National Socialism begins and ends with the mystical German *Volksgeist*, on whose altar the most fundamental individual rights were sacrificed (Dubber, 1995, p. 261).

It is curious, furthermore, to note, in Rüthers, the need that Schmitt and other authors committed to National Socialism had to differentiating themselves from the Hegelian tradition, namely regarding their philosophy of the State. The Hegelian State, as an embodiment of morality and rational concretization, was not subject to any totalitarian or partisan instrumentalization. As an ethical whole, within which individual morality had absolute value, and in which the governors themselves were subject to normative limits, knowledgeable by rational criteria, this is an idea of State that became difficult to harmonize with a community that conceived the State as an instrument of the National Socialist ideology, or with a construction that saw in the Führer not an organ of the State but "the supreme lord of the Nation's courts and the highest legislator" (Schmitt, 1936, p. 181-185 *apud* Rüthers, 2016, p. 129, translated). It did not match with a state based on the myth of the superiority of the Nordic race and the racial homogeneity of the people, which saw the Führer as its absolute leader. Thirsty for party approval, which demanded the separation from their own tradition, Schmitt declares that on the day of Hitler's rise to power, "the nineteenth-century, Hegelian, civil-servant state, for which the unity of officials and the class in charge of the state was typical, was replaced for a new state. On that day, therefore, it can be said that «Hegel was dead»" (Schmitt, 1997, p. 46-47, translated) [12].

[12] Schmitt adds that everything that was "big and German" in Hegel's powerful intellectual construction, remained effective in the new configuration. Only the forms of state corresponding to the nineteenth-century model were abandoned. Bernd Rüthers emphasizes the need felt by many of the jurists linked to that popular juridical renewal under the designs of the National Socialist ideology to make use of the Hegelian categories, namely in relation to the doctrine of concrete order and of the concrete-general concepts. Larenz, according to the author, had always tried to maintain this link with the Hegelian tradition, not only with the respective Logic and Dialectic, but also with his Philosophy of the State. Given the configuration that the Nazi state was assuming, as observes Rüthers, the effort of articulation between these constructions was doomed to fail (Rüthers, 2016, p. 82-119, translated).

4 LEGAL AND DOCTRINAL PERSPECTIVES IN THE NATIONAL-SOCIALIST JURIDICAL DISCIPLINE

Given that context, the habitual speech used by Freisler is even more unsettling in his propaganda writings and in his jurisprudential production at the People's Court (whose sentences always started with the same words: *In namen das Deutschen Volkes*). References to community morality, good customs, and values such as honor and decency, brought to justify the approximately two thousand death sentences signed by Freisler between 1942 and 1945, are now perceived as purely evil, devoid of any ethical sense. Using a language that Ortner describes as rude and harmful, often shouting at and humiliating the accused, while characterizing them as "shameless", "execrable", "without honor", he most often uttered his judicial sentences without even legally classifying the violations for which he condemned those people. And when doing so "In the name of the German people", as Ortner (2018) observes, he turned all the Germans into bloodthirsty accomplices[13].

Even more shocking these reprimands get if we keep in mind the very legislative environment that served as a legitimate background for these actions, not only by this particular institution, but by the entire Nazi judicial organization. The Weimar Constitution, formally kept in validity because it was never abolished, became completely "un-constitutionalized", according to Lowenstein (1936, p. 802), from the moment Hitler stepped into power[14]. The so-called Plenipotentiary Law (Law of Full Powers) of 1933 had the simplicity of being made of only five articles, and acknowledged the government with full power of legislation, able to deviate from the Constitution if it so decided. Legislation by government decrees, or by mere ordinance, becomes the rule, while

[13] Ortner (2018, p. 130-136, translated) points the finger at a "blind-eyed people", "mere spectators and people who would rather turn their backs". See also H.W. Koch (1989, *maxime* cap. 8).

[14] Lowenstein (1936) questions the constitutionality of the Plenipotentiary Law passed in 1933, pointing out that it did not constitute an amendment to one or more clauses of the Weimar Constitution, rather representing the complete overthrow of the constitutional order then existing, so it would have to have been submitted to the "constituent power originating in the entire German nation". See also the article "Dictatorship and the German Constitution: 1933-1937", by Karl Lowenstein (1937, p. 543). Carl Schmitt (1997, p. 17-25), however, considered the Law of 1933 an authentic provisional Constitution.

normal legislation constitutes the exception, in a complete inversion of the framework that characterizes the normality of the Rule of Law (Lowenstein, 1936, p. 787-789). In *The Origins of Totalitarianism*, Hannah Arendt had already highlighted the tendency of totalitarian regimes to abusively bestowing decrees, as a privileged instrument of the bureaucracy through which the same regimes proceeded to implement their ideological strategies. This is because "the inherent stability of the law threatens to establish a community in which no one can become a god, because everyone must obey him" (Arendt, 1968, p. 216; 244 *et seq*., translated). Or because, in another perspective, the decree allows one to rule in anonymity (while the laws can be attributed to specific men or assemblies), whereas, while the legislator is guided by principles, there are no general, reasonable principles behind a decree, but there are ever changing circumstances, and the ruled-over people are permanently ignorant of this "carefully organized" setting. And for that reason, as the author concludes, people governed by decrees never get to know what rules over them (Arendt, 1968, p. 244).

The "normalized" use of decrees might make sense in emergency situations, as long as the emergency is the reason and the limit for this ruling practice. However, in a permanent state of exception[15], such as the National-Socialist one, the repetitive use of decrees completely distorts that nature, making them a pure expression of power and arbitrariness. A power, which, as Arendt pointed out, in a constitutional government could only enforce the Law, but here it becomes the very source of all legislation (Morais e Coutinho, 2005, p. 243).

From the promulgation of the Plenipotentiary Law of March 24, 1933, and the decrees issued due to it, especially during the years 1934 and 1935, all the elements that make a Rule of Law, enshrined in the Weimar Constitution, started to be emptied of meaning in the face of the autocratic omnipotence of the Führer and his party ideology. An anti-democratic and anti-parliamentary political creed that the National

[15] This concept is introduced by Schmitt (2005, *maxime* p. 5-15), who develops the idea that the sovereign is the one who decides in a state of exception. In a political worldview dominated by the categories of *friend* and *enemy*, the permanent state of exception got enhanced. See also Carlos Blanco de Morais and Luis Pereira Coutinho (2005).

Socialist ideology was a product of became institutionalized, sacrificing fundamental principles, such as the separation of powers, the independence of the courts or the judicial administration itself (Schuman, 1934, p. 210-232, p. 224-225; Lippman, 1997, p. 202-203). Also, the freedom and the individual rights were then sacrificed, onto the altar of a mystical, racial community, whose personification was Hitler.

5 BRIEF NOTES ON THE CRIMINAL LAW AND THE CRIMINAL PROCEEDINGS UNDER THE NAZI REGIME

Hans Julius Wolff, writing in 1944, points out that, more than private law in general, criminal procedural law is perhaps the legal area that most strongly reflects the conceptions from its current political system (Wolff, 1944, p. 1967). Lowenstein seems to agree with that, although highlighting the fact that the national-socialist ideology enhanced the erosion of what was one of the great achievements of liberal jurisprudence: the separation between public and private law, by subordinating the individual well-being to the well-being of the community. Public command now entered in areas that previously belonged to private law (Lowenstein, 1936, p. 780 *et seq*.). Thus, although the "*Volk* hysteria" had encompassed all areas of Law (Dubber, 1995, p. 263), the greatest damage occurred in the criminal sphere. Not aiming at extinguishing the discussion, we should note some of the elements that made the most perverse transfiguration of the German legal order take place. The retroactivity of laws became the rule, since the day they were used to legitimize the sentencing to death of Marinus van der Lubbe by the fire of Reichstag, in February 1933, or the purge of 1934, following the Night of the Long Knives[16]. Moreover, by a decree of 28 June 1935, an amendment is introduced in the Criminal Code that authorizes the prosecution of crimes or offenses without the respective legal provision, thus abolishing the crucial principle of *nullum crimen sine lege*, and starting the possibility, in the criminal field, of using analogy. Furthermore, the amendment adds that any act was deserving of

[16] Referring to the retroactivity of the so-called van der Lubbe Law, Koch (1989, p. 43) underlines the precedent that in this sense would have already been set by the Weimar Republic in its Law for the Protection of the Republic of 1922.

punishment, in accordance with the principles underlying the criminal law or the well-being of the people. This represented, as mentioned in the *Judgments of Justice*, a decisive incursion into the rights of the individual citizens, who thus saw themselves subject to the arbitrary (or politically-ideologically linked) opinion of the judge, as to what constituted an offense (USA, 1951, p. 45 *et seq*.). In a speech delivered in 1942 at the People's Court, Joseph Goebbels said that "In making his decisions, the judge should be guided less by the Law than by the basic idea that the offender must be eliminated from the community. [...] the idea that the judge needs to be convinced of the defendant's guilt must be completely abandoned" (USA, 1951, p. 1021-1022).

Free access to jurisdiction became a mirage, in the same way that the notions of a fair, rational or equitable proceedings were devoid of content. The *res iudicata* principle was also abolished, and the People's Court or the Führer himself could change decisions in which the defendants had been acquitted or subjected to lesser penalties than would be appropriate to the interests of the People and the Führer. Unusually violent punishments were allowed for offenses that were not even stated as offenses beforehand, abolishing any degree of double jurisdiction, so that the sentences could not receive any pleas.

This judicial farce, which required the presence of judges and lawyers, members of the Party or, in any case, elements of the political machine, who consciously participated in this system of cruelty and injustice, on a national scale and on behalf of the authority of the Minister of Justice, led the Court in the *Judgments of Justice* to state that "The dagger of the assassin was concealed beneath the robe" (USA, 1951, p. 985).

6 JUDICIAL INDEPENDENCE AND THE IDEOLOGICAL INSTRUMENTALIZATION OF THE LEGAL METHOD

This fake judicial Independence situation is formally maintained in force until 1942[17]. Article 102 of the Weimar Constitution, which protects

[17] On the attribution of the loss of independence to the careful and meticulous action of Himmler, who over the years had been expanding and consolidating the power of the SS and the respective incursion in the field of justice, see H.W.Koch (1989, *maxime* p. 124 - 125). Stephen Sfekas (2015, p. 213-216) highlights the role of Schlegelberger and

the independence of the judges and their strict submission to the law, is never really annulled, probably due to the convenience of maintaining the illusion of judges' obedience to the law. But the truth is that the law is now solely the Führer's unrestricted word; only by obeying his commands does the judge obey the law, so formally the constitutional provision is not affected. The problem of legal precepts prior to the seizure of national-socialist power is solved through a deeply ideological conception of legal interpretation, according to which it is up to the judge to decide, within the framework of judicial discretion, and according to his conscience, whether a legal provision that had not yet been cancelled is in accordance with the new order. In the words of Lowenstein, legal interpretation thus abandons the precepts of positivist construction, and it starts to be guided by the Nazi legal rationale. Hence, an unprecedented notion of equity is introduced, unlike its counterpart in Anglo-American (and Western, in general) doctrine, which does not have the purpose of renewing, improving positive law, or filling its gaps, but rather to introduce the Nazi value system into the old Law (Lowenstein, 1936, p. 804). "When things like honor, freedom or life are at stake", as Freisler puts, "the German judge shall not judge according to the rules of a 'hidden science', but according to the inner law of the popular essence, and according to (our) sense of decency" (Freisler *apud* Ortner, 2018, p. 129, translated). Carl Schmitt, the greatest ideologue of the popular renewal of the Law, also thinks like that. While writing in 1934 in the journal *Juristische Wochenschrift*, an organ of the German Association of Lawyers, he declared that "all current German law, including the precepts that remain in force because they were not derogated, must be dominated by nothing more than the spirit of the National Socialism [...]. Every interpretation has to be *an interpretation towards National Socialism*" (Schmitt *apud* Rüthers, 2016, p. 63, translated).

From 1933 to 1945, the German legal system, once a respected institution with a liberal-constitutional scope, gets reduced into an instrument of Nazi ideology and despotism (Sfekas, 2015, p. 225). The

Rothenberger, two of those accused in the Judgment of Justice, in the gradual concession by the judiciary of its independence. And he concludes that with Thierack (Minister of Justice in 1942) and Freisler (President of the People's Court in 1942), any claim of legality in Germany is put to an end.

Ministry of Justice and the judiciary are reorganized, in the words by the *Proceeding of the Judges*, to "implement terrorist functions to support the Nazi regime" (USA, 1951, p. 988). What proves itself distressing is the centrality of the justice system to provide legitimacy to a process of extermination and annihilation of millions of human beings, with the seal of someone – the Führer – who expressly considered the legal professionals with absolute contempt. The implementation of Nazi ideology was, to a significant degree, the product of legal decrees and judicial deliberations (Lippman, 1998, p. 432), fostered by the National Socialism's intention to achieve its political ends through the masked distortion and complete destruction of the Rule of Law.

7 THE NATIONAL-SOCIALIST JURISTS

The consequences of this fully grotesque setting, made justifiable by Law practitioners of the time, causes perplexity even nowadays, with full caution in order to avoid judging behaviors in historical times. For some, the jurists of the 3rd Reich hid themselves under the cloak of legal obligation in order to avoid having to confront their personal and collective responsibilities. Justifying themselves with biased technicalities, they tried to avoid any ethical or philosophically embarrassing dilemmas (Lippman, 1998, p. 430-431). Stephen Sfekas recalls that De Tocqueville, in his *Democracy in America*, observes that jurists, due to instinct and training, tend to value stability, as well as logical thought and order procedures. They prefer order to injustice. We could say that this preference, applied to German lawyers, would make even more sense. But... is it enough to justify their actions?

A) THE TREATY OF VERSAILLES

According to a relatively wide-spread idea, the National-Socialist philosophy found in 1920s and 1930s Germany fertile ground to grow, thanks to the general feeling of frustration and revolt caused by the humiliation of the political defeat and the economic and military restrictions left by the 1919 Treaty of Versailles. In a nation known for its

philosophical and scientific depth, for the sophistication of its material and intellectual culture, a considerable part of society, including the class of jurists, had deeply adverse feelings towards the democratic, parliamentary, republican regime established with the 1918 proclamation. The Constitution drafted at the time was then among the most liberal and democratic of the 20th century, with a text that was described as "sweet and eloquent in the ear of any democratic mind"[18]. But it was only on paper. Even before this Weimar Constitution was approved, "an inevitable event would cast a tremendous curse on it, and on the Republic it would later establish". The endorsement of the Treaty of Versailles in 1919, imposing extreme, humiliating and even degrading conditions onto the defeated of the World Conflict, ended up leaving Germany in a catastrophic political and economic situation, which generated in the population a feeling of latent revolt, and plowed the ground for National Socialism. inherited values from the 18th and 19th centuries, such as those of individual freedom, equality, or of the dignity of the human person, fully developed and highly expressed in the Weimar constitutional text, were (being) sacrificed in favor of a racist and totalitarian ideal of *Volk*, feeding the wounded pride of the German nation. For many, the myth of racial superiority could free the common German citizen from the inferiority complex created by the humiliating defeat in the war, allowing them to be racially superior, even if poor[19].

B) THE NAZI JUDGES AND LEGAL POSITIVISM

Still seeking to justify the complicity of the jurists and the German judicial system with the National-Socialist insurrection, some think, even

[18] See the classic work of William Shirer (1960, p. 49 et seq.). In the words of García Amado (2011, p. 2), Germany knew how to endow itself with a constitution of authentic Rule of Law, at a time when the model of State Law still had a decisive weight in doctrine.

[19] The author develops an interesting historical parallel with the persecution that happened in Germany until the end of the 18th century towards witches, an almost national religious obsession. The example allows us to illustrate a certain German tendency to convert religious and emotional prejudice into elaborate legal systems. (Lowenstein, 1936, n. 18).

nowadays, that the nineteenth-century legal positivism could have constituted a class of legal practitioners who were compatible with the Nazi ideology in the twentieth century. In his consecrated post-war criticism, the former legal-positivist Radbruch stresses the ethical and moral bewilderment caused by a century of legal-positivist practices, which had prevented jurists from appreciating the imperative existence of principles transcending the requirements of the laws, and which had prevented them from recognizing that a Law which denies these precepts would not have validity (Radbruch, 1953, p. 219-222)[20]. Like automatons, they had shown themselves once again able to blindly apply a formally legitimate Law (in theory) in detriment to its material contents. Thus, German jurist's legal positivism was accounted, which supposedly led them to consider autonomous Moral Law, and which incurred in them the obligation of blind compliance with legal rules. After the picture we have generally described of the National-Socialist Law, this statement appears to be, at the very least, out of place.

Ingo Müller refers to a so-called legend of jurists' loyalty to the letter of the law, whose origins of creation are not clear, but which is not defendable nowadays (Müller, 2007, p. 299 *et seq*.). This thesis has suffered historical scrutiny, and it shows that it was an excuse used by National-Socialist jurists to defend themselves and get rid of their guilt. The testimony declaration of Professor Jahrreiss, given on June 25 and 26, 1947, in the *Judgment of Justice*, goes in this direction, as he refers to the ideas by one of the most important constitutionalists of the Weimar Republic, Gerhard Anschuetz (USA, 1951, p. 252 *et seq*.) [21]. While quoting a comment by him to the aforementioned article 102 of the Weimar Constitution, he argues with the impossibility on the part of any jurist at the time to question either the constitutionality or the ethics of a constitutionally approved law (USA, 1951, p. 257).

[20] The text was first published in 1945, as an open letter addressed to students in Heidelberg.

[21] Jahrreiss was a professor of Public Law and International Law at the University of Cologne.

C) THE FRAILTY OF HISTORICAL UNACOUNTABILITY

More recent studies, such as those by Ingo Müller or Bernd Rüthers, have thoroughly dismantled that historical bickering widely used in the post-war period to clear out the conscience of all the involved parties. As the former author states, no professional group emerged from the Nazi era with as healthy a conscience as jurists (Müller, 2007, p. 297). By granting exclusive responsibility to Nazi legislators and their own positivist training and education, they seek to relieve themselves of any guilt in the judicial atrocities committed during the period of Nazi rule, and justify themselves with their role as mere servants of the law.

Actually, as we have tried to point out throughout these pages, there seems to be little doubt as to the widespread and broadcast contempt and explicit abandonment of positivist and normativist conceptions of law by National-Socialist jurists. The need and even the mandatory withdrawal, from the start of their methodological guidelines, was repeatedly invoked by them. The Führer's will, not the letter of the law, should guide interpretation at court. And those courts must judge according to the people's well-being, or with "tough love", and must "make value judgments matching the National-Socialist legal order and the will of the political leadership" (Dahm *apud* Müller, 2007, p. 96, translated). Any appeal to the letter of the law "was rejected as moral and legal thought, typical of liberals Jewish people" [22]. Or, in the aforementioned words by Schmitt, "every interpretation has to be *an interpretation towards National Socialism*" [23]. Also rejecting this cleansing of historical reality, Garcia Amado highlights the deliberate and thoughtless lie that constituted the blaming of Kelsen's doctrines, representing legal positivism, in the context of German jurists' submission to the normative commandments of Nazism. Besides showing lack of understanding regarding the ideas of the Austrian jurist, such charges seem to obliviate the deep anti-Kelsen (and anti-Positivism) ideas professed by the

[22] Extracted from a Sentence of the Wetzlar City Court, of June, 17, 1935 (*apud* Müller, 2007, p. 96 and 298).

[23] See *supra*, section 6, p. 348.

ideologues of National-Socialist Law as a whole. It is therefore questionable whether the prestigious Karl Larenz was possibly under a positivist influence when, in 1934, he wrote that "the renewal of German legal thought is not conceivable without a radical break with positivism and individualism", or when the distinctive mark of the new legal science would be the "fight against positivism, in particular against the pure theory of Law" (García Amado, 2011, p. 11, translated).

When acknowledging legal positivism as the undisputedly dominant doctrine of the authoritarian state under the Kaiser, Müller notes how that had no longer been a reality during the fourteen years of the Weimar Republic, however. It was a period of latent anti-democratic forces, which soon came to determine the rise of National Socialism. The ideological discretion of jurisprudence was already noticeable at this time, with sentences that, based on a broad interpretative competence, were often shown to be anti-Semitic and anti-republican, and violated individual rights that were neglected in favor of State interests. Hence, as the author says, the Weimar judiciary anticipated the sinister excesses to which its Nazi successor surrendered, and created the foundations for the National-Socialist leaders to "twist criminal law" and make it an instrument for them to reach power (Müller, 2007, p. 106, translated).

D) NAZI JURISTS AND THEIR LEGAL METHODOLOGY

Also dismantling the thesis that a strict and positivist attachment to the law supposedly served as support to the National-Socialist jurisprudence, Rüthers emphasizes something that seems to us of paramount importance and that, to a large extent, has encouraged the development of this paper. For him, the twisting of the Law and the legal science by Germany between 1933 and 1945 was not only – nor mostly – due to a legislative shift, nor due to the legal link to positivism in a new legislation (Rüthers, 2016, p. 122). Doctrine and jurisprudence were indeed important, as they were able to instrumentalize the mechanisms and the methodological categories from the legal science in order to develop and renew the legal reality of the time. Hence, he sees the following ideas as the fundamental resources used by the Nazi ideologues

to install a new legal order, to promote the so-called popular legal renovation in which there should be the spirit of the people and the political will of their leader. Firstly, the proclamation of a new idea of law (a "natural law of land and blood"), followed by the redefinition of the respective theory of sources, and by the development of a new theory of interpretation, serving the interests and needs of the new political order[24]. These three lines inevitably intertwine, in close dependence on each other. As a clear challenge to the liberal Rule of Law enshrined in the Weimar Constitution, the Law ceases to identify itself exclusively with the laws, and it directly meets the National-Socialist ideology. To the laws, those prior to 1933 and not repealed, and those that come to be emanated after that date, now is added a fundamental idea of Law, pre and supra-positive, which brings its contents from the National-Socialist philosophy itself, and which represents their entire legal purpose. For this reason, the legal system as a whole and the administration of justice must be governed. This is how legal sources are added with the spirit of National Socialism, the Führer's leadership, the popular well-being, or the Nazi Party's own political program, as the true sources from which the Law must sprout. The norms of positive law, namely those inherited from the Weimar Republic, are now (consciously and intentionally) relativized by the judge's bond to the laws. And these are subject to being revoked by the eventual non-conformity with all this ideological source of imprecise substantive contours. Through a very particular conception of legal interpretation, Law is reconstituted according to the National-Socialist, popular-racial spirit, thus becoming, in the words of Rüthers (2016, p. 57), the first methodological instrument to turn its back to the contents of a

[24] He also refers to a fourth line of action to achieve this extra-legal renewal of the Law, which consisted in the development of new doctrines in the area of legal theory, legal concepts and methods. It concerns, concretely, Schmitt's concrete thinking and Larenz's concrete-general concepts, which we do not analyze here (Rüthers, 2016, *maxime* p. 55-70). In relation to the new model of interpretation, Rüthers insists on criticizing the prevailing model of objective interpretation, from which judges could easily deceive the will of the law by giving free rein to their own. See also, *La revolución secreta* (Rüthers, 2020, p. 71 *et seq*.; p. 159-162).

legal system that had apparently undergone very few changes. Popular legal renewal would be reached through an ideological application of the Law.

When referring to the poorly credible post-war legal-naturalistic conversion of jurists previously committed to National-Socialist discipline, García Amado notes that those who had previously opposed legal positivism, because they considered it "individualistic, dissolvent, Jewish and enemy of greatness and expansion of the German people ", are now extravagant in criticizing the same legal positivism for being based on the separation between Law and Morals, contrary to the" essential axiological background of the Law, the leading role of individual human dignity, and the undeniable positive and supra-positive validity of human rights" (García Amado, 2011, p. 9, translated).

8 LEGAL METHODOLOGY AND THE RULE OF LAW: LESSONS FROM HISTORY

One aspect we consider important to highlight from this whole discussion is the necessity of learning from the past. The tension between the law and the judicial decision, or between the creation and the application of the Law, is a constant issue for the legal science. This can also be said about totalitarian regimes or ideological movements, or the simple disposition of jurists, to transform the Law according to values that are not related to it; or the application of a current Law to facts that take place after new values and social patterns are develop, especially with ideological-political bias (Rüthers, 2016, p. 46 e 56). This is a constant threat to our societies, to justice administration, and to the Rule of Law.

Briefly back to our starting point, let us recall the uneasy feeling developed from the reading of *The Executioner*, especially from those doctrinal transcripts and those sentences in which the twisted and evil use of certain concepts and doctrines was accomplished by the Nazi jurists.

Even if reaching certain conclusions with radically distinct conceptions and practices, we do agree with some of the methodological perspectives used by the National-Socialist legal science. From the need to

rethink the connection between the judge to the law, to the very idea of law as a positive, general, abstract entity, which needs the permanent ability of the judiciary to rebuild depending on an ever-variable concreteness. Also, the recognition of the interpretative activity as a complex and meaning-generator action, whose creative potential is clearly visible in the judicial scope. Moreover, the recognition of jurisprudence and the judicial Law as unavoidable and necessary instances for the setting and the completeness of any legal order. These are dimensions and spheres of the Law and its practice that seem to us realistically irrefutable, and by themselves, they do not imply the instrumentalization of political forces that are evil or totalitarian. Those are different scopes. The analysis carried out by Rüthers on the evolution of German Law between 1933 and 1945 allows him to systematize twenty-four lessons resulting from the transformation / twisting of Nazi law, of which we highlight that of the interpretation potential to transform an entire legal system, or that of the centrality of the judicial activity for the construction of any legal order, the judges being necessarily conditioned by the spirit of their time[25].As the author himself admits, together with many thinkers of the contemporary doctrine, the idea of pure subsumption, with the pre-conception of a previously existent, coded, finished Law "lacked then and lacks now in realism, and it was nothing but an illusion" (Rüthers, 2016, p. 192, translated). Such recognition does not make us more vulnerable to abuse or evil from the liberal model of the Rule of Law and its individual guarantees. It makes us, first and foremost, perhaps more conscientious of this permanently frailty, and, eventually, better able to develop effective protection mechanisms. In this regard, we must underline one of the greatest merits of Rüthers' work, explicitly in the evidently methodological perspective that he adopts and encourages to be used. At a certain point, he states that "the evil of the legal system does not happen with any kind

[25] Respectively, lessons nº 1 and nº 2. See Rüthers (2016, p. 191-192).

of automation. It presupposes unscrupulous governments and is set in motion by submissive jurists" (Rüthers, 2016, p. 46). While acknowledging the inexistence of an apolitical jurisprudence, ideologically neutral, since the political and ideological charge of the positive laws, he then highlights the axiologically neutral nature of the methodological instruments the legal science gives for jurists to proceed to the practice of the constituted Law. In his opinion, these same instruments are not linked to the imposition of specific values or ideologies, but have shown to be able to successively serve different ideologies or political purposes (Rüthers, 2016, p. 218).

The author has a certain indistinction between method and methodology in his writings. However, what seems important to highlight is his insistence in evidencing nowadays "critically and systemically, the diverse and absolutely variable utility" of these conceptual instruments and the set of arguments that are accessed by the sources of the Law, of the legal interpretation and of the legal development / improvement or the Law. It is the need to adopt, as an investigation object, the set of legal ideas, methodological schemes, and other methodical operations "in order to boost the philosophical and methodological self-awareness and self-criticism of lawyers in science and in practice" (Rüthers, 2016, p. 47 e 218). It is, on the other hand, an insistence on the conscience and professional ethics of jurists, not only through the due legal-methodological education, but also by the competence they develop, first to identify as an essential dimension of their profession their relation with the value system underlying the legal order they integrate, and then to assess whether and to what extent through the simple application of legal values, or through the judicial development of the Law, can they become the functional support of the respective political system (Rüthers, 2016, p. 225). All this is because, reiterating what has been said before, and recalling the words of García Amado, "it is powerfully noteworthy that two ideas have remained fully in force in the German judiciary and the Weimar doctrine, as well as that of Nazism and the subsequent decades to

Nazism: that positivism was refutable due to its legalism, and that certain substantive principles should prevail in Law, which are those that give meaning to it and that, in fact, must guide the judicial decision" (García Amado, 2011, p. 8, translated). Linking this permanence to the second lesson expressed by Rüthers, that is, the fact that the principles of power separation and the association of judges to the law are of absolutely fundamental importance for constituting and maintaining the Rule of Law, it is essential to recognize the centrality of legal-methodological studies, its instruments and categories, for the practical-normative realization of any legal order[26].

9 ETHICAL-LEGAL PERSPECTIVES IN THE NATIONAL-SOCIALIST LEGAL DOCTRINE

Let us finish with a reflection based on Peter Haas, about the characterization of Nazi philosophy as a form of ethics, due to the way it parallels with discussing whether the Nazi Law can or cannot be seen as a form of Law. The American scholar and rabbi develops an idea that an ethics (we would say, as a law) can perfectly exist and function devoid of specifically moral content. To the extent that it depends of, is based on, and is basically a function of a discursive universe, a pattern of common thought, speech and action, within which people make and justify value judgments, it is not the existence of a particular content or a certain substance, which gives it validity. For Haas, what makes ethics persuasive and functional is the rhetorical logic on which it is based to think, define and discuss about right and wrong, about good and evil. In these terms, the Holocaust had all the characteristics of a form of ethics. "It included a speech pattern that provided a systematic definition of good and evil, it was able to shape and judge conduct as good or bad in terms of this criterion, it was based on a wide range of external scientific guarantees to lend it credibility" (Haas, 1988, p. 383-393, translated).

[26] In his most recent text, *La revolución secreta. Del Estado de Derecho al Estado judicial. Un ensayo sobre Constitución y método*, Rüthers (2020, p. 162 *et seq*,) even defends the constitutionalization of the Methodology, with the consideration of methodological issues as being constitutional issues.

Not really dwelling on the scope of the ethical conception suggested by Haas, we are tempted to give him reason when he rejects, from the confrontation between the Holocaust and moral theory, the solutions of either total / radical evil or the banality of evil[27]. The alternative he suggests is that of an ethical conception that understands it as a function of discourse, that is, patterns of thought, language and action. A form of ethics in which our judgments about right and wrong result from the way we look at the world and the words we use to analyze and describe its parts. In what Haas sees as a branch of this idea of ethics, the language used by the Nazis in relation to the Germanic *Volk*, to the superiority of the Aryan race, to the hatred of the Jews, were not "mere rhetoric", they rather described the way people in a community really saw the world and understood their circumstances. If the Nazi ideology achieved acceptance, and at this point we insist, - if the Nazi justice system succeeded - it was because it met a pattern of discourse, thought and action, which was shared by the community; it was because it concretized into a language, and an ethics, which were implicitly or explicitly derived from values and assumptions that were already part of the descriptions of the reality of its recipients; it was because it was firmly based on certain cultural facts, perspectives and perceptions that had self-evident, intuitive and correct truths. In this sense, if Nazi law had been too different from the dominant discursive patterns, it would most likely have remained "marginal" and, ultimately, "impotent" (Haas, 1988, p. 391)[28]. Whether all this configures the existence of an ethics of National-Socialist Law or not, remains debatable. To the same extent that the doubt remains as to whether to recognize the legal order intended to implement the statute of true Law[29].

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[27] Categories employed by Hannah Arendt, respectively in *The Origins of Totalitarianism* (Arendt, 1968) and in *Eichmann in Jerusalem: a Report on the Banality of Evil* (Arendt, 1965).

[28] In this sense, and contradicting, also, Arendt's idea of the banality of evil, or the argument of the German people's lack of responsibility for the Holocaust with the mere (pseudo) positivist compliance to the laws, see the controversial work of Daniel Goldhagen (1999), *Hitler's Willing Executioners*.

[29] In the view of Gavin Byrne, the decadent legal system in force in Germany between 1933-1945 was never replaced by the legal order designed by the National-Socialist regime. Bearing this in mind, and standing at the heart of the debate we referred to earlier between Hart and Fuller as far as Nazi legal discipline is concerned, he argues that this legal order projected by the Nazis could never integrate the legal conception of either. A sense of fidelity to the Law would, for both, be an important part of the concept itself. The absence of minimum normative requirements and the hostility to which the Nazi

10 CONCLUSIVE NOTES

It was not the education or training in positivistic tones that allowed the National-Socialist jurists to be able to transform their legal order and subordinate it to the will and interest of the *Volk* and the State of Germany. It was not it, in any way, the responsible for transforming the legal methodology into a mere instrument of concretization of a set of political assumptions with despotic and totalitarian traces, with full contempt towards values such as life, freedom and human dignity. There was something more insidious, with a cultural, (im)moral, contextual scope that authorized and facilitated it. If the indeterminacy supported by the Law, which confers limited discretion to the judiciary, is today considered unquestionable and co-natural to the judicial concretization of any legal order, that is not where the danger of its mischaracterization or loss of its autonomy lies. In our view, it is the contrary. If we want to prevent ourselves from new holocausts, it should be done by persevering in a humanistic, realistic legal autonomy, within a delicate balance of powers, and in permanent respect for the Rule of Law, there is where we must invest our efforts. In order to do so, it is essential to reveal the need to persevere in legal-methodological studies, developing the reflection around the possibilities offered by their concepts and categories, and the different meanings that might be considered. This way, we shall contribute to a greater critical awareness on the part of the jurists as to the functions they must perform within that balance. To this end, knowledge of history is an invaluable resource at the disposal of the science of Law, so we welcome the hypothesis recently developed by Rüthers, according to which "legal and methodological history is the first step in understanding the current law and finding the right Law for the future" (Rüthers, 2020, p. 154, translated).

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legal system in general voted for verifiable empirical factuality (albeit imperfectly) made this fidelity completely impossible. "There is nothing that we can show fidelity to if the facts of each person's actions (what they did or did not do) are irrelevant in the eyes of the so-called 'legal system'" (Byrne, 2018, p. 87, translated).

REFERENCES

ARENDT, Hannah. *Eichmann in Jerusalem:* a report on the banality of evil. New York: Viking Press, 1965.

ARENDT, Hannah. *The Origins of Totalitarianism*. Orlando: Harcourt, 1968.

BYRNE, Gavin. Spirit without letter: How *volkish* Nazi law falls outside Fuller's and Hart's concepts of law. *Comparative Legal History*, v. 6, n.1, p. 65-96, 2018.

CONTRERAS PELÁEZ, Francisco. *Savigny y el Historicismo jurídico*, Madrid: Tecnos, 2005.

DUBBER, Markus Dirk. The german jury and the metaphysical volk: from romantic idealism to nazi ideology. *The American Journal of Comparative Law*, v. 43, p. 227-271, 1995.

FERNÁNDEZ-CREHUET LÓPEZ, Federico *La perspectiva del sistema en la obra y vida de Friedrich Carl von Savigny*. Granada: Editorial Comares, 2008.

FULLER, Lon. Positivism and fidelity to Law – a reply to Professor Hart. *Harvard Law Review*, v. 71, n. 4, p. 630-672, Feb. 1958.

GARCÍA AMADO, Juan António. ¿Es posible ser antikelseniano sin mentir sobre Kelsen?. *In:* BRAND, Mario Montoya; RESTREPO, Nataly Montoya (eds.). *Hans Kelsen*: El reto contemporáneo de sus ideas políticas. Medellín (Colombia): Fondo Editorial Universidad EAFIT, 2011. Disponível em: https://www.academia.edu/34472987/_Es_posible_ser_antikelseniano_sin_mentir_sobre_Kelsen. Acesso em: 20 out. 2020.

GARCÍA AMADO, Juan António. Introducción: Un ejemplo más; el caso de Theodor Maunz. *In:* RÜTHERS, Bernd. *Derecho degenerado: teoría jurídica y juristas de cámara en el Tercer Reich*. Madrid: Marcial Pons, 2016. p. 15-42.

GOLDHAGEN, Daniel. *Os carrascos voluntários de Hitler*. Lisboa: Editorial Notícias, 1999.

HAAS, Peter J. The Morality of Auschwitz: Moral Language and the Nazi Ethic. *Holocaust and Genocide Studies*, v. 3, n. 4, 1988, p. 383-393, 1988.

HART, H. L. A. Positivism and the separation of Law and Morals. *Harvard Law Review*, v. 71, n. 4, p. 593-629, Feb. 1958.

HOFER, Walther. *Der Nationalsozialismus:* dokumente 1933-1945. Frankfurt: Fischer Bücherei,1957.

KOCH, H. W. *In the name of the Volk.Political Justice in Hitler's Germany*. New York: St. Martin's Press, 1989.

LIPPMAN, Matthew. Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism. *Temple International & Comparative Law Journal*, v. 11, n. 2, p. 199-308, 1997.

LIPPMAN, Matthew. The prosecution of Josef Altstoetter*, et al*: Law, Lawyers and Justice in the Third Reich. *Dickinson Journal of International Law*, v. 16, p. 343-433, 1998.

LIPPMAN, Matthew. The White Rose: judges and justice in the Third Reich. *Connecticut Journal of International Law*, n. 15, p. 95-206, 2000.

LOWENSTEIN, Karl. Law in the Third Reich. *Yale Law Journal*, v. 45, p. 779-815, 1936.

LOWENSTEIN, Karl. Dictatorship and the German Constitution: 1933-1937. *University of Chicago Law Review*, v. 4, p. 537-574, 1937.

MORAIS, Carlos Blanco de; COUTINHO, Luis Pereira (org.). *Schmitt revisitado*. Lisboa: Instituto de Ciências Jurídico-Políticas, 2005.

MÜLLER, Ingo. *Los juristas del horror. La "justicia" de Hitler:* el pasado que Alemania no puede dejar atrás. Caracas: Editorial ACTUM, 2007.

ORTNER, Helmut. *O executor:* a história secreta do líder do tribunal nazi que ordenou a morte de milhares de alemães. Trad. de Pedro Garcia Rosado. Lisboa: Alma dos Livros, 2018.

OTT, Walter; BUOB, Franziska. Did Legal Positivism Render German Jurists Defenceless during the Third Reich? 2 *Social & Legal Studies,* v. 2, p. 91-104, 1993.

RADBRUCH, Gustav. Cinco minutos de filosofia do direito. *In:* RADBRUCH, Gustav. *Filosofia do direito*. Trad. de L. Cabral de Moncada Coimbra: Arménio Amado, 1953. p. 219-222.

RÜTHERS, Bernd. *Derecho degenerado: teoría jurídica y juristas de cámara en el Tercer Reich*. Madrid: Marcial Pons, 2016.

RÜTHERS, Bernd. *La revolución secreta. Del Estado de Derecho al Estado judicial:* un ensayo sobre constitución y método. Madrid: Marcial Pons, 2020.

SAVIGNY, Friedrich Carl von. *Sistema del Derecho Romano Actual;* tomo I. Madrid: F. Góngora y Compañia, 1878.

SCHMITT, Carl. *État, Mouvement, Peuple:* Lórganisation Triadique de l' unite politique. Paris: Éditions Kimé, 1997. [Trad. francesa do original *Staat, Bewegung, Volk:* Die Dreigliederung der politischen Einheit. Hamburg: Hanseatische Verlagsanstalt, 1933.]

SCHMITT, Carl. *Political Theology, Four Chapters on the Concept of Sovereignty*. Trans. by George Schwab. Chicago: University of Chicago Press, 2005.

SCHUMAN, Frederick L. Political Theory of German Fascism, *28 The American Political Science Review*, v. 28, n. 2, p. 210-232, 1934.

SFEKAS, Stephan J. The enabler, the true believer, the fanatic: German Justice in the Third Reich. *The Journal Jurisprudence*, v. 26, p. 189-230, 2015.

SHIRER, William. *The rise and fall of the Third Reich:* A history of Nazi Germany. New York: Simon & Schuster, 1960. Disponível em: http://elibrary.bsu.az/books_400/N_389.pdf. Acesso em: 20 out. 2020.

USA. *Trials of War Criminals before the Nuernberg (sic) Military Tribunals under control council n.º10*. Washington: United States Government Printing Office, 1951. v. 3. Disponível em: https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf. Acesso em: 30 nov. 2020.

WOLFF, Hans Julius. Criminal Justice in Germany. *Michigan Law Review*, v. 42, p. 1067-1088, 1944.

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