

## **CONSTITUTION AND RELIGIOSITY OF/IN THE CONSTITUTIONAL ORDER OF THE NATIONAL SOCIALIST EMPIRE**

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### **Abstract**

In this article, we will analyse the National Socialist regime as a politico-constitutional reality. We will do it from a new way of looking at politico-constitutional phenomena, interpreting them as registered in a religious grounding. It seeks to show that the National Socialist regime was characterised by having identified the political community – a racially interpreted and raised community to the Absolute – with an empirical historic personality regarded as eminently communitarian. It suggests that the regime constitutes a *sui generis* case, either in a context of regimes conventionally classified as "right-wing authoritarian and/or totalitarian" or in a larger context of contemporary politics.

### **Keywords**

National-socialism; III.<sup>o</sup> Reich; Constitution; Religion; Christianity

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## CONSTITUTION AND RELIGIOSITY OF/IN THE CONSTITUTIONAL ORDER OF THE NATIONAL SOCIALIST EMPIRE<sup>1</sup>

**Pedro Velez**

In this work, the constitutional structuring of the National Socialist regime is examined. The aim is to show that the National Socialist regime was characterised by having identified the political community, racially interpreted and elevated to the Absolute, with an empirical historic personality regarded as eminently communitarian; and that in it and because of it, it constitutes itself as a *sui generis* constitutional case on the map of contemporary politics.

### **Analytical perspectives**

We analyse the constitutional structuring of the National Socialist from a new way of looking at the politico-constitutional, which does not only stick to forms or institutions; nor is it limited to probing a favourable or eventual "determining" socio-political occasion or "capturing" of a "founding" axiological materiality of low intensity ("too human", so to speak) – constitutional moments that are certainly "real" and important.

When interpreting constitutional forms, we will take as grand "working hypothesis" the idea of how the "forms of public affairs"<sup>2</sup> express and lead themselves back to choices of a "Supreme Good" or "Sovereign Good". We will assume that the Supreme Good can be determined in terms of different intensities and through evaluating "axiophanic" comprehensiveness; therefore, it may or may not be interpreted as an Absolute, as a single, exclusive, unlimited, unconditional source of all normativity, values and axiological normative authority, and it may eventually be erected to a way of life or even a universal civilizational order.

In light of a certain "theoretical (re)vision", we will look at the politico-constitutional as a "place" of religiosity, *res sacrae*,<sup>3</sup> instantiations or determinations of the "religious" or the "sacred".

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<sup>2</sup> We appropriated here a concept of Aristotelian affiliation whose meaning (the constitution as a fundamental form of the political community) we did not refrain from incorporating in this study – Maria Lúcia Amaral, *A Forma da República: Uma introdução ao estudo do direito constitucional*, Reprint, 1<sup>st</sup> ed., Coimbra Editora, Coimbra, 2012.

<sup>3</sup> To use an expression dear to the known constitutionalist and administrative jurist Ernst Forsthoff – vide Ernst Forsthoff, *Res sacrae*, *Archiv des öffentlichen Rechts*, Vol. 31, 1940, pp. 209-254.



We will also consider Carl Schmitt's intuition, according to which modern constitutional politics has to be understood as a place of "mixed things" (*"Res mixtae"*), as decision ("negotiation") on the borders between real modern politics and "traditional religion".<sup>4</sup>

We adopted such an analytical framework not only because it seems the most suitable method to capture the "deep structure" of the constitutional phenomena in general but also, and mainly, because it looks at the so-called "right-wing non-democratic regimes" of the inter-war period in a way that we suggest will increase the analytical capacity available to clarify them.

We will see, then, the faces of the politico-constitutional National Socialist, trying to capture the core of its specific constitutional structuring.

### **Favourable occasion**

In 1918, the German Reich is a recent Nation-State and still *in fieri*. In that same year, the *Kaiserreich* is re-founded in liberal-democratic moulds (the Weimar Republic).<sup>5</sup>

In the inter-war period, German society registers a complex of crises – economic, financial and political – which were "producing" a latent and diffuse existential crisis. In such context, a mass movement was emerging, crystallising and conveying a vision of a "new order" fully built from the idea of the "national community of the German People" – the National Socialist Movement.<sup>6</sup>

From 1930, under the auspices of President von Hindenburg, attempts to overcome Weimar impasses are tested; attempts between the commissarial dictatorship, repetition (non-identical) of the order of the Second Empire and construction of a new "Nationalist" State based on the presidential institution, army and public administration.<sup>7</sup>

With the failure of such attempts, part of the governing class associated with the executive and with a nationalist ideology would move the National Socialist Movement to power. The "National Socialist Revolution" was beginning. A "new State to support the Voegelin State" was also emerging. In January 1933, the Reich's President, Marshall Paul

<sup>4</sup> Vide Carl Schmitt, *Political Theology II, The Myth of the Closure of any Political Theology*, Polity, Cambridge, 2008 (1970). [See also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT Press, Cambridge, Massachusetts/London, England, 1985, work originally published in 1922 and reissued with a new preface in 1934]. For the analytical framework presented in this text, see Pedro Velez, *Constituição e Transcendência: os casos dos regimes comunitários do entre-guerras*, Dissertação de Doutorado, FDUNL, 2013; cf. also Pedro Velez, *Sobre a ordem constitucional no/do fascismo italiano*, em *Janus.net, e-journal of international relations*, Vol. 7, No. 2, November, 2016 – April, 2017, pp. 70 ff.

<sup>5</sup> On the background underlying the emergence of the National Socialist Constitution vide: Folko Arends and Gerhard Kümmel, *Germany: From Double Crisis to National Socialism*, in *Conditions of Democracy in Europe, 1919–39*, cit., 184 to 212; Hans Mommsen, *The Rise and Fall of Weimar Democracy*, University of North Carolina Press, Chapel Hill/London, 1995; Eric D. Weitz, *Weimar Germany, Promise and Tragedy*, Princeton University Press, Princeton/Oxford, 2007.

<sup>6</sup> For this context see Carl Schmitt, *State Ethics and the Pluralist State* (1930), in Arthur J. Jacobson, Bernhard Schlink (ed.), *Weimar: A Jurisprudence of Crisis*, University of California Press, Berkeley/Los Angeles/London, 2000, pp. 300-312.

<sup>7</sup> We refer to the attempts by governments of a presidential initiative (Brüning, von Papen, von Schleicher) to rebuild the Weimar constitutional order based on presidential institutions. On this politico-constitutional period, see David Cumin, *Carl Schmitt: Biografie politique et intellectuelle*, Les Éditions du Cerf, Paris, 2005, pp. 93 ff.



von Hindenburg, following the constitutional forms, would appoint the leader of the National Socialist Movement, Adolf Hitler,<sup>8</sup> as chancellor of the empire.

## The "National Revolution"

The referred appointment would set a time for constitutional re-foundation;<sup>9</sup> a state of exception enabling deviations and emptyings in relation to the Weimar Constitution and, simultaneously, the crystallisation of a sovereign able to decide (and leave) it (to also mention here Carl Schmitt's *Constitutional Theory*, a contemporary and famously aspect "updated" by Giorgio Agamben).

On 21<sup>st</sup> March, 1933, due to the opening of the new Reichstag in Postdam, Adolf Hitler would announce the objectives of his government encapsulated in the "national recovery": "We want to restore the unity of spirit and will of the German nation. We want to preserve our ethnic personality, with all its inherent energies and values, as the eternal foundation of our life". On 23<sup>rd</sup> March 1933, a "German nation reconstruction programme" would descend again, aiming for the establishment of a "true national community" supported by "unity in the leadership of the Nation" (implying the "suppression of Marxism" and a general "elimination of opposition elements"). Incursions "on the philosophy of law" that took place on this occasion were extremely eloquent:

*The primary object of our legal organisation is to maintain the existence of the national community. Not the individual, but the whole nation must be the main concern of the law. The only possible basis of law can only be the existence of the Nation.*<sup>10</sup>

<sup>8</sup> In the legislative elections of September 1930, the National Socialist German Workers' Party (NSDAP) obtained 18.3% of votes (107 parliamentary seats). Its leader, Adolf Hitler, obtained 30% of votes in the first round and 37% in the second round of the presidential elections disputed in March-April 1932. In that year, in the legislative elections of July 1932, the movement became the largest parliamentary party (38% of votes and 230 seats in the Reichstag). Once the rise of Hitler to the governance was blocked and the dissolution of the Reichstag by von Hindenburg was decreed, new legislative elections would take place in November 1932. From the representative position conquered by them – 33.1% of votes and 196 seats – and even though this did not reflected an upward trajectory. The NSDAP would then be called to power.

<sup>9</sup> On the "reconstruction" of the politico-constitutional conducted by National Socialism, vide: W. Jellinek, *Le Droit Public de l'Allemagne en 1933*, in *Annuaire de l'Institut International de Droit public-1934*, 1934, pp. 43 and 76; and *Le Droit Public de l'Allemagne en 1934*, in *Annuaire de l'Institut International de Droit public-1935*, 1935, pp. 350-363; Carl Schmitt, *I caratteri essenziali dello Stato Nazionale Socialista*, in Oreste Ranelletti/Gaspere Ambrosini/Carl Schmitt, *Gli Stati europei a partito politico unico*, Panorama, Milano, 1936, pp. 17-52; and *State, movement, people: the triadic structure of the political unity (1933)*, English vers., in Carl Schmitt; Simona Draghici (Trans.), *State, movement, people: the triadic structure of the political unity (1933)*; *The question of legality (1950)*, Plutarch Press, Corvallis, OR., 2001, pp. 3 -52; Martin Broszat, *L'État hitlérien, L'origine et l'évolution des structures du troisième Reich*, Fayard, Paris, 1985; R. C. van Caenegem, *Uma Introdução Histórica ao Direito Constitucional Ocidental*, Portuguese vers., Fundação Calouste Gulbenkian, Lisboa, 2009, pp. 332 ff.; The main legal mechanisms that materialise the constitutional revolution described in this chapter can be seen in the volumes of 1934, 1935 and 1936 of the *Annuaire de l'Institut International de Droit Public*, pp. 76 ff., 364 ff., and 89 ff., respectively [entry "Allemagne"].

<sup>10</sup> Cesare Santoro, *Hitler's Germany as seen by a foreigner*, 3<sup>rd</sup> ed., English vers., Internationaler Verlag, Berlin, 1939, pp. 35 ff. Under Chancellor Hitler's proposal, the president of the Third Reich decreed the dissolution of the Reichstag from 1<sup>st</sup> February 1933, and established that the new elections would take place on 5<sup>th</sup> March 5 1933. A decree from 4<sup>th</sup> February for the "German people's protection" facilitated its preparation, allowing the suspension of newspapers and electoral meetings that were against the NSDAP. From the known "decree for the protection of people and the State" ("*Verordnung zum Schutz von Volk und Staat*"), emanated the presidential decree of 28<sup>th</sup> February 1933, under Article 48 of the Weimar Constitution, following the famous fire of the Reichstag, which anticipated a long-term state of emergency,



With the approval by the Reichstag of a decree of 24<sup>th</sup> March 1933 "for the elimination of the people and the Reich's misery" ("*Gesetz zur Behebung der Not von Volk und Reich*"), known as the "Enabling Act" or "Decree of Full Powers" (*Ermächtigungsgesetz*). With this, the government could enact decrees in the formal sense and modify the constitution, shying away from the institutional structure of the parliamentary government model.<sup>11</sup> The new constitutional position allowed the National Socialist leadership to make a series of constitutional changes. The new German leadership would end national state construction, through the "*gleichschaltung*" of organisations and the non-national socialist powers.

The *Bundesstaat* would quickly give place to the *Einheitsstaat*, with the elimination of federalism, of German states as state realities. The "harmonisation of the Reich" decree of 31<sup>st</sup> March 1933 and the decree of 7<sup>th</sup> April 1933 "on the Reich's Governors" (*Reichsstatthalter*) would centralise the Reich's politico-administrative form of organisation. The decree of 30<sup>th</sup> January 1934, called the "reconstruction of the Reich" – enacted by the National Socialist Reichstag – would deprive the federated German states of their power and start "administering them" (*ex vi* Article 3).<sup>12</sup> The decree of 14<sup>th</sup> February 1934 on the abolition of the Reichsrat would put an end to the existence of the second chamber. Decrees on the Reich's governors and the municipal government on 30<sup>th</sup> January 1935 would develop and complete such a line of constitutional development.

The "pluralist party State" (C. Schmitt) ended and the National Socialist German Workers' Party (NSDAP) was erected to the institutional headquarters of support and segregation of the political leadership. For the new governing class, it was the institutional basis for defence, development and dissemination of a new civil theology referred to as the German political community. A decree on the 14<sup>th</sup> July 1933 "on the prohibition of founding new parties" declared the NSDAP as the only existing political party in Germany (§1.º). The decree of 1<sup>st</sup> December 1933 on "the identity of the Party and State", in turn, placed the Party in the State. The National Socialist Party was, then, declared representative of the "Germanic State idea" and as "inseparably merged with the State" (§1.º/1), on behalf of the "public law corporation" (§1.º/2). This legal instrument also punished those who tried to organise other political parties or form a new political party. In addition, it would make provisions for the "Vicar"/"Delegate" of the party's leader, who would replace him in the current management of the party, as well as the chief of staff

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aimed, on its own terms, to protect the State against communist acts of violence that put it in danger, suspending fundamental rights such as: the right to personal freedom; not to be detained; freedom of speech, press, assembly, association; to the inviolability of correspondence and communications, property and home.

<sup>11</sup> Translating Hitler's "legal revolution" strategy, its preamble expressly stated that the law "met the requirements established for the emanation of legislation amending the Constitution". Such a normative act turned the government into a normal legislator: it provided, in Article 1, that "the laws could . . . be equally edited by the Government of the Third Reich" (laws could be "*Regierungsgesetze*"); the decrees edited by the Government should be promulgated by the Chancellor and published in the *Reichsgesetzblatt* (Article 3). After the emanation of this normative act, very few decrees were enacted by the Reichstag during the Third Reich – the Reichstag approved, namely, the renewal of the Decree of Full Powers, the Decree of Reconstruction of the Reich of January 1934, as well as the denominated Nuremberg Decrees of 1935. The Law of Full Powers also operated (*ex vi* Article 2) the transfer of Constitution amendment power to the Government, creating, however, preservation guarantees of certain institutions: decrees enacted by the government could not affect the Reichstag and Reichsrat's institutions as such, as well as the powers of the Reich's President. In the early days, there were those who, in the legal community, saw in such act a kind of "transitional constitution". The validity of such a legislative act would be successively confirmed and extended, as has been suggested and as will be seen later.

<sup>12</sup> However, a decree on 2<sup>nd</sup> February 2 passed on to the former federal states some sovereign rights to be exercised in the name of the Reich.



of the existing partisan paramilitary force (Assault Sections – AS) were members of the Reich's Government.<sup>13</sup> To ensure "the closest collaboration of the party services and SA with the public service", the members of the NSDAP "complex" were invested with "higher duties" not only in the face of its head (the Führer) but also, the "Nation-People (*Volk*)" and the "State" – §3.º/1.<sup>14</sup> Later, a decree of 26<sup>th</sup> January 1937 (*Beamtengesetz*) established that a person appointed to a position in the civil service should be "imbued with a National Socialist point of view"; in such a legal act, the NSDAP was defined "as spokesman of the will of the people", the "vital force behind the concept of the German State". With the "decree on the Reich's Flag", approved in the famous Nuremberg Congress, the emblem of the National Socialist Party erects the symbol of the political community; in the words of Carl Schmitt:

*[T]he German Reich now has only one flag – the flag of the National Socialist Movement – and this flag is not composed only of colour, but it also has a large, real symbol: the symbol of the swastika that evokes the people.*<sup>15</sup>

The labour world would also be reorganised into a community-based national State. The unions were abolished in May 1933 (by decree on 2<sup>nd</sup> May 1933). Companies were later "re-institutionalised" as business communities (*Betriebsgemeinschafts*) to increase the "business good and the common good of the People and the State", with the emanation of the decree of 20<sup>th</sup> January 1934 on "national organisation of labour".<sup>16</sup> The decree of 24<sup>th</sup> October 1934 created the "German Labour Front" (*Deutsche Arbeitsfront*), a unitary organisation of employers and workers that aimed at "forming a truly national and labour communion of all Germans", so that each one could have the "intellectual and physical conditions to be present in the Nation's economic life" (Article 2).<sup>17</sup>

The creation of "bodies" and professional councils<sup>18</sup> were also being drafted. However, it was clear that, in using the constant terms of the preamble of a decree of 22<sup>nd</sup> September 1933 "the establishment of professional groups is not, as a whole, the construction of a State in a State, not even next to it, but it is the State itself in its new form". The idea of a corporate senate (bringing together, especially, the rectors of the universities and the high clergy) in the National Socialist order, proposed by Wilhelm Frick (Minister of the Interior, 1933-1943), and that remembered the detested "pluralist" *Gran Consiglio del Fascism*, would explicitly be superseded.

<sup>13</sup> It would be up to the head of the NSDAP, the Führer, to decide on its statute (§1.º/2)

<sup>14</sup> The existence of a special jurisdiction of the party and the Assault Sections provided for the knowledge of cases related to the harm of such duties – §3.º/2.

<sup>15</sup> Cf. Carl Schmitt, *The constitution of Freedom* (1935), in Arthur J. Jacobson, Bernhard Schlink (Ed.), *Weimar A Jurisprudence of Crisis*, cit., p. 325.

<sup>16</sup> The business-community would be organised around a head, the owner of the company (typically), and his entourage of employees and workers. A board should work with the company heads, with the task of developing mutual confidence within the business community. The business regulation, the "internal law of the company", should serve "the good of the company and the national community". State employees – commissioners (*Treuhänder*) – would "tutor" the business-community.

<sup>17</sup> At the core of the Front, the famous *Kraft durch Freude* would work, responsible for the national-community *bildung* of the working masses, taking care of the organisation of its recreational time.

<sup>18</sup> Note that in the German Labour Front the internal framework of its members by professions was accepted (Article 5).





## "New modes and orders"

The political community would receive a specifically National Socialist ordination.

The political body was being rebuilt from the ideal of a national community based on race. The decree of 7<sup>th</sup> April 1933 on the reorganisation of the civil service, as well as the decrees of October 1933 on the professions (e.g., journalists and lawyers, on 4<sup>th</sup> and 7<sup>th</sup> October, respectively), incorporated a principle of German race exclusivity in the access to public service and such professions. Similarly, the decree of 14<sup>th</sup> July 1933 on people with hereditary diseases was introduced, which allowed elimination in reproduction processes.

With the emanation of the "decree on the Reich's citizens", one of the famous Nuremberg decrees of 15<sup>th</sup> September 1935 established a *destinguo* between two circles of citizenship, simultaneously and cumulatively meeting what was regarded as a national racial belonging and a demonstration demand of *pietas* in the face of the political community. In a general circle, rather than citizens, subjects would re-enter; according to § 1.<sup>o</sup> of the referred legal mechanism,

*"it is the State citizen (Staatsbürger) who belongs to the German Reich protection association and, because of this, is required in relation to it".*

A second and narrow circle expresses a proper belonging to the *civitas germanica* – in § 2.<sup>o</sup>:

*"it is only the Reich citizen, the national German, who has German blood or is related and proves by his conduct to have the intention and quality required to faithfully serve the people and the German Reich".* Declining a similar principle, the "decree for the protection of German blood and honour" – another Nuremberg decree, which evoked "the purity of German blood" as "the condition for the maintenance of the German people" and "an inflexible will to forever ensure the future of the German nation" prohibited "marriages between Jews and national Germans with German or related blood".<sup>19</sup>

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<sup>19</sup> According to information from Ernst Rudolf Huber, in 1941 the Great German Reich was articulated by distinguishing the following subjective and community legal positions: i) those with German blood as members of the people (*Volkszugehörige*), subjects of the State (*Staatsangehörige*) and the Reich's citizens (*Reichsbürger*), consisting on the Reich's "hard core"; ii) those with species-related blood, considered as members of the people, subjects of the State and Reich's citizens (*Vistula Veneti*, Masurians, e.g.); iii) those with species-related blood not integrated with the *Volksgemeinschaft*, but remaining as subjects of the German State and the Reich's citizens (national Polish and Danish groups in the territory of the former Reich); iv) those with species-related blood not accepted in the *Volksgemeinschaft*, but considered subjects of the German State (Walloons, Malmedy and Eupen); v) those with species-related blood who were only considered subjects of the German Reich (the Polish in the eastern territories); vi) those with species-related, considered blood subjects subordinated to the Reich – the case for the Czechs in the protectorate; vii) German blood subjects of a foreign State (are not citizens of the Reich; German national groups abroad);



On the other hand, political power was gradually transferred to the historical personality of Adolf Hitler, the *Führer* of the National Socialist Movement; a transference which also seems to have weighed a relatively spontaneous "bottom-up" movement of order construction, with the diffuse projection by the "German masses", in the figure of Adolf Hitler, of the *idem sentire de republica* and a monarchic sacral vision of power<sup>20</sup>. It is important to note, for example, the generalisation, from the bottom up, of the designation of "*mein Führer*", being suitable as a "political symbol" of something distinctly German.

In 1933 there was the understanding of the unborn new order "*Führerstaat*" as a personal order; an order "materialised" not in a rule or impersonal institution but in a concrete person.<sup>21</sup> In the "annihilating" purge of the SA leadership in 30<sup>th</sup> June 1934, which justified the acts that led to the "domestication" of the SA as acts of order, State self-defence acts, emerging from original authority, A. Hitler proclaimed himself "as Führer; the German people's supreme judge".<sup>22</sup>

Article 4 of the decree of 30<sup>th</sup> January 1934 concerning "the reconstruction of the Reich", approved unanimously by the Reichstag, had given the government the fullness of constituent power. Therefore, the "decree on the Head of State" of 1<sup>st</sup> August 1934, enacted the day before the death of Paul von Hindenburg, should come into force at the time of the death of the President (*vide* § 2 of the referred to decree), which effectively happened in 2<sup>nd</sup> August 1934. This established the transfer of functions and duties of the Reich's president to the "Führer and Chancellor of the Reich", Adolf Hitler. According to §1.º: "the old duties of the Reich's President go to the Führer and Chancellor of the Reich, Adolf Hitler". Due to Hitler's express order – by letter to the Reich's Minister of the Interior – the official title of the incumbent of the new "office" should precisely be "*Führer und Reichskanzler*"<sup>23</sup>. All civil servants, soldiers and hierarchs of the National Socialist Party must take an oath of personal loyalty to the *Führer und Reichskanzler* Adolf Hitler. From the emanation of such a decree, the designation of the National Socialist order as "*Führerstaat*" (or "*völkischer Führerstaat*") therefore "democratises itself". The concentration of power operated by this legal instrument has reached the limit where power begins to transcend formal legal rules, directly and immediately setting up its authority as *Grundnorm*. The legal order was increasingly being dominantly interpreted in terms of the idea of order emanating from the power structure and no longer in terms of the intra-systematic procedural validity of Weimar constitutional normativity, or in terms of a new unborn formal legality. The Minister of the Third Reich, Dr Frick, at a

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viii) members of "foreign" racial groups considered subjects of the State but not Reich citizens (Jews in the territory of the former Reich); ix) members of foreign racial groups that do not have the status as either subjects of the State or the Reich's citizens (Jews in the eastern territories and in Eupen and Malmedy). Cf. Ernst Rudolf Huber, *Form and Structure of the Reich (1941)*, in Arthur J. Jacobson, Bernhard Schlink (ed.), *Weimar A Jurisprudence of Crisis, cit.*, pp. 330-331.

<sup>20</sup> Ian Kershaw, *Le Mythe Hitler, Image et réalité sous le III Reich*, French vers., Flammarion, 2006.

<sup>21</sup> Horst Dreier, *Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer Heft 60*, Walter de Gruyter, Berlin, New York, 2001, pp. 48-49, especially note 190.

<sup>22</sup> However, such extraordinary actions would subsequently be normalised in formal terms by a decree "relative to national defence measures" of 3<sup>rd</sup> July 1934. This decree contained the following meaningful wordings: "the measures implemented on 30<sup>th</sup> June and 1<sup>st</sup> and 2<sup>nd</sup> July to suppress high treason attacks are legal as legitimate State defence". On this episode of the constitutional history of Third Reich and its meaning, *vide* Carl Schmitt, *Le Führer protège le droit. À propos du discours d'Adolf Hitler au Reichstag du 13 juillet 1934*, in *Cités*, No. 14, 2003, pp. 165-171.

<sup>23</sup> In the letter, Hitler also ordered a decree combining the functions of the Head of State and Chancellor to be submitted to a referendum.





press conference held on 9<sup>th</sup> January 1935, referring to Hitler, declared that: "all powers are concentrated in his person while he himself is only responsible before the nation". On 30<sup>th</sup> January 1936, it was written on the official *Völkischer Beobachter*:

*The Führer, wrote Wilhelm Stuckart, gathers in his hands all the rights and obligations of the Head of the Party, Chancellor and President of the Empire. But saying this is not enough; in fact, the Führer-und-Reichskanzler function goes far beyond the sphere of competence of the two former positions. The constitutional evolution turned Hitler into the People's supreme political leader, supreme head of the administration, the People's supreme court and supreme commander of the army. Legislative power exclusively belongs to him. The Führer und Reichskanzler is also legally, according to the practice of recent years that has created a customary law, the source of our law.*<sup>24</sup>

### **The National Socialist "constitution": the *Volksgemeinschaft* and the Führer as Absolutes**

From 1935, the constitutional challenge seemed to have received a definitive answer. "Attempts to constitutionally encode the National Socialist State" were definitely blocked by Hitler in such a period".<sup>25</sup> However, after that, Hitler would not refrain from making promises to the conservative national sectors regarding a future "legal formalisation of the politics". In his speech of 30<sup>th</sup> January 1937, he declared:

*"[a]nd finally the future task will be to seal for ever and eternally a Constitution, the real life of our people, as it was politically organised, and, thus, turn it into the imperishable fundamental law of all Germans".*<sup>26</sup>

Continuity with legality and formal constitutional Weimar legitimacy would never be interrupted. The validity of the Full Powers Act would be successively confirmed and extended by laws voted by the Reichstag on 30<sup>th</sup> January 1937 and 30<sup>th</sup> January 1939. On 10<sup>th</sup> May 1943, the "decree of powers delegation" was enacted, declaring the duration of the Führer as limitless.

The Weimar Constitution was never formally abolished – which would happen if a new constitution were enacted – but it was un-constitutionalised, losing its old and superlative formal force, and abrogated as principled order. In Third Reich Germany, a new constitutional order, directly and immediately material, was crystallised.<sup>27</sup>

<sup>24</sup> Jacques Maupas, *L'État National-Socialiste*, in *Sciences Politiques*, 53<sup>rd</sup> Year, No. 11, 1938, p. 516.

<sup>25</sup> Vide: Martin Broszat, *L'État hitlérien, L'origine et l'évolution des structures du troisième Reich*, cit., p. 19.

<sup>26</sup> Apud Marcel Cot, *La conception hitlérienne du Droit*, Bibliothèque de l'Institut de Droit comparé de Toulouse vol. IV, Duchemin, Paris, 1938, p. 247.

<sup>27</sup> At the end of the constitutional transformation process performed by National Socialism, the fragmentary linguistic utterances remaining from the Weimar text could, for example, be modified by government



In the descriptive and apologetic words of a coeval interpreter of the National Socialist constitutional order (Ernst Rudolf Huber):

*The new German Reich Constitution is not a constitution in the formal sense, as typical of the nineteenth century. The new Reich has no written constitutional declaration, but its non-written constitution exists in the Reich's basic political order... The advantage of such a non-written constitution over a formal constitution is that the basic principles do not become rigid, but remain in continuous, uninterrupted movement. They are not dead institutions; living principles determine the nature of the new constitutional order.*<sup>28</sup>

Following and strengthening the lines of force of the constitutional transformation processes with the production of a new language in a constitutional asking for theory and constitutional right, a new public juridical discourse articulated the "living principles" of the order. The new order was based on the principle of national community – that the *Volk/Volksgemeinschaft* symbols evoked – and, as an implication of this principle, on a principle of personal power embodied in the Führer (*Führerprinzip*).<sup>29</sup>

### ***Volk/Volksgemeinschaft***

According to the National Socialist constitutionalist Ernst Rudolf Huber:

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decree, the Reichstag or considered – by the government or the judiciary – incompatible with the National Socialist ideological system. On the "destiny" of the Weimar legal mechanism, vide Karl Loewenstein, *Dictatorship and the German Constitution: 1933-1937*, in *The University of Chicago Law Review*, Vol. 4, No. 4, 1937, pp. 545 ff. Certain legal acts (the decree of 24<sup>th</sup> March 1933, e.g.) would be recognised, officially and in the legal community, as fundamental due to the importance they obtained in the construction of the new material order of personal power – Michael Stolleis, *A History of Public Law in Germany 1914-1945*, English vers., Oxford University Press, Oxford, 2004, pp. 333-334.

<sup>28</sup> Ernst Rudolf Huber, *Constitution* (1937), English vers., in Arthur J. Jacobson, Bernhard Schlink (ed.), *Weimar A Jurisprudence of Crisis*, cit., p. 329. It has been argued that Hitler wanted the *in fieri* constitutional order to "organically" evolve, as in England, and nurtured a special aversion to lawyers and legal rules. Also Cf. Joseph Goebbels, *Journal 1943-1945*, Tallandier, Paris, 2005, p. 284, for a revealing testimony on the vision of the lawyers' National Socialist top leaders and their *forma mentis*. Regarding characters such as H. Frank (President of the Academy of German Law, from 1933 to 1945, and the Reich's Minister without portfolio, from 1939 to 1945), Thierack – President of the People's Court (1936) and the Reich's Minister of Justice (1942-1945) – Gürtner (Minister of Justice, from 1932 to 1941) and Roland Freisler (General Secretary at the Ministry of Justice since 1933 and President of the People's Court from 1942 to 1945), Hitler and Goebbels would comment: Frank "reconciles with the wife, but as a lawyer"; Thierack, "even though better than Gürtner, he has not moved from his lawyer prejudices", since "lawyers will always be lawyers"; Freisler would think that "lawyers are more comfortable when they occupy the position situated immediately below the highest one", which could turn them into National Socialist fanatics.

<sup>29</sup> On the new construction of the fundamental order of the political community and these two vide: Horst Dreier, *Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus*, cit., pp. 9-72; Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, in Christian Joerges/Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe*, Hart Publishing, Oxford, 2003, pp. 19-41; Roger Bonnard, *Le Droit et l'État dans la doctrine Nationale-Socialiste*, Librairie Général de Droit & de Jurisprudence, Paris 1936; Marcel Cot, *La conception hitlérienne du Droit*, cit.; Carlo Lavagna, *La Dottrina Nazionalsocialista del Diritto e dello Stato*, Giuffrè, Milano, 1938; Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, in *Archivio Giuridico "Filippo Serafini"*, Series V, Vol. VIII, 1942, pp. 115-141 ("la nuova concezione giuridica tedesca").



*There is no people without an objective unit, but there is no people without a common consciousness of unit either... The new German Reich comes from the concept of political people, determined by natural characteristics and the historical idea of a community in itself. Political people are formed by the uniformity of its natural characteristics. The race is the natural base for people. As political people, the natural community becomes aware of its solidarity and struggle to form, develop, defend and conduct itself. 'Nationalism' is essentially this effort of a people that became aware of itself, its self-direction, self-realization and a deepening and renewal of its natural qualities.<sup>30</sup>*

The National Socialist political order identified itself or aspired to be identified with a national community – *Volk/Volksgemeinschaft* – interpreted as centred on a homogeneous racial, ethnic and spiritual base; the relatively original (in terms of the history of the State) racial determination of the political community seemed, however, to be interpreted along a holistic spiritual line ("we do not infer the ability of a man from his physical type, but from his achievements and race", Hitler would stress in the early 1930s), as well as in terms of union of related races, with the Nordic Aryan race as a guiding element.<sup>31</sup>

The national community constituted "specific and original value"(Huber).<sup>32</sup> Such a community was considered a source of truth and value, legality and justice, and an end in itself. Hence, in public legal doctrine, the dissemination of maxims such as: "the collective utility has pre-eminence over individual utility"; "its people is everything, you are nothing";<sup>33</sup> "law is what benefits the people; non-law, what damages it"<sup>34</sup>; "law is what befits the people and the race" (Robert Ley);<sup>35</sup> "justness is what befits the German people" (Roland Freisler); and "the purpose of law is to maintain the purity and existence, as well as the protection and progress, of the German people" (*Oberlandesgericht* by Jena). In the "spontaneous constitutional discourse" of power, the *Volk* could be described – resorting to the language that in Western metaphysics is designated *Realissimum* – as "substance" (Hitler) and a "thing in itself" (Goebbels).<sup>36</sup>

The community nature of the National Socialist politico-constitutional imagination was expressed, through the negative, in a fundamental axiomatic "refusal" of the discourse

<sup>30</sup> Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, Hanseatische Verlagsanstalt, Hamburg, 1939, pp. 153-155.

<sup>31</sup> On the racial conception that was part and parcel of the National Socialist politico-constitutional doctrine, vide: Ulrich Scheuner, *Peuple, État, Droit et Doctrine Nationale-Socialiste*, in *Revue de droit public et de la science politique*, 54, 1937, pp. 44 ff. and A. James Gregor, *National Socialism and Race* in *The European*, No. 11, 1958, pp. 273-91. For a "genealogy" of the racial idea, vide Eric Voegelin, *The Growth of the Race Idea*, in *The Review of Politics*, Vol. 2, No. 3, 1940, pp. 283-317.

<sup>32</sup> Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, cit., p. 164.

<sup>33</sup> The first of these maxims could indeed be read in para. 24 of the National Socialist Party programme – which can be consulted in Martin Broszat, op. cit. (document attached) pp. 573-576. The second one was also a present motto on the Reich's coins.

<sup>34</sup> Hans Frank, in Hans Frank (ed.) *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, Zentralverlag der NSDAP., F. Eher nachf., g.m.b.h., Berlin, 1935, p. XIV.

<sup>35</sup> Vide *Le Droit national-socialiste: Conférence internationale tenue à Paris les 30 Novembre et 1er Décembre 1935*, Librairie Marcel Rivière, Paris, 1936, p. 63.

<sup>36</sup> Klaus Vondung, *National Socialism as a Political Religion: Potentials and Limits of an Analytical Concept, in Totalitarian Movements and Political Religions*, Vol. 6, No. 1, 2000, pp. 90 and 94, note 18.



on subjective rights ("innate and inalienable rights of the individual", "personal freedoms of the individual that are outside the State sphere and that must be respected by the State").<sup>37</sup> The statute of individual members of the people (*Volksgenossen*) was, then, understood in terms of legal positions in the community and service to the community (where "rights should be considered as duty-rights").<sup>38</sup>

## Führer

According to the last manual of constitutional right published in the Third Reich:

*The Reich of the [German] People's Führer is founded on the recognition that the true will of the people cannot be revealed through parliamentary votes and plebiscites, but that the will of the people in its pure and incorruptible form can only be expressed through the Führer... The Führer unites all the sovereign authority of the Reich; all public authority in the State, as well as the movement.*

*We must speak not of State authority, but of the Führer's authority, if we want to correctly appoint the nature of the political authority within the Reich. The State does not hold the political authority as an impersonal unity, but receives it from the Führer, as the executor of national will. The Führer's authority is complete and comprehensive, unites in himself all the means of political direction, is extended to all areas of national life, covers all the people, who are bounded to the Führer by loyalty and obedience. The Führer's authority is not limited by the verification and monitoring of independent bodies or individual rights, but it is free and independent, omni-comprehensive and unlimited. However, it is not selfish, arbitrary and its ties are not within itself. It is derived from the people – that is entrusted to the Führer by the people. It exists for the people and has its justification in the people, is free from all external ties because it has its most intimate nature firmly linked with the destiny, welfare, mission and honour of the people.*

*The Führer has nothing in common with the employee, agent or representative that pursues a delegated mandate and that is bounded to the will of those who appointed him. The Führer is not "representative" of a particular group whose wishes should be accomplished. He is not an "organ" of the State in the sense of a mere executive official. He is, in himself, the bearer of the collective will of the people.<sup>39</sup>*

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<sup>37</sup> Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, op. cit., p. 361.

<sup>38</sup> *Idem*, pp. 365-366.

<sup>39</sup> *Ibid*, pp. 164 and 230.



In the National Socialist constitutional imagination, the national community was embodied in the Führer – constituting or reconstituting itself in a political community.<sup>40</sup> The *Volksgemeinschaft* involved the communitarian epiphany segregation of a conductor, a guide, of the German People – which possessed, in a qualitatively superlative degree, the objective spirit, the essence of the community that is invested in all its members (*Volksgeist*) – and was able to express the objective will of the *Volk*. The Führer was the authentic interpreter of the spirit of the people, bearer of the "eternal spirit of Germany" (Hans Frank), "the source and the representative of law" (Hans Frank)<sup>41</sup>: "the will of the Führer is the law", Goering proclaimed;<sup>42</sup> his will, sentenced and synthesised by Schmitt, "is now the *nomos* of the German people".<sup>43</sup>

Just as the "matrix" and the "manifestation" of the authority of the national community, the Führer's authority constituted an exclusive and absolute original personal authority. Resuming Ernst Rudolf Huber's expressive words, a "free and independent, omnicomprehensive and unlimited" authority was at stake. In National Socialism, the community-individual, in the imagination of the order, by transposition or transfer, seems to occupy the structural place and have the characteristics of the liberalism of the individual. There is no space for a superior substantive *norm* or exterior to the will of the Führer. In relation to racial qualification, for example, the will of the Führer, ultimately, and self-referentially defined the content of the order: ponder, for example, the phenomenon of the so-called Aryanisation decrees. A specific combination of community ordinalism/institutionalism and personal sovereign decisionism, of *ordnung* and *gestaltung* – consistent syncretism, at least from an internal point of view to the ordering National Socialist idea, but carrying potentially antagonistic escape leagues – has been identified as the deep grammar of National Socialism.<sup>44</sup>

The Führer would exercise his powers according to the spirit of the people – specifically, in a legal sense. Only the existence of internal limits of the *Führung* were admitted, which were associated with the very nature of its way of being, that is its configuration and teleology. As thinkable and acceptable guarantees of the functional assignment of the *Führung*, only the qualities inherent to the Führer as a person appeared: penetration of the spirit of the people to the Führer to an unmatched degree – by definition, the Führer

<sup>40</sup> Note that in sectors of a "new dogma" (Reinhard Höhn, e.g.) that completely purged the legal public discourse of inherited dogmatic legal (and judicio-theoretical) categories, constructing new operational concepts from National Socialist political symbols, the word "State", considered as intrinsically associated with an administrative and bureaucratic meaning, was not used to designate the political community (the "political people"), preferring the concepts of *Volk* or *Reich* to designate the political unity – vide Carlo Lavagna, *La Dottrina Nazionalsocialista del Diritto e dello Stato*, cit., pp. 164 ff. [On the fracture lines in the field of state doctrine and public law in National Socialism, vide Michael Stolleis, *A History of Public Law in Germany 1914-1945*, cit., p. 335]. However, in the constitutional discourse of power and National Socialist doctrine, the use of the word "State" was not infrequent, precisely giving it the sense of a politically organised, current and living national community ("the political form of a people"), and not of the bureaucratic apparatus (*Apparat*) – see, for example, Karl Larenz, *La Filosofía Contemporánea del Derecho y del Estado*, Castilian vers., Editorial Revista de Derecho Privado, Madrid, 1942, pp. 163 ff. cf. António José de Brito, *O Totalitarismo de Platão*, in António José de Brito, *Ensaio de Filosofia do Direito*, Imprensa Nacional Casa da Moeda, Lisboa, 2006, pp. 157-158, note 7.

<sup>41</sup> Marcel Cot, *La conception hitlérienne du Droit*, cit., p. 156 and Hans Frank, *Fondamento Giuridico dello Stato Nazionalsocialista*, Italian vers., Dott. A. Giuffrè – Editore, 1939-XVII, pp. 68 and 29.

<sup>42</sup> Goering, *Discurso*, in *Deutsche Justiz*, No. 28, 1934, p. 881, *apud* Marcel Cot, *La conception hitlérienne du Droit*, cit., p. 243.

<sup>43</sup> *Apud* Olivier Jouanjan, "Pensamento da Ordem Concreta" e Ordem do Discurso "Jurídico" Nazista: Sobre Carl Schmitt, in *Revista Eletrônica do Curso de Direito – PUC Minas Serro*, No. 2, 2010, p. 34. [<http://periodicos.pucminas.br/index.php/DireitoSerro/article/view/1330>].

<sup>44</sup> Cf. Olivier Jouanjan, *Justifier L'injustifiable*, in *Astérion*, No. 4, 2006, pp. 123-56.





the community-individual like no other of his blood fellows – and the Führer's moral qualities. K. Larenz expressively noted (in a "Christian pagan-like" image):

*[T]he relative autonomy of the individual is exceeded in the Führer. It does not follow the norm intended for it, but a vital law of the community that, with him, acquired meat and blood. His will is one with the community's, because he completely erased the private man and he wants nothing more than the common interest. All responsibility is entrusted to him, because, to him and through him, the community is the most living reality.*<sup>45</sup>

Inside the constitutional National Socialist way of thinking, if the Führer stopped acting according to the spirit of the people, he would become a dictator. The existential and factual possibility of communitarian epiphany of a new Führer removing a Führer who had become a dictator or tyrant (which, for this quality, could de jure remove the dictator) was a limit guarantee.<sup>46</sup>

The National Socialist order was based on the Führer personal institution.<sup>47</sup> Therefore, Huber understood that the "Führer does not have the combination of the former Chancellor and President positions side by side, but a new and unified position".<sup>48</sup> For the eminently National Socialist jurist, R. Höhn, not even the concept of position was appropriate to designate the personal matrix of the National Socialist order for being associated with a technical bureaucratic universe (a "clinical unity" – "*Anstaltseinheit*", e.g.).<sup>49</sup> The suggested formation, with the Führer, of a Senate that would help and advise him – and could eventually elect his successor – always remained at the level of hypotheses.<sup>50</sup> Despite the "multiplication" of the figure of the head in the National Socialist rearrangements of the *civitas germanica* (the *Unterführer* phenomenon), the

<sup>45</sup> K. Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, Mohr, Tübingen, 1934, p. 44, *apud* Olivier Jouanjan, *Justifier L'injustifiable*, cit., p. 150.

<sup>46</sup> On the conceptualisation of the power limitation theme in national, *vide* Roger Bonnard, *op. cit.*, pp. 81 ff.

<sup>47</sup> In a minority way, it was possible to such an institution as "State agency". Against the background of a national people, political State and formal legal, normative construction that represented them as coincident realities, it was sought to mean with the use of the category agency that the Führer would "exist" and "live" within a formal legal normative order (consequently, these sectors continued to use the term *Rechtsstaat* to characterise the National Socialist order). It was the case for Otto Koellreutter, for example, in the National Socialist "new dogma", the politico-legal moment was, in the opposite sense, "dissolved" in the Führer's *auctoritas*. *Vide* Carlo Lavagna, *La Dottrina Nazionalsocialista del Diritto e dello Stato*, cit., pp. 137 ff. Cf. also Peter Caldwell, *National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the debate over the nature of the Nazi State, 1933-1937*, in *Cardozo Law Review*, 16, 1994, pp. 339-427.

<sup>48</sup> Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, *op. cit.*, p. 208. For the author, the term "position of head of the State" ("*Stellung des Staatsoberhauptes*") from the Decree of 1<sup>st</sup> August 1934 should be interpreted as "position of Führer of the Reich and the German people" ("*Amt des Führers des Deutschen Volkes und Reiches*") – *apud* Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, cit., p. 151, note 1 (referring to E. R. Huber, *Reichsgewalt und Reichsführung im Kriege*, in *Zeitschrift für die gesamte Staatswissenschaft*, 1941, p. 539).

<sup>49</sup> Cf., again, Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, cit., p. 151, note 1 (which, refers to Höhn, *Volk und Verfassung*, in *Deutsche Rechtswissenschaft*, 1937, pp. 209 ff.).

<sup>50</sup> In the "table talk" of 31<sup>st</sup> March 1942, Hitler formulated the same idea – *Hitler's Table Talk, 1941-1944: His Private Conversations*, Enigma Books, New York, 2000, pp. 385 ff. Joseph Goebbels foresaw the future existence of a Sacred College that would bring together the National Socialist elite (recruited based on individual success, racial purity and, in a future time, heredity, and such college would represent hundreds of families that – like the British Empire – would rule the Reich *ad aeternum*) – cf. Joseph Goebbels, *Journal 1943-1945*, cit., pp. 280-281.



constitution of figures equipped with their own autonomous *auctoritas* was never at stake in such mimicry.

In formal institutional terms, the personal nature of the order also implied that either the traditional powers and State functions or "punctuated" powers in the new National Socialist institutions should be seen as springing from the Führer's *auctoritas*. The Government – *Reichsregierung* (*Reichskabinett*) – was reconceptualised as the Führer's council, devoted to the discussion of laws and political guidelines (appointed by him, the ministers of the Third Reich had a judicio-administrative relationship with him), and the Reichstag redefined as an organ that adhered to the will of the Führer. Administration, the Armed Forces and the NSDAP (*Bewegung*) consisted of instruments of the *Führung*.<sup>51</sup> The formal laws were understood, in a non-legal rational way, as typical acts of the *Führung*, the expression of the will and commands of the Führer – according to Schmitt's definition, the law is "the plan and will of the Führer" (that is why the generality was not understood as a necessary property).<sup>52</sup> The decisional will of the Führer, as objective communitarian will, could be expressed beyond any formal means – by oral orders, for example. According to the Chief President of the Hanseatic Appeal Court, a "representative character", "law is born from the Führer; every conversation, every statement of the Führer is in itself a source of law".<sup>53</sup>

From the structure of the National Socialist order, the symbolically significant overhaul appears, prevailing in the Third Reich the motto of the Bismarckian and Wilhelmine Reich: "*Ein Reich, Ein Volk, Ein Gott*" (Second Reich)/"*Ein Volk, Ein Reich, Ein Führer*" (Third Reich). As it has been pointed out, for legal doctrine under National Socialism (Larenz, Binder, e.g.), the Führer, considered the sole participant of the communitarian Absolute, should be understood as personality endowed with an almost divine or semi-divine nature. It was possible to explicitly evoke the idea of the "divine mission of the Führer" ("*die göttliche Sendung des Führer*", W. Sauer), representing his duty (*Führertum*) as a "divine mission originated from the spirit of the nation" ("*der aus dem Geiste der Nation geborene göttliche Beruf*", Julius Binder).<sup>54</sup>

### **The progressive affirmation of the National Socialist Constitution; from the *Ordnungsstaat* to the post-legal rational State**

By decree on 4<sup>th</sup> February 4 1938, the Führer took charge of the direct command of the armed forces. On 1<sup>st</sup> September 1939, when speaking at the Reichstag, the Führer

<sup>51</sup> At first, "*Führung*" and "*Leitung*" were distinguished. The last term means to be able to govern through orders and commands in the State administration framework. Such distinction would gradually be blurred. The Hitler Youth, "department" of the Third Reich directly dependent on the Führer was run by a Führer (Decree of 1<sup>st</sup> December 1936).

<sup>52</sup> In theory, the legislating will of the Führer could be exposed through the so-called *Regierungsgesetze*, "government" decrees (issued according to Article 1 of the decree of 24<sup>th</sup> March 1933, previously alluded), *Reichstagsgesetze*, legislative acts approved by the Reichstag according to forms envisaged by the Weimar Constitution, as well as through *Volksbeschlossenes Gesetze*, decrees "approved" by plebiscite (in the terms of the decree of 14<sup>th</sup> July 1933 related to the plebiscite). Note that the diversity of normative "sources" (in particular, the traditional specificity of the normative source law) was always cancelled out (at least partially) by the fact that the Führer was able to "arbitrarily" choose, by stating the right, among a set of various normative sources (nominally diverse).

<sup>53</sup> *Vide Le Droit national-socialiste: Conférence internationale tenue à Paris les 30 Novembre et 1er Décembre 1935, cit.*, p. 48.

<sup>54</sup> See Massimo La Torre, *La "lotta contra il diritto soggettivo": Karl Larenz et la dottrina giuridica nationalsocialista*, Dott. A. Guiffre Editore, Milano, 1988, p. 414, note 132, from where Sauer e Binder's quotes were taken.





established who should succeed him, doing it "as if it were the most natural thing in the world" (Carl Schmitt).<sup>55</sup> In the act of modification – *Änderungsgesetz* – of 16<sup>th</sup> September 1939, he reappeared as "supreme vigilante and judge" – *oberster Gerichtsherr und Richter* – and the prerogative to overturn a criminal sentence passed through the courts was recognised. A decree from 26<sup>th</sup> April 1942 of the *Grossdeutsche Reichstag* recognised, in particular, his right to dismiss the judges through normal administrative channels.

*There can be no doubt that... the Führer must have the right to do everything that serves or contributes to the attainment of victory. He has, therefore, as Führer of the nation... supreme vigilante and party leader, to be in a position of being able to give deserved punishment without following provided procedures... to every German... that does not meet his obligations, regardless of the so-called vested rights.*<sup>56</sup>

The Führer started legislating, normally, via other normative sources than the formal law. The Führer's Decree – *Führer-erlasse* – a new source of law originating from the prerogative of the Reich's President and initially devoted to organisational issues, is used to determine and modify the substance of laws, as an legislative power delegation instrument, for example. According to it, the Führer takes a stand manifests himself even beyond "classic" formal constraints – often in juridical acts that could be signed but not published, and they were hierarchically transmitted to the higher authorities of the Reich; in the secret affairs of the State, his orders and instructions could take an oral nature. Since the end of 1942, the denomination "Führer" has also exclusively figured in the non-military normative acts issued by Hitler.

In the constitutional air that involved and followed the initial National Socialist "constitutional engineering", presented as "legal revolution", the image of an *Ordnungsstaat* loomed as an interpretive and anticipatory image of the ongoing process. It seemed that the crystallisation of a hierarchical organisation of power that was a legal, rational hierarchical organisation for creating law was an issue. The ideal type of hierarchical legal system had, in a certain sense, been updated to an unmatched degree. The existence of a unified centre of power behind the normative production, in particular legislative production, as well as the very entry of such production in the normal regime, seemed even to announce the introduction of increasing rationalisation of the legal order.<sup>57</sup> The legal ideology *rechstaatlich* of certain sectors of the German national or "conservative national" tendency in the world of politics, senior management or a part of

<sup>55</sup> Carl Schmitt, *Apropos the question of the position of Reich Minister and Chief of the Reich Chancellery: Observations from the standpoint of constitutional law* (1947), in *Telos*, No. 72, 1987, p. 122. In case the that successors appointed by the Führer die, the Reichstag should appoint his successor by choosing the most dignified and valiant from among its members. According to Huber, such a speech would constitute one of the most important laws (although the form of the law was absent here) of National Socialism – cf. Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, cit., p. 128, note 4.

<sup>56</sup> Cf. R. C. van Caenegem, *Uma Introdução Histórica ao Direito Constitucional Ocidental*, cit., p. 340.

<sup>57</sup> As Eric Voegelin observed in *Hitler and The Germans, the collected works of Eric Voegelin Vol. 31*, University of Missouri Press, Columbia/London, 1999, Cf. also Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933 – 1944*, Harper and Row, New York, 1966.



the legal community was also part and parcel of the "National Socialist meeting with the constitutional" in this historical situation.<sup>58</sup>

In the context of updating the National Socialist Constitution, a fundamental, material symbolic legality with a personnel bio-political nature, a new paradigm of modern State emerged, which was a power organisation working in "neo-feudal" and non-rigid ("fluid") bureaucratic terms, with the continuous recreation of people hierarchies, forms and impersonal institutions taking an epiphenomenal dimension in such a flow.<sup>59</sup> Even though the structural place of formal positive law becomes intrinsically soft, given the relativity of its internal, relatively autonomous and independent systemic logic, it was not about to disappear. In response to what K. Larenz saw as utopian desires to go beyond the law, or at least the order of rules and fixed forms, in a full future implementation of the communitarian National Socialist project (desires expressed in sectors which are self-interpreted as essentially National Socialist), he stated that:

*The community cannot exist without their right. Community and law are originated as well as content and form. The Community shapes their right and, through this, itself; it exists only in this self-organisation... Life is not thinkable without form and figure, and thus even the community of the people would disappear if they do not give form and figure to their existence.*<sup>60</sup>

### **Omni-comprehensivity of the National Socialist constitution**

The principle of the *Volksgemeinschaft*, which informed the National Socialist regime, implied that all areas of life should be regulated by a community metric and have the good of the *Civitas Germanica* as a reference, in order to use an expression that acquired "city forums" in the language of the National Socialist jurists.<sup>61</sup> Therefore, in legal knowledge, for example, a judicio-theoretical and dogmatic language originally National Socialist, tended to replace the traditional judicio-theoretical and dogmatic concepts that

<sup>58</sup> On the subject of identity of the "legal ideology" of a certain bureaucratic world, see the work about a very central character of the Ministry of Justice's bureaucracy – the Secretary of State, Franz Schlegelberger (who, by the way, seemed to be aligned with the "legal ideology" of the Reich's first Minister of Justice, Franz Gürtner) – and documenting a way of thinking the law in which the legal ("formalistically" represented) appeared as indispensable and irreplaceable means of State control over society, cf. Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, in *Law and History Review*, Vol. 18, No. 2, 2000, pp. 281-304.

<sup>59</sup> See Carl Schmitt, *Apropos the question of the position of Reich Minister and Chief of the Reich Chancellery*, cit., pp. 116-123; John H. Hertz, *German Administration under the Nazi Regime*, in *The American political science review*, Vol. 40, No. 4, 1946, pp 46, 682-702; Robert Koehl, *Feudal Aspects of National Socialism*, in *The American Political Science Review*, Vol. 54, No. 4, 1960, pp. 921-933.

<sup>60</sup> *Apud* M. La Torre, *La lotta contra il diritto soggettivo*, cit., p. 27, note 71. As E. Forsthoff noted, due to the organisation existential needs of the modern State, the level of positive law was indispensable (written, exterior and formal). For a description of the National Socialist State, precisely as a dual State, *vide* (note, although, that is was written in 1941) Ernst Fraenkel, *The Dual State*, Oxford University Press, New York, London, Toronto, 1941/The Lawbook Exchange, Ltd., Clark, New Jersey, 2006.

<sup>61</sup> Although the community metric could be interpreted as "appropriate" in the sense of conservation of the "traditional" legal solutions. Thus, e.g., *in foro*, in civil liability, the damage caused should be repaired not according to the interests of the harmed party, but the community's interest, to the extent that such damage would disturb the community in a way that only the consideration of harm to party interests would stop it (decision of the High Administrative Court of Saxony of 18<sup>th</sup> January 1935).



presupposed, or were seen as, a liberal and individualistic metaphysical and ideological substratum.<sup>62</sup>

There was also a new and comprehensive existential paradigm *in fieri* based on the complete identification of the individual with the political community. The new people's national order required the establishment of a mode of communitarian subjectivity, a "community character" ("*Gemeinschaftspersönlichkeit*"), community-individuals.<sup>63</sup>

The following paragraph by E. Forsthoff in 1933 from the *Der totale Staat*, which referred to the figure that the new State should assume, seems to account for the full dimension of the Third Reich:

*[T]he total State should be a State of total liability. It represents the total involvement of every individual to the service of the nation. Such recruitment removes the privacy of individual existence. Everyone is responsible for everything, in their activity and public demonstrations as well as in their family and home, for the nation's destiny. It is not the fact that the State enacts its laws and commands to the smaller cells of people's lives that is important (this is the total, "social" quantitative State); it is the fact of also being able to assert a responsibility, to account for the individual who did not submit his own destiny to the Nation.*<sup>64</sup>

### **A conception of the international order structuring**

It is true that the National Socialist experience does not have a truly analogous component for the dimension of abstract ideological universality inherent to the fascist politico-constitutional experience. However, it has a moment of concrete universality: the people's national community in its unity and totality was not conceived as limited by territorial or geographical boundaries. As E. R. Huber stated:

*[T]he German people form a closed community that does not recognise national borders. It is evident that a people has not exhausted its possibilities just in the formation of a national State,*

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<sup>62</sup> Michael Stolleis, *Community and National Community (Volksgemeinschaft) Reflections on legal terminology under National Socialism* in Michael Stolleis, *The Law under the Swastika, Studies on Legal History in Nazi Germany*, English vers., The University of Chicago Press, Chicago/London 1998, pp. 64-83. New generic ways of legal thought (appropriate to National Socialist constitutional ecology) **acquired visibility**: observe, e.g., Carl Schmitt's theory of concrete order (*konkretes Ordnungsdenken*) – which shows an institutionalist decision inflection of the renowned thinker – or Karl Larenz's (a combination of methodological neo-Hegelianism with National Socialist content) "method" of concretely general concepts (*konkret-allgemeine Begriffe*); on these new generic ways of legal thought, vide Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, cit., pp. 36-37; Carl Schmitt, *La science allemande du droit dans sa lutte contre l'esprit juif* (1936), in *Cités*, No. 14, 2003, pp. 173-180.

<sup>63</sup> Reinhard Höhn, *Staat und Rechtsgemeinschaft*, in *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 95, No. 4., 1935, p. 676. In National Socialist constitutional discourse, such a communitarian perspective would not imply "the value of personality": "On the contrary, in politics, art and economic life, he complains about strong and free personalities"; it would be highlighted, e.g., by Ulrich Scheuner, *Peuple, État, Droit et Doctrine Nationale-Socialiste*, cit., p. 50.

<sup>64</sup> E. Forsthoff, *Der totale Staat*, Hanseatische Verlagsanstalt, Hambourg, 1933, p. 42 (*apud* Olivier Jouanjan, *Justifier L'injustifiable*, cit., p. 137).



*but represents an independent community that goes beyond such limits.*<sup>65</sup>

Consequently, the following ideas were adopted: union of all Germans in the same political entity – the establishment in 1938, with the end of Austria as an independent State, of a Great German Reich would be the largest part of it; constitution of a future Germanic Reich (Hitler *dixit*) that should integrate populations understood as objectively belonging to the *Volk* (e.g., Holland and Norway), all under the leadership of its original and mostly conscious core based in Germany; expansion of Germans to a new imperial "vital space".<sup>66</sup>

Also originated from the idea of Reich, a thought on international order and international law particularly emerged (and also on a German Europe): Carl Schmitt's theory of the Great Spaces (*Grossraumlehre*), which was inspired by the Monroe Doctrine and pointed to an international order founded on the constitution of empires, leading large spaces and maintaining relationships with each other based on a principle of non-interference in one another's sphere; and a theory of vital space (*Lebensraum*), which was inspired by Haushofer and supported the right of the nation to conquer the territory necessary to meet the needs of its population (a theory with greater impact on the grand National Socialist expansion strategy to the east and related to National Socialist racialism).<sup>67</sup>

## **The political community and Christianity**

The regime initially adopted Christianity as a national State formation ethos and sought to co-opt Christian confessions into the establishment of a top-to-bottom national consensus. On 23<sup>rd</sup> March 1933, Chancellor Hitler declared to the Reichstag:

*[T]he national government considers the two Christian confessions essential factors for the maintenance of our ethnic personality... But at the same time the Government expects its national and moral reconstruction task proposed to be properly appreciated... The only objective of the Government is to ensure a sincere collaboration between Church and State. The struggle undertaken by the Government against materialism and the effort to create a real national community serve both the interests of the German nation and the Christian religion.*<sup>68</sup>

<sup>65</sup> Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, op. cit., p. 158.

<sup>66</sup> See: *Hitler's Table Talk, 1941-1944: His Private Conversations*, cit., pp. 401 ff.; Reinhard Höhn, *Reich, Sphere of influence, Great power*, in Arthur J. Jacobson, Bernhard Schlink (eds.), *Weimar A Jurisprudence of Crisis*, cit., pp. 332-333.

<sup>67</sup> On these subjects, see, e.g., the following articles in Christian Joerges/Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe*, cit.: Ingo J Hueck, 'Spheres of Influence' and 'Völkisch' Legal Thought: Reinhard Höhn's Notion of Europe, pp. 71-85; John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, pp. 133-141; Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, pp. 167-191.

<sup>68</sup> Cesare Santoro, *Hitler Germany, as seen by a foreigner*, cit., p. 36.



In such a framework, pointing to a national State civil peace and remembering the Bismarckian *Kulturkampf*, a concordat with the Catholic Church would be celebrated on 29<sup>th</sup> July 1933.<sup>69</sup> For a certain period, an attempt to establish a Protestant Church of the Reich was sponsored.<sup>70</sup>

There were also a movement to square the Christian universe symbolic with the National Socialist worldview, according to an idea that the order should give substance to the concept of "positive Christianity". Although, the National Socialist Party programme had already consecrated such a concept:

*[T]he party, as such, defends the point of view of a positive Christianity, without confessional connection to a particular belief. The party combats materialistic Jewish spirit within us and outside us.*<sup>71</sup>

Part of the National Socialist universe had a "racist syncretism that was making Christ and God Aryan and Germanic" (E. Gentile).<sup>72</sup>

A sector of the governing class favoured, even explicitly, the replacement of Christianity with a new German *mythos* (Alfred Rosenberg, Heinrich Himmler).<sup>73</sup> Hitler explicitly distanced himself from such a project, publicly denying (in 1938, e.g.) an interpretation of National Socialism as a mystical worship movement, presenting it only as a movement with a racist *völkisch* political philosophy.<sup>74</sup>

The Führer still remained strictly – liberally – linked to the "clarity" of the division between the State domain and the spiritual domain of the churches. In 1942, Hitler theorised about the very space of the churches' representatives in the life of the German community:

*[A]s long as they are concerned with their religious problems, the State does not care about them. But, if they try by any means –*

<sup>69</sup> The concordat text can be seen in *The Persecution of the Catholic Church in the Third Reich, facts and documents translated from German*, Burns Oates, 1940, pp. 516-522.

<sup>70</sup> Rudolf Hess Hermann Göring pointed out on 18<sup>th</sup> April 1940 that "the Führer not only gave up the plan of creating an Imperial Church that had already been proceeded, but now he rejects the entire plan". Vide Hans Mommsen, *National Socialism as a political religion*, in Hans Maier and Michael Schäfer (ed.), *Totalitarianism and Political Religions: Concepts for the comparison of dictatorships, Volume II*, Routledge, London/New York, 2007, pp. 158 and 162, note 18.

<sup>71</sup> On the National Socialist "positive Christianity", Richard Steigmann-Gall, *The Nazis 'Positive Christianity': a Variety of 'Clerical Fascism'?*, in *Totalitarian Movements and Political Religions*, Vol. 8, No. 2, 2007, pp. 315-327; cf., by the same author, *The Holy Reich, Nazi conceptions of Christianity, 1919-1945*, Cambridge University Press, Cambridge New York, 2003.

<sup>72</sup> Emilio Gentile, *New idols: Catholicism in the face of Fascist totalitarianism*, in *Journal of Modern Italian Studies*, Vol. 11, No. 2, 2006, p. 148. Karla Poewe, *New Religions and the Nazis*, New York/London, Routledge, 2006; Karla Poewe and Irving Hexham, *The Völkisch Modernist Beginnings of National Socialism: Its Intrusion into the Church and Its Antisemitic Consequence*, in *Religion Compass*, Vol. 3, No. 4, 2009, pp. 676-696; Doris L. Bergen, *Twisted Cross: The German Christian Movement in the Third Reich*, University of North Carolina Press, Press, Chapel Hill, 1996.

<sup>73</sup> Roger Eatwell, *Reflections on Fascism and Religion*, in *Totalitarian Movements and Political Religions*, Vol. 4, No. 3, 2003, p. 157. On the topic of occultist-pagan genealogy of National Socialism, see Nicholas Goodrick-Clarke, *Raízes Ocultistas do Nazismo, cultos secretos arianos e sua influência na ideologia nazi*, 1st Portuguese ed., Terramar, 2002.

<sup>74</sup> Emilio Gentile, *New idols: Catholicism in the face of Fascist totalitarianism*, cit., p. 148.





*letters, encyclicals, for example – to attribute to themselves rights that belong only to the State, we will force them to return to their specific spiritual, pastoral activities. They have no title to criticise the morality of a State. The German State leaders will be responsible for the morality of the German State and the German People".<sup>75</sup>*

In addition, like the liberals of the nineteenth century, the Führer expected, not without a deist residue, Christianity to gradually disappear with the progress of science and its social effectiveness.<sup>76</sup>

Anyway, and decisively, due to the intensity of value in the *quid* that determined it as the Supreme Good and the reach of its idea, it was inherent to the National Socialist order the possibility or virtuality of a community ethos to replace Christianity as an existential paradigm, grammar of the collective existence. An outside observer of the National Socialist "system" noted:

*[T]he Nazi movement is not anti-religious. The danger is to have a religion that is not of the Christian orthodox. This religion does not have the dogmatic character of the communist creed; it is a fluid and incoherent thing expressed in different ways. There is the neo-paganism of the extreme pan-Germanic element, the Aryan and nationalised Christianity of the German Christians and the racial and nationalist idealism that is a characteristic of the whole movement and this, if it is not religious in the strict sense, tends to develop its own mythology and ethics that can easily take the place of Christian theology and ethics.<sup>77</sup>*

One example of the latter essential reality: "Once we attributed an eternal existence to it, the *Volks* is the embodiment of value. Religions only have value if they serve to preserve the living substance of humanity", Hitler stated (in 1937, at the Congress of the National Socialist Party).<sup>78</sup> According to Hans Frank:

*For us, National Socialists, the people are a primary ordering, given by God. The churches' Jus Divinum, as original divine right, is an erroneous application of the concept of law. The formulation of the complex of natural laws are clearer, while they can touch the common life of a people, that law which nature teaches.<sup>79</sup>*

<sup>75</sup> Apud Emilio Gentile, *New idols: Catholicism in the face of Fascist totalitarianism*, cit., p. 147.

<sup>76</sup> On these dimensions of the Führer's thoughts, see Eric Voegelin in *Hitler and The Germans, the collected works of Eric Voegelin volume 31*, cit., pp. 121-129 and Roger Eatwell, *Reflections on Fascism and Religion*, cit.

<sup>77</sup> We referred to the historian Christopher Dawson – vide Christopher Dawson, *Religion and the Totalitarian State*, in *The Criterion*, Vol. 14, No. 54, 1934, p. 8.

<sup>78</sup> Apud Ernst Fraenkel, *The Dual State*, cit., p. 120.

<sup>79</sup> The idea that "the people was in itself a primary plan given by God" was later interpreted according to a racist interpretation of natural people. See Hans Frank, *Fondamento Giuridico dello Stato Nazionalsocialista*, cit., pp. 24-25 (*maxime* note 9).



Besides the "pragmatic" dimensions, there were conflicts against this background that were felt by the Catholic Church; the network of Catholic organisations was almost completely dismantled, with the progressive suppression of Catholic schools, institutions and press, which added to the systematic defamation of the Church's principles and institutions.<sup>80</sup> In 1937, the encyclical *Mit brennender Sorge* of Pius XI, although condemning core aspects of the conception of order associated with the National Socialist regime and not directly a regime, seemed to, ultimately, respond to the crystallisation of a new comprehensive secular absolute:

*If the race or the people, the State or any of its emanations, the representatives of State power or other fundamental elements of human society have, in the natural order, a respectable place, who, however, unties them from this scale of earthly values, elevating them to the category of supreme law of everything, even of religious values, deifying them with cult worship, perverts and falsifies the order created and imposed by God and is far from the true faith in God and the conception of life according to it.*<sup>81</sup>

In times of National Socialism in total war, Hitler clarified in the famous "table talk":

*When National Socialism has ruled long enough, it will no longer be possible to conceive a way of life different from ours. In the long term, National Socialism and religion will not be able to coexist.*<sup>82</sup>

In such a context, likewise, the untying and disengagement of the National Socialist regime in relation to the sources and more structural ethos of the concrete order of society in which it emerged will be understood.

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<sup>80</sup> A notorious symbolic dispute between the crucifix and the portrait of Hitler in schools in Bavaria from 1937 to 1941 was part of such a conflict scenario (by "bottom-up" imposition, and in wartime, the ban on displaying the crucifix in public schools would be raised in 1941). On the relations between the Third Reich and the Catholic Church, see Guenter Lewy, *The Catholic Church and Nazi Germany*, 2nd ed., Da Capo Press, Boulder, Colo, 2001.

<sup>81</sup> Vide: [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_14031937\\_mit-brennender-sorge\\_it.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_it.html)). Heinz-Albert Raem, *Pius XI und der Nationalsozialismus. Die Enzyklika "Mit brennender Sorge" vom 14 März 1937*, Schöningh, Paderborn, 1979.

<sup>82</sup> The considerations that followed such a statement were also significant: "It is a simple matter of honesty and everything comes down to it. In England, the statute of the individual in relation to the Church is governed by State considerations. In the United States, it is all purely a matter of conformism. The special quality of the German people is patience; and they are the only people capable of making a revolution in this field. They could do it, because only the German people made the moral law the principle which governs their action. The heaviest blow that ever struck humanity was the coming of Christianity. . . ". Cf. *Hitler's Table Talk, 1941-1944: His Private Conversations*, cit., pp. 6-7 (15<sup>th</sup> July 1941).





## Conclusion

It seems evident that the National Socialist regime characterised itself as having identified the political community – a racially determined political community raised to the Absolute – with an empirical and historical personality regarded as eminently communitarian. Martin Heidegger's following statements, contained in an appeal to German students on 3<sup>rd</sup> November 1933, may reflect the last substance of the National Socialist order:

*German students! The National Socialist Revolution brings a complete turnaround to our German life. Do not let dogmas and "ideas" rule your being. The Führer himself, and only him, is the present and future reality of the German people and its law.*<sup>83</sup>

Regarding the National Socialist Third Reich, perhaps one should speak of a constitutional formation, ultimately, with no parallel in modern politics.<sup>84</sup>

As well as in the interwar regimes, usually classified as non-democratic right-wing regimes, in the German case the political community was raised to the first and last reference of order construction (also taking into account the traditional-religious as part of the national). As in some of these regimes, especially in Italian fascism, the political community could also be interpreted as a comprehensive *Absolutum*. The National Socialist constitutional formula could not, however, be essentially assimilated to such "generic" and "sub-generic" frameworks: it stands out, mainly and in an eminently singular and *sui generis* way, for its construction of constitutional order through reference to a political community concretely absolutised in terms of its personification in a human figure, in a "community-individual."<sup>85</sup> Throughout twenty years of fascism, an essentially "mono-archival" State crystallised, but a proper constitutional doctrine similar to the

<sup>83</sup> Martin Heidegger, *Political Texts* (1933-1934), in Richard Wolin (ed.), *The Heidegger Controversy: A Critical Reader*, The MIT Press, Cambridge, Massachusetts, and London, England, 1993, pp. 46-47.

<sup>84</sup> The idea that the personification of the political community in a community-individual is a nuclear dimension, if not the central dimension, of the National Socialist regime, can be found in the writings of some authors, although frequently the National Socialist case is pointed out, among others, as a case in which a phenomenon of "community embodiment" occurs superlatively or par excellence. See, e.g.: Klaus Vondung, *National Socialism as a Political Religion: Potentials and Limits of an Analytical Concept*, cit., pp. 587-595; Marcel Gauchet, *À l'épreuve des totalitarismes, L'avènement de la Démocratie III*, Bibliothèque des sciences humaines, Gallimard, Paris, 2010, pp. 464 ff. Cf. Also see Claude Lefort's pioneering writings (mainly focus on Stalinism, but also referring to National Socialism and fascism) on the figure of the "Egocratic" as a characteristic figure of totalitarianism: Claude Lefort, *la logique totalitaire e l'image du corps et le totalitarisme*, in Claude Lefort, *L'invention démocratique: les limites de la domination totalitaire*, Fayard, Paris, 1981, pp. 85-106 and pp. 159-176, respectively.

<sup>85</sup> On the constitutional realities referred to in the text, see: Pedro Velez, *Das Constituições dos Regimes Nacionalistas do Entre-guerras*, ICS, Lisboa, 2016 and Pedro Velez, *Sobre a ordem constitucional no/do fascismo italiano*, cit., pp. 69-96. These are the various fundamental constitutional decisions (or material constitutions) concretely recognised: (i) elevation of the political community to Absolute (Italian fascism); (ii) designation of the political community as a prominent good, but not clearly as an exclusive order principle (several order projects "constitutionalistically" articulated, especially through the emanation of new written constitutions – as in Poland, Estonia, Lithuania and etc.); (iii) desire for a monist national State order with a Catholic identity (Spain under Primo de Rivera; first Francoism); (iv) definition of a public orthodoxy of Christian radication, in which Christianity is inscribed no more than as a civil national element (Hungary restored by Horthy, the "French State"); (v) conception of an ethnocentric political community as exclusive and unconditional *nec plus ultra* (absorbing in itself the local traditional religious) (the "Croatian Independent State" to the Romanian "Legionary National State", e.g.); (vi) elevation of the political community to the Supreme Good, but submitting itself to a concretely Catholic "moral invariant" (crystallised Francoism, in the first line; in the "Austrian State" and Portuguese New State).



German doctrine of the *Führerstaat* did not. Contrary to what happened in Hitler's Germany, the constitutional was not identified with the original authority of a communitarian person.<sup>86</sup>

The distance in relation to the liberal-constitutionalist tradition was a maxim – at least on the surface (given a last certain permanence of the category of the individual, with his "transference" to the communitarian plane – to a political community postulated as macro-individual, and to the community-individual). Something similar could be said, without qualification, in relation to a certain Christian politico-constitutional tradition of linking political power to a previous and superior law. There was a clear manifestation of "political religion", evoking an Absolute Good that channels all axiological normative authority to the political order and/or power.

The National Socialist constitutional experience somehow re-edited the paradigm of the Divine Rulers, a constitutional paradigm of pre-Christian or pre-Jewish-Christian origin, revived in the late Middle Ages, the early Modern Ages, with theories of the divine right of kings (a politico-theological standard in which a "sovereign" centre instantiates (and diffuses) divine power and will).<sup>87</sup> The fact that the articulation of the German Nation-State began in a post-Christian and post-idealist era was not strange to that "re-edition".<sup>88</sup> The millenarian, messianic and apocalyptic ballast of German society, perhaps reactivated in the hyper-disruptive conjuncture of Weimar, could also have been its condition of possibility.<sup>89</sup>

<sup>86</sup> See, again, Pedro Velez, *Sobre a ordem constitucional no/do fascismo italiano*, cit.

<sup>87</sup> On the paradigm of the Deity-Kings, see: Eric Voegelin, *The Collected Works of Eric Voegelin Vol. 14: Order and History Volume I, Israel And Revelation*, University of Missouri Press, Columbia/London, 2001, first part («*The Cosmological Order of the Ancient Near East*»). On this paradigm and its "repetition" in the early Modern Ages, see Francis Oakley, *Kingship: The Politics of Enchantment*, Blackwell, Malden, MA/Oxford, 2006, pp. 108 ff., and Catherine Pickstock, *After writing: on the liturgical consummation of philosophy*, Blackwell, Oxford, 1998.

<sup>88</sup> Vide Eric Voegelin, *Race and State (1935)*, in Eric Voegelin, *Published Essays 1934–1939, The Collected Works of Eric Voegelin Vol. 9*, University of Missouri Press, Columbia/London, 2001, pp. 40-53; Eric Voegelin, *The Growth of the Race Idea*, cit.

<sup>89</sup> Vide Norman Cohn, *The Pursuit of the Millennium: Revolutionary Millenarians and Mystical Anarchists of the Middle Ages, revised and expanded*, Oxford University Press, Oxford/London/New York 1970; Klaus Vondung, *The Apocalypse in Germany*, English vers., University of Missouri Press, Columbia, MO, 2000.