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MASSIMO LA TORRE

European University Institute, Florence

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MASSIMO LA TORRE

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European University Institute
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Italy

Massimo La Torre

NOSTALGIA FOR THE HOMOGENEOUS COMMUNITY: KARL LARENZ AND THE NATIONAL SOCIALIST THEORY OF CONTRACT

1. Preliminary

In the context of the National Socialist attack on the foundations of liberal democratic society, Karl Larenz, with a bevy of other jurists, embarked on a rather ambitious endeavour: to reconstruct the whole of legal knowledge in anti-individualistic, organicist terms 1, so as to give a new basis not only to public law but also to the whole of private law, to such an extent that the "prime dichotomy" itself between public law and private law would cease to have meaning 2. In the context of the battle being waged against the figure of subjective right, seen as the key concept of the liberal conception of law 3, Larenz follows two paths. On the one hand is the familiar, well-delineated one of statist, formalist, legal positivism, with the supremacy of the State over the individual (the "subject, der Untertan, of which the whole of publicist doctrine of the Germanic cultural area speaks") 4. On the other hand, our German jurist follows the path of collectivist anti-formalism originating in the positivist philosophy and anti-individualism that runs through a major part of the social and sociological theories of the later 19th century, from Comte 5to Durkheim, by way of Marx, in the field of theory of law reaching Duguit, whose merciless criticism of the concept of subjective right 6is echoed in more than one passage in Larenz's writing. The two paths of statist legal positivism and collectivist anti-formalism meet at the point of common rejection of the natural-law theories regarded by both as "unscientific", or nearly so. The rejection of natural law was transmitted to Larenz also by the Hegelian philosophy whose follower he claimed to be 7.

There is, however, one important difference between legal positivism and the sociological perspective. While the legal positivist tradition, though maintaining the State's supremacy over the individual, does not go so far as to deny the latter a dignity of existence and an ontological status (cancelling out the individual - in the extreme case of Kelsen's theory, for instance - only within the legal system), the social theory of philosophical positivism (with a few exceptions, notably Spencer) affirms the ontological supremacy of the collectivity over the individuals and not - as, say, legal positivism does - its normative supremacy. If legal positivist theories question the axiological privilege of the individual and in any case deny the individual the dignity of being a source of law, philosophical positivism (which in the overwhelming majority of its theoreticians was methodologically collectivist) queries the onotological primacy of the individual person vis-à-vis society 8. Society is not - for this philosophy - an aggregate of individuals and in any case a product of them; instead the individual is a creature, almost an invention, of society. And this, though refounded on an idealistic basis, is the theoretical inspiration that prevails in Larenz's theory and in general in the political doctrine of National Socialism. It should be recalled that for that doctrine - as Ernst Cassirer writes - "the German people is not a mixtum compositum, a mere aggregate of many millions of men and women. It is a homogeneous whole, a corpus mysticum, a profound, mysterious unity" 9.

2. The reformulation of the legal figure of the contract

The critique of subjective right is pursued by Larenz in the name of the reasons of practical life against the abstractness of the formulas of jurists and in the name of the principle of solidarity that binds the members of the community against the selfishness and individualism of those who regard society as an aggregation of individual subjects among whom there is no other relationship than the formal one of contractual reciprocity. In Larenz's thought the critique that demolishes the notion of

subjective right is a logical consequence of the critique of the bourgeois society that National Socialist doctrine regards as an epoch of decadence 10. Bourgeois society - on this view - developed on the wreck of the original, genuine bonds of community that resisted until the assertion of the mercantile economy. "This form of society," writes Larenz of bourgeois society, "is in reality the ruin of every human bond and civility (Gesittung); the State, too, here increasingly becomes the plaything of economic magnates and is thereby voided of its dignity and meaning. The law, I would say, takes part in this ruining of 'moral power': under the banner of 'contractual freedom' it increasingly becomes the 'right of those interested (Interessentenrecht), that is, the dictate of the economically strongest. It still holds only as the formal rule of play of economic struggles and of class, which determine the specific 'content' of social existence; which is thereby deprived of formative energies, ethical content and creative goals" 11.

Contractual freedom, according to Larenz, is nothing but an artifice behind which there is concealed the power of the cleverest and the strongest: "In economic life, contractual freedom served those who managed to secure an advantage for themselves by clever calculation and the ruthless exercise of their economic power" 12. Thus, the ideal of the certainty of law is attacked, since behind it there is concealed merely the need for security of economic transactions. "The ideal of the positivist is the state of complete certainty of law, a state in which the legal consequences of every action can be exactly calculated in advance, in which the free play of economic forces may come about undisturbed, along the "lines" - as it is significantly put - of the law" 13. Our German jurist's attack on the related categories of subjective right and contractual freedom echoes themes of Marxist and socialist critique (I am thinking in particular of the work of Pasukanis 14), similarly rigidly opposed to the legal figure of rights.

Larenz's words ring very strongly with the desire for a return to the mythical past of the undivided, homogeneous community, not yet dismembered, fragmented and made pluralist by the process of secularization. During the whole of the 19th century and the early years of the 20th, a period of time over which the occidental societies became definitively secular thanks to the parallel (but not necessarily interconnected) advance of the industrial and the democratic revolution, many philosophers and sociologists had pointed to the move from feudal society to the new bourgeois organization with the help of a pair of concepts which, though denoted by different names (status and contract in Maine, Gemeinschaft and Gesellschaft in Tönnies, "military society" and "industrial society" in Spencer, "organic epoch" and "critical epoch" in Saint-Simon), always designated two identical social conditions: on the one hand the integrated monistic society of which the individual person was a function, on the other the conflictual, pluralist society of which the individual is the creator. Larenz's theory - as more generally the whole of National Socialist thought - can accordingly be seen as the attempt at the level of social organization and more specifically of legal organization to bring European society back in time to before the French revolution, to status, and to annihilate the modern society based on contract. "What Hegel," he writes, "saw coming about at the end of antiquity has been repeated in the 19th century. The community has fallen apart, and right has thus been transformed into a coercive external norm. Today, however, National Socialism has given us the genuine community, returning to the original sources of the people's life" 15.

Larenz discerns in the affirmation of man as individual, that is, as a being endowed with value in himself and not by the fact of belonging to a community, the origin of the dissolution of the organic community and the decline of the idea of law as a principal inherent in the social body. "As long as the community awareness in a people is still immediate and intact, the individual feels law and custom not so much as a limit to his will, but as the natural form, suited to him, of his own

existence. In such epochs the need for an exact and even written determination of the rights and duties of the individual is accordingly minimal. They remain included in the general order of life, the element of each one's existence. Law lives in these epochs in memory and in tradition and in the immediate ius dicere, and can scarcely be distinguished for custom. But when the original sense of togetherness loosens, when the individual begins to feel himself an individual and to counterpose his interests to those of the community, then the legal order appears before him as claim and limitation" 16. Moreover, the very terminology used by our German jurist is unequivocal: in counter-position to subjective right, he speaks of Rechtsstellung, which might serve as a German translation of status, and of Volksgemeinschaft in counter-position to the bourgeois, individualistic society conceived of as a work of individual relationships. Where he distinguishes between "convention" and "custom" and defines the former as "the generalized habit of a social group or class or of many individuals or of the formless "one" (des gestaltlosen "Man") 17, and the second as "expression of a definite community spirit, the product and connecting link of a real community" 18, Larenz adds that there is the same difference here as between "spirit of the people", a genuine community spirit (Gemeingeist), and mere "collective opinion" (kollektives Meinen), "or simply between community (Gemeinschaft) and society (Gesellschaft), between living whole (Lebensganz) and collective (Kollectiv)" 19.

In place of subjective right Larenz wishes to set up the Rechtstellung of the Volksgenosse, which may represent and be a legal translation for the position of the subject in the concrete order of the community (the Gliedstellung), that is, the "legal position" as member of the community. "The fundamental concept of the future private law will no longer be the person, the abstractly equal bearer of rights and duties, but the Rechstgenosse, who as member of the community has a well-defined position of rights and duties" 20. This is true particularly of the so-called absolute rights, ownership and parental power.

Here the individual's power of disposal is nil. The subject cannot dispose, except in the most limited terms, of his own "position", still less of the "rights" (in the improper sense), the "Befugnisse", which result from the Rechtsstellung. This means in practice a return to a society in which each individual was indissolubly tied to his own social condition.

This theoretical reconstruction/liquidation of subjective right is not incompatible with maintenance of the figure of relative right arising from an obligatory relationship, to which Larenz still acknowledges usefulness as far as commercial exchanges are concerned. However, the content and appearance of these rights too are profoundly altered. Though recognized as "legal positions" different from those arising from a Gliedstellung and hence accepted as Ansprüche (the term they are traditionally denoted by in German doctrine), these are conceived no longer as the expression of an "abstract power of will" but as a concrete posse and licere of the Volksgenosse (and, be it noted, of him alone and not of any individual whatever), which result from the obligatory relationship, likewise remodelled as a Rechtsstellung, or as a "relationship of community right" 21. "Accordingly, even a legal relationship like renting is not a bundle of individual subjective rights and duties, but a relationship of community right in which duties and powers limited by duty are organically combined" 22.

Subjective right is accordingly replaced by a legal position in which "rights" (claims) and duties are intimately connected. We are no longer facing the bourgeois model of "right" counterposed to duty, "complementary" to it, so that one party has only or principally rights and the other only or mainly duties. "In the obligatory right," writes another Nazi jurist, Heinrich Lange, "creditor and debitor stand against each other. The creditor as such has only rights, the debtor has only duties" 23. The Rechtsstellung theorized by Larenz restores the model of medieval status in which one's own right can be asserted against a certain party only to the extent that subjection to a definite duty

towards that party is accepted. Larenz replaces the "complementarity" of right and duty with the "reciprocity" of right and duty typical of feudal status 24. The Rechtsstellung is, in fact, the "essence (Inbegriff) of duties and rights (Berechtigungen)" 25, as well as being an "expression of the position as member of the community 26". According to Larenz the point is no longer to take part in the "unfortunate alternative between right and duty" 27, but to develop a unitary concept of subjective legal position containing in itself both right and duty.

Larenz attacks contract as a "universal-abstract" concept, seeking to replace it with a series of concrete contractual "types", which can no longer be subsumed under a single general concept of contract. "The aspiration to the construction of new, substantial, functional concepts is one of the essential reasons for the limitation (demanded by Siebert and me) of the scope of application of the concept of contract and the formulation of a series of types running from the fleeting contractual relationship (for instance the purchase of a packet of cigarettes) to the time-limited contract to the employment relationship, which cannot be brought under the concept of contract, and thence to the agreements (Einigungen) in family law" 28. Larenz asserts that he does not wish to deny private autonomy. This, he writes, if regarded as a "delegation by the community" (Gemeinschaftsdelegation), or authorization (Ermächtigung) of the individual - coming from the community - to run the affairs that concern one is a "fundamental principle of the National Socialist legal order" 29. However, there is a decisive rejection of the equation between personal Selbstgestaltung, which he regards as an irrenounceable feature of the legal order, and contractual autonomy.

In particular, Larenz stresses that the element of consent as the condition for entering a certain legal relationship is insufficient to make that relationship a contract. He distinguishes clearly between contracts and the acts he proposes

to call "agreements" (Einigungen), in which the parties' consent is still the condition required to form the legal relationship but does not determine the content of the relationship. While in the contract consent, the will of the parties, determines the constitution and content of the relationship, in the so-called Einigungen (above all marriage, and then adoption and the employment contract), consent determines only the constitution of the relationship, or better only the entry of those who consent to it into an already given position, into an "order" (the family, the enterprise) which is independent of that consent and exists irrespective of it.

There is then, in Larenz's view, one further difference between contracts, a category which he restricts exclusively to the "exchange of individual services or goods" 30, and Einigungen. The former do not concern and do not bring into play the subject's legal position as Gliedstellung, as position of being a member, but only what Larenz defines as the positions of the subject in relation to other subjects 31. Marriage, by contrast, or the employment relationship in an enterprise, involve the individual's very personality, assigning him a new position in the community, inserting and incorporating him "into a greater whole" (in ein grösseres Ganze) 32.

Nonetheless, the category of contract, even within the limits of the "legal circulation" (Rechtsverkehr) to which it has been relegated, undergoes profound transformations. These are of two types. (a) In one aspect, private autonomy as the source of contractual regulation is considerably reduced and made conditional on authorization or the assent of the political authorities. "One increasingly important feature of our legal order," writes Larenz, "is the concurrence of personal autonomy and 'sovereign decision' (hoheitliche Entscheidung)" 33. (b) In another aspect, the contract is conceived of as a function that the parties play in the context of the community order and for its ends. The contract is conceived "today no longer as the relationship between two individuals, and thus in their

isolation, but in the context of the overall concrete order of the people and its creative function within the scope of that order" 34.

The sphere of application of the figure of the contract, as we have said, is restricted by National Socialist doctrine to the sphere of "legal circulation", or Rechtsverkehr, that is, the circulation of goods. The latter is, then, treated as the "function" of the contract. "From the function of the obligatory contract of permitting the circulation of goods it follows that the obligatory relationship is not exhausted in the satisfaction of the opposing interest of the contracting parties by a sort of peace treaty, but also has the function common to the parties of bringing about the exchange of goods" 35. Thus, concludes Franz Wieacker, another Nazi jurist, there is even between contracting parties a community of purpose (Zweckgemeinschaft), the scope and intensity of which are graduated. The "community of purpose" may be sometimes lesser "as in buying a tube of toothpaste" 36, sometimes greater, up to becoming a sort of "community of performance" (Leistungsgemeinschaft) as in supply contracts. National Socialist legal thought sees the parties not as adversaries each tending to their own personal interest but as "contractual companions" (Vertragsgenossen) 37, who by cooperating are aiming at securing the purposes set by the Volksgemeinschaft. The fundamental duties of the parties to the contract exist both before it is stipulated and after it is concluded. They take their origin not from the will of the parties but from the community order. Accordingly, contractual responsibility, in National Socialist legal doctrine, increasingly takes on the outlines of extra-contractual responsibility 38.

Even a contract whose scope of application is reduced to the sphere of circulation of goods does not, according to National Socialist doctrine, constitute a relationship that can be summed up as the sum of the individual services it gives rise to or "actions" it permits. Even the contractual relationship, writes

Wieacker, is instead a genuine "order" - or according to Lange a "unit" 39in which the element of duty prevails over that of right 40. This "order" or "unit", manifested chiefly in a series of "general clauses" or general principles (like "good faith", the creditor's so called Schutzpflicht, fair recompense for services etc.), further limits the role that the parties' will plays in determining the content of the contract 41.

Freedom of contract is questioned in relation to the conception that Larenz develops of freedom of the individual as such: "The freedom of all contains also the freedom of the individual, certainly not arbitrary freedom but the freedom of the ethical will aware of concrete responsibility in concrete community relationships" 42. Larenz is however less critical and destructive towards the notion of contract than towards that of subjective right. While the latter is eliminated and replaced by the figure of the Rechtsstellung, the concept of contract is instead retained, albeit only with a thorough revision of its essential characteristics. What is forcibly stressed is on the one hand what would today be called the "social function" of the agreement between the parties, and on the other the dependency of the contract on the law, in a way that closely recalls Kelsen's theory of the contract as an individual norm 43. "The contracting parties," writes Larenz, "act not only as separate individuals but as members of the community, located within the community order. Their contractual settlement, to be legally valid, must be adapted to the general order as one of its means. It must be presented as the further concretization, determination and realization of the popular order. The 'popular order' ought not therefore to be represented as a rigid, fixed set of norms. It consists primarily only of directives, in constant need of specific perfecting and of implementation, through which alone the order is realized as a concrete form of life. Among instruments for the specific perfecting of the community order is also the contract, if regarded no longer as a relationship between individuals but between community members" 44.

The contract - on this view - is not an expression of the autonomy of the individual but a function of the legal order; not an instrument made available to the individual in order to enter into relationship with others associated with them and thereby achieve his own interests, but a mechanism that enables the norms of the order, to some extent always general and abstract even after the Deutsche Rechtserneuerung, to become concrete and be applied to the specific case. "The contracting parties' own will thus ceases to be the sole determining factor for the contractual relationship. It is only the second factor alongside the will of the community which is the primary decisive element.... It is clear that the rigid opposition so far upheld between law, objective right on the one hand and agreement of the parties on the other falls.... Accordingly, the normal contract too is nothing other than the final link in a series of forms of production and realization of law, among which only the aspect of determination by the individual members of the community constitutes a different element" 45.

According to Larenz the contract is not a form of production of law counterposed to statute, the first being a voluntary agreement and the second a coercive act. The contract on this view constitutes an instrument for linkage and adjustment between positive law and social reality. The changeability and plurality of situations in social reality often render the instrument of law insufficient and its rigid regulation inadequate, instead requiring a mechanism of adjustment that allows the law an effective grip on reality. The contract is thus conceived of as the ultimate link in the chain of acts producing law. This formula immediately calls to mind the similar conception of Kelsen, who sees the contract as an intermediate element with an "individualizing function" between the law and the verdict 46. The analogy between Kelsen's conception and his own does not escape Larenz himself, who accordingly feels himself obliged to point out the difference between them. "What interests us here," writes our German jurist, "is not the establishment of a formal-logical relationship of delegation and hierarchy between the law

and legal business, but to grasp the concrete essence in the other and with the other of the life order of the whole people and of the particular order of the Volksgenossen in the formation of the concrete contractual relationship" 47.

On this view the limitations on contractual freedom take on a quite different meaning. They are no longer exceptions to the principle of contractual freedom but applications of the principle of the relativity of such freedom and its foundation in the community order. "The limitations set on the parties' freedom of determination are accordingly to be understood not as exceptions to the principles of contractual freedom but as consequences of the dependence on the community, inherent from the outset in a contract between Volksgenossen, and of the resulting principle of the relativity of the freedom of determination" 48.

Unfortunately, Larenz admits, one cannot do without a certain dose of freedom of initiative for the subject. "National Socialism does not eliminate the will, the initiative, of the individual Volksgenosse; it expects responsibility from him, and must accordingly allow him a certain dose of genuine freedom of determination, bound by duty" 49. Some form of agreement between subjects, some form of contractual practice, must persist even after the Deutsche Rechtserneuerung. "The contract, the free agreement between members of the national community, is accordingly a legal construction that even National Socialism, in accordance with its nature, can never completely do without" 50.

However, on this view, one cannot assert the existence of a private sphere that escapes the direct interest of the community: what natural-law theoreticians defined as the scope of the "licit" or of the "legally irrelevant". Every human action is, on Larenz's view, of legal (as being of community or social) relevance. "It is accordingly not correct to explain the fact that even today the individual still has some freedom of

determination in his own legal affairs by pointing solely to the fact that the community has no immediate interest in such affairs. This is certainly true in many aspects, and over and above this it is the very responsibility required and expected by National Socialism of the acting personality that renders necessary the granting of a certain liberty of determination and of disposition" 51.

3. From contract to "status". A new feudalism?

The sharpest attack on the "old" private law and the whole liberal legal order is brought to bear by Larenz not through reformulation of the legal concept of contract but through the restructuring of the legal figure that lies behind the concept of subjective right: legal capacity 52. As we know, in legal systems of Enlightenment inspiration, be they still absolutist or already liberal, legal capacity is the particular form of legal subjectivity that lies in the capacity to be a bearer of rights, attributed to each human being in virtue of his very existence. The formulation given by the Austrian Civil Code is exemplary in this connection. Article 16 of the ABGB states: "Jeder Mensch hat angeborene, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachen...".

From the fact that legal capacity results solely from the existence of the human subject there derives as a corollary that it is attributed to all humans, without distinction of class, race, sex, religion or political conviction. The concept of legal capacity is the legal figure that reflects at the level of the positive legal order the principle of equality understood as the equal dignity of all human beings before the law 53. This emerges explicitly from Article 11 of the Swiss Civil Code, which in its formulation links equality among human beings with legal capacity: "Every human being has civil rights. Everyone accordingly has, within the limits of the legal order, an equal capacity to have rights and duties". The connection between the

liberal concept of legal capacity and the principle of equality is well grasped by Larenz. "Dogmatics has to date," writes our German jurist, "considered the person as the possible bearer of rights and duties, and has thus identified the personality in the legal sense with legal capacity. It assumes as natural the fact that every human being as such, without regard to nationality or other requirements, is a person and hence legally capable. As persons, or in relation to the possibility of having rights, all human beings appear to it as equal. Accordingly, it does not in general recognize even degrees or gradations in legal capacity; instead it explicitly declares: 'The legal capacity of human beings is in principle equal'. In this way the idea of equality is revealed as the ideological a priori of the abstract concept of person" 54.

In the Nazi critique of liberal thought, the principle of equality is seen as a derivative of the principle of individual freedom and of individualism. And not wrongly. Once the individual is conceived of as an ontologically free subject, autonomous and "legally capable", that is, free, autonomous and "legally capable" of itself, by its very nature, prior to any legal recognition by the State or by "membership" in a particular social body, freedom ceases to be a "privilege" and becomes an intrinsic quality of the individual, as such attributed to all individuals, who in this respect become equal among themselves. This comes out well in the following statement by Heinrich Lange: "Equality was the undesired consequence of the freedom of the other, of the lack of bonds on each" 55. Previously, Eugen Ehrlich had stressed that "individualism in law means above all that the law asserts each person to be an individual, not merely a member of a group of people" 56and that "under the dominion of individualism it is not just the individual that is recognized as having legal capacity, but every individual" 57.

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Gino Gorla, in a study on Tocqueville and the "idea of rights", distinguishes three conceptions of subjective rights: (a) the aristocratic conception (b) the natural-law conception and (c)

the statist conception. On the first view, an example of which can be found in Edmund Burke's "Reflections on the French Revolution", subjective right is the hereditary privilege of particular subjects in virtue of certain of their qualities (in general their membership in a certain social group, a certain class (nobility, clergy, bourgeoisie), or a certain city or region. On this conception "the subjective right, the personality, were understood as a conquest and a product of the particular history of each" 58. "Here" continues Gorla, "it is not abstractly to man, by nature or reason, that rights and personality are attributed, but to whoever as man or group has personality and rights rooted in their own history, their own tradition, their own activity and that of those like them" 59. The "aristocratic" conception of rights is accordingly based on the assumption and acceptance of the inequality of men and of their classification and arrangement in social hierarchies and ranks.

The natural-law conception of rights starts from the postulate of the fundamental equality of human beings. This conception is presented by Gorla as follows: "Man, not this or that particular man, not this or that particular group, association or moral entity because of its history or traditions...; man has a right, a power of will, a personality that are original and innate. All men are equal and all, by nature and by reason, have innate subjective right" 60. The statist conception is instead the one that asserts the derivation of subjective right from the power of the State. The subjective right is no longer, on this conception, an <u>original</u> right (as in the aristocratic and natural-law conceptions), but is <u>derived</u> 61, a "reflected right" 62. What interests us here, though, is the difference between the "aristocratic" and the "natural law" conception. Legal capacity, as the capacity of <u>all</u> men to be bearers of rights and duties, represents, and renders operative at legal and institutional level, what Gorla defines as the natural-law conception or "feeling" of right. "Legal capacity" is a conception of natural-law extraction, not so much, be it noted,

because it asserts the original nature of rights (since feudal privilege too was conceived as original) as because it roots this originality in the equal nature of human beings (and therefore has as a postulate equality among men). Accordingly, Larenz criticizes the modern notion of legal capacity - which posits the equivalence between human being and legal subject - precisely because this notion is the object of a conception that postulates the natural equality of all human beings.

Larenz denies that all men are subjects of full right, "persons". It is instead, in his view, only the members of the folk community, the so-called Volksgenossen, that are truly "persons". "The core of the National Socialist renewal of law," writes Larenz, "lies in the overcoming of the idea of equality by the principle of the folk community determined by race" 63. Larenz does not however go so far as completely to deny the capacity to the foreigner, who does not belong to the folk community, confining himself to asserting that this latter capacity is a capacity of lower degree, and dependent by comparison with that of the Volksgenosse. "It is not 'every human being' who is legally capable as a person, but only the Volksgenosse as 'Rechtsgenosse'. As a guest, the foreigner enjoys derived, limited legal capacity" 64. However, in order to enjoy this reduced capacity, the foreigner must not belong to a race foreign to and remote from the Germanic one, that is, must not be artfremd 65. But what is the connecting link between being a Volksgenosse and being a Rechtsgenosse? The link between the two qualities derives from a concept that is as vague and mythical as it is laden with obscure and already then terrible implications: "honour" 66. It is honour that makes the community member a subject of law in full title.

After having denied the prime characteristic of legal subjectivity typical of liberal legal systems (legal capacity), namely its attribution by birth to all human beings, Larenz turns against its second component. In liberal systems, as we know, legal capacity means capacity to be a bearer of rights. This is

opposed and refuted by the National Socialist jurist, who lays down a necessary nexus between the fact that legal capacity is conceived of as due by birth to all men and hence equal for all and the fact that it consists chiefly in the possibility of being a bearer of subjective right. This nexus is for him no less purely ideological. "With the assertion, entirely devoid of meaning, that legal capacity is the capacity to have any right and duty whatever and that in this sense legal capacity of all men is 'in principle the same', there is nothing but concealment of the essential basis of the differences in favour of an idea of equality whose political and spiritual origin goes clearly back to the thought of the Enlightenment and the French Revolution" 67. According to Larenz the capacity of being a member of the Volksgemeinschaft is no longer the capacity to have and to exercise rights, but that to "take part" in the life of the folk community. "Legal capacity does not mean the capacity to possess subjective rights, but the capacity to participate in the legal life of the community and in particular positions as member within the folk community" 68.

Furthermore, the traditional concept (of Enlightenment origin) of legal capacity, as well as being rooted in merely being human and consisting chiefly in being a bearer of subjective right, is disputed as such, as being an abstract legal concept. Legal capacity should instead be transformed into "capacity to possess legal positions" and hence into "a concrete concept, full of content" 69. Larenz, referring also to the work of another Nazi jurist, Karl Michaelis 70, enumerates a series of "aspects" that as a whole constitute legal capacity. These are firstly (a) protection of the personality (Persönlichkeitsschutz), that is, "the legal recognition of the personality in its typical manifestations by the community" 71. This recognition includes in the first place the right to one's name and to personal honour, the so-called most personal rights, among which the German jurist also enumerates the right to self-defence. Then comes (b) the patrimonial capacity, that is, "recognition of an autonomous economic power of the personality in the context of

the community, of participation in the common heritage of the nation". "The patrimonial capacity of the individual too," adds Larenz "is based, and this is something often overlooked, on the position within the community (or in relation to our community) and may therefore undergo limitations in the case of a foreigner or of someone alien to the race (Rassefremd), whose legal capacity is in any case reduced by comparison with that of a member in full right" 72. Thirdly, legal capacity includes (c) procedural capacity. Fourthly comes (d) connubium, that is, the right to contract matrimony "within the community of the race"; then (e) political capacity, that is, the capacity to hold public office and in general to be part of the political community. Finally, (f) come the special capacities conditioned by particular prerequisites, such as, for instance, the capacity to be a farmer.

All these six aspects, taken individually, sanction a sort of hierarchy or scale of differing capacities, from a minimum to a maximum, from the extremely reduced capacity of someone "alien to the race" up to the full capacity of the Volksgenosse. If a general and abstract concept of capacity were adopted, like that in traditional private law, this gradation and hierarchicalization would prove impossible. In that case, legal capacities, characterized by a few formal common features, would of necessity have to be conceived of as equal for all and the only alternative that would remain open would be that of having or not having legal capacity. Larenz instead intends forcibly to affirm the inequality of human beings working and operating within the folk community and to transfer this onto the level of law without having to deny anyone some share of capacity. A negation of this type would in fact, apart from raising a series of irresoluble theoretical paradoxes, clash with the consolidated practice of relationships between associates and threaten the operation of the most elementary social mechanisms (one need think only of transactions of an economic nature). "The individual member of the legal community (Rechtsgenosse) is not, as in abstract conceptual thought, merely capable in law, but

instead has a definite legal capacity which may be further characterized by the presence or absence of some of the aforesaid features. From the broad legal capacity of the member in full right (citizen) we may accordingly distinguish the diminished capacity of 'those who are about to become a member in full right' (des "werdenden Vollgenossen"), that of the foreigner who does not belong to the political community (foreign to the State) but not foreign to the race, and finally that of one who is alien to the race (die des Rassefremden). One lacks only political capacity, the other also connubium, the possibility of being a farmer etc.) 73.

Legal subjectivity, in National Socialist doctrine, is no longer the "legal capacity" of liberal systems, which may give rise to the possibility of bearing indefinite and theoreticallly infinite subjective rights that may pursue multiple goals. Legal capacity, according to the legal doctrine that has dominated since the Enlightenment revolution, is in fact, as Ulrich K. Preuss writes, "the universal capacity of a subject to have rights, irrespective of whether the subject is also in a position to exercise those rights" 74. Legal subjectivity and being a bearer of the legal position (subjective right) remain quite distinct in the configuration given to legal subjectivity through the concept of "legal capacity" 75. "Legal capacity," writes Preuss again, "includes all the social qualifications that may be the object of rights" 76. The concept of "legal capacity" is moreover inseparably linked with that of subjective right. Legal capacity is the capacity to be a bearer of subjective rights. And the figure of subjective right is an extension onto the plane of legal concepts of the philosophical conception that the individual is an autonomous moral subject (a "person" in the Kantian sense). Subjective right marks the attribution to this subject of a sphere of action of his exclusive competence, which it will then be for the subject himself to fill with content in accordance with his interests and preferences.

According to Larenz, the abstract concept of person no longer has any meaning within the community set up in conformity with the principles of National Socialism, is not a legal figure operating within the sphere of "community right". It can have at most historical value. "The concept of abstract person, which, as Hegel understood it, remains important as the principle of a different historical formation - that is, the late-Roman private law understood individualistically and its reception in the 'Pandect system' of the 19th century - but has become unjustified for folk law in the proper sense" 77. The meaning of the concept of person is regarded as purely historical, in reference to the institutional structure and legal thought of the bourgeois epoch: "It retains its significance as a particular degree of the development of the idea of law, considered from historical and philosophical points of view" 78. Equally, if some significance is to be attributed to subjective right, this will, according to Larenz, be only a historical significance, testifying to a social and legal reality that is henceforth "overtaken". "The concept of subjective right," writes the German jurist, "in its present form goes back to the ideology and legal philosophy of early liberalism. At the centre of that thought was the idea of the human being as a morally free person. According to this philosophy the law exists only for the purpose of this moral freedom of the individual human being; the most vigorous expression of this freedom was, according to that philosophy, just this subjective right of the individual. This is the immediate expression of the autonomy of will, egocentrism and self-sufficiency of the individual, which is accordingly an end in itself" 79. In a society like the National Socialist one that sacrifices individuals on the altar of the community and the sacred will of the Führer, subjective right can be nothing more than a museum artifact, ceasing to be one of the concepts through which the members of the society think and guide their actions.

Subjective right allows the subject to have a freedom of movement and hence a possibility of exchanges and relationships which would be (and was) impossible within a system of status, in which

the legal form itself already expresses a particular, specific social condition (membership in a certain social stratum, a certain profession, a certain family, a certain geographical area) and does not refer for this purpose to the free determination of the subject 80. It is in this sense, but only in this one, that the Marxist analysis is correct in linking subjective right to the bourgeois requirement of market freedom 81. Subjective right, as a general concept (that is, one that may be applied to the generality of social situations in which the subject may find himself), and an absolute one (that is, not "relative", as being not capable of gradation or reducible to arbitrary decision by the legal order, not conditioned in legal form by its own object, and hence "predictable" in application) is also this: the function of a certain economic system. But it does not have its roots in being a function of that system; that is, it is a consequence not a cause. For subjective right, and in general for many legal concepts, there applies what Susanne K.Lange wrote in connection with the vocal and linguistic play of children and the rites of primitive society, and in general for all cultural forms of any society whatever. They cannot be explained, or not fully or chiefly, by their apparent or presumed practical end 82. This is true, in my view, of all important social concepts (practical concepts) that is, for those concepts the members of society conceive of (and guide) their conduct by, and in part for the theoretical concepts (that is, the concepts through which they describe the state of affairs) 83.

The roots of the concept of subjective right are not "functional" but "symbolic": they lie in the conception of the world developed by liberal democratic thought. "The appearance of the idea of subjective right," writes Helmut Coing, "is... the expression of a social philosophy that sees in the autonomy of the individual and its protection the essential purpose of the social order" 84. Larenz is well aware of the eminently symbolic nature of rights. Nor are they mere legal categories that are functional for the systematic needs of the dogmatic and the practical lawyer. It is for this reason that Larenz considers that the new

National Socialist legal order cannot, on pain of contradicting itself, retain this category. "This is not," writes Larenz in connection with the concept of subjective right, "as more than one person might think, an innocuous 'systematic concept' that might calmly be retained with the due limitations and adaptations to the new legal ideas, without having to fear drawbacks from that. Instead, we have to do here with a category which is thoroughly rooted in a particular conception of the world" 85.

The rejection of the universality and abstractness of the concepts of "legal capacity" and "subjective right" is rooted in Larenz's doctrine in a general rejection of universal and abstract concepts 86and of the vision of law as a system of general and abstract norms, regarded, not wrongly, as a product of the Enlightenment and of liberal thought. This way of thinking, in abstract concepts, is traced back by Larenz to the tradition of Roman law, regarded as essentially foreign to the structure and principles of "Germanic law" 87. "What we have to overcome in Roman law," writes Larenz, "because it threatens our very existence, is not so much individual propositions that we have taken over and may in part retain without harm, as the overall spiritual content it contains within it and the mode of thought in which it has been passed down to us. Contributing towards the overcoming of both is today the task not only of the legislator but also of German legal science. Since the structure of Germanic law is different from that of Roman law, it requires particular concrete concepts in the place of abstract universal concepts, and requires dialectic thought directed towards the totality" 88.

In the place of the autonomy and freedom of movement made possible by subjective right, since through it it is possible to attribute to the subject a normative competence in relation to everything that concerns the individual (this too a general and abstract concept), Larenz, as we have already been able to see, sets the "legal position" of being a member of the community, the Rechtsstellung (which is instead, a particular concrete concept).

This Rechtsstellung is related to a certain definite field of action of the individual subject, not to all its possible fields of action. Instead of the individual, a general and abstract figure which accordingly allows infinite variations in its concrete manifestation, there is the Volksgenosse, the member of a certain social class, a certain profession, a certain family, the centre of the "new" legal order advocated by Larenz, or better the new centre to which to attribute legal subjectivity in the context of the Volksgemeinschaft. "The Volksgenosse, like the Rechtsgenosse, is not the bearer of subjective rights, but is found in particular legal positions and accordingly in law" 89.

The concrete person underlying the figure of "community member" is, on this concept, intimately bound up with the particular sphere of his activity which is termed legal (being a farmer, a father and guardian, a tenant, landlord etc.). In reality here it is not so much activities (which as such may theoretically be carried out by any subject whatever) as personal qualities of the subject that do not depend (as would be the case for beginning an "activity") on the will of the subject but are instead transmitted by natural means or impinge upon it by "destiny". The farmer, for instance, in Larenz's doctrine, is a subject of law not as being a human being but as being a farmer, and as a farmer, not inasmuch as exercising the activity of a farmer but as being by birth the son and heir of farmers. The condition of being a farmer expressed his "place" within the community" (his quality of being a Volksgenosse) and is a reflection of his legal dignity (his quality of being a Rechtsgenosse). "The farmer," writes Larenz, "is not the abstract person of private law, but only the bearer of authorization (berechtigt) as a member and in a certain sense as trustee of his kindred and of the whole folk community" 90. The "legal position" is defined as "the place within the community"; it is a status.

While Larenz does not employ the term status in defining the active legal position of the individual in the "folk" order,

Wolfgang Siebert by contrast explicitly refers to the concept of status. He is one of the Nazi jurists closest to Larenz's theories. Siebert too, like Larenz, reformulates the figure of legal subjectivity by rejecting the concept of "legal capacity" developed in traditional doctrine. Thus, the legal capacity of the Volksgenosse, according to Siebert, "is not the abstract capacity to have rights or duties, but the capacity to take part in the legal life of the people" 91. More important and relevant than mere capacity is instead, Siebert writes, the realization of this capacity in the respective "legal positions" of the "folk comrades" (Volksgenossen). "This legal position," he continues, "appears as status, as an integral life relationship and as a position as member concretely formed in the community and in its most restricted units and particular spheres" 92. Siebert, that is, explicitly asserts the equivalence of the concepts of Rechtsstellung and of status.

Status in the sense discussed here, that is in the meaning that the term takes on as equivalent to the "legal position" theorized by Larenz, can be distinguished from the status spoken of by Georg Jellinek in his System der öffentlichen subjektiven Rechte. In Jellinek's theory status (here translated not as Rechsstellung but as Zustand) designates the relation the human being is in vis-à-vis the State, a primarily formal relationship at legal level, rather than material at social level. "The possible relationships in which he may be in relation to the State places him in a series of states (Zustände) of legal relevance" 93. This "state" [status] or formal condition founds the subject's rights vis-à-vis the State. "The claims (Ansprüche) that result from these states are what is called subjective public rights" 94. To the various "states" (or statuses), explicitly defined as legal (rechtliche Zustände 95), there correspond, in Jellinek's theory, different types of right. Here, accordingly, status and subjective right are counterposed or mutually exclusive, but the former is taken as the basis for the second. Larenz's conception is different; for him status (Rechtsstellung) represents not the formal relationship of the subject to the

State but the condition of the individual within the social organism (the Volksgemeinschaft), not the degree of greater or lesser freedom of the subject but his function, origin and work in the context of the community. While in Jellinek's theory status (Zustand) is a situation that necessarily refers to another subjective legal situation, the right of the individual, in Larenz's theory status (Rechtsstellung) is the only subjective legal situation. In his doctrine status is a subjective legal situation that differs from and is counterposed to subjective right. While in Jellinek status and subjective right are fully compatible situations and indeed intimately connected, in Larenz we find that "antinomy of subjective right and status (statut)" that Georges Renard speaks of 96.

Subjective right and status (Rechtsstellung in Larenz, statut in Renard) are counterposed without being mutually exclusive within one and the same legal system (in Renard's moderate theory) or are mutually exclusive (in Larenz's extremist version) for three chief reasons. 1) Status is not a general requisite of all human beings but an attribute of the members of a particular community ("institution", says Renard). Or, "subjective right is the radiation of the personality, status is the reflection of the institution" 97. 2) Status is not an abstract legal situation that is made specific (filled with content) only following exercise of the subject's will: on the contrary it already expresses one, and only one, definite concrete possibility of action by the latter. Or, "status is the consequence of an arrangement of things of which I am not the master; it is a position that I occupy" 98. Accordingly, by contrast with subjective right, status is neither disposable nor transmissible. "Subjective right is disposable: the bearer of the right may renounce it, sell it or give it away. Status is non-cessible, inalienable; it cannot be renounced" 99. 3) Status is not always equal to itself, absolute, but may diversify, graduate, hierarchicalize, reduce or expand its own limits, in a word, is relative. Or, "status participates in the mobility of the institution, subjective right is rigid. Subjective right, once

constituted, challenges events; status follows the fate of the institution; it day by day adapts to its ups and downs" 100.

In another sense we may speak of status in relation to the configuration of the subjective legal position delineated by Larenz and by National Socialist legal doctrine. Status, understood as the subjective legal position typical of the feudal order, is characterized in its internal structure by the link it sets up between the exercise of a right and subjection to a duty 101. This connection, whereby assertion of a claim against a party is at the same time subjection to a duty towards that party so that that right can be asserted inasmuch as one has taken on that duty, may also be rendered, according to Niklas Luhmann, by the notion of "reciprocity", counterposed to that of "complementarity", between rights and duties 102. In status, according to Luhmann, rights and duties are "reciprocal", in the sense that one is possessed on condition of also having the other. Status is accordingly a set of rights and duties accruing to the same subject. This definition of status sticks closely to the definition of Rechtsstellung given by Larenz: an Inbegriff von Rechten und Pflichten. Being a bearer of and exercising subjective right is instead not conditioned by any duty to which the bearer of the right must submit. Duty is here, as Luhmann writes, "complementary" to subjective right. The duty corresponding to the subjective right bears upon a different subject from the bearer of the right, and characterizes the legal position of the person on whom it (the duty) bears as a "passive situation" by comparison with the "active" one of the bearer of subjective rights. In the bourgeois legal order, as Heinrich Lange, another front-rank Nazi jurist, writes, the creditor is characterized as a subject that has only rights and the debtor as one that has only duties 103.

The concept of status is bound up with that of "a state", of "class", in the feudal sense, of Stand, to which one belongs purely by birth and from which one cannot become emancipated 104. In Larenz's conception the theoretical reference to the

feudal order is not merely implicit but deliberate. This can be seen from the architecture of the "new" legal order, as sketched out by our German jurist. From the subjective viewpoint, as far as the individual's position is concerned, there is no longer anything but a Gliedstellung, and a "personality conditioned by the community and the race (art- und gemeinschaftsbedingte Persönlichkeit)" 105. From an objective viewpoint, as far as the structure of the folk community is concerned, it is conceived as an organic agglomerate of Gliedstellungen, that is, as a ständische Lebensordnung, an order of estates. The Gliedstellung is given once and for all: the subject cannot change it; it is expressed by a "bound legal position", a gebundene Rechtsstellung. The individual claims arising from this status or "legal position" cannot be distinguished or detached from the status itself. That is, not only can the status not be disposed of, but nor can the individual "rights" (in the improper sense), that is, the powers and competences (Befugnisse) that derive from it. "The legal positions in which a position as community member are expressed (like the position of farmer or parental power) represent a task assigned by the community; duty and power here are the same thing. There cannot be disposition either of the legal position or of the individual power" 106. In the system Larenz is presenting the legal relationships run exclusively through the interplay of status and of Stände.

In bourgeois society the legal subject is an abstract, free subject, that is, formally emancipated from a determined social condition: the personal individual and the individual as member of an estate or class not longer coincide. Marx writes in this connection that in feudal society, "for instance, a noble always remains a noble, a roturier always a roturier, irrespective of any other condition they may have; this is a quality inseparable from their individuality. The difference between the personal individual and the individual as member of a class, casuality as the condition of life for the individual, arises only with the appearance of the class which in turn is a product of the bourgeoisie" 107. In bourgeois society, for instance, the

peasant disposes of and enjoys his piece of land not as a peasant, but as a human being who bears a property right, and is accordingly free to divest himself of his condition as farmer (which is not legally relevant for the purposes of possession and of exercise of the right of ownership) by selling or renting out his land, that is, disposing of his right. He is equally free to take on the condition of, let us say, baker by buying the necessary equipment or selling his labour services, that is, again by buying or ceding rights. This freedom is not fictional or merely ideological, as a part of the socialist and Marxist critique has been asserting for over a century now 108, but real. The farmer can in fact change occupation, residence and class. He can move between different places and social positions. This freedom does not imply equality of conditions, but only the possibility of taking on <u>different conditions</u>. Nor does this freedom imply the possibility of improving an individual's conditions of life, but only of <u>changing</u> them. It implies horizontal social mobility, between social conditions at the same level of wealth, and not necessarily also vertical, between social conditions at different levels of wealth. It is against this freedom, against social mobility <u>tout court,</u> that the attack of National Socialist lawyers is directed 109.

They rail against freedom of movement and change within the social body and against those legal mechanisms introduced by bourgeois society to promote that mobility: consider the bourgeois battle against entails in favour of freedom of testament. Freedom of testament is attacked by Nazi legal theory along the lines on which it attacked legal capacity: on the one hand against the freedom to dispose (principle of autonomy), or against the power of the individual to himself decide the norms governing his conduct, in particular the norms regarding the destination to give his own property after his death; on the other against the generality of disposition, that is, against the possibility of disposing of <u>all</u> one's property (the principle of universal succession), that is, against the possibility of conceiving a subject's property as a general, abstract entity

corresponding to the generality and abstractness of the legal subject. The inheritance, as was already the case with the legal subject, becomes distinguished and fragmented into a sum of particular elements. These particular elements (goods) are classified in different categories and these in turn ordered according to a hierarchical criterion. To the greater or lesser closeness of the individual asset to the community order, the greater or lesser link of the asset with the "blood" and "soil" of the Volksgemeinschaft, will correspond a greater or lesser disposability of it 110.

"Since legal transactions are possible not alongside but only within the folk community order," Larenz writes, "it has as its prerequisite the particular systems and articulations of the people's life. Thus, for instance, property has its foundation in the family and in the order of estates (Ordnung der Stände), and belongs to legal circulation only to the extent to which it is alienable or can be violated. From the family oder as the prime order of existence that decisively determines the life of the child there also follows the discipline of transactional capacity, from the personal requirement to act in legal circulation 111." The proposal to go backwards towards feudal society is explicit in Larenz when he writes that "the German idea of law is destined in the next historical epoch to replace that of the French Revolution" 112. And in what, according to Larenz, did the idea of law introduced by the French Revolution consist? In the "elimination of all differences of estate, sex, race and religion" 113. The task of the "German idea of law" will, contrary to what the "abstract" individualism that emerged from natural-law rationalism and liberalism had done, be to restore the social differences and replace the co-existence of equals with the immediate 114and organic union of the members of an ethically homogeneous or "pure" body.

4. The "overcoming" of the division between public law and private law. Karl Larenz and Wolfgang Siebert

Reformulation of the category of the subjective legal position and of the figure of the contract by National Socialist legal doctrine culminated in its abandonment of the division between private law and public law 115.

The distinction between ius privatum and ius publicum is traditionally founded on the different type of interest that is the object of the protection offered by each type of law. While in private law the interest and utility of the individual take prominence and are protected as such, in public law it is the interest of society as a whole that takes the upper hand and constitutes the reference point for legal regulation 116. Moreover, private law takes into consideration the legal relationships between individuals and assumes a notion of legal duty that is articulated between private subjects, the performance of which is entrusted to the decision of the private person. "Private law," writes Karl Larenz in this connection, "in the sense adopted hitherto intends to regulate relationships of individual persons with other individuals. It knows legal duties only as duties of the one towards the other, towards the bearer of the advantaged position, and regularly refers to the latter in order to assert these duties by the request for performance or for compensation for damage. The individual's duties towards the collectivity (Gesamtheit) are instead confined to public law" 117. Traditional private law is seen as an autonomous system of legal relationships between individuals. This also means that the system of private law is constructed dogmatically on the basis of presumptions of its own, and can be understood and explained only by reference to these.

Larenz rejects this construction of private law as the sphere of legal relationships among individuals because "any such autonomous system as private law can no longer be reconciled with out people's order of life (mit unserer völkischen Lebensordnung)" 118. This rejection is based

on three chief reasons. (a) Firstly, private law as a system clearly distinct from public law sanctions the existence of a sphere of relationships in which the merely private interest takes precedence, in contrast with the National Socialist principle of the absolute, permanent and pervasive superiority of the general interest over the particular interest. Gemeinnutz geht vor dem Eigennutz, went one of the slogans most used by Nazi propaganda 119. (b) The conception of an autonomous private law clashes with National Socialist legal doctrine where it sees legal duty as duty towards an individual subject, towards an individual, whereas Nazi doctrine conceives the Rechtspflicht essentially as a duty towards the community. (c) Finally, private law is criticized by Larenz as a system claiming to be autonomous with respect to other spheres of law, still more with respect to ethics and politics, whereas National Socialist doctrine tends to subordinate every legal sphere to principles of public law, and to identify these with the principles of a certain ethics and a certain ideology and political practice, namely the principles of National Socialism 120.

To explain the way in which the "new" Germanic law realizes the "overcoming" of the division between public law and private law, Larenz dwells on the reformulation of the figure of the contract brought about by Nazi dogmatics and legislation. The foundations of the system of private law, asserts Larenz, are private autonomy and contractual freedom. The few restrictions on contractual freedom present in traditional private law can, according to our German jurist, be traced back to one of the objectives assumed by this legal system, namely the intention to offer every individual the same chances of entering into a contractual relationship with another. It is only where these equal chances for different subjects cannot be brought about otherwise than by a limitation of private autonomy that legal regulation enters in to lay down an obligation to make a contract. "Wie anders heute!" exclaims our author with satisfaction. "How different today! In the sphere of the market order the legal relationships of individual folk

comrades (Volksgenossen) are increasingly regulated by provisions of objective law instead of by contractual agreements. In the sphere of circulation of real property contractual regulation is increasingly dependent on authorization by the authorities" 121.

Even in the sphere of relationships left by the National Socialist order to the free determination of the parties, Larenz adds, contractual freedom is conditioned and limited by the guidelines of the economic and social order. However, the limits that the National Socialist legal order sets to contractual freedom are not aimed at bringing about an equal possibility for individuals to enter a contractual relationship, but to ease the tasks in favour of the community imposed on each individual. Objective law comes in to restrict private autonomy, in the National Socialist order, in order that particular tasks and functions of the community can be performed. "Even where the parties can still freely conclude contractual relationships, they must tolerate the evaluation of their relationships in reference to the community's needs. They must, for instance, accept that the price set by law will be valid between them instead of the agreed price, or that the power of termination laid down by the Civil Code or by contract - in respect, for instance, of rentals or the employment relationship - will be increasingly limited" 122.

Wolfgang Siebert takes up the critique of the "bourgeois" notion of contract common to Nazi jurists and presents Larenz's contract theory again. As far as the figure of the "contract" is concerned, just as for the "legal position" of the Volksgenosse (the figure developed to replace the arch-liberal subjective right), Siebert is one of the most attentive followers of Karl Larenz's ideas.

Firstly, and this is indicative of the ideological motives that animate National Socialist doctrine, Siebert identifies as the basis of the "bourgeois" theory of contract the principle of equality among men. The

traditional doctrine, argues Siebert, asserts that every legal relationship that goes beyond the personal legal sphere of the subject and enters the legal sphere of another subject must in principle be formed by the assent of the party concerned by the subject's action and hence through an agreement between those concerned. This conception assumes that the legal spheres of all subjects have the same value and deserve the same protection. The justificatory foundation for the assertion of the need for agreement by those concerned in those relationships that involve interests going beyond the individual subjects is accordingly, according to Siebert, the principle of the equal dignity of human beings: a principle that clashes violently with the racism and anti-egalitarianism of Nazi ideology.

Against the liberal doctrine of the contract Siebert, following Larenz, raises a series of objections. The first, preliminary, one is that law is not, as positive legal theory asserts, an artificial system created by men, but instead a natural order consubstantial with the laws that govern the existence of social organisms. Law ought accordingly not to be regarded as the product of declarations of will nor conceived of as a relation between individual subjects 123. The total legal order does not in this view result from individual legal relationships and is not made up of them, but is already in itself a "whole", a unitary and compact "organism" and not a sum of individual decisions and relationships. Within this "organism", certainly, legal relationships are constituted, which however presuppose that "whole" and must be functional for that "whole". "The system of legal relationships between folk comrades," writes Siebert, "rests primarily on the orders and natural communities within the overall order and rests so immediately thereupon that we may say that it is in these natural orders that our new law is deployed, and in the natural articulation of the folk order that the new legal system is manifest" 124.

The various articulations and legal relationships are subordinate to the ends and interests of the overall organism. They fulfil functions for the life of the organism. "To all these spheres of the whole, there is the common fact that within the folk order they fulfil a particular function and develop a system peculiar to them according to the type of task" 125. A functionalist theory of legal institutes and relationships thus takes shape, where - by contrast with what happens in sociological functionalism - functions are determined by reference not to a particular structure of society presented with greater or less claims to objectivity and scientific accuracy but to a normative model of community (the "folk community" modelled in accordance with the principles of National Socialism).

In relation to the theory of the contract Siebert carries out two operations: 1) he transforms the concept of contract "from free contract to means of forming the folk order" 126; 2) he restricts the sphere of application of the figure of the contract to the sphere of "legal circulation" (Rechtsverkehr). This latter operation is brought about by introducing the distinction between "contract" (Vertrag) and "legal relationship in personal law" (personenrechtliche Rechtsverhältnis), a distinction that echoes the similar one made by Larenz between "contract" (Vertrag) and "agreement" (Einigung).

Above all, as we have said, the very concept of the contract is transformed. There is a denial of what constitutes the central nucleus of the notions of contract developed by the pandectists and by natural-law doctrine: contractual freedom. "The contract," writes Siebert, "is the instrument made available to the folk comrade by the legal system for the purpose of responsible accomplishment of his life relationships in the context and service of the overall order" 127. Private autonomy, continues Siebert, is no longer a principle counterposed to the community order, but a means for

its deployment and development. Consequently, if the contract is a functional relationship in the overall community order, "the meaning and content of this legal relationship depend in the first place on the overall order; determination by those concerned comes in only at a subsequent stage, insofar as the overall order requires or permits this freedom of determination" 128.

In reality, Siebert adds, there has never existed any legal order allowing full contractual freedom. However, in the liberal order, though it bristles with restrictions on such freedoms, they are seen as exceptions to the general principle of contractual freedom. Instead, National Socialist legal doctrine asserts that the bounds placed on the contractual freedom of the individual by groups or communities (a) are natural manifestations of the legal order and accordingly (b) not exceptions to the postulates of this order but exceptions to a principle like that of contractual freedom that is radically rejected. This does not however mean, maintains Siebert, citing Larenz, that National Socialist doctrine does not recognize the need for and usefulness of the contract, that is, the voluntary participation of subjects in the maintenance and development of the legal order. The contract as a means for creating the folk order "is a necessary and valuable element in the German legal order, since an authentic community needs for its development the personal responsibility of its individual members" 129.

From this conception there follow a few fundamental novelties as regards the criteria and spheres of validity of contracts. In the first place a contract, according to Siebert, is invalid if the will of the parties does not concur "with the laws of life of the overall order", that is, with ideological principles but also with the more strictly political and practical needs (ultimately, the raison d'état) of the Nazi regime. The requirement is absolute concordance and coincidence between those principles and these needs on the one hand and the content of the contract on the other: only then can

the contract be recognized as valid by the order. "The general principle that applies is that every legal transaction, (Rechtsgeschäft), in order to be valid, must correspond to good morals (den guten Sitten), that is, the fundamental laws of the overall folk life order" 130. However, to ascertain whether the parties to a contract have observed the principles of the folk order and hence whether the contract in question is valid, it is not enough, Siebert writes, to work with the simple alternative between validity and invalidity. The judge must instead be allowed a sphere of judgment and a room for intervention that is much broader in relation to determining the content of the contract and ascertaining the parties' will. The reformulation of the notion of contract by Siebert accordingly leads to assigning greater powers to the judge in assessing the requirements for the contract's validity.

Another major consequence of this theory is the introduction in particular situations of the obligation to contract (Kontrahierungszwang). National Socialist doctrine no longer bases this obligation, as traditional German doctrine had been accustomed to do, on Article 826 of the BGB (Schadenersatzpflicht bei vorsätzlicher und sittenwidriger Schädigung), but on a positive duty to conclude the contract, seen as resulting directly from the Rechtsstellung that the subject has in the Volsgemeinschaft.

Siebert, like Larenz, perceives the contract no longer as a relationship between subjects with counterposed interests, but as "a community of purpose". The contractual relationship, on this view, is seen not as a legal relationship characterized by the counterposition and composition of differing, opposing interests of the parties, but as an association between associates which comes about with an eye to purposes and functions that are common (to the parties). From this community of purposes, tasks and interests of the parties it follows that both the parties (both creditor and debtor) have both rights and obligations. The creditor as such cannot solely

assert rights towards the debtor and the debtor as such does not simply have to submit to the burden of duties to the creditor. The latter has as such also duties towards the debtor, and the debtor as such may claim rights in relation to the creditor.

This conception is of practical importance from the viewpoint of contractual responsibility, since for it the existence and scope of the obligatory bond between the parties are no longer determined exclusively or chiefly by the parties' will. This bond, writes Siebert, "starts instead, on certain conditions, already before conclusion of the contract, and does not necessarily finish at the time it is accomplished" 131.

In this construction an esential part is played by the principle of good faith (Treu und Glauben). This is no longer seen as the precept of a fair balancing of the parties' interests and as an auxiliary principle in relation to the predominant one of contractual autonomy. The principle of "good faith" is seen as a fundamental and primary principle (in relation to the parties' freedom too), observance of which serves to measure the contracting parties' membership in the "folk community" and their loyalty to it. From the reformulation of the principle of good faith in the sense that it determines the suitability of the contract for its community function, Siebert deduces the admissibility of judicial intervention aimed at setting right an invalid or void contract 132.

We have seen above that Siebert reformulates the theory of contract through two principal operations: (a) the transformation of the notion of contract from free and autonomous agreement of the parties to Gestaltungsmittel of the "folk order" (in a formula of Larenz's); (b) the limitation of the sphere of application of the figure of the contract reformed in this way to the sphere of obligatory property relationships, what is in German called Rechtsverkehr. To this last end, in order to delimit the sphere of application

of the category of the contract, Siebert introduces the distinction between "contract" and "association in personal law" (personenrechtliche Zusammenschluss). Siebert, in order to justify this distinction, starts from the finding that in the life of the law there are two main types of agreement between associates: 1) agreements aimed at the transfer or exchange of particular goods or individual services or the constitution of an obligation to such a transfer or exchange; 2) agreements aimed at participation in a community in personal law and its order, "where," Siebert adds, "this community immediately (unmittelbar) includes the personality of its members" 133. Entry into such a community is "immediate entry", that is, without mediation, unmittelbare Eingliederung, and not an exchange of goods or services mediated by contract and by measuring the (economic) values at stake. But, according to Siebert, only agreements of type 1) can be conceived of and concluded as contracts, while those of type 2) are "associations in personal law".

By contrast with the contractual agreement, the "association in personal law" that Siebert talks of (coinciding in essential features with Einigung in Larenz's theory) is an "organic unit". "This sort of association comes about," writes Siebert, "only when folk comrades (Volksgenossen), on the basis of an agreement (Einigung) and a personal commitment to the service of a common national task (the performance of work in an enterprise, enterprise activity of the community, life in the matrimonial community) commit themselves to a closer, permanent community" 134. The community that is the object of the Zusammenschluss is an organic unit that by its nature already has its laws within it. Its regulation derives not from agreements between the parties (from the Zusammenschluss) but from its nature as a self-sufficient organism.

Siebert, like Larenz, does not deny the fact that entry into a community in personal law comes about through an act of will by the subject. However, he holds that "the voluntary nature of entry into an order in no way

justifies the whole legal relationship being regarded as a contract" 135. Instead, adds Siebert, the voluntary nature of the act of entry into the community is based specifically on incorporation into an order whose content and effects are to be found at a "higher" level than the one in which the parties' will is manifested.

The different role of the parties' will in the "contract" and the "association in personal law" is outlined by Siebert as follows: firstly, Siebert distinguishes between the act of entry into the legal relationship and the legal relationship itself. Both in the sphere of the "contract" and in that of the "association in personal law", the act of entry into the relationship is voluntary. The will of the individuals is not completely eliminated from the legal order. However, while in the "contract" the voluntary agreement of the parties constitutes the basis of the contractual relationship and creates the relationship itself, in the "association in personal law" precisely the opposite occurs. In the personenrechtlicher Zusammenschluss, writes Siebert, it is the relationship (the community) that is the basis for the agreement (the voluntary act of entry into the community). In "associations in personal law" the agreement presupposes the relationship and is justified (founded) by it. Here the agreement of the parties does not constitute the relationship but is instead constituted by it. The agreement, Siebert argues, cannot create a community that already exists in itself, that has a life independent of the parties' will.

This "overcomes" the opposition between private and public law. National Socialist legal doctrine no longer recognizes any sphere of individual life of associates that is not determined by the order and principles of the Volksgemeinschaft.

5. A new subdivision of law. Politics as totalizing dimension

To the traditional subdivision between public and private law (corresponding to an opposition "overcome" by National Socialism) Larenz counterposes a different articulation of the legal system. He starts by leaving out of the sphere of the "folk" legal system international law and ecclesiastical law. These, according to Larenz, do not concern the internal legal order of the Volksgemeinschaft, but the relationship of that order with other, different, legal systems (those of other peoples in international law, those of the Churches and religious sects in ecclesiastical law). Additionally, there are two other types of law, procedural law and criminal law, which, in our author's view, do not express the order of community law. These types of law are instead instrumental in relation to the community's internal order, as providing means to accomplish it. Procedural law serves for the actual affirmation of the rules of material law, for their application and execution, while criminal law has to do with the "punishment (Ahndung) of wrong, that is, not only the external protection of the order but also the manifestation of its intimate validity and inviolability" 136.

With the field of the "internal" legal reality of the Volksgemeinschaft thus cleared of external forms (international law, ecclesiastical law) and accessory ones (criminal law, procedural law) of legal regulation, Larenz subdivides the "community" legal order into four main spheres. These are as follows: 1) the "political order" (in the strict sense); 2) the "social order"; 3) the "family order"; 4) the "law of the folk comrade" (das volksgenössische Recht) (in the strict sense).

These four spheres are articulated with each other in accordance with a hierarchical order that places at the summit the "political order" and at the base the "right of the folk comrade", while the "social order" and "family order" are located on a footing of parity at the same hierarchical level. These four spheres constitute, again in a

hierarchical order, the one (higher) the foundation for the other (lower, so that the "political order" is the foundation for the "social order" and the "family order", and these latter two orders jointly and equally are the basis for the "law of the folk comrade". Fundamental to all the levels, however, is the "political order".

As far as the "political order" is concerned, "its decisive character is not the use of sovereign power, but the task of the political integration of the people as a total life community (als totaler Lebensgemeinschaft) 137. The essence of the "political" is seen here not as the sovereign's decision as to the state of exception, as in Carl Schmitt's formula 138. Politics is seen by Larenz not as mere decision, still less as mere brute force. It is instead the "self-affirmation of a community capable of historical action" 139, that is, more concretely, the integration of the people "as a whole that wills and acts in unitary fashion" 140. This integration is brought about through the work of leadership (Führung), through education and organization from above of the people, and through its own commitment, that is, through participation by the masses. "The political integration of our people," writes Larenz, "is brought about through the use of the party, its articulations, the State and the army (Wehrmacht)" 141.

We must emphasize the novelty and importance of the cocneption of the "political" developed by Larenz. It in fact deliberately expresses the specific character of the totalitarian State, tracing the line of demarcation between this new State form and traditional despotic regimes. The end of politics in National Socialist doctrine and practice is not so much rule over the German people, as its "integration". (This is not the case, however, with National Socialist policy towards peoples different from Germans, the Artfremden: towards these, National Socialist policy is pure deployment of force 142.) The point for National Socialist political theory is not

to make the German people (passively) tolerate the operations of political power but to secure the people's (active) contribution to those operations. For the totalitarian State (of which the Nazi State is a paradigmatic example) the point is not to "oppress" or "exploit" the people, but to "create" it, to make it an entity in its own image and likeness. While the traditional despotic regime programmatically intends to dig a deeper ditch between the dimension of society and the sphere of political power, the totalitarian regime cherishes the ambition to fill in that ditch and to confuse it and combine it with the social dimension. Totalitarian State means not so much a State that has all power, as a State that has extended its boundaries to the whole society, a total State 143.

From the diversity of the ends pursued by the despotic regime and the totalitarian one respectively there follows a different relationship of the two regimes with individuals and the masses. The despotic regime, in order to accomplish its ends, has no need of the active involvement of the masses. The totalitarian regime by contrast cannot do without it. Inasmuch as the National Socialist regime has the ambition to "create", to "remodel", the people, to free it from "impure" elements, to regenerate it and to make it a driving element for its expansionism, it cannot operate purely by repressive means but must also be capable of gaining and mobilizing the consent of the (German) people. The typical feature of the politics of the totalitarian State, in particular the National Socialist State, is well put in Karl Larenz's conception of the "political": it is "total mobilization" 144.

The fundamental principles of the "political" order in the strict sense - the first and fundamental sphere of the four into which Larenz subdivides the "new" legal system - are two: 1) Führung (that is, the absolute power of the Führer) and 2) Gefolgschaftstreu (that is, loyalty and absolute obedience to the directives coming from the leader). These two principles, in Larenz's subdivision, determine not only the

"political order" in the strict sense, but also the "social order", the "family order" and the "law of the folk comrade" in the strict sense. To be sure, writes Larenz, the whole of law is a "political order" in the broad sense, as being pervaded by the general principles of Führung and of Gefolgschaftstreu. However it is, he continues, appropriate to distinguish, from the overall order of the Volksgeminschaft (as "political order" in the broad sense) the Führungsordnung of the Reich, the organization of the party (the NSDAP), the Wehrmacht, the State and the communes (as "political order" in the strict sense).

The "social order" regulates the working and occupational life of the Volksgenosse, and in connection with it the administration of the territory and the organization of the economy 145. The "social order" thus includes labour law in the broad sense, the organization of professional associations, agrarian and planning law, market regulation and the general organization of the economy. In the sphere of "social order", there operate together the production of law by the authorities and that by the individual "folk comrade". "The legal position (Rechtsstellung) in the social order as a rule includes both community tasks and duties towards the community, as well as rights and duties towards the folk comrades. The decisive criterion for assessment is social or professional honour. This requires both professional performance and the fulfilment of the community tasks founded in the social legal position and duty of loyalty within the framework of a closer community relationship, for instance that of the enterprise community" 146. The violation of social honour, of the "farmer" or "professional" for instance, may be punished (geahndet), within the sphere of the "social organization", through de-recognition of the legal position, as farmer or as entrepreneur, say, or through loss of job or even expulsion from the occupation association, that is, a measure amounting to a bar on continuing the occupational activity hitherto carried out, aimed at those who have been guilty of a violation. Larenz rejects the proposal put forward by some Nazi jurists to consider

the regulation included within "social order" solely as "law of the estates" (ständisches Recht) or corporative law. Instead, in his view, what is present in respect of labour and enetrprise law, agrarian and town planning law, law of the economy and of industry, is in the main law "of the whole people", gesamtvölkisches Recht, and hence not special law (Sonderrecht) but ordinary law (Gemeinrecht).

"The family," writes Larenz, "is, alongside the folk community and as a fundamental cell of it, the only community founded upon a bond of blood" 147. The individual is born in the family as he is in his people. By comparison with the family and the folk, all the other "communities", like the "estate" and even the State, are regarded as artificial organisms. This does not mean, says Larenz, that they are based on some type of contract. Family law is accordingly not to be inserted either into law of the "social order" nor "law of the folk comrade" in the strict sense. Family relationships are seen here not as economic or professional relationships nor as contractual relationships or something similar. The category of contract within the sphere of the family order is made to play an entirely subordinate role. It cannot be said, maintains Larenz, repeating Hegel's verdict 148, that marriage constitutes a contract, save by committing an "infamy" (eine Schändlichkeit) 149. This is also true in relation to adoption. This too, according to Larenz, cannot be treated legally as a "contract" 150.

It is more correct, Larenz maintains, to assert that as far as the legal pattern and dogmatic presentation of matrimony and adoption is concerned, what we have are "agreements" (Einigungen), "since the expression 'contract' alludes to a contractual relationship, not to the foundation of a community relationship eines Gemeinschaftsverhältnisses), which is constructed on personal loyalty and dedication, on care and submission, and not upon performance and counter-performance" 151.

The formal, "universal abstract", concept of contract adopted by traditional legal dogmatics brings with it, according to Larenz, the fact that the legal provisions contained in the codes, in particular the BGB, are applied to the most diverse cases - as long as nothing else is provided for by law - even where those cases had not been foreseen nor considered by the legislator. The provisions on contract contained in the BGB were, Larenz argues, elaborated and issued in terms of real and obligatory relationships, that is, in terms of so-called legal circulation, Rechtsverkehr. He accordingly sees them as not suited for founding a "community relationship", like an employment relationship, a betrothal, or matrimony. Larenz accordingly proposes to confine the applicability and operationality of the figure of the contract solely to the sphere of "legal circulation", which, as we shall see below, constitutes "the law of the Volksgenosse in the strict sense" 152.

Matrimony, in Larenz's doctrine, constitutes a "closer community" within the sphere of the "folk community", an articulation of the Volksgemeinschaft. Just as the latter is seen as a natural organism endowed with a life of its own, not produced by agreement of its members but instead generating these from its innards, similarly matrimony is regarded not as a human creation, the result of the agreement of the spouses and their wish to live together, but similarly seen as a natural reality independent of the will of its "members", a "whole" which is more than the sum of its "parts" 153. Moreover, matrimony, being an "articulation" of the Volksgemeinschaft, cannot be contracted by any man with any woman, but only among members of the same race or kindred races. "True matrimony is accordingly not conceivable between any individuals whatever, but only between those belonging to related races, meeting the minimum biological requirements" 154.

From the theory of matrimony as natural "community" derives the assertion of its indissolubility. What man has not made, man cannot put asunder. "He who concludes matrimony," writes Larenz, "must know that he is contracting a

bond which certainly cannot be dissolved even with the assent of the other, not even at the cost of renouncing a son. The law of divorce must make clear to all that contracting matrimony is at a different level from concluding a contract; that matrimony, apart from exceptional cases to be regarded as misfortune (Ungluck), is indissoluble, and its survival does not depend solely on the parties' will" 155. Matrimony is thus conceived as a union that is as a rule indissoluble, except for a few cases in which the breakdown of the communal life between the spouses is very severe and irreparable, what Larenz calls "the incurable ruin of the marriage". The incurability of this ruin is to be ascertained irrespective of the possible blame of one or both spouses, and is consequently to be left up to the judge, even simply at the request of the public prosecutor against the will of the spouses themselves 156.

The "family order", though regarded as a "natural community", is nonetheless subordinate to the "political order" in the strict sense. This emerges clearly, writes Larenz, both at the point of concluding matrimony and at that of dissolving it. For both these aspects, argues Larenz, require in order to come about the intervention of the State authorities. Moreover, the "national political" significance of matrimony is claimed to be manifest in the legislation on the impediements to the conclusion of matrimony, aimed at safeguarding the "purity" of German blood and guaranteeing race hygiene, and in the provisions on the grounds justifying the dissolution of marriage 157. "Marriage and the family are fundamental aspects of the overall constitution of the folk: their further perfecting cannot therefore come about independently of the political order" 158.

Moreover, as regards property relations between the spouses and the right of inheritance, the "family order" includes a sphere related to property law and the law of obligations. The relationship between family law on the one hand and property law and law of obligations on the other as

sanctioned in liberal codes and in particular the German Civil Code, the BGB, is overturned in National Socialist legal doctrine. While in the German Civil Code the foundations of property law of the family are to be found in the provisions of the so-called "general part", "we", writes Larenz, "must precisely to the contrary see in the construction of the family one of the foundations - the second alongside the social order - of the property-law relationships of the individual folk comrade" 159. In a new future "people's code" (Volksgesetzbuch) accordingly, there will in his view be a need to deal with family law, at least in essential features, before relationships of obligation.

The "law of the folk comrade" (das volksgenössische Recht) in the strict sense includes the property and contractual relationships of the individual Volksgenosse as such, and not as member of a particular estate, a particular occupation or class or family, that is, a narrower "community". The individual here appears as a bearer of a life sphere of his own ("als Träger eines eigenen Lebensbereichs" 160), and also as a participant (Teilnehmer) in legal exchanges. The means made available to the individual by the order for such participation and for the co-management or co-production (Mitgestaltung) of this sphere of life is the contract. The obligation towards the other party, called by Larenz the "comrade in contract" (Vertragsgenosse), is realized in contractual responsibility. Alongside this, there is place also for extra-contractual repsonsibility aimed at defending the individual from attacks against his "life sphere" coming from third parties, subjects who are not his Vertragsgenossen.

The fundamental institutions of the "law of the individual Volksgenosse" in this view are: property (as principal type of "real right"), the contract (as principle type of "legal transaction") and contractual and extra-contractual responsibility. Larenz defines this order as law of the individual "folk comrade" in the strict sense, since in the

broad sense all four spheres in the quadripartition developed by Larenz constitute the law of the member of the Volksgemeinschaft, the Volksgenosse. Every regulation of the "new" order concerns the life and interests of the individual, and is accordingly volksgenössisches Recht in the broad sense. The law of the Volksgenosse in the narrow sense is, however, only that which takes into consideration the individual as such, divested of his various qualifications as "member" of this or that articulation of the "community" (family, estate, locality, party organization etc.).

"The law of the folk comrade (in the narrow sense) is not," writes Larenz, "an autonomus legal sphere as private law has been to date; instead its bases are determined decisively by the social order and by the family order" 161. Thus, property in its various manifestations (for instance as ownership of the hereditary farm, the Erbhof 162, of a piece of agricultural or urban land, of raw materials or of consumer goods) takes into itself definite bonds and duties resulting respectively from the differing types of things that are the object of the property, from the actual destination of the thing and from its value to the "community". This is true mutatis mutandis for contractual freedom too. "This in general exists today," asserts Larenz, "only as long as the overall social and economic order leaves it a space, and may be exercised even irrespective of particular provisions of law only in accordance with the duties that result for the indidivual from his social tasks and responsibility" 163.

To illustrate his conception of contractual autonomy as the social function performed by the individual, Larenz gives an example. Suppose, he writes, that in a village there is only one seller of groceries, and he refuses to sell his goods to a particular individual. In such a case the latter could according to the provisions contained in the BGB and the traditional conception of contractual relationships assert against the shopkeeper only the instrument

of compensation for damage (within the meaning of Article 826 BGB). Larenz instead considers that it is possible, starting from the idea that private autonomy is conditioned by the social function of its bearer, to lay down an obligation on the shopkeeper to sell his goods to whoever asks to buy them, assuming that he is the sole seller of groceries in that particular territory. The fact that the shopkeeper for certain necessary goods is the only one in a particular area objectively attributes to him, according to Larenz, the function (and hence the duty) to provide for the supply of those goods to all the inhabitants of the territory.

The distinctive character of the "law of the folk comrade" in the strict sense lies not so much, Larenz asserts, in the fact that it is valid for every "folk comrade", since the discipline of the "political order" too applies to every member of the Volksgemeinschaft. The distinctive feature of the "law of the Volksgenosse" instead is that it includes those legal relationships of individuals among themselves that are not founded on their "positions as member" (Gliedstellungen), that is, on their Rechtsstellungen based on belonging to a family, a firm, a geographical place, corporations or the political articulations of the State or the party. The "law of the folk comrade" in the strict sense disciplines the relationships of the individual as such, irrespective of his "legal position" as "position as member" in the community. It is what remains in the National Socialist legal order of the "old" private law, the part of it that the Nazi jurists consider they have to maintain in order to allow the functioning of trade and exchange.

Given the quadripartition of the law into "political order" (in the strict sense), "social order", "family order" and "law of the folk comrade" (in the strict sense) as alternative to the division between public law and private law, Larenz is concerned to establish a principle of unity to connect the various orders in the quadripartition with

each other. "A subdivision of the legal order into spheres organically linked with each other," writes our German jurist, "indeed overcomes the separation and laceration that the opposition between public law and private law involves, but does not yet guarantee the unity of the law as an order of national life over and above any articulation of it" 164.

The unity of the National Socialist legal order, articulated and fragmented into four distinct spheres, cannot be that offered by, for instance, the Grundnorm of Kelsen's doctrine. The "fundamental norm", in fact, is ill-adapted to a doctrine like the National Socialist which requires absolute and material (ideological) foundations of validity, regarded as objective and not merely "assumed", or to a legal and political organization - like the Führerstaat - which is not content with formal expedients to assert the validity and concatenation of its own norms. Moreover, as Norberto Bobbio has maintained 165, the theory of the Stufenbau and in particular the placing at its summit of the Grundnorm 166are in a certain sense the translation at the level of theory of the structure of law of the ancient ideal of the rule of law, or of the prevalence of the law over political power (over the government of men). National Socialist political and legal theory goes in the opposite direction, culminating in exhaltation of the Führer's will to power.

Nazi legal doctrine combines voluntarism and organicism, giving rise to a mixture in which voluntarism plays the part of a "constitutional doctrine", and organicism has the function of justifying or giving an absolute foundation for it and at the same time ideologically concealing the exaggerated voluntarism of the "constitutional doctrine". Voluntarism has in a certain sense descriptive value for the Nazi political regime as it is in reality, while organicism is entirely prescriptive (though it claims to be a descriptive theory of legal reality) and evokes a mythical need to be of a single and indivisible community which might well be summarized

in the theological precept ut omnes unum sint. Organicism then performs an important ideological function in the framework of the total State. The National Socialist regime is not only a regime upheld by a sovereign will that is above the law, it is also a totalitarian regime that needs the support of the masses. The mystique of the Volksgemeinschaft and the organicist conception of law as "life order" also serve this purpose, of mobilizing the masses around the decisions of the leader, the Führer, the "egocrat" 167.

The unity of the legal order in its multiple subdivisions is assured, in Larenz's doctrine, by the "unity" of the idea of law (Rechtsidee), which inspires both the "political order" (in the strict sense) and the "social order" and family order, and the "law of the individual Volksgenosse" (in the strict sense). "Our law, over and above the necessary articulations and despite some widespread contradictions," writes Larenz, "constitutes and must constitute, nonetheless, an internal unity, in virtue of the unitariness of the idea of law which in the last analysis is at its foundation" 168. This "idea of law" is connected in our Nazi jurist's conception with the "being" and "nature" of the German race and people. "This unity," he writes, "is both an expression and a pledge of the unity and totality of our national being" 169.

The "idea of law" of which Karl Larenz speaks so much, which supposedly ensures the unity of the "folk" legal order, is overloaded with ethical, political and ideological elements and accordingly differs from the purely formal "idea of law" in neo-Kantian philosophy, of Stammler, say 170. "This idea of law," writes Larenz, "is not a merely formal principle but a principle that creates the content: the principle of community." 171

Larenz's Rechtsidee perfectly coincides with the conception that National Socialism has of law. Thus, not only is the division between public law and private

law, and the one between individual and community underlying it, "overcome", bases as they are of the legal model of the liberal State, but the other great division that liberalism sought to realize in the sphere of the organization of society is also overthrown: the one beteen ethics and politics on the one hand and law on the other 172. From the confusion of law and politics here, it is certainly not law that comes off best. It is politics that becomes omni-comprehensive, a totalizing dimension that absorbs every other sphere of human action. In the National Socialist regime and in its legal doctrine there is no longer any space of social life that is not seen as of relevance to politics 173.

6. Total State and legal subjectivity

In the "new" "folk" (or "national") order, the law does not have the function of limiting the sphere of freedom of the individual, since this would presuppose the existence of an autonomous individual, of a free sphere of action for him, which would lie outside the community and the State law. According to Larenz, on the contrary, "the liberty of the whole contains also the liberty of the individual"; the individual is not conceivable except as a product, part, appendix, of the community. Freedom "is due the individual not as an individual outside the community, but only in the community and through the community" 174. The law accordingly does not have the function of limiting an individual freedom that precedes it, but of conceding and creating a freedom that finds in the law (the community order) its source, its instrument and its end.

In Larenz's doctine the community and the State (which is a direct emanation of the community) precede the freedom and the sphere of autonomy of the individual. The "whole" of the community pre-exists the peculiarities of the individual living beings and naturally absorbs them. This statement is central to the theory of Larenz and of all National

Socialism. "The priority and primacy of all its "members (parts)", Herbert Marcuse writes in this connection, "is a fundamental thesis of heroic popular realism. The whole is understood not simply as a sum or an abstract totality, but as the unity that unifies the parts, a unity that is the prior condition for the realization and completion of each part. The demand for the realization of this totality occupies the foremost place in the programmatic proclamations of the total autoritarian State" 175.

"Civil society", as the sphere of the "particular", the area in which relationships between individuals take place, is, in Larenz's thought, absolutely subordinate to the State, understood as the collective dimension par excellence, the sphere of the "universal", and hence as the "concretization" of the Volksgemeinschaft. This differs from what is the case in Marx's thought; as we know, he had intended to turn Hegel's original scheme of the relationship between State and "civil society" upside down 176. "Civil society", or even in Larenz's terminology Gesellschaft (in opposition to the "community", to the Gemeinschaft) is further seen as something "relatively dead", as being produced by alienation and the crystallization of community life. "Society (Gesellschaft)," writes Larenz, "is in fact the dialectical opposite of community (Gemeinschaft) and may very well be characterized in relation to it as something relatively dead, which in the complex of life must nonetheless fulfil its own function, limited and subordinate though it be" 177.

However, even in the most despotic and totalitarian of regimes, some minimum freedom must be acknowledged to the individual. Certainly, the ideal for those regimes would be to be able to get rid entirely of this embarrassing presence and convert the community and the law from a mere representation of a system or mythical organism into the reality of such a being. This is obviously impossible. That dream nonetheless constitutes one of the guiding threads running

through and connecting a variety of imperativist and statist conceptions of law. The monstrous being evoked by the mystique of the community "whole" in Larenz is already sketched on the cover of the first edition of Hobbes's Leviathan. The prevailing legal dogmatics, in particular in Germany, as from the second half of the last century seeks to efface the individual's materiality and drive out the category of subjective right from its majestic doctrinal systematizations. Kelsen finally proclaims the "reduction of subjective right to objective right" 178; Larenz, in the conclusion to his Gemeinschaft und Rechtsstellung, writes "thus, the opposition between subjective right and objective right is overcome" 179.

The strange and paradoxical contiguity between Kelsen's extreme legal positivism and the theories of National Socialism on the point of the dogmatic construction of legal subjectivity was pointed out just when the two theories were being clarified (the early 30s for both) by a scholar who can certainly not be suspected of sympathy for National Socialism or antipathy to Kelsen: Renato Treves. In a courageous article aimed at disputing the pretended Hegelian derivation of Nazi doctrine, noting among other things, with some regret, the rise of irrationalism in German culture and the adherence to National Socialism of thinkers thitherto loyal to the ideals of reason and the rule of law, Treves notes in passing the analogies between the theses on subjective right and the prevalence of public right in Kelsen and the theories of Nazi jurists in this connection. "In the critiques of individualist formalism," writes Treves, "in the affirmation of the superiority of public law over private law, of objective right over subjective right and in all those other points of contact with Hegelianism we have seen already mentioned by Schmitt and Huber, the impossibility becomes entirely clear of picking out an intrinsic, substantive connection, because obviously these principles are not characteristic of the two conceptions but very widespread even in differing and indeed clearly opposite doctrines. One typical example of this may be Kelsen's doctrine,

which is fiercely opposed by the writers of the new Germany although it maintains the very same principles of reduction of private law to public law and of subjective right to objective right which, according to those writers, ought to lie at the basis of the renewed German legal science" 180.

The procedure whereby Larenz's organicist theory on the one hand and legal positivist formalism, in particular Kelsen's "pure theory", on the other, deconstruct the figure of the legal subject is certainly different. Legal formalism places the law at such a level of abstraction that the materiality, or humanity, of the subject, and his unity, dissolve into a series of formal relationships of which he (the subject) represents the point of imputation for each. The subject is thus made to evaporate by the formalists, especially by Kelsen; it is no longer, on this view, anything but a myriad of points of reference for the individual norms. Kelsen, that is, reduces the legal subject from the assumed unity of the order and therefore possible reference point for every norm to the point of imputation of the individual norm.

Legal subjectivity is not elimated by Kelsen, but confined within the sphere of the individual normative relationship. There is no longer, according to Kelsen, a legal subject in the sphere of the order, and hence a legal quality of subject, but a subject of the individual normative relationship, the point of reference for the individual norm. The legal subject, in the pure doctrine, is not assumed or "found" by the legal order, but created by it, because the norm requires a point of reference 181. The unity of the human person is deconstructed into a myriad of reference points 182. What seemed indivisible, namely the individual 183, that which constituted the ultimate element in liberal legal orders, is decomposed by Kelsen into ever tinier, simpler elements, into so many "points" of reference for the norm. This is a realization, as Kelsen himself recognizes, of an ancient dream of legal positivist dogmatics. "Only now," writes Kelsen, "can there be

complete satisfaction for the old requirement of positivist legal theory: namely to conceive the physical person and the legal person as essentially identical. The 'physical person' is not man as maintained by the traditional doctrine. Man is not a legal concept but a biological and psychological one, and does not express any unity given by the law or by the knowledge of law, because the law does not embrace man in his totality with all his spiritual and bodily functions, but treats as obligations or authorizations only well-delimited human acts" 184.

Larenz proceeds differently. The human person as legal subject is no longer made to evaporate into a normative atmosphere (where the norms are the only entities endowed with meaning and existence), but - in Larenz's organicist conception - dipped in and corroded away by the different situations of social life, treated in each of them as a particular subject (as a "member" of a "narrower community" (and hence subject to a special law. As Franz Wieacker, another National Socialist theoretician, wrote: "The citizen or member of the State to whom the civil codes of the early 19th century are addressed has become an abstraction that is today replaced by the equally universal but non-abstract concept of the folk comrade (Volksgenosse), who according to subsequent specification may be sometimes a worker, sometimes the head of a firm, sometimes a farmer, sometimes an employee or a soldier" 185. According to Larenz and National Socialist doctrine, denying the "universal abstract concept" of the human being, the subject is not the ordering centre of the various legal positions. The "farmer", for instance, as legal subject is in this view not commensurable with nor equatable with the "tenant", the "soldier" or the "employee". These social descriptions are not regarded as subsequent specifications of a previous quality of being a subject or a person but are so many original forms of subjectivity.

Thus while in Kelsen's "pure theory" the concept of a human person as legal subject is

deconstructed through formalizing abstractions, in Larenz's theory by contrast this comes about through the fragementation and extreme relativization of the quality of being a subject. This is no longer linked to human nature (which, as being a "universal abstract concept" is denied), but to the Bedingtheit, to the "relativity", of the specific situations of social life there corresponds a distinct legal subject. While Kelsen posits, in place of the concept of the human person, the formal notion of "point of reference", Larenz replaces the traditional concept of legal subject by a notion of a sociological character: the role that a certain individual plays in a contingent social situation. The sociological viewpoint is here assumed in order to nullify the individuality and uniqueness of the human subject and identify him entirely with the group in which he acts: "From the sociological viewpoint," writes Franz Wieacker as a Nazi jurist, "there is no conduct of a group of folk comrades as citizens" 186.

The attempt to efface the autonomous subject from the legal system is however condemned to encounter the reality of the facts: it is not the human being that is the product of law, but on the contrary, unfortunately for jurists who might otherwise believe themselves to be at the centre of the world, it is the law that is a product of man. And man in turn is not an abstract entity, cannot even in the rarified atmosphere of a legal system be reduced to a "point of reference", a "role", a "function", a "system" among so many others, but is always the separate person, the individual. Thus even Larenz, despite his radical anti-individualism, is compelled to acknowledge that "National Socialism cannot, nor wishes to, do without the collaboration of the acting personality, independent and responsible, of the community member in economic and legal transactions" 187.

The Nazi regime, too, "cannot, nor wishes to" eliminate individual autonomy entirely. Here there is no difference between National Socialism and, say, legal

positivism. Nor would there be with the most liberal and flexible of legal systems. The difference consists not so much in acknowledging the impossibility of doing without the individual as in (a) the limits within which this necessity is recognized and (b) the status attributed to that sphere (even if very limited). In Nazi doctrine, by comparison with legal positivist theories, (i) the sphere within which individual autonomy or the individual's independent action is recognized is very restricted; (ii) the status attributed to this sphere is very impoverished.

In legal positivist theories the sphere of individual autonomy, even if minimal, is guaranteed by a series of formal mechanisms that take concrete shape in the principle of strict legality, and by the images underlying these mechanisms, in particular the material concept of law (what Franz Neumann and Friedrich von Hayek define as "law in the material sense" 188), images that centre round the moral and social dignity of the autonomous human person. "The material law," writes Franz Neumann, "is... defined as the type of State norm that can be linked to definite ethical postulates, irrspective of whether these are postulates of justice, liberty, equality or whatever, This meaning of law is in constituent relationship with the cocnept of law as norm: the essence of the norms is the rational principle (logos) that is represented in them" 189.

In National Socialism, which had got rid of the material concept of law (in the sense in which this term is used by Franz Neumann and by von Hayek) and in which the collective imagination turned around the figure of a mythical community organism, compact and homogeneous, the margins of the sphere of autonomous individual action are "relative" 190. These are, that is, insecure, uncertain, since their extent depends entirely on the needs and requirements of the "folk community", the needs of an entity that can never be reduced to the individuals who are "inserted" or "incorporated" in it (eingegliedert, as Larenz often says), that is, properly

considered, from everything that until the 17th century used to be called ratio regni, the "reason of State".

In National Socialism, Larenz maintains, the contract means not the activation of transactional freedom of action for the individual that is in principle unlimited and only exceptionally made subject to certain limitations, but the activation of a freedom of determination (Bestimmungsfreiheit) that is granted to the members of the community within the sphere of the general order and is more or less broad according to the needs of the life of the folk, a liberty that can never be exercised save in accord with the "folk order" 191. This residual Bestimmungsfreiheit is very fragile, "relative" in fact, because it may at any moment be reduced or wiped out, in accordance with the requirements of the Volksgemeinschaft, or by whoever, on the basis of this mythical "organism", holds actual political power, and is in that case "he who decides on the state of exception" 192.

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1. In this effort, the jurists combined in the Kiel University law faculty distinguished themselves. This faculty was advised for students throughout Germany, being regarded by the Nazi leaders as a political Stosstrupp. Larenz was full professor there. In this connection see P.Thoss, Das subjektive Recht der gliedschaftlichen Bindung. Zum Verhältnis von Nationalsozialismus und Privatrecht, Europäische Verlagsanstalt, Frankfurt am Main 1968, p.12, and esp. E.Döhring, Geschichte der Juristischen Fakultät 1665-1965, in AA.VV., Geschichte der Christian Albrechts - Universität Kiel 1665-1965, vol. 3, part 1, K.Wachholtz, Neumünster 1965, p.201ff.

2. On this "prime dichotomy" see N.Bobbio, Dalla struttura alla funzione. Nuovi studi di teoria del diritto, Comunità, Milan 1977, p.148ff.

3. "The struggle against the present central significance of 'subjective right'" is hoped for by Larenz in Neubau des Privatrechts, in "Archiv für die civilistische Praxis", No.145, 1939, p.107

4. A discordant voice in this connection comes from Frantisek Weyr, even though he is a thinker operating in the sphere of the dogmatic tradition of Laband and Jellinek. See F.Weyr, Zum

Problem eines einheitlichen Rechtssystems, in "Archiv für öffentliches Recht". XXIII, 4, p.563.

5. To Larenz's doctrine one might apply what Gioele Solari writes in connection with Auguste Comte's thought: "For Comte, the a priori is not the freedom of the individual, which is an abstraction, but the freedom of the individual within the whole, which is concrete. Accordingly, his system of rights and obligations aims not so much at the equal co-existence of liberty as at the subordination of liberties, or of right, to the totality" (G.Solari, Positivismo giuridico e politico di Auguste Comte, now in G.Solari, La filosofia politica, vol.II, Da Kant a Comte, edited by L.Firpo, Laterza, Rome-Bari 1974, p.329). There are those who maintain that Comte's thought is at the origin of the Fascist ideology of Action Française. This is the opinion of, for instance, Julien Benda: "In France the true theoreticians of the State as negating the individual - the true fathers of the clerics who have betrayed the country - are Bonald ... and the author of the Catéchisme positiviste" (J.Benda, La trahison des clercs, Italian translation by S.Teroni Menzella, 2nd ed., Einaudi, Turin 1976, p.19). On the collectivist nature of Nazi ideology cf. Thomas Mann, Das Problem der Freiheit, Bermann-Fischer, Stockholm 1939, p.28ff.

6. See L.Duguit, Les transformations générales du droit privé depuis le code Napoléon, Felix Alcan, Paris 1912. On Duguit's critique of the notion of subjective right and the link between this criticism and Durkheim's functionalism, see H.Coing, Zur geschichte des Begriffs "Subjektives Recht", now in H.Coing, Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht, V.Klostermann, Frankfurt am Main 1982, p.259-260. The relationship between certain ideas of Durkheim and Duguit and Nazi communalism is maintained by R. Bonnard, Le droit et l'état dans la doctrine national-socialiste, Librairie générale de droit et de jurisprudence, Paris 1936, p.175. Cf. also Delbez, La pensée politique allemande, R.Pichon and R.Durand-Auzias, Paris 1974, p.215.

7. On the content of Larenz's Hegelianism and the limits within which he followed Hegel's legal philosophy, see K.Larenz, Die Aufgabe der Rechtsphilosophie, in "Zeitschrift für Deutsche Kulturphilosophie", vol.4, 1938, esp.pp.219-229

8. See R.Dahrendorf, Homo sociologicus: Versuch zur Geschichte, Bedeutung und Kritik der Kategorie der sozialen Rolle, now in R.Dahrendorf, Pfade aus Utopia. Zur Theorie und Methode der Soziologie, 4th ed., Piper, Munich-Zurich 1986, p.128ff.

9. E.Cassirer, The technique of our modern political myths, in E.Cassirer, Symbol, Myth and Culture, Essays and Lectures of Ernst Cassirer 1935-1945, edited by D.P.Vrene, Yale University Press, New Haven and London 1979, p.255. Larenz's thought is a typical example of "holism": see the 7th and 23d sections in K.R.Popper, The Poverty of Historicism, 3rd ed., Routledge & Kegan Paul, London and Henley 1979. The most extreme "holism" is a characteristic of National Socialist political and legal

doctrine. "In the maxims 'the common good prevails over personal good', 'you are nothing, your people is everything'," writes Heinrich Lange, an eminent Nazi jurist, "the new legal thought expresses the idea of duty and of community" (H.Lange, Nationalsozialismus und bürgerliches Recht, in Nationalsozialistisches Handbuch für Recht und Gesetzgebung, ed. H.Frank, Franz Eher Nachf., Munich 1935, p.935).

10. In this connection one should note the influence of Oswald Spengler's work on National Socialist ideology. See e.g. O.Spengler, Jahre der Entscheidung, Deutschland und die weltgeschichtliche Entwicklung (I ed.,1933), DTV, Munich 1961, p.110ff., p.122ff.

11. K Larenz, Typologisches Rechtsdenken. Bemerkungen zu V.Tuka: Die Rechtssysteme, in "Archiv für Rechts- und Sozialphilosophie", vol.34, 1940/1941, p.27.

12. K.Larenz, Vertrag und Unrecht, 1. Teil: Vertrag und Vertragsbruch, Hanseatische Verlagsanstalt, Hamburg 1936, p.32.

13. K.Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, J.C.B.Mohr (Paul Siebeck), Tubingen 1934, p.13. Emphasis in original.

14. See E.B. Pasukanis, La teoria generale del diritto e il marxismo, Italian translation in AA.VV., Teorie sovietiche del diritto, edited by U.Cerroni, Giuffré, Milan 1964, esp. p.153ff.

15. K.Larenz, Gemeinschaft und Rechtsstellung, in "Deutsche Rechtswissenschaft", vol. 1, 1936, p.35. My emphasis.

16. K.Larenz, Volksgeist und Recht. Zur Revision der Rechtsanschauung der Historischen Schule, in "Zeitschrift für Deutsche Kulturphilosophie", vol. 1, 1935, p.47. My emphasis. Obviously, in this context "immediate" is equivalent to "non-mediate".

17. K.Larenz, Sitte und Recht, in "Zeitschrift für Deutsche Kulturphilosophie", vol.5, 1939, p.236. For a similar conceptual formulation see one of the authors the Nazi Larenz most frequently cites, W.Schönfeld, Der Kampf wider das subjektive Recht, in "Zeitschrift der Akademie für deutsches Recht", 4. Jahrgang, 1937, p.109.

18. K.Larenz, Sitte und Recht, cited p.236.

19. Ibid. See also K.Larenz, Vom Wesen der Strafe, in "Zeitschrift für Deutsche Kulturphilosophie", vol.2, 1939, p.29.

20. K.Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, cited p.40. Emphasis in original.

21. K.Larenz, Rechtsperson und subjektives Recht. Zur Wandlung der Rechtsgrundbegriffe, in AA.VV., Grundfragen der neuen

Rechtswissenschaft, Junker und Dünnhaupt, Berlin 1935, p.259. See also K.Larenz, Neubau des Privatrechts, cit., pp.103-104.

22. K.Larenz, Gemeinschaft und Rechtsstellung, cit., p.38.

23. H.Lange, Nationalsozialismus und bürgerliches Recht, cit., p.940.

24. On the difference between "complementarity" and "reciprocity" in the relationship between right and duty and in particular on the difference in this connection between subjective right and status, cf. N.Luhmann, Zur Funktion der "subjektiven Rechte", in "Jahrbuch für Rechtssoziologie und Rechtstheorie", 1, 1970, p.321ff., now in N.Luhmann, Ausdifferenzierung des Rechts, Beiträge zur Rechtssoziologie und Rechtstheorie, Suhrkamp, Frankfurt am Main 1981, p.360ff.

25. K.Larenz, Neubau des Privatrechts, cit., p.103. Emphasis in original.

26. Ibid., p.105.

27. Ibid., p.106.

28. Ibid., p.98. On the National Socialist theory of contract cf. the study by R.Schröder, Zur Rechtsgeschäftslehre in nationalsozialistischer Zeit, in Recht und Unrecht im Nationalsozialismus, ed. P.Salje, Regensberg & Biermann, Münster 1985, p.8ff.

29. K.Larenz, Neubau des Privatrechts, cit., p.93.

30. Cf. ibid., p.97.

31. Cf. K.Larenz, Rechtsperson und subjektives Recht, cit., p.250ff.

32. K.Larenz, Neubau des Privatrechts, cit., p.98.

33. Ibid., p.95. On the delimitation of the sphere of application of contract to Rechtsverkehr brought by Nazi legal doctrine see F. Wieacker, Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts, in "Deutsche Rechtswissenschaft", vol. 2, 1937, p.22.

34. K.Larenz, Neubau des Privatrechts, cit., p.98. Rmphasis in original.

35. F.Wieacker, Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts, op.cit., p.22.

36. Ibid.

37. Cf. H.Lange, Nationalsozialismus und bürgerliches Recht, op.cit., p.944.

38. Cf. K.Larenz, Rechtswidrigkeit und Tatbestand in der Lehre vom Unrecht im Rechtsverkehr, in "Deutsches Gemein- und Wirtschaftsrecht", 1. Jahrgang, 1 October 1935 - 31 December 1936, p.401ff.

39. H.Lange, op.cit., p.944. Lange defines the contractual relationship also as an "organism" (cf. H.Lange, op.cit., p.943).

40. F. Wieacker, op.cit., p.21.

41. Cf. ibid., p.24.

42. K.Larenz, Rechtsidee und Staatsgedanke, Einführung, in Rechtsidee und Staatsgedanke, Beiträge zur Rechtsphilosophie und zur politischen Ideengeschichte. Festgabe für Julius Binder, Herausgegeben von K.Larenz, Junker und Dünnhaupt, Berlin 1930, p.VI.

43. Cf. H.Kelsen, Allgemeine Staatslehre, J.Springer, Berlin 1925, p.233.

44. K.Larenz, Die Wandlung des Vertragsbegriffs, in "Deutsches Recht", 5. Jahrgang, Volume 19/20, 15 October 1935, p.490; emphasis in original. To contract there applies what Larenz maintains in relation to the institution of property: it is to be understood as a provision that the "new" German law derives not from the abstract idea of person but from that of a "concrete" personality integrated with the community. "For us," writes Larenz, "the concept of contract is made up not only of the aspect of the common will of both the contracting parties but equally of the relationship with the objective order of the community in which every contract must be incorporated in order to have legal existence" (L.Larenz, Die Aufgabe der Rechtsphilosophie, op.cit., p.233; emphasis in original).

45. K.Larenz, Die Wandlung des Vertragsbegriffs, op.cit., pp.490-491. Emphasis in original.

46. Cf. H.Kelsen, Reine Rechtslehre, F.Deuticke, Vienna 1934, Italian trans. by R.Treves, Lineamenti di dottrina pura del diritto, III ed., Einaudi, Turin 1973, pp.110-111.

47. K.Larenz, Die Wandlung des Vertragsbegriffs, op.cit., p.490, note 6. Emphasis in original.

48. Ibid., p.491. Emphasis in original.

49. Ibid. A position close to Larenz's is taken by another influential Nazi jurist, Ernst Forsthoff: cf. E.Forsthoff, Der totale Staat, Hanseatische Verlagsanstalt, Hamburg 1933, p.42.

50. K.Larenz, Die Wandlung des Vertragsbegriffs, op.cit., p.491. My emphasis.

51. Ibid. My emphasis.

52. Cf. F.Messineo, Manuale di diritto civile e commerciale, VIII ed., vol.1, Giuffrè, Milan 1950, p.267.

53. On this see A.Falzea, Capacità, in Enciclopedia del diritto, vol.VII, Giuffrè, Milan 1960, now in A.Falzea, Voci di teoria generale del diritti, II ed., Giuffrè, Milan 1978, p.87ff., esp. p.99.

54. K.Larenz, Rechtsperson und subjektives Recht, op.cit., p.227; emphasis in original. It may be interesting to note that according to our German jurist the concept of "person" is connected with that of "property". "This will of the individual," writes Larenz, "normatively bound only in certain relationships, is the person in the sense of private law. The concept of person conceived individualistically and the concept of ownership are made for each other. It is upon these that to date the whole of private law has been built". (K.Larenz, Volksgeist und Recht, op.cit., p.59).

55. H.Lange, Nationalsozialismus und bürgerliches Recht, op.cit., p.933.

56. E.Ehrlich, Die Rechtsfähigkeit, Puttkammer & Mühlbercht, Berlin 1909, p.59.

57. Ibid. Emphasis in original.

58. G.Gorla, Commento a Tocqueville. "L'idea dei diritti", Giuffrè, Milan 1948, p.33.

59. Ibid.

60. Ibid., p.38-39.

61. Cf. ibid., p.57ff.

62. On the theory of Reflexrechte, cf. F.Ruffini, Diritti di libertà, II ed. with introduction and notes by P.Calamandrei, facsimile reprint, La Nuova Italia, Florence 1975, p.105ff.

63. K.Larenz, review by G.A.Walz, Artgleichheit gegen Gleichartigkeit. Die beiden Grundprobleme des Rechtes, Hanseatische Verlagsanstalt, Hamburg 1938, in "Deutsche Rechtswissenschaft", Vol.4, 1939, p.94.

64. K.Larenz, Rechtsperson und subjektives Recht, op.cit., p.259.

65. Cf. K.Larenz, Zur Logik des konkreteten Begriffs. Eine Voruntersuchung zur Rechtsphilosophie, in "Deutsche Rechtswissenschaft" vol.5, 1940, p.289. I would recall that according to Larenz "scientific discussion no longer has any sense" when it takes place "between members of races far apart from each other" (ibid., p.283).

66. On this concept of "honour", cf. J.Binder, Philosophie des Rechts, G.Stilke, Berlin 1925, p.445. According to Blinder "Honour is the awareness of the dignity of one's own person as a member of a social whole" (ibid.). This definition is seen by Binder as alternative to another one by Friedrich Julius Stahl (taking up an idea of Kant's), as follows: "Honour is awareness of one's own absolute value as a person" (F.J.Stahl, Philosophie des Rechts, Zweiter Band, Dritte Auflage, Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung, Erste Abtheilung, J.C.B.Mohr, Heidelberg 1854, p.316). While Stahl connects the honour of the person exclusively with value as an individual, Binder instead links honour with the person's belonging to a certain social group, with the consequence that while for Stahl the individual maintains honour even in the absence of the social bond and hence even in the event of exclusion or expulsion of the individual from the group, according to Binder honour is lost in the moment at which the individual is no longer a member of the social group.

I would recall that among the doctrines Julien Benda reproaches the "modern clerisy" with is that of "exaltation of honour" (cf. J.Benda, La trahison des clercs, Italian trans. cit. p.155ff.). The cult of honour, notes Benda, is often theorized and advocated (the French writer refers in particular to Barrès) because if "well-utilized by an intelligent leader, it can give practical results" (J.Benda, op.cit., p.156). Benda's considerations regarding the cult of honour in Barrès's theories can also apply to the similar cult developed by Binder and Larenz, and in general by National Socialism.

67. K.Larenz, Zur Logik des konkreten Begriffs, op.cit., p.289. Emphasis in original.

68. K.Larenz, Rechtsperson und subjektives Recht, op.cit., p.259.

69. K.Larenz, Zur Logik des konkreten Begriffs, op.cit., p.288. "

The concrete concept is the totality of its elements, that is, not the mere co-existence of its individual characteristics, but the meaningful concatenation of features that require and complete each other and thus combine into a unity, elements which in turn are new 'concrete concepts'" (ibid., p.290; emphasis in original).

70. Cf. Karl Michaelis, Die Überwindung der Begriffe Rechtsfähigkeit und Parteifähigkeit, in "Deutsche Rechtswissenschaft", vol.2 1937, p.301ff.

71. K.Larenz, Zur Logik des konkreten Begriffs, op.cit., p.288.

72. Ibid., p.289.

73. Ibid., emphasis in original.

74. U.K.Preuss, Die Internalisierung des Subjekts. Zur Kritik der Funktionsweise des subjektiven Rechts, Suhrkamp, Frankfurt am Main 79, p.79.

75. On the difference between legal capacity and being a bearer of subjective legal positions, cf. A.Falzea, Capacità, op.cit., p.104.

76. U.K.Preuss, op.cit., p.79.

77. K.Larenz, Die Aufgabe der Rechtsphilosophie, op.cit., p.234.

78. Ibid.

79. K.Larenz, Gemeinschaft und Rechtsstellung, op.cit., p.32.

80. On the difference between a legal system based on status and one based on subjective rights cf. M.Rehbinder, Wandlungen der Rechtsstruktur im Sozialstaat, in Studien und Materialen zur Rechtssoziologie, Herausgegeben von E.E.Hirsch und M.Rehbinder, Westdeutscher Verlag, Cologne and Opladen 1967, p.200ff.

81. Cf. e.g. J.Habermas, Überlegungen zum evolutionären Stellenwert des modernen Rechts, in J.Habermas, Zur Rekonstruktion des Historischen Materialismus, 3rd ed., Suhrkamp, Frankfurt am Main 1982, p.262.

82. Cf. S.K.Langer, Philosophy in a new key. A study in the symbolism of reason, rite and art, III ed., Harvard University Press, Cambridge, Mass. 1960, p.44ff.

83. On these questions see J.Habermas, Zur Logik der Sozialwissenschaften, Erweiterte Ausgabe, Suhrkamp, Frankfurt am Main 1985, p.548, and L.Fleck, Das Problem einer Theorie des Erkennens, German trans. by B.Wolniewicz and T.Schnelle, in L.Fleck, Erfahrung und Tatsache. Gesammelte Aufsätze, Herausgegeben von L.Schäfer and T.Schnelle, Suhrkamp, Frankfurt am Main 1983, p.110.

84. H.Coing, Zur Geschichte des Begriffs "Subjektives Recht", now in H.Coing, Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht, 1947-1975, vol.1, op.cit., p.258.

85. K.Larenz, Gemeinschaft und Rechtsstellung, op.cit., p.31.

86. Cf. K.Larenz, Zur Logik des konkreten Begriffs, op.cit., p.90ff.

87. National Socialist political doctrine establishes a link between the Romanist legal tradition and liberal thought. This was, in the view of Nazi lawyers, set up by the work of the pandectists. In this connection see H.Lange, Nationalsozialismus und bürgerliches Recht, op.cit., p.934, and H.Nicolai, Die rassengesetzliche Rechtslehre. Grundzüge einer nationalsozialistischen Rechtsphilosophie, F.Eher Nachf., Munich

1932, p.6ff. In the critique of Romanist doctrine and pandectistics one may note the irrational features of Nazi legal thought. Lange, for instance, reproaches pandectistics with having placed "the intellect above feeling" (H.Lange, op. ult.cit., p.934). On the "struggle against Roman law" embarked on by Nazi doctrine cf. C.Schmitt, Nationalsozialistisches Rechtsdenken, in "Deutsches Recht", 4. Jahrgang, 1934, p.226ff. The hostility to Roman law, seen as a petrified law foreign to the German folk conscience, goes back at least to the work of Otto von Gierke, some of whose nationalist and organicist themes and terminology (Volksgemeinschaft, for instance) were taken up and developed by Nazi lawyers. For von Gierke's critique of Roman law, claimed to have caused "unspeakable damage" to the German popular tradition, cf. O.von Gierke, Recht und Sittlichkeit, in "Logos", vol.6, 1916/1917, p.259. On the aversion to Roman law in German nationalist circles in inter-war Germany, cf. also J.Roth, Rechts und Links, Kiepenheuer & Witsch, Cologne 1985, p.46. One Nazi jurist who is by contrast favourable to the (partial) maintenace of the categories coming from the Romanist tradition is Heinrich Stoll: cf. H.Stoll, Das bürgerliche Recht in der Zeiten Wende, W.Kohlhammer, Stuttgart 1933, p.7ff.

88. K.Larenz, Volksgeist und Recht, op.cit., p.56, my emphasis. Cf. also K.Lange, Über Gegenstand und Methode des völkischen Rechtsdenkens, Junker und Dünnhaupt, Berlin 1938, esp. p.43ff.

89. K.Larenz, Rechtsperson und subjektives Recht, op.cit., p.260. Emphasis in original.

90. K.Larenz, Volksgeist und Recht, op.cit., p.59.

91. W.Siebert, Die allgemeine Entwicklung des Vertragsbegriffs, in Deutsche Landesreferate zum II. Internationalen Kongress für Rechtsvergleichung in Haag 1937, Herausgegeben von E.Heymann, W. de Gruyter, Berlin and Leipzig 1937, p.203.

92. Ibid.

93. G.Jellinek, System der subjektiven öffentlichen Rechte, Wissenschaftliche Buchgesellschaft, Darmstadt 1963, facsimile of the second edition, Tübingen 1905, p.86. For a critical account of the theory of status in Jellinek see R.Alexy, Theorie der Grundrechte, Suhrkamp, Frankfurt am Main 1986, p.229ff.

94. G.Jellinek, System der subjektiven öffentlichen Rechte, op.cit., p.86. Emphasis in original.

95. Ibid.

96. G.Renard, La théorie de l'institution. Essai d'onotologie juridique, Sirey, Paris 1930, p.352.

97. Ibid., p.331.

98. Ibid.

99. Ibid., p.334.

100. Ibid., p.331.

101. Cf. H.S.Maine, Ancient law, its connections with the early history of society and its relation to modern ideas. With introduction and notes by F.Pollock, J.Murray, London 1912, p.172ff.

102. Cf. N.Luhmann, Zur Funktion der "subjektiven Rechte", op.cit., p.362ff.

103. Cf. H.Lange, Liberalismus, Nationalsozialismus und bürgerliches Recht, J.C.B.Mohr (Paul Siebeck), Tübingen 1933, p.14.

104. Cf. M.Rehbinder, Wandlungen der Rechtsstruktur im Sozialstaat, op.cit., pp.200-202.

105. K.Larenz, Gemeinschaft und Rechtsstellung, op.cit., p.32.

106. K.Larenz, Rechtsperson und subjektives Recht, op.cit., p.260.

107. K.Marx, F.Engels, L'ideologia tedesca, Italian trans. by F.Codino, II ed., Editori Riuniti, Rome 1977, p.55.

108. Cf. K.Marx, F.Engels, L'ideologia tedesca, op.cit., p.56.

109. Though one may assert the influence of Hegelian philosophy on Nazi doctrine and in particular on Larenz's thought, there is no doubt that on the point of attacking freedom of occupation Nazi lawyers are very far from Hegel's opinion in this connection. Cf. G.W.F.Hegel, Grundlinien der Philosophie des Rechts, addendum 156 (by E.Gans) to para.262.

110. On the National Socialist conception of testament see J.Binder, Das Recht des Testamentes, in "Deutsche Rechtswissenschaft", vol.3, 1938, p.246ff. Binder is, moreover, in favour of eliminating the holograph will (cf. ibid., p.251).

111. K.Larenz, Vertrag und Unrecht, Teil 1: Vertrag und Vertragsbruch, op,cit., pp.15-16. Emphasis in original.

112. K.Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, op.cit., p.38.

113. Ibid., p.39.

114. As has already been said, the myth of recomposing the divided community runs through a part of Western post-Enlightenment thought. In this connection see F.Crespi, Mediazione simbolica e società, Angeli, Milan 1982.

115. On this division, cf. F.Galasso, Diritto (le base storiche delle partecipazioni), in Enciclopedia del diritto, vol.XII, Giuffrè, Milan 1964, p.822ff.

116. Cf. N.Bobbio, Pubblico/Privato, in Enciclopedia Einaudi, vol.XIII, Einaudi, Turin 1981, now in N.Bobbio, Stato, governo, società. Per una teoria generale della politica, Einaudi, Turin 1985, p.3ff.

117. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, in Tag des Deutschen Rechts 1939. 6. Reichstagung des nationalsozialistischen Rechtswahrerbundes, Herausgegeben vom nationalsozialistischen Rechtswahrerbund, Deutscher Rechtsverlag, Berlin-Leipzig-Vienna 1939, p.559. In this connection, see also D.Grimm, Zur politischen Funktion der trennung von öffentichem und privatem Recht in Deutschland, now in D.Grimm, Recht und Staat der bürgerlichen Gesellschaft, Suhrkamp, Frankfurt am Main 1987, p.84ff.

118. K.Larenz, op.ult.cit., p.561. Cf. also ibid., p.574.

119. Cf. H.Frank, Fondamento giuridico dello Stato nazionalsocialista, Italian trans. by l.l.Palermo, Giuffrè, Milan 1939, p.37.

120. On the loss of significance, for the "new" National Socialist legal system, of the division between public law and private law, cf. K.Larenz, Rechtswahrer und Philosoph. Zum Tode Julius Binders, in "Zeitschrift für Deutsche Kulturphilosophie", vol.6, 1940, p.4. Cf. also what another influential Nazi theorist of law, R.Höhn, has to say in Wom Wesen des Rechts, in Deutsche Landesreferate zum II. Internationalen Kongress für Rechtsvergleichung im Haag 1937, op.cit., p.175.

121. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.562.

122. Ibid.

123. Cf. R.Höhn, Vom Wesen des Rechts, op.cit., p.154ff.

124. W.Siebert, Die allgemeine Entwicklung des Vertragsbegriffs, op.cit., p.202.

125. Ibid.

126. Ibid., p.203.

127. Ibid.

128. Ibid.

129. Ibid., p.205.

130. Ibid.

131. Ibid., p.206.

132. Cf. ibid., p.202.

133. Ibid., p.208.

134. Ibid., p.209. Emphasis in original.

135. Ibid.

136. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.565. Note that Ahndung here expresses a punishment that has the nature of revenge.

137. Ibid.

138. Cf. C.Schmitt, Politische Theologie, II ed., Duncker & Humblot, Munich and Leipzig 1934, p.11.

139. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.565.

140. Ibid.

141. Ibid., pp.565-566.

142. I use the term "force" here in a sense similar to that attributed to the term by Alessandro Passerin d'Entreves, in distinguishing between "force", "power" and "authority". See A.Passerin d'Entreves, A chi obbedire?, now in A.Passerin d'Entreves, Obbedienza e resistenza in una società democratica, Comunità, Milan 1970, p.41ff.

143. Cf. E.Forsthoff, Der totale Staat, op.cit.

144. Cf. E.Jünger, Die totale Mobilmachung, in Krieg und Krieger, ed. E.Jünger, Junker und Dünnhaupt, Berlin 1930, p.9ff.

145. Cf. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.566.

146. Ibid., Emphasis in original.

147. Ibid., p.50.

148. Cf. G.W.F.Hegel, Grundlinien der Philosophie des Rechts, para.75.

149. Cf. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.567, and K.Larenz, Hegel und das Privatrecht, in Verhandlungen des zweiten Hegelkongresses vom 11. bis 21. Oktober 1931 in Berlin, Herausgegeben von B.Wigersma, J.C.B.Mohr (Paul Sienbeck)-N.V.H.D. Tjeenk Willink & Zoon, Tübingen-Haarlem 1932, p.141. Cf. also K.Larenz, Die Anfechtbarkeit des Kindesannahmevertrages wegen Eigenschaftsirrtums, in "Zeitschrift der Akademie für Deutsches

Recht", 6. Jahrgang, esp. pp.14-15, and K.Larenz, Grundsätzliches zum Ehescheidungsrecht, in "Deutsches Recht", 7. Jahrgang, 1937, p.186. The thesis of the impossibility of reducing matrimony to the figure of the contract is a strongpoint of National Socialist legal doctrine: cf. e.g. K.A.Eckhardt, Zum Begriff des subjektiven Rechts, in "Deutsche Rechtswissenschaft", vol.1, 1936, p.355. Cf. also J.Binder, Philosophie des Rechts, op.cit., p.450ff.

150. Cf. K.Larenz, Die Anfechtbarkeit des Kindesannahmevertrages wegen Eigenschaftsirrtums, op.cit., p.11ff.

151. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.567.

152. On this matter see K.Larenz, Über Gegenstand und Methode des völkischen Rechtsdenkens, op.cit., p.45ff.

153. An organicist conception of matrimony is held also by Ernst Jünger, one of the German intellectuals closest to Nazism. Cf. E.Jünger, Der Arbeiter, Herrschaft und Gestalt (I ed. 1932), Klett-Cotta, Stuttgart 1982, p.34.

154. K.Larenz, Grundsätzliches zum Ehescheidungsrecht, op.cit., p.186.

155. Ibid. Emphasis in the text.

156. Cf. ibid., pp.187-188.

157. Ibid., p.184ff.

158. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., pp.567-568.

159. Ibid., p.568.

160. Ibid.

161. Ibid.

162. Cf. the law of the "hereditary farm", the Reichserbhofgesetz, of 29 September 1933 in "Reichsgesetzblatt", Part 1, 1933, no.108, of 30 Sepotember 1933, pp.685-692. On the doctrinal treatment of this law see W.Saure, Das Reichserbhofgesetz in Nationalsozialistisches Handbuch für Recht und Gesetzgebung, Herausgegeben von H.Frank, op.cit., p.1054ff. In this connection see the considerations by O.Kirchheimer, Staatsgefüge und Recht des Dritten Reiches, in "Kritische Justiz". 9 Jahrgang, Heft 1, 1976, now in O.Kirchheimer, Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung, Herausgegeben von W.Luthardt, 2nd ed., Suhrkamp, Frankfurt am Main 1981, p.152ss., esp. pp.182-184. For an account of Nazi doctrine of property see F.Wieacker, Wandlungen der Eigentumsverfassung, Hanseatische Verlagsantalt, Hamburg 1935.

163. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., pp.568-569.

164. Ibid., p.570. Emphasis in original.

165. Cf. N.Bobbio, Il potere e il diritto, in "Nuova Antologia", no.2142, April-June 1982, p.79, N.Bobbio, Kelsen e il problema del potere, in "Rivista internazionale di filosofia del diritto", 1981, 4, p.567ff., N.Bobbio, Dal potere al diritto e viceversa, in "Rivista di filosofia", 1981, 3, pp.356-358, and N.Bobbio, Kelsen e il potere giuridico, in Ricerche politiche. Saggi su Kelsen, Horkheimer, Habermas, Luhmann, Foucault, Rawls, edited by M.Bovero, Il Saggiatore, Milan 1982, p.26.

166. As we know, the theory of the dynamic normative order was first formulated by Adolf J.Merkl and then adopted by Kelsen, who added the idea of the Grundnorm. In this connection cf. M.G.Losano, Saggio introduttivo, in H.Kelsen, La dottrina pura del diritto, Italian trans. by M.G.Losano from the second edition of the Reine Rechtslehre (F.Deuticke, Vienna 1960), Einaudi, Turin 1966, p.XXIVff.

167. On the figure of the "leader" as "egocrat" in totalitarian regimes cf. C.Lefort, L'uomo al bando. Riflessioni sull'Arcipelago Gulag, Italian trans. by M.Colombo, Vallecchi, Florence 1980, p.52, where we read the following: "In him the perfect image of the one is realized. That is the meaning of the word egocrat: not a despot who governs alone and without control by the law, but the one who in his person concentrates the whole of social power and, in this sense, appears (and is presented) as if there were nothing outside of him, as if he had absorbed the substance of society, as if, as absolute ego, he could expand infinitely without meeting resistance from outside" (Emphasis in original). In this connection compare also some pages in E.Weiss, Gesammelte Werke, Herausgegeben von P.Engel and V.Michels, Vol.14, Der Augenzeuge, Suhrkamp, Frankfurt am Main 1982, p.108, p.149.

168. K.Larenz, Die Rechtsurdnung als völkische Lebensordnung, op.cit., p.571. My emphasis, to draw attention to the confusion of a descriptive level and a prescriptive level in Larenz's discourse.

169. Ibid., p.570.

170. Cf. K.Larenz, Das Rechtsphilisophische Lebenswerk Rudolf Stammlers, in "Deutsches Recht", 8. Jahrgang, vol.13/14, 15 July 1983, p.263ff.

171. K.Larenz, Die Rechtsordnung als völkische Rechtsordnung, op.cit., p.570.

172. Cf. K.Larenz, Sittlichkeit und Recht. Untersuchungen zur Geschichte des deutschen Rechtsdenkens und zur Sittenlehre, in Reich und Recht in der deutschen Philosophie, Herausgegeben

Recht", 6. Jahrgang, esp. pp.14-15, and K.Larenz, Grundsätzliches zum Ehescheidungsrecht, in "Deutsches Recht", 7. Jahrgang, 1937, p.186. The thesis of the impossibility of reducing matrimony to the figure of the contract is a strongpoint of National Socialist legal doctrine: cf. e.g. K.A.Eckhardt, Zum Begriff des subjektiven Rechts, in "Deutsche Rechtswissenschaft", vol.1, 1936, p.355. Cf. also J.Binder, Philosophie des Rechts, op.cit., p.450ff.

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151. K.Larenz, Die Rechtsordnung als völkische Lebensordnung, op.cit., p.567.

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von.K.Larenz, Erster Band, W.Kohlhammer, Stuttgart and Berlin 1943, p.177ff.

173. Referring to Hegel's juvenile writings, Larenz conceives of the Volksgemeinschaft, the "political order" in the broad sense, as an organism that embraces all the aspects of human life, that is, as a totalizing dimension. "A true community," he writes, "should not be founded solely... on a part of human nature, but should embrace the whole man, and hence not be conceived of as a common law, but as a life whole" (K.Larenz,, Die Bedeutung der völkischen Sitte in Hegels Staatsphilosophie, in "Zeitschrift für die gesamte Staatswissenschaft", vol.98, 1938, pp.113-114. Emphasis in original.) "The community," continues Larenz, "is by its nature total, it penetrates and cogently models all the manifestations of life. It cannot be confined solely to law, to culture, to politics or to religion, but must include within itself all these spheres of life as different forms of manifestation of a unitary life" (ibid., pp.114-115, emphasis in original). In the Neue Volksgemeinschaft, writes Gerhard Ritter in connection with Nazi Germany, "in principle there was not to be any private life of the community outside the State, nor any social ethics that did not simultaneously and primarily serve the formation of power and the propaganda of the ruling party, nor any moral code that was to hve absolute value in the face of the interest of the politics of power, nor, finally, any divine law that could be invoked against the will of the supreme ruler, the Führer or Duce" (G.Ritter, Il volto demoniaco del potere, Italian trans. by E. Melandri, III ed., Il Mulino, Bologna 1971, p.171).

On the Nazi conception (and practice) of politics as a totalizing dimension cf. H.Arendt, Organisierte Schuld, now in H.Arendt, Die verborgene Tradition. Acht Essays, Suhrkamp, Frankfurt am Main 1976, p.35ff. The "total politics" of National Socialism, writes Hannah Arendt, "completely destroyed the atmosphere of neutrality in which the daily life of men takes place" (ibid., pp.35-36). The end of the "atmosphere of neutrality" is theorized by, among other Nazi jurists, Otto Koellreutter, according to whom every German citizen ought to be a "political soldier" (O.Koellreutter, Grundriss der Allgemeinen Staatslehre, J.C.B.Mohr (Paul Siebeck), Tübingen 1933, p.168).

174. K.Larenz, Rechtsidee und Staatsgedanke, op.cit., p.VI. Cf. also K.Larenz, Sittlichkeit und Recht, op.cit., p.180, where the German jurist writes that the law is an order "through which the individual is incorporated into the community as a concrete organism living under the protection of its personality".

175. H.Marcuse, La lotta contro il liberalismo nella concezione totalitaria dello Stato, in H.Marcuse, Cultura e società. Saggi di teoria critica 1933-1965, Italian trans. C.Ascheri, H.Ascheri Osterlow and F.Cerutti, Einaudi, Turin 1969, p.20.

176. Cf. K.Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, op.cit., pp.11-12, note 2.

177. K.Larenz, review of G.K.Schmelzeisen, Deutsches Recht. Einführung in die Rechtswissenschaft (Leipzig 1938), in "Archiv für die civilistische Praxis". vol.145, 1939, pp.252-253. My emphasis.

178. Cf. H.Kelsen, Lineamenti di dottrina pura del diritto, Itaian trans, by R.Treves from the first edition of the Reine Rechtslehre (F.Deuticke, Leipzig and Vienna 1934), op.cit., p.83.

179. K.Larenz, Gemeinschaft und Rechtsstellung, op.cit., p.39.

180. R.Treves, La filosofia di Hegel e le nuove concezioni tedesche del diritto e dello stato, in "Annali dell'Istituto di scienze giuridiche, economiche, politiche e sociali dell'Università di Messina", vol.VIII, 1934-35, Principato, Messina 1935, p.304. Cf. also R.Treves, Il diritto come relazione. Saggio critico sul neo-kantismo contemporaneo, memorie dell'Istituto giuridico dell'Università di Torino, Turin 1934, p.122.

181. On this see A.Falzea, Capacità, op.cit., p.92.

182. Cf. H.Kelsen, Lineamenti di dottrina pura del diritto, op.cit., p.87ff.

183. Cf. the first chapter in N.Luhmann, Liebe als Passion. Zur Codierung von Intimität, 4th ed., Suhrkamp, Frankfurt am Main 1984, p.13ff.

184. H.Kelsen, Lineamenti di dottrina pura del diritto, op.cit., p.87.

185. F.Wieacker, Der Staand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts, op.cit., p.11.

186. Ibid.

187. K.Larenz, Vertrag und Unrecht, Part 1: Vertrag und Vertragsbruch, op.cit., p.36, my emphasis. Still more explicit in this sense, and accordingly implicitly critical towards Larenz's communitaristic and objectivistic radicalism, is Julius Binder. "The will of the community," he writes, "can become real only as will of the individual. The will can become real only as action (Handlung); a will that does not become action is not will. And actions are always only possible as activities (Betätigungen) of the individual and of his individual will" (J.Binder, Die Bedeutung der Rechtsphilosophie für die Erneuerung des Privatsrecht, in AA.VV., Zur Erneuerung des Bürgerlichen Rechts, C.H.Beck, Munich and Berlin n.d. (but 1938), p.28).

188. Cf, F,Neumann, Die Herrschaft des Gesetzes. Eine Untersuchung zum Verhältnis von politischer Theorie und Rechtssystem in der Konkurrenzgesellschaft, German trans. by A. Söllner, Suhrkamp, Frankfurt am Main 1980, pp.68-71, and F.A. von Hayek, Die Verfassung der Freiheit, J.C.B.Mohr (Paul Siebeck), Tübingen 1971, Chap.10, esp. p.187.

189. F,Neumann, op.cit., p.69.

190. Larenz talks of "relative independence (relative Selbständigkeit) of the individual in relation to the whole" (K.Larenz, Deutsche Rechtseuerung und Rechtsphilosophie, op.cit., p.44, my emphasis) and of "relativity (Relativität) of freedom of determination (Bestimmungsfreiheit)" (K.Larenz, Die Wandlung des Vertragsbegriffs, op.cit., p.491, my emphasis). See also K.Larenz, Rechts- und Staatsphilosophie der Gegenwart, 2nd ed., Junker und Dünnhaupt, Berlin 1935, p.157, note 6.

191. K.Larenz, Die Wandlung des Vertragsbegriffs, op.cit., p.491, my emphasis.

192. The formula is, as we know, the one used by Karl Schmitt to define the "sovereign" (cf. C.Schmitt, Politische Theologie, op.cit., p.11). This formula however, contrary to what its author says, does not, in my view, have a descriptive nature (of power as it is), but a prescriptive one (of power as it ought to be). It indicated, at the time it was formulated (the first edition of Politische Theologie is from 1922) not the reality of political power in the Weimar Republic to which it was supposed to apply, but more the ideal of a political power finally aware of its role (of its role according to Schmitt, clearly) which was still waiting to come into being. It was only with the advent of Hitler that this formula assumed some descriptive character (in relation to the National Socialist regime), which it retains for occupation regimes, for military dictatorships and partially for totalitarian systems, or for all those regimes that Ferenc Fehér would define as "political societies" (cf. F.Fehér, Le "kådårisme" comme État "khrouchtchévien" modèle, in "Libre", 7, 1980, p.121ff.

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