

LAW IN THE THIRD REICH*

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I

ABUNDANT information is available in this country on National Socialism as a new political system.¹ Due attention has been given to the new order and its system of values insofar as they are expressed in terms of constitutional law or political institutions. Among these political achievements of the Third Reich we might mention the principle that dictation according to the leadership principle was substituted for deliberation and majority vote in parliamentary bodies. Separation of powers was superseded by unity of command and concentration of authority in the hand of the "Führer" and his associates. The federal structure of Germany was transformed into a highly centralized unitary state by eliminating the historical boundaries of individual states. The striking success of the new regime in coordinating the widely divergent streams of cultural and social life and in establishing what has been called the totalitarian state needs no further elaboration on this side of the ocean.

This momentous transformation of a previously liberal and democratic state was accomplished on the basis of a deliberate and self-conscious

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1. Since this article is written for American readers reference is made mainly to sources in English. Selected material from the amazingly voluminous German literature is indicated only occasionally.

The vast mass of books on National Socialism in English are to a large extent sensational or biased. Moreover, very few books are based on original German sources. The following, however, are believed to meet these objections: Mildred S. Wertheimer, *The Nazi Revolution in Germany*, in BUELL, *NEW GOVERNMENTS IN EUROPE* (1934); KONRAD HEIDEN, *A HISTORY OF NATIONAL SOCIALISM* (1935); FREDERIC L. SCHUMAN, *THE NAZI DICTATORSHIP* (1935); *DICTATORSHIP IN THE MODERN WORLD* (Guy Stanton Ford ed., 1935); Fritz Morstein Marx, *GOVERNMENT IN THE THIRD REICH* (1936); *id.*, *German Bureaucracy in Transition* (1934) 28 *AM. POL. SCI. REV.* 467; Arnold J. Zurcher, *The Hitler Referenda* (1935) 29 *AM. POL. SCI. REV.* 191.

For a more general evaluation of the constitutional problems involved in fascism, see Karl Loewenstein, *Autocracy versus Democracy in Contemporary Europe* (1935) 29 *AM. POL. SCI. REV.*, 571, and 755. Some legislative material is translated in: JAMES POLLOCK & J. H. HENEMAN, *THE HITLER DECREES* (1934); NORMAN L. HILL & HAROLD W. STOKES, *THE BACKGROUND OF EUROPEAN GOVERNMENTS* (1935), 393 et seq.

In German literature, the report by Fritz Poetzsch-Hefter (and others) in: 31 *JAHRBUCH DES OFFENTLICHEN RECHTS* (1935) 1 et seq. (hereafter cited *POETZSCH-HEFFTER*) covering the events in 1933 and 1934 is outstanding for objectivity and comprehensiveness. A German bibliography is compiled by ERICH UNGER, *DAS SCHRIFTTUM DES NATIONALSOZIALISMUS* (1934), which lists alone for 1933 and 1934, 2981 items. For an excellent bibliography both of German and foreign books, see the appendix (by Alexander Elkin) to HERMAN: *KANTOROWICZ, DICTATORSHIPS* (1935).

political philosophy, conceived, at least in its elements, as far back as 1920. The famous party program of twenty-five points² invented by Gottfried Feder was fully endorsed and elaborated by Adolf Hitler in his amazing book, "My Battle," to which National Socialism adheres as unchangeable gospel. The program presents an ingenious mixture of historical, biological, economic, and psychological half-truths emanating from deliberate misrepresentation and unintentional misapprehension of scientific trends and economic postulates. If we try to condense the verbosity of the basic concepts of National Socialism into a comprehensive formula we might say that the system recognizes six substantial values which are pillars upon which the whole edifice of the Third Reich is built, namely, state, race, soil, labor, honor, cultural and spiritual values, military power.³ Heterogeneous as these elements are, they crystallize, in the last analysis, into the familiar Hegelian concept of state omnipotence. In fact, racism as a new guiding principle of social life is the only novel and positive ingredient of the system. Conspicuous by their absence are all values drawn from freedom as a concept of innate law. By antithesis, National Socialism is anti-liberal and anti-individualistic; by implication it is irrational, mystical, and romantic; by its results it is totalitarian to the point of religious obsession. That such a world-concept has conquered a nation which is famed for its scientific thoroughness, is mainly due to the fact that National Socialist philosophy coincided with a spiritual vacuum in Germany, created by the humiliation of political defeat and the difficulties of economic post-war adjustment.

Much as is known in this country of the political doctrines of National Socialism, information as to how these doctrines express themselves in private law is comparatively scanty. Yet private law is more important than public law for the social determination of a country, because the ordinary citizen may submit to any form of government if his contacts in daily life remain unaffected by a fundamental change in legal values. The totalitarian demands of the Third Reich, however, deny most emphatically the existence of any domain of social life which is immune from the new ideology. The line of demarcation between public and private law, one of the historical achievements of the liberal jurisprudence, is obliterated by political purposiveness. As a member of the National Socialist community, every citizen must be conscious of the

2. POLLOCK & HENEMAN, *op. cit. supra* note 1, at 1; SCHUMAN, *op. cit. supra* note 1, at 491. HILL & STOKES, *op. cit. supra* note 1, at 398.

3. The legal system of National Socialism is dealt with comprehensively by various authors in what purports to be a standard work of National Socialist legal science, edited by Hans Frank, formerly Reichs-Commissar of Justice: NATIONALSOZIALISTISCHES HANDBUCH FÜR RECHT UND GESETZGEBUNG (Munich, 1935) (hereafter cited as FRANK). See, especially, Introduction at p. xv.

political implications of all his acts. Not even a minimum of purely private relations is recognized. The catchword which justifies this repression of private law by political law, and which imposes a relentless social obligation upon the individual, is the famous commonplace that individual welfare must be subordinated to common welfare (*Gemeinnutz geht vor Eigenmütz*). The ubiquity of public law in the sphere of private law explains the reversal of systematic law in Germany; much of what belonged formerly to private law becomes now an object of political command.

Thus far, for various reasons, no attempt has been made critically to appraise National Socialist private law. Obviously only a lawyer trained in the specific technique of German legislation and jurisprudence is qualified for this task. It is even more obvious that any such person when still under the jurisdiction of the Third Reich, is barred from criticism for reasons of self-preservation. Even if he feels himself free from political allegiance, an arduous task awaits the student of contemporary private law in Germany, since he has to overcome the obstacles offered by the new mode of presentation and the new technique of German jurisprudence. Formerly, German jurisprudence was legalistic and elaborate, perhaps inelegant and formalistic, but logically precise and strictly positivistic. Legal formulation under National Socialism is vague, and at the same time flamboyant. Moreover, it is very often couched in metaphorical language more befitting the prophet or the stump orator than the legislator or the lawyer. Vagueness in terminology allows for indefiniteness in application of the law, while in the interpretation of the statutes, the courts are instructed to guide themselves by legal value-judgments no less vague and ambiguous. This situation accounts for the instability of private law in the Third Reich.

Another serious hindrance to a fair appraisal of the new legal values results from the output of legislation, jurisprudence and juristic literature under National Socialism, which, under the impulse of a total reconstruction of legal life, has assumed vast proportions. The number of statutes, decrees, ordinances, orders, published in the official law bulletin for the Reich alone, within three years, exceeds 4,000. In addition, there are countless regulations enacted by the states and subordinate and delegated authorities.⁴ An Academy founded in 1934

4. The Official Law Bulletin is the REICHSGESETZBLATT (hereafter cited as RGBLI). A very useful and systematically arranged collection of Federal and Prussian statutes is contained in WERNER HOCHÉ, DIE GESETZGEBUNG DES KABINETS HITLER (Berlin, appearing in regular intervals since 1933) (hereafter cited as HOCHÉ). Until the end of 1935, no less than 15 closely printed volumes of 500-700 pages each, were issued. For a synoptical survey, see 32 and 33 JAHRBUCH DES DEUTSCHEN RECHTS (edited by Fr. Schlegelberger, W. Hoche and E. Staud, 1934 and 1935) (hereafter cited as SCHLEGELBERGER). These volumes also give a digest of selected cases, but no texts of laws. For a more intensive study, reference to the various law journals, JURISTISCHE WOCHENSCHRIFT; DEUTSCHE JURISTEN

serves the purpose of a totalitarian reconstruction of law in the National Socialist spirit.⁵ A great number of statutes, however, deal mainly with the effects of the crisis which has been aggravated by the economic experiments of the regime, and do not come under the scope of this survey. Only a selection of some major pieces of legislation illustrating the new system of legal values can be offered here.

II

During the period prior to their seizure of power, the National Socialists sought to capitalize on the idea of an irreconcilable contrast between a genuine "Germanic" law and the "liberalistic," "Jewish," "Roman," law⁶ as expressed in the existing codification of private law. It is true that the five German codes⁷ reflect clearly the spirit of the age which created them, namely the economic liberalism of the late 19th century. They are liberal insofar as they embody the principle of rationality, predictability and calculability of legal rights and duties which the bourgeois type of *homo economicus* demands; they are individualistic inasmuch as they permit use of private property and conduct of legitimate business within general laws without class or group discrimination. Restrictions, however, were imposed in accordance with the necessities of social life in a closely-knitted community. German liberalism always had a special complexion. It allowed for State interference in the interest of social control to a larger extent than any other European system of private law. Thus the liberal codes admirably suited the bulk of the German middle-class bourgeoisie, which formed the most potent factor of the society in the Bismarckian Reich.

ZEITUNG; DEUTSCHE RICHTERZEITUNG; DEUTSCHE JUSTIZ (the official journal of the Reichs-Ministry of Justice); and DEUTSCHES RECHT (the official gazette of the Academy for German Law) is indispensable.

5. Gesetz über die Akademie für deutsches Recht of July 11, 1934, RGBl. I 604; 9 HOCHÉ, at 128.

6. See, on this subject, an instructive study by Lawrence Preuss, *Germanic Law Versus Roman Law in National Socialist Legal Theory* (1934) 16 J. COMP. LEG. AND INT. LAW 269. As to German literature, see HELLMUTH NICOLAI, *RASSE UND RECHT* (Berlin, 1933), *DIE RASSEGESETZLICHE RECHTSLEHRE* (Munich, 3rd ed., 1934); G. R. SCHMELZEISEN, *DAS RECHT IM NATIONALSOZIALISTISCHEN WELTBILD* (Lipsia, 1933); BOOS, *NEUGEBURT DES DEUTSCHEN RECHTS* (Berlin, 1934); HEINRICH LANGE, *VOM ALTEN ZUM NEUEN SCHULDRECHT* (Hamburg, 1934); Achim Gercke, in FRANK, op. cit. *supra* note 3, at 11. See also H. Lange in (1934) *DEUTSCHE JURISTEN-ZEITUNG* 1493, and (1935) *id.* at 406; Carl Schmitt, (1936) *id.* at 15.

7. German Civil Code (Bürgerliches Gesetzbuch) of August 18, 1896, RGBl. I 195, in force since January 1, 1900; Commercial Code (Handelsgesetzbuch) of May 10, 1897, RGBl. I 219, a thorough revision of the former general commercial code of 1861; Code of Civil Procedure (Civilprozessordnung) of January 30, 1877, RGBl. I 83; German Criminal Code (Strafgesetzbuch für das Deutsche Reich) of May 15, 1871, RGBl. I 171; Code of Criminal Procedure (Strafprozessordnung) of February 1, 1877, RGBl. I 253. Every single one of the codes is amended and supplemented since its enactment.

That German private law was "Roman" in character, as charged by the National Socialists, was also true to an extent. In fact, it wholly conformed to a traditional legal technique developed from the centuries-long dominance of Roman law training. This technique subsumed the individual case under pre-established positive norms of a general character. It is true, also, that the codes were affected by the sociological shortcomings of their age. Their predominantly static nature rendered them to a large extent unsuited to the needs of industry under full-fledged capitalism and to the task of meeting the growing demands of labor under capitalism for stronger collective control. As a result, special legislation became necessary to supplement and substitute for the codified private common law. Labor legislation, in particular, attained a very advanced development both before and after the war. Contemporaneously, the commercial laws were modernized in order to facilitate the development of the new capitalistic forms of business organization—corporations, trusts and cartels.

A reconstruction of private law, however, was under way, promoted by two lines of thought which were at variance with economic liberalism and with juridical positivism.⁸ On the one hand, the experience with state-regulated economy during the war and the post-war crisis suggested extension of collectivist control over private property. On the other hand, reform of rigid positivism was expressed in the demands for a new conception of equity law. Equity as an independent source of law was completely alien to German legal tradition, since codified law in its positivist nature aimed at being exhaustive and all-comprehensive. During the first decade after 1900, the so-called "Free Law movement" (*Freirechts-Schule*) launched attacks against "conceptual jurisprudence" and the "juridical slotmachine system" which overstresses the rational and logical aspects of the law-finding process. Another indication of a new and dynamic trend in private law was the so-called "jurisprudence of interests," which also tried to free jurisprudence from the shackles of abstract classifications and to secure a more elastic conception of the actual needs of social life. It aimed ultimately at less positivism and more realism. In this connection, it should be noted that the so-called general clauses of the civil code served as a basis for the introduction of equity within the very frame of positive law, and for thus mitigating the defects of rigid positivism under the codes.⁹

Disregarding the slowly progressing transformation of private law, and indeed unaware of it, the framers of the party program of 1920 stated in Point 19:

8. For details see an excellent essay by Rudolf Littauer, *Case Law and Systematic Law* (1935) 26 *SOCIAL RESEARCH* 481, which intends to make positivism as the specific technique of German scientific jurisprudence understandable for American readers.

9. Civil Code, articles 138, 157, 226, 242, 826 etc.; see also GUSTAV HEDEMANN, *DIE FLUCHT IN DIE GENERALKLAUSELN* (Jena, 1933).

"We demand that the Roman law which serves the materialistic world-order should be replaced by a German legal system."

The existing legal order of the codes was labelled "Romano-Jewish-Byzantine." For propaganda purposes, this slogan served admirably. Viewed from a critical angle, however, the new legal concept of a genuine Germanic law in contrast with Roman law is revealed as a typical specimen of National Socialist ideology. Undoubtedly, the Byzantine Emperor Justinian codified the Roman case-law and common law. Yet, from any elementary outline of legal history, National Socialist jurists could have learned that the reception of Roman law in Germany from the 15th Century onwards did not amount to the acceptance of the Justinian *Corpus Juris*.¹⁰ German folk laws were replaced by a transformation of the old Roman law, which took place under the pens of the Italian Glossators of the 12th and 13th Centuries. These venerable lawyers, neither Oriental nor Jewish, were Christian scholars applying the methodological experience and logical technique of Christian scholastic theology to Roman substantive law. Their successors, the Italian Commentators of the 14th Century, molded together Roman law, the Glosses, Canon law, and a good deal of imported Italo-Germanic (i. e. Langobard) law under Roman general classifications. Thus, much of what was genuine Germanic law entered Germany in the guise of Roman or Italian law. The Romanists of the following centuries, especially the brilliant school of Pandectists in the 19th Century, perfected what has been called "usus modernus Pandectarum."

Subsequent to the revival of Romanticism in Germany in the early 19th Century, Savigny and the school of historic law emphasized the sociological implications of a nationally grown and traditionally accepted common law. German legal science became deeply conscious of the values of a national law conforming to the social habits of the people. Gierke and the school of Germanists, animated partly by juridical, and partly by historical interest, discovered the specific values of the German folk laws of the middle ages and advocated their re-introduction by modernizing existing Roman-law practice. Thus revived, for example, was the idea of the "*Genossenschaft*," a cooperative association of members with limited or unlimited liability, which proved itself better adapted to the economic needs of the small tradesman or artisan than the abstract and impersonal societies of the Roman law.

The various committees of scholars and practitioners working on the Civil Code for almost thirty years after 1870¹¹ unified the widely dismembered private law of the different German states and thereby welded

10. Littauer, *supra* note 8, at 494 et seq.

11. See, also, BORCHARD, *GUIDE TO LAW AND LEGAL LITERATURE IN GERMANY* (1912) 56 et seq.

Roman or Pandect institutions with the legal traditions of German origin. Thus the Civil Code of 1900 indissolubly combines Romanistic and Germanistic elements. German thought structure prevails in Real Estate and Movables, the Law of Persons, the Family Law, and largely also in Inheritance Law, while the masterly abstractions and formulations of Roman or Pandect law shaped contracts, torts, and the general classifications of private law.¹²

When National Socialism came into power, although denunciations of the Un-German or Jewish-Roman law were repeated incessantly, and still form the highlights of every public address on legal matters, little was done actually to replace the allegedly Roman Codes by a German law. The historic argument could not be used in practice and the codes are still in force. The only practical result of the anti-Roman agitation, deplorable as a cultural loss, yet on the whole unimportant, was the elimination of Roman law from the examination curriculum of the universities. In spite of the endless incantations of Germanic law as the true source of the new legal consciousness, not even an attempt was made to separate scientifically the different historical elements in private law. National Socialists realized that it was a hopeless task to make an anatomical dissection of what, in the course of centuries of growth, had become the organic and unified body of German legal traditions, and to reintroduce into the period of the dynamo and cartel, Germanic laws of the middle ages, intended for a purely agricultural and feudal society.

On the other hand, this new romanticism fostered by the National Socialists was the driving force in the promotion of the racial myth.¹³ In its legal application, it derived a pure Germanic law from popularized cultural anthropology. This part of National Socialist legal theory, with its mystical rigmarole, is scarcely explicable to foreign lawyers, or even to German lawyers who do not unquestioningly accept the National Socialist faith. An attempt will be made here, however, to formulate it in plain language.¹⁴ National Socialism, according to Adolf Hitler, is a world-outlook, completely re-creating German life and culture. Hence the necessity of a new conception of law. German law must consider

12. See Erwin Riezler, in: 1 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Munich, 9th ed. 1925) 9 et seq.

13. The German literature on race and nation is enormous. For details, see URGER, *op. cit. supra* note 1, at 59 et seq. and Gercke, in FRANK, *op. cit. supra* note 3, at 17, 28. The founders of the racial myth are a Frenchman and a naturalized Englishman, namely, COUNT ARTHUR DE GOBINEAU, *ESSAI SUR L'INÉGALITÉ DES RACES HUMAINES* (Paris, 1853-55), and H. ST. CHAMBERLAIN, *GRUNDLAGEN DES 19. JAHRHUNDERTS* (Munich, 1922). National Socialism praises as a standard work that by ALFRED ROSENBERG, *DER MYTHOS DES 20. JAHRHUNDERTS* (Munich, 1931). Rosenberg's influence on Hitler's *MY BATTLE* is generally known. The popularization of the racial idea in pseudo-scientific form is due to the various books of Hans F. K. Günther, professor of racial biology in Jena.

14. See PREUSS, *supra* note 6, at 270 et seq.

the German soul and nature. Instead of the soulless legislative machinery of Romanistic liberalism, the data of blood and race are called into action. Roman law, it is argued, is one of reason, and therefore individualistic and egoistic; true Germanic law is one of soul, and therefore altruistic and socially-minded. Only a pure race can create a pure legal conscience. The true German nation is a community tied by bonds of blood, and not by that common history and experience which usually mould heterogeneous racial elements into a nation. According to Rosenberg, the pontiff of the racial myth, and Nicolai, who formulated the racial theory of law, national spirit is synonymous with racial soul. Among all races, the Aryans alone count; and, among the latter, the Nordics are the most eminent branch. Only the Aryan race is creative of cultural values. Thus, law is not a technique or a science, but innate and transmitted only by blood; so that only he who enjoys the proper racial inheritance has the creative spirit of law. The statute merely transforms legal conscience into application. No devised law is good; only the pure racial conscience confers legal values.

Such a pure legal conscience existed, for example, among the Teutonic tribes; and National Socialism has retroactively endorsed the qualities of the ancient Germans. The pure man of the German forest obviously resembles Rousseau's "Bon Sauvage."¹⁵ But the portrait is manifestly drawn from Roman sources, and every student of history knows for what political reasons conservative Tacitus idealized German life for his readers at home. Cardinal Faulhaber's sermons of 1933, on the same subject, showed that the ancient Germans were barbarians on the low cultural level of a primitive tribe.¹⁶

National Socialist legal theory, based on the racial myth, clearly reveals different elements. Historically, it is an outgrowth of crude and unspirited romanticism.¹⁷ Philosophically, the racial myth is similar to the class myth in Marxist economic determination, with which it has in common the fact that everything is explained in terms of one denom-

15. *Id.* at 278.

16. *JUDENTUM, CHRISTENTUM, GERMANENTUM* (Munich, 1933).

17. For an excellent illustration, see DARRÉ, *DAS SCHWEIN ALS KRITERIUM DER NORDISCHEN RASSE* (1933). Herr Darré, now German Minister of Agriculture, points out: "The Semites reject everything that pertains to the pig. The Nordic peoples, on the contrary, accord the pig the highest possible honor. . . . in the cult of the Germans the pig occupies the first place and is the first among the domestic animals. This predominance of the pig, the sacred animal destined to sacrifices among the Nordic people, makes it right to conclude that the religion of these peoples has drawn its originality from the great trees of the German forest. . . . Thus out of the darkness of earliest history arise two human races whose attitude in respect of pigs presents an absolute contrast. The Semites do not understand the pig, they do not accept the pig, they reject the pig, where this animal occupies the first place in the cult of the Nordic peoples." See also *NATION*, Feb. 5, 1934, at 148.

inator. Psychologically, the racial theory, through its over-simplification, has an irresistible appeal to the masses, who, because of their ignorance, admire science and erudition. The race myth is within the grasp of the lowest intellect, and tends to release the inferiority complex created by the war-time defeat. Mr. Everyman discovers that, although economically poor, he is racially pure. The Aryan, conscious of his superiority, is lifted above at least one section of the nation, namely the Jews. Without giving too much weight to psycho-analytic arguments, this release of a sub-conscious inferiority complex explains partly, why the racial myth could develop into such an amazing popular theology.¹⁸

Once the predominance of race and blood is established, the notion of the supreme importance of the soil naturally follows as an emotional, if not a logical consequence. Here political motives are again obvious, since a stable and strong stratum of middle-class, self-supporting, farmers is a bulwark against Bolshevism. Furthermore, prolific farmers guarantee increasing military power.

Thus, purity of race becomes the foremost objective of legislation, causing on the one hand, anti-Semitic measures, and, on the other, various laws which, on the whole, are beneficial for the promotion of eugenics and purity of public life. And from the basic assumption of the holiness of soil, arise far-reaching agricultural reforms demanded as early as in the party program of 1920.

III

Dictatorial government facilitates the legislative process in that the legislative will of the state encounters no obstacle arising from the parliamentary deliberation and compromise involved in parties and in the free functioning of public opinion. By this we do not mean that group interests are excluded. On the contrary, while the chamber is abolished, the ante-chamber flourishes.¹⁹ Fundamentally, however, the legislative process is immensely simplified and its machinery operates rapidly and without friction. The law is the political command of the "Fuehrer." The normal type of legislation is a decree of the government passed by the cabinet without further formalities under the name of a government statute.²⁰ The government might even enact constitutional

18. Incidentally, an historical parallel illustrates what is perhaps a German tendency to convert a religious and emotional prejudice into an elaborate juridical system: Witch-burning amounted to a national religious obsession in Germany where the last witch ascended the stake as late as 1775, one year before the American Declaration of Independence. See Eberhard v. Künssberg's article: *Hexenprozesse*, in 3 *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT* (Stier-Somlo and Elster ed., Berlin-Lipsia, 1928) 171.

19. This well-coined phrase is borrowed from BROOKS, *DELIVER US FROM DICTATORS* (1935).

20. The legal basis for government by decree is the *Gesetz zur Behebung der Not von*

law, which is no longer different from ordinary statute law, thereby over-riding the Constitution of Weimar.²¹ In only a few instances has the Nazified Reichstag been called to rubber-stamp measures, and in these cases, only because the appearance of parliamentary ratification was desirable for political reasons.²²

A fundamental transformation of legislative technique has accompanied the new method of legislation inasmuch as the differences between statute law and executory ordinance were almost completely obliterated. The government decrees usually contain only a proclamation of policy, in the broadest outlines, while details are regulated by unlimited delegation of powers to ministers, boards, commissioners, or subordinate authorities. In these circumstances, the executory ordinance can scarcely transgress the statute, yet it very frequently changes the content of the enabling provisions.

Judicial review of statutes is, of course, ultra-vires the courts, because the statute, being the command of the "Führer," is supreme.²³ And although some National Socialist jurists admit in theory the power to review ordinances,²⁴ no case is recorded of a judge's being foolhardy enough to challenge an ordinance because of excess of delegated power or of lack of conformity with the statute in question.

These unprecedented facilities offered by the legislative process enabled the regime to enact some valuable reforms. Although National

Volk und Reich of March 24, 1933, RGBl. I, 141; 1 HOCHÉ, *op. cit. supra*, at 23, art. 1. This is the famous "enabling law," the pivotal point of the entire National Socialist constitutional structure. This law contained substantial deviations from the constitution of 1919, then still in force. Its adoption by the Reichstag was made possible only by illegally excluding the Communist and by arresting many of the Socialist members of the parliament, while the Catholic Centre was put under irresistible mental intimidation. The necessary majority of two thirds for constitutional amendments [see LOEWENSTEIN, *ERSCHEINUNGSFORMEN DER VERFASSUNGSÄNDERUNG* (Tübingen, 1931)] was obtained only by a series of violations of the constitution, since the National Socialist Party and the allied German National People's Party (German Nationalists) could muster only 52% of the total vote at the preceding elections of March 5, 1933. National Socialist constitutional lawyers are unusually silent on this all-important point. See, however, Knubben, *Die Nationalsozialistische Revolution und ihre Legalität*, (1934) RPrVBl. 522; STEINBRINK, *DIE REVOLUTION ADOLF HITLERS* (Berlin, 1934). ERNST HERMANN JAHR, *DAS REGIERUNGSGESETZ* (Bochum-Langendreer ed., 1935) 2 et seq.

21. See the law quoted in the preceding note, art 2; Gesetz über den Neuaufbau des Reichs of January 30, 1934, RGBl. I, 75; 6 HOCHÉ *op. cit. supra* note 4, at 21, art. 4.

22. Examples: The laws quoted in the two preceding notes; the so-called Nuremberg-laws of September 15, 1935, namely Reichsflaggengesetz, Reichsbürgergesetz and Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre, RGBl. I, 1145, 1146.

23. See OTTO KOELLREUTER, *DEUTSCHES VERFASSUNGSRECHT* (Berlin, 1935) 170. The problem of judicial review has undergone a conceptual transformation under National Socialism. See *infra* p. 803 et seq.

24. See KOELLREUTER, *op. cit.*, *supra* note 23, at 57. Schack, (1934) RPrVBl. 592.

Socialism naturally takes credit for their achievement, many of these reforms were already on the way to enactment by the previous democratic regimes. The most conspicuous among them is the Judicial Procedure Reform Act of 1933,²⁵ drafted by the former democratic regime and now hailed as an important product of the National Socialist re-birth. Its main features consist in the abolition of evidence-taking before a single judge or a judge-commissioner and the substitution of what is called immediateness of evidence before the entire trial court. The conduct of the trial is considerably accelerated. Parties may be heard on oath who previously could be admitted to sworn evidence only as a rare exception. The reform aims at concentrating the trial into one hearing and thus eliminating the exasperating delays in the form of continuances or adjournments that were characteristic of the procedure based on written briefs. The presiding judge is in many ways also freed of the fetters of a formalized procedure—a change which apparently conforms to the leadership principle. Statistics demonstrate that the average trial is thus decidedly shortened.²⁶ But this is perhaps less due to the incorporation of the "Fuehrer" principle into judicial procedure, than to the shrinkage of trade and industry, and the fact that business is more and more driven into arbitration and extra-judicial compromise in order to avoid the political pressure now characteristic of the German courts, just as of other political and social institutions.

To the same category of beneficial reform belongs a new law concerning the winding up of insolvent debtors by composition agreement, which gives better protection to the creditor.²⁷ This is all the more notable since the regime as a general rule clearly favors the small debtor, for political reasons. The debtor class was, for example, considerably benefited by the introduction of a standard rent contract in apartment houses,²⁸ the acceptance of which was made possible only by political pressure upon the unions of landlords and tenants. It amounts to a relaxation of landlord rights in the name of the common welfare, and it was considered a concession to the tenants grumbling against the "capitalistic" landlord.

In addition, a fundamental reform of criminal law, hitherto based on the liberal codes of the 70's, is well under way. The published draft of

25. Bekanntmachung der Neufassung der Zivilprozessordnung of Nov. 8, 1933, RGBL. I, 821, in force since January 1, 1934. See also Cohn, *New Regulations in the German Code of Civil Procedure* (1935) 17 J. COMP. LEG. AND INT. LAW 73.

26. See 32 SCHLEGELBERGER op. cit. *supra* note 4, at 355, 634, 882 and 33 id. at 143, 444, 611.

27. Vergleichsordnung of February 26, 1935, RGBL. I, 321; 12 HOCHÉ op. cit. *supra* note 4, at 318.

28. Made public on March 7, 1934; see DEUTSCHE JUSTIZ (1934) 304, and 32 SCHLEGELBERGER op. cit. *supra* note 4, at 545.

the proposed penal code,²⁹ as well as new penal legislation already enacted, breathes the spirit of virility, harshness, and severity characteristic of any dictatorial government. For obvious reasons of self-preservation, the regime sharpened its weapons of retaliation against its enemies.³⁰ By their outspoken brutality, many of the new measures exercise a deterring influence on the public.³¹ Dismissing the liberalistic idea that the criminal deserves humanitarian treatment, inclemency in meting out punishment and utmost strictness in the execution of sentence on the convicted are emphasized.³² In the fight against pro-

29. NAZIONALSOZIALISTISCHES STRAFRECHT, DENKSCHRIFT DES PREUSSISCHEN JUSTIZMINISTERS (Berlin, 1933).

30. See Mezger, *Der strafrechtliche Schutz von Staat, Partei und Volk*, in: FRANK, op. cit. *supra* note 3, at 1377-1402. Only a selection of the more important statutes can be given here: Verordnung (ordinance) des Reichspräsidenten gegen Verrat am deutschen Volk und hochverräterische Umtriebe of February 28, 1933, RGBl. I, 85; 1 HOCHÉ op. cit. *supra* note 4, at 202. This ordinance of the President of the Reich, based on the emergency Article 48, of the Weimer constitution, was enacted on the morning after the Reichstag fire. The main provision was contained in Art. 6, which made any resistance against the government a crime of high treason. The mere existence and the vigorous application of this provision by the police and the courts crippled fatally the activities of the opposition parties in the impending elections for the Reichstag because it put the press under threat of prosecution for high treason. Suspending seven of the most important fundamental rights of the constitution (articles 114, 115, 117, 118, 123, 124, 153) the ordinance legalized any interference whatever of the police and the authorities with freedom of property, speech and freedom from arrest. The ordinance was replaced by the law of April 24, 1934, RGBl. I, 341; 7 HOCHÉ at 168, which was even more stringent. See further, Verordnung zur Abwehr heimtückischer Angriffe gegen die Regierung der nationalen Revolution of March 21, 1933, RGBl. I, 161, 1 HOCHÉ at 209; Gesetz zur Gewährleistung des Rechtsfriedens of October 13, 1933, RGBl. I, 723; 4 HOCHÉ at 245. The most effective protection of the regime was provided for by the Gesetz gegen heimtückische Angriffe auf Staat und Partei und zum Schutze der Parteiformen of December 30, 1934, RGBl. I, 1269; 11 HOCHÉ at 153. This law makes defamation of the regime a punishable crime. The same protection is accorded to members of the party and of its affiliated organizations. Even critical utterances concerning the regime and its institutions are subject to punishment if they are deemed "to undermine the confidence of the people in its leaders" (articles 1 and 2). See further, Gesetz zur Änderung des Strafgesetzbuches of June 28, 1935, RGBl. I, 839; 14 HOCHÉ at 191, art. 3.

31. Capital punishment or life terms of penal servitude were introduced for many felonies (e.g. misuse of explosives, and arson and crimes endangering the population) by the Gesetz zur Abwehr politischer Gewalttaten of April 4, 1933, RGBl. I, 162; 1 HOCHÉ at 214, for high treason or treasonable attempts, conspiracy with foreign powers, attacks against the security of the state, by the Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens of April 24, 1934, RGBl. I, 341, 7 HOCHÉ at 168. Any attempt to reorganize the prohibited parties Gesetz gegen die Neubildung von Parteien of July 14, 1933, RGBl. I, 479; 3 HOCHÉ at 66 or even reading or communication of the illegal newspapers imported from abroad or listening in to Moscow radio broadcasts constitutes high treason.

32. Verordnung über den Vollzug der Freiheitsstrafen und über Massregeln der Sicherung und Besserung, die mit der Freiheitsentziehung verbunden sind, of May 14, 1934, RGBl. I, 383; 8 HOCHÉ at 127. See also Dürr, in FRANK, op. cit. *supra* note 3, at 1477 et seq. No

fessional crime, custody in concentration camps or confinement in work houses at hard labor, as well as sterilization and castration are permissible.³³ As regards procedure, the judge is freed from positive law wherever the criminal code offers no basis for conviction.³⁴ Statutes are made retroactive,³⁵ and unusual punishments introduced.³⁶ The rights of the accused are heavily curtailed,³⁷ and special tribunals without appeal are established, more or less on the Star Chamber principle.³⁸

milder treatment is allowed for prisoners who committed a crime in pursuing their political conviction ("Überzeugungstäter"); see Bekanntmachung of April 25, 1933, RGBl. I, 233; 2 *Ночне* at 157.

33. The most momentous innovation of the regime in this field is the law against habitual dangerous criminals and on measures for safeguarding and "improving them," (Gesetz über die gefährlichen Gewohnheitsverbrecher und über Massregeln zur Sicherung und Besserung of June 24, 1933, RGBl. I, 995; 5 *Ночне* at 306). Details on the treatment of professional criminals see in Verordnung of May 14, 1934, RGBl. I, 383; 8 *Ночне* at 127, especially art. III §§ 16-23.

34. Gesetz über Änderung des Strafgesetzbuches of June 28, 1935, RGBl. I, 839; 14 *Ночне* at 190. On this revolutionary departure from the well-established principles of criminal law in civilized communities see *infra* p. 812.

35. Gesetz über die Verhängung und den Vollzug der Todesstrafe of March 29, 1933, RGBl. I, 151; 1 *Ночне* at 214 § 1 (concerning spreading of disaffection among the police and the army and other treasonable attempts, defined by the ordinance of February 28, 1933). This was a purely political measure, permitting prosecution of resistance or opposition to the regime prior to the Reichstag fire. The German Supreme Court (Reichsgericht) upheld the statute by inflicting capital punishment upon the alleged incendiary of the Reichstag—van der Lubbe. The decision is open to grave doubts even from the purely legal viewpoint.

36. See § 2 of the statute quoted in the preceding note which permitted hanging as the legal form of capital punishment instead of decapitation. In German tradition the rope is considered degrading as compared with the usual hatchet or guillotine.

37. Many of the most fundamental rights of the accused were abolished or severely curtailed. Examples: Verordnung des Reichspräsidenten zur Beschleunigung des Verfahrens in Hoch- und Landesverratsachen of March 18, 1933, RGBl. I, 131; 1 *Ночне* at 206, art. 2 (restriction of preliminary investigation); art. 3 (abolition of the decree of commencement); Verordnung der Reichsregierung über die Bildung von Sondergerichten of March 21, 1933, RGBl. I, 136; 1 *Ночне* at 211, art. 16 (denial of appeal against decisions of the Special Court); art. 9 (no oral hearing on the arresting order). According to the law of April 24, 1934, RGBl. I, 341; 7 *Ночне* at 168, art. IV § 3, selection of counsel in cases before the People's Court is dependent on approval of the president of the court; preliminary investigation and decree of commencement is granted only at the discretion of the court (art. IV §§ 4, 5 of same law); no appeal is allowed (art. III § 5). The law of June 28, 1935, RGBl. I, 839; 14 *Ночне* at 190) frees the judge and the public prosecutor explicitly from many formal provisions of the code of criminal procedure thereby restricting most severely the rights of the accused. Preventive custody hitherto more or less a political measure of the police is now legalized by law (art. 5).

38. Special Courts (Sondergerichte) were introduced by the ordinance of the president of the Reich über die Bildung von Sondergerichten of March 18, 1933, RGBl. I, 136; 1 *Ночне* at 210. Many matters under the jurisdiction of the ordinary criminal courts were transferred to the special Courts. The most formidable extraordinary Court, however, is the People's Court, a tribunal of the true Star Chamber type, deciding on high treason and

Summarizing the reforms in penal law, we cannot fail to notice that at least one department of law has been thoroughly permeated by the new legal values of National Socialism.

Despite simplified legislative processes, the resultant mass of new laws, and the impetus of revolutionizing ambitions, the imprint of National Socialism on private law during its first three years of power is surprisingly slight. The despised system of "liberal" civil law has by no means been abandoned. Some changes in family and inheritance law were caused by the agricultural and racial reform.³⁹ "Misuse" of marriage and of adoption in cases where no real family relationship is intended, has been forestalled.⁴⁰ So far nothing has been accomplished in the direction of a fundamental recasting of private law, previously so vociferously advocated. Especially surprising is the failure to sponsor the "Genossenschaft" (association of persons with limited or unlimited liability) type of cooperative society, in spite of the fact that this form of collective organization is a peculiarity of Germanic law especially suited to the gregarious spirit of artisans and small tradesmen.⁴¹ The explanation seems to be that the vast network of compulsory guilds organized by the National Socialists under the system of estates⁴² made it inadvisable to foster such associations, which might develop into independent bodies of professional character.

How can we explain this evident failure of the regime to revolutionize private law? Common (i. e. private) law, because of its intimate connection with social habits, reflects traditional patterns of life much more

political crimes directed against the regime, according to the law of April 24, 1934, RGBl. I, 241; 7 *HOCHÉ* at 168, art. III.

39. See *infra* p. 795, 799.

40. Gesetz über Mißbräuche bei der Eheschliessung und der Annahme an Kindesstatt of November 23, 1933, RGBl. I, 979; 5 *HOCHÉ* at 333. It happened occasionally that a marriage was concluded exclusively for the purpose of conferring upon the wife the aristocratic name and title of the husband, in consideration of monetary compensation paid by the wife, a genuine marital bond not being intended. Similarly, the institution of adoption was misused for purely social reasons.

Another improvement of the existing private law is the Gesetz über die Anwendung deutschen Rechts bei der Eheschliessung of January 24, 1935, RGBl. I, 48; 12 *HOCHÉ* at 300. The gist of this law is to give to the German wife, who has married a foreigner while retaining her German nationality, the right of divorce in Germany even if the national law of the husband does not permit the divorce.

41. Several laws involving changes in the legal structure of the "Genossenschaft" (see 5 *HOCHÉ* at 359 and 11 *id.* at 171) did nothing to encourage a more extended use of this type of non-political associations.

42. It is beyond the objectives of this article to deal with the system of estates, which is partly an upshot of historical romanticism, but to a larger extent an ingenious device for subjecting the entire economic and professional life of Germany to the supervision of the dictatorial state. Some details are given in POETZSCH-HEFFTER, *op. cit. supra* note 1, at 164 et. seq. The author expects to discuss the German estates system later on in a special article.

than does public law. Common law as expressed in a code is the outgrowth of organic tradition and admits of intentional change as a rule only under very exceptional sociological conditions. New legal standards cannot be imposed upon a people by force, unless preceded or accompanied by a radical overturn of the economic structure of society. Moreover, the obvious impotence of the regime in the realm of private law leads to one of two conclusions. Either the Germans were, with minor exceptions, satisfied with their private law and not desirous of a new legal order, or National Socialist legal values are not fertile enough to create such a new order in accordance with the needs of daily life. Apparently, mystical slogans are unsuited to embodiment in common law.

In one field, however, namely in the attempts to consolidate and unify German private law, the simplified legislative technique did yield tangible results. Uniformity of law corresponds to unity of command. Under the political impulses of centralizing and unifying tendencies, much of what had formerly been governed by the private law of the states was taken over or replaced by federal legislation and administration. Agriculture,⁴³ land settlement,⁴⁴ mining,⁴⁵ forestry,⁴⁶ hunting,⁴⁷ public health,⁴⁸ were made uniform, on the whole with beneficial results to the common welfare. Administration of justice, previously reserved to the states, was transferred to the Reich,⁴⁹ and the separate ministries of

43. Gesetz über die Neubildung des Bauerntums of July 14, 1933, RGBl. I, 517; 3 HOCHÉ at 530; Gesetz über Zuständigkeit des Reichs für die Regelung des ständischen Aufbaus der Landwirtschaft of July 15, 1933, RGBl. I, 495; 3 HOCHÉ at 161.

44. Gesetz über die Regelung des Landedarfs der öffentlichen Hand of March 29, 1935, RGBl. I, 468; 13 HOCHÉ at 50.

45. Gesetz zur Überleitung des Bergwesens auf das Reich of February 28, 1935, RGBl. I, 315; 12 HOCHÉ at 548; Lagerstättengesetz of December 1, 1934, RGBl. I, 1223; 11 HOCHÉ at 331.

46. Gesetz zur Überleitung des Forst- und Jagdwesens auf das Reich of July 3, 1934, RGBl. I, 534; 9 HOCHÉ at 66; Gesetz über Waldverwüstung of January 18, 1934, RGBl. I, 37; 6 HOCHÉ at 224; Forstliches Artgesetz of November 15, 1934, RGBl. I, 1236; 11 HOCHÉ at 401.

47. Jagdgesetz of July 5, 1934, RGBl. I, 549; 9 HOCHÉ at 425.

48. Jurisdiction over public health regulations formerly belonged largely to the states. After an ordinance of the president of the Reich of April 22, 1933, RGBl. I, 215; 2 HOCHÉ at 331, had permitted the Reich to take jurisdiction, unification was reached by the establishment of uniform public health offices in the Gesetz zur Vereinheitlichung des Gesundheitswesens of July 3, 1934, RGBl. I, 531; 9 HOCHÉ 513. The most incisive measure on this field is the Gesetz zur Verhütung erbkranken Nachwuchses of July 14, 1933, RGBl. I, 520; 3 HOCHÉ at 623, and supplementary law of June 26, 1935, RGBl. I, 773; 12 HOCHÉ at 437, *see infra* p. 798. See also Gesetz über die Feuerbestattung of May 15, 1934, RGBl. I, 380; 8 HOCHÉ at 147.

49. Three laws concerning the transfer of judicial administration from the states to the Reich (Gesetze zur Überleitung der Rechtspflege auf das Reich): of February 16, 1934, RGBl. I, 91; 6 HOCHÉ at 75; of December 5, 1934, RGBl. I, 1214; 11 HOCHÉ at 140; of January 24, 1935, RGBl. I, 68; 12 HOCHÉ at 253.

justice were converted into branches of the Federal Ministry of Justice. All state courts became federal courts. Thus the states were deprived of their previously jealously maintained rights to appoint judges and administrative officers; and the monopolistic control of the party identified with the state was firmly entrenched. On similar grounds, the training of young jurists was centralized and made uniform.⁵⁰ No applicant for judicial service is accepted unless he undergoes a specified course of education in a "training camp,"⁵¹ not in legal matters, but in National Socialist spirit. Before admission, he is subjected to a searching investigation as to proper allegiance and subservience.⁵² The new generation of judges, lawyers, public prosecutors, and civil servants will respond blindly to the political demands of the regime. Similarly, the teacher of law in the universities is no longer admitted on the basis of scientific accomplishments, but his appointment hinges upon the ominous criterion of his political reliability.⁵³ As far as can be seen, the German legal tradition of excellence, independence and originality is badly, perhaps irreparably, damaged.

Seen from outside, Germany presents a solid body of one Reich, one "Fuehrer," one law. Closer observation, however, reveals strong pluralistic tendencies behind the appearance of a political hierarchy of uniform power. Thus, the nation is split into layers with discriminatory

50. Verordnung über den Aufbau des Reichsjustizprüfungsamtes of February 27, 1935, RGBl. I, 342; 12 *HOCH* at 256.

51. Verordnung über den weiteren Ausbau des Gemeinschaftslagers Hans Kerrl of March 9, 1935, RGBl. I, 359, 12 *HOCH* 12, 258.

52. Verordnung über die Laufbahn des Richters und Staatsanwalts of March 29, 1935, RGBl. I, 487, 13 *HOCH* 206 especially § 2.

53. The legal basis for the famous "purge" of elements in German universities deemed undesirable by the new regime is contained in the law for the reestablishment of the civil service. Gesetz zur Wiederherstellung des Berufsbeamtentums of April 7, 1933, RGBl. I, 175, 1 *Hoche* 113. Since teachers in universities are civil servants, the law was applicable to them. § 3 establishes the famous "Aryan clause"; § 4 provides for the retirement or dismissal of such civil servants who in view of their political activities prior to the advent of the regime to power do not offer sufficient guarantees that they will defend the regime without reservations; § 5 makes it permissible to transfer a public official to another position against his will, even with lower salary and rank; § 6 provides for the retirement or dismissal of civil servants in the interest "of simplification of the administration." The numerous executive ordinances were finally consolidated in the voluminous law concerning public servants [Gesetz zur Änderung von Vorschriften auf dem Gebiete des allgemeinen Beamten-, des Besoldungs und des Versorgungswesens, of June 30, 1933 (RGBl. I, 433, 3 *Hoche* 125)], which made the restrictive provisions, if possible, even more rigorous. Every official is bound to swear solemn allegiance to the "Führer." Gesetz über die Beerdigung der Beamten und Soldaten der Wehrmacht of December 1, 1933 (RGBl. I, 1016, 5 *Hoche* 129). A new law of August 20, 1934, (RGBl. I, 758, 10 *HOCH* 104), imposing the oath of allegiance, was enacted after the death of President von Hindenburg. Special provisions for depriving university teachers of their functions are enacted by the Gesetz über die Entpflichtung und Versetzung von Hochschullehrern aus Anlass des Neuaufbaus des deutschen Hochschulwesens of January 21, 1935 RGBl. I, 23, 12 *Hoche* 69).

legal standards. The party and its members and ramifications enjoy a legal status of their own from which other parts are strictly excluded.⁵⁴ A separate legal order exists for farmers as over against the urban population, while among the latter the wealthy classes are discriminated against socially and economically in favor of the middle classes, the small shop-keeper, the petty bourgeois, and the lower officials. In spite of lip-service paid to class solidarity, a sharp division exists between employers and employees.⁵⁵ According to the totalitarian principle, regimentation applies to all classes, but big business for instance, still has more elbow-room than the liberal or artistic professions. The vast system of estates or compulsory guilds create an analogous variety of legal status. Thus, Germany presents the picture of a neo-feudal state, in which many particular loyalties are legally recognized, provided that they do not conflict with blind obedience to National Socialist postulates.

One of the most conspicuous features of this situation is the intumescence of special courts entrusted with special functions and superseding the jurisdiction of the ordinary courts. The new estates for agriculture, labor, handicrafts, culture, the guilds of journalists, authors, musicians, artists, etc., have established special honor courts dealing with professional misdemeanors and controversies. Economic differences are dealt with by administrative boards; special courts are set up in connection with the Hereditary Farms Law; medical courts deal with matters concerning public health and eugenics. This new feudality is largely responsible for the destruction of that equality before the law and that equality of the law, which is cherished by liberal constitutions.

IV

The bulk of the new laws introduced by the National Socialists may be roughly divided into two different though overlapping groups. On the one hand, as a positive achievement, a new legal order has been established for those classes of the nation which, as the case may be, are the most favored and the least favored by the National Socialist regime. In the last analysis, politics determine legislation in private law. Also, on the other hand, as a negative result, though intimately related to the positive one, the rule of law as the integration of the liberal state has been completely destroyed.

The legal ramifications of the race myth of blood and soil are three-fold: (a) anti-Semitic measures, (b) measures intended for purity of the race, (c) measures privileging farmers and laborers.

Anti-Semitism is on the whole the only tangible result of the racial myth in private law. The details of the unrelenting process resulting in elimination of German Jewry from public and economic life do not need

54. See *infra* 809.

55. See *infra* 800 et seq.

further elaboration in this country. Some summarizing remarks as to the present status of the Jews in German private law might, however, be appropriate. Racial intermarriage during the 19th and 20th centuries gave rise to the creation by the National Socialists of a mass of hair-splitting distinctions, which a regime with a greater sense of humor certainly would have called "talmudical."

At first the Higher courts, resisting political pressure, rarely went beyond the letter of the existing positive law. Voidability of mixed marriages concluded before the advent of the regime was denied by the Supreme Court.⁵⁶ In due course, however, the courts were overridden by new legislation. According to the Nuremberg laws of September 1935,⁵⁷ Jews are legally defined as persons with three or four Jewish grandparents. A Jew is also a person with two Jewish grandparents, he who professes the Jewish religion or is married to a Jew or Jewess. Half-Jews or quarter-Jews are styled "Jewish mixed offspring." The task of the registrar of marriages has become a specially hard one. Marriage after, September 16, 1935, between Jews and Aryans are illegal, and partners to such marital bonds are threatened with heavy punishments. Sexual intercourse between Jews and Aryans is a new crime ("racial defilement"), thus making Germany a paradise of blackmailers.

56. Before the enactment of the Nuremberg laws of September 15, 1935 the question whether a "mixed marriage" (between an "Aryan" and a "Non-Aryan" partner) is voidable, if concluded before the advent of National Socialism and its racial principles, was one of the most debated controversies of jurisprudence. See 32 SCHLEGELBERGER, *op. cit. supra* note 4, at 207; 33 *id.* at 402. § 1333 of the Civil Code allows dissolution of the marital bond by voiding the marriage act, if the marriage was concluded in error about an important quality of the other partner. Such an error was assumed to exist in the absence of knowledge that racial intermixture is deemed detrimental to the racial ideals of Germany. However, the Supreme Court held that the statute of limitation (six months according to § 1339) for bringing in the action for voidability of the marriage expires not later than 6 months after the seizure of power by the National Socialist regime (see decision in 145 *Entscheidungen des Reichsgerichts in Zivilsachen* 1). Thus the court adroitly avoided the crucial question because most of the actions were instituted only after the expiration of six months. It is, however, more likely than not, that mixed marriages concluded prior to the regime will soon become a target for new legal attacks. Already proposals for dissolving them in accordance with the "spirit" of the Nuremberg laws are under way (see *N. Y. Times*, Jan. 22, 1936, at 17).

Dismissal of Jewish employees even if they had unexpired contracts was usually sustained by the courts which on the whole conformed unreservedly with the anti-semitic trends of the regime.

57. At present the legal bases of anti-semitic legislation are contained in the so-called Nuremberg laws of September 15, 1935, namely: Gesetz zum Schutze der deutschen Ehre und des deutschen Blutes, and Reichsbürgergesetz, RGBl. I, 1146, 1147, and the executory ordinances of November 14, 1935, RGBl. I, 1333, 1334. The laws have caused many intricate questions of international private law. Provisions in other laws or instructions of the National Socialist party and its affiliated organizations, which go beyond the Nuremberg laws, are expressly maintained in § 6 of ordinance of November 14, 1935. On the Nuremberg laws, see also James W. Garner (1936) 30 *AM. J. INT. L.* 96.

The tendency of the new law is that of diminishing the stock of Jewish blood in the German population. Thus, quarter or half-Jews may not marry members of the same class, but may enter marital relations with Aryans from which no increase of the Jewish blood may be feared.

That the famous "Aryan clause" runs like a red thread through National Socialist legislation, needs no repetition. By its results, "Non-Aryans" are strictly excluded from public office and public life, from the liberal professions (doctors, lawyers, teachers) as well as from the theater, films, music, literature, art, stock exchange, auctioneering, and so forth.⁵⁸ Since a membership-card in one of the professional guilds or the Labor Front is indispensable for the exercise of any trade, profession, or employment, non-Aryans are actually excluded from every position which might bring them in contact with public life. Jews are finally driven out even from the remaining nooks and crannies of economic life by the official economic boycott, more or less endorsed by the courts. Jewish business at present is selling out. Where the positive law has lagged behind the intentions of the regime, extra-legal pressure and communal regulations intervened. Jews are forbidden residence, occupation, the conduct of legitimate business, acquisition of real estate, according to the zeal and whim of the local satrape. Deprived of citizenship, Jews are only "members of the Reich."⁵⁹ They are not allowed to have female help under 35 years of age in their households.⁶⁰ Thus at least one plank of the party program is fulfilled to the letter. The racial myth has succeeded in making German Jewry, which has contributed its full share to German culture and civilization, not an ethnical minority but a new caste of untouchables in the very heart of Europe.

Other legislation derived from the race myth attempts to weed out the physically unfit and to provide for a healthy progeny in the future.⁶¹ Despite the vagueness and uncertainty of underlying biological and anthropological theories, they constitute, on the whole, a commendable effort to promote eugenics and national hygiene. Couples intending to marry have to submit to the registrar a certificate of the public health officer to the effect that they are not afflicted by mental or bodily disease which would prevent healthy offspring.⁶²

58. No detailed references to legal provisions can be given here. But see, e.g. *Schriftleitergesetz* of March 4, 1934, RGBl. I, 713; 4 *Hochz* at 530 § 5 nr. 3. *Verordnung über die Zulassung von Ärzten, Zahnärzten und Zahntechnikern zur Tätigkeit bei den Krankenkassen* of November 20, 1933, RGBl. I, 983; 5 *Hochz* 716, art. IV.

59. *Reichsbürgergesetz* of September 15, 1935, RGBl. I, 1146.

60. *Gesetz zum Schutze der deutschen Ehre und des deutschen Blutes* of September 15, 1935, RGBl. I, 1147, § 3.

61. Compare the statutes referred to in note 48, *supra*. The public health offices take care of many questions of biological hygiene. Stripped of its racial exaggerations the public health legislation seems soundly conceived.

62. *Erbgesundheitsgesetz* of October 18, 1935, RGBl. I, 1246.

The most important innovation, however, is the law preventing reproduction by persons afflicted with congenital diseases.⁶³ A new health tribunal, composed of one trained jurist and two medical assessors, decides whether a person complained against is to be subjected to sterilization or, since 1935, to castration. Mental diseases, as well as physical defects and deformities such as harelip (*lagostoma*), entail sterilization because of their hereditary character. It should be noted that responsible legal and medical experts in the Higher Courts combine their efforts in order to mitigate the revolting harshness of the law, and, frequently, the excessive arbitrariness of the lower tribunals. Higher health tribunals to which appeal was taken have sought to ensure at least a minimum of procedural safeguards for the protection of persons coming under the law.⁶⁴ No political abuse is recorded.

A fundamental reform of family law in line with new racial viewpoints is in preparation, making, for example, the inability to procreate or to bear children a legitimate ground for divorce.⁶⁵ The position of the illegitimate child has not yet been improved.

Summing up, it must be said that so far the race consciousness plays no conspicuous part in the daily habits of the people. The notions of blood and soil are artificially imposed upon the German people and they have not yet been integrated by popular conscience. Although anti-Semitism looks back on a long tradition in Germany, the race dogma is recognized by the bulk of the people as a political invention rather than an innate legal concept. It is very likely, however, that the new generation growing up under the influence of the extensive propaganda may think and act differently.

The dogma of the soil, that other implication of the racial myth, has precipitated far reaching changes in agricultural legislation,⁶⁶ making the

63. Gesetz zur Verhütung erbkrankten Nachwuchses of July 14, 1933, RGBl. I, 529; 3 HOCHÉ at 633, with numerous executory ordinances and an enormous mass of literature and jurisprudence; see 33 SCHLEGELBERGER, *op. cit. supra* note 4, at 16, 208, 467.

64. For details of countless decisions see 33 SCHLEGELBERGER, *op. cit. supra* note 4, at 471 et seq.

65. N. Y. Times, Dec. 1, 1935, at 1.

66. The entire agricultural life was organized into a "nutrition guild" or "food estate" ("Reichsnährstand"): Gesetz über die Zuständigkeit des Reichs für die Regelung des ständischen Aufbaus der Landwirtschaft of July 15, 1933, RGBl. I, 195; 3 HOCHÉ at 530; Gesetz über den vorläufigen Aufbau des Reichsnährstandes of September 13, 1933, RGBl. I, 626; 4 HOCHÉ at 377. In order to provide a "just" price for the farmer, not only were tariffs widely extended and raised, but also the use of German agricultural products in German industries was made mandatory. For details, see PÖTZSCH-HEFFTER, *op. cit. supra* note 1, at 187, and 32 SCHLEGELBERGER, *op. cit. supra* note 4, at 18, 492. Restrictions of crops and acreage were introduced and compulsory cartels and marketing schemes intended to protect domestic agriculture were established. The legislative regimentation amounts in total to the most extensive and rigorous system of planned economy existing today, outside of Russia.

farmers, in fact, a privileged class under a separate private law. Urbanization is considered undesirable because it loosens the ties of the people with the soil, ties looked upon as the "fountain head" of national strength. The gist of the new legislation is to create a new peasant nobility, independent of economic fluctuations. Soil no longer is to be an object for materialistic speculation like any other fungible good, but a sacred trust of the owner for his family and the whole community. In the Hereditary Peasants Farm Law of September 29, 1933,⁶⁷ we witness the legislative fruition of the blood and soil idea. While constituting the first visible effort to create a "German" law, it cuts deeply into private law. All estates up to 125 hectares (about 300 acres) are compulsorily converted into hereditary farms, if they are capable of supporting a farmer's family. The owner is the bearer of a new title of nobility, and may even add the name of the farm to his family name. As a privileged class, farmers' estates are exempted from the civil law of inheritance. Upon the farmer's death the estate passes undivided to his eldest son or the nearest male relative, while the younger children are entitled to claim support from the farm. They, in turn, are liable to service on the farm. Since the new labor legislation has deprived the agricultural population of the right to migrate freely and to seek employment in the cities, the younger generation becomes a sort of new "glebae adscripti", yoked under a new bondage in the name of blood and soil. Thus, here again, the neo-feudal traits of the legal order are revealed. As a corollary to the protection by the state, the owner has no right to sell or to mortgage the hereditary farm or parts thereof without permission of his local Hereditary Farm Tribunal, and the farm and its accessories cannot be attached, or foreclosed by the creditor of the farmer. While the soil is thus made sacred and inalienable, the law is rather double-edged for the farmer. Private credit is scarcely available to him because of the impossibility of attachment or mortgage. Every milkpail must be paid for in cash on delivery. Not a few farmers are little pleased, especially since regimentation by marketing schemes applies also to the farms and requisitions of products are strictly enforced. According to reliable reports, some of the new "aristocrats of the soil" try to escape the consequences of the law by asserting that there is Jewish blood in their veins, since, of course, non-Aryans cannot be hereditary farmers.⁶⁸

67. Reichserbhofgesetz of September 29, 1933, RGBl. I, 685; 4 HOCH 382. It constitutes the most notable effort of German legislation fundamentally to reconstruct national life. Numerous executory ordinances were enacted and a whole library of literature and jurisprudence has grown up around the new law. See also SCHUMANN, *op. cit. supra* note 1, at 410; Mildred S. Wertheimer, in 8 WORLD AFFAIRS PAMPHLETS (1935) 15. A clear and exhaustive report on the law is given by Kaden, *Peasants Inheritance Law* (1935) 20 IOWA L. REV. 350.

68. According to private information received by the author during his stay in Europe in the summer of 1935.

A variety of most complicated legal controversies has grown up around the Hereditary Farm Law which is technically very ambiguous. Specialists in more than 1500 Hereditary Farm Tribunals established under the law are needed for its interpretation,⁶⁹ which tends to be no less "legalistic" than the interpretation of legislation under the "liberalistic" state.

Peasants, as the spoiled children of the regime, find themselves privileged in many other respects. Elaborate regulations prevent execution of judgments and foreclosure of mortgages against any peasant;⁷⁰ new insolvency laws provide for reduction of his debts and reorganization of insolvent farms;⁷¹ private and public creditors are compelled to consent to reduction of interest on agricultural credits.⁷² Whether, in the long run, it will prove desirable to make the farmers a privileged class in a country which derives three quarters of its income from industry and trade, is at least open to doubt.

The new Labor Law works a further change in German private law. The Labor Front, which smashed the Trade Unions and confiscated their huge property, embraces all German manual and "white-collar" workers. The Labor Code of January 20, 1934,⁷³ while abolishing collective rights of organized labor, proclaims the leadership principle in business. The owner of the factory or plant or business is the "leader" of the enterprise, while employees are the "followers." The new feudality is reflected in the new conception of labor, which is no longer an individual right, but a social duty. Loyalty to the shop community is demanded from all concerned and enforced by the local Labor

69. For German literature and decisions see 32 SCHLEGELBERGER, *op. cit. supra* note 4, at 51, 477, 705; 33 *id.* at 27, 221, 481. In one issue of the *Jahrbuch*, which records only important cases, no less than 85 decisions of the Supreme Court of Hereditary Farm Law are reported, besides several hundred handed down by the lower Hereditary Farm Tribunals.

70. The first regulation of this kind was already in effect on February 14, 1933 (*Verordnung über den landwirtschaftlichen Vollstreckungsschutz*, RGBl. I, 63; 1 HOCHÉ 276; it helped greatly to make the farmers cast their votes in favor of the National Socialist Party at the elections following on March 5, 1933. Several subsequent laws increased the forms of special protection of the farmers by the regime: *Verordnung zur Förderung der Landwirtschaft* of February 23, 1933, RGBl. I, 80; 1 HOCHÉ 286; *Gesetze über den landwirtschaftlichen Vollstreckungsschutz* of October 25 and December 27, 1933, RGBl. I, 779, 1115; 5 HOCHÉ at 644.

71. *Gesetz zur Regelung der landwirtschaftlichen Schuldverhältnisse* of June 1, 1933, RGBl. I, 331; 3 HOCHÉ at 523. Agricultural leaseholders were equally well protected, see e. g. *Pächterentschuldungsverordnung* of March 12, 1935, RGBl. I, 360; 12 HOCHÉ 580.

72. *Gesetz über die Zinserleichterungen für den landwirtschaftlichen Realkredit* of November 28, 1934, RGBl. I, 860; 10 HOCHÉ 498; *Gesetz über Zinsen für den landwirtschaftlichen Realkredit* of July 31, 1935, RGBl. I, 1057; 14 HOCHÉ 385.

73. The new "labor code" is embedded in the *Gesetz zur Ordnung der nationalen Arbeit* of January 20, 1934, RGBl. I, 45; 6 HOCHÉ 351, with no less than 13 executory ordinances to April, 1935. See also SCHEUMAN, *op. cit. supra* note 1, at 397 et seq.

Trustee appointed by the Minister of Labor.⁷⁴ A "shop council,"—which, it may be noted, is the very last vestige of the elective principle in Germany, the leadership principle being dominant in all other aspects of public life—has consultative voice in the enterprise, but the "leader of the enterprise" (employer) is the undisputed master in determining all labor relations. Social Honor Courts⁷⁵ accept complaints from the "followers" and the "leader" of the enterprise if and when an allegation is made that the social principles governing the conduct of business have been violated by either one of the parties. Controversies of individual employees come before the ordinary Labor Courts,⁷⁶ which constituted one of the outstanding achievements of social legislation prior to the Third Reich. Freedom of contract in labor has been superseded by social, or rather political, considerations. The situation for the workman is aggravated by the fact that, due to the new legislation for national redistribution of labor,⁷⁷ free movement of labor on the market is scarcely possible any longer. Migration of labor between the cities is dependent on special permission of the authorities; unmarried employees under 25 years of age are compulsorily transferred to agricultural districts in order to vacate their places in favor of older men among the unemployed. The introduction of the compulsory labor-book, which controls the movements of the individual laborer,⁷⁸ and the labor conscription service,⁷⁹ have also aided in creating another compartment of the new feudal order in which the various classes live under different laws.

74. Gesetz über Treuhänder der Arbeit of May 19, 1933, RGBl. I, 285; 2 *Hochz.* at 349.

75. § 35 of the law quoted in note 74, *supra.* Establishment and procedure of the new Honor Courts is contained in the Verordnung of March 28, 1934, RGBl. I, 255; 7 *Hochz.* 353.

76. Bekanntmachung der Neufassung des Arbeitsgerichtsgesetzes of May 15, 1934, RGBl. I, 319; 7 *Hochz.* 393. Lay assessors of the Labor Courts are, of course, no longer elected by and from employers and employees, but are appointed instead by the authorities under supervision of the Labor Front, the huge state organization of national labor.

77. Gesetz zur Regelung des Arbeitseinsatzes of May 15, 1934, RGBl. I, 381; 8 *Hochz.* 226. The President of the Federal Board of Labor Exchange and Unemployment Insurance is equipped with dictatorial powers. The need of agriculture for sufficient farm hands is satisfied by the Gesetz zur Befriedigung des Bedarfs der Landwirtschaft an Arbeitskräften of February 26, 1935, RGBl. I, 310; 12 *Hochz.* 559. Industrial laborers employed formerly in agriculture are to be dismissed and transferred to the rural districts.

78. Gesetz über die Einführung eines Arbeitsbuches of February 28, 1935, RGBl. I, 311, 12 *Hochz.* 559.

79. The merit of having introduced the voluntary labor service belongs justly with the cabinet of Brüning in 1932. The National Socialist government militarized the institution (Gesetz über den freiwilligen Arbeitsdienst of December 13, 1934, RGBl. I, 1235; 11 *Hochz.* at 491. While professing to retain its voluntary character it was clearly understood that refusal to enter a labor camp was punishable by withdrawal of public relief, at the very least. Full-fledged labor conscription for both sexes—for men as a preliminary condition to military service—was made compulsory by the Reichsarbeitsdienstpflichtgesetz of June 26, 1935, RGBl. I, 769; 14 *Hochz.* 483.

VI

National Socialism attains its political ends by destruction of the rule of law.⁸⁰ Separation of powers, independence of judges, judicial control of administration, impartial efficiency of the civil service, a Bill of Rights as safeguard against executive and legislative encroachment, all these elements of the rule of law are over-ruled by the monocratic omnipotence of the "Führer" and the party. Under the Weimar Constitution, civil liberties, such as enjoyment of private property within the general laws, freedom of contract and of legitimate conduct of business, respect for vested rights, freedom of economic and professional movement, were protected by an elaborate Bill of Rights.⁸¹ Liberty was not unlimited, however, but, rather, harmoniously reconciled with the necessities of the social process; and it had come to terms with authority and state control. Where the Constitution did not explicitly permit infringement of civil guaranties of life, liberty, and property as contained in the Bill of Rights, they could be curtailed only by constitutional amendment. It is true that, owing to the pressure of the crisis and to political difficulties arising from party cleavage, the government, since 1930, had resorted more and more often to government by decree under Article 48.⁸² This, however, was only as a temporary expedient to meet the emergency; the government tried throughout to act under the authority of the Constitution.

After Herr Hitler seized power, the Weimar Constitution, although never formally abolished, was deconstitutionalized. By the famous enabling law of March 24, 1933, the cabinet was empowered to depart from the Constitution by simple government decrees; and the Law of January 30, 1934, equipped the government with the full *pouvoir constituant*.⁸³ Under National Socialism, individual rights became obsolete and even obnoxious.⁸⁴ One of the National Socialist jurists asserts:⁸⁵

80. For an accepted definition of the rule of law, see DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (8th ed. 1915) 183, 189; see McMillin, *Government by Law*, (1936) 14 *FOREIGN AFFAIRS* 185 et seq.

81. See Part II, art. 109-165. The best discussion of German jurisprudence and constitutional law under the Weimar republic by an American author is MATTERN, *PRINCIPLES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE GERMAN REPUBLIC* (1928).

82. For literature in English, see: HENEMAN, *THE GROWTH OF EXECUTIVE POWER IN GERMANY* (1934) 165; MATTERN, *op. cit. supra* note 81, at 483 et seq.; OGG, *EUROPEAN GOVERNMENTS AND POLITICS* (1934) 709 et seq. ROGERS, *CRISIS GOVERNMENT* (1934) 69 et seq., *id.*, *German Political Institutions* (1932) 2 *POL. SCI. Q.* 583 et seq.; Friedrich, *The Development of the Executive Power in Germany* (1933) 27 *AM. POL. SCI. REV.* 185 et seq.

83. See notes 21 and 22, *supra*.

84. KOELLREUTTER, *DEUTSCHES VERFASSUNGSRECHT* (1935) 83. On the basis of article 48, the President of the Reich superseded the seven fundamental rights of articles 114, 115, 117, 118, 123, 153, by his ordinance of February 28, 1933 (*Verordnung des Reichspräsidenten zum Schutze von Staat und Volk*, *RGBl. I*, 83; 1 *HOCH* 236). Although according

"Fundamental rights which create free spheres for individuals untouchable by the state are irreconcilable with the totalitarian principle of the new state."

Thus the fundamental rights of the individual, although some of them were at first, despite political pressure, occasionally sustained by the courts,⁸⁶ fell into oblivion. Furthermore, the judge is supposed to override any article of the former Constitution which, in his opinion, is inconsistent with National Socialist legal values.⁸⁷

This observation leads at once to the much debated question as to the relation of judge and law.⁸⁸ Since it was obviously impossible forthwith to recast the existing private law in its entirety, the individual judge at first was encouraged to deviate from the written law when, in his opinion, the positive statute-law obstructed the enforcement of National Socialist legal values. Later on, however, as it seemed dangerous to free the judge from the written law, a principle embodied in the Weimar Constitution was restated, namely, that the judge is bound to adhere to the written law. As the law is the command of the infallible "leader," the command must be blindly obeyed. Says one of the leading jurists of the regime, Dr. Freisler:⁸⁹

"The judge is bound to investigate his innermost soul whether he is in accordance with the leader. He performs this task, in the first place, by considering the law. The law is and remains the most incisive type of the leader's command, and the leader's command is the most noble and the most secure expression, beyond doubt, of the demands of popular conscience."

The rule requiring strict subordination of the judge under the written law was summarized as follows by the Prussian Supreme Court of Adminis-

to the preamble this ordinance was intended for the defense against "communistic terror acts endangering the state," by instructions to the Secret Police and the Nazi troopers enlisted as auxiliary police the application was extended to all acts which even indirectly might contribute to conditions under which communism could grow. This loose construction was sustained by the courts; see decision of the PrOVG. of Oct. 25, 1934, (1934) JURISTISCHE WOCHENSCHRIFT 1272; in the transitional stage of National Socialism most of the arbitrary infringements of life, liberty and property were based on this ordinance which permitted arrest for an indefinite period and without trial, confiscation of property, prohibition of free speech and free assembly and the well known regimentation of the entire press. Space forbids further explanation of the manner in which this system subsequently was converted into "ordinary" legislation.

85. Freisler in 32 SCHLEGELBERGER, op. cit. *supra* note 4 at 3.

86. See e.g., decision of the Special Court (Sondergericht) Darmstadt of March 26, 1934, (1934) JURISTISCHE WOCHENSCHRIFT 1745; this decision promptly met with violent criticism by Huber (1934) JURISTISCHE WOCHENSCHRIFT 1745.

87. Schmitt, in (1934) 39 DEUTSCHE JURISTEN-ZEITUNG 691 et seq. Huber, in (1934) JURISTISCHE WOCHENSCHRIFT 1745.

88. See 32 SCHLEGELBERGER, op. cit. *supra* note 4, at 25, 463; Freisler, in (1934) 39 DEUTSCHE JURISTEN-ZEITUNG 167; Schmitt, id. at 691.

89. 33 SCHLEGELBERGER, op. cit. *supra* note 4, at 523.

tration, a tribunal competing with the Reichsgericht in judicial wisdom and reputation:⁹⁰

"The judge is not permitted to depart from the statute because, in his opinion, it is in contradiction with National Socialist world-concepts. The construction, however, of the general clauses demands application in the sense of the prevailing legal consciousness, that is in the spirit of the National Socialist world-concept."

While this principle is undisputed in relation to statutes enacted under National Socialism, laws passed before the advent of the regime are differently treated. A new conception of equity, it is said, must be applied to adapt the pre-National Socialist statute law to the new spirit. The word "equity," here is not to be confused with the Anglo-Saxon conception of the term. National Socialist "equity" is not intended to mitigate hardships of the common law or to fill its gaps, but rather to infuse the National Socialist system of values into the old law. Legal interpretation may thus change the application of the old statutes without changing their textual formulation.⁹¹ National Socialist "equity" seized in particular, upon those general clauses of the codes which already provided for equity as an integral part of positive law.

Furthermore, the Third Reich profoundly changed the attitude of the Supreme Court as regards the doctrine of "stare decisis." The German Supreme Court was supposed to operate as a coordinating agency to unify the trend of decisions all over the Reich. Although no enactment required that precedents be given binding force, the hierarchy in the system of appeals and revision, resulted in practice in the unchallenged supremacy of the Supreme Court decisions as guiding precedents for the other courts. According to the Judicature Act of 1877 (Article 136), however, a special procedure existed for any departure of the Supreme Court from its own precedents, namely, a plenary session of all the combined Senates of the Supreme Court. The cumbersome procedure was rarely resorted to because of the "horror pleni." A clause of the new law of June 28, 1935,⁹² explicitly frees the Supreme Court from the binding force of its own precedents, thus removing a serious obstacle to interpretation of existing statutes according to the new "equity." In the preamble to the law, it is made incumbent upon the Supreme Court to inculcate the new spirit. Article 102 of the Weimar Constitution, which subjected the judge strictly to the law, is therefore also upheld

90. Decision of February 15, 1934 in (1934) JURISTISCHE WOCHENSCHRIFT 1269; (1934) RPrVBL 286.

91. See Roland Freisler in 33 SCHLEGELBERGER, op. cit. *supra* note 4, at 520 et seq., especially at 521: "Laws and statutes may be changed as regards their content without their textual formulation being affected by this change in any way."

92. Gesetz zur Änderung von Vorschriften des Strafverfahrens und des Gerichtsverfassungsgesetzes of June 28, 1935, RGBl. I, 844; 14 HOCH 189, art. 2, 3.

in the new order, with the proviso that legal interpretation no longer follows the precepts of positivistic construction, but rather those of the National Socialist legal conscience.

The National Socialists faced a similar problem as regards the independence of judges. The rule of law requires that, in applying the law of the land, the judge be guided only by his legal responsibility and not by political motivation. The article of the Constitution which guaranteed judicial independence was never formally disavowed by the Third Reich. Since independent judges, however, appointed under the old regime and relying on their immovability, were legally in a position to frustrate the political aims of dictatorship, the regime found it necessary to bend the judge to the will of the state. For obvious reasons, an open repudiation of the principle of independence seemed inadvisable.⁹³ National Socialist legislation therefore, devised a more subtle and unobtrusive way of achieving this end by making both appointment to and tenure of office dependent upon political reliability.⁹⁴ Thus, by the various laws since 1933 for the re-establishment of the civil service, every judge as well as every other public official is very much like a man under a suspended sentence. Any judicial act deemed contrary to the interests of the regime may be considered an indication of political unreliability, justifying dismissal from office, even without pension, since vested rights of officials are no longer recognized. The law, originally limited to a transitional period, has been lately extended *ad Calendas Graecas*. It is noteworthy that very few of the acting judges preferred retirement to conformity to the new principles. The younger generation of judges and public prosecutors is so thoroughly trained in the new spirit that in due course the bench will be wholeheartedly subservient to the state.⁹⁵

Similarly, all other persons exercising judicial functions, such as jurors, lay judges, and aldermen, were thoroughly coordinated by eliminating the last vestiges of popular participation in their appointments.⁹⁶ Likewise, the lawyers, organized in an integrated bar,⁹⁷ are subjected to

93. KOELLREUTTER, *ALLGEMEINE STAATSLERE* (1933) 108 et seq. emphasizes that only that state is governed by the rule of law ("Rechtsstaat") in which the independence of judges is guaranteed.

94. See the laws quoted in note 53, *supra*. Permission to remove officials from office for political reasons was limited first to September 30, 1933, then repeatedly extended and finally made permanent by the clause "until the new law concerning public officials is enacted" (Änderungsgesetz of September 26, 1934, RGBl. I, 945; 10 *HOCHE* at 103).

95. A familiar way of forcing the resignation of a judge disliked by the regime, but against whom there existed no legal ground of complaint, consisted in transferring him from a High Court or Court of Appeals to the lowest court, whereupon he duly resigned.

96. Gesetz über die Neuwahl der Schöffen, Geschworenen und Handelsrichter of April 7, 1933, RGBl. I, 188; 1 *HOCHE* 201.

97. The so-called "Reichsrechtsanwaltskammer" was established by the ordinance of the

the most rigid political sifting and discipline. Since December, 1935, admission to the Bar is no longer an individual right, based upon the results of the bar examination, but a privilege of the state granted exclusively to loyal supporters of the regime.⁹⁸ Any action not in accord with National Socialist spirit entails professional disadvantages, and even disbarment. The interest which the state takes in the client, rather than the interests of the client, counts.

Another pillar of the rule of law is the principle enshrined in Article 105 of the Weimar Constitution, that no one shall be denied free access to the ordinary courts, and that exceptional courts are prohibited. Matters which the common law of the land assigns to judicial courts shall not be decided by other agencies, such as non-judicial boards, commissioners, or the executive (ministry or cabinet). We speak of exceptional courts as contrasted with ordinary courts if, for political reasons, a judicial agency deals with classes of individually designated cases usually belonging to the ordinary courts. In German jurisprudence, exceptional courts are also distinguished from special courts; the latter

President of the Reich of March 18, 1933, RGBl. I, 109; 1 HOCHÉ 123. It took over disciplinary jurisdiction on appeal (concerning disbarment of members of the Bar) from the Supreme Court, while retaining members of the Supreme Court bench as well as members of the bar as judges (Gesetz zur Änderung von Vorschriften über die Ehrengerichtsbarkelt der Rechtsanwälte of March 18, 1934, RGBl. I, 252; 7 HOCHÉ at 159. On the organization of the Reichsrechtsanwaltskammer, see Gesetz zur Änderung der Rechtsanwaltsordnung of December 13, 1935 §§ 41-58, RGBl. I, 1470. That appointment of the presidents of the local bar was substituted for free election by and from among the members of the bar needs to be noted. Gesetz über die Vorstände der Anwaltskammern of January 6, 1934, RGBl. I, 21, and of March 30, 1935, RGBl. I, 469; 6 HOCHÉ 75, 13 id. at 209.

98. Order of the Prussian Ministry of Justice of November 20, 1933 (Deutsche Justiz 1933, 729, 5 HOCHÉ 295).

The subjection of the liberal profession of lawyers to the will of the National Socialist regime reached its climax in the third Gesetz zur Änderung der Rechtsanwaltsordnung of December 13, 1935, RGBl. I, 1470. While formerly admission to the bar for an applicant of moral integrity who had passed the bar examination could be denied by the President of the Court of Appeals and the President of the local bar only for reasons specifically enumerated by the law [see order of the Ministry of Justice of January 16, 1935, (1935) DEUTSCHE JUSTIZ 91; 12 HOCHÉ 262], admission to the bar is no longer an individual right of every qualified applicant, but it is a privilege granted by the regime only to a limited number of candidates who must be tested followers of the regime. The Reichsminister of Justice decides without appeal whether or not he is to be admitted to serving a preliminary term of apprenticeship in a lawyer's office (§§ 9, 16). The final admission three years later is dependent again on approval by the Minister of Justice with the concurrence of the "leader of German Jurists." Commenting on the law, the former Reichs-Commissar of Justice, Frank, emphasized that admission to the bar is no longer based on the results of the examination but exclusively on tests drawn from the practice prevailing in the selection of "proved National Socialist fighters." In other terms: the *numerus clausus* for admission to the bar is established, the bar became a closed union or guild for National Socialist lawyers.

function as the ordinary courts for specific matters in a general way.⁹⁹

The first principle of free access to the ordinary courts is to a large extent repudiated by the National Socialist regime. During the first two years of the regime numerous breaches of the existing civil law were committed in forcing the new political order on business life. Obligations of contract, vested rights, the right to dispose freely of property, were superseded by political coordination. Legal titles were voided and property confiscated under the pressure of party members and officials. The courts, invoked for redress of grievances, or for damages, were frequently bound to decide, according to existing laws, in favor of the dispossessed claimants. As such action taken by the courts threatened to frustrate the political results of the revolution in business life, a law of December 13, 1934,¹⁰⁰ empowered the Minister of the Interior at his discretion to withdraw all civil claims from the ordinary courts even after they had become *res judicata*, and to settle them in the interests of the state without permitting appeal. The effect of the law was to deprive private individuals of the right to bring their cases before the ordinary courts. Compensation for damages incurred through the revolution became a matter of arbitrary decision of the ministry.¹⁰¹

Similarly, a law of June 26, 1935,¹⁰² withdrew controversies arising from the fight of the Protestant Church against the totalitarian state from the ordinary jurisdiction. The courts, in accordance with the written law, had in many cases sustained the claims of the ousted ministers to their salaries or to the use of church property. Because the courts, bound by existing statutes, sided with the fighting church, the decision of such cases was transferred to a board appointed by and in connection with the Ministry for Church Affairs. Its decisions, given

99. See Eduard Kern, in 2 HANDBUCH DES DEUTSCHEN STAATSRICHTS (Anschütz and Thoma ed., Tübingen, 1932) 494.

100. Gesetz über den Ausgleich bürgerlicher Rechtsansprüche of December 13, 1934, RGBl. I, 1235; 11 HOCH 173, Verordnung of February 22, 1935, RGBl. I, 210; 12 HOCH 60.

101. In numerous laws legalizing infringement of vested rights or confiscation of property, an ominous clause reads as follows: "No compensation is granted for damages incurred through measures taken on the basis of this law." For the year 1933, alone, PÖRZSCH-HEFFTER, op. cit. *supra* note 1, at 268, lists 17 laws with this clause. See also decision of the Reichsgericht of October 22, 1934, in 145 Entscheidungen in Zivilsachen 369; (1935) JURISTISCHE WOCHENSCHRIFT 597. In rare instances the public authorities grant compensation in equity for damages incurred in connection with acts of the state or the public authorities, but such compensation is determined not by independent courts, but by the administration itself (see PÖRZSCH-HEFFTER op. cit. *supra*, at 268, 271). These frequent infractions of due process concerning restrictions of property rights or vested rights deprive the citizen completely of legal protection against arbitrariness of the administrative authorities.

102. Gesetz über das Beschlussverfahren in Rechtsangelegenheiten der evangelischen Kirche of June 26, 1935, RGBl. I, 774; 14 HOCH 488.

under instructions from the Minister, are final and binding upon all concerned. Likewise, the creation and functioning of various exceptional Courts, such as the People's Court for high treason and political crimes,¹⁰³ has concomitantly meant the virtual abandonment of the notion that every person is entitled to due process and equal protection of the laws in the determination of his rights of person and property. Only two of the five judges of the People's Court, for example, are legally trained, the majority of three being lay assessors appointed because "of special knowledge in the defense against subversive activities or being most intimately connected with the political trends of the nation." This definition is a convincing example of metaphorical vagueness in legislative terminology. These courts are in fact disguised revolutionary tribunals of the Star Chamber type, intended to influence public opinion by the severity of their punishments. Some of the fundamental principles of criminal procedure are abolished, such as the rights of the accused to choose counsel, to be granted preliminary examination, and to appeal. Selection of counsel is subject to the approval of the president of the court. Evidence offered by the defense can be refused.

Special courts,¹⁰⁴ created to take over specific tasks arising from the new organization of labor, the establishment of estates or guilds, and various other legislative measures, have interfered with the ordinary processes of administration of justice in still other ways. Although some of them, for example the boards for discharging insolvent farmers,¹⁰⁵ are qualified on grounds of special administrative technique, the majority were formed with the intention of substituting for the ordinary courts quasi-judicial agencies recruited from among faithful partisans of the regime who would be more accessible to political considerations. Thus, in Social Honor Courts of the guilds and of the Labor Front and

103. Gesetz zur Änderung von Vorschriften des Strafgesetzbuches und des Strafverfahrens of April 24, 1934, RGBl. I, 341; 7 *НОСНЕ* 168, art. III.

104. Without attempting to be exhaustive, we note the following special Courts which replace the jurisdiction of the ordinary courts: Military courts; party courts; courts for the press; Social Honor Courts for labor; Honor Courts of the Nutrition Guild; Special Courts of the Hereditary Farm law (two instances); Honor Courts for lawyers (two instances); Special Courts (*Sondergerichte*) for criminal matters; People's Courts (for high treason and attempts against the regime); Honor Courts of the Artisans Guild (two instances); Board for dissolution of entails (*Fideikommissgericht*), established at the Ministry of Justice; Hereditary Health Courts (of the Gesetz zur Verhütung erbkranken Nachwuchses of July 14, 1933, RGBl. I, 529; 3 *НОСНЕ* 633); Special Board established at the Prussian Supreme Administrative Courts for deciding controversies arising from the land requirements of the army (Gesetz über Landbeschaffung für Zwecke der Wehrmacht of March 29, 1935, RGBl. I, 467; 13 *НОСНЕ* 47); *Schutzbereichsämter* (*Schutzbereichsgesetz* of January 24, 1935, (RGBl. I, 499; 12 *НОСНЕ* 131). See also, for judicial decisions withdrawn by the Ministry from the ordinary courts, the laws quoted in notes 100 and 102, *supra*.

105. Gesetz zur Regelung der landwirtschaftlichen Schuldverhältnisse of June 1, 1933, RGBl. I, 331, 3 *НОСНЕ* 533 §§ 4 and 5.

in various other types of vocational boards, preeminence is given to members of the profession¹⁰⁶ who decide according to professional sentiment and national conscience rather than according to legal standards. Customary procedural guarantees are entirely neglected. Yet tribunals of the guilds which are empowered to decide whether or not a person shall be admitted to a guild have the power to inflict professional death upon the accused,¹⁰⁷ since membership in one of the integrated guilds is the indispensable condition for practising the profession. This network of special courts and boards strangely contradicts the National Socialist contention that the regime simplified and unified Germany's judicial organization.

Foremost among the special Courts rank the Party Tribunals, which officially came into existence by the law of December 1, 1933.¹⁰⁸ Comparatively little is known about their function and procedure. Originally intended for dealing with disciplinary offences of the Brown-Shirts, they developed more and more into a separate jurisdiction for party members at large. Their most important function is deciding upon exclusion from the party, which involves civil death for the person concerned. These courts, which are under the special control of the Deputy Leader of the party, not only enjoin party discipline but also extend their jurisdiction semi-officially over civil matters in which a party member is involved. The standards applied to judgments and decisions are wholly extra-legal, socially uncontrollable, and derived from the political order. The party also is privileged before the ordinary courts, particularly before the lower courts, in that party members wearing the party badge are in a better position. This is, of course, not expressed in the form of a statute, but it is an almost unavoidable consequence arising from the

106. See e.g. Social Honor Courts of the Gesetz zur Ordnung der nationalen Arbeit of January 20, 1934, RGBl. I, 45; 6 *Нормы* 251 §§ 35-55; 1 *Verordnung über den vorläufigen Aufbau des deutschen Handwerks* of June 11, 1934, RGBl. I, 493; 8 *Нормы* at 196 §§ 59-91; *Schriftleitergesetz* of March 4, 1933, RGBl. I, 713; 4 *Нормы* 530 § 27 and regulation of procedure (*Verfahrensordnung*) of January 18, 1934, RGBl. I, 40; 6 *Нормы* 403. See also Hubernagel, in FRANK, *op. cit. supra* note 3, at 1425 et seq.

107. The technical term (see *Schriftleitergesetz* § 31) is "to strike off the professional roll." In addition, the Minister of Enlightenment and Propaganda may eliminate any member of the press guild even without judicial decision of the Honor Court, "if he thinks it expedient for reasons of the public welfare." (§ 35). This specimen of legalized arbitrariness easily explains why the regimentation of the press succeeded.

108. Gesetz zur Sicherung der Einheit von Partei und Staat of December 1, 1933, RGBl. I, 1016; 5 *Нормы* at 60. The ominous "U Schla" ("Untersuchungs- und Schlichtungsausschuss"), a special court of the party of the purest Star Chamber type, and completely removed from any outside control, is perhaps the most dreaded tribunal in German history. See the report in the N. Y. Times, Nov. 15, 1935, at 1, which noted that the mayor of Berlin was ousted from the party because he had bought in a Jewish department store. The matter came to the notice of authorities by the bank clerk handling the checks in pursuance of his professional duties.

absence of popular control over judicial administration. The privileged position of party members and party sympathizers is further shown by the administration of mercy¹⁰⁹ through the government. Partisans of the regime benefit most from the Government's power to pardon, to stay proceedings, and to grant amnesties, while the law is applied without mercy against enemies of the regime.

We have already noticed that political dictatorship is incompatible with judicial review of statutes and even ordinances.¹¹⁰ The courts maintain that legislative and executive acts of a political nature ("actes de gouvernement") undertaken for the sake of political expediency, are beyond judicial control.¹¹¹ This applies especially to the measures of the political police.¹¹² Protective custody in concentration camps, confiscation of property, prohibition of newspapers and other products of the printing press, may not be challenged before the ordinary courts. What lawyer or judge would be foolhardy enough to protest against the illegality of an act of the political police, since the Prussian Supreme Administrative Court maintains that protective custody, which means confinement for an indefinite time without trial or even indictment, is not amenable to judicial control.

Denial of due process and of equal protection reached its climax in

109. Verordnung des Reichspräsidenten über die Gewährung von Straffreiheit of March 21, 1933, RGBl. I, 134; 1 HOCHÉ 208, which granted amnesty for all acts committed "during the fight for the national revival". The Gesetz über Gewährung von Straffreiheit of August 7, 1934, RGBl. I, 769; 9 HOCHÉ 153 also granted amnesty, inter alia, for acts committed "in exaggerated zeal during the fight for National Socialist thought" (§ 3 nr. 3).

110. See *supra* p. 788.

111. Decision of April 24, 1934, 144 Entscheidungen des Reichsgerichts in Zivilsachen, 253; H. Schwabe, in (1934) JURISTISCHE WOCHENSCHRIFT 1616. Judicial review of acts of the state under § 839 of the Civil Code, which makes public officials liable for tort was also specifically excluded. Party officials are, of course, identified with public officials. Thus their acts are wholly exempt from redress by the courts.

112. The problem was widely discussed at the beginning of the regime when the breach with the traditions of the rule of law seemed too obvious to permit of silent acquiescence by jurisprudence and courts. See 32 SCHLEGELBERGER, *op. cit. supra* note 4, at 26; W. Hoche, in (1933) DEUTSCHE JURISTEN-ZEITUNG 1490. See also the decisions in 33 SCHLEGELBERGER at 470. According to an important decision of the Prussian Supreme Administrative Court of May 2, 1935 (1935) JURISTISCHE WOCHENSCHRIFT 2398, the Secret Political Police ("Gestapo") is given the standing of a political body and, as such becomes wholly exempt from due process as established by the Prussian Polizeiverwaltungsgesetz. The latter law provided for the application of the rule of law to all acts of the police. Only a right of "complaint" ("Aufsichtsbeschwerde") is given to the accused, but decision thereon is rendered by the Chief of the Political Police, namely the Prussian Prime Minister, from whose judgment no appeal lies. The existing practice was legalized by a Prussian law of February 12, 1936 by which the State Secret Police became a self-contained system of Justice. The law defines the "Gestapo" as an independent branch of public administration which is specifically empowered to give orders to the provincial governors. No check on its activities exists, except by that of the "Führer," himself, or the Prussian Prime Minister.

the famous blood-purge of June 30, 1934. Here we are concerned only with the juridical implications of those well-known events. Participants in the alleged plot, and alleged participants, were executed without any process, not to speak of due process. If the reports are true, in many cases they were not even informed about the indictment. No court acted, but the "Führer" alone. Taking the responsibility for the action, Herr Hitler later on justified it as "an act of self-defense of the state."¹¹³ As a revolutionary incident, the "liquidation" of political enemies would transcend juridical explanation. The government, however, went so far as to create a legal justification for its purely political action. The law of July 3, 1934, concerning measures of self-defence of the state, states in its single article.¹¹⁴

"The measures taken on June 30, July 1 and 2, in order to suppress treasonable attacks, are declared legal."

The statute is a unique example of an indemnity act emanating from the same person who sought indemnification. Herr Hitler himself, in the Reichstag speech of July 13, declared:

"In this hour, I was responsible for the fate of the German nation and thereby the Supreme Law-Lord (Höchster Gerichtsherr) of the German people."

This retroactive legislation and justification is more interesting for the lawyer than the executions themselves. It means that the "Führer" and his group are beyond the rule of law, *legibus solutus* in the proper sense of the term. One of the leading jurists of the regime, Dr. Freisler, admitted that the action had no basis in written law,¹¹⁵ and the crown jurist of the Third Reich, Herr Carl Schmitt, qualified the act as one of "genuine jurisdiction not subject to justice but supreme justice in itself. . . . Law is no longer an objective norm but a spontaneous emanation of the 'Führer's' will."¹¹⁶ Positive law is valid only so far as it corresponds with the political intentions of one man. Stripped of its metaphors, which make little sense to the unbeliever, this assertion is tantamount to a blunt denial of the separation of powers and the rule of law.¹¹⁷ Both are submerged in political power, which another jurist of the regime calls "Unity of Command."¹¹⁸

113. In his speech in the Reichstag of July 13, 1934.

114. Gesetz über Massnahmen der Staatsnotwehr of July 3, 1934, RGBl. I, 529; 9 HOCH 64.

115. In 32 SCHLEGELBERGER op. cit. *supra* note 4, at 495.

116. Carl Schmitt, *Der Führer Schützt das Recht* (1934) DEUTSCHE JURISTEN-ZEITUNG 947.

117. No better legal definition of arbitrary despotism could be found in history. Says Montesquieu, in 2 SPIRIT OF THE LAWS (1750) c. 1: "In despotic government, one man alone, without law and without rule, determines everything by his will and by his whims."

118. Huber, in (1934) DEUTSCHE JURISTEN-ZEITUNG 950.

The legal concepts of National Socialism, illustrated by the *ex post facto* acts of June 30, 1935, constituted a prelude to a general application of justice without law in criminal matters. The principle has hitherto been universally accepted as the "Magna Charta" of criminal justice among civilized nations, that no act of an individual may validly be punished unless it had been explicitly established as an offence or crime by a statute enacted prior to the performance of the act. The maxim "Nulla poena sine lege" was accepted in Germany, prior to the Third Reich, just as elsewhere. This involves, of course, the prohibition of retroactive legislation. Furthermore, the rule involves the principle that no act is punishable unless a definite law declares it as punishable, legal analogy being insufficient as a basis for judicial conviction.¹¹⁹

National Socialism boldly discarded this fundamental principle of justice. By a law of June 28, 1935,¹²⁰ the judges were empowered to punish an act as a crime or offence without a previous specific statute making it punishable. It is sufficient if a similar or analogous statute can be applied. Legalized arbitrariness was carried even further by another provision of the same law, to the effect that in determining an act as punishable it is sufficient if, in the opinion of the court, the moral precepts of the racial conscience of an "average man" demand punishment. Thus an entirely new notion of "equity" in criminal matters, as we might describe this momentous departure from universal legal ethics, is introduced into German criminal law. Any act performed in good faith and without awareness that it might constitute a violation of what is vaguely called "healthy national conscience," may afterwards be prosecuted as an offence or crime. The judge may sentence without being bound by any legal limitations, acting only on the authority of his "racial conscience." In this way, the entire process of German legal history is reversed, since juridical technique, from the very beginning, attempted, for the sake of the security of the accused, to exclude the arbitrariness of the judge and to establish well-defined patterns of criminal behavior as objects for punishment.

It would be misleading to assume that the destruction of the rule of law by political legislation in the Third Reich was accepted by National

119. Strafgesetzbuch für das deutsche Reich of May 15, 1871, § 2; WEIMAR CONST. Art. 116. See also Germany's classic commentary on criminal law by REINHARD FRANK, DAS STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH (18th ed. Tübingen, 1931) 20; GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS (Berlin, 1933) 547 et seq.

120. Gesetz zur Änderung des Strafgesetzbuches of June 28, 1935, RGBL. I, 839; 14 HOCH 190, art. 1: "Any act is punishable which is declared punishable by the law or which deserves punishment according to the principles of any criminal statute or according to the healthy sentiment of the people. If no specific statute can be applied to the act directly, the act is punishable on the basis of the statute whose principle can be applied most fittingly to the act." See also McIlwain, *supra* note 80, at 187, for the comments on the new law by the Minister of the Reich, H. Frank.

Socialist jurisprudence without misgiving.¹²¹ On the contrary, at least the older generation of lawyers trained and still entangled in "liberal" concept of the "Rechtsstaat,"¹²² were keenly alive to the fact that any civilized community can thrive only if some minimum requirements as to the conduct of the state towards its citizens are recognized. The needs for predictability and stability of legal relations are deeply implanted in the German conscience. During a century of bitter fighting, the guarantees of the rule of law were wrested from monarchical absolutism. Without exception, every school of jurisprudence since the early 19th Century has contributed its share to the materialization of the idea of the rule of law. The names of the most eminent among German jurists, from Rotteck and Welcker, from Gneist and Bähr, to Laband, Anschütz, and Triepel, were intimately connected with the ultimate triumph of the principles of the "Rechtsstaat." National Socialist jurisprudence has taken great pains not to be blamed for discarding a principle which is a cherished part of legal tradition, and scarcely any other problem was more debated than the departure from the rule of law.¹²³ In order to bridge the evident gulf between the legal postulate and the contradictory practice, National Socialism resorted to a tried-out technique of adroitly applying a new construction to an old term. As law under National Socialism is a purely political conception intended for the promotion of the interests of the state or the community, any norms enacted by the political authorities are "right" in the sense of "just." It is naked positivism without regard to the actual content of the law, in spite of invocations of superpositivistic sources, from which the norms allegedly emanate. This identification of justice and positive law is perhaps less an identification of "right" and "might", as it appears at first sight,¹²⁴ and more a blunt denial of the individual claim to calcula-

121. For example, Carl Schmitt, once one of the prominent constitutional lawyers of the republic and now ranking foremost among the legal defenders of the regime, admits with some naivete (in FRANK, *op. cit. supra* note 3, at 4): "It is obvious that there is no state which confesses openly that it is an 'unjust' state and therefore every state desires to be a state under the rule of law." But he concludes the article quoted with the statement (at 9): "By the declarations of eminent National Socialist trustees of law ('Rechtswahrer') it is made clear that there is legal security also in the National Socialist state, that the laws of the state are valid forever, ('unverbrüchlich') that judges are independent, that an extensive protection by the law exists." See also Schmitt in (1934) JURISTISCHE WOCHENSCHRIFT 713; G. KRAUSS AND O. VON SCHWEINICHEN, DISPUTATION ÜBER DEN RECHTSSTAAT (Hamburg, 1935).

122. KOELLREUTTER: DER NATIONALE RECHTSSTAAT (1932); ALLGEMEINE STAATSLEHRE (1933) 108 et seq., and *passim*; DEUTSCHES VERFASSUNGSRECHT (1935) 11 et seq. See also the remarkably courageous article by Helfritz, *Rechtsstaat und nationalsozialistischer Staat* (1934) DEUTSCHE JURISTEN-ZEITUNG 426.

123. HANS GERBER, STAATSRRECHTLICHE GRUNDLINIEN DES NEUEN REICHS (1933); HANS LANGE, VOM GESETZSTAAT ZUM RECHTSSTAAT (1934). See, also, *supra* notes 121, 122.

124. The attempt of National Socialist constitutional lawyers to justify this situation by

bility of legal relations, which is the ultimate goal of any positive order of law in a community.

VII

National Socialism through its most prominent spokesman, the "Führer" himself, claims that it has come to stay, at least for a thousand years, as the final form of German history. Neither this sanguine optimism, nor the assertion of the millennial values of the regime, are measurable by scientific standards. It is however, only fair to say that three years of a regime which pretends to reconstruct German life from top to bottom do not furnish a sufficient basis for final evaluation. At any rate, some provisional estimates may not be premature.

History reveals that revolutionary movements show the greatest efficiency in celerity and weight in the enthusiasm of the start. Encountering the obstacles of tradition and habits, the movement slackens. Perhaps no other part of social life is less accessible to violent and sudden change than civil or common law, which formalizes the daily habits of the people. On the other hand, the political form of the community may comparatively easily be overthrown. It would be tantamount to a refutation of historical experience, as well as of German mores, if National Socialism ultimately succeeded in reversing German law and jurisprudence. By tradition and disposition, German legal habits are based on rationality, formalism, and technicality. It may be that National Socialist legal values will be at least temporarily accepted, perhaps in view of the exaggerated rigidity of the former positivism, perhaps also in view of the amazing pliability of human nature under continued mental pressure. Undeniably the regime is masterly in utilizing psychological techniques. Very often theology has proved to be stronger than religion. But the prediction seems permissible that such a rationally created system of values will scarcely find a permanent foothold in the nation. The racial myth and its implications are not of organical growth; they are artificially invented and politically superimposed. Certainly a new set of legal values might originate from the creative forces of the national conscience, but an artifice such as the crude romanticism of the racial philosophy cannot turn back the hands of the clock. There is so far no indication that the new legal values will conquer German jurisprudence. On the contrary, even the most revolutionary examples of National Socialist legislation, such as the Hereditary Farms Law, or the law against professional criminals, were almost immediately conquered by the traditional juridical technique.¹²⁵

the subtle distinction between a state governed by laws and a state ruled by a "leader" is rather obvious legalistic sophistry. See Walz in (1933) *DEUTSCHE JURISTEN-ZEITUNG* 1338.

125. The output of jurisprudence and decisions caused by the new laws was indeed

With due reserve, therefore, we may say that National Socialist legal concepts are only an incident in German legal history. Perhaps a necessary and justified incident, since excessive formalism and technicality needs at times a tonic in the form of a dynamic and even "unjust" law. In due course, Germany's legal structure is likely to return to a more congenial substance and shape, incorporating—as is usual in revolutions—such elements of the National Socialist experiment which correspond to the national disposition. In spite of or because of its rationalism, National Socialist legal philosophy is nothing more than an unspirited relapse into romanticism, not the first one and probably not the last one in a nation whose unbalanced nature vacillates between the extremes.

stupendous. See 32 SCHLEGELBERGER, *op. cit. supra* note 4, at 65, 507, 760; 33 *id.* at 55, 325, 758. Secretary of State R. Freisler protested even the "exaggerated" caution and consideration of the Reichsgericht in applying customary standards of due process to the treatment of professional criminals, especially concerning castration and sterilization.