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**A National-Socialist Jurist  
on Crime and Punishment -  
Karl Larenz and the So-Called  
'Deutsche Rechtserneuerung'**

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A NATIONAL-SOCIALIST JURIST  
ON CRIME AND PUNISHMENT -  
KARL LARENZ AND THE SO-CALLED  
"DEUTSCHE RECHTSTERNEUERUNG"

by  
Massimo La Torre

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\* English translation by Iain Fraser revised by the author.

The treatment Karl Larenz gave the topic of penalty in the 1930s is a pointer to the view of the relationships between individual and legal system and of the question of the individual's responsibility and legal capacity as theorized in National Socialist legal doctrine. For this German jurist, primarily a scholar of private law, dealing with the topic of penalty meant applying his conceptions<sup>1</sup>, and the principles of the Deutsche Rechtserneuerung<sup>2</sup> they are inspired by, to areas of

<sup>1</sup> To be found chiefly, as far as questions of legal theory are concerned, in three works: K. Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, J.C.B. Mohr (Paul Siebeck), Tübingen 1934; K. Larenz, Rechtsperson und subjektives Recht. Zur Wandlung der Rechtsgrundbegriffe, in Grundfragen der neuen Rechtswissenschaft, Junker und Dünnhaupt, Berlin 1935, p.225 ss.; K. Larenz, Über Gegenstand und Methode des völkischen Rechtsdenkens, Junker und Dünnhaupt, Berlin 1938.

<sup>2</sup> On the "Deutsche Rechtserneuerung", that is, the movement of Nazi lawyers aiming at "German legal renewal" in the sense of adapting the legal system to the political directives of National-Socialism, see, for a general view, D. Grimm, Die "Neue Rechtswissenschaft" - Über Funktion und Formation nationalsozialistischer Jurisprudenz, in D. Grimm, Recht und Staat der bürgerlichen Gesellschaft, Suhrkamp, Frankfurt am Main 1987, p.373 ff. For the area of private law, see B. Rüthers, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus, J.C.B. Mohr (Paul Siebeck), Tübingen 1968, and P. Thoss, Das subjektive Recht in der gliedschaftlichen Bindung. Zum Verhältnis von Nationalsozialismus und Privatrecht, Europäische Verlagsanstalt, Frankfurt am Main 1968. For public law, see Staatsrecht und Staatsrechtslehre im Dritten Reich, ed. by Ernst-Wolfgang Böckenförde, Müller, Heidelberg 1985; and cf. W. Hempfer, Die nationalsozialistische Staatsauffassung in der Rechtsprechung des Preussischen Oberverwaltungsgerichts, Duncker und Humblot, Berlin 1974; for international law, see D.V. Vagts, International Law in the Third Reich, in "American Journal of International Law", vol.84, 1990, p.631 ff. For the "German legal renewal" in the area of criminal law, see M. Stolleis, Gemeinwohlformeln im nationalsozialistischen Recht, J. Schweizer, Berlin 1974. On criminalist legal scholarship variously preparing or supporting the Deutsche Rechtserneuerung, see K. Marxen, Der Kampf gegen das liberale Strafrecht. Eine Studie zum Antiliberalismus in der Strafrechtswissenschaft der zwanziger und dreißiger Jahre, Duncker & Humblot, Berlin 1975. Cf. also M. Frommel, Von der Strafrechtsreform zur "Rechtserneuerung", in Recht, Rechtsphilosophie und Nationalsozialismus, ed. by H. Rottleuthner, Steiner, Wiesbaden 1983, p.445 ff. A scholarly, able presentation of the principles of Nazi penal law,

law far from those most familiar to him, testing the "soundness" of his theories and verifying their validity in relation to the totality of legal phenomena.

The object of this study is principally to reconstruct and present the arguments of Larenz, an eminent and influential jurist of National-Socialism<sup>3</sup>, in the area of the theory of crime and punishment. In doing so, however, one cannot - nor would one wish to - avoid a glance at the events ranged obscurely behind the theory. In the conclusion I shall accordingly seek to outline some connections between Larenz's doctrine, Nazi legal theory and the totalitarian political model of which they are expressions.

# 1. "Community of the people", "concrete order", and legal subjectivity

According to Larenz, the essence of the penalty is the meaning it has in itself, not as a means to an end external to it. In this connection he takes up a distinction earlier employed by another protagonist of the Deutsche Rechtserneuerung, Walter Schönfeld: between "meaning" and "purpose"<sup>4</sup>. "Meaning is

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summarizing and systematizing the results of the Deutsche Rechtserneuerung and of the debate around it among Nazi jurists can be found in H. Welzel, Der Allgemeine Teil des deutschen Strafrechts in seinen Grundzügen, de Gruyter, Berlin 1940. On the legal philosophers who "flanked" the enterprise of Deutsche Rechtserneuerung, see A. Kaufmann, Rechtsphilosophie und Nationalsozialismus, in Recht, Rechtsphilosophie und Nationalsozialismus, ed. by H. Rottleuthner, p.1 ff.

<sup>3</sup> Larenz is one of the representatives of the so-called "Kiel school", that is, of a number of teachers grouped in the legal faculty of the University of Kiel who were the most radical, combative wing of Nazi lawyers in the "Deutsche Rechtserneuerung". On the "Kiel school", also known, in its criminalist branch, as the "phenomenological school", cf. P. Thoss, Das subjektive Recht in der gliedschaftlichen Bindung, p.39 ff.

<sup>4</sup> Cf. W. Schönfeld, Rechtsphilosophie, Jurisprudenz und Rechtswissenschaft, in "Zeitschrift für Deutsche Kulturphilosophie", vol.1, 1935, p.61 ff. Schönfeld is one of the



original definition; purpose, definition subsequently added. Meaning is based on itself, purpose on an arbitrary position. Meaning is "in" a thing, purpose attributed to it; meaning irradiates from the whole to the parts, from the personality to its action, from the community to the life of the individual, as it develops; purpose brings the thing into relation with another thing, subjects it"<sup>5</sup>.

For Larenz meaning is what brings a thing into immediate contact with another, a contact not mediated by any third external element. Purpose instead decrees the end of that immediacy and sets up between things artificial relationships which are no longer organic or intrinsic to the things themselves. "Meaning brings a thing into comprehensive, ultimately metaphysical, connection; purpose isolates it, divests it of its natural connections in order to bring it under a new linkage which however is non-organic, but mediated"<sup>6</sup>.

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authors most cited by Larenz, from his very first articles: cf. K. Larenz, Die Wirklichkeit des Rechts, in "Logos", vol.16, 1927, p.209; and K. Larenz, Das Problem der Rechtsgeltung, Junker and Dünhaupt, Berlin 1929, pp.22, 30, 32, 36. To form an idea of Schönfeld's theory, it is sufficient to read W. Schönfeld, Deutsche Rechtsanschauung, in "Archiv für Rechts- und Sozialphilosophie", vol.27, 1933/1934, p.463 ff.

<sup>5</sup> K. Larenz, Vom Wesen der Strafe, in "Zeitschrift für Deutsche Kulturphilosophie", vol.2, 1936, (henceforth cited as VWDS), p.26. The distinction between "meaning" and "purpose" is reformulated with somewhat new contents in Larenz's later doctrine: see K. Larenz, Die Sinnfrage in der Rechtswissenschaft, in Festschrift für Franz Wieacker zum 70. Geburtstag, ed. by O. Behrends, M. Dießelhorst, H. Lange, D. Liebs, J.G. Wolf, C. Wollschläger, Vandenhoeck & Ruprecht, Göttingen 1978, p.411 ff.

<sup>6</sup> VWDS, p.26, my emphasis. Criticism of conceptions of law based on the idea of purpose and in general on instrumental rationality (means/end) is a perennial theme in Nazi legal doctrine: cf., e.g., E. Forsthoff, Vom Zweck im Recht, in "Zeitschrift der Akademie für Deutsche Recht", vol.4, 1937, p.174 ff. The uselessness of the concepts of "purpose" and "interest" for a legal doctrine guided by the principles of National-Socialism is also affirmed by W. Siebert, Vom Wesen des Rechtsmißbrauchs. Über die konkrete Gestaltung der Rechte, in Grundfragen der neuen Rechtswissenschaft, Junker and Dünhaupt, pp.207 ff.



The mode of thought centred round the concept of purpose, defined by Larenz, in Hegel's footsteps, as Verstandesdenken and undoubtedly identified with the Aufklärung, inevitably, in his view, leads to "positivism". Here Larenz, as often happened in his case, overlaps the two notions of philosophical positivism and legal positivism<sup>7</sup>, in part because of unclear understanding of the two distinct cultural phenomena<sup>8</sup>, in part, too, because he considers that legal positivism and philosophical positivism are closely connected with each other<sup>9</sup>. Positivism (legal and philosophical together) "knows nothing of any meaning of the law but only of purposes pursued by the individual legal norms. The legal norm becomes a provision, a means, by the help of which the legislator accomplishes his arbitrarily set purposes"<sup>10</sup>. Thus - Larenz goes on - law ceases to be a people's will for justice and ethical spirit, becoming degraded into a "subtly meditated means of rule over society"<sup>11</sup>.

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<sup>7</sup> Cf., e.g., K. Larenz, Die Wirklichkeit des Rechts, cit., p.204. It is significant in this connection that Larenz uses the expressions "positive legal statutes" and "empirical laws" indifferently to denote the norms of a positive (State) legal system (cf. K. Larenz, Das Problem der Rechtsgeltung, in particular pp.18-19, note 47).

<sup>8</sup> For a clear distinction between philosophical positivism and legal positivism, see G. Fassò, Storia della filosofia del diritto, vol.3, Il Mulino, Bologna 1970, p.217 ff.

<sup>9</sup> Cf. K. Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, p.11, where he asserts that legal positivism takes its roots from philosophical positivism.

<sup>10</sup> VWDS, p.27.

<sup>11</sup> Ibid. Law as a subtly considered "means" for ruling society is indeed exactly what the Nazi regime achieved. In Nazi Germany - writes Franz Neumann - the law is a technical instrument for the accomplishment of specific political goals. "Law is merely an arcanum dominationis, a means for the stabilization of power" (F. Neumann, Behemoth. The Structure and Practice of National Socialism (1933-1944), Frank Cass, London 1967, p.448). In this connection, see also H. Schorn, Die Gesetzgebung des Nationalsozialismus als Mittel der Machtpolitik,

The distinction between "meaning" (Sinn) and "purpose" (Zweck) serves Larenz as a starting point for dealing with the issues of penalty. Thanks to this preliminary distinction, the

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Klostermann, Frankfurt am Main 1963. Cf. also I. Müller, Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz, Knaur, München 1989, and B. Rüthers, Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich, Beck, München 1988. For an overall view of Nazi legal systems, see D. Majer, Grundlagen des nationalsozialistischen Rechtssystems. Führerprinzip, Sonderrecht, Einheitspartei, Kohlhammer, Stuttgart 1987.

As to the legal nature of the Nazi State, opinions differ. There are those who deny the Nazi State the character of legality and with it also that of statehood, regarded as bound up therewith: this is the opinion of Franz Neumann (cf. F. Neumann, Behemoth, in particular p.467 ff.). Some instead speak of a "dual State", maintaining that alongside or inside the traditional State structure, Nazi Germany presents an organization of a different type coinciding with that of the Party (the NSDAP) or of some special bodies (primarily the SS). The latter opinion is maintained by Ernst Fraenkel (cf. E. Fraenkel, The Dual State. A Contribution to the Theory of Dictatorship, English trans. by E.A. Shils, Octagon Books, New York 1969). On this controversy cf. W. Luthardt, Unrechtsstaat oder Doppelstaat. Kritisch-theoretische Reflektionen über die Struktur des Nationalsozialismus aus der Sicht demokratischer Sozialisten, in Recht, Rechtsphilosophie und Nationalsozialismus, ed. by H. Rottluthner, p.197 ff. On the special nature of the legal organization of the "Third Reich", cf. also H. Arendt, The Origins of Totalitarianism, Harcourt Brace Jovanovich, New York 1979, p.418, where she speaks of the Nazi State's "structurelessness". Interesting considerations on this point are to be found in J.P. Stern, Hitler. Der Führer und das Volk, dtv, München 1981, p.107 ff. Stern maintains the following: "A controlled chaos of institutions: this is perhaps the best way of describing the characteristic form of National-Socialist rule" (*ibid.*, p.111, emphasis in original).

Nazi law, under the ideological veil of "communitarian popular law" woven by theoreticians like Larenz, got rid of laws understood as general and to some extent rational provisions (as being linked among themselves by provisions of a formal logical nature) (cf. F. Neumann, Behemoth, p.440 ff.) and made the law only a disconnected set of "measures" (Maßnahmen), that is, of commands. Were it not that behind these commands there was still an accepted normative system (albeit in a restricted sphere, within the National-Socialist party, the NSDAP), the Führerstaat could have been the delight of imperativist theoreticians of law, fully confirming their conception of the legal phenomenon. The problems of a hypothetical model of society governed solely by commands are well set out by Axel Hägerström. On this see E. Pattaro, Lineamenti per una teoria del diritto, CLUEB, Bologna 1985, p.189.



Nazi jurist is able immediately to clear the field of utilitarian, or as he puts it "positive", theories of penalty. "Positivist, rational thinking in terms of purpose enables one to ask only about the purpose of the penalty, not about its meaning. The penalty is thus conceived from the outset exclusively as a means, and the punishment as a measure, intended to pursue a particular purpose"<sup>12</sup>. Civil society intimidation and the so-called rehabilitation of the delinquent have the purpose of protecting society, seen as the totality of citizens. In that perspective there is no room for an "absolute justification" of the penalty. One might certainly - adds Larenz - replace the purposes of bourgeois society by those of the "national community" and assert that by the "elimination" or "neutralization" of the delinquent, recognized as incapable of community life, or by re-educating him or her to become a member of the community, the purpose of safeguarding the people is being pursued. However, one would according to him even so remain a prisoner of the utilitarian Weltanschauung of liberal, positivist thought, failing to recognize the profound meaning that penalty takes on in the community order<sup>13</sup>.

To explain what in his view is the "meaning" of penalty, Larenz first clarifies what he regards as the meaning and scope

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<sup>12</sup> VWDS, p.28; emphasis in original. The attack on "purpose" as the pivotal concept of the theory of penalty contains an implicit polemical reference to Franz von Liszt, who had made "purpose" the Leitmotiv of his own criminalist doctrine (cf. F. von Liszt, Der Zweckgedanke im Strafrecht, in F. von Liszt, Strafrechtliche Aufsätze und Vorträge, vol.1, J. Guttentag, Berlin 1905, p.126 ff.), and to the influential school of criminal law that had taken off from von Liszt's ideas (the work of such as Gustav Radbruch). For an explicit critique of von Liszt's school by National-Socialist criminalist doctrine, cf. F. Schaffstein, Rechtswidrigkeit und Schuld im Aufbau des neuen Strafrechtssystems, in G. Dahm, F. Schaffstein, Methode und System des neuen Strafrechts, de Gruyter, Berlin n.d. (but 1937), pp.295 ff.

<sup>13</sup> On the problems inherent in justifying penalty from a utilitarian viewpoint, see P. Koller, Probleme der utilitaristischen Strafrechtfertigung, in "Zeitschrift für die gesamte Strafrechtswissenschaft", vol.91, 1979, p.45 ff.

of the concept of law, then goes on to establish the concept of the wrongful or illicit (Unrecht), and from this finally derives the concept of penalty. For him law is the specific order of the community, "the form the national community gives itself"<sup>14</sup>. Law is the form of life of the community. Thence derives its bindingness, for "where the community disintegrates, law loses its binding force and becomes transformed into a mere conventional rule or coercive external norm devoid of all ethical content and still justified at all only by external expediency"<sup>15</sup>. Law accordingly has its roots in the being of that social organism that marks the "higher" phase of the history of man<sup>16</sup> and represents the maturity and maximum vitality of man's life in society, namely the Volksgemeinschaft. "The community is at once the origin and the end of law. It is origin not in the sense of being prior in time but in the sense that the whole comes 'before' the parts"<sup>17</sup>. Moreover, as Larenz adds, just as law takes its origin from the community, so it leads back to it, seeking to conform the people's life in accordance with

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<sup>14</sup> VWDS, p.31. Cf. K. Larenz, Über Gegenstand und Methode des völkischen Rechtsdenkens, p.10 ff. In formulating the theory of the legal system as "concrete order", Larenz also draws on the organicist institutionalism upheld by Carl Schmitt (see C. Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens, Hanseatische Verlagsanstalt, Hamburg 1934, p.11 ff.). For an explicit affirmation of the affinity between Schmitt's doctrine and that developed by Larenz, see K. Larenz, review of C. Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens, in "Zeitschrift für Deutsche Kulturphilosophie", vol.1, 1935, p.112 ff. Cf. L. Lüderssen, Dialektik, Topik und "konkretes Ordnungsdenken" in der Jurisprudenz, in K. Lüderssen, Kriminalpolitik auf verschlungenen Wegen. Aufsätze zur Vermittlung von Theorie und Praxis, Suhrkamp, Frankfurt am Main 1981, p.115 ff. On Schmitt's institutionalism and its ideological nature, see F. Neumann, Behemoth, p.448 ff.

<sup>15</sup> VWDS, p.32.

<sup>16</sup> See K. Larenz, Typologisches Rechtsdenken. Bemerkungen zu V. Tuka: Die Rechtssysteme, in "Archiv für Rechts- und Sozialphilosophie", vol.34, 1940/41, p.20 ff.

<sup>17</sup> VWDS, p.32.



the image of the "genuine justice" which that people produces of itself as an expression of its nature. Community and law are accordingly intrinsically interlinked, as form and content: one cannot do without the other, and vice versa. It is from the "community" that the law has its "meaning" and its binding force.

The "national community" is not the mere being together of people in a given geographical area. That our German jurist conceives the community social organism, the Volksgemeinschaft, as a body never reducible to the set of individuals who do nonetheless make it up, emerges a contrario even from the foregoing assertion. "Intimidation, neutralization, but also the rehabilitation of the criminal to make him a 'useful member of society' again and thereby save him from recidivism have in the last analysis the object of protecting society, as the sum of all citizens, against crime"<sup>18</sup>. Larenz is, however, also explicit in this connection. "The community [...]" he writes "is not a sum of individuals nor even only their mere living together in the same area"<sup>19</sup>.

The "community" is based on a people's unity of blood and destiny. Nonetheless, in order for the life of the "community" to be able to develop from that unity there must be not only the intrinsic unity of social life (combining blood, destiny and history), but also the initiative of the individual, his action and responsibility vis-à-vis his comrades, and hence awareness of their mutual belonging. The "community", maintains Larenz, consists not only of the subordination of the individual's interests to the collectivity's (which he nevertheless unequivocally affirms)<sup>20</sup>. "The community must not be thought of solely as a body abstractly counterposed to its members, to which

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<sup>18</sup> VWDS, p.28.

<sup>19</sup> VWDS, p.32.

<sup>20</sup> Larenz unequivocally upholds "the primacy of the community's life over the individual's interest" (VWDS, p.40), in accordance with the National-Socialist principle asserting that "Gemeinnutz geht vor Eigennutz!".

these must merely be subordinate. The individual, despite the community's superiority, nevertheless takes part in the community rather than facing it as an object, instead being in it as subject, that is as joint bearer (Mitträger) of the community life"<sup>21</sup>.

Our German jurist gets caught in the contradiction between the primacy of the community and the need for activation of and participation by the individual and hence of at least a minimum of autonomous activity, which is explicitly recognized where the outlines of the so-called Rechtsstellung are sketched out<sup>22</sup>. The latter, conceived of as an objectively determined position, counterposed to subjective right<sup>23</sup>, is nonetheless a subjective legal situation distinct from merely being an addressee or "reflex" of objective law and refers to an aspect (albeit reduced in the extreme) of freedom of the subject. Larenz on the one hand asserts the total superiority of the "community" over the individual but then affirms that he is an essential element of it, a subject and not object of law, whose initiative, alongside the objective requisites of unity and history, is among the necessary conditions for the formation of the community organism. Larenz sees the "false antithesis between individual and community" as "overcome" in a "genuine community"<sup>24</sup>. In my view, however, this "antithesis" persists, since the individual is conceived not only as an apparatus of the "community" devoid of own initiative and good only for transmitting and executing its orders and impulses, but also as in some sense an active subject (in however narrow limits), and the "community" is at any rate not a product of this subject but of "laws", "destinies",

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<sup>21</sup> VWDS, p.33.

<sup>22</sup> Cf. K. Larenz, Vertrag und Unrecht. 1 Teil: Vertrag und Vertragsbruch, Hanseatische Verlagsanstalt, Hamburg 1936, p.36.

<sup>23</sup> Cf. K. Larenz, Rechtsperson und subjektives Recht. Zur Wandlung der Rechtsgrundbegriffe, p.260.

<sup>24</sup> VWDS, p.33.

"spirits" that escape determination by him and operate in a dimension well beyond his radius of action.

Note that the "freedom" that Larenz recognizes to the individual is a minimal freedom whose existence would not in any way serve to define a political system. This "freedom" could certainly not serve as a basis for anyone wishing to assert the liberal nature of the Nazi regime. The minimal freedom under discussion here is what results from the fact that every human being acts through his own nervous system and is the sole source of significant movement in space and time. No human enterprise, group or institution can ever do without this source. All this is trivial and obvious. This sort of freedom can accordingly, as being connected with man's very being, never define any social or political group or any legal order. Nevertheless, its existence raises enormous problems for those who conceive of human groups as absolutely distinct from the individual and wish to attribute to the latter an ontological status inferior to society's. That would make society, not the individual, constitute the main if not sole source of significant movement. These problems become acute in such a mind-boggled (and mind-boggling) conception of the relationship between society and the individual as National-Socialism's, giving rise to innumerable paradoxes and fallacies.

The freedom Larenz recognizes in and requires of the individual moreover refers to another range of problems than that of the ontological status of the individual and of society. National Socialism, while it repressed individuality and presented itself as a radically collectivist movement, needed, for the type of society and State it was seeking to create, the Volksgemeinschaft and the total State<sup>25</sup>, the active participation of individuals. The total State hailed by Nazism meant the erection into a political system of the total

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<sup>25</sup> Cf. H. Forsthoff, Der totale Staat, Hanseatische Verlagsanstalt, Hamburg 1933.



mobilization<sup>26</sup> already experienced in military, and in part economic, terms during the First World War. Total mobilization requires the participation of the masses and of the individual. National Socialist legal and political doctrine advocated the absolute passivity (expressed in the term Gefolgschaft, designating the retinue over which Führung is exercised and at the same time its allegiance to) and at the same time the participation of the individual.

## 2. Imputation as destiny

If law is the order of the "community", the unlawful will be violation of that order, antisocial or - in the terminology used by Larenz - "anticommunitarian" behaviour, that is, Gemeinschaftswidrigkeit<sup>27</sup>. The antisocial nature of the act does not however - according to our German jurist - imply that it need necessarily actually endanger the community's existence. An "anticommunitarian" act is instead one committed in breach of the duties resulting from the subject's two fundamental "legal positions" (Rechtsstellungen): (a) the Rechtsstellung as "position of being member" of the community, as Gliedstellung, or the subject's relation with the community as a whole, and (b) the "legal position" deriving from particular legal (in general contractual) relations the subject carries on with other members of the community<sup>28</sup>. "Those who contravene the duties resulting from their own incorporation (Eingliederung) into the community and their consequent bond with its other members act against the

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<sup>26</sup> Cf. E. Jünger, Die totale Mobilmachung, in Krieg und Krieger, ed. by E. Jünger, Junker und Dünhaupt, Berlin 1930, p.9 ff.

<sup>27</sup> VWDS, p.34.

<sup>28</sup> Cf. K. Larenz, Rechtsperson und subjektives Recht. Zur Wandlung der Rechtsgrundbegriffe, p.245 ff.



community (gemeinschaftswidrig)"<sup>29</sup>. Accordingly, even someone offending a single member of the community is acting against the community as a whole. Antisocial or "anti-communitarian" behaviour is not only, maintains our German jurist, engaged in by those committing the crime of high treason, but also by the thief, the cheat, the murderer. Whoever attacks the individual attacks the community and vice versa, "since the community and its members are one thing only"<sup>30</sup>. However, for Larenz the most typical of crimes remains treason, "the special feature of which is to be found in the criminal's radical denial of belonging to the community"<sup>31</sup>. This is the gravest, most repugnant crime in the Nazi jurist's conception: treason is "the most serious form, in some absolute fashion"<sup>32</sup> of crime. Not murder (the most serious crime against the person) but treason (the most serious crime against the "community" or against the people) is, in National Socialist legal theory, the crime par excellence.

As I have mentioned above, Larenz does not rule out the psychological responsibility of the culprit, and constructs the imputability of this act to his deliberate intent. We might say that in this respect Larenz is closer to the "classical" conception of crime than to that of the "positive school". Our German jurist holds that crime is the outcome of the culprit's free choice, that responsibility for an act is inconceivable unless the act has been consciously willed. "Only the possibility of its negation renders possible also the free confirmation,

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<sup>29</sup> VWDS, pp.33-34.

<sup>30</sup> VWDS, p.34. "Crime," writes another Nazi jurist, "is understood as breach of specific duties deriving from the community. Accordingly, certain groups of offences have been given particular emphasis (the crimes of treason and breach of trust)" (W. Siebert, Vom Wesen des Rechtsmißbrauchs, p.208, note 46).

<sup>31</sup> VWDS, p.37.

<sup>32</sup> Ibid.

fulfilment, of one's own destiny (Bestimmung) as task and performance (Leistung). The responsibility of the individual is rooted in the fact that he may confirm or deny, fulfil or miss, his own destiny. The negation of his own ethical destiny, the negation of the community not only in this or that respect but of the community sic et simpliciter (schlechthin) and thereby of his own being as comrade (Genosse), is an extreme possibility of human action which, though it amounts to the denial of any responsibility, loads the culprit with the gravest responsibility, with an absolute responsibility"<sup>33</sup>. The individual, though subject to his destiny, may nonetheless decide either to carry it to fulfilment or to evade it by a free, conscious act. Crime is accordingly, according to Larenz, a product of a decision of the subject about his fate, and therefore an act of will. In consequence, our jurist recognizes that one cannot hold responsible a person who is totally irresponsible, that is, utterly incapable of intention and will<sup>34</sup>. Accordingly, no penalty can be inflicted on such an incapable person.

Determinism, or better fatalism, is in the background here, playing a subordinate role, contained as it is within the idea of the Bestimmung of the acting subject which he may confirm or deny through his own autonomous decision. That is, at any rate, until the concept - of positivist, Lombrosian extraction - of the criminal "type" is introduced<sup>35</sup>. Larenz is, however, determinist

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<sup>33</sup> VWDS, p.39.

<sup>34</sup> Cf. VWDS, p.40. This position is the "official" one of Nazi legal doctrine: cf. Nationalsozialistische Leitsätze für ein neues deutsches Strafrecht, 1. Teil, ed. by H. Frank, 4th ed., Deutscher Rechtsverlag, Berlin 1935, p.35.

<sup>35</sup> On the concept of "type" in National-Socialist doctrine, see K. Larenz, Typologisches Rechtsdenken. Bemerkungen zu V. Tuka: Die Rechtssysteme, p.20 ff., and K. Larenz, Über Gegenstand und Methode des volkischen öffentlichen Rechtsdenkens, p.45 ff. It is also on the notion of "type" that Larenz's later doctrine is constructed: cf. K. Larenz, Methodenlehre der Rechtswissenschaft, 4th ed., Springer, Berlin-Heidelberg-New York 1979, p.443 ff.

as far as the triggering of the mechanism of penalty is concerned. Though moderately voluntarist in the theory of crime, he is instead rigidly determinist as far as the theory of penalty is concerned. The penalty, according to him, results automatically from the anti-social nature of the act, which per se destroys the bond between subject and community. It is just the destruction of this bond that in Larenz's conception is the essence of the penalty. The penalty, from the fine to the death penalty, does not for him do anything other than render visible to all an event that has already occurred internally, underground: the failing of the relationship between an individual and community. "The penalty makes visible what the crime, as an act of will by a subject responsible to the community, is according to its nature"<sup>36</sup>.

Larenz stresses the cogent need for the relationship which in his view is set up primarily between action and its legal treatment as a wrongful act and hence between the fact regarded as wrongful and the penalty. The legal description of a fact is not the outcome of the subsumption of a given event under elements of an offence specified by a norm attributing a certain value to it and accordingly a result of a decision of man (of judge and legislator). The legal description, according to Larenz, is instead intrinsic in the act itself and thus results not from a decision, an act that is to some extent always arbitrary, but from an ascertainment, comparable to the act whereby one establishes that a natural law applies. Wrongfulness, in this view, belongs to the world of "being", not to the normative world of "ought"; its determination will accordingly be contained in a descriptive rather than a prescriptive statement. "The assertion that crime is anti-communitarian behaviour ought not to be understood in a merely "normative" sense. A crime does not become an anti-community act merely because it is first brought into comparison with the requirements

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<sup>36</sup> VWDS, p.36. Emphasis in the original.



of community living and then judged to be against the community. Its anti-community nature is instead the meaning intrinsic in it from the outset, which is not attributed to it by the judge but ascertained by him"<sup>37</sup>.

Larenz disputes the conception of neo-Kantian philosophy that action as such belongs to the sphere of natural reality and is hence in itself devoid of ethical significance, acquiring this significance only following the intervention of the judge (in the trial) or the dogmatic jurist (in the construction of legal concepts). Larenz finally disputes the difference between causality and imputation, referring among others to the work of Georg Dahm and Friedrich Schaffstein, both of them Deutsche Rechtserneuerung jurists committed to the redefinition of criminal law in a "folk" (völkisch)<sup>38</sup> and "community" sense, and members of the "Kiel school".

For Larenz wrongfulness, the legal description of an act as wrongful, is not the product of man. An act is not wrongful in relation to a certain norm, a certain normative system; an act is wrongful in itself, objectively, or better naturally. "An anti-community nature is the specific internal determinacy of crime, belonging to it over and above the fact whether it corresponds to the elements of an offence in a legal norm or not"<sup>39</sup>. Here, it may be noted, Larenz's ethical cognitivism, for which values are facts capable of objective determination, is translated fairly consistently to the legal plane. Acts have in themselves their ethical value which is therefore not a product of man but known in the same way as the physical laws that govern the occurrence of those acts. Larenz's ethical naturalism goes as far as considering not only the ethical description but even

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<sup>37</sup> VWDS, p.34.

<sup>38</sup> Cf. J. Gernhuber, Das völkische Recht. Ein Beitrag zur Rechtstheorie des Nationalsozialismus, in Tübinger Festschrift für Eduard Kern, J.C.B. Mohr (Paul Siebek), Tübingen 1968, p.167 ff.

<sup>39</sup> VWDS, p.35.



the legal one as an objective description and intrinsic value of the natural event. Accordingly, our German jurist is able to maintain that the ethical meaning of punishment is the intimately necessary consequence of the crime<sup>40</sup>. Moreover, it should be recalled that Larenz tends to overlap the two planes of ethics and law, drawing law into the orbit of the ethical world.

A rapid comparison with Kelsen's theory of the norm may serve to throw further light on Larenz's specific position. As we know, according to Kelsen, while the principle whereby one may understand the natural order is that of causality, the principle that lets us understand the legal order is that of imputation. Imputation, according to Kelsen, is distinguished from causality for three main reasons<sup>41</sup>. (a) While the law expressing the relation of causality is not regarded by Kelsen as posited arbitrarily (in the sense that one cannot equally well assume that water boils at 100 or at 25 degrees), the law expressing the relationship of imputation is absolutely arbitrary (in the sense that one may equally well assume, say, that a killer should be condemned to death, to 10 years imprisonment, or fined, or even rewarded with a decoration). (b) While the causal relation is infinite, in the sense that the cause of a certain effect x is in turn the effect of another cause and that the effect x is in turn the cause of another effect and so on ad infinitum, in the relation of imputation condition is not conditioned, and the conditioned event is not in turn a condition in the context of another relation of imputation. (c) While in the relationship of causality one assumes that cause and effect are linked by a bond, over and above the rule expressing that link, in the relation of imputation there is, over and above the norm expressing the relationship of imputation, no link between the two events (a certain piece of conduct and the penalty applied to it). But according to Larenz the relationship between wrongful conduct and

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<sup>40</sup> Cf. VWDS, p.30.

<sup>41</sup> On all this, see E. Pattaro, Lineamenti per una teoria del diritto, p.23 ff.

penalty, between conditioning event and conditioned event, is instead, as happens in the causal relationship, intrinsic and objective, that is, non-arbitrary. The penalty is not an effect attributed to the wrongfulness, but its natural consequence. The penalty is not an external consequence of the crime, but renders its inner essence explicit. It is perhaps more exact to say that in Larenz's doctrine it is not so much the penalty as the legal description as wrongful or as a crime that is the cogent effect of causal relationships set up between the "anti-community" behaviour (the cause) and its wrongfulness (effect). The penalty does nothing but make manifest or "reveal" the wrongfulness of the "anti-community" conduct.

"The essence of the act," writes Larenz in connection with crime, "is the perturbation or disruption of the community in which the culprit took part as a member (Glied) and comrade (Genosse). He learns in the penalty what that meant for him. The penalty separates him from the community, or rather makes manifest to him the separation from the community brought about through his act. Accordingly it is the actual accomplishment of what is posited in the act as its intrinsic meaning. It accordingly makes the culprit's responsibility effective, showing him that his existence is bound up with the community and that he has, in the community, attacked the deepest root of his very own being. The violation of community turns against its culprit; in the penalty he learns his separation from the community as a limitation on his own existence"<sup>42</sup>. We can better understand Larenz's conclusion when he writes that "the penalty is the necessary consequence of anti-community conduct, for which the culprit has to answer"<sup>43</sup>. In the penalty, "the consequences of the action recoil on its perpetrator"<sup>44</sup>: it represents for the

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<sup>42</sup> VWDS, pp.35-36. Emphasis in original. Cf. also VWDS, p.50.

<sup>43</sup> VWDS, p.35.

<sup>44</sup> VWDS, p.30.

culprit "a fate (Schicksal) that he has prepared for himself"<sup>45</sup>.

But if an act is wrongful not in relation to a norm but objectively, by its very nature, the judge, in order to ascertain the wrongfulness or unlawfulness of a piece of conduct, cannot (nor should) refer to the norm as his principal criterion of judgment. "The norm says only what the action is according to its nature, indicating to the judge the conclusions he should draw. It is not the norm under which the action falls that makes it a crime, but the meaning of the action as an actual, real violation of community that justifies the application of the norm"<sup>46</sup>. Accordingly the judge, in deciding the wrongfulness of a piece of conduct, should refer not to the written norm, which has an entirely relative importance and performs a secondary function in this view, but to the "inner" meaning of the conduct in question, in particular to the relationship it has with the "requirements" of the Volksgemeinschaft. This marks an end to the principal of strict legality, nullum crimen nulla poena sine lege, and the advent of an enormous power for the judge, to decide what is an offence and what not on the basis purely of considerations of political opportunity<sup>47</sup>.

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<sup>45</sup> VWDS, p.35.

<sup>46</sup> Ibid.

<sup>47</sup> The decisionism of the Nazi judge is further strengthened by the abrogation of the ban on analogical interpretation in criminal matters (see the Gesetz zur Änderung des Strafgesetzbuches of 28 June 1935, art.1). However, this enhanced power for the judiciary organ does not justify the conclusion that the judge in the National-Socialist regime was absolutely sovereign in respect of the interpretation and application of the norm. Quite the contrary. The judge's power is absolute in relation to the parties, in relation to the accused and to the defence, which are no longer capable of verifying the formal procedure of the decision and the correctness of the argumentation whereby the judicial measure is arrived at. It is not so, however, in relation to the political authorities, which may in thousands of ways manipulate, direct and if need be undo the judge's measure (see H. Rottleuthner, Substantieller Deizisionismus. Zur Funktion der Rechtsphilosophie im Nationalsozialismus, in Recht, Rechtsphilosophie und Nationalsozialismus, ed. by H. Rottleuthner, p.22 ff.). The



### 3. The penalty as stigma and as annihilation of the personality

"Whoever offends the community, be it the collectivity or another member of the community, thereby destroys his position in the community and loses his legal position (Rechtsstellung). Therein lies the essence both of the wrongfulness (Unrecht) and of the penalty"<sup>48</sup>. The wrongfulness has the automatic effect of

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untying of the judge from the law and his duty to refer to the gesundes Volksempfinden enable the political power - which substantively controls judges' conduct - to move the machinery of justice as it pleases, in the most unconstrained fashion (cf. O. Kirchheimer, Criminal law in National Socialist Germany, in "Studies in Philosophy and Social Science", vol.8, 1939/40, p.444 ff., now translated into German (by M. Looser) in O. Kirchheimer, Von der Weimarer Republik zum Faschismus: die Auflösung der demokratischen Rechtsordnung, ed. by W. Luthardt, Suhrkamp, Frankfurt am Main 1981, p.186 ff.). As far as the activity of the Nazi judge is concerned it would, then, be correct to say that it is not so much increased decisional freedom as a freeing of his powers from formal references, and a materialization of jurisdictional practice. In the National-Socialist regime the judge's effective power was a paltry thing. Behind the freedom (from the law) of the judge's decision, proclaimed and ideologically constructed by regime doctrine, was concealed the iron fist of the party bosses and the Führer. As Professor Hinrich Rüping has written, "Das neue Rechtsdenken wird in einem System des Dezisionismus verwirklicht. Daß völkisches Rechtsdenken den Richter von formallogischen Fesseln der Subsumption befreit und statt dessen dazu beruft, durch Konkretisierung des Gemeinschaftswillens das Recht schöpferisch zu gestalten, gibt ihm nur scheinbar größere Macht. Der "Wille der Volksgemeinschaft" erschöpft sich in mythischer Beschwörung. Er bezeichnet keinen soziologisch bestimmbar, realen Willen der Mehrheit, sondern offenbart sich fortgesetzt im Willen des Führers" (H. Rüping, Zur Praxis der Strafjustiz im "Dritten Reich", in Recht und Justiz, im "Dritten Reich", ed. by R. Dreier and W. Sellert, Suhrkamp, Frankfurt am Main 1989, p.181).

For the theoretical grounds for the National-Socialist rejection of the principle nullum crimen nulla poena sine lege, cf. G. Dahm, Beibehaltung oder Abschaffung des Grundsatzes: "Nulla poena sine lege", in Deutsche Landesreferate zum II. Internationalen Kongreß für Rechtsvergleichung im Haag 1937, ed. by E. Heymann, de Gruyter, Berlin and Leipzig 1937, p.514 ff., and C. Schmitt, Der Leviathan in der Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols, 2nd ed., Hohenheim, Cologne 1982, p.110.

<sup>48</sup> VWDS, p.33. My emphasis.

bringing about the penalty. Indeed the penalty and the wrongfulness, on this view, ultimately coincide. For both constitute loss of the community link by the subject, with the difference that one (the wrongful act) is the internal manifestation of this event (loss of the "existential" connection between individual and community), while the penalty is its external manifestation, "visible to all" - as Larenz is fond of saying. As we know, the subject, according to our German lawyer, exists only within the community, and has no autonomous ontological status. Accordingly the wrongful act, which consists in negation by the individual of his own membership in the community order, will as an (automatic) effect have the dissolution of the subject as such, his ontological end. Death, (in the extreme case of capital punishment), on this view, does no more than sanction the fact already accomplished, and accomplished, to boot, by the subject himself: the loss of the subject as subject in the community (which, according to Larenz, is his only possible existence). In a certain sense, on our German lawyer's view, one might say that by committing the wrongful act the subject "annihilates himself", by voluntarily and consciously destroying his own existence (which is here the only one possible) as member of the community. All the penalty would do would be to make this "suicide" effective. For it sanctions the reduction or loss of legal subjectivity, or in other words, on Larenz's doctrine, the dissolution of the existence (first social and then physical) of the culprit.

In the criminal law of the Enlightenment tradition, the penalty does not by itself attack the legal subjectivity of the condemned, and even where, as frequently occurs, it reduces it, that happens as a collateral effect. In the new legal order advocated by Larenz, the penalty always coincides with the reduction (which may go as far as annihilation) of the subjectivity of the condemned. What in criminal law of the Enlightenment, liberal tradition are only collateral and contingent effects of the penalty are instead, in National Socialist doctrine, consubstantial with the penalty. "According to our law in force, many penalties are or can be bound up by the



adjudicating body with so-called "accessory consequences" (Nebenfolgen), such as the incapacity to render military service or hold public office, incapacity to be a witness, guardian or trustee, loss of parental rights, subjection to police surveillance, etc. Conviction for a serious crime involves, according to the Reichserbhofgesetz, loss of capacity to be a farmer, leading to deprivation of administration of the farm (Hof) and of its usufruct. All these so-called "accessory consequences" are in fact essential to the penalty. In them, the penalty is again shown to be something completely different from infliction of any harm whatever. It reduces the culprit's position, both legally and as a member (Rechts- und Gliedstellung). Accordingly, the penalty is not irrelevant for legal capacity"<sup>49</sup>.

The penalty is not "irrelevant" (bedeutungslos) for legal capacity, in the National Socialist lawyer's view, for three chief reasons. (a) Firstly, because legal capacity is not conceived of as something that is in some way independent of intervention by State bodies, be it that of the legislator or of the judge, so that the penalty (intervention by a state agency) cannot revoke what the state agency does not have the power to bestow (namely the capacity). In Larenz's conception, legal capacity is seen as something depending entirely on positive law, even if this is ideologically<sup>50</sup> conceived as a "concrete order" and not as the command or decision of a sovereign will. Capacity is, according to him, a function of the subject's position within the community, of which the law is the order and the "meaning". Capacity, just as it has been given, can also be taken away from the individual. In this connection Larenz criticizes his master, Julius Binder. Binder felt that such penalties as banishment or

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<sup>49</sup> VWDS, p.38.

<sup>50</sup> I am here referring to a notion of "ideology" fairly close to what Karl Mannheim defines as the "particular conception of ideology", consisting in a form of lying or disguising of reality. See K. Mannheim, Ideology and Utopia. An Introduction to the Sociology of Knowledge, Routledge, London and New York 1991, p.49 ff.



conscription "are not in accordance with the idea of law"<sup>51</sup>, since the quality of being a legal subject is in his opinion strictly connected with that of being human. Just as the latter cannot be denied, so equally the human being cannot be denied, over and above his humanity, the quality of being a legal subject. According to Binder one is a subject of rights because one is a human being, irrespective of any intervention by the positive legal order. Thus, legal subjectivity remains outwith the scope of the law. Larenz objects to this position of Binder's by restating an idea which is the guiding theme of his doctrine: "A man is a member of the legal community (Rechtsgenosse) not as man in general, but as a member of the people in which he is born and towards which he is responsible as an ethical being"<sup>52</sup>.

(b) The second reason why, in our German jurist's theory, the penalty is not "irrelevant" for legal capacity is that, according to him, legal capacity is not the general and abstract capacity to have subjective rights (typical of liberal orders)<sup>53</sup>, but the capacity to occupy different "loci" (Orte) in the community. In legal orders in the Enlightenment tradition, general legal capacity and specific capacities do not coincide: general legal capacity is not the sum of the special legal capacities, so that a reduction in the latter does not encroach on legal capacity as such (which is general), which subsists - as Hannah Arendt has noted - in the "right to have rights"<sup>54</sup>. In

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<sup>51</sup> J. Binder, Philosophie des Rechts, Stilke, Berlin 1925, p.665.

<sup>52</sup> VWDS, pp.38-39.

<sup>53</sup> A paradigmatic definition in this connection is the one given by Francesco Messineo, that legal capacity "is the capability (or suitability) to be a subject of subjective rights in general" (F. Messineo, Manuale di diritto civile e commerciale, vol.1, 8th ed., Giuffrè, Milano 1950, p.217, emphasis in the original).

<sup>54</sup> Cf. H. Arendt, Es gibt nur ein einziges Menschenrecht, now in Praktische Philosophie/Ethik, ed. by O. Höffe, G. Kadelbach, and G. Plumpe, Fischer, Frankfurt am Main 1981, p.152

liberal systems this general right acknowledged, albeit with many reservations and limitations, to every person (even the non-citizen) is never entirely eliminated by the penalty. The converse is true in the theoretical view of National Socialism.

For Larenz, general legal capacity, specifically as the capacity to have rights, as a "universal, abstract" concept, should be banned from the legal system<sup>55</sup>. In its place should be set the special capacities to occupy certain "functions" in the community. Thus there are no longer general capacities but only special capacities in the Nazi legal system: no longer capacities for rights, but capacities for "positions as member" (Gliedstellungen) in the context of the community<sup>56</sup>. In this system, then, when a special capacity is reduced or eliminated, the general legal capacity of the subject is ipso facto reduced, since it does not exist other than as the sum of special capacities. The reduction or elimination of a special capacity consequent upon the penalty here has the effect of a reduction in the general subjectivity (where "general" is to be understood in the sense of "total"). While in the liberal order the deprivation of, let us say, parental rights does not encroach more than slightly on the subject's general legal capacity (as "right to have rights"), in the so-called "community order" advocated by Larenz, this law has, so to speak, the effect of mutilating a part of the subject's ontological structure.

(c) The third reason why the penalty is not "irrelevant" for legal capacity lies in the fact that the penalty, in Larenz's conception, in itself consists essentially in being a reduction of legal capacity. "The penalty has the unconditional meaning of

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<sup>55</sup> Cf. K. Larenz, Zur Logik des konkreten Begriffs. Eine Voruntersuchung zur Rechtsphilosophie, in "Deutsche Rechtswissenschaft", vol.5, 1940, p.287 ff.

<sup>56</sup> Cf. K. Larenz, Rechtsperson und subjektives Recht, pp.259-260.

rendering the person's responsibility visible and effective"<sup>57</sup>. The person's responsibility in this case lies in the fact of having broken the bond of solidarity binding him organically to the community. The penalty ought, then, to make "visible" the breaking of that bond. But the bond is the basis on which the individual's subjectivity is erected, the substance of which it consists. The breaking of that "existential" bond accordingly signifies dissolution of the very foundation of subjectivity, and hence its degradation or destruction, or at any rate a "diminution" of it. In this sense, whoever commits a crime at the same time commits an action against himself, since by attacking the bond linking him to the community he attacks his own subjectivity and his very existence. "Through the crime the author loosens or destroys his membership in the community. He thereby turns against himself, something he learns through the penalty"<sup>58</sup>. The penalty, the intrinsic object of which is to make the "loosening" or "destruction" of the culprit's membership in the community visible, has then to make specific and effective that "loosening" or "destruction". The penalty is, on this view, directed immediately and principally against the culprit's legal subjectivity. "The penalty makes the meaning of an act effective for the person who has committed it; it is, accordingly, the reduction or annihilation of the culprit's position as member, of his being a member, of the legal community (Rechtsgenosse), as the inwardly necessary consequence (als die innerliche notwendige Folge) of the action against the community for which he is called on to answer"<sup>59</sup>.

This means conceiving the penalty as a stigma, or as that procedure which renders the subject's guilt perceptible and visible, and sanctions the guilty person's separation from the

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<sup>57</sup> VWDS, p.39.

<sup>58</sup> Ibid. Cf. also K. Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, pp.41-42.

<sup>59</sup> VWDS, p.39.



community, brought about by himself by the very fact of his criminal conduct. Once the penalty is conceived of as a stigma, Larenz re-assesses the medieval punishments, both those aimed at degrading the condemned person's dignity (the pillory, for instance), and corporal ones (like mutilation of part of the body). In his view, these paramountly achieved the characteristic function of penalty, namely that of marking the condemned person's guilt, of making it clear to all the rest of the community. "Consider the pillory, the parading of a criminal through the streets of the town, cutting out the tongue or cutting off the right hand. To us these penalties appear only as manifestations of medieval cruelty; at their own time, however, they were expressions of a community reference of the crime and of the punishment. They make explicit the punishment's symbolic nature and its function of rendering the criminal act visible"<sup>60</sup>. In this view, in which the penalty is understood as a stigma, the meaning of criminal judicial procedure and penalty measures changes radically. First of all, the liberal idea so effectively expressed by Franz von Liszt that "the criminal code is the criminal's Magna Carta"<sup>61</sup> is overturned. Criminal law is conversely conceived by Nazi jurists as a weapon of the community against the criminal, who is its mortal enemy. Accordingly, the presumption of innocence of an accused person not yet condemned falls<sup>62</sup>. The penalty (for instance detention) no longer means deprivation of an individual's fundamental object of legal protection (freedom of movement, in the case of detention), but is seen as an expedient to make effective and to sanction the

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<sup>60</sup> VWDS, p.37.

<sup>61</sup> F. von Liszt, Ueber den Einfluss der soziologischen und anthropologischen Forschungen auf die Grundbegriffe des Strafrechts, in F. von Liszt, Strafrechtliche Aufsätze und Vorträge, Vol.2, J. Guttentag, Berlin 1905, p.80.

<sup>62</sup> Cf. E. Wolf, Zur Stellung des Beschuldigten im Strafverfahren. Bemerkungen zu einer Schrift von August Hegler, in "Zeitschrift der Akademie für Deutsches Recht", vol.4, 1937, p.178.

separation from the community that the guilty person is held already to have brought about through his criminal act. And the public nature of the criminal trial, seen in liberal orders as a mechanism in favour of the accused, is instead seen by Larenz as one of the necessary conditions for making public, "visible to all", the condemnation of the culprit and hence his removal from the community<sup>63</sup>. The trial, in this conception, makes the

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<sup>63</sup> The substantialist, idealist and sociologizing conception of substantive law corresponds in National-Socialist doctrine with a functionalist vision of procedural law, and in general of all legal formality, which is attributed a value only in relation to the results, or else for the portion of substantive law (consisting in the principles and "life" of the Volksgemeinschaft) that can be achieved through it. Thus the criminal trial is conceived on the model of an administrative measure directed towards bringing about a definite goal, in this case the maintenance of the political and racial "integrity" of the "community". This has the consequence of subordinating and possibly sacrificing procedure to the attaining of the end in question, leading to the so-called Auflockerung (loosening) of procedure that became an official conception in Nazi legal doctrine. "If the outcome of the trial," Hinrich Rüping writes in this connection, "becomes decisive, the procedural forms no longer have a value in themselves but are always let fall where a conflict arises" (H. Rüping, "Auflockerung" im Strafverfahrensrecht. Grundsätzliche Entwicklungen zwischen Liberalismus, "deutschen Gemeinrecht" und Naturrecht, in Recht, Rechtsphilosophie und Nationalsozialismus, ed. by H. Rottleuthner, p.68). The trial is conceived of as a "fight of the people against the criminal" (E. Wolf, Zur Stellung des Beschuldigten im Strafverfahren, p.178). Thus "the fundamental principles of the criminal trial ought not to be based on the exceptional case where the accused is innocent. They must count on the normal case that the accused is guilty" (E. Wolf, op.ult.cit., p.178; emphasis in the original).

punishment become a "public spectacle"<sup>64</sup>, thereby acquiring its nature as a stigma.

#### 4. Justification and legitimation of punishment: an "absolute" theory

Larenz rejects the so-called "relative" theories of punishment (where, as we know, the maxim punitur ne peccetur applies) that is, those theories that do not attribute an intrinsic ethical value to punishment as such. These, on his view, fail to understand properly the relationship set up between the crime (or guilt) and punishment. "Relative theories conceive the relationship between the crime and its punishment as a loose connection that does not determine the essence of the penalty"<sup>65</sup>. As we have seen above, Larenz rejects the utilitarian basis of punishment, in particular its two most important variants: the theory of punishment as intimidation and the theory of punishment as rehabilitation. As far as the theory of intimidation is concerned, he certainly recognizes that every punishment is accompanied by an intimidatory effect. He further accepts that the penalty always pursues the aim of protecting from crime society as a whole and also its components taken individually. "This aim is in a certain sense natural for

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<sup>64</sup> On punishment as a "public spectacle", cf. K. Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, p.42, note 1. In Larenz's doctrine the penalty again takes on the characteristics of medieval torture. What Foucault writes in connection with the tortures carried out in the European kingdoms up to and beyond the threshold of the Enlightenment also holds for the model of punishment advocated by Larenz, if in Foucault's framework the prince is replaced by the "national community" and its Führer. Cf. M. Foucault, Surveiller et punir. Naissance de la prison, Gallimard, Paris 1975, p.52. In particular, what Foucault says is one of the characteristics of the "torture", namely the function of driving to an extreme the asymmetry between the subject who has dared to break the law and the prince, applies to Larenz's model of punishment.

<sup>65</sup> VWDS, p.41.



punishment, but it tells us nothing about its nature, considering that many other measures may pursue the same aim"<sup>66</sup>. Larenz also denies that punishment can have a rehabilitative character. This is for a very simple reason: education presupposes the incorporation of the person being educated into the community to which and in which he is being educated, while punishment consists in the separation of the condemned person from the community, in removing him from the life of relationships which, however, is essential to education. "Punishment, by its very nature, is anything but an appropriate form of education. For education to community - and that is the only kind to be considered - can succeed only within a specific community. But the penalty excludes the criminal from that very community"<sup>67</sup>.

Larenz instead concurs with the so-called "absolute" theory of penalty (for which the maxim punitur quia peccatum applies), that is, the theories that consider that the justification for the penalty lies within itself, as a moral reaction to the crime. However, our German jurist is not completely satisfied with the traditional "absolute" theories. For in his view these consider the crime and the culprit in isolation from the life context they fit into, atomistically. They see the crime purely as the action of an individual committing an individual act abstractly conceived, which with logical necessity brings about the consequence of the penalty. "But the act takes on the character of crime not as the isolated action of an individual, but as the conduct to which a member of the community must respond, which modifies the latter's relationship with the community"<sup>68</sup>. The "absolute" theories, then - according to our German jurist - should be purged of their individualistic outlook and developed by adding in a "communitaristic" Weltanschauung. The basis for the penalty lies not - according to Larenz - in the act as such,

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<sup>66</sup> VWDS, p.40.

<sup>67</sup> Ibid.

<sup>68</sup> VWDS, p.42.

but in the culprit's responsibility for his or her anti-social (or better "anti-community") conduct, a responsibility regarded as possible only where the culprit is regarded primarily as the responsible member (and hence still endowed with independent capacity to understand and intend) of the "community".

Larenz's theory of penalty, like much of his doctrine developed between the second half of the '20s and the first half of the '40s of this century<sup>69</sup>, is influenced by and derived from Hegelian philosophy<sup>70</sup>. The relationship with that philosophy is

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<sup>69</sup> A distinction should however be drawn between Larenz's thought as expressed first in K. Larenz, Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung. Ein Beitrag zur Rechtsphilosophie des Kritischen Idealismus und zur Lehre von der "juristischen Kausalität", Deichert, Leipzig 1927, and later in, for instance, VWDS. The difference between Larenz's work written on the very threshold of the '30s and that written later lies particularly in the interpretation of the Hegelian "morality" as a "community of blood and fate" and in the stress on the anti-individualistic, fatalistic and deterministic elements in Hegelian idealism, which he arrives at as from the very early '30s. In Larenz as Nazi there is an attempt to present Hegel as a precursor of race doctrines, maintaining that the German philosopher had conceived the concept of Volksgeist not as a mere spiritual phenomenon but as "the intimate vital, animating principle of a form of people that already lies in the natural phenomenon" (K. Larenz, Die Bedeutung der völkischen Sitte in Hegels Staatsphilosophie, in "Zeitschrift für die gesamte Staatswissenschaft", vol. 98, 1938, p.134; emphasis in the original). To see the difference between these two periods in the German jurist's thought (before and after 1933), compare the two editions of K. Larenz, Rechts- und Staatsphilosophie der Gegenwart, Junker and Dünhaupt, Berlin 1931, and Berlin 1935.

<sup>70</sup> On the Hegelianism of Larenz (and his teacher at Göttingen Julius Binder), there is an effective account in E. Topitsch, Die Sozialphilosophie Hegels als Heilslehre und Herrschaftsideologie, 2nd enlarged edition, R. Piper, Munich 1981, p.86 ff. On this see also the work by H. Kiese Wetter, Von Hegel zu Hitler. Eine Analyse der Hegelschen Machtstaatsideologie und der politischen Wirkungsgeschichte des Rechtshegelianismus, Hoffmann und Campe, Hamburg 1974, p.267 ff. (on Binder), p.287 ff. (on Larenz). On the legal doctrine of Binder and Larenz, cf. M. Stolleis, Gemeinwohlformeln im nationalsozialistischen Recht, cit., p.50 ff. On the Hegelianism of National-Socialist legal doctrine, the considerations by 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, vol.8, 1934/1935, Principato, Messina 1935, p.293 ff., are still valid today. On Binder, cf. N. Bobbio, La filosofia del



inter alia explicitly claimed by the German jurist in referring to this distinction between "relative" and "absolute" theories of penalty. Declaring his aversion for the former and sympathy for the latter, he recalls that Hegel's should be numbered among the latter, as the most important of them. "It is from Hegel that the awareness comes that the penalty is not an external consequence of the crime, but reveals its intimate nature"<sup>71</sup>.

Larenz distinguishes two periods in Hegel's work: the young Hegel, represented as far as legal philosophy and the theory of penalty is concerned in particular by the Theologische Jugendschriften, and the Hegel of the Grundlinien der Philosophie des Rechts. The "absolute" theory of penalty finds, in Larenz's view, its clearest, most unequivocal manifestation in Hegel's youthful work. Here the penalty is seen as the culprit's self-destruction of his own life, so that the penalty is an absolutely necessary consequence of the crime. The penalty is conceived by the young Hegel as "destiny" (Schicksal) of the culprit<sup>72</sup> and as a reaction of the crime onto the one who has committed it. "The criminal", writes Larenz, "appears here not as a single individual who has through his act caused harm solely to another individual or to the State set up against him as an external

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diritto di Julius Binder, in Studi giuridici dedicati dai discepoli alla memoria di Gino Segrè, Giuffrè, Milano 1943, p.87 ff., and especially R. Dreier, Julius Binder (1870-1939). Ein Rechtsphilosoph zwischen Kaiserreich und Nationalsozialismus, in Rechtswissenschaft in Göttingen. Göttinger Juristen aus 250 Jahren, ed. by F. Loos, Vandenhoeck & Ruprecht, Göttingen 1987, pp.435-455.

<sup>71</sup> VWDS, p.43.

<sup>72</sup> Cf. K. Larenz, Staat und Religion bei Hegel. Ein Beitrag zur systematischen Interpretation der Hegelschen Rechtsphilosophie, in Rechtsidee und Staatsgedanke. Beiträge zur Rechtsphilosophie und zur politischen Ideengeschichte, Festgabe für Julius Binder, ed. by Larenz, Junker and Dünhaupt, Berlin 1930, p.259. On the "young Hegel" as seen and used by Larenz, cf. K. Larenz, Die Rechts- und Staatsphilosophie des deutschen Idealismus und ihre Gegenwartsbedeutung, in G. Holstein, K. Larenz, Staatsphilosophie, Oldenbourg, München-Berlin 1933, p.146 ff.



power, but as bearer of the supra individual life from which he separates himself by his very act, so that he thereby destroys the foundation of his own life. This is the profoundest justification of penalty conceivable"<sup>73</sup>.

This position, though still an influence on and in part present in the thought of the mature Hegel, was subsequently modified by the fact that both crime and punishment are, in the edifice of Hegel's philosophical system, transferred onto the level of the so-called "abstract law". At this level, the individual is no longer seen - Larenz maintains - as the member of a specific community (family, tribe or "gens" (*Sippe*), people, State) but as an individual (who as a rational and "universal abstract" being is equal to all other individuals), that is, as a "person". In Hegel's concept of person there is an ambivalence: on the one hand the individual is considered as something unique existing on its own account, accordingly a "concrete" concept, and on the other the individual as a rational being is considered as equal to other individuals, all endowed with the same reason, and is accordingly an "abstract" concept<sup>74</sup>. The nature of Hegel's "abstract law" arises, according to Larenz, from this very ambivalence in his view present in Hegel's thought: between the individual as rational being, and hence between the abstract universality of the "person", and the individual as specific, unique being. Thus, in "abstract law" the individual as such is superposed on the individual understood as universality of will and reason.

On this ambivalence of the concept of person, Hegel constructs the very possibility of crime and the justification of penalty. In crime, the possibility is realized of a discrepancy between the two aspects making up the person, its

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<sup>73</sup> VWDS, pp.43-44. Emphasis in the original.

<sup>74</sup> On the opposition between "concrete" concepts and "abstract" concepts in the doctrine of Larenz (who fights to eliminate "abstract" concepts), cf. K. Larenz, Zur Logik des konkreten Begriffs, p.279 ff. Cf. also K. Larenz, Über Gegenstand und Methode des völkischen Rechtsdenkens, in particular p.43 ff.

"particularity" as a single, unique individual and its universality as a rational being. The crime in Hegel's system appears when the universal will and the particular will in the person diverge. The particular will in the Hegelian system has legal value, that is, belongs to the sphere of the objective spirit, only when it coincides with the universal will manifested in the law. In crime, then, the particular will, which dissents from universal will, does not manage to take on true reality, but is instead a nullity. "This nullity of the crime", comments Larenz, "is manifested in the penalty, which, as annihilation of what is in itself null, accomplishes the actual self-destruction of the crime and thereby simultaneously the production and realization of the objective right which takes on existence in the penalty<sup>75</sup>." The penalty is however for Hegel not only the production of objective law. It is also and particularly the reaffirmation of the abstract personality of the culprit, who as a "universal" must will the necessary consequences of his act and is through his punishment recognized as a responsible being<sup>76</sup>.

Larenz, though feeling very close to Hegel's theses, nonetheless does not recognize himself fully in his philosophy of penalty. This is particularly because it treats the individual at the level of "abstract law", not that of "morality". In doing so Hegel (a) recognizes the individual as "person" and hence as a being equal to others of his kind, (b) posits a counterposition between individual and law (State), and (c) sees the penalty as something reaching the individual from outside and hence in need of justification. "This sequence of ideas," writes Larenz, "contains the correct opinion that crime, as the individual's revolt against the will of the law, destroys itself. But this self-destruction of the crime can be understood in its essence only when the criminal is seen not as an abstract person but as

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<sup>75</sup> VWDS, p.44.

<sup>76</sup> Cf. G.W.F. Hegel, Grundlinien der Philosophie des Rechts, §§ 97, 99-101 (ed. J. Hoffmeister, 4th ed., Meiner, Hamburg 1955, pp.93-98).

an actual member of the community who through his act not only comes into contradiction with the abstract "law as such" but separates himself from the actual community and thereby annihilates the basis of his own life"<sup>77</sup>.

The criminal, continues the German jurist, as a rational universal being, as abstract person, coincides with the law. As long as he continues to be such (a rational, universal being), he cannot become a criminal. In fact, the criminal as such is - in the Hegelian perspective - a mere single, particular will, which stands for itself, and is through the penalty forced to succumb by the dominating power of the universal will. "Inasmuch as the criminal has committed the crime and is punished, he is not rational and universal but an individual; inasmuch as he is a rational universal who wills the right, his own universality, he cannot commit a crime, and the penalty cannot affect him"<sup>78</sup>. This contradiction cannot in Larenz's view be got round other than by transferring the level at which the individual is placed from the aspect of "abstract law" to that of "morality". "It is only at the level of morality, in the actual community, that the individual as individual person is at the same time a member of the community and accordingly an actual universal"<sup>79</sup>.

At the level of "morality", the opposition between the individual as a separate individual and the abstract universality of law dissolves. This opposition would in Larenz's view undermine the justificatory foundation of the penalty or - more exactly - render impossible the absolute basis for the penalty, namely a basis for the penalty that lies within the latter itself. In this case the problem would inevitably arise of the justification of the penalty in relation to the individual's singularity. The penalty could no longer be justified for itself but would have to come to grips with the individual that

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<sup>77</sup> VWDS, p.45.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid. Emphasis in original.



undergoes it and be justified with respect to him. This is unwelcome to Larenz, who instead goes in search of the "profoundest possible justification of the penalty"<sup>80</sup>, and, we may add, the "profoundest possible justification" of political power and of the law. The German jurist in fact seeks more to rid himself of the problem of "justification" (Rechtfertigung), which to some extent requires an "object" which it is proposed to "justify" (or legitimize) to be singled out as a problem and put in question, in this case the institutions of a particular social organization. The Nazi jurist wishes to supply law and political authority with the foundation that natural events enjoy<sup>81</sup>: the cogency of causality, faced with which there can never be any question of "justification" or of legitimation, as instead arises in the case of human action.

By shifting the individual, within the Hegelian system, from the level of "abstract law" to that of "morality", Larenz to his mind resolves the opposition between concrete particular will and abstract universal will. On the level of "morality" the individual is no longer regarded as an isolated individual but as a member of a community, and is hence at the same time "concrete" and "universal", and is indeed the "actual universal" in which particularity and universality merge.

The Hegelian dualism of a particular will counterposed to the universal will, which constitutes the essence of "abstract law", is, for the theory of penalty, heavy with implications that Larenz does not hesitate to call "fatal". In the Hegelian conception, he writes, the offender as an individual, or as a

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<sup>80</sup> VWDS, p.44

<sup>81</sup> This is a typical feature of the Nazi Weltanschauung. Hans Frank, for instance, Minister of Justice of the Reich organizer of the "Deutsche Rechtserneuerung" movement and, later on, "Generalgouverneur" for the Polish territories occupied by the German army, compared the "efficacy over time of the revolutionary conception put forward by Adolf Hitler in his laws with the power of the laws of nature" (H. Frank, Fondamento giuridico dello Stato nazionalsocialista, It. trans. by L.L. Palermo, Giuffrè, Milano 1939, p.20).

particular will, finds himself in the position of an object vis-à-vis the universal abstract will of law. The penalty has accordingly the purpose of dissolving the individual in his particularity and thereby reaffirming the power of the universal will and its mastery over the particular will. In this view, penalty takes on the connotation of reprisal. It is harm inflicted on the culprit to make him feel his "nullity" in the face of the power of the law and of the State. This is the interpretation of Hegel's theory of penalty supplied by Larenz, who objects to it as follows. "But the offender is not thereby regarded as a member of the community who through his crime has modified his position in the community, but as an individual with respect to whom the community appears as an external power, namely as the abstract universal, for the purpose of making him submit to itself"<sup>82</sup>. In this way Hegel is seen as denying the unity of the "supra-individual life" that he had instead affirmed in his youthful works. But above all, according to Larenz, "this means that the deeper idea that the offender through his crime separates himself from his basis of life, and learns through the penalty what he has done, is lost"<sup>83</sup>.

In Hegel's theory of "abstract law", the penalty, in Larenz's view, no longer appears as a compliment to or ulterior effect of the offender's criminal act, but as a measure by an authority outside the actor (the offender) and counterposed to him. But this - and here is Larenz's chief concern - means the losing of that "absolute" justificatory basis of penalty that is the ambitious aim of our Nazi jurist's theoretical construction. Where the penalty is regarded as the "self-destruction" of the culprit, coming about automatically once the condition of wrongfulness is met, the penalty no longer needs any further

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<sup>82</sup> VWDS, p.46.

<sup>83</sup> VWDS, p.47. However, according to Larenz, there always remains, at the centre of Hegel's philosophy of law, the "idea of the moral tonality, of the community of a people that lives everywhere" (K. Larenz, Hegelianismus und preußische Staatsidee. Die Staatsphilosophie Joh. Ed. Erdmanns und das Hegelbild des 19. Jahrhunderts, Hanseatische Verlagsanstalt, Hamburg 1940, pp.43-44).

justification. This is for two reasons: (a) because it arises with the force of the laws of nature that govern the physical life of the subject who offends and (b) because it is desired and executed (through the criminal act) by the very subject who undergoes it. The culprit committing a crime that is above all "anti-community conduct" deliberately separates himself from the "community of the people" (Volksgemeinschaft) and thereby destroys his own reason for being, his ontological basis, which lies in the link with the "community", in being an expression of it. The penalty, which is above all the annihilation of subjectivity, does no more than make the breaking of the existential link brought about by the crime clear and effective. Accordingly, the penalty has no need for justification vis-à-vis the culprit, for it is not bestowed by a subject other than the criminal himself, as instead happens in Hegel's theory of "abstract law". The penalty in Larenz's conception is the "fate" of the culprit, and he can neither rebel against it nor in any way withdraw from it. In the face of fate he must bow his head.

##### 5. The offender as "enemy"

I shall run through the main passages in Larenz's theory of penalty. I shall not dwell further on its overwhelmingly ideological nature because I feel it emerges unequivocally from the German jurist's own prose. It is clear, for instance, that the "fate" that Larenz sees as realized in the penalty and to which he recommends the fullest resignation is nothing but the



arbitrariness of the total State<sup>84</sup>, "incarnated" in the person of the Führer, a new "mystic body"<sup>85</sup>.

<sup>84</sup> Cf. E. Forsthoff, Der totale Staat, p.29 ff. The Nazi State is "total" in a twofold sense: (a) that it embraces the whole range of social relations in a given territory (and therefore total because it has competence over every area; in this connection see also J. Binder, Der deutsche Volksstaat, J.C.B. Mohr (Paul Siebeck) Tübingen 1934, p.31 ff.); (b) that its activity does not meet with any human limits whatever (total, therefore, because its powers may take on any content whatever). This is made clear by the following formulation by Erik Wolf: "The right (Anspruch) of the National-Socialist State covers the entire earthly existence of man. It finds no limit either in historical traditions or in any fundamental rights or human rights" (E. Wolf, Das Rechtsideal des nationalsozialistischen Staates, in "Archiv für Rechts- und Sozialphilosophie", vol.28, 1934/1935, p.355).

<sup>85</sup> The Führer "incarnates" the "spirit of the people" (Volksgeist) or "race soul" (Rassenseele), or "Gothic soul" (gotische Seele) (as stated by W. Sauer, Schöpferisches Volkstum als national- und weltpolitisches Prinzip. Zur Klärung der rechts- und sozialphilosophischen Grundlagen der nationalsozialistischen Bewegung, in "Archiv für Rechts- und Sozialphilosophie", vol.27, 1933/1934, p.24 and p.28); the "legal conception of the people" (E. Wolf, op.ult.cit., p.352); and, in Larenz's version, "the concrete unwritten idea of law of his people" (K. Larenz, Deutsche Rechtserneuerung und Rechtsphilosophie, p.34). Or again, in Binder's doctrine, the Führer is "incarnation of his nation, of its common will, of the will to freedom and assertion" (J. Binder, Der Idealismus als Grundlage der Staatsphilosophie, in "Zeitschrift für Deutsche Kulturphilosophie", vol.1, 1935, p.157). On the Führer as a metaphysical entity cf. also A. Capizzi, Alle radici ideologiche dei fascismi. Il mito della libertà individuale da Constant a Hitler, Savelli, Roma 1977, p.151 ff. The central thesis of this book, that the cultural roots of National-Socialism and of fascism arise from liberal (in particular Constant) and libertarian (Stirner and Proudhon) thought, is highly disputable, not to say so much hot air.

Nazi ideology takes over, adapting them to its purposes, a series of myths (and rites) of Christian doctrine (and liturgy). This is noted by G.L. Mosse, The Nationalization of the Masses. Political Symbolism and Mass Movements in Germany from the Napoleonic Wars Through the Third Reich, Howard Fertig, New York 1975, p.204 ff. There is a stimulating page in this connection by E.M. Remarque in Die Nacht von Lissabon, Ullstein, Frankfurt am Main 1978, p.40. On the role of myths and rites in the ideology of totalitarian regimes, and in particular Nazi regime, there is the important last chapter of E. Cassirer, The Myth of State, Yale University Press, New Haven and London 1946, p.277 ff.

The essential points of Larenz's conception, as far as the theory of the criminal law of the Volksgemeinschaft is concerned, are as follows. (a) Larenz does not exclude personal liability as regards the commission of the crime, or better considers that the deliberateness and willedness of the act, and accordingly a capable subject, are necessary conditions for imputing a crime<sup>86</sup>. (b) Once the crime is committed, the penalty is conceived of as the necessary consequence, or "meaning", of the crime. Accordingly, at the level of penal procedure, the point is not, on this view, to decide the penalty, but only to accept it. Similarly, on the moral plane, the point is not - in the framework of this doctrine - to justify the penalty, but to recognize it through an intellectual proceeding which cannot be arbitrary and evaluative but must instead be objective and cognitive. In this way the legal and moral responsibility of the person establishing the penalty for the specific case, the individual responsibility of the one deciding on the life and property of others, is mitigated, indeed entirely thrown out in favour of a presumed objective course of events, the sole efficient cause of which - nota bene - is considered as being the subject committing the offence. On him, then, as Larenz several times says, the effects of the events that he, the culprit, has set in motion "redound". Thus while on the one hand Larenz maintains individual responsibility as far as the subject committing the crime is concerned, he instead denies this responsibility (more on the moral than the legal side) as regards the subject who has to establish and apply the penalty. Here there is a paradoxical absolutization as far as the judge is concerned of the moral (or amoral depending on the point of view) attitude typical of legal positivism, for which "law is law" (Gesetz ist Gesetz) and there is no need to ask questions of ethical justification in connection with the application of a positive norm. In Larenz's theory the Gesetz of positive law, which is a human law, becomes a law of nature, and still more a

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<sup>86</sup> According to Erik Wolf too, "only he who acts in awareness of his own wrong makes himself punishable" (E. Wolf, op.ult.cit., p.355).



law of fate, which the judge accordingly cannot (not according to the norms of the positive legal order, but in virtue of the superior cogency of the causal nexus between the facts of nature or of the supranatural force of fate) escape.

As far as the position of the individual offender within such a theory is concerned, the following must be said. (i) Larenz, as we have seen, accepts personal responsibility in the commission of the crime, or considers the voluntary nature of the act as one of the conditions of guilt and of the crime. However, the responsibility for the criminal act is not here the result of a norm, is not derived from some human rule (whether or not enshrined in the law) but is rooted in the ontological nature of the culprit, i.e. his being a member of the "community of the people"<sup>87</sup>. The crime is the breaking of the link binding the individual to his community, and the penalty has the task of making that break effective and evident to the eyes of all members of the Volksgemeinschaft. That is, the penalty is conceived of by Larenz as a mark of the anti-social nature of the criminal, as a stigma. Hence the support he gives to the public execution of the penalty, as against its progressive

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<sup>87</sup> For this reason, Larenz has considerable problems in bringing the criminal responsibility of the foreigner under this concept of his. The latter cannot in fact be termed a member of the Volksgemeinschaft and hence - if Larenz's theory were applied to the letter - would have to be regarded as a non-imputable, criminally irresponsible subject. The German jurist overcomes this difficulty by maintaining that the foreigner enjoys a particular "guest right" (Gastrecht), by the granting of which a relationship is established between the former and the host community. One may, Larenz then affirms, accept the criminal responsibility of the foreigner without bringing into discussion the objective basis of the criminal responsibility which lies in the "existential" relationship between the subject and the community. On this cf. VWDS, p.42. Similar problems connected with the criminal responsibility of the foreigner in terms of "treason" are gone into by Georg Dahm, one of the most radical Nazi theoreticians of the "new" criminal law: cf. G. Dahm, Verrat und Verbrechen, in "Zeitschrift für die gesamte Staatswissenschaft", vol.95, 1935, p.308 ff. On the legal conditions of the "foreigner" in Nazi legal doctrine, see also K. Michaelis, Die Überwindung der Begriffe Rechtsfähigkeit und Parteifähigkeit, in "Deutsche Rechtswissenschaft", vol.2, 1937, in particular p.317 ff.



"privatization" in liberal systems (one need think only of the practice of capital punishment in liberal democratic States confined within the screening walls of a prison)<sup>88</sup>, and to penalties which physically or morally mark the individual's separateness from the community (the pillory, hand amputation, etc.).

(ii) Since the crime means the breaking of the individual's community link and this link represents the individual's ontological foundation, the penalty is then directed immediately and chiefly against the culprit's subjectivity. The penalty is - in this view - an attack on the criminal's humanity, aggression against his being a human being, and therefore runs from degradation of that human dignity up to total physical annihilation. "It [the penalty] thus dissolves or restricts the culprit's membership in the community. According to its nature, it is diminution (Minderung) or annihilation (Vernichtung) of the position as member (Gliederstellung) of the culprit in the community. It is not any harm whatever that is inflicted on the culprit, but a limitation of his legal position and position as member, which merely expresses the extent to which the offender has excluded himself from the community"<sup>89</sup>.

Also important for understanding Larenz's legal doctrine is his position vis-à-vis Hegel's legal philosophy, in particular that of the mature Hegel. Larenz, though brought up in a philosophical atmosphere impregnated with Hegelianism and though largely recognizing himself as Hegelian, departs from him where he conceives the law as "abstract law". This is for one fundamental reason: Hegelian "abstract law" involves a notion of legal subjectivity which is still the Enlightenment one. On this view the subject is such as a human or rational being, and subjectivity is thus a quality deriving from the intrinsic characteristics of man (the "humanity" or "rationality" of his

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<sup>88</sup> In this connection, cf. the remarks by A. Camus, Réflexions sur la guillotine, in A. Camus, A. Koestler, Réflexions sur la peine capitale, Calmann-Lévy, Paris 1986, p.125 ff.

<sup>89</sup> VWDS, p.36. Emphasis in the text.

being), and accordingly attributable to all human beings. This clearly contradicts the racism and anti-egalitarianism of the German jurist's theoretical approach.

Moreover, the idea of "abstract law" implies a notion of wrongfulness founded on the individual and not on the "community", hence a notion of penalty which has to refer to the individual rather than to the community in order to acquire its own justification. "If the law," writes the German jurist, "is understood solely in a sense of 'abstract law', as recognition of the person and his 'sphere of freedom', then the wrongfulness (das Unrecht) will be the violation of that sphere of freedom"<sup>90</sup>. "If instead," Larenz goes on, "we see the law as the community order realized in its members' life together, then the wrongfulness will according to its meaning be negation of membership in the community or of the culprit's particular position as member"<sup>91</sup>. Thus wrongfulness consists essentially in this view in negation of the position as member, the Gliedstellung, and not of the individual's sphere of freedom as still in Hegel's philosophy. By negating his own "position as member" the subject also, according to Larenz, negates his own ethical nature. "By rebelling against the community and its laws he disowns his ethical destination as member of the community and undermines his own position in it"<sup>92</sup>. The penalty does no more, then, than bring out a fact already brought about by the criminal's act, his self-exclusion from the community. "The penalty makes this evident, representing a diminution not only of his legal goods but of his position as member, his honour, his freedom or his property"<sup>93</sup>. In this way the penalty no longer needs justificatory foundations, as instead happens where it is (a) a measure distinct from the wrongful act and not a mere "manifestation" of it, (b) a measure directed against the

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<sup>90</sup> K. Larenz, Die Aufgabe der Rechtsphilosophie, in "Zeitschrift für Deutsche Kulturphilosophie", vol.4, 1938, p.233.

<sup>91</sup> Ibidem.

<sup>92</sup> Ibid., pp.233-234.

<sup>93</sup> Ibid., p.234.

individual's "sphere of freedom" and not against his "existential" link with the "community". While in Hegel's theory of "abstract law" the penalty must always be justified in respect of the limitations and suffering it involves, as being a measure external to the subject originating in a limitation of his autonomy (the wrongful act) and being equally reduced to such a limitation, in Larenz's theory the penalty has no need for justification, as following cogently and almost automatically from the wrongful act and accordingly not needing justification vis-à-vis the individual, or because the wrongful act is a violation of the "community" and not of the individual's autonomy<sup>94</sup>.

In Larenz's National Socialist doctrine, legal subjectivity is uprooted from the subject's humanity, from his mere existence as a human being, and is founded instead on his social function and his loyalty to the political system (to the Volksgemeinschaft)<sup>95</sup>. Thus, while in liberal systems' subjectivity is removed from normative intervention, or better from a normative intervention within the system which accepts the norm establishing the naturalistic basis of subjectivity (cf., e.g., Art.1 of the Italian Civil Code), in Nazi law, where subjectivity is based on a dependent variable of the given normative system (the relation between subject and "national community"), that subjectivity may be attacked by measures within the system (without thereby modifying the given normative structure of the system). Moreover, since in this theory the subject's dignity and very existence are made to depend on his position as member of the Volksgemeinschaft, on his Gliedstellung, the penalty, which as its principal target has just that "position as member", has as effect the moral and

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<sup>94</sup> Nor does the law as such, according to Larenz, need any "justification". For it "isn't an apparatus "in itself" outside the values, which has to be justified or condemned from the viewpoint of the individual's morality, but is in itself a piece of the ethical life realized - and realizing itself - in the community" (K. Larenz, Das Problem der Rechtsgeltung, p.31).

<sup>95</sup> Cf. K. Larenz, Gemeinschaft und Rechtsstellung, in "Deutsche Rechtswissenschaft", vol.1, 1936, p.31 ff.



existential degradation of the culprit. "The laws of the Third Reich must lead to the annihilation of the criminal", writes Hans Frank<sup>96</sup>. The penalty is here theorized as a direct attack on the life and dignity of the person, an attack which may go to the extreme of suppressing that life and that dignity. The concentration and extermination camps are already adumbrated in this theory of penalty.

The penalty as stigma and as annihilation of the personality is a direct consequence of the view of the offender as alien to the community (and to the race, artfremd) and hence, by a mechanism of mental association it seemed to have been overcome by the progressive affirmation of the idea of "humanity", as an enemy<sup>97</sup>. In Nazi political doctrine, which has its most intelligent and refined formulation in the writings of Carl Schmitt, the enemy is just "the other", the foreigner. The enemy, writes Schmitt, "is just the other (der andere), the foreigner (der Fremde), and for him to subsist it is sufficient that he be existentially, in a particularly intense way, something other, something strange, so that in the extreme case conflicts are possible with him that cannot be decided either through a previously established general norming or through the verdict of a third "disinterested" and accordingly "impartial" party"<sup>98</sup>.

The crime is accordingly seen by National Socialist legal doctrine as a manifestation of hostility, an act of war, an activity of the "enemy". "In the National Socialist State," writes Erik Wolf, "the crime appears primarily as disobedience and rebellion; in the offender it is the enemy of the people that

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<sup>96</sup> H. Frank, Fondamento giuridico dello Stato nazionalsocialista, it. trans. p.33. Cf. K. Kraus, Die Dritte Walpurgisnacht, ed. by H. Fischer, Kösel, München 1967, p.264 ff.

<sup>97</sup> In this connection see the observations by S. Freud, Zeitgemäßes über Krieg und Tod, now also in S. Freud, Kulturtheoretische Schriften, ed. by A. Mitscherlich, A. Richards and J. Strachey, Fischer, Frankfurt am Main 1986, in particular p.136.

<sup>98</sup> C. Schmitt, Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien, Duncker & Humblot, Berlin 1963, p.27.

is struck at"<sup>99</sup>. Once the crime is conceived of as an act of war against the community, an attack by the enemy, the attention of the criminal provision is increasingly directed more at the subject committing the crime than at the crime itself. Nazi criminal doctrine accordingly preached the move from a criminal law founded on the figure of the criminal act (Tatbestand) to a law which instead metes out its blows and directs its attack no longer in relation to the fact termed criminal but in relation to the characteristics of the criminal subject, the offender<sup>100</sup>. In this view the offender is no longer the subject committing a criminal act; instead the act becomes criminal if and inasmuch as committed by a subject who is already in himself defined by his physical and mental characteristics as delinquent, that is, falls within the typology of the Verbrechermensch<sup>101</sup>.

For National Socialist doctrine the delinquent is an "enemy", one who has rebelled against the order of the "community" and cut the umbilical cord binding him to it. He is often described as a "degenerate", "inferior" being. And since the enemy is to be annihilated, in accordance with the merciless friend/enemy dialectic which admits no middle terms, conciliation or moderation, theorized by Carl Schmitt and accepted by the bulk of Nazi legal theory, the death penalty is accepted by this

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<sup>99</sup> E. Wolf, Das Rechtsideal des nationalsozialistischen Staates, p.355, my emphasis. The theme of the offender as "enemy" turns up again in J. Binder, Grundlegung der Rechtsphilosophie, J.C.B. Mohr (Paul Siebeck), Tübingen 1935.

<sup>100</sup> See G. Dahm, Verbrechen und Tatbestand, in Grundfragen der neuen Rechtswissenschaft, p.62 ff. See also K. Larenz, Rechtswidrigkeit und Tatbestand in der Lehre vom Unrecht im Rechtsverkehr, in "Deutsches Gemein- und Wirtschaftsrecht", 1 October 1935-31 December 1936, p.401. On the centrality of the figure of the delinquent over the criminal act in Nazi penal doctrine, cf. M. Stolleis, Die Rechtsordnung des NS-Staates, in "Juristische Schulung", 1982, p.651.

<sup>101</sup> Cf. D. Dölling, Kriminologie im "Dritten Reich", in Recht und Justiz im "Dritten Reich", ed. by R. Dreier and W. Sellert, p.194 ff. On the figure of the "criminal man" in modern criminology influenced by positivist scientism and on its philosophical implications, see P. Strasser, Verbrechermensch. Zur kriminalwissenschaftlichen Erzeugung des Bösen, Campus, Frankfurt/New York 1984.



theory with sincere enthusiasm. "The death penalty," writes Larenz, "which definitively rids the community of the delinquent, accordingly at the same time, without prejudice to its own meaning, serves the purpose of counteraction (Unschädlichmachung), suppression (Ausmerzung) of the degenerate (des Entarteten) and protection of the community from the spread of inferior subjects (der Minderwertigen)"<sup>102</sup>.

The concept of "enemy" is employed by National Socialist legal doctrine to justify the death penalty and at any rate the deviants exclusion from society. Nor could it, I believe, serve anything other than this<sup>103</sup>. The friend/enemy relation, as understood by Schmitt and other Nazi jurists like Wolf, Forsthoff and Koellreutter<sup>104</sup>, means nothing other than total war between

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<sup>102</sup> VWDS, p.40. "The suppression of the degenerate," Larenz continues, "fits fully in with the "healthy" view of the people (Volksanschauung), not led astray by some false sense of humanitarianism, nor, however, dominated by a blind sense of revenge. It is as necessary for the safeguarding of the community as it is justified for the community's good and that of the offender who must answer for his actions" (*ibid.*, my emphasis).

<sup>103</sup> I regard some recent attempt to use Schmitt's concept of "enemy", loaded as it is with anti-egalitarian and totalitarian theoretical implications, in order to delineate a conflictualist and hence pluralist social model as doomed to failure. For this attempt see V. Tomeo, Il diritto come struttura del conflitto, Angeli, Milano 1981, p.93 ff. For the anti-egalitarian implications of the concept of "enemy" in National-Socialist legal doctrine, cf. the use made of it, for instance, by H. Lange, Vom Gesetzesstaat zum Rechtsstaat, J.C.B. Mohr (Paul Siebeck), Tübingen 1934, p.20.

<sup>104</sup> Schmitt's concept of "enemy" is, among other things, widely used to justify anti-Semitism. See what is written by Schmitt's pupil E. Forsthoff, Der totale Staat, pp.38-40; and O. Koellreutter, Vom Sinn und Wesen der nationalen Revolution, J.C.B. Mohr (Paul Siebeck), Tübingen 1933, p.32. Moreover, in Schmitt's doctrine the "friend" is defined as "kin comrade" (Sippengenosse) and "blood friend" (Blutsfreund) (cf. C. Schmitt, Über das Verhältnis der Begriffe Krieg und Feind (1938), Korollarium 2, in C. Schmitt, Der Begriff des Politischen, p.104). For a further sample of the German public lawyer's anti-Semitism, see C. Schmitt, Die deutsche Rechtswissenschaft in Kampf gegen den jüdischen Geist, in "Deutsche Juristen-Zeitung", Issue 20, 41, of 15 October 1936, column 1193 ff. On the use of Schmitt's concept of "enemy" by National-Socialist legal doctrine and practice, one well-documented study is by D. Majer, "Fremdvölkische" im Dritten Reich. Ein Beitrag zur



two parties who are bearers of interests and values in conflict, and the rejection of any discursive rationality in their relationship<sup>105</sup>. And war cannot but tend to the victory of one of the two parties<sup>106</sup>, that is, the affirmation of the stronger and the defeat of the weaker. Accordingly, it tends towards the homogeneity of the social body, to the undisputed dominion of one alone (be it an individual or a group), to the liquidation of the conflict. On the other hand, from the psychological viewpoint, as Stefan Zweig noted, "it is not possible to coordinate war with reason and with right feeling. It has need of a state of excitation of the feelings, of enthusiasm for one's own cause and hatred of the adversary<sup>107</sup>. War (or the friend/enemy relationship) necessarily exalts fanaticism and not tolerance, aggressivity and not meekness, passion and not reason: all feelings suited to an authoritarian, integrated society, certainly not to a free, pluralist society. The notion of "enemy"

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nationalsozialistischen Rechtssetzung und Rechtspraxis in Verwaltung und Justiz unter besonderer Berücksichtigung der eingegliederten Ostgebiete und des Generalgouvernements, Harald Boldt, Boppard am Rhein 1981, p.109 ff.

<sup>105</sup> Had Schmitt not maintained - with disdain - that the basic principle of liberalism (by him identified with parliamentarianism tout court) is discussion? Cf. C. Schmitt, Die geistesgeschichtliche Lage des heutigen Parlamentarismus, Duncker & Humblot, Berlin 1961 (reprint of the second edition of 1926), p.5 ff. On decisionism as the breaking off of discursive communications, cf. H. Lübke, Dezisionismus - eine kompromittierte politische Theorie, now in H. Lübke, Praxis der Philosophie. Praktische Philosophie. Geschichtstheorie, Reclam, Stuttgart 1978, p.61 ff. On the relationship between "friend" and "enemy" as a breaking off of discussions, cf. also H. Heller, Gesammelte Schriften, ed. by M. Drath, G. Niemeyer, O. Stammer, and F. Bolinski, Sijthoff, Leiden 1971, p.479.

<sup>106</sup> In this connection, see the definition of war given by a "classic" of military theory, R. Montecuccoli, Aforismi dell'arte bellica, ed. by E. Faccioli, Fabbri, Milano 1973, p.7, and that of J. Locke, Two Treatises of Government, Book 2, Chap. 3 (ed. Everymans' Library, London-New York 1979, p.125).

<sup>107</sup> S. Zweig, Die Welt von Gestern. Erinnerungen eines Europäers, Fischer, Frankfurt am Main 1985, p.269. Cf. C. Schmitt, Über das Verhältnis der Begriffe Krieg und Feind, p.104, where for the definition of the concept of "enemy" reference is made to the meaning of Hassenden (he who is to be hated).

is functional and serviceable to an anti-pluralist, organicist conception of society for which every deviant element, everyone different is in himself or herself, by mere existence, apart from any specific actions begun or accomplished, regarded as a danger, that is, as "enemy". And as such the enemy is to be rendered unable to do harm, that is - since it is the very existence of the enemy that constitutes a threat to the whole "community" - must be suppressed<sup>108</sup>.

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<sup>108</sup> The enemy in Schmitt's theory - as Hermann Heller notes - is the "outsider (der Fremde), who in the case of conflict must be annihilated" (H. Heller, Staatslehre, ed. by J. Niemeyer, 6th revised edition, J.C.B. Mohr (Paul Siebeck), Tübingen 1983, p.234, my emphasis). Indeed Schmitt's political theory is radically anti-pluralist: cf. C. Schmitt, Der Leviathan in der Staatslehre des Thomas Hobbes, p.118.



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