The Legal Order of National Socialism[1]

By Otto Kirchheimer

It is one of the strongest contentions of the National Socialist legal system that it has finally closed the gap which, under the liberal era, had separated the provinces of law and morality.[2] Henceforth, the legal and the moral order are one and the same. What is the reality against which we have to measure this contention? The National Socialist legal order substitutes racial homogeneity for equality, and therefore abandons the conception of human beings equipped with similar capacities and equally capable of bearing legal rights and duties. It was easy for the Nazis to make fun of this conception. Under the conditions of our advanced industrial society, it usually did not offer a profitable tool for the adjustment of differences which frequently represented claims of social groups and not of mere individuals. But our legal heaven does not consist exclusively of group claims and counter claims. There exist also parallel relations among individuals and between the individual and the state. Indeed the subjection of individual and government alike to the same rules of the game is one of the happiest and not unintentional consequences of the liberal emphasis on general notions, with its quest for equality between the contending parties. Under the veil of the community ideology, the system of general legal conceptions equally applicable to all cases falls.[3] With it falls the beneficial fiction of a government bound by law to the same rules as the individual contesting its commands. Now the individual is checked by two forces, the official social grouping and the government, whose commands are not subject to discussion and who are organized so that their jurisdictional disputes cannot be exploited by the individual. The individual is subjected to the law of his professional group as well as to the impetuous command of the state. For the run of his daily task the government relinquishes him to the paternal care of the group, but does not hesitate to make use of its own coercive machinery when the latter's persuasive and dis-

[1] Public lecture given in Columbia University in December 1941.

[2] H. Frank, *Rechtsgrundlegung des Nationalsozialistichen Führerstaates*, Munich 1938, p. 11.

[3] Cf. G. A. Walz, *Artgleichheit gegen Gleichartigkeit*, Hamburg 1938, p. 19.

ciplinary means of professional, racial, and intellectual co-ordination and discrimination have been of no avail. The group's police power is in itself no creation of the National Socialist regime. But before, the power of the professional and trade associations was limited by the individual's chance to stand aloof from them and was further subjected to the rule of the civil law interpreted by the civil courts. With the access to power of National Socialism the common legal bond of a generally applicable civil law disappeared more and more, and at the same time the professional organizations lost their voluntary character. The labor organization, economic groups, the handicraft and peasant organizations became compulsory organizations. By the same token the National Socialist system dispensed with an outside body to whose authority a group member could appeal when faced with an inequitable group decision.[4]

The authority of the group bureaucracy in industry, trade and the professions, representing the most powerful interests or combinations of interests, is steadily increasing with the number of executive tasks relinquished to them by the state bureaucracy.[5] For this reason the conventional notions of property and expropriations are in need of redefinition. What profit an individual is able to draw from his real property, trade or ownership of means of production, depends mainly on his status within his professional group and on the general economic policy of the government. It is the group that determines the quota of available raw material and with its authoritative advice guides the labor authorities in deciding the vital question as to the labor force to which an individual entrepreneur should be entitled.[6] Should his property lose its economic value in consequence of such decisions of the group bureaucracy, it is once more the organs of the group and not the courts that will decide whether and

[4]Even in cases involving the coercive power of an organization as much affected with public interest as that of the social insurance doctors, the civil courts have shown the utmost reluctance to examine the orders of the group leadership which deprive a member of his livelihood. Cf. German Supreme Court, April 26, 1940, *Entscheidungen des Reichsgerichts in Zivilsachen*, 164, pp. 15, 32; German Supreme Court, December 21, 1937, *Zeitschrift der Akademie für Deutsches Recht*, 1938, p. 131, with comment by E. R. Huber; L. Kattenstroh, "Rechtscharakter und Nachprüfbarkeit von Anordnungen der Wirtschaftsgruppen," in *Deutsches Recht*, 1939, p. 676.

[5]The most recent shifts in the distribution of functions between state bureaucracy and group bureaucracy have been discussed by A. Dresbach, "Amter und Kammern, Bemerkungen über die staatliche Wirtschaftsverwaltung," in *Die Wirtschaftskurve*, 1941, No. 3, p. 193.

[6]Cf. "Auskämmungskommission," in *Frankfurter Zeitung*, May 18, 1941, Nos. 250-251, p. 7. Interestingly enough in this commission where members of the military and the state bureaucracy, of the bureaucracy of the groups and the chambers of commerce are always present, representatives of the Labor Front are called upon only irregularly.

to what amount and in what form indemnity may be granted.[7] They also will decide whether his exclusion from the rank of the producers shall be permanent or transitory, whether he should be allowed some trade privileges or should become a rentier fed on a more or less liberal allowance, to be paid by his more fortunate competitors, or whether, as in the handicraft organization, he should simply be thrown into the ranks of the working class.[8] The logic of economic concentration has never worked more smoothly than when the ideology of the community deprived the weaker group member of the right to appeal to an outside body which would be prepared to maintain the intra-group balance. In the same vein the separation of the legal title to property from the enterpreneurial function has been legally stabilized by the new joint-stock company legislation. The minority stockholder has lost the last vestiges of legally enforcible influence on the administration of industrial enterprise, regardless of whoever may actually be in control, the old majority interests or new managerial elements. If the newspapers and court decisions report at length instances of legal skirmishes between minority stockholders and the controlling group of an enterprise, this may serve the welcome aim of humanizing the world of corporate giants, but the decisions on the scant amount of information to be thrown open to stockholders do not affect the security of tenure assured to the controlling group and the complete economic domination it may exercise.

In the realm of agriculture, the government has gone as far as to sanction the redefinition of property relations brought about by the activity of the official groupings, which are more tightly knit in this field than in any other.[9] In the hereditary farm legislation it has created a powerful tool for the preservation of an agricultural aristocracy and middle-class throughout the whole country. The creation and the security of tenure of a class of well-to-do peasants and landowners was of such great concern to the government that it took pains to create a strict legal order of succession in favor of the oldest or, as the local custom may be, the youngest son of the family, pushing the other children into the ranks of the proletariat. The decisions

[7]Cf. F. Wieacker, "Die Enteignung," in *Deutsches Verwaltungsrecht*, Munich 1937, p. 749. The practice of the estate courts in indemnity cases is discussed by L. Gebhard and H. Merkel, *Das Recht der landwirtschaftlichen Marktordnung*, Munich 1937, and by P. Giesecke, "Entschädigungspflicht bei marktordnenden Massnahmen," in *Festschrift für Justus Hedemann*, Jena 1938, p. 368.

[8]We do not have figures on the depletion of these groups as a result of the war combing-out measures. As regards the pre-war figures cf. *Der Vierjahresplan*, 1939, p. 1029.

[9]Cf. the remarks of A. Dresbach, *op. cit.*, p. 196.

of the special hereditary farm courts make it abundantly clear that undivided preservation of substantial agricultural units in the same family takes precedence over considerations of proven ability.[10] The legislation on the so-called dissolution of entailed property, which enables the Junkers to take cover under the status of hereditary farmers, follows exactly the same pattern. When the present occupant of the entailed estate is in good standing with the authorities and the undivided preservation of his property fits into the Food Estate's agricultural program, he will become a "peasant."[11]

This legislation was introduced without delay in the territories regained from Poland.[12] While the great landowners thus get preferential treatment, the inverse process may be observed with regard to the internal settlement and colonization policy.[13] Under the Third Reich the internal settlement policy, which theoretically at least would have corresponded so well to the blood and soil ideology, receded more and more into the background. Agriculture now takes on the color of a large scale industry; small units vanish, mechanization advances, cheap labor is furnished by the government, products are standardized and their sale monopolized by the Food Estate bureaucracy that fixes the prices in a bargaining process with the other powers of the realm.

In the case of the hereditary farmer, the government has taken care to lay down binding legal rules of succession in the interest of conserving a reliable rural upper class and in order to produce a maximum amount of staple food. In all other cases the new statute on wills of July 31, 1938 left fairly intact the right of the individual to dispose of his worldly goods.[14] It only strengthened the position of the family of the testator and gave government and family the legal weapons to harass the churches in case they might be beneficiaries and to nullify all dispositions in which an absent minded testator might have shown some affection for a Jew or other enemy of the community.[15] This freedom to testate would be a problematical one and would not hinder the breaking-up of big industrial and rural estates if the legal succession were subject to a heavy tax

[10]Supreme Hereditary Farm Court, May 30, 1939, *Entscheidungen des Reichserbhofgerichts*, 6, p. 295; December 20, 1939, 7, p. 237, and January 30, 1940, 7, p. 256.

[11]Statute of July 6, 1938, art. 31, I, *Reichsgesetzblatt*, 1938, I, p. 825, Decree of March 20, 1939, *Reichsgesetzblatt*, 1939, I, p. 509.

[12]Decree of March 18, 1941, *Reichsgesetzblatt*, 1941, I, p. 154.

[13]*Wirtschaft und Statistik*, 1941, p. 285.

[14]*Reichsgesetzblatt*, 1941, I, p. 973.

[15]Cf. A. Roth, "Zum Art. 48, 2 des Testamentgesetzes," in *Deutsches Recht*, 1941, p. 166, and G. Boehmer, "Die guten Sitten im Zeichen nationalsozialistischer Familienpflicht," in *Zeitschrift der Akademie für Deutsches Recht*, 1941, p. 73; German Supreme Court, September 17, 1940, and September 19, 1940, *ibid.*, pp. 84-85.

burden as is now the case in England and the United States. But the German inheritance tax as established in 1925 was already comparatively mild, and it was further modified in 1934 in the same direction by granting more generous exemptions to smaller fortunes and large families and total exemption for the succession into a hereditary farm. Inheritance tax rates for children do not exceed 15% in the highest bracket. That the inheritance tax is meaningless in terms of the German tax system may be seen from the fact that out of 23 billion marks total revenue collected in 1939, only 104 millions—that is to say, not even one half of one per cent—was derived from inheritance taxes.[16] Thus, of the two pillars which characterize the legal order of the liberal era, private property in the means of production and the freedom of contract, property, even if heavily mortgaged to the political machine, has managed to survive. But what about contracts? Is it still justifiable to say, as is officially done in Germany,[17] that the liberty of contract together with private property, competition and the continuance of free private trade associations form the irreplaceable fundamentals of the racial community? This characteristic utterance itself gives a clue to the answer. The right to combine freely into trade associations is, under prevailing German conditions, synonymous with the existence of powerful cartels and combines, which exercise public power either directly or under the thin disguise of official chambers and groups. Liberty of contract and government-sponsored monopoly are incompatible. The effect of this state of affairs was to reduce to a minimum the sphere in which free contracts are still concluded. We witness an acceleration of the long drawn-out process by which general norms and conditions are substituted for individual contracts. The conditions of business relations between producers in different stages of the process of production, or between producers and agents of distribution, are either covered in advance by a general agreement between partners of approximately equal economic strength or are forced by the more powerful party on its economically weaker partner. Only where this unilateral dictate threatened to become too disastrous in its possible consequences, did the government take the supervision of these dictated norms into its own hands. Under the Third Reich the pseudo-contractual relations shaped by such unilateral dictates are steadily increasing. As cartels acquire official titles as authorities for distribution, their clients can do

[16] *Wirtschaft und Statistik*, 1941, p. 235. It should be borne in mind that there is only a Reich Inheritance Tax in Germany.

[17] C. H. Nipperdey, "Das System des bürgerlichen Rechts," in *Zur Erneurung des Bürgerlichen Rechts*, Munich 1938, p. 99, and Hans Frank, *Rechtsgrundlagen des Nationalsozialistischen Führerstaates*, Munich 1938, p. 21.

nothing but acquiesce in the general conditions laid down by them. Criticism and suggestions of academic writers notwithstanding, the general norms and conditions incessantly replace liberty of contract and make it meaningless.[18] But whereas the government took only an intermittent interest in the conditions under which so-called free contracts were concluded, it did not hesitate to interfere more and more with the stages of execution of individual contracts. At first it limited its interference by refusing the creditor its help in executing a judgment against a small debtor. Later it went further and extended to every reliable racial comrade the help of the judge in getting wholly or partially rid of the debts he had contracted during the "pseudo-prosperity" period or the previous depression.[19] The war decrees generously widened the frame of this legislation. Liquidation of most of the small creditor-debtor relations, whether they concern rents, mortgages, doctor's or furniture bills, was entrusted to the administrative skill of a judge, who was expected to alleviate the little man's burden wherever feasible.[20] Contract, therefore, is steadily disappearing from the legal horizon of Mr. Everyman. The workers, the small businessmen and the small farmers as well as the consumers in general have no bargaining power, as they are prohibited from combining for such purposes. The local representatives of the Party, of the Labor Front or of the National Socialist welfare organizations, may find it convenient to recommend a change in a particular working, wage, distribution or price arrangement. They may or may not be able to carry their point against the industry and industry's bureaucratic spokesmen. But these battles are fought and compromises are reached over the head of Mr. Everyman. For him contract has been replaced by the peculiar compound of private command and administrative order. This compound, which joins in the same individual undertaking the interest of private property and of the administration, the private advantage,

[18]The German literature in this field is increasing. We note only the scholarly discussion by L. Raiser, *Recht der Allgemeinen Geschäftsbedingungen*, Hamburg 1935; the characteristically vague reform proposals by H. Brandt, "Die allgemeinen Geschäftsbedingungen und das sogenannte dispositive Recht," in *Deutsche Rechtswissenschaft*, 5 (1940), p. 76; and the cocksure attitude of the respresentative of industry, C. van Erkelens, "Lieferbedingungen der Industrie im Kampf der Meinungen," in *Zeitschrift der Akademie für Deutsches Recht*, 1940, p. 367. More interesting than the theoretical discussion is the attitude of the bureaucracy which favors more and more the policy to make standardized contracts universally binding and applicable. Cf. C. Ritter, "Legalisierung der allgemeinen deutschen Spediteurbedingungen," in *Deutsches Recht*, 1940, p. 779, and especially K. Nehring, "Das neue deutsche Speditionsrecht," in *Hanseatische Rechts-und Gerichtszeitung*, 1940, 23 (1940), Abt. A, pp. 75, 80.

[19]Statute of August 17, 1938, *Reichsgesetzblatt*, 1938, 1, p. 1033. Cf. H. Vogel, "Die Rechtsprechung zur Schuldenbereinigung," in *Deutsches Recht*, 1940, p. 1343.

[20]Decree of September 3, 1940, *Reichsgesetzblatt*, 1940, 1, p. 1209. Cf. Breithaupt, "Die Neufassung des Gesetzes über eine Bereinigung alter Schulden," in *Deutsches Recht*, 1940, p. 1602.

and the public purpose, is one of the first characteristics of the new legal order. Taken in this sense, the National Socialist legal doctrine rightly claims to have overcome the traditional gulf between private and public law.[21] Free agreement and contract are restricted to the province of the mighty. Their contract, in turn, has lost its private character, since their working agreements are the basis of the new constitutional order.

We may venture to define the present conditions of property in Germany as follows: the ranks of the proprietary class, controlling the means of production, are steadily shrinking through such well-known devices as concentration, Aryanization, combing-out legislation, quota restrictions and closing-down "on account of war emergency."[21a] Those proprietary elements that belong to the rentier group suffer from the administration's control over investment conditions and rents. They suffer also from the general ability to gain a foothold in the process of production, which, with the administration's active furtherance, has been monopolized by a few powerful individuals and combines. New property titles are accumulating in the hands of the newcomers from the ranks of party, army and bureaucracy. Yet, members of these groups do not always find it advisable to acquire formal titles to property but find it sufficient for their purpose to reap the fruit of administrative control. The freedom to transfer property titles and the lack of onerous inheritance taxes are intended to perpetuate the property structure as it is developing from this process of concentration.

The German lawyer has acquired the habit of separating rather sharply the rules which dominate family life from the realm of contractual property relations. In fact, it is one of the most frequent reproaches against the old civil code that its general rules placed business relations on the same footing as the order of the family; the National Socialist legislation takes pride in having radically separated the issues of blood and money.[22] It contends that in its new racial and family law it has prepared a basis for the development of the racial community. This new legislation excels in two characteristics: the thoroughgoing extirpation of the Jews and, above all, its outspoken populationist traits. We do not have to dwell here upon the anti-Semitic legislation, as it constitutes the most widely known element of the German legislative and administrative endeavors. The

[21] E. R. Huber, "Neue Grundlagen des Hoheitlichen Rechts," in *Grundfragen der neuen Rechtswissenschaft*, 1935, pp. 143, 151.

[21a] Even the German legal literature has to recognize this process. Cf. J. W. Hedemann, *Deutsches Wirtschaftsrecht*, Berlin 1939, p. 209: "The distribution of property becomes more critical or assumes at least other forms."

[22] F. Schlegelberger, *Abschied vom B. G. B.*, Munich 1937, p. 9.

populationist traits of the new family legislation are visible everywhere. They are evident in the social and welfare policy, with marriage loans, substantial tax reductions and exemptions and special family allowances. They are evident in the manifold attempts to improve the position of illegitimate mothers and children. That such adjustment measures are due not to moral or humanitarian but to purely populationist motives, a recent edict shows very distinctly. This edict orders the school authorities to see to it that illegitimate children do not feel at a disadvantage psychologically, provided that racially and biologically they are not objectionable.[23] The exemption of parents from punishment under anti-procurement statutes in case they allow their children to have pre-marital sexual intercourse under their own roof has been forced on a recalcitrant higher judiciary, mainly by the propaganda of the influential weekly of the SS. Blackshirts, *Das Schwarze Korps*.[24] In spite of earlier judicial utterances to the contrary, an employer is no longer allowed to dismiss female workers on grounds of pregnancy, regardless of whether the expectant mother is or is not married.[25] This relaxation of conventional moral conceptions, noticeable everywhere in Germany, was accompanied by open attacks on some of the most basic doctrines of the established churches, calculated to keep down to a minimum any ecclesiastical influence on the social life of the family. Since millions of Germans today live a barracks life rather than a family life, the State found it easy to encourage *ad hoc* sexual relations. Together with this encouragement went the official endeavors to minimize legal as well as social consequences of illegitimacy. Such moves could not fail to influence deeply the sex mores of the German population and especially of German youth, who would, of course, be more immediately affected. This change in turn was bound to leave a heavy imprint on the institution of marriage, even if not a single word of the family law, as contained in the old civil code, had been changed. But, in fact, the government subjected the family law to complete revision in 1938.[26]

While this policy generally transforms every woman into an official agent of procreation, marriage in particular is regarded as a state institution to which the main responsibility for raising the

[23]Edict of the Ministry of Education of May 29, 1940, reprinted in *Deutsche Justiz*, 102 (1940), p. 1143.

[24]German Supreme Court, June 29, 1937, and the new line of thought in the decision of the Cottbus *Schöffengericht* of February 7, 1937, in *Juristische Wochenschrift*, 1937, pp. 2386-2389.

[25]German Supreme Labor Court, August 21, 1937, *Juristische Wochenschrift*, 1937, p. 3057.

[26]Statute of July 6, 1938, *Reichsgesetzblatt*, 1938, 1, p. 807.

birthrate has been transferred. Marriage becomes a business relationship, the success or failure of which is measured in terms of the production of soldiers and future mothers who live up to the physical and intellectual standards of the Third Reich. The Hereditary Health Courts are instituted to uphold such standards at the admission into marriage and during its continuance; divorce and annulment procedures perform the same tasks at its dissolution. Under the limited divorce facilities granted by the earlier German legislation, the parties who wanted to separate usually had to reach collusive agreement which then was registered by the court under one of the existing legal categories. The new statute of 1938 has opened a wide field for controversial divorce proceedings by abandoning the principle of guilt. It has introduced a number of situations in which circumstances outside the control of the partners are grounds for a divorce. Foremost is the sterility of either partner, but contagious diseases, mental defects or a three-year separation are also sufficient grounds for issuance of a divorce decree.[27] Whatever progressive characteristics this statute may have had, they have been completely submerged in the course of its interpretation by the courts. Not in all cases may the decisions rendered be as crude and morally shocking as the following one handed down by the German Supreme Court. A woman had lost her fertility through an operation necessitated by an abdominal cavity pregnancy. The husband's request for a divorce was granted and a plea of duress was denied to the defendant mainly on the grounds that the state had an active interest in the plaintiff's getting children from a new marriage.[28] But such decisions set precedents, and it is no wonder that the chief reasoning in divorce cases gravitates more and more around the rights and duties deriving from the fulfillment, partial fulfillment, or impossibility of fulfillment of maternal functions.[29] On the one hand, egotistical or immoral motivations of a partner are encouraged when they happen to coincide with the government's desire to raise the birthrate.[30] But on the other hand, the same official considerations may lead to the maintenance of an entirely meaningless marriage as a reward for services a mother has rendered to the state by the production of a numerous progeny.[31] It is too early to surmise all the consequences of this policy. The rise in the rate of divorce and annulment proceedings, which began immediately after 1933, may have been par-

[27] *Loc. cit.*, Art. 50-55.
[28] German Supreme Court, September 5, 1940, *Deutsches Recht*, 1940, p. 2001.
[29] German Supreme Court, June 29, 1940, *ibid.*, p. 1567; July 8, 1940, *ibid.*, p. 1627.
[30] German Supreme Court, May 7, 1940, *ibid.*, p. 1362.
[31] German Supreme Court, March 6, 1940, *ibid.*, p. 1050; March 20, 1940, *ibid.*, p. 1049; May 22, 1940, *ibid.*, p. 1363.

tially caused during the first years by the desire of many to avail themselves of generous facilities for getting rid of Jewish partners.[32] Under the new law of 1938, the divorce rate, as was to be expected, jumped up. In 1939, out of every 10,000 marriages 38 were terminated by divorce as against 29 in 1932 and 32 in 1936.[33] That the institution of marriage does not stand to win much by its instrumentalization, which makes it the most convenient breeding agency, seems a fairly safe conclusion.

Before we enter into a discussion of the ways and methods peculiar to the coercive machinery of the Third Reich, let us have a moment's look at the personnel which runs this machine and at the principles according to which it is run. The personnel of the judicial bureaucracy, especially in the higher ranks, still consists overwhelmingly of the very persons who held office under, and to the detriment of, the Weimar Republic. As late as the beginning of 1941, a lifelong member of the bureaucracy of the Ministry of Justice, Dr. Schlegelberger, was appointed Acting Minister of Justice.

Yet, under the traditional conceptions, the judiciary is only a concomitant to an established body of laws which it adapts to the special needs of the community. The procedural formulas which it develops provide a certain amount of predictability.[34] The contending individuals and groups, though they never are sure which of the many possible interpretations of their behavior will prevail in a given case, usually could confine their actions within such limits that these could not be said to contradict openly the wording of the law and the procedural requirements of the established courts and agencies. The business of individualization carried on by the courts contained a certain amount of rationality, insofar as their decisions tried to satisfy as many as possible of the so-called legitimate interests of society.

The rationality which we can observe in the courts and agencies of the Third Reich is of quite a different nature. Rationality here does not mean that there are universally applicable rules the con-

[32] As late as 1939 an appeal court helped a writer to an annulment of his marriage, reasoning that only after the events of 1938 (vom Rath assassination and November pogroms) did the appellant get a clear perception of the Jewish question. Munich, Appeal Court, December 11, 1939, *ibid.*, p. 327.

[33] *Wirtschaft und Statistik*, 1941, p. 37, including some interesting comments showing how the rise of the birth rate has become the uppermost official consideration.

[34] *Vide* K. Loewenstein, "Law in the Third Reich," in *Yale Law Journal*, 45 (1936), pp. 779, 782, 814.

sequences of which could be calculated by those whom they affect.[35] Rationality here means only that the whole apparatus of law and law-enforcing is made exclusively serviceable to those who rule. Since no general notions prevail which could be referred to by the ruling and the ruled alike and which thus might restrict the arbitrariness of the administrative practice, the rules are being used to serve the specific purposes of those ruling. The legal system that results is rational for them only. This, then, is a strictly Technical Rationality which has as its main and uppermost concern the question: How can a given command be executed so as to have the maximum effect in the shortest possible time? In a recent speech Reich Minister Hans Frank, President of the Academy of German Law and Governor General of Poland, quite correctly compared this kind of rationality to the working of a good machine. "A smoothly functioning and technically superior administration is to a chaotic despotism what precision machinery is to an unreliable makeshift instrument producing only chance results."[36] Frank wants the industrial methods of taylorism introduced into the realm of statecraft in order to get the most precise answer to the question as to how the will of the political leadership can be put into practical effect as speedily as possible. Such an attitude is not the wishful dream of a particular if highly placed individual. Technical rationality simply follows a pattern drawn by the organization of industry. There, it was not conceived as a method for production departments only. The now officially sponsored Dinta (Institute for Scientific Management and Rationalization of Work), when still owned by representatives of industry, was the first to introduce the same principle into the business of human relations.[37] Technical rationality, as dominant over all governmental organization, precludes the existence of a general body of law in which the rules do evolve but slowly. Under the new system, a legal rule can have only a purely provisional character; it must be possible to change a rule without notice, and, if necessary, retroactively. The Third Reich, with an unlimited legislative and decree power given the Führer and liberally delegated by him to his paladins, amply provides for such facilities. With this legislative omnipotence and latitude for delegations goes also an unlimited

[35] Cf. the opposite conclusions drawn by E. Fraenkel, *The Dual State*, New York 1941, who holds that the existence of a rational law is necessary for the existence of a monopoly-capitalist society, overestimating, however, the importance of some isolated judicial decisions of the earlier epoch. *Vide* my review of this excellent book in *Political Science Quarterly*, 56 (1941), p. 434.

[36] H. Frank, "Technik des Staates," in *Zeitschrift der Akademie für deutsches Recht*, 1941, p. 2f.

[37] As to the Dinta cf. F. L. Neumann, *Behemoth. The Structure and Practice of National Socialism*, New York 1942, p. 429.

willingness to abandon any pretense of logical coherence. Out of every individual situation the maximum of advantage must be drawn, even if the second step contradicts the premises under which the first was taken.[38] Moreover, technical rationality makes it necessary to search always for the shortest ways of transmission from the top to the bottom. That too has been taken care of. Once an agreement is reached by the mighty of the realm and promulgated under the Führer's authority, there is no intermediary organ which could venture to arrest or delay its execution. No court has the right to contest the constitutionality or legality of any legislative enactment. Whereas the judge is given a certain amount of leeway to examine the extent to which anterior legislation conforms to the National Socialist principles,[39] he is emphatically discouraged from making similar inquiries into any piece of Nazi legislation.[40] In short, the idea of technical rationality which underlies the new governmental organization actually finds its nearest approximation in a perfectly running, though complicated, piece of machinery. Nobody save the owners are entitled to question the meaningfulness of the services which the machine performs: the engineers who actually operate it have to content themselves with producing immediate reactions to the owners' changing commands. They may be ordered to proceed more rapidly or more slowly, they may be ordered to change some technical processes and to attain some variations in output. The purport of the results achieved lies beyond this kind of rationality, which is aimed only at the certainty that every order will produce an exactly calculable reaction.

In its judiciary the Third Reich has created an almost perfect tool for the realization of its orders. For reasons we have already explained before, the judiciary has lost much of its earlier importance as an agency for deciding differences between various groups and between individuals. The judicial statistics amply prove this thesis. With the above mentioned exception of matrimonial cases, the number of legal procedures shows a startling decline. Thus, for instance, the roles of those courts which had jurisdiction over civil disputes involving 500 RM or more show a decline from 319,000 cases in the prosperity year of 1929 to 112,000 in 1937.[41] That

[38]Cf., for instance, the Decree of March 27, 1941, *Reichsgesetzblatt*, 1941, 1, p. 177, which legalizes until December 31, 1942, the practice of Aryan successors to Jewish business concerns carrying on their premises the name of their Jewish predecessors side by side with their own.

[39]On National Socialist "equity" cf. K. Loewenstein, *op. cit.*, p. 804.

[40]German Supreme Court, June 17, 1940, *Zeitschrift der Akademie für Deutsches Recht*, 1940, p. 304.

[41]*Deutsche Justiz*, 100 (1938), p. 1140.

does not necessarily mean that the courts are going out of business. But they have thoroughly changed their character. From independent agencies of society, able to throw their weight with any of the contending social groups, they have turned into executive agencies of the government. They are employed with preference where a certain amount of individualization is desired. As such they clear up the debtor-creditor or producer-consumer relation, and as such they decide many of the issues which come up in the course of the racial legislation.

As the law, decree, or edict on whose authority the judge bases his decision can be changed without delay, an inopportune decision of his has only the effect that the legal rule will be immediately changed. In the realm of criminal law, the stake of the authority of the state is too important to allow an undesirable decision to go unchallenged. The war legislation has, therefore, introduced the possibility of changing every individual criminal judgment in the desired direction. A Special Section of the *Reichsgericht* is directed to take up the case again and revise the decision[42] in the direction desired by the Führer as indicated by the *Oberreichsanwalt*. The first case to be carried before the Special Section was as follows: A man known for a long time to be a homosexual had profited from the blackout to force a younger man to become the object of his desires. A Special Court had sentenced the offender to hard labor. There are no appeals by either the defendant or prosecutor from sentences imposed by the Special Courts. Nevertheless, under the new law, the case was reopened before the Special Section of the *Reichsgericht* at the request of the *Oberreichsanwalt* and terminated, as desired, in a death sentence.[43]

A decision which is disadvantageous to government interests, though rarely apt to be forthcoming, is frequently of neither legal nor social consequence for the establishment of a precedent for future cases arising in similar circumstances. In addition the judge, like any other administrative official, is accountable for the contents of his decision. Where the relentless pressure of the party through channels like the *Schwarze Korps* should prove of no avail, the new organizational statutes provide ample facilities for dis-

[42]Decree of September 16, 1939, *Reichsgesetzblatt*, 1939, I, p. 1841. Cf. W. Tegtmeyer, "Der ausserordentliche Einspruch," in *Juristische Wochenschrift*, 1939, p. 2060, and my article "Criminal Law in National Socialist Germany" in this periodical, VIII, pp. 444ff.

[43]German Supreme Court (Special Section), December 6, 1939, *Zeitschrift der Akademie für deutsches Recht*, 1940, p. 48, with comment by Klee.

charging or transferring a recalcitrant judge.[44] The judiciary is entitled to have and to express opinions of its own only in those cases where it does not act as a kind of common executive organ to the combined ruling classes. There are some boundary spheres where the distribution of power between the mighty of the realm has not been finally settled. The judiciary, for instance, may trespass into the sphere of the party and try with varying success to apply the general rules of civil and criminal responsibility to acts of party officials.[45] The party, of course, does not stand by passively in such jurisdictional conflicts, and presses forward vigorous attacks of its own against the bureaucracy. Right now it uses the party-dominated police as a cover to wrest from the judicial bureaucracy the complete control of the criminal police and, therewith, the final direction of criminal prosecution.[46] Generally speaking, however, the industrialists and landowners, party and army, as well as the corresponding bureaucracies, jealously see to it that nobody trespasses into the provinces carved out for each by common agreement; the tendency is, therefore, towards departmentalization, towards disappearance of a unified system of law behind innumerable steadily increasing special competences. If technical rationality is nevertheless to be preserved, two conditions have to be fulfilled. First, every official agency must grant recognition to an official act of other public agencies. Second, each of these groups must be equipped with a penal power of its own in order to execute swift reprisals against malefactors in its own sphere. The party has established its own jurisdiction over its members and over its special subdivisions like the SS;[47] the army achieved the reestablishment of

[44]Judges are subject to the provisions of the Civil Service Statute. *Vide* A. Brand, *Das Deutsche Beamtengesetz*, Berlin 1937, p. 462. Regarding the possibilities of transferring judges to other jobs, cf. the Decree of September 1, 1939, *Reichsgesetzblatt*, 1939, 1, p. 1658, and especially Art. 4,3 of the "Decree on the Organization of a Supreme Administrative Court" of April 3, 1941, *ibid.*, 1941, 1, p. 201. For an interesting definition of the meaning of judicial independence under National Socialism, cf. Hans Frank, "Reichsverwaltungsgericht," in *Deutsches Recht*, 1941, p. 1169.

[45]A. Lingg, *Die Verwaltung der NSDAP*, Berlin, 1940, p. 257. The right of the courts to pass on this question is upheld by S. Grundmann, "Die richterliche Nachprüfung von politischen Führungsakten," in *Zeitschrift für die gesamten Staatswissenschaften*, 100 (1940), pp. 511ff., and by the German Supreme Court, February 17, 1939, *Deutsches Recht*, 1939, p. 1785.

[46]W. Best, *Die Deutsche Polizei*, Darmstadt 1940, p. 28, against which E. R. Huber is polemizing in his review, in *Zeitschrift für die gesamten Staatswissenschaften*, 101 (1941), p. 723, where he gives the legal and administrative arguments of the higher bureaucracy in its fight to restrict Party influence.

[47]One of the first statutes of the Third Reich, dated April 28, 1933, *Reichsgesetzblatt*, 1933, 1, p. 230, enables the Führer to institute special disciplinary and penal courts for the SA and SS. Cf. also the Decree of October 17, 1939, *ibid.*, 1939, 1, p. 2107. That the Party, even under actual war conditions, does not relinquish its grip upon its special formations becomes evident from the Decree of April 17, 1940, *ibid.*, 1940, 1, p. 659, which takes the jurisdiction over members of SS formations in the armed forces away from the court martials and transfers it to the SS Court in Munich.

its own court martials as one of the first rewards of the new order;[48] the industrial groups and chambers as well as the official organizations of the Food Estate can levy fines of their own; the Ministries of Finance and of Economics and the Price Commissioner also have been equipped with extensive powers to fine.[49] The latest newcomer in this list is the compulsory Labor Service. By decree of Nov. 17, 1940,[50] extensive penal powers, which for some time it had been exercising "illegally,"[51] were confirmed to it. This list of exemptions and penal privileges is not given merely for curiosity's sake. With the one exception of the penal privileges granted to the bureaucracy of the Ministries of Finance and Economics which allows powerful individuals to buy off their penalties without adverse publicity and thus make the business man prefer this kind of administrative jurisdiction to the general one of the criminal courts, this development appears as a death-warrant to individual rights.

The separation of functions between the employer and the coercive machinery of the state was one of the main guarantees of individual liberty in a society where an ever diminishing number of people controlled the means of production. This separation is swept aside when the organizations—Party, Army, Food Estate, Labor Service—on whose attitude depends the social existence of the individual, are able to bolster up their commands with a, so to speak, "company-owned" disciplinary and penal power. It is at this point that the inroads of the National Socialist machine into the daily life of the average citizen appear the most striking and that absence of an outside agency willing and able to sift the individual's grievances will bring the greatest moral and material hardship.

The repressive activities of this joint enterprise, officially called the Racial Community, are exercised by the already mentioned special agencies, by the so-called People's Court, the Special Courts, the regular criminal courts, and last but by no means least, by the party-dominated police. The police has a special and comprehensive jurisdiction: it may kill or imprison for an indeterminate time persons whom it thinks to be inimical to the people's welfare, without taking the trouble of handing them over to other agencies[52] for examination of the merits of the case. It may

[48]Statute of May 12, 1933, *ibid.*, 1933, 1, p. 264.

[49]Cf. K. Siegert, *Wirtschaftsstrafrecht*, Berlin 1939, and the Decree of April 6, 1940, *Reichsgesetzblatt*. 1940, 1, p. 610, regulating the procedure in regard to contraventions in the sphere of distribution.

[50]*Ibid.*, p. 1513.

[51]Cf. my article, *loc cit.*, p. 453, note 3.

[52]W. Best, "Die politische Polizei des Dritten Reiches," in *Deutsches Verwaltungsrecht*, Munich 1937, p. 417.

likewise apply the same technique after the other agencies have relinquished an accused person, either after he has served his time or has been acquitted. The latter does not happen too frequently—the rate of acquittals in the regular criminal courts has gone down from 13% in 1932 to 7% in the second quarter of 1940.[53] The procedures followed by the agencies of repression correspond in the highest degree to the already formulated principles of technical rationality. To attain the results desired by the government with the maximum speed and with the greatest possible degree of accuracy, criminal procedure, that part of the law that was the most formalized hitherto, now had to become its most formless one.[54] Careful preparation was sacrificed to speed, all possibilities for effective defense were abolished,[55] the functions of the judge, traditionally the central figure in a German criminal trial, completely receded behind those of the prosecutor, and, finally, the opportunities for an appeal were severely curtailed and often completely abolished in capital cases. The same technical calculation dominates the methods applied to the different categories of offenders. The substantive penal law has been equipped with a network of conceptions which with every succeeding legislative enactment become broader and less definite.[56] Within a framework sufficiently broad to include easily every supposed wrongdoer, the government has unlimited latitude to be lenient or brutal. It has shown the utmost leniency against the small fry in general and against every criminal in its own ranks. A most generous succession of general amnesties and general *nolle prosequi,* repeated fairly regularly every second year, was turned out to the benefit of the host of wrongdoers of little consequence, granting absolution of nearly every crime committed by overzealous party members.[57] Directed likewise by the desire to enrol as large as possible a number of racial comrades into the regular labor process, the government passed on November 17, 1939, and complemented in 1941, some enlightened rules which allow criminals, after a certain period, to

[53] *Wirtschaft und Statistik,* 1941, p. 247.

[54] Cf. the somewhat melancholic reflections of G. Dahm, "Richtermacht und Gerichtsverfassung," in *Zeitschrift für die gesamten Staatswissenschaften,* 101 (1941), p. 287.

[55] As regards the limitations set to the lawyer's representation of his client's interest, cf. the much publicized Groepke case, *Deutsches Recht,* 1941, p. 918.

[56] Cf. R. Freisler, "Rechtswahrer-Gedanken zum Kriegsjahr 1940," in *Deutsche Justiz,* 103 (1941), pp. 6, 17. Cf. also the Decree of September 7, 1939, *Reichsgesetzblatt,* 1939, 1, p. 1683, forbidding listening to foreign broadcasts, which penalizes the spreading of news which might weaken the power of resistance of the German people, with the comments in *Deutsches Recht,* 102 (1940), p. 1415.

[57] As regards the earlier amnesties cf. my article, *loc. cit.,* p. 457. A new amnesty has been granted at the beginning of the war by a decree of September 4, 1939, *Reichsgesetzblatt,* 1939, 1, p. 1753. No figures have been published, however, as to the effects of this amnesty.

pass as not previously convicted.[58] The same viewpoint has dominated for a long time the National Socialist attitude towards juvenile crime, where reformation long remained the official slogan. Still, in 1940, thanks to the combined efforts of the youth and the labor authorities, who were eager not to lose a single part of their most precious capital, labor power, fines and short term imprisonment for juvenile criminals were replaced by a special light and short form of detention.[59]

However, long before the beginning of the war this policy was overshadowed by the increasing brutality which became the rule against all those regarded as criminal enemies of the people at large. The number of enemies who did not find mercy continued to increase. In the beginning these comprised mainly habitual and professional criminals who were taken into preventive custody, as well as traitors who were believed to have menaced or to threaten to menace the internal and external security of the Reich. Soon this category of enemies of the people was extended to cover the new crime of "race defilement" and was applied to the ever increasing body of sex offenders, which seems to have arisen from the general brutalization of sexual morality. Now, after two years of war, the list of enemies of the people's community who have to be extirpated to protect the home front, comprises those perpetrating almost every type of criminal act if committed by means of violence[60] or as an exploitation of the state of war. It comprises, too, violations of the War Economy Decree of September 4, 1939.[61] In this connection the Führer claimed that in this war, for the first time in history, the principle by which the merchant made his gain, whereas the soldier died,[62] had lost its validity. As if to confirm this, the German newspapers are at present announcing the first death sentences for usury. But since Sec. 25,4 of the above-mentioned War Economy Decree

[58] *Reichsgesetzblatt*, 1939, 1, p. 139, and the announcement in the *Frankfurter Zeitung*, September 12, 1941. Cf. also M. Wachinger, "Die Wirkungen der Tilgung eines Strafvermerks," in *Deutsche Justiz*, 102 (1940), p. 863.

[59] Decree of October 4, 1940, *Reichsgesetzblatt*, 1940, 1, p. 1366. Cf. also Rietzsch, "Neuordnung des Jugendstrafrechts," in *Deutsches Recht*, 1940, p. 698. Contrast the Decree of October 4, 1939, *Reichsgesetzblatt*, 1939, 1, p. 2000, which tends to deprive juveniles in the more serious cases of the privileges granted in the special juvenile jurisdictions.

[60] For an extensive interpretation of the term "weapon to cut and thrust" as including the use of the bare fist, cf. Stuttgart Special Court, February 1, 1940, *Deutsches Recht*, 1940, p. 441.

[61] *Reichsgesetzblatt*, 1939, 1, p. 1609.

[62] Cf. "Bekanntmachungen über die Bekämpfung der Preistreiberei," Executive Decree of January 11, 1941, *Deutsche Justiz*, 103 (1941), pp. 110, 112, which contains detailed instructions as to the procedure to be followed in the case of offenders of the War Economy Decrees.

exempts cartel prices, it is obvious that the main war profiteers are in no actual danger of punishment. But as a means of popular oppression and general deterrence rather than of monopoly control the death penalty has become fairly widespread during the last two years. There are no accurate figures available. The published statistics, even if accepted as accurate, cover only the number of offenders convicted through the channels of the special and regular law courts, which probably means that they embrace only a small percentage of criminals liable to death penalty. For the sake of comparison, however, those figures are important in that they indicate a sharp increase in the use of the death penalty. In the following figures the number of convictions for murder is compared with that of death sentences in general. In 1937 the quarterly average of all convictions for murder, attempts at or participation in murder, was 45, as against a total of death sentences for all crimes, including murder, of 14; the quarterly average for 1939 begins to show an inverse ratio between murder convictions and death sentences, 34 murders as against 39 death sentences, and the known figures for the second quarter of 1940 show only 14 sentenced murderers, but 80 death sentences.[63] The death penalty thus covers a steadily widening range of so-called criminal behavior.

Relatively late German writers and officials have realized that the complete subjection of criminal law and procedure to the idea of technical rationality is bound to shatter completely the specific protective functions inherent in traditional law; and the hope is being expressed that it might be possible, after the war, to reconcile what we called Technical Rationality with somewhat enlarged protective devices and guarantees.[64] Yet, it stands to reason that a system of law which seeks to operate by technical rationality and which at the same time attempts partial retention of liberal guarantees—two mutually exclusive and incompatible objectives since they derive from different social systems—must soon exhaust itself. The social processes that have taken place under National Socialism provide the explanation of the changes which the legal system has undergone. The concentration of economic power which characterizes the social and political development of the Nazi regime crystallizes in the tendency towards preserving the institution of private property both in industrial and agricultural production, whilst abolishing the correlative to private property, the freedom of contract. In the con-

[63] *Wirtschaft und Statistik*, 1939, p. 553; 1940, p. 557, and 1941, p. 257.
[64] G. Dahm, *op. cit.*, and Hans Frank, "Die Aufgaben der Strafrechtserneuerung," in *Zeitschrift der Akademie für Deutsches Recht*, 1941, p. 25.

tract's place the administrative sanction now has become the *alter ego* of property itself. Equality of law and freedom of contract tended to secure protection to everyone who had acquired legal title to property. The new system of administrative property relations, while abolishing the general rules and uniform procedures, shifts the decision on what property titles may be validated to the monopoly-dominated group.

Within every power grouping, the position of those in control is enhanced through subordinating the individual member of the group to the omnipotence of the group hierarchy that acquires a relatively autonomous jurisdiction of its own. Thus, in the very structure of society the rights and privileges granted the individual in his own right are abolished. Intra-group conflicts in which the individual may fight for the preservation of his claims and legal titles become an arena of mere force collisions and the economically atomized individual becomes a mere object of domination by monopolistic group and estate machines. Simultaneously, legality, no longer serving as an armor to protect the individual, becomes null and void and dissolves into technical rationality which now is the foundation of the structure of legal institutions, of the legal apparatus and of the machine that applies them, the judiciary.

But then, no rights of the individual have to be preserved and maintained in spheres outside economic and political life either. Legal regulation of human relations, whether it be in the sphere of contractual relations, family life or criminal infractions becomes subject to demands of everyday necessities of the totalitarian regime without mediation or indirect transmission. Necessities of securing sufficient labor supply preside as directly over legislation on matrimony as they rule over criminal procedure and substantive criminal law. Where there is a labor shortage which must be overcome as soon as possible, no ethical considerations will influence the decision as to the status of marriage or divorce, and no stipulations of the criminal code will prevent the government from refraining to prosecute or from pardoning numerous offenders. At the same time, special categories of offenders will be outlawed and victimized to serve as mementos of the defenselessness of the atomized individual and of the omnipotence of the groups and machines that run the state with the assistance of a technicalized apparatus of law and law-enforcing.

The system of technical rationality as the foundation of law and legal practice has superseded any system for preservation of indi-

vidual rights and thus has definitely made law and legal practice an instrument of ruthless domination and oppression in the interest of those who control the main economic and political levers of social power. Never has the process of alienation between law and morality gone so far as in the society which allegedly has perfected the integration of those very conceptions.