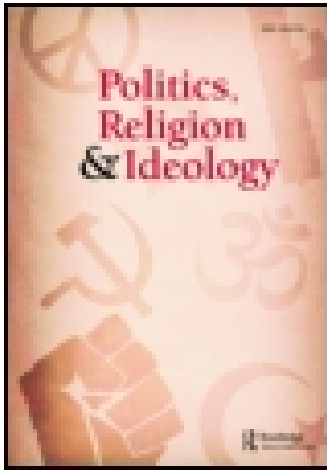


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## Community of Neighbours vs Society of Merchants: The Genesis of Reinhard Höhn's Nazi State Theory

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**ABSTRACT** *Reinhard Höhn's writings have provided the Nazi ideological discourse with a crucial synthesis of various models of anti-liberal modernity discussed in the Weimar era. Influenced by cultural pessimism, Höhn's intention to reverse the trend of the social development back to pre-modern community corresponded to an extreme attempt to prevent 'the decline of the west'. His 'communitarian law doctrine' connected Ferdinand Tönnies' sociology of community with the teachings of his right-wing counterparts, Jerusalem and Freyer. His constitutional theory correlated the 'political neighbourhoods' conceived by the leader of the Young German Order, Artur Mahraun, and Carl Schmitt's 'concrete orders' as the basis for the Third Reich's new social order. The common feature was the desire to overcome the 'atomized society of Hobbesian egoistic individuals'. For Höhn, the individualistic rationality had to be erased by a combination of forces from above – the Führer – and below – closed communities obtained by re-structuring the social body into a net of neighbourhoods. This article shows the gradual transformation of Höhn's public law theory as he was trying to devise a social structure fitting the demands for a 'substantial' democracy and social justice. His final outcome was Führerdemokratie, an anti-rationalist leadership legitimized by power relationships among members of exclusive communities.*

### Introduction

The importance of Reinhard Höhn for the development of Nazi political and legal theory was apparently better known during the years of the Second World War than it is today. All of the most appreciated surveys of the Third Reich published in those years in the West quoted his name as 'one of the few important Nazi theorists'.<sup>1</sup> Oddly enough, nowadays there are no monographs dedicated specifically to him. A limited number of recently written essays provide valuable information about his career and responsibilities as an academic and officer of the SS security service (*Sicherheitsdienst* – SD) during Hitler's regime. They also reveal disconcerting facts regarding his 'second life' as acclaimed founder of the

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<sup>1</sup>See Otto Kirchheimer and John Herz, 'Leadership Principle and Criminal Responsibility (July 18, 1945)' in Franz Neumann, Herbert Marcuse, Otto Kirchheimer, and Raffaele Laudani (eds) *Secret Reports on Nazi Germany. The Frankfurt School Contribution to the War Effort* (Princeton, NJ: Princeton University Press, 2013), pp. 464–474. Franz Neumann defined Höhn as one of 'the most advanced National Socialist's lawyers', in *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Toronto: Oxford University Press, 2009 [1942]), p. 469. Similarly also Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Clark: The Lawbook Exchange, 2006[1941]), pp. 190–191.

Harzburg Academy for Executives in the post-war Federal Republic.<sup>2</sup> Essays dedicated to specific questions of Nazi law doctrine provide insights into different aspects of Höhn's legal theory.<sup>3</sup> What they do not explain is the genesis of his theory, namely how Höhn's ideas have evolved within the intellectual scenery of the Weimar era and the early years of Third Reich.

In recent years, Michael Stolleis offered undoubtedly one of the most important and comprehensive syntheses of Nazi legal theory. He describes with precision Höhn's work, but only from the perspective of the development of juridical science.<sup>4</sup> If we limit the analysis to this point of view, Stolleis is right in affirming that 'the informational value' of Höhn's legal definitions 'was virtually null'; that the key concepts used by the Nazi law scholar were based on a value system that was 'absolutely binding – though, paradoxically, never precisely defined'; and finally, that Höhn's claim that the concept of community had 'made its way into legislation' was drawn 'on relatively insignificant evidence'.<sup>5</sup>

Nevertheless, Höhn's relevance should not be evaluated only according to the classical criteria of legal theory. We might as well agree with Stolleis that he was not much of a law scholar, but we should not underestimate him as an ideologue. As Ingo Hueck rightly points out, Höhn 'acted primarily as a political publicist or "community rhetorician" (Stolleis), rather than as an intellectual theoretician – like, say, Carl Schmitt'.<sup>6</sup> In fact, if we can say that there is some part of ideology in every legal system, undoubtedly the Nazi legal system contains nothing but ideology, promising 'substantial justice' in place of 'empty paragraphs' and 'abstract norms'. As Oliver Lepsius effectively recapitulated, 'it was in fact an essential feature of National Socialist law not to reach solidly fixed content, but to leave things hovering in an associational syncretism', leading finally to 'openness in principle plus occasional decisions by the Führer'.<sup>7</sup>

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<sup>2</sup>Gideon Botsch defines well Höhn's teaching method at Harzburg Academy as a 'translation of militaristic concepts of "leadership" and "community" deriving from his experience in the juvenile movement, which he had already adopted for the purposes of the National Socialist ruling interests', Gideon Botsch, 'Der SD in Berlin-Wannsee 1937–1945. WannseeInstitut, Institut für Staatsforschung und Gästehaus der Sicherheitspolizei und des SD', in Gedenkstätte Haus der Wannsee-Konferenz (ed.) *Villenkolonien in Wannsee 1870–1945. Großbürgerliche Lebenswelt und Ort der Wannsee-Konferenz* (Berlin: Hetrich, 2000), pp. 70–95, p. 81. An accurate description of Höhn's career before and after the Second World War is provided also by Ingo Hueck in "'Spheres of Influence" and "völkisch" Legal Thought: Reinhard Höhn's Notion of Europe' in Christian Joerges and Navraj Singh Ghaleigh (eds) *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and Its Legal Traditions* (Oxford: Hart, 2003), pp. 71–85.

<sup>3</sup>For a recent but all too brief review of Höhn's writings see Arthur J. Jacobson and Bernhard Schlink (eds) *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2002), pp. 317–318. It is possible to find more information regarding Höhn in the German-written literature: Dieter Rebetisch and Karl Tepe, 'Einleitung' in *ibid.* (eds) *Verwaltung contra Menschenführung im Staat Hitlers. Studien zum politisch-administrativen System* (Göttingen: Vandenhoeck & Ruprecht, 1986), pp. 51–53; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Band 3: *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (München: Beck, 1999), pp. 327–329 [available also in English: *A History of Public Law in Germany 1914–1945* (Oxford: Oxford University Press, 2004)]; Bernd Rütters, 'Reinhard Höhn, Carl Schmitt und andere – Geschichten und Legenden aus der NS-Zeit', *Neue Juristische Wochenschrift*, 39 (2000), pp. 2866–2871; Bernd Rütters, *Geschönte Geschichten, geschönte Biographien: Sozialisationskohorten in Wendeliteraturen: ein Essay* (Tübingen: Mohr, 2001); Peter K. Steck, *Zwischen Volk und Staat. Das Völkerrechtssubjekte in der deutschen Völkerrechtslehre (1933–1941)* (Baden-Baden: Nomos, 2003), pp. 208–216.

<sup>4</sup>Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998).

<sup>5</sup>*Ibid.*, p. 77 and pp. 80–81.

<sup>6</sup>Hueck, *op. cit.*, p. 77.

<sup>7</sup>Oliver Lepsius, 'The Problem of Perceptions of National Socialist Law Or: Was There a Constitutional Theory of National Socialism?' in Christian Joerges and Navraj Singh Ghaleigh (eds) *Darker Legacies*, *op. cit.*, p. 39.

Therefore, an inquiry into the roots of Höhn's theories helps us to understand the dynamics that shaped the *Weltanschauung* of German fascism and its focus on an anti-individualistic, i.e., communitarian, idea of society. Crossing from sociology of law to constitutional theory, he fabricated an important synthesis of various models of anti-liberal modernity deriving from different political and cultural milieus. His 'communitarian law doctrine' was able to connect the anti-bourgeois tendencies of the Weimar era deriving from both sides of the political spectrum. As many young social scholars, he was strongly influenced by the sociology of community promoted by the Social Democrat Ferdinand Tönnies, as well as by his right-wing counterparts Franz Wilhelm Jerusalem and Hans Freyer. Among public law scholars, the father of 'integration' theory Rudolf Smend had a major influence on young Höhn, encouraging him to focus on sociological aspects of the state theory and neglect normative ones. Carl Schmitt's constitutional doctrine (*Verfassungslehre*) also played a major role in his formation. Furthermore, the genesis of Höhn's ideas reveals a direct line between the teachings of the leader of the Young German Order, Artur Mahraun, and the Nazi theories of the 'new order'. Searching for a way out from the 'atomized society of Hobbesian egoistic individuals', they all have provided the sociological substratum on which Höhn was able to build his radical constitutional views.

An analysis of Höhn's writings published after 1933 reveal that he did not add much to the core ideas developed during the Weimar years. Such an outcome can hardly be a surprise: Weimar's democratic milieu was clearly much more favourable to open debates and harsh confrontations on which new theories could grow, than the subsequent years of ideological regimentation. Once the Nazis seized power, Höhn generally modified his views of the 'people's community' to convey them from the wider discourse of 'conservative revolution' into the ever-narrowing margins of the new state ideology. Such a manoeuvre mainly required him to purge all references to Mahraun's concept of 'neighbourhood' and substitute them with Carl Schmitt's 'concrete orders', which evidently appeared to him as the politically most promising outline. Furthermore, his writings were primarily a weapon to be used in the rat race for pre-eminence in the Third Reich's polycracy. In fact, Höhn's ability to recognize the needs of the ruling elite, in particular the SS, and adjust his works consequently, can best explain his rise above other Nazi ideologues.

Höhn expressed brand new theories, unrelated to pre-1933 debates, only after the outbreak of the Second World War and the creation of Nazi-occupied Europe. However, those writings fall outside the scope of the present article, since they concern the sphere-of-influence concept (*Großraum*), suitable for the Third Reich's needs in the field of international law.<sup>8</sup> The same can be said for Höhn's activity as the person in charge of the journal *Reich – Volksordnung – Lebensraum. Zeitschrift für völkische Verfassung und Verwaltung*, a forum for ideas aimed to optimize control and exploitation over the conquered *Großraum*.<sup>9</sup>

Therefore, the present article will limit its attention to what appears as a crucial, but previously unexplored, question: the genesis of Höhn's theory of internal state order. It can be

<sup>8</sup>As Hueck rightly asserts, since the expansion of the Reich 'made the vigorous debate about state and community lose importance' (op. cit., p. 77), the sphere-of-influence debate took pre-eminence. Carl Schmitt first proposed it on 1 April 1939 at the Kiel Institute for International Law. Höhn joined the debate only in 1942, mainly with a work entitled *Reich, Grossraum, Grossmacht* (Darmstadt: Wittich, 1942).

<sup>9</sup>Höhn was in charge of the journal from 1941 to 1943, together with four other editors, all of them high officers entrusted with the control of the occupied territories. On 20 January 1942 two of them participated in the Wannsee conference: Höhn's intimate friend Wilhelm Stuckart, state secretary in the Interior Ministry and high SS officer, and Gerhard Klopfer, assistant to Martin Bormann in the Office of the Party Chancellery (*Partei-Kanzlei*). For the connections between the infamous conference and the Institute for State Research (*Institut für Staatsforschung an der Berliner Universität*), directed by Höhn from 1936 to 1945, and located since May 1937 in Königstraße 71 am Großen Wannsee, see Botsch, 'Der SD in Berlin-Wannsee', op. cit., pp. 70–95.

better depicted as a synthesis of various ideological trends and traditions animating Weimar public debates. By examining the writings he published since the end of the 1920s until the so-called years of consolidation of the Third Reich (circa 1936), the present analysis aims to define in which way he interrelated those elements.

A further aim is to reveal the gradual conversion of Höhn's attempts to transform the structure of the modern capitalist society. It should help answer the question: **how and why did a young sociology and law scholar turn into a fascist? As with many other academics during the Weimar years from both sides of political spectrum, he was hoping to find a formula fitting the demands for a 'more substantial' direct democracy and social justice.** Stolleis' rationalist critique can easily describe **the communitarian law theory** as mere 'rhetoric'; **but Höhn was following the path indicated by the *maitre-penseurs* of the time.** Tönnies and other leading social thinkers were describing **the individualistic society as a profound, deadly illness of the modern world, claiming that 'the whole modern progress is essentially negative', thus 'it will definitively lead to the death of such a culture.'**<sup>10</sup> Within an intellectual landscape dominated by cultural pessimism, Höhn's intention to **reverse the trend of social development back to a pre-modern community cannot be dismissed as just a pretext for totalitarian domination. We must consider that he, as well as many of his contemporaries, really believed – at least for some period – that crushing the 'arbitrary', i.e., free will of the individuals corresponded to an extreme attempt to prevent 'the decline of the west'.**

Arguably Höhn's evolution as an individual in what Hobsbawm called the 'age of extremes' can be described as a typical conversion from juvenile attraction for radical ideologies into a grown-up cynical careerism. Nevertheless, the parable of his intellectual life matches a crucial point in Germany's tragic destiny. **His hopes for defeating the 'forces of plutocracy' turned him toward *Führerdemokratie*, intended as an anti-rationalist leadership legitimized by power relationships among members of exclusive communities.** For Höhn, **market rationality was a product of egoistic individualism, which had to be erased by a combination of forces from above – the *Führer* – and below – closed communities obtained by re-structuring the social body into a net of 'political neighbourhoods'.**

### People's Community as Juridical Principle

It has been said that the **Nazi ideology had the 'specific effect of destroying law';** thereby it could seem unacceptable for German law scholars to get 'involved in the self-destruction of the legal science'.<sup>11</sup> The same intrinsic incompatibility seemed to denote sociology under Hitler. As Hugo Sinzheimer, renowned professor of sociology of law and labour law, wrote in 1935 in Dutch exile, **'a "total state" cannot be a friend of a science based on social reality.'**<sup>12</sup> **Yet, Nazi seizure of power marked a discontinuity only for some orientations within German law and sociology.** Constitutional theorists supporting social-democratic positions, like Hermann Heller, Franz Neumann or Otto Kirchheimer,

<sup>10</sup>Ferdinand Tönnies, *Kritik der öffentlichen Meinung* (1922) vol. 14 of Alexander Deichsel and Lars Clausen (eds) *Gesamtausgabe* (Berlin: de Gruyter, 2002), p. 232. For the anti-individualist implications of Tönnies' teachings and their impact on the coeval discourse see Stefan Breuer, 'Von Tönnies zu Weber. Zur Frage einer "deutschen Linie" der Soziologie' in *Max Webers tragische Soziologie: Aspekte und Perspektiven* (Tübingen: Mohr Siebeck, 2006), pp. 272–293.

<sup>11</sup>Lepsius, op. cit., p. 19. Stolleis refers to the 'destruction and self-destruction of a subject', see Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Band 3: *Staats- und Verwaltungsrechtswissenschaft*, op. cit., pp. 316–350.

<sup>12</sup>Hugo Sinzheimer, 'Die Aufgabe der Rechtssoziologie' (1935) in *Arbeitsrecht und Rechtssoziologie, Gesammelte Aufsätze und Reden* (Frankfurt; Köln: Europäische Verlagsanstalt, 1976), p. 103.

or liberal democrats like Hans Kelsen (not to mention the Jewish origins of many of them), were forced into exile and their works were expelled from the scientific debates. But both sciences had also another, equally influential, face, expressing trends and traditions of the Wilhelmine Germany. Their representatives among law scholars greeted the so-called 'national revolution' with what appeared as 'a literary contest aiming to offer to the new ruler the most suitable legal theory and the most efficient methodological tools'.<sup>13</sup>

Analogously, sociological thought representing the democratic, socialist and urban face of the Weimar Republic found no place in the Nazi 'new order'. It was the case, for example, of Karl Mannheim's 'sociology of knowledge', or the 'critical theory' promoted by the Frankfurt School of Social Research. On the other hand, the 'total state' seemed to give a new impetus to other sections of the German sociological community.

Undoubtedly the *Führerstaat* needed neither an actual legal science, nor actual sociological inquiries, openly confronting the declared political goals of the legislator with their real outcomes. The *Führer* himself had nothing but scorn for the profession of law, thus leaving to legal science the task of legitimizing his acts ex-post. The Third Reich's *Kronjurist* Carl Schmitt gave one of the best examples of this servile role in his article 'The Führer Upholds the Law', a retroactive 'theoretical' justification for the killings perpetrated during the 'night of the long knives'.<sup>14</sup> As for social inquiry, Hitler considered himself a much better barometer of the popular mood than the opinion polls. After all, he was supposed to be the 'living connection' between the state and the people's community.<sup>15</sup>

Still, the Nazi technocratic elite revealed a strong interest in sociology as a means to obtain exclusive and objectively collected data concerning social reality. In the absence of free democratic life exposing popular opinion, the 'total state' promoted the 'professionalising and institutionalising of empirical sociology'.<sup>16</sup> It led to the foundation of several new institutes for social research, some closely connected to the SD. Thus, the promoter of the so-called 'scientific National Socialism', and head of the SD 'Weltanschauung' department, Franz Adolf Six, founded in 1939 the German Institute for Foreign Studies (*Deutsches Auslandswissenschaftliches Institut* = DAWI), while Höhn directed the Institute for State Research from 1936 to 1945.<sup>17</sup>

<sup>13</sup>Bernd Rüthers, *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich* (München: Beck, 1988), p. 20.

<sup>14</sup>Carl Schmitt, 'Der Führer schützt das Recht. Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934', *DJZ (Deutsche Juristen-Zeitung)*, 39 (1934), pp. 945–950.

<sup>15</sup>Hitler's notes in the margin of a report concerning popular opinion dated March 1942 reveal scepticism towards the research institutes: 'If we should give weight to what people always say, everything would be long lost. The real attitude of the people lays much deeper ...', quoted in Hubert Rottleuthner, 'Rechtsphilosophie und Rechtssoziologie im Nationalsozialismus' in Ralf Dreier and Wolfgang Sellert (eds) *Recht und Justiz im 'Dritten Reich'* (Frankfurt am Main: Suhrkamp, 1989), pp. 295–322, p. 321.

<sup>16</sup>Cf. Alexandra Schauer and Silke van Dyk, 'Vom doppelten Versagen einer Disziplin. Die Stilllegung der DGS, die Entwicklung der Soziologie im Nationalsozialismus und die Geschichte der Aufarbeitung' in Hans-Georg Soeffner (ed.) *Unsichere Zeiten: Herausforderungen gesellschaftlicher Transformationen; Verhandlungen des 34. Kongresses der Deutschen Gesellschaft für Soziologie in Jena 2008* (Wiesbaden: VS, 2010), vol. 1, pp. 917–944. For a general overview see Alexandra Schauer and Silke van Dyk, '... daß die offizielle Soziologie versagt hat'. *Zur Soziologie im Nationalsozialismus, der Geschichte ihrer Aufarbeitung, und der Rolle der DGS* (Wiesbaden: VS, 2010).

<sup>17</sup>A list of institutes of empirical sociology operating during Nazism is provided by Carsten Klingemann, 'Vergangenheitsbewältigung oder Geschichteschreibung? Unerwünschte Traditionsbestände deutscher Soziologie zwischen 1933 und 1945' in Sven Papcke (ed.) *Ordnung und Theorie: Beiträge zur Geschichte der Soziologie in Deutschland* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986), pp. 262–279. For the 'sociological think-tank' employed by the SD and the role of Franz Six, see Carsten Klingemann, *Soziologie und Politik: Sozialwissenschaftliches Expertenwissen Im Dritten Reich und in Der Frühen Westdeutschen Nachkriegszeit* (Wiesbaden: VS, 2009); Gideon Botsch, 'Politische Wissenschaft' im 2. Weltkrieg. *Die 'deutschen Auslandswissenschaften' im Einsatz 1940–1945* (Paderborn: Schöningh, 2006).



In 1987 the sociologist René König underlined the ambivalences of the sociological heritage that came to light after 1933:

We must ask ourselves about the milieu in which sociology was born. It will bring us straight back to the endemic German anti-Semitism, anti-liberalism, anti-democracy, anti-socialism, anti-urbanism and so forth, to complexes of cultural explanations proceeding continuously from *Kaiserreich* through Weimar Republic into National Socialism, thus making it impossible to talk about discontinuity.<sup>18</sup>

Nevertheless, König's assertions need a comment: the continuity within the German authoritarian tradition must be reconsidered in the light of the Third Reich's substantial peculiarity. The ideological difference between National Socialism and the authoritarian nationalism of the *Kaiserreich* can be well illustrated by an ideal-typical comparison of the two key concepts of the coeval political discourse: the people's community (*Volksgemeinschaft*) and the popular state (*Volksstaat*). The latter, developed in the second half of the nineteenth century by law scholars like Carl Friedrich von Gerber, was focused on sovereignty. According to Gerber, *Volksstaat* demanded submission as an indispensable value for the protection of the idealized people's unity against the threats of the discordant social plurality. He declared obedience as the only 'natural' response of the people to the call of the 'sovereignty bearer' (*Hoheitsträger*).<sup>19</sup>

On the other hand, the *Volksgemeinschaft* was depicted as the 'immediate social reality' in contrast to the 'purely ideological', i.e. fictional, formation of the state. The emphasis on the spontaneous and genuine character of the bonds connecting community members was making both the mere coercion practiced by the traditional authoritarian state and the 'natural' obedience requested from the popular state insufficient. The *Volksgemeinschaft* demanded nothing less than a 'communitarian life'.

Largely inspired by a substantialist interpretation of Ferdinand Tönnies' major work *Community and Society*, the term 'community' had become an idiomatic element of the political, philosophical and theological reflections of the Weimar epoch.<sup>20</sup> Trying to define the 'primeval concept' at the basis of every social act, Tönnies abstracted two 'normal types' of attitude from the empirical variety: the 'communitarian will' and its opposite, i.e., the 'arbitrary will of the individuals'. As the Weimar Republic was rapidly losing legitimacy, Tönnies repeatedly exhorted his readers not to mistake his conceptual abstractions for the real world; yet, his warnings were increasingly pushed aside. On the one hand, his idea of 'society' became the symbol of a diffuse discomfort caused by political, economic and cultural turmoil. On the other hand, the evocations of a people's community aroused hopes for an 'island of peace in a sea of class conflicts'.<sup>21</sup>

Once the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) achieved power, party leaders imposed irrational and anti-formalistic communitarianism as the official orientation within law theory. Still, the majority of public law scholars continued to resort to the legal formalisms despised by the Nazis. Even jurists actively involved in the so-called national revolution were not eager to adopt the 'community' as a juridical principle. Although they paid lip service to the idea of the people's community and its *völkisch*

<sup>18</sup>René König, *Soziologie in Deutschland. Begründer/Verächter/Verfechter* (München/Wien: Hanser, 1987), p. 413.

<sup>19</sup>Cf. Carl Friedrich von Gerber, *Grundzüge des deutschen Staatsrechts* (Leipzig: Tauchnitz, 1865).

<sup>20</sup>Ferdinand Tönnies, *Gemeinschaft und Gesellschaft* (Leipzig: Reislad, 1887); transl. Jose Harris, *Community and Society* (Cambridge: Cambridge University Press, 2001). For the reception of Tönnies' theories within the juvenile movements and the 'conservative revolutionaries', see Steck, op. cit., pp. 175–179.

<sup>21</sup>Stolleis, *The Law*, op. cit., p. 93.

language, they remained faithful to the separation between state and society and its guarantees. Be it the 'rule of national law' (*Nationale Rechtsstaat*) proposed by Professor of Constitutional Law Otto Koellreutter as a replacement for the liberal rule of law, or be it the 'ethical state' as suggested by the right-wing neo-Hegelian Karl Larenz, Third Reich juridical thinking seemed unable to abandon the traditional features of the nineteenth-century schools of thought.

A representative of Right Hegelianism, public law scholar Ernst Rudolf Huber, proposed a conciliatory solution: a 'Hegelian' synthesis between the traditional idea of state sovereignty and the *völkisch* ideology. In his view, the *Volk* and its space (*Raum*) were the natural 'essence' of the state's constitution. He defined the basic value inherent to the *Volk* by quoting Schmitt's concept of 'the political'. The *Volk* was 'political' as far as it remained faithful to its 'historical idea, task and mission',<sup>22</sup> a Nazi translation of the Hegelian spirit of history. Thus, the Third Reich was a *völkisch* state, characterized by a *völkisch*, i.e. political, constitution expressing the historical mission of the German nation. As such, Huber described the constitution as a synthesis between norms and values, a dialectical sublation of *sein* (what is – the life of the *Volksgemeinschaft*) and *sollen* (what ought to be – the legal order giving shape and stability to the 'movement').<sup>23</sup> Thus he criticized sharply Smend's 'integration' theory, which described the state exclusively in terms of 'becoming and passing', instead as 'stable banks impeding the political streams to overflow'.<sup>24</sup> In his words, 'So much the *völkisch* thought rejects the stiff and dead state-apparatus of the bureaucracy, so much it recognises the movement's need for a stable establishment, institutions and forms, firm command hierarchy and a reliable discipline ... preventing the risk of a "permanent Revolution"'.<sup>25</sup>

After 1939 Huber applied the term '*Reich*' to indicate the German state as the incarnation of the Hegelian objective will. According to Huber, unlike any other state, the *Reich* was able to unify all the opposing elements on a superior level, offering a unique image of harmony between the individual and the community, as between the 'movement' and the state. The most important consequence was that his concept of *Reich* was embracing also the relationship between the leadership and the following, thus binding the *Führer* into the state. Such a view was clearly opposing the interpretations of the party or SS lawyers like Höhn or Werner Best. For them, the state was but an instrument, an apparatus to be used for the purposes of the people as interpreted by the *Führer*.

As Michael Stolleis argued, thanks to Huber's intellectual ability to develop a philosophical construction supported by incisive legal argumentation, his textbook *Constitutional Law of the Great-German Reich (Verfassungsrecht des Großdeutschen Reiches)* was 'the public law masterpiece of the National Socialism'.<sup>26</sup> For all that, it also had nothing to do with the reality of the Third Reich's lawless domination, internal fights and institutional confusion, nor with the intentions of its rulers. In 1947, Huber claimed that his intention was to 'develop a systemic public law from the chaos of the revolution'.<sup>27</sup> It was just wishful thinking: his textbook was useful to the Nazi cause as it gave it flair of intellectual respectability among academic readers. But it had no ideological influence on the further evolution of what was doomed to be the *Führerstaat* or even the *SS-Staat*.

<sup>22</sup>Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung* (Hamburg: Hanseatische Verlagsanstalt, 1935), p. 45.

<sup>23</sup>Ibid., p. 53.

<sup>24</sup>Ibid., p. 25.

<sup>25</sup>Ibid.

<sup>26</sup>Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Band 3: Staats- und Verwaltungswissenschaft, op. cit., p. 349.

<sup>27</sup>Ibid., p. 348.



As for Koellreutter, he resorted to Otto von Gierke's *Genossenschaftslehre* (companion-ship doctrine) to solve the tension between the individual and the community. To make it suitable for Nazi schemes, he turned Gierke's idea of the state of law into a 'state of national law', serving 'the traditional ways of life of the Germanic people' instead of individual fundamental rights. Nevertheless, Koellreutter refused to replace the state with the community. He claimed that 'legal certainty and calculability are, within rightful limits, important values in the life of people...The institutions serve to guarantee that the law administration follows fixed norms, and the provision of legal acts to every comrade countryman [*Volksgenosse*] be calculable'.<sup>28</sup> He insisted that the 'French' liberal idea of state had to be overthrown, but not in order to destroy the very idea of the state. It had rather to be substituted by a 'German' idea, focused on a revaluation of the administrative hierarchies and private property. Otherwise, he said, the 'new order' would turn into 'a national-Bolshevik state, similar even in its exterior aspect to the primitiveness of a military camp'.<sup>29</sup>

Scholars favouring a full strength Nazi legal system attacked Koellreutter for his insistence on the indispensable calculability of state acts. A new generation of so-called 150% Nazi lawyers was imposing theories based exclusively on the communitarian principle. As Oliver Lepsius points out, the concept of the *Volksgemeinschaft* was central to National Socialist law: 'It was used to assert the legitimacy of the ruling order, discredit fundamental rights, and collectivise and de-legalise the position of the individual'.<sup>30</sup> According to the opinion of a detached observer, Ernst Fraenkel, 'the most important academic interpreter of this theory of the "totalitarian community"' was Reinhard Höhn. As a trailblazer of the communitarian perspective, he devoted himself to a new sociological approach to public law. In his review of Koellreutter's *General Theory of the State*, Höhn rejected the author's concerns as to the calculability of legal relations, stating that 'the problem does not exist at all if the attitude [of the people] is communitarian'.<sup>32</sup>

Such a statement testified to a new perspective towards interpersonal relations, one deriving from sociological considerations. According to Höhn, new social relations were favouring new principles in legal theory. The burden of traditional legal thought was derived from the age of philosophical idealism, such as Kant and Hegel's emancipatory rationalism. The young SD officer set this burden aside as the fruit of a worn out age of individualism. Similarly, he relegated Savigny's historical school to the age of Romanticism, an age expressing the torments of a man incapable of restoring the division between his individualistic intellect and the call from his communitarian roots. The sole precursor of the new collectivistic era – although unable to see clearly beyond his own bourgeois epoch and tied to the idea of the rule of law – was Otto von Gierke. According to Höhn, being a son of an era of individualism, Gierke 'was forced to act within a fundamentally individualistic juridical system, where some depictions were unquestionable, such as the distinction between public and private law, or the liberal idea of the rule of law and of the law as a system of norms'.<sup>33</sup>

The gradual development of Höhn's communitarian theory can be seen as a result of three successive steps in his academic life. Each step was determined by the crucial contribution of a temporary mentor, later abandoned to his destiny. The first was Artur

<sup>28</sup>Otto Koellreutter, *Der deutsche Führerstaat* (Tübingen: Mohr, 1934), p. 7.

<sup>29</sup>Otto Koellreutter, *Volk und Staat in der Verfassungskrise. Zugleich eine Auseinandersetzung mit der Verfassungslehre Carl Schmitts* (Berlin: Junker und Dünnhaupt, 1933), p. 33.

<sup>30</sup>Lepsius, op. cit., p. 24.

<sup>31</sup>Fraenkel, op. cit., pp. 190–191.

<sup>32</sup>Reinhard Höhn, 'Review of Otto Koellreutter "Grundriß der Allgemeinen Staatslehre"', *Juristische Wochenschrift*, (1936), p. 1653.

<sup>33</sup>Reinhard Höhn, *Otto von Gierke* (Berlin: Deutsche Rechts- u. Wirtschaftswiss. Verl.-Ges, 1936), p. 6.

Mahraun, the charismatic founder of one of the major paramilitary nationalistic youth organizations in the Weimar Republic, *Jungdeutscher Orden* (Young Germans' Order, known as Jungdo). The second was Franz Wilhelm Jerusalem, Professor in Sociology of Law and International Law at Jena University. Finally, during the Nazi period, Höhn's efforts were encouraged by Carl Schmitt and enriched by his doctrine of 'concrete orders'.

Höhn called for strict synergy between the theoretical elaborations of the juridical order and the monitoring of social praxis. According to him, such a connection between theory and praxis was essential for the reconstruction of the people's community. This working scheme was announced at the sociological symposium he organized in January 1934 at Jena University. Its aim was to promote a 'highly applied real National-socialist science', in place of the old liberal sociology, based on 'abstract and empty academic discussions'.<sup>34</sup> The symposium's slogan, 'people in becoming' (*Volk im Werden*), quoted the title of the pedagogy review founded in 1933 by another of its participants, the Nazi philosopher and pedagogue Ernst Krieck. The slogan expressed a (kind of) Nazi utopia: the possibility to give a new (pseudo-)concrete quality to the concept of 'people'. The 'people' had to be turned from a purely discursive dimension into a perceivable reality. Or, as Höhn wrote, they had to transform the 'invisible spirit typical of the representations of Romanticism', as was the case with the abstract concept of *Volkgeist*, into the concreteness of a 'real, visible community'.<sup>35</sup>

### The Closed Horizons of the Political Neighbourhoods

The first step in Höhn's formation was under the influence of Artur Mahraun. In 1923, as a 19-year-old son of an official of the judiciary administration, Höhn joined the *Jungdeutscher Orden*. In 1929, as he graduated in law at Jena, he was appointed by the order's Grandmaster (*Hochmeister*) Mahraun to the role of leader of an ad-hoc established Jungdo 'department for the state science'. In the same year, as a newly nominated university assistant, he published essays dedicated to the spiritual divide opposing Mahraun's movement to the liberal bourgeois society and the prospect of a new order based on the 'real German democracy'.

During the next two years (until his expulsion from the order in December 1930 caused by his opposition to Mahraun's leadership) Höhn's writings were adopted as Jungdo's proposal for the reform of the Weimar constitution. He had the opportunity to discuss his views in public assemblies with some of the most renowned scholars of the general theory of the state (*Allgemeine Staatslehre*): at Berlin University with Carl Schmitt and Rudolf Smend, in Munich with Hans Nawiasky, in Bonn with Richard Thoma and in Heidelberg with Hans von Eckardt.<sup>36</sup>

The pillars of his theory were based on Mahraun's 1927 manifesto.<sup>37</sup> As specified in the manifesto's subtitle, i.e., *People against Clique and Money; Protection of the Peace through the*

<sup>34</sup>See the article dedicated to the Jena symposium in *Völkischer Beobachter* dated 11 January 1934, quoted in Carsten Klingemann, *Soziologie im Dritten Reich* (Baden-Baden: Nomos, 1996), p. 26.

<sup>35</sup>The expression 'visible community' appeared for the first time in Reinhard Höhn, *Rechtsgemeinschaft und Volksgemeinschaft* (Hamburg: Hanseatische Verlagsanstalt, 1935), p. 74 ss. On Krieck see Hans D. Sluga, *Heidegger's Crisis: Philosophy and Politics in Nazi Germany* (Cambridge: Cambridge University Press, 1993), pp. 125–154.

<sup>36</sup>See Alexander Kessler, *Der Jungdeutsche Orden in den Jahren der Entscheidung (I) 1928–1930* (München: Lohmüller, 1975), 4. Heft, p. 34 and p. 77.

<sup>37</sup>Artur Mahraun, *Das Jungdeutsche Manifest: Volk gegen Kaste und Geld; Sicherung des Friedens durch Neubau der Staaten* (Berlin: Jungdeutscher Verlag, 1927). On Mahraun's ideas see Clifton Ganyard, *Artur Mahraun and the Young German Order: An Alternative to National Socialism in Weimar Political Culture* (Lewiston: Edwin Mellen Press, 2008), Chapters 4 and 5.

*Rebuilding of the State*, popular unease was considered by Mahraun as a product of complexities typical of the modern mass society. In his view, the transformation of the traditional German cities in 'metropolises' (new crowded urban areas) was leading the nation towards existential estrangement. The combined effects of industrialization and urbanization were de-structuring the organic unity of the people, turning them into an inorganic mass of individuals. In place of a communitarian state (*Gemeinschaftsstaat*), modelled after the ancient Greek's *polis* or the Germanic *Thing*, the modernization had created a mass state (*Massenstaat*)<sup>38</sup> where popular will was manipulated by 'modern demagoguery'. A healthy connection between the people and their legitimate leaders was interrupted by a party and media system dominated by 'plutocratic forces'. As Mahraun wrote,

Wherever an organic structure is transformed into a mass, the real power is in the hands of the owners of the means of mass persuasion. The concentration of economy in modern industrial centres is pointing out the seriousness of the problem. The life in countryside was not allowing such concentration of masses because of mere questions of space. But more the big industrial cities are spreading and more the state is endangered by the moods and the inadequacies of the masses ... The state itself has no possibility to influence the masses, so it gives in to those having the means of power, thus drifting relentlessly toward plutocracy ... The parliamentary life of the modern republics suffers particularly because of those cliques.<sup>39</sup>

According to Mahraun, a real democracy requires a spatial reorganization of the large mass of individuals. The people had to be regrouped into single units or cells, in which the 'communitarian life' could be reactivated; he denominated such cells 'neighbourhoods' (*Nachbarschaften*). In this manner, citizens that used to be socially or religiously divided would overcome their differences by virtue of a common 'spiritual purpose'. Mahraun claimed that during the years of war, 'the front-line community (*Frontgemeinschaft*) for the defence of the fatherland' had achieved similar spiritual unity. Hence, spiritual unity will re-emerge each time 'a disgrace leads to the creation of an emergency community'. Considering Weimar society as living in a state of emergency, Mahraun's doctrine of the popular state was urging for 'the founding of a new community of peaceful civil service for the people's state' (*die Gemeinschaft des friedlichen staatsbürgerlichen Dienstes am Volksstaat*).<sup>40</sup>

Similar desires for substituting the parliamentary democracy with some more 'genuine' form of expression of the popular will were common to the radical movements of the Weimar era, often galvanized by the Bolshevik experiments with the workers' and peasants' councils. The idea of neighbourhoods as a possible base for a 'substantial' democracy was circulating in the coeval public debate, not least because of the popularizations of Tönnies' sociology of community. According to his teachings, there were basically three specific forms of community: 'kinship' as community of blood, 'friendship' as community of spirit and 'neighbourhood' as community of proximity. As for 'class', Tönnies (so too Weber and Sombart) considered it as missing the requirements for the foundation of a community. For Tönnies, the communitarian spirit of the neighbourhood was a product of cohabitation: it established numerous human contacts, reciprocal addiction and an intimate acquaintance, leading inevitably to organizing and managing work in common. The

<sup>38</sup>Mahraun, op. cit., p. 57 and p. 105.

<sup>39</sup>Ibid., pp. 56–58.

<sup>40</sup>Ibid., p. 83.

everyday customs were then further affirmed by assembly decisions and habits considered as sacred.<sup>41</sup>

Max Weber considered the 'sociation' produced by physical proximity rather as a middle way between the two extremes – the communism of the household and the individualism of the market community. The 'economical brotherhood' of neighbours was in Weber's descriptions generally limited to emergency cases. Such interpretation had a strong influence on the debates of the Weimar era. A conceptual nexus was gradually emerging between the idea of 'neighbourhood' and the other two key categories of the political discourse: the 'community' and the 'state of emergency'. Weber argued that a community of neighbours was promising 'mutual dependence in case of distress', against the logic of the market imposing maximizing of profit. But this 'popular ethics' had to be interpreted as 'unsentimental', because it was not its intention to undermine in any way the existence of reciprocal private spheres and class differences.<sup>42</sup>

As for Mahraun, he used the depiction of his 'political neighbourhoods' as 'vertical cross-sections of the national character (*Volkstum*)'. The *Volk* resembles, he argued, a 'layer cake'<sup>43</sup>: thus, a state ordered by ranks or classes is structured along the existing layers dividing the people. On the contrary, the popular state he had in mind had to be structured into sections crossing each layer. In other words, their purpose was not the transformation of the class society into a classless one. Rather, each unit had to gather exponents of all classes (as a kind of 'social probing') in order to develop a communitarian spirit among them and thus to deactivate the menace of the class struggle.

The communities of proximity were considered not only as a solution against the anonymity of the mass society, but also as an antidote to the appeal of the Soviet model. Unlike the workers' councils, the members of a neighbourhood had to perceive the common commitment as a moral duty, regardless of their actual position within the means of production. According to Mahraun, the class struggle was not the cause, but a symptom of social disintegration. The best cure consisted of a new attitude inspired by a sentiment of classless national unity, as community life and group identity were the only true answer to the demand for people's unity.

Furthermore, the function of the neighbourhoods was to reshape urban spaces: the de-structuring disposition of the new urban life was seen as an obstacle to the growth of healthy social and political relations among Germans. Thus, the neighbourhoods were intended as cells of a reconstituted social organism. Once society had been restructured, the 'popular state' would become reality as a direct and 'substantial' democracy in place of the purely formal parliamentary one. Free from the media and party interference, the formation of the popular will would rise within each neighbourhood directly from the everyday face-to-face experience. Direct democracy would be obtained thanks to a pyramidal system of representation similar to the one introduced in the Soviet Union, except for its basis on a network of neighbourhoods instead of soviets. The will of the people would be elevated via a rising scale of intermediate units – municipalities, districts, *Länder* – to the apex of the *Reich*.

In order to express its will, each neighbourhood had to elect a leader (*Führer*) with the double function of guiding and representing his local community. As an ideal size, allowing a personal relation between the leader and each fellow neighbour, Mahraun proposed units of 500 members. Their participation in the political life of the unit – electing the local leader

<sup>41</sup>See Tönnies, op. cit., pp. 27–30.

<sup>42</sup>Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley and Los Angeles: University of California Press, 1978), pp. 361–363.

<sup>43</sup>Mahraun, op. cit., p. 96.

and taking part in assembly discussions – was intended not as a mere right, but rather as a duty, a sort of civil service for the benefit of the state. As in an ancient *polis*, beside the body of 500 active citizens, each neighbourhood would comprise also the inhabitants excluded from political life: women, who would have only the right to take part in a separate assembly dedicated exclusively to ‘feminine’ questions, and residents alien to the national community and enjoying a status comparable to *metics* in ancient Athens.

Höhn’s writings of the Jungdo period followed Mahraun’s example. The most interesting, entitled *The Bourgeois State of Law and the New Front*, also focused on the process of rapid change within society. But as a young scholar of constitutional theory, his attention was primarily oriented towards the reciprocal influence between the new social reality and the form of government.

In his eyes, the liberal state was doomed because of its inability to solve the social question. Thus it had to be overcome by a new order, **free from the bonds of the rule of law. Höhn argued that economic inequality had been intrinsic to the liberal state since the time its principles were proclaimed by Abbé Sieyès.** In his essay *What is the Third Estate?*, the main theorist of the French Revolution identified the nation as the third estate, that is the bourgeoisie,<sup>44</sup> in an epoch when ‘the concept of the proletarians intended as the people and a political factor hadn’t yet appeared’.<sup>45</sup> According to Höhn, each state based on such principles was granting only the economic interests of the bourgeoisie. In order to fulfil the promises of the German Revolution of 1918–1919, the political democracy had to be translated into a social democracy, i.e. into a ‘de facto equality for all members of the national community’.<sup>46</sup> **This could be achieved only if the people were mobilized against the liberal rule of law.** The latter was not in his eyes but a defence line protecting the iniquities of such a ‘society of merchants’ – an idea of modern society influenced by the writings of Tönnies.

By indicating the ‘economic forces’ as the real architects of the Weimar material constitution, Höhn was quoting a wide spectrum of coeval anti-liberal sociologist, both left-wing, such as Max Adler or Ferdinand Tönnies, and right-wing, such as Hans Freyer. As for the constitutional theory, his references were the authors developing a concept of democracy opposed to those developing a concept of liberalism: **the ‘conservative revolutionaries’ Carl Schmitt and Rudolf Smend, but also the ‘nationally aware’ socialist Hermann Heller.** Their controversy against Hans Kelsen was fought in the name of the same values Höhn recognized as part of Jungdo patrimony: ‘the ideal of democracy isn’t freedom, but equality – precisely, equality within community’.<sup>47</sup> Quoting Schmitt’s *Constitutional Theory (Verfassungslehre)*, he declared that democracy had to be intended as:

**the domination of the people, intended as the whole of the citizens, upon the state. It has nothing to do with the masses, or the universal equality of men, or the concept of liberty. The lack of a leader is in absolute contradiction with the concept of democracy. The democratic character of the leader is based on the fact that the one who dominates has emerged among the dominated, his dominance resting on the will, mandate and trust of the dominated and therefore they govern themselves.**<sup>48</sup>

<sup>44</sup>Reinhard Höhn, *Der bürgerliche Rechtsstaat und die neue Front, Die geistesgeschichtliche Lage einer Volksbewegung* (Berlin: Jungdeutscher Verlag, 1929), p. 21.

<sup>45</sup>Ibid., p. 31.

<sup>46</sup>Ibid., p. 30.

<sup>47</sup>Ibid., p. 108.

<sup>48</sup>Ibid., p. 109.

According to Schmitt, democracy has no particular political substance; for Höhn this means that democracy gives people the power to want anything, including 'to abandon themselves into the hands of an absolute sovereign and still it will be a democracy'.<sup>49</sup>

But according to the young Jungdo theorist, 'the most energetic launch beyond the liberal understandings' was to be found in Rudolf Smend's integration theory rather than in Schmitt's doctrine.<sup>50</sup> Höhn claimed that thanks to Smend, for the first time state theory was not serving exclusively individual purposes: the deciding factor was the community and its everyday renewal through the constant interaction of its members. But the 'everyday plebiscite' described by Smend at the theoretical level – i.e. the perpetual renewal of links integrating each citizen into the state community – was still missing a form for practical application. According to Höhn, the right constitutional form was the cellular state proposed by his Grandmaster Mahraun: 'the new idea of state is described as a becoming, a process proceeding from the bottom to the top, from the neighbourhoods up to the head of the *Reich*'.<sup>51</sup> Mahraun's political neighbourhood was thus becoming the key part of a plan to overcome the liberal state by dismantling its social premises. The communities of proximity were intended as a medium able to transmute the mass of bourgeois individuals into new men held together by a communitarian spirit:

The great interior transformation must occur within each neighbourhood. The deepest bond between each single citizen and the state must be obtained, so deep to absorb him without reserve, insert and transform him into a communitarian person. State and people must become the same thing... single persons shouldn't confront each other anymore 'as subjects acting and wanting according only to their free will' (Tönnies).<sup>52</sup>

In fact, according to Höhn, 'in its natural condition, the people aren't a community, but they can become one through work'.<sup>53</sup> The process requires an adequate spatial condition – the delimited ground of the neighbourhood – providing 'a closed horizon leading the community to itself and keeping it united'.<sup>54</sup> Only an enclosed space can be perceived by its inhabitants as their 'place of destiny' and as such acquire the 'spiritual value of the community'.<sup>55</sup> In the words of Hans Freyer, the sociologist of the 'revolution from the right' quoted by Höhn, 'be it in a figurative sense for all kinds of communities or in a literal sense for a family, the space constitutes the reality of the four walls within which a man feels at home'.<sup>56</sup> Höhn argued that this was a fundamental law, known from the everyday experience of the communitarian life. The decisive issue was to implement it into the world of politics: only then would the real democracy not just be a utopia.<sup>57</sup>

### Direct Democracy as *Führerdemokratie*

NSDAP's big success at the September 1930 elections was a hard blow for Mahraun's political leadership. This encouraged Höhn's plans to turn the youth movement's perspectives

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<sup>49</sup>Ibid., pp. 44–45.

<sup>50</sup>Ibid., p. 116.

<sup>51</sup>Ibid., p. 121.

<sup>52</sup>Ibid., pp. 103–104.

<sup>53</sup>Ibid., p. 127.

<sup>54</sup>Ibid., p. 126.

<sup>55</sup>Ibid.

<sup>56</sup>Ibid., p. 125.

<sup>57</sup>Ibid., p. 127.



more decidedly towards a fascist-type *Führerdemokratie*. Mahraun responded to electoral disappointments by launching a new campaign for the year 1931 called 'labour service and settlement' (*Arbeitsdienst und Siedlung*). During the next two years, several hundred small rural Jungdo communities were founded. They gave the city youngsters the possibility to experience a working commitment in touch with nature and free from the alienating dynamics of the market economy. Furthermore, the settlements were intended as examples inviting the whole nation to redeem and regain unity through a rediscovered feeling of 'brotherhood' and 'return to the countryside'.<sup>58</sup>

But the bucolic escapes typical of the *Wandervogel* tradition were not what Höhn had in mind. The same year, he started his collaboration with the sociologist Franz Wilhelm Jerusalem, and contributed to the writing of his essay *Community and State*.<sup>59</sup> The widespread unrest in Weimar Germany was seen by Jerusalem as the proper moment to re-launch his sociological system. In fact, his major work, *The Sociology of Law*, which was presented in 1925 and focused on the sociology of community, has been rejected by academia as 'scientifically infertile'.

A comparison between *The Sociology of Law* and the essay co-written with Höhn helps us shed some light on the latter's maturing thought and role as Jerusalem's collaborator. In contrast to Jerusalem's lengthy writing, *Community and State* is characterized by a sense of national emergency, exposed in terms typical of Höhn's militant rhetoric; what's more, its 'sociological' argumentations are just foundations for its constitutional goal, the substitution of the parliamentary with a *Führer* democracy. From its first page, the essay is warning its readers about the acute political crisis of the Weimar Republic, signing the end of the age of individualism. The age 'that had its major philosophical expression in Kant's moral autonomy of the person' was to be dethroned by a new era of collectivism, as 'foreseen by Rousseau'.<sup>60</sup> The state theorized by Hobbes, Spinoza and Locke, based on a contract stipulated by free individuals emerging from a state of nature, was no longer a guarantee for the survival of the German people and the entire Western culture.<sup>61</sup>

According to Jerusalem's general scheme, the history of the West was proceeding along the principle of the 'evolution of the human spirit from pristine collectivism to individualism and then back to a new collectivism'. The evolution of the idea of state was but one of numerous expressions of this general process.<sup>62</sup> Its dynamics, he claimed, were not completely understood even by Tönnies, who distinguished only 'the succession of two ages: after that of the community, came that of society', signalling the waning of Western culture.<sup>63</sup>

According to Jerusalem and Höhn, the final destiny of the West was rather the establishment of a new collectivity, where the single personality will be saved from the anonymity of a uniform mass society. 'Everyone will receive the credit he deserves as a member of a community',<sup>64</sup> in accordance with his contribution to the whole. This new man will develop a

<sup>58</sup>On the influence of the Jungdo's *Freikorps der Arbeit* on the Nazi labour service see Manfred Seifert, *Kulturarbeit im Reichsarbeitsdienst: Theorie und Praxis nationalsozialistischer Kulturpflege im Kontext historisch-politischer, organisatorischer und ideologischer Einflüsse* (Münster: Waxmann, 1996), pp. 34–35 and pp. 59–72.

<sup>59</sup>Franz Wilhelm Jerusalem (unter Mitwirkung von Reinhard Höhn, Assistent des soziologischen Seminars der Jenaer Universität), *Gemeinschaft und Staat* (Tübingen: Mohr, 1930).

<sup>60</sup>*Ibid.*, p. 5.

<sup>61</sup>*Ibid.*, pp. 5–6 and p. 19.

<sup>62</sup>Franz Wilhelm Jerusalem, *Soziologie des Rechts* (Jena: Fischer, 1925), p. 215.

<sup>63</sup>*Ibid.*, p. 214.

<sup>64</sup>Jerusalem (unter Mitwirkung von Reinhard Höhn), *op. cit.*, p. 10.

'collectivistic personality',<sup>65</sup> and his position in the social hierarchy will be evaluated by 'the measure of communitarian spirit he has demonstrated by his deeds'.<sup>66</sup>

The early collectivism knew no distinction between state and society, as was demonstrated by Gierke's researches on Medieval Germanic communities: 'the family belonged as much to the state as to the village community or to the people's community. Then the process of differentiation started, beginning in the medieval city-states.<sup>67</sup> The new age of individualism brought the new state in which the figure of the community *Führer* was ousted by a new figure – the depersonalized head of the state: 'a sovereign Prince, incarnating the principle of the rule of law, was carrying out the functions of military defence, justice and police for the sum of individuals treated as subjects'.<sup>68</sup> Along with the centralization of power, the sovereign set in motion the complementary process of atomization of society. By doing so, he was deliberately ignoring the fact that his subjects were not Hobbesian abstract individuals, but members of a concrete community.

Still, the individualistic state had to 'rely on some functions of the previous community, such as its capacity of defence from internal and external aggressions, i.e. the army and justice'.<sup>69</sup> Due to this 'intrinsic weakness' of the individualistic state, the prince had to resort to the survival instinct of the people's community and its sense of justice. Such governmental praxis was then translated by the theorists of the sovereign state, Machiavelli and Bodin, into an institutional form, i.e. the form of a legal community (*Rechtsgemeinschaft*). Its function was to preserve the spirit of the people (*Volksggeist*) and natural law (*Naturrecht*), the two sources from which the state could develop its positive law.<sup>70</sup>

The same transformation from a collective to an individual life was accomplished in the sphere of the economy. 'As Karl Marx showed in the first volume of his *Das Kapital*', the authors asserted, 'the industrial worker, rejected by his community, robbed of every support, seen by the employer only as a counterpart of a labour contract, was dumped into a trough of corporal and spiritual misery'.<sup>71</sup> Unlike the Marxists, the two authors considered the class struggle a consequence of the egoistic spirit reigning in the age of individualism, not of a specific mode of production. It divided the pristine unity of the people into two conflicting groups: 'the workers end up joining their forces in communities of proletarians against their employers, identified with the whole bourgeois class'.<sup>72</sup>

Communism, as a reaction against economical individualism, was but the 'crudest form of the communitarian impulse, aiming to restore only the most superficial exterior equality to the way of life, and forgetting that even this can exist only if supported by an interior collective spirit'.<sup>73</sup> For the authors, a real community must be based on private property, which gives each member the opportunity to affirm his personality and thus find his proper position 'inside the circle of comrades'.<sup>74</sup> Likewise, nationalization of the means of production was rejected by the authors because it would only 'transfer the means into the hands of today's individualistic state', creating a regime of 'state capitalism'.<sup>75</sup> Therefore, the Soviet Union was not a valid example of an 'organic collectivity capable of

<sup>65</sup>Ibid.

<sup>66</sup>Ibid.

<sup>67</sup>Ibid., p. 13.

<sup>68</sup>Ibid., p. 16.

<sup>69</sup>Ibid., p. 14.

<sup>70</sup>Ibid., pp. 14–15.

<sup>71</sup>Ibid., p. 18.

<sup>72</sup>Ibid.

<sup>73</sup>Ibid., p. 21.

<sup>74</sup>Ibid.

<sup>75</sup>Ibid., p. 22.

binding the whole personality of a single man'.<sup>76</sup> They condemned the Soviet model as an economical system, as a system of political representation and as a vehicle of a new social order: 'The Soviet Union is consciously dissolving and annihilating the family, thus destroying the very basis of any collectivistic system. In fact, the main principle of the Bolshevik state is individualistic. [ ... ] Individual personalities join together in soviets only in order to reach individual goals.'<sup>77</sup>

In their view, a real collectivizing state does not need soviets, but organic communities similar to families, albeit 'of a superior rank: thus Artur Mahraun's proposal for the rebirth of the state and his concept of neighbourhood are particularly relevant for a collective merger between neighbours'.<sup>78</sup>

Nevertheless, Jerusalem and Höhn introduced a critical stand towards Mahraun's state theory. In their view, major relevance had to be given to the unifying figure at its top. They objected that a state could not be built merely out of a sum of communities, because of the technical impossibility, already observed by Rousseau, of 'uniting the comrades in a collective unit of a superior rank'.<sup>79</sup> What a collective state needs in addition to community life from below is *Führerdemokratie* from above, i.e. a representation

intended in accordance with the principle of identity formulated by Carl Schmitt: a qualified representative which, being a *Führer*, is capable to speak and act in the name of the community. Therefore a leader-representative (*Führerrepräsentant*) is authorized also to represent a collective of inferior rank in front of the superior one.<sup>80</sup>

In other words, each 'comrade' becomes symbolically part of the state by the medium of the *Führer*. The latter was thus replacing the local communities in their role of the main force guiding the process of spiritual transformation of the individuals. As a kind of Nietzschean 'sovereign individual', the *Führer* was the only one within the community entitled to a fully autonomous existence. His status had nothing to do with electoral procedures Mahraun had in mind, since the superiority of the *Führer* was for Jerusalem and Höhn the result of the natural selection confirmed by power relations inside the community: 'the *Führer* is always the strongest personality between the comrades and he maintains his role as long as he can prove his qualities'.<sup>81</sup>

The *Führer* was depicted as deriving his strength from the strength of the community. Therefore it was obvious for the authors that 'the weak community life of our days is expressing itself through the lack of real leading personalities'.<sup>82</sup> Because of their absence, the survival of the German *Volk* was at risk, endangered by the conflict between the proletariat and bourgeoisie.

### From Neighbourhoods to Concrete Orders

In 1933, taking the opportunity of the 'national revolution', Höhn organized with Jerusalem's help a coup against Tönnies' presidency of the German Sociological Society (DGS – *Deutsche Gesellschaft für Soziologie*). Charged paradoxically for 'repressing the

<sup>76</sup>Ibid., p. 26.

<sup>77</sup>Ibid., pp. 27–28.

<sup>78</sup>Ibid., p. 28.

<sup>79</sup>Ibid., p. 29.

<sup>80</sup>Ibid., p. 30.

<sup>81</sup>Ibid., p. 11.

<sup>82</sup>Ibid.

sociology of community', Tönnies had to resign in favour of Hans Freyer.<sup>83</sup> The Sociological Society had in their plans to join the Academy for German Law (*Akademie für Deutsches Recht*) and sustain Carl Schmitt's theoretical work on the new public law. In a total of 39 sociology professors active until 1933, 12 were forced into exile for political or racial reasons; 14 adhered to National Socialism, and the remaining 13 chose the 'internal exile'.<sup>84</sup>

The prospected merger of the Sociological Society with Hans Frank's Law Academy is better understood within the context of the doctrine of *Volksgemeinschaft*. As Oliver Lepsius explained, the National Socialist state 'was not a suitable object for treatment by legal science. It could only still be grasped in ideological, political, philosophical, spiritual or psychological terms, but not using the resources of law.'<sup>85</sup> This methodological assessment explains subject crossing and combining between sociologists and constitutionalists during the first years of the regime, dedicated to the debate about state and community. In its 1935 edition, the eminent German biographical encyclopaedia of scientists *Kürschners Deutscher Gelehrten-Kalender* described many pre-eminent law scholars, such as Carl Schmitt, Ulrich Scheuner, Otto Koellreutter, etc., as sociologists. On the other side, the Academy for the German Law had its sociological members, such as the doyen Werner Sombart, or the *Volkstum*-researcher Max Hildebert Boehm.<sup>86</sup> After 1935, the sociologists were excluded from the academy, and the sociological society led by Hans Freyer ceased all activities. Its disbandment can presumably be explained by the fact that Freyer maintained the standpoint of the 'conservative revolution' of the Weimar years. Within the Third Reich's political climate, such an attitude was eventually outdated by the activities of researchers like Höhn, aiming to enlist empirical sociology for the purposes of the regime.<sup>87</sup>

The solemnization of the 'sociology of community' culminating with the Jena Symposium had not brought to Jerusalem the long-awaited recognition. Having refused to adhere immediately to NSDAP (he eventually joined the party in 1937), Jerusalem maintained his chair at Jena but faced increased isolation and no academic praise. In his further writings he seemed to rediscover the values of the state-guaranteed legal certainty and criticized heavily the leading Nazi public law scholars, such as Schmitt, Huber, Koellreutter and also Höhn. Jerusalem declared the communitarian law doctrine incompatible with the modern state, since it would lead 'each public official to act according to his personal understanding of what the healthy feelings of the *Volk* should be. But a uniform administration belongs to the essence of the modern state.'<sup>88</sup> As a result, he was put under surveillance and denounced by the Association of National-Socialist Students for 'not having a positive stand toward Nazism and insisting on old theories, such as the absolute separation between public and private law'.<sup>89</sup> Even Höhn had no qualms about criticizing his old mentor for 'not understanding properly the peculiar relationship between the *Führer*, the people, the race and the state'.<sup>90</sup>

<sup>83</sup>The charge is expressed in the letter Jerusalem wrote to the Vice-President of the Sociological Society Leopold von Wiese on 30 June 1933, quoted in Klingemann, *Soziologie*, op. cit., p. 16.

<sup>84</sup>Schauer and van Dyk, 'Vom doppelten Versagen', op. cit.

<sup>85</sup>Lepsius, op. cit., p. 40.

<sup>86</sup>On this episode see Rottleuthner, op. cit., pp. 309–310; and Otthein Rammstedt, *Deutsche Soziologie 1933–1945: die Normalität einer Anpassung* (Frankfurt am Main: Suhrkamp, 1986), p. 98.

<sup>87</sup>Klingemann, *Soziologie*, op. cit., p. 29.

<sup>88</sup>Jerusalem's critique of the communitarian ideology was expressed mainly in his monograph *Der Staat: Ein Beitrag zur Staatslehre* (Jena: Fischer, 1935). For an analysis of Jerusalem's sociology of law under Nazism see Rottleuthner, op. cit., pp. 316–320.

<sup>89</sup>The report on Jerusalem written by Nazi students is quoted in Klingemann, *Soziologie*, op. cit., pp. 38–39.

<sup>90</sup>Reinhard Höhn, 'Rezension von der "Staat" und "Das neue Verwaltungsrecht und der neue Staat"', *Deutsches Recht*, 5 (1935), p. 291 and p. 379 ss.

Höhn proved to be much more proficient, not least because of his engagement with the SS security service, under the direct orders of Reinhard Heydrich.<sup>91</sup> His academic career boomed: thanks to political pressures, in 1935, as a relatively unknown 31-year-old, he got the chair in public law at Berlin University at the expense of his intellectual idol, Rudolf Smend. A year later his new protector, Heinrich Himmler, nominated him at the head of the newly founded Institute for State Research (*Institut für Staatsforschung an der Universität Berlin*). His task was to report to the SS leadership on the evolution and perspectives of the new order.<sup>92</sup> At the same time, he founded and directed Section II/2 of the *Sicherheitsdienst*, an observatory on public opinion providing information for ‘focused measures of state prophylaxis’.<sup>93</sup>

Under the auspices of Schmitt, Höhn devoted himself to the development of a general legal theory of the people’s community. Already in his 1934 essay, *The Development of Public Law Theory*, he declared his opposition to Koellreutter and other defenders of state sovereignty:

Once we accept the people’s community and the leadership (*Führung*) as the basic principles of our global idea of the state’s life, we must admit that the state as juridical person has lost its significance as a ‘cornerstone of public law’ ... The state as a legal person and a community are reciprocally irreconcilable.<sup>94</sup>

Within the context of early twentieth-century European dictatorships, such views were paradoxically more in line with a Bolshevik law philosopher like Jewgenij Pashukanis, than with a nationalist conservative like Koellreutter. In his 1923 essay, *General Theory of Law and Marxism*, Pashukanis presented his hopes for a future socialist society. As in Tönnies’ representation of a ‘society of merchants’, for Pashukanis the capitalist society was a dog-eat-dog world of atomized individuals. Among them, the commodity exchange represented the only type of social action. Thus the model of contract essential for commodity exchange dominated all branches of law. For the same reason, the ideology of law declared all men equal citizens of a universal ‘Republic of the Market’. Shared socio-logical convictions were thus leading Pashukanis and Höhn towards the same disdain for the formal equality, the rule of law and the formal democracy, considered as ideological smoke screens for the reality of the ‘Despotism of the Factory’.<sup>95</sup>

Pashukanis hoped that a future socialist society would have no need for legal coercion (even in the form of a ‘socialist law’). The awareness of a ‘shared purpose’ would provide the objective basis for a change in the people’s attitude.<sup>96</sup> Self-discipline would arise among citizens once the market was completely substituted by a planned economy. Such new social praxis would progressively lead to the substitution of the state-regulated adjudicative justice with new forms of social measures of self-defence, envisioned by the Bolshevik theorist as ‘technical regulations’.

<sup>91</sup>On Höhn’s connections with the SS see Ulrich Herbert, *Best: biographische Studien über Radikalismus, Weltanschauung und Vernunft; 1903–1989* (Bonn: Dietz, 1996).

<sup>92</sup>See Klingemann, ‘Vergangenheitsbewältigung oder Geschichtsschreibung?’, op. cit., pp. 264–265.

<sup>93</sup>Ibid., p. 278.

<sup>94</sup>Reinhard Höhn, *Die Wandlung im staatsrechtlichen Denken* (Hamburg: Hanseatische Verlagsanstalt, 1934), p. 31.

<sup>95</sup>Published in Moscow in 1923, now in Jewgenij Pashukanis, *Allgemeine Rechtslehre und Marxismus: Versuch einer Kritik juristischer Grundbegriffe 1924/1929*, edited by Hermann Klenner and Leonid Mamut (Freiburg-Berlin: Haufe, 1991).

<sup>96</sup>For a comparison between Pashukanis’ commodity exchange law theory, Tönnies concept of ‘society’ and Max Weber’s rational-legal justice see Eugene Kamenka and Alice Erh-soon Tay, ‘The Life and Afterlife of a Bolshevik Jurist’, *Problems of Communism*, 19:1 (1970), pp. 72–79, especially p. 78.

Höhn's speculations had several features in common with Pashukanis: for him too, the task for the legal scholars was to deduce the new legal forms from the evolutions in social life generated by the government. As Bodin developed the institutional theory of the individualist state by observing the governmental praxis of the sixteenth-century sovereign princes, Nazi law theorists had to convey the praxis into the theory of people's community. Only abandoning the solid ground of nineteenth-century legal doctrine – be it normative or decisionistic – they would become aware of the actual life of the people's community. The new point of view was indicated by Carl Schmitt in his essay *On the Three Types of Juristic Thought*:

The new public and administrative law imposes the *Führer* principle and with it concepts as loyalty, allegiance, discipline and honour, understandable only within a concrete order and community. The political unity is built on three lines of order – state, movement, people. The notion that leadership, discipline and honour are inseparably connected will be strengthened thanks to the introduction of the system of ranks, which will overcome normativism built on the antecedent principle of separation of powers.<sup>97</sup>

Höhn's view was identical: the relationship between the leadership and the following was conducting the citizens back into a framework of 'real orders', such as family or estates.<sup>98</sup> Once the mass society was restructured in concrete orders, '... the communitarian principle will affect all aspects of life, generating brand new results in penal law, civil law, and above all in public law'.<sup>99</sup> The latter had no need any more for the concept of sovereignty, or that of government, but only for guidance.<sup>100</sup> In fact, the responsibility of the *Führer* derived from his guiding role; if his attitude

loses such spirit, he will no longer be a guide, but merely a single man without any support from the community. If he refuses to accept the consequences and remains in power, he will turn into a dictator. In that case he will maintain his position until a new *Führer* rises from the community and dethrones him. And the rapidity with which this happens will depend on the vigour of the communitarian life.<sup>101</sup>

In Höhn's view, the substitution of the state's sovereignty with the relationship between leadership and following required a corresponding public law based on a 'spiritual bond' instead of formal procedures. Thus, the relationship between the legal person of the state and its citizens was bound to disappear, together with the subjective public rights conceived by Georg Jellinek. Confronted with 'substantial justice' pursued within 'concrete, real life', the formalities of general and abstract law had to be discarded.

The essay Höhn published in 1935, *The Community of Law and the People's Community*, is the one that reached major attention and best expresses the author's original thoughts. Even Huber praised it for 'opposing any attempt to form a community based on the law as such, that is to develop an autonomous "community of law" independently from the

<sup>97</sup>Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), p. 63. Höhn refers to Schmitt's essay in *Die Wandlung im staatsrechtlichen Denken*, op. cit., p. 46.

<sup>98</sup>Höhn, *Die Wandlung im staatsrechtlichen Denken*, op. cit., p. 12.

<sup>99</sup>Ibid., pp. 12–13.

<sup>100</sup>Ibid., p. 34.

<sup>101</sup>Ibid., p. 40.



people's community'.<sup>102</sup> Höhn predicted a total 'overcoming of differences between public and private law'.<sup>103</sup> He described the new communitarian order free from conflicts between particularistic interests of the single citizens, as between them and the state, since the latter would also abandon its individualistic and egoistic attitude. Therefore, a theoretical distinction between natural and legal persons would become needless, as there would not be any cases of conflicting interests to solve. As examples of Nazi legislation overcoming the private/public dichotomy, he quoted the national labour law,<sup>104</sup> the law on hereditary farms,<sup>105</sup> and the various courts of honour of the party organizations. Those laws mainly regulated labour and property relations between private citizens, but at the same time they were creating an intrinsic link with the public sphere.

Furthermore, the new communitarian legislation was introducing a 'new type of criminal law, defending not just the mere representations of general values',<sup>106</sup> such as, for example, the abstract value of property. An offence against the property was now an element of disorder in the life of the community. A theft thus assumed the meaning of a 'betrayal destroying the community and dissolving its order'.<sup>107</sup> 'Each case of stealing within a communitarian order, be it the Labour Service (*Reichsarbeitsdienst* – RAD) or the SS', Höhn argued,

won't be intended as a simple 'offence against private property'. The one that steals within such community won't be tolerated as a member and the one stealing outside will not be worthy to become one. Therefore he won't be a comrade of law (*Rechtsgenosse*). Even if the delinquent served his time he won't be able to be a member of the community again.<sup>108</sup>

For him, only 'comrades of law' were entitled to the benefits of the administration of justice. But to be a member of the 'community of law', one had first to be a member of the 'people's community'. Hence, the law did not protect persons excluded from the *Volksgemeinschaft*. A legal opinion expressing such extreme negation of the rights of the subject was fitting for the plans and aspirations of the heads of the SS, Himmler and Heydrich.

Höhn's fortunes were thus rising together with the power of the SS within the *Reich*. In 1936, backed by his powerful friends, he orchestrated an attack against his previous mentor Schmitt. Höhn not only admired Schmitt, but also owed him a lot: when he was an unknown assistant, Schmitt gave him the possibility to publish in the most important book series in the field, *Der Deutsche Staat der Gegenwart*. What is more, in October 1935, when Höhn usurped the chair belonging to the very well-known Rudolf Smend at Berlin University, Schmitt supported him with a recommendation.<sup>109</sup>

Still, Höhn showed Schmitt the same disloyalty as he had shown previously to Mahraun and Jerusalem. Conspiring with Schmitt's rivals, such as Koellreutter and Stuckart, he

<sup>102</sup>Huber, op. cit., p. 90.

<sup>103</sup>Höhn, *Rechtsgemeinschaft und Volksgemeinschaft*, op. cit., p. 16.

<sup>104</sup>*Gesetz zur Ordnung der nationalen Arbeit* (20 January 1934) transformed the relations between employer and employees according to the *Führerprinzip*: as 'followers', the latter had the duty to obey.

<sup>105</sup>*Reichserbhofgesetz* (29 September 1933) declared the farms belonging to Aryan families as fee tail consecrated to the 'blood and soil' ideology.

<sup>106</sup>Höhn, *Rechtsgemeinschaft und Volksgemeinschaft*, op. cit., p. 57.

<sup>107</sup>*Ibid.*

<sup>108</sup>*Ibid.*, p. 58.

<sup>109</sup>See Anna-Maria Gräfin von Lösch, *Der nackte Geist: die Juristische Fakultät der Berliner Universität im Umbruch von 1933* (Tübingen: Mohr Siebeck, 1999), p. 402.

managed to stop him becoming state secretary in the Ministry of Justice. In the summer of 1936, Höhn used his powers as SS-*Sturmbannführer* and with Heydrich's authorization ordered Schmitt's mail, personal contacts and activities to be checked.<sup>110</sup> During the following months, he prepared for the SD a dossier on the 'Schmitt case', accusing him of 'Philo-Semitism, conservatism and Catholicism', and instigated a campaign in the official newspaper of the SS, *Das schwarze Korps*.<sup>111</sup> On 18 December 1936, Höhn sent an official SD note to the *Reich's* student leader (*Reichsstudentenführer*) Scheel defining Schmitt as 'not tolerable any more'.<sup>112</sup> The latter maintained his chair at Berlin University but had to resign from the Association of German Jurists (*Bund Nationalsozialistischer Deutscher Juristen* – BNSDJ) and the Academy for German Law.

In 1937, Höhn seriously endangered his own career as a result of his endless ambition. Together with SS comrade and colleague at the Berlin law faculty Karl August Eckhardt (and with the support of Heinrich Himmler), he tried to dethrone the leading Nazi historian Walter Frank. The duel within the Nazi scientific community reached the highest levels of political patronage, since Frank appealed to his intimate friends Alfred Rosenberg and Rudolf Hess. The dispute quickly degenerated into a conflict between the SS's emerging elite and the old comrades of the *Führer*. Hitler had to intervene personally and invite Hess and Himmler to settle the matter. Höhn was released from all official duties within SD, but avoided a trial at the party tribunal. At any rate, in September 1939 Heydrich called him back into service.<sup>113</sup>

## Conclusions

Höhn's theory shifted the focal point of politics from state back to social relations. According to him, the 'concrete orders' established by the government were intertwining their spheres of activity in an all-embracing network gradually absorbing the daily routine of the Third Reich's citizens. Legal scholars had the duty to investigate the ways of life within those new concrete forms of social order, and to locate the germs of new-born anti-liberal and communitarian law. This new social order would gradually reveal the enfranchisement of the people's community from the coercions of the society of merchants and the individualistic state. This was not the perspective Tönnies had in mind: his plea against individualistic rationality was not a rebellion against rationalism as a whole. Strongly inspired by Marx, Tönnies condemned the anti-social expressions of modern individualism. But his opposition was rather a request for a different modernity and a new and unprecedented sociable individual. Höhn turned Tönnies' critique of modernity into an ersatz refuge from it. His new order was promising to restore the time of pre-individualism, a 'golden age' before market economy imposed its specific forms of rationality. Such an escape from the liberal state depended on the combination of two forces. One – the *Führer* – guiding people from above towards their 'becoming'; the other – be it the neighbourhood or the concrete order – operating from below, by virtue of the emotional bonds able to erase the borders of individual rationality.

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<sup>110</sup>Rüthers, *Entartetes Recht*, op. cit., p. 127; on Höhn's intrigue against Schmitt see also Andreas Koenen, *Der Fall Carl Schmitt* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1995), p. 651 ss; Reinhard Mehring, *Carl Schmitt. Aufstieg und Fall. Eine Biographie* (München: Beck, 2009), p. 378 ss.

<sup>111</sup>Lösch, op. cit., p. 464.

<sup>112</sup>Ibid., p. 467.

<sup>113</sup>Ibid., p. 427.

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