The Idea of the State Subject to Law: Lessons from the German Experience 1840-1940*

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Samevatting

Die Idee van die Staat Onderworpe aan die Reg: Lesse uit die Duitse Ervaring 1840 - 1940

Toe J.P.A. Mekkes, in die aanvangstadium van die Tweede Wêreldoorlog, sy uitgebreide kommentaar oor die ondermyning van die regstaatbeginsel gegee het, was hy in werklikheid besig om 'n ooggetuie-verslag van die disintegrasie van die idee van die regstaat binne die wyer Europese konteks in die algemeen en die onstaan van outoritêre regstaatbewegings spesifiek te lewer. Sy uitgebreide nadenke oor ontwikkelinge binne humanistiese staatsteorieë verskaf nuttige aanduidings vir die identifisering van dié faktore wat hoofsaaklik vir die disintegrasie van die regstaatbeginsel en die konsep van die konstitusionele staat veranwoordelik was. 'n Indringende ondersoek na die ondermyning van die regstaatdenke in Duitsland in die tydperk 1840 tot 1940 toon aan dat die beginsel van soewereiniteit in eie kring nie altyd voldoende antwoorde bied om die ideologiese aanslag teen die staat se regstaak en –owerheidsfunksies te hanteer nie. Dié tendens word toegelig met verwysing na die Suid-Afrikaanse situasie waar die aanslag van die idee van die nasie ernstige bedreiginge vir die konkretisering van 'n genuanseerde regstaatmodel inhou. Die vraag word vervolgens beantwoord tot welke mate die beginsel van soewereiniteit in eie kring uitgebou kan word ten einde tendense soos aangedui teen te werk.

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1. Introduction

When J.P.A. Mekkes wrote his extensive commentary on the demise of the rule of law[1] during the initial stages of the Second World War, he was

1 *Proeve eener critische beschouwing van de ontwikkeling der humanistische rechtsstaatstheorieën* (Utrecht, 1940).

actually giving an eyewitness account of the disintegration of the idea of the law state within the broader context of Europe generally, and the emergence of authoritarian law state movements specifically. His elaborate reflections on the developments in humanistic law state theories provide useful indicators for identifying the factors mainly responsible for the disintegration of the idea of the state subject to law and the concept of the constitutional state. Mekkes's observations are particularly useful because they give a good overview of the developments in constitutional law and political theory since the early Enlightenment in Europe that ultimately led to the downfall of the rule of law in the legal systems of Western Europe. He also gives sufficient background to his observations to make his reflections useful for practically evaluating the level of a state's rule of law commitment in a legal system.

The essence of Mekkes's perspectives on the theory of the state subject to law can be summarized as follows: A meaningful theory of the rule of law demands a constant material (normative) criterion for identifying the function and role of the state in any legal system.[2] This is provided only by the normative structural principles distinguishing the state from other social institutions[3]; all positive forms of expressing the law state are historically determined visible manifestations of the normative idea of what a state subject to law should be.[4] Many of the earlier efforts to identify such a fixed principle for distinguishing the state from other social spheres resorted to natural law theory.[5] According to Mekkes, modern positivism and historicism eliminated the central structural principle of the state as basis for the variety of forms in which the state is manifested.[6] Only the reflection on such a normative principle enables man to identify the valuable elements in the ancient and medieval constructions of natural law.[7] Mekkes furthermore draws a distinction between the material (core) elements and the formal (organizational) elements in an acceptable law state perspective.[8] The material conception of the law state contains two elements: stated negatively, it delimits the state's functions in its relationships with other non-statal entities; positively it provides the principles leading the operational functions of the state in its legal

2 Mekkes 729.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid., 730.
8 Ibid.

formation.[9] The legal limits of the material competence of state authority and human rights both presuppose a fundamental order in which the normative elements pertaining to the legal life in the state can be identified.[10] Mekkes consequently provides a number of examples of influential legal theories to substantiate his observations regarding both the normativity of the law state principles operative in society and the limits to the state's legal functions in securing basic legal order in society.[11] Considering the development of the idea of the law state in its different manifestations since the early period of the Enlightenment, Mekkes remarks that a fundamental challenge was posed to early Enlightenment thinking in its protection of the public law conception of state authority against the undifferentiated authoritarianism of the feudal regimes.[12]

With reference to the material principles at the root of the state's legal functions Mekkes observes that the modern idea of the law state can only be maintained by distinguishing the sphere of civil private law from that of public law.[13] The inability of early Enlightenment theories of natural law, based on the notion of a *volenté générale* overarching both spheres of law, to Mekkes, caused a demise of the structural laws of human society and co-existence, resulting in the overstatement of the sphere of public law at the expense of man's freedoms in civil law.[14] Furthermore the

9 Ibid.
10 Ibid., 730-1.
11 Cf. e.g. ibid., 731-2.
12 Ibid., 732.
13 Ibid., 734.
14 Ibid., 735. H.J. van Eikema Hommes, *Major Trends in the History of Legal Philosophy* (Amsterdam/New York/Oxford, 1979) 164 supports Mekkes's views by pointing out the inherent conflict between Jean-Jacques Rousseau's universalistic political construct of the general will of the people (*volenté générale*) as law-making entity with the theory of innate human rights. According to Rousseau the theory of human and civil rights can be founded only on the idea of the *volenté générale*. This general will of the people is the expression of human liberty and equality on the superior cultural level of the only legitimate form of state, viz. direct popular democracy. The antimony implied in this is that the general will, as the highest form of human liberty, destroys liberty as such. Art. 6 of the French *Déclaration* of 1789 expresses this principle as follows: "The law is the expression of the *volenté générale*. All citizens have the right to take part in its formation personally, or by means of their representatives. It must be the same for all, whether it protects or whether it punishes. All the citizens being equal in its eyes, they are equally fit for all public honors, positions and employments …" This inherent tension between the abstract theory of human liberty and equality, and the idea of the general will made a harmonious, well-balanced development of public and civil law impossible. Also cf. Hommes *De elementaire grondbegrippen der rechtswetenschap* (1972) along the same lines as Mekkes's observations that this form of universalism tends to subject the whole of society to the public law of the state.

nominilistic principle of legal will introduced an unlimited absolutism of the lawmaker, and in the sphere of civil law, resulted in the dictatorship of the strongest political grouping in society.[15] The nominilistic view of reality contained in this theoretical perspective on the state and the law, maintained an abstract view of the nation at the expense of the fundamental principles underlying and guiding the spheres of both civil private law and public law.[16] Originally the idea of the law state took the maintenance of human rights (in the form of civil rights) to be the purpose of the state.[17] In the furthering of this teleological perspective the internal structure of the state was negated to the extent that the state ventured into non-state spheres of typical non-statal nature.[18]

As a consequence of the application of Mekkes's principles underlying his law state theory, he observes that the government of the state is typically qualified in terms of its public law functions.[19] This means that the state is not only directed at the execution of laws but has diverse functions in terms of promoting the public legal interest.[20] The idea of the law state in a next phase of Enlightenment natural law theory, harboured the ideal of brining the expanding sphere of state administration (accompanying the expanding concept of the state as a public law entity) into line with the concept of democracy, by subjecting the individual in society to the idea of the nation as an overarching entity of legal formation of which the state is the apex and organizational form of the nation (or people).[21] For Mekkes the theory of law emanating from this theoretical perspective allowed no recognition of natural rights to liberty, but only recognized the rights of statutory origin or those provided by fundamental laws.[22] The constitution itself thereby became the source of legality and the idea of natural limitations to the competence of the lawmaker was disallowed in principle.[23] The rise of absolutism in the constitutional systems of Western Europe was, to Mekkes, the necessary consequence of the demise of the

15 Mekkes, supra 735. The notion of the *raison d'état* or *Staatsräson* is the root of the view that the maintenance of state-power is the supreme end of state-politics, and to which justice and morality are secondary values (cf. Hommes *Major Trends*, 72-3).
16 Ibid., 736-7.
17 Ibid.
18 Ibid., 737.
19 Ibid.
20 Ibid.
21 Ibid., 738.
22 Ibid., 739.
23 Ibid.

normative idea of the state.[24] These developments in the relationship between the state and the law produced a structure totally different from its original roots, namely that the focus was no longer directed at the legal limitations or boundaries of the competence of the lawmaker, originally flowing from either a pre-state reality or structure of natural freedom and equality, but only at the internal-organizational mechanisms for guaranteeing the statutory rights of liberty of the subjects to the administration.[25] The duty of the people's representatives was limited merely to applying these guarantees in their participation in the process of lawmaking.[26] The emphasis of the law state and the rule of law moved towards the sphere of positive public law, binding the supremacy of the administration to statutory boundaries in order to protect the rights of liberty of the subjects against the bureaucratic administrative state.[27]

The developments mentioned above were accompanied by the influence of the idea of the nation based on a social contract between individuals, according to which the purpose of the state is limited to the organized maintenance of the natural right to liberty. The state is absorbed by the idea of the nation with its own personality, promoting the aims of the people, of which the application of law is only one element. In its administrative functions the state then becomes the instrument for accomplishing the non-legal purposes of public law.[28] To Mekkes the *vitium originis* of this perspective, aligning the law state idea with the doctrine of state purposes rather than orientating the state to its internal structural principle, was the direct result.[29] The main reason for disempowering the law state according to humanistic legal theory is therefore contained in the negation of the material-legal limits of state competence in the law-making functions of the state. The negation of the

24 The nominalism of Marsilius of Padua prepared the way for the idea of the supreme legislative power of the people. Accordingly the original and sovereign legislative power of the state resides in the people, or the most important part of the people, which exercises its legislative powers in an assembly of enfranchised citizens, or of elected representatives, by means of majority rule. This legislature determines the entire organization of state, as also the status of the executive or administrative power (*principatus* or *pars principans*) which remains subordinate always to the legislative power. The people have the power to divest the executive of its legal power (Hommes *Major Trends* 63).

25 Mekkes supra 739.

26 Ibid.

27 Ibid.

28 Ibid., 740.

29 Ibid.

boundaries of legal competence for the lawmaker was merely the consequence of the universalistic idea of the state, manifesting itself in the universalistic-idealistic conception of the newly constructed nation.[30] In effect the whole positive legal order is thereby "devoured" by the state as an organ of the extended nation.[31] The idea of self-government by the nation and the formal freedoms of non-statal societal institutions within the domain of the supreme state structure directly undermine the notion of individual rights and freedoms.[32] The normative conception of the state is undermined insofar as the state becomes a mere instrument of power at the disposal of societal interest groups who have the ability to muster the largest number of voters behind them – it is no longer the vehicle of legal values as such.[33] The implications of these developments for the idea of rule of law are far-reaching: in a naturalistic sense law is reduced to a mere social function and the idea of democracy, which for Rousseau was intimately connected to the demand for fundamental civil rights, is socialized.[34] The state loses its exclusive statal character and becomes the instrument for satisfying all sorts of societal aspirations.[35] The idea of the sovereignty of the people is reduced to societal relationships of interests – all that remains is the tyranny of the "half-plus-one" of the voting public and in practice this culminates in an unlimited parliamentarianism. Respect for law is undermined and the natural law mysticism of the Enlightenment is supplanted by a positive view of the clash of interests taking place behind the process of law-making. In a political context democracy takes on the form of a technique of nationalizing the authority as well as the entire sphere of law.[36] Democracy becomes the expression of a political relativism, and the state and the concept of democracy become the basis for dictatorship.[37] The law, perceived as a mere social function, leaves no room for civil liberty and equality which are not useful for the socio-economic purposes of the state.[38] This process is enhanced by the doctrine of "sovereignty of law" over and against the classical distinction between public law and civil private law.[39] The principles of

30 Ibid., 740-2.
31 Ibid., 742.
32 Ibid., 743.
33 Ibid., 744.
34 Ibid., 744
35 Ibid.
36 Ibid.
37 Ibid., 745.
38 Ibid., 746.
39 Ibid., 747.

civil private law are also taken to be "social functions" and subjected to the socio-economic purposes of the nation, accompanied by the relativizing of subjective rights in the private sphere.[40] The deterioration of the idea of the state subject to law is thereby carried forward by the ideal of social democracy to the point where the whole of the legal life of society is absorbed in a totalitarian way.[41]

Mekkes's analysis of the decline of the idea of the law state poses important questions: firstly, to what extent did the breakdown in law state thinking in Germany follow the trajectory of demise in the rule of law as described by him; and secondly, what are the lessons for other legal systems constitutionally subscribing to the rule of law principle from the history of the German experience from 1840 to 1940?

2. The notion of the state subject to law in German legal thought

Views on the idea of the constitutional state from the first half of the 19th century to the years preceding the Second World War differed widely. In the thinking and experience of philosophers and legal practitioners, it was obvious that law and justice must be practised, that the state must be subject to law and that the state must function in the service of the law. How this was to be accomplished was a matter of heated and extensive debate. The notion of the "rule of law", however, was fairly new and became apparant for the first time through the differentiation between justice and positive political legality (the state acting lawfully). The term "rule of law" in its verbal expression of the "Rechtsstaat" emerged in Germany in the first half of the 19th century, whilst the concept of "rule of law" was coined by Dicey[42] towards the end of the 19th century. In Germany Robert Kohl is designated as the person who introduced the concept of the "Rechtsstaat" through his book *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaats* (Police Science according to the principle of the Rule of Law) (1832).[43] Yet examples of the use of the term are also to be found before this time; for instance the romantic political scientist Adam Müller (in his *Deutschen Staatsanzeigen*, 1817),[44] speaks of the difficulties which a "commerce state, a war state and a

40 Ibid.
41 Ibid., 748-750.
42 *Introduction to the Law of the Constitution* (London, 1885).
43 *Die Polizeiwissenschaft nach den Grundsätze des Rechtstaas* (Tübingen, 1832). Also cf. R, Thoma, *Jahrbuch des öffentliches Rechts*, vol. 4 (1910), 197.
44 *Deutschen Staatsanzeigen*, vol. 2 (Leipzig, 1817), 33ff.

bureaucracy"[45] have to confront in order to raise themselves once more to the dignity of a constitutional state …"[46] In previous centuries, during which the contrast between justice and positive, politically imposed law was not experienced with the poignancy which it developed during the course of the 19th century, the term "rule of law" was unknown. Foreign literature of the 19th century adopted the term primarily under the influence of Georg Jellinek as "Etat de droit" or "Etat juridique" in the French (for example Hauriou and Duguit), as "Stato di diritto, Stato giuridico and Stato legale" in Italian (for example Orlando, Santi Romano, del Vecchio), and as "Estado de derecho" in Spanish (for example B. de Valle Pascual). In Russian legal history as well, the contrast between the liberal "westerner" and the national pro-Slovenian, as well as the contrast between "constitutional state" (Prawowoje Gosudarstwo) and "State subject to justice" (Gosudarstwo Prawdy) was expressed.

Complaints about the ambiguity and misuse of the term "rule of law" are widespread. The national German poet T. Gotthelf characterized the idea of rule of law as the "source of all evil" and the "legal sanction of egoism."[47] The German statesman Otto von Bismark designated the term rule of law as "an artistic expression invented by Robert von Mohl of which no definition exists which would satisfy a political head, and which has not been translated into other languages."[48] The difficulty of an unambigious translation arises from the fact that various options are given, for example in Italian, "Stato di Diritto", "Stato giuridico", and Govorno legale" are distinguished in order to make the concept clear. The same occurs in French as appears from Hariou's remark in his *Principes de Droit public* (1916).[49] It therefore seems that Bismark was right in his observations about the confusion arising from the use of the term.[50] Despite the differences, however, it has penetrated into legal jargon as well as into popular linguistic usage.

3. Historical perspectives on the "Rule of Law"

3.1 The rule of law as a polemic-political concept

The phrase "Rechtsstaat" (or state subject to law) owes its popularity and usage primarily to the fact that it can be used as an effective designation for different and entirely contrary interpretations of law and state. The relative popularity which the term has obtained occurred mainly because

45 "Geld-, Kriegs- und Beampten-Staat".

of its use as a contra-concept. In liberal discourse on the state subject to law, this is usually the notion of the state ruled by force (dictatorship). It was this meaning that liberalism for more than a century attributed to every non-liberal state, whether an absolute monarchy, a fascist or a national-socialist state, by representing it as a state not under rule of law and therefore an unjust state.[51] Other contra-concepts for rule of law which have frequently been used are: "bureaucratic state", "welfare state", "commerce state"[52], and above all "police state". The contrast between rule of law and the so-called "police state" has, since Otto Maner's textbook on Administrative Law (1890)[53], devolved upon the doctrine of German administrative law as a dogma and has often been repeated without criticism in some of the most prominent liberal textbooks on administrative law (for example Fleiner, Jellinek, Hatschek). Although R. Mohr[54] himself protested against the talk about the contrast between rule of law and police state, and R. Gneist in his *The National Concept of Law of the Diets* (1894)[55], presented the German state of the 18th century, the so-called "police state", as an exemplary state under rule of law. Otto Maner (*Administrative Law*)[56] himself ridiculed this concept. W. Hofacker[57] in turn contradicted the pseudo-scientific manner of the allegedly apolitical antithesis of the police state of the 18th century and the liberal notion of the rule of law of the 19th century. Another antithesis turned the rule of law into the opposite of the feudal state (for example, in the works of the legal historian Felix Dahn and the political scientist Bluntschli). This polemic

46 Ibid., 33.
47 *Deutsche Juristen Zeitung*, 15 October 1943, 1259.
48 Letter to Von Goszler of 25 November 1881, cited by Joh. Hedel in *Zeitschrift der Savingny-Stiftung* part XIX (1930) 268ff. Cf. Carl Schmidt, *Staatsgefüge und Zusammenbruch des Zweiten Reiches* (Hamburg, 1934), 21.
49 *Principes de Droit public*, 2nd ed. (1916), 12ff.
50 Cf. e.g. Bluntschli, *Algemeines Staatsrecht*, 4th ed. (1868) 69ff; H. Schultze, *Deutsches Staatsrecht* (1867) 145; Krieken, *Über die sogenannte organische Staatstheorie* (1973); O. Maner, *Bemerkung zu Gierkes Begriff des Rechtsstaates*: "Viel mehr als eine blosze Umschreibung des Namens wird uns auf diese Weise nicht gegeben."
51 The work by Darmstädter, *Rechtsstaat oder Machtstaat* (Berlin, 1932) is an example of the application of the liberal idea of the law state and his criticism of other law state models as "states of power" ("Machtstaat").
52 Cf. the reference to Adam Müller *supra.*
53 *Lehrbuch des Verwaltungsrechts*, 1st ed. (1890), 45.
54 *Encyclopädie* (1872) 88.
55 *Die nationale Rechtsidee von den Ständen* (Berlin, 1894).
56 *Verwaltungsrecht*, vol. 1, 45.
57 *Die Staatsverwaltung und die Strafrechtsreform* (1919) 47.

use of the word can be understood from the battle of the political middleclass against the "feudal" Prussian military and official monarchy, thus from the state of the 19th century. In order to modify the liberal concept of the rule of law, adjectives such as "Christian", "middle class", "national" or "social" rule of law, were used.[58]

3.2 The rule of law as a legal-philosophical concept

Under a constitutional state one can understand a state characterized as a whole in its entire establishment. This presupposes a definite, material, objective concept of law and state as well as a definite conception of the relation of both. This in turn presupposes a philosophical interpretation of law and state. In the work of R. von Mohl this is strongly emphasized. He states that: "Theocracy answers to the religious way of life of the nation; despotism to the purely sentient; the patriarchal state to the simple family view, but rule of law to the sentient, sensible purpose of life … the freedom of the citizen is the main principle in this view of life."[59] During the course of the 19th century the liberal-individualistic political and social interpretation of the term rule of law secured itself. Kant's legal philosophy, which turned the state into a "legal institution" and a "union of citizens under authoritarian laws", became the philosophical justification of a considerably individualistic rule of law. Trendelenburg in his *Naturrecht* (1860)[60] aptly states in this regard that the rule of law, especially according to Kant, would amount to a "public institution for the securing of personal freedom and the protection of the individual, of his property and his contracts." These theories "draw the state, in the name of the law, toward the individual being so that it can legitimately serve his

58 So e.g. under the Weimar Republic the state was described by some of the moderate parties as Christian, by the German People's Party as "national" and by the Social Democrats as a "social state". For the idea of the social law state cf. Hermann Heller, *Rechtsstaat oder Dictatur* (Tübingen, 1930). O. Koellreutter, *Der nationale Rechtsstaat* (Tübingen, 1932) 26, states: "Die für den Rechtstaatsbegriff als solchen gefährliche Einseitigkeit Freislers liegt darin, dass er in der Gewaltenteilung nur ein die Volkskraft atomisierendes Moment erblickt … In der Unterscheidung und der richtigen Ausbalanzierung von Verwaltung und Rechtspflege liegt das Wesen des modernen Rechtstaates." Also his *Vom Sinn und Wesen der nationalen Revolution* (1933), *Grundriss der Algemeinen Staatslehre* (1933), 108ff.; H. Gerber, *Staatsrechtliche Grundlinien des Neuen Reiches* (1933); L. Dennewitz, *Das nationale Deutschland ein Rechtsstaat* (1933) ("staatsbetonter Rechtstaat"). For criticism of the idea of the "national law state, cf. Eberhardt Menzel, *Grundlagen des neuen Staatsgedankens* (Eisenach, 1934), 70ff.

59 See supra 5.

60 *Naturrecht* (1860).

freedom, his education and his happiness." Lorentz von Stein attempted to overcome this individualism by means of Hegel's concept of the state as a realm of morality (therefore, an ethical state, not merely a constitutional state). Stein emphasized that the constitutional state was a specific German concept by means of which a boundary is set in relation to the governmental law of the state by means of acts, self-representation and the rights of the individual to secure the independence of these three factors against the force of government. Gneist in his *The Rule of Law* (1872)[61] agreed with him in principle. However, the purely individualistic, liberal interpretation was accepted, at least after 1971, and from its ideological and legal philosophical basis was moulded not only constitutional law, but also the administrative, criminal, procedural and civil law: in short, all spheres in accordance with liberal ideology and its accompanying concept of the rule of law.

3.3 The rule of law as a juristic-technical concept of the 19th century

Also under the rule of law, a certain technical juristic manner of execution of the various ideological, political or philosophical concepts of law and justice may be understood. Firstly this means the formalization and neutralizing of the concept of the rule of law. In the form and nature of such a rule of law even contradictory views of society, law and state can be realized. The rule of law is taken to be a non-contextual, purely formal, non-substantial and only functional "modus" and presents itself to the various concepts of justice as an instrument for their execution and realization. This perspective on the rule of law was strongly advocated by Friedrich Julius Stahl and gained substantial ground in Germany. According to his famous statement rule of law "does not mean aim and content of the state at all, but only the realization of the nature and character of the same."[62] The contents and manner of realization, the material and formal concept, are separated, and law and the state, in the end, become interchangeable forms for the contents designated by

61 *Der Rechtsstaat* (1872), 183, 184.

62 *Die Philosophie des Rechts*, vol. 1 (1926), 137, 138: "De Staat soll *Rechtsstaat* sein, das ist die lösung und ist auch in Wahrheit der Entwicklungstrieb der Neueren Zeit. Er soll die Bahnen und Grenzen seiner Wirksamkeit wie die freie Sphäre seiner Bürger *in der Weise des Rechts* (my emphasis) genau bestimmen und unverbrüchlich sicheren … Dies ist der Begriff des Rechtsstaates, nicht etwa dass der Staat bloss die Rechtsordnung handhabe ohne administrative Zwecke, oder vollends bloss die Rechte der Einzelnen schütze, er bedeutet überhaupt nicht Ziel und Inhalt des Staates, sondern nur Art und Charakter dieselben zu verwirklichen."

ideology, morality and justice. This abuse of the concept of the rule of law leads to a likewise neutral, interchangeable legal positivism and changes the rule of law into its opposite: an indifferent legislative state[63] (state in which the legislature is supreme) or judicial state (state in which the judiciary is supreme). Liberal and absolutistic societies can then be states under rule of law insofar as they realize their ideals of justice "in a certain manner." This, in essence, implies that all exercise of political power should continuously and intermittently be executed in a predictable manner. However, this can only be accomplished by previously-established norms and rules whose contents are definite and exact, which determine the measure and the extent of the political interventions by which the state and all its subjects are bound. In this frame of thought the rule of law is no longer a matter of justice but only a matter of certainty and predictability. The state under rule of law becomes a concept contrary to the "state under justice." It does not serve justice in a material sense, but is employed as a matter of positivistic foreseeability. Individual freedom according to this view, is deemed to be the individual "guided" by positive law, in terms of which a party can make use of the system of national justice and administrative structures and which "norms" he can calculate and which control the entire public life. Otto Manner designated the state under the rule of law in this system of thought as a state in which everyone "knows what the state must provide him with."[64] Despite apparent neutrality and instrumentality, this type of state under rule of law again becomes a typical instrument of liberal individualism. The concept of law in a state under "rule of law" is given the meaning of a positivistic legalism and normativism, of which the logical conclusion is only to the advantage of the inconsiderate and unscrupulous individualism typical of the liberal epoch.

3.4 The standardization and characterization of the rule of law

In the textbooks of the law of procedure, administrative and criminal law, as well as in other legal disciplines, a certain fixed catalogue of the particular institutions and norms which prevail as appertaining to the rule of law developed. These were treated as definite characteristics of and equated with the rule of law. It has to be emphasized that each element of

63 Cf. Heinrich Lange, *Vom Gesetzesstaat zum Rechtsstaat* (Tübingen, 1934) (*Recht und Staat* part 114). For the opposite of Führerstaat and Gesetzesstaat cf. Walz, *Deutsche Juristenzeitung* (1933), 1338ff.

64 Cf. supra.

the rule of law concept, for example equality of the law and the principle of the legitimacy of the administration, can only be evaluated in its joint connection of constitutional, procedural and other branches of law and political theory. So "law", for example, means something entirely different theoretically and practically depending upon whether an act of a constitutional monarchy or of a parliamentary lawmaking democracy is concerned. There are no completely isolated institutions, principles and norms which can be separated from the entire political context, or they would become meaningless or points of departure for undermining the principle itself. The rule of law therefore demands independence of the judiciary. The principle of independence of the judiciary, however, means something different in a constitutional monarchy from what it means in a parliamentary democracy. Consequently the recognition of the independence of the judiciary would as a concept of rule of law determined by a constitutional parliamentary system of democracy, recognize the independence of the judiciary in its relatedness to the division of authority and the constitutional conception of law, whilst within a state of an entirely different nature, the same principle would be interpreted differently. Secondly the rule of law institutions and arrangements can only be evaluated in terms of their inseparability.

Generally speaking the developments of the rule of law in a constitutional sense have manifested themselves as the requirements of a written constitution; definite contents of the constitution, namely structure of the state according to the principles of division of authority, that is, an organizational separation of legislation, government, administration and administration of justice; a specific catalogue of rights of freedoms, for example personal freedom, freedom to own private property, freedom of expression of one's opinion, freedom of association and freedom to meet, freedom of coalition, religious freedom, and so forth; subjection of the government to the judicial authority. In this system of thought the rule of law is equated with the liberal constitutional state. A specific concept of law belongs inseparably to this. Law in the formal sense can only come about through the co-operation of the representatives of the people and through those procedures which can guarantee the necessary sense and justice of law, giving law its "precedence" above all other political expressions of intention. Only through this does the law become a norm valid for all, thus forming the foundation of the lawfulness of the entire political life in the state.

The administrative law implications from this conception of constitutionality are varied and complex:

Legitimacy of the administration, precedence and reservation of the law is interpreted as the essence of the rule of law. This also implies that the principle of the slightest intervention prevails. Generally speaking this gives rise to the notion that under rule of law the intervention by the police into the legal sphere of the subjects must be limited to a minimum.

The development and extension of the subjective public rights of subjects as claims of individuals who can expect something from the state and thereby receive power over the state.[65] The systematic development of the liberal idea of claims in constitutional and administrative law began with the *System der subjectiven Öffentliche Rechte* by Georg Jellinek (1892).

The development and extension of legal protection formed by the administration of justice for the protection of these subjective public rights.[66] Generally speaking it is taken to be irrelevant whether or not the proper courts of the civil administration of justice are obliged to take over this legal protection, or whether or not specific administrative courts have to observe this protection. As long as these administrative courts are only "imitations" of the proper civil jurisdictions, the distinction between rule of law and judicial state is in fact meaningless. The tendency to let justice prevail in the entire public sphere and in particular the administration is made out to be the decisive characteristic of the rule of law. This trend leads to the demand of a universal general clause for the competence of the administrative courts in all disputes of public law according to the nature of the general competence of the civil courts in all disputes of public law according to the nature of the general competence of the civil courts for civil disputes. Jellinek in this regard remarks as follows: "Only the general clause does justice to the demands of the rule of law."

Development and extension of the principle of general liability for damages of the state or the bodies of public law for breach of duty of its officials[67], as well as in the case of legal individual interventions, by the highest courts of justice whilst allowing legal procedure in the proper courts as far as liability for breach of official duty in particular is concerned.

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65 Cf. R. Thoma, *Handbuch des Deutschen Staatsrechts* II 609 and Th. Maunz, *Neue Grundlagen des Verwaltungsrechts* (1934). The systematic description of the liberal idea of claims against the state was initiated by Georg Jellinek, *System der subjectiven öfentlichen Rechte* (Tübingen, 1892).

66 The so-called "Justizstaat according to Otto Bähr, *Der Rechtsstaat* (1864). Also cf. Jellinek, *Verwaltungsrecht* 299.

67 Section 134 of the Weimar Constitution.

In criminal law the idea of the liberal rule of law leads towards viewing the strategic standardization primarily from the aspect of certainty of individual freedom and the calculability of political interventions. The textbook of criminal law becomes, so to speak, the "Magna Carta" of the criminal.[68] The phrase of the positivistic legislative state (the state in which the legislation is supreme) "nulla poena sine lege", which only occurred in the individualistic, enlightened thinking of the 18th century, takes the place of the principle of justice "nulla crimen sine poena".[69] The crime is defined as an act threatened with punishment, that is, the punishment no longer occurs as a consequence of the crime, rather the crime becomes a product of thought of the threat of punishment. The realization of the just punishment is dissolved in the claims for the execution of punishment of the state and consequently relativized thereby.

4. The demise of the state subject to law in the German Third Reich

4.1 The building, edification and deification of the nation

Central to the basic tenets of the state subject to law in the legal philosophy of National Socialism during the German Third Reich was its ideal of building, edifying and deifying the concept of the German nation. The influential German thinker of the Nazi State, Gericke, expressed the desire to approach the reality of law and the state from the perspective that "(t)he individual person is viewed from the side of the community of people and seen in the frame of the building-up of the nation … On his own, removed from the association, he is only a splinter."[70] The author Kier formulated the role of the individual in building the nation as "the task of every member of the nation to enable the form of organization of his national community in every way to fulfill these tasks."[71] Not only is

68 An expression by Von Liszt.

69 Cf. H. Henkel, *Srafrichter und Gesetz im neuen Staat* (Hamburg, 1934).

70 "Rasse und Recht" *Nationalsozialistisches Handbuch für Recht und Gesetzgebung* (München, 1935) 14: "Der einzelne Mensch ist von seiten des Gesamtvolke aus gesehen und im Rahmen des Volksaufbaues betrachtet nur ein Teil einer organischen Lebenszelle. Er ist für sich, aus dem Zuzammenhang genommen, nur ein Splinter."

71 "Volk, Rasse und Staat", in *Nationalsozialistisches Handbuch für Recht und Gesetzgebung* (München, 1935), 19: "Aufgabe jedes Volksangehörigen ist es, die Organisationsform seiner völkischen Gemeinschaft in jeder Weise zu befähigen, diese Aufgaben zu erfüllen." Cf. also H. St. Chamberlain, *Grundlagen des 19. Jahrhunderts* (München, 1928); L.J. Clausz, *Rasse und Seele* (München, 1934); Walter Darré, *Neuadel aus Blut und Boden* (München, 1934); Von Eickstedt, *Rassenkunde und Rassengeschichte der Menschheit* (Stuttgart, 1934), *Die rassischen Grundlagen des deutschen Volkstums* (Köln, 1934); W. Frick, *Bevölkerungs- und Rassenpolitik*

the building of the German nation a priority without precedent, but the nation is seen as a transpersonal entity preceding the state and making law and the enjoyment of rights possible and meaningful.[72] Gericke points out, though, that the family is not organizationally involved in the building up of the state. The state is the organization of the willpowers of a people: "The state, however, must care for the family because it is the corner-stone of the people. The family builds up the nation and secures its perpetual existence through life in these organic units."[73] Kier observes that National Socialism attributes intrinsic value to nationhood as such and views the state as an organization serving nationhood.[74] According to him National Socialism stands in antithesis to fascism which does not ascribe an own value to the nation as such.[75] The Nazi lawyer, Otto Dietrich, describes the good of the nation as the "highest synthesis of all material and immaterial goods of the nation."[76] This implies that the individual is not only bound to the totality of the nation, but is also absorbed into the nation.[77] Only from the exalted position of the nation can the state be established because it presupposes a "certain feeling of solidarity, grounded in an identity of character …".[78]

(Langensalza, 1933); A. von Gercke & R. Kummer, *Rasse in Schriftum* (Berlin, 1934); Gobineau, *Essai sur l'inégalité de races humaines* (1854); W Grotsz, *Rassenpolitische Erziehung* (Berlin, 1934); Günther, *Rassenkundliche Werke* (1929, 1930, 1933); A. Hitler, *Reden* (1934); Kuhlenbeck, *Entwicklungsgeschichte des römischen Rechts* (München, 1910); T. von Leers, *Geschichte auf rassischer Grundlage* (Leipzig, 1934); H. Nicolai, *Rassengesetzliche Rechtslehre* (München, 1932), *Grundlagen der kommenden Verfassung* (Berlin, 1931), *Rasse und Recht* (Berlin, 1933); A. Rosenberg, *Der Mythus des 20. Jahrhunderts* (München, 1934), *Blut und Ehre* (München, 1934), *Das Wesensgefüge des Nationalsozialismus* (München, 1934); Ehemann, *Die Rasse in den Geisteswissenschaften* (München, 1928/31).

72 In his *Ideen zur Philosophie der Geschichte der Menschheit* (1784) the German philosopher Herder, from an idealist-universalist point of view, called attention to the individual totalities of "the people" and "the nation". Fichte and Schelling also nurtured the idea of the individual national community of the people as an all-encompassing supra-individual community (cf. Hommes, *Major Trends* 188).

73 Supra, 15: "Der Staat hat aber für die Familie zu sorgen, da sie Baustein des Volkes ist."

74 Supra 19: "Sie stellt eine bestimmte Rangordnung menschlicher Gemeinschaftswerte auf. Den höchsten Rang in ihr nimmt das Volkstum ein."

75 Ibid.: "Der Nationalsozialismus steht hier in einem Gegensatz zum Faschismus, der dem Volk als folchem keinen eigenen Wert beimisst, …"

76 *Die philosophischen Grundlagen des Nationalsozialismus* (Breslau, 1934), 27.

77 Ibid., 28-30.

78 Ibid., 37ff.

4.2 The nation-ideal as a contra-value

The blueprint of the National Socialist criticism of the previous government in Germany, in its quest to justify the new ideals of the German nation, was Adolph Hitler's *Mein Kampf* (My Struggle). To Hitler Austria affords a very clear and striking example of how easy it is for tyranny to hide its face under a cloak of what is called "legality". The legal exercise of power in the Habsburg State was based, at that stage, on the anti-German attitude of the parliament with its non-German majorities, and on the dynastic House, which was also hostile to the German element.[79] The strength of the previous unjust dispensation rested on three pillars, according to Nazi propaganda: the monarchal form of government, the civil service, and the army: "The Revolution of 1918 abolished the form of government, dissolved the army and abandoned the civil service to the corruption of party politics. Thus the essential supports of what is called the Authority of the State were shattered. This authority nearly always depends on three elements, which are the essential foundations of all authority."[80] The motivation and edification of the nation as a transpersonal political and legal entity, are primarily justified as contra-values to the legacy of the Weimar Republic and its alleged fundamentally unjust impact on the German people. The primary point of criticism by Nazi philosophers against the previous political dispensation was that the state and the nation had existed as opponents from 1918 to 1933.[81] The rectification of past injustices, the broadening of democracy and the deepening of a democratic culture in line with the needs and values of the nation were taken to represent contra-values to the injustices of the past. The ideal of nation-building represents a total transformation towards attaining justice: "In its political ideology, national socialism first took these facts into consideration and we are correct in speaking of a national-socialistic revolution as the transformation, as the political life which it takes upon itself results from a new meaning of life. Human acts

79 *Mein Kampf* (München, 1937), 105: "Indem die Habsburger versuchen, mit allen mitteln dem Deutschtum auf den Leib zu rücken, griff diese Partei das 'erhabene' herrscherhaus selber, und zwar rücksichtslos an."

80 Ibid., 579: "Die Revolution des Jahres 1918 hat die Staatsform beseitigt, das Heer zersetzt und den Verwaltungskörper der Parteikorruption ausgeliefert. Damit sind aber die wesentlichsten Stützen einer sogenannten Staatsautorität zerschlagen worden."

81 Alfred Rosenberg, *Der Mythus des 20. Jahrhunderts* (München, 1936), 526: " Staat und Volk standen sich von 1918 bis 1933 also offen als Gegner, oft als Todfeinde gegenüber. Wie dieser innere Konflikt überwunden werden wird, so wird sich Deutschlands Schicksal auch nach ausen gestalten."

are still determined by this conscious or unconscious meaningfulness, which guides the individual or a community of people. A true revolution is imminent particularly then when the new powers which take place as a result of a radical change and which creatively intervene in the life of a state and nation are filled with a new disposition and want to arrange the life of the community according to this characteristic under a new system."[82] The Weimar interim empire bestowed parliamentary democracy upon the German people on the basis of a questionable ideology, according to the Nazi line of thinking.[83] This led to the complete confusion of the nation, "as however well worked out the democratic-parliamentary power arrangement was, it represented the height of complete irresponsibility."[84] The same author adds: "The officials were irresponsible, the responsibility of the government was highly questionable and practically one could never call the authorities to account as they remained invisible behind a skilful net."[85] All of this destroyed the "moral foundations of nationhood."[86] In contrast with this, the new state based on the idea of the German nation "must and will, in the first place, take moral principles into account and thus it pleads for honor, discipline, efficiency and responsibility."[87] The proponents of National Socialism felt that they would bring about a true democracy, something which "parliamentary democracy could not realize on account of its false premises", namely "the greatest participation by the nation in its fate and

82 Kier supra 18: "In seiner Staatsideologie hat der nationalsozialismus als erster diesen Tatsachen Rechnung getragen und wir sprechen mit Recht von einer nationalsozialistischen Revolution, da die Umformung, der das staatliche Leben von ihm unterzogen wird, aus einer neuen Lebenssinngebung erfolgt. Das menschliche handeln ist stets durch die bewusste oder unbewusste Sinngebung bestimmt, die den Einzelmenschen oder eine Gemeinschaft von Menschen leitet. Eine echte Revolution liegt vor allem dann vor, wenn die neuen Kräfte, die infolge eines Umbruches an die Stelle kommen, welche gestaltend in das Leben eines Staates und Volkes eingreifen, von einem neuen Sinn erfüllt sind und das Leben der Gemeinschaft under diesem Gesichtspunkt nach einer neuen Ordnung regeln wollen."

83 Ibid., 22: "Das Weimarer Zwischenreich hatte dem deutschen Volke auf Grund einer dem deutschen Wesen fremden Ideologie die parlementarsiche Demokratie beschert."

84 Ibid., : "Diese führte zu einer vollkommenen Volkszerrüttung, denn so ausgeklügelt die demokratisch-parlementarische herrschaftsordnung auch war, sie stellte die höchste Blüte vollkommener Verantwortungslosigkeit dar."

85 Ibid: "Die Abgeordneten waren unverantwortlich, die Verantwortung der Regierung war eine höchst fragwürdige und praktisch konnte man die wirklich Massgeblichen nie zur Rechenschaft ziehen, da sie hinter einem kunstvollen Netz unsichbar blieben."

86 Ibid: "… zerstörte damit die sittlichen Grundlagen der Volksgemeinschaft."

87 Ibid.: "Im Gegensatz dazu muss und will der vom Rassengedanken getragene Staat in erster Linie sittlichen Grundsätzen tragen. Und so tritt er ein für Ehre, Zucht, Leistung und Verantwortung."

the creation of its fate"[88]: "The participation of the nation in its fate must become so strong that the whole nation, including the last fellow German far out in the world, participates in the fate of his nation, becomes aware thereof that he is an inseparable link of a double unity: A link in the service of generations and a link of the living national community. Only then will the German nation have turned into a truly living nation."[89] Commenting upon the role of the state under Nazi rule, Rosenberg observed that the state was now no independent entity: it was an instrument to serve the nation – like the church, law, arts an science: "The forms of the state change and laws come and go. From this it follows that the nation is the first and the last, to which everything else is subject."[90] This also implies, to Rosenberg, that the "authority of the nation stands higher than the authority of the state – who does not confess this, is an enemy of the nation."[91]. Rosenberg adds that the rebirth of the new manifestation of the idea of the nation in National Socialism places the nation above the state and its forms. It declares protection of the nation to

88 Ibid., 24: "… die tiefste Anteilnahme des Volkes an seinem Schiksal und seiner Schicksalsgestaltung."

89 Ibid: "Die Anteilnahme des Volkes an seinem Schicksal muss so stark werden, dass das ganze Volk einschliesslich des letzten Volksgenossen weit draussen in der Welt seines Volkes Schicksal mitlebt, sich bewusst wird, ein unlösbares Glied einer doppelten Einheit zu sein: Glied in der Reihe der Geschlechter und Glied der lebenden Volksgemeinschaft. Dann esrt wird aus dem deutschen Volk ein wahrhaft lebendiges Volk geworden sein." The German historical school of law was mainly responsible for departing from the conception of law as an objective organism of human freedom and rejecting the notion of the law as an "external aggregat of random decisions for whose reflection the legislator must thank its origin – like the language of a people, it is regarded as the product of history completely internally: "Wir gehen von der heutzutage herrschenden Auffassung des Rechts als eines objectiven Organismus der menschlichen Freiheit aus. Es ist gegenwärtig kein Streit mehr darüber, dasz das Recht nicht, wie man es früher betrachtete, ein äuserliches Aggregat willkürlicher Bestimmungen ist, welches der Reflexion der Gesetzgeber seinen Urpsung verdankt, sondern gleich der Sprache eines Volkes ein innerlich abgeschlossenes Produkt der Geschichte ist" (R. Von Jhering, *Geist des römischen Rechts*, vol. 1 (1898), 25).

90 Rosenberg, supra 526: "Der Staat ist uns heute kein selbständiger Götze mehr, vor dem alle im Staube zu liegen hätten; der Staat ist nicht einmal ein Zweck, sondern er ist auch nur ein Mittel zur Volkserhaltung. Ein Mittel unter anderen, wie es Kirche, Recht, Kunst und Wissenschaft ebenso sein sollten. Staatsformen ändern sich und Staatsgesetze vergehen, das Volk bleibt. Daraus folgt allein schon, dass die Nation das Erste und Letzte ist, dem sich alles andere zu unterwerfen hat. Daraus folgt aber auch, dass es keine Staats-, sondern nur Volksanwälte geben darf."

91 Rosenberg (534) concedes that this implies a form of socialism, meaning "the subjection of the individual to the will of the collectivity, whether it is called class, church, state or nation" (my translation AR).

be of more importance than protecting a religious confession, a class, a monarchy or the Republic; it regards treachery to the nation as a greater crime than treason against the state.[92] In the last resort law is what is useful to the people and government in the exercise of the highest authority according to the general will.

4.3 The state to serve the nation

In the political and legal philosophy of National Socialism the nation occupies a central place in the hierarchy of human communal values: "National Socialism attributes intrinsic value to nationhood as such and views the state as an organization serving nationhood." It is added: "Next the German state must serve the purification, maintenance and extension of the nation and communal fate of the German nation."[93] In this respect National Socialism stands in antithesis to Fascism, which does not ascribe an own value to the nation as such.[94] The same author enumerates some of the most important implications of the state serving the nation: "As National Socialism views the state as an organization serving nationhood, the inference is made that the powers supporting the state and dealing for it must, according to their nature, be competent for this purpose. Consequently it is obvious that in a state supported by the national socialistic spirit, both of whose chief responsible bodies, the party and the arm, only recruit themselves with members of the nation supporting the state or with related national groups. In the same way it is necessary in such a state that the people acting for the state, thus the officials, are collectively members of the nation supporting the state or belong to a national group related to it."[95] This necessity was addressed by the Nazi government with the Act on the Restoration of Professional Officialdom

92 Ibid., 524.

93 Kier supra 19: "Der deutsche Staat hat nach ihr der Läuterung, Erhaltung und Erweiterung der Art und die Schicksalgemeinschaft des deutschen Volkes zu dienen."

94 Ibid.

95 Ibid., 21: "Da der Nationalsozialismus im Staate eine dem Volkstum dienende Organisation sieht, so ergibt sich daraus die Folgerung, dass die den Staat tragenden und für ihn handelnden Kräfte wesensmässig hierzu befähigt sein müssen. Es ist daher selbstverständlich, dass in einem vom nationalsozialistischen Geiste getragenen Staat deren beide Hauptträger, die Partei und die Armee, sich ausschliesslich aus Angehörigen des den Staat tragenden Volkes oder der mit diesem stammverwandten Volksgruppen rekrutiert. Ebenso ist es in einem solchen Staate notwendig, dass die für den Staat handelnden Personen, also die Beampten, sämtliche Angehörige des staatstragenden Volkes sind oder einer mit diesem stammverwandten Volksgruppe angehören."

of 7 April 1933.[96] Probably the most important priority envisaged by the German authorities was the furthering of the ideal to give the "German mother-nation" a political form "according to its inherent nature."[97] The state, in serving the nation, must support those ideals which are sacred to the nation.[98] This also culminates in the awarding and recognition of rights: "A just legal order, which carries its moral justification in itself, only exists where a certain measure of duties is confronted with a certain measure of rights and vice versa. The liberal state sinned grossly against this perception. It granted rights although the person endowed with them did not take over any duties, and it imposed duties without guaranteeing rights to the person so burdened. What is to be regarded as a balance to rights and obligations varies according to culture and economy in the perpetual change of times. The decision as to when this balance prevails must remain in the hands of the political government; as this decision is purely instinctive and not rationally comprehensible, it is the greatest right and the most holy duty in the government. This primarily leads to the perception that the government of the nation must ensue from people similar in nature and must be deeply bound to the nation, because only this … bond with the nation alone certainly confers that instinct which is necessary to recognize when this balance between rights and obligations occurs."[99] The state, sustained by the ideals of the nation, has corresponding obligations towards the nation: "It wants to obtain this by propaganda and training, by the performance of honors to heroes by highlighting works of an appropriate nature and by the encouragement of kindred artists. By schematic politics in the press and by taking the service of all those who are publicly active. By honoring and heroizing people of pure German impression with historical achievements in great festivals encompassing the entire nation…"[100] The fundamental duty of

96 Gesetz zur Wiederherstellung des Berufsbeamtentums.

97 One of the important steps taken by the Nazi government was to ensure that persons obtain citizenship whose racial heritage offered the guarantee that those concerned were included in the racial image of the nation supporting the state. This served as justification for practising extended programmes of reversed discrimination in the public sphere.

98 Ibid., 22: "Er will dem deutschen Muttervolke die seinem angeborenen Wesen gemäsze staatliche Form geben."

99 Ibid., 22-23.

100 Ibid., 23: "Eine gerechte Rechtsordnung, die ihre sittliche Rechtfertigung in sich selbst trägt, liegt nur dort vor, wo ein bestimmtes Masz von Pflichten einem bestimmten Mass von Rechten gegenübersteht und umgekehrt. Gegen diese Erkenntniss hat der liberalistische Staat auf das schwerste gesündigt. Er teilte Rechte zu, ohne dasz der damit Beteilte Pflichten übernahm, und er erlegte Pflichten auf,

the state sustained by the ideals of the nation is to "further duty to tighten the connection of all with each other and to lead them to the … nation."[101]

To Hitler the nation was primarily responsible for the advance in cultural progress. Only then can the state protect the entity that is responsible for such progress.[102] The fundamental principle, to him, was that a state is not an end in itself but the means to an end: "It is the preliminary condition under which alone a higher form of human civilization can be developed, but it is not the source of such development."[103] Furthermore the state is an effective weapon in the service of the great struggle for existence, "a weapon which everyone must adopt, not because it is the main expression of our common will to exist."[104] The "people's state" is but a form, filled with the contents, values and ideals of the nation.[105] This has vast

ohne dem damit Beschwerten Recte zu gewähren." The same author observes that just as an accomplished feat creates claims so too can a right be forfeited on account of failure in the feat. Such a moral attitude of the entire nation corresponds with the clear responsibility which a state built up reveals. This alone creates the requirement that the authority of every leader "is one which is gladly recognized."

101 Ibid., 24: "Dies will er erzielen durch Propaganda und Erziehung, durch Pflege der Heldenehrung, durch herausstellen artgemäszer Kunstwerke und Förderung artverbundener Künstler. Durch planvolle Pressepolitik und durch Inpflichtnahme aller, die öffentlich tätig sind."

102 Ibid., 25. He adds that from a National Socialistic point of view it was the duty of the state to take every measure to free the German nation again from the foreign influences in the nation (ibid.).

103 *Mein Kampf*, 432.

104 *Mein Kampf*, 431: "Die grundsätzliche Erkenntniss ist dann die, dasz der Staat keinen Zweck, sondern ein Mittel darstellt. Er ist wohl die Voraussetzung zur Bildung einer höheren menschlichen Kultur, allein nich die Ursache derselben." Also cf. his remarks at 433: "Der Staat ist ein Mittel zum Zweck. Sein Zweck liegt in der Erhaltung und Förderung einer Gemeinschaft physisch und seelich gleichartiger Lebewesen."

105 Ibid., 334. Hitler adds: "Es ist, wie gesagt, natürlich leichter, in der Staatsautorität nur den formalen Mechanismus einer Organisation zu erblicken als die souverän Verkörperung des Selbserhaltungstriebes eines Volketums auf der Erde." The shift towards the emphasis of the human will and orientation towards irrationalism in jurisprudence was mainly accomplished by the idealism of Hegel and the German thinkers of the second half of the 19th century. In his *Grundlinien* 28 Hegel explicitly observed that the foundation of law is actually the intellect, and its "closer position and point of exit" the will, which is free, so that freedom constitutes its substance and purpose and the legal system is the realm of realised freedom, the world of the intellect procreated by itself, "like a second nature" ("Der Boden des Rechts ist überhaupt das Geistige, und seine nähare Stelle und Ausgangspunkt der Wille, welcher frei ist, so dasz die Freiheit seine Substanz und Bestimmung ausmacht, und das Rechtssystem das Reich der verwirklichten Freiheit, die Welt des Geistes aus ihm selbst hervorgebracht, als eine zweite Natur, ist." Von Jhering had reservations about Hegel placing the substance of law in the will in the objective as well as the subjective sense. The incorrectness of this view, to Savigny, was that it allows the concept of law to develop into that of the will. The law could then be defined, in terms of Hegel's

implications for the state and the nation. The principal duty of the Nazi state was to educate and promote "the existence of those who are the material out of which the state is formed." This means that "the state must also adapt its own organization to meet the demands of this task."[106] The "people's state" must forbid the custom of taking advice on certain political problems – economics, for instance – from persons who do not promote the ideals of the nation.[107] Furthermore, the state has the duty to politically construct the nation and bring it into harmony with "those laws to which the nation already owes its greatness in the economic and cultural spheres."[108] To accomplish this task, the state must reflect a certain level of militancy: "Therefore whoever really and seriously desires that the idea of the People's State should triumph must realize that this triumph can be assured only through a militant movement and that this triumph movement must ground its strength only on the granite firmness of an impregnable and firmly coherent program."[109]

The people's state serving the nation as a transpersonal entity, steering the law, the legal system and committed to serving the nation, says Hitler, "will never be created by the desire for compromise inherent in a patriotic coalition, but only by the iron will of a single movement which has

theory, as a delimited piece of "will substance". Jhering strove to protect the integrity and autonomy of private law against the intrusion of public law based on human will, by stating that the legal feasibility and securing of this free application of purpose adapting itself entirely to the individual purpose norm, is the sense of private law (" Während Kant und seine Schule über die äuszere Erscheinungsform des Rechts: den Zwang nicht hinausgekommen sind, hat Hegel – und sein Einflusz ist für die neuere positive Jurisprudenz, bewuszt oder unbewuszt ein maszgebender geworden – die Substanz des Rechts sowohl im objectiven als subjectiven Sinn in den Willen gesetzt … Das Irrige dieser Ansicht besteht darin, dasz sie den Begriff des subjectiven Rechts in dem des Willens aufgehen läszt. Endzweck desselben ist für sie das Wollen, und das Recht würde ihr zufolge zu definiren sein als ein abgegrentztes Stück Willensubstanz … In Wirklichkeit ist aber das Verhältnisz zum Recht ein gänzlich anderes … Die rechtliche Ermöglichung und sicherung dieser freien, gänzlich der individuellen Zwecksetzung sich anpassenden Zweckverwendung ist der Sinn der privatrechtlichen Autonomie" (*Geist des römischen Rechts* III 328sqq).

106 Hitler *supra* 334.: "Da der Staat an sich nur eine Form darstelt, ist es auch sehr schwer, Menschen auf diese hin zu erziehen oder gar zu verplichten. Eine Form kann zu leicht zerbrechen. Einen klaren Inhalt aber besitzt – wie wir sahen – der Begriff 'Staat' heute nicht."

107 Cf. *ibid*., 492-3.

108 *Ibid*., 502.

109 *Ibid*: "Damit wird die staatliche Verfassung der Nation in übereinstimmung gebracht mit jenem Gesetz, dem sie schon auf kulturellem und wirtschaflichem Gebiete ihre Grösze verdankt."

successfully come through in the struggle with all the others."[110] The authority and power of the state to compel obedience to its commands, says Hitler, is "unequivocally … entitled to demand respect and protection for its authority only when such authority is administered in accordance with the interests of the nation, or at least not in a manner detrimental to those interests."[111]

Responding to the issue of whether law is superior to politics, or whether politics is higher than law, "in other words whether morality or power has precedence", Rosenberg answers that generally speaking, governance has succeeded over constitutions. However, this problem is a false dilemma: men have treated both concepts as absolute entities.[112] They forgot that both – law and politics – are not absolute entities but the products of man; both ideas have to be evaluated from the perspective of the nation: "Law is not contrary to anything if it is understood as "our law", when it serves and does not rule the total structure of the nation."[113] Roman law is the product of the Roman people, therefore it cannot be copied by the German people.[114] Roman law produced the perspective that individual capitalism

110 *Ibid*: "Wer also den Sieg einer völkischen Weltanschauung wirklich und ernstlich wünscht, der muss nicht nur erkennen, dasz zur Erringung eines solchen Erfolges erstens nur eine kampffähige Bewegung geeignet ist, sondern dass zweitens eine solche Bewegung selbst nur standhalten wird unter Zugrundelegung einer unerschütterlichen Sicherheit und Festigkeit ihres Programms."

111 *Ibid*., 578: "Man vergesse niemals, dass alles wirklich Grosse auf dieser Welt nicht erkämpft wurde von Koalitionen, sondern dass es stets der Erfolg eines einzelnen Siegers war."

112 *Ibid*., 104. Even legality is subject to the interests of the nation and its existence: "Im allgemeinen aber soll nie vergessen werden, dasz nicht die Erhaltung eines Staates oder gar die einer Regierung höchster Zweck des Daseins der Menschen ist, sondern die Bewahrung ihrer Art. Ist aber einmal diese selber in Gefahr, unterdrückt oder gar beseitigt zu werden, dann spielt die Frage der Legalität nur mehr eine untergeordnete Rolle. Es mag dann sein, dass sich die herrschende Macht tausendmal sogenannter 'legaler' Mittel in ihrem Vorgehen bedient, so ist dennoch der Selbsterhaltungstrieb der Untrdrückten immer die erhabenste Rechtfertigung für ihren Kampf mit allen Waffen."

113 *Supra* 571: "Man hat bisher beide Begriffe als zwei für sich bestehende, fast absolute Einheiten betrachtet und dann darüber je nach Charakter und Temparament seine Urteile über ihr wünschenswertes Verhältnis zueinander abgegeben."

114 *Ibid*: "Dagegen hatte man vergessen, dass beides – Recht und Politik – nicht absolute Wesenheiten, sondern nur bestimmte Auswirkungen bestimmt gearteter Menschen sind. Beide Ideen beziehen sich auch vom Standpunkt der Vorherrschaft des Volklichen auf einen über beiden stehenden Grundsatz, der sie sowohl in innen- wie auszenstaatlichen Verhältnissen zu leiten hat und je nach Verwendbarkeit im Dienst eines höheren in seinen Aufbau des Lebens eingliedert." The irrational decisions of the human will to make legal decisions gained considerable ground in the latter part of the 19th century and the first two decades of the 20th century. Stammler observed that positive law is the qualified legal intention depending upon the human will. To

is a holy institution.[115] Judges have the primary duty to protect the honour of the nation and politics have to carry this through.[116]

5. The rule of law and lessons from the German experience

Mekkes's analysis of the broad trends in the historical development of the deterioration of the principle of the rule of law in 17th and 18th century enlightenment thinking and 19th and 20th century positivistic jurisprudence, to a large extent anticipated the broad trend of subjecting the state's legal mechanisms of law formation and the integrity of both public and private law to the ideological whims and fancies of the will of the German nation. Implicit in Mekkes's appeal for a constant material (normative) criterion for identifying the function and role of the state in the legal system and distinguishing the normative structural principles of the functioning of the state from those of other social entities, is the classical Dutch principle of sovereignty in own sphere of the state as a legal entity. From the perspective of the principle of sovereignty in own sphere, Mekkes endeavours to protect the constant legal integrity of the state as a social entity in spite of the variation in the forms in which the state manifests itself.[117] The "internal" sovereignty of the state, from Mekkes's rule of law analysis, fulfills two important functions: firstly, in delimiting the state's functions in its relationships with other non-state entities; and secondly, it

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him the essence of law lies therein that it is a specific kind of human intention: the "invulnerable, binding, arbitrary intention" (*Theorie der Rechtswissenschaft*, 75: "'Positives' Recht ist das bedingte rechtliche Wollen." He adds that law is an abstract phenomenon and flows from man's consciousness: "Denn auch das Recht ist ja doch nur ein Bewusztseinsinhalt", based on man's will: "Das Wesen des Rechtes liegt also darin, dasz es eine bestimmte Art von Menschlihem Wollen ist" (43); "das unverletzbar selbstherrlich verbindende Wollen" (69). Isay, *Rechtsnorm und Entscheidung* 25sqq. emphasizes human decision-making as the essence of law: "Die Rechtsnorm ist etwas Fertiges, Vergangenes, Unbewegliches, Statisches. Die Entscheidung dagegen ist ein dynamischer, ein Erlebnisvorgang, sie ist also Leben, Werden, Bewegung." Husserl, *Recht und Welt*, 77 found the essence of law in "intention at work": "Das Recht ist Willenswerk: Ein willentlich gewirktes Etwas, das selbst wirkender Wille ist. Über die wesensstruktur des Rechtswillens ist hier folgendes anzuemerken: Das Recht – das wir der 'Rechtsordnung' gleichsetzen – ist Wille der Rechtsgemeinschaft."

115 Ibid., 572.

116 Ibid: "In der römischen Rechtsauffassung liegt zugleich die heiligerklärung des individulistischen Kapitalismus."

117 Ibid, 574: "Des Richters erste Pflicht ist, die Volksehre durch Spruch vor jedem Angriff zu sicheren und die Politik hat die Pflicht, enien solchen Spruch restlos durchzuführen." This type of thing was considerably enhanced by pronouncements of Hegel. He based the positive element in law on the national character of the people: "Das Recht is positiv überhaupt a) durch die Form, in einem Staate Gültigkeit zu

provides the principles leading the operational functions of the state in its legal formation generally.

In view of the subjection of the state to the ideology of the nation in the German Third Reich, it may legitimately be asked whether the rule of law attached to the principle of the sovereignty in own sphere of the state can prevent the abuses of law and justice as was manifested in the jurisprudence of the Third Reich. The vagueness in the concept of sovereignty in own sphere does not always make it the useful instrument that proponents of the cosmologic idea of law proposed it to be. The Dutch author Goudzwaart[118] expressed the fundamental concern that the principle of sovereignty in own sphere as such could easily create misunderstanding and wrong impressions about the applicability in assuring the legal integrity of the state's role in the legal order. His first reservation about this principle is that it could easily be converted from a "norm-directed" principle to one primarily satisfying demands placed on the state; secondly, converting this principle from a dynamic one to one in which static barriers are created between the state and non-state entities, and thirdly that this principle is interpreted primarily from the authority of the state to society as a whole – in other words that society as a whole is to be protected against the state, but not vice versa. Goudzwaart's interpretation of the principle of sovereignty in own sphere, then, entails a norm-directed (oriented) principle, in which the dynamic calling of the government and society is mutually expressed, thereby rejecting the notion that the principle is a static rule which demands one-sided obedience of governmental authority in all relationships of authority in society. In a later publication[119], Goudzwaart remarked that it is not tenable and at least a one-sided approach to focus on the omnipotent state threatening the other social entities in society. The materialization and commercialization

haben, und diese gesetzliche Autorität ist das Prinzip für die Kenntnis desselben, die positive Rechtswissenschaft. b) Dem Inhalte nach erhält dies Recht ein positives Element *?*) durch den besonderen Nationalcharakter eines Volkes … *?*) durch die Notwendigkeit, dasz ein System eines gesetzlichen Rechts die Anwendung des allgemeinen Begriffes auf die besondere von auszen sich gebende Beschaffenheit der Gegenstände und Falle enthalten musz … *?*) durch die für die Entscheidung in der Wirklichkeit erforderlichen letzten Bestimmungen" (*Grundlinien* 21sq).

118 For a more elaborate reflection on this principle and its implications see H.J. van Eikema Hommes, *Major Trends in the History of Legal Philosophy*, 392-399, and the sources cited there.

119 See his *Grote taak voor kleine mensen* (s'Gravenhage: Antirevolutionaire Partij-Stichting, 1969); "Christelijke politiek en het principe van de 'soevereiniteit in eigen kring'", in *Anti-Revolutionaire Staatkunde*, vol. 47 (1977).

of society, for example, says Goudzwaart, operates in just the opposite direction, thereby fundamentally undermining the functions and duties of the state, in similar fashion to its impact upon the internal liberties of families and other spheres with regard to education for example. The German experience provides clear examples of the implications of the assault on the state and the abuse of the state's law making and maintaining functions by the nation. The mere statement of the principle of sovereignty in own sphere does not provide adequate mechanisms for protecting the state's legal integrity.

Would a more extensive formulation of social rights have prevented the state from external abuse by the ideological assaults of the nation? By the early years of the 1930s the formal principles of the rule of law were already largely integrated into the German legal system. The rule of law concept manifested itself mainly in the form of protective mechanisms to ensure the maintenance of the classical and the basic liberal rights of freedom liberty and equality. This was insufficient to protect the state against ideological abuse by the nation. The development in human rights theory towards promoting basic social rights, subjecting the state to the burdens of positive duties and obligations towards society, as well as the development of the idea of the economically "caring state" in providing social security, housing, health care and subsidy policies, empowered the nation even further in the field of economically related issues. W.H. Velema[120] pointed out how, in the Netherlands for example, government intervention in economically related matters has increased rapidly since the late 1950s and early 1960s. The expanding involvement of the state in the areas of education, welfare, culture, health care and housing were largely taken on board by expanding the state's providing in the economic needs of society, while the demands of an importunate populace increase accordingly. These phenomena induced A. Rouvoet[121] to observe that the materially caring state and the consumptive society accompanying it manifested themselves as two sides to the same coin.

In contradistinction to the basic human rights in terms of the liberties of religion, education, expression, meeting and so on, primarily aimed at the protection of the individual against authoritarianism by the state, the social basic rights, such as the right to legal support, social security and

120 "Twee maal publieke gerechtigheid", in *Beweging*, vol. 55, no. 4 (August 1991).
121 *Het verval van de verzorgingstaat* , 2 vols. (Appeldoorn, Willem de Zwijgerstichting, 1987).

education, for example, demand more active government involvement in its care for society and the establishment of material welfare for its citizens. In many areas of life the responsibilities of society (or the nation) were taken over by the state and aspects pertaining to the welfare of the individual were left to the state.

Although the formulation of the principle of sovereignty in own sphere as a defensive mechanism for protection against by other social entities is a sound one, it does not extend far enough to bolster the state's legal integrity in providing a secure legal order for realizing and reflecting the balanced diversity of individual and social rights and norms in public and private law. A more aggressive formulation of the state's duty in maintaining the coherence of human rights and legal norms in their mutual relatedness, is needed to prevent the abstract universality of the nation from manifesting itself as the concrete universal state against which human rights (for example minority and protective cultural rights) and their enforcement merely act as small enclaves in a hostile sea of national materialistic demands. For this very reason the muddled formulation of the concept of the nation and its ownership of strategic resources in the South African Constitution[122] and other laws breeds concern about the state's ability to transcend its subjection to popular demand. With regard to property, section 25 (2) provides for the expropriation of property for public purposes or in the public interest, and subject to compensation. Subsection (3) stipulates that the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including the current use of the property; the history of the acquisition and the use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation. For the purpose of this section, subsection (4) stipulates that the public interest includes the nation's commitment to land reform, and the bringing about of equitable access to all South Africa's natural resources. Furthermore subsection (4) (b) states that property is not limited to land. Subsection (5) then places the burden upon the state to take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. The meaning and status of the

122 A. Rouvoet, *Reformatorische staatsvisie. De RPF en het ambt van het overheid* (Nunspeet: Marnix van St. Aldegonde Stichting, 1992), 174.

nebulous concept of the nation opens the door to substantial interference by the state in executing its functions in satisfying the demands of the nation. Even more concerning is the subjection of the state to the aspirations of the undefined concept of the nation in section 2 of the legislation dealing with the Mineral and Petroleum Resources of the Republic of South Africa. The muddled formulation in linking state, people and nation creates the impression that the foremost intention in the drafting of this act was to safeguard the populist demands on the state. Section 2 (a) states that the objective of the act is inter alia to recognize the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic. Subsection 2 (b) then inexplicably limits the state's sovereignty by formulating the second objective of the act in terms of giving "effect to the principle of the State's custodianship of the nation's mineral and petroleum" resources, to which subsection (c) adds the additional objective to "promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa." Paragraph 2 (d) adds that another objective of the act is to expand substantially and meaningfully expand the opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit "from the exploitation of the nation's mineral and petroleum resources." Subsection 2 (h), with reference to section 24 of the Constitution, also contains a reference to the nation's ownership of mineral and petroleum resources and to ensure that these are developed in an orderly and ecologically sustainable manner "while promoting justifiable social and economic development." Nowhere in the act (or the Constitution) is the concept of "nation" defined and therefore it has to be accepted that it is used here in the ordinary (extended) sense of the people of South Africa as a whole as it expresses its will through its Parliamentary representatives.[123]

Secondly, constitutional guarantees are needed to ensure that government officials do not merely execute their functions and legal discretions in the carrying out of their state functions as appliers of the abstract notion of the people. Section 195 of the Constitution and its allusion to the principle that public administration must be governed by democratic values, that people's needs must be responded to ((1)(e), and that public administration must be "broadly representative of the South African people" could change a shift in emphasis from the abstract notion of the

123 As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, published under the slogan "One *law* for One *nation*".

will of the legislature to the perceived will of the people. Not the perceived will of the people, but the securing and maintaining of the coherence of the human rights and legal norms in all areas of law has to be advanced more aggressively in order to protect the integrity of the legal status, vocations and liberties of all the individuals and social entities in the legal order. This implies that the legal system, and in particular the courts, have to espouse greater sensitivity in the proclaiming and fostering of the individual's rights, the legal mechanisms of the state and the aspirations of the nation. In the American case of *Roberts v United States Jaycees*[124], judge Brennan expressed himself as follows in furthering the principle of fostering the diversity in the legal system, and the courts acting as a critical buffer between the individual and the power of the state, with particular emphasis on the preservation of political and cultural diversity "and shielding dissident expression from suppression by the majority" in the case of expressive associations: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State".[125] He added the following important considerations for protecting individual rights from unwarranted state interference: "Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[126]

In order to describe the complex nature of the status of both state authority, the social involvement of subjects in the legal order and the individual's participation and functioning in the intricacies of the legal life of society, the philosopher H.G. Stoker uses the term "office".[127] This contains a normative appeal not only to state officials acting as organs of state, but also expresses the role of individuals and non-state social entities in the

124 Also note the principle contained in section 25(4) of the Constitution to the effect that property may be expropriated only in terms of law of general application for a public purpose or in the public interest, which includes "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."
125 468 US 609 (1984).
126 At 471.
127 At 472.

legal order. It reflects a number of aspects, for example that of stewardship, responsibility and reckoning – duties in the public sphere flowing from man's relatedness – in office to that of his fellow man, functioning in a varied social reality with its diverse challenges, possibilities, norms; it implies that there are fundamental limits to man's rights in terms of and demands from his fellow man, and subjects man to fundamental obligations in order to ensure the necessary guarantees for the whole populace to ensure the fulfillment of their vocations, aspirations and motivation – much needed for stimulating their involvement in all sectors of society. Furthermore, it expresses the need for individuating the status, role and involvement of all in the legal system; it implies that every person is an office-bearer in a unique sense; that a firm balance has to be maintained between the administration-in-office of organs of state, for example, and the service-in-office of the subjects entrusted to their governance; it presupposes obeying the multiform of office that coincides with the various life-relationships such as the home, church, state and school; it implies that man's office is basic to the development of the various life relationships and that the office of one life zone limits that of the others; it entails the specialization-in-office in each of the life zones unfolding in its continuing specialization and depth of involvement in society. The multitude of legally secured offices on the basis of which the coherence of human rights and legal norms in their variated complexity can be fostered and protected becomes seriously jeopardized when the abstract concept of the nation becomes the key legal structure determining the legal life of society, acting as a grey blanket of uniformity for social engineering towards expressed and implied political goals of diverse ideological content. Securing the integrity-in-office of both the individual and social interests of the entire population in its multi-faceted dimensionality, demands a very sensitive and reserved approach to expressions like the organic metaphors used in the case of *Ryland v Edros*[128] to the effect that the Constitution is "a 'mirror reflecting the national soul, the identification of the ideals and aspirations of a nation." The potential in using the metaphor of "office" to understand the complex relatedness of the law to man's involvement in reality, was used by L.M. du Plessis[129] in the description of the essence of law in terms of "security-

128 See his *Die Aard en die Rol van die Reg – 'n Wysgerige Besinning* - (Johannesburg: Randse Afrikaanse Universiteit, 1970), 15 & 64-65.

129 [1996] 4 All SA 557 © and *S v Acheson*, 1991 (2) SA 805 (NmHC) at 813 A-B where it was stated: "The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and

in-office". If the law is merely seen to be the formal manifestation of the will of the people and applied as such, and if it is deemed to be a tool for supporting the predilections and presuppositions of lawmakers (including judges), then it becomes a mechanism of suppression and illegitimate undermining of man's role and vocation in reality.

Thirdly, the concept of the social contract as legitimating principle for explaining the existence of the nation, in the political sphere, cannot be used as a legal concept to ensure justice and securing the rights and liberties of all in the legal system. For example, the unwillingness of submitting to the political aspirations of the nation by a part of the populace would then, by implication, mean that they would be without law and legal protection because they did not subscribe to the political aims of the majority of the population (or nation). This further implies that the abidingness of law and its enforceability cannot be explained by relying on the notion of the social contract as a political mechanism. The abidingness of law has to be explained with reference to the binding together of all men's human rights, his subjection to legal norms and the fulfilling of their diverse vocations-in-office. In the early period of the Enlightenment the *vis obligandi* was found in the natural law basis of the social contract. In the legal philosophy of Emmanuel Kant (1724 - 1804) the application of the social contract and natural law ideology reached its zenith by awarding the social contract to be the basis of the legal system, the status of transcendental idea and explaining man's legal status in terms thereof. Kant thus approached the legal system from the angle of co-existing autonomous individuals contracting politically to maintain their sovereignty. This political contract is then used by Kant to delimit the human rights and justify the application of legal norms in the legal order. The result is that the political aspirations of the nation ultimately determine the ambit, extent and enforceability of man's human rights. The basic antinomy in Kant's legal theory, by starting from the sovereignty of rational co-existing individuals establishing a state by means of a social contract, and ultimately subduing the individuals to the sovereignty of the state as the spearhead of the sovereign will of the nation, can largely be explained by his limited view on the covenantal nature of legal formation in the state. Although the idea of a legal covenant is an appealing one for

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the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

explaining the abidingness of law and the harmonious co-ordination of all the individual and social vocations of man's office-commitments in the legal system, the umbilical cord between the political and legal dimensions of social covenanting has to be severed. In explaining the basis of legal formation in the state and the bindingness of law, Stoker alludes to the fact that the whole of human (richly differentiated but interrelated) society demands in principle that the legal order be a legally covenanted order.[130] This order, according to Stoker, does not only guarantee the possibility and security of man's existence in society, but also the legal solidarity in society. This covenantal legal order is essentially an order to secure peace.[131] This means, says Stoker, that the legal order demands a "covenant", because it is an order involving accountable and responsible people; when man is stripped of this covenantal order one person becomes a threat to the other, and arbitrary power (high-handedness) becomes the determining factor, as we sometimes find in the theories of the Enlightenment.

Implicit in sis's discourse on the legal covenant, is the distinction between the legal covenant and other forms of covenantal arrangements, for example the political covenant establishing the state. This distinction provides valuable perspectives on the demarcation between the legal domain of the state and that of the nation. In the final phases of the Enlightenment Jean-Jacques Rousseau, from a humanistic perspective, also resorted to the distinction between the state, the nation and the people in order to solve the conflicting interests between the political and legal interests in society.[132] Rousseau distinguishes between the "general will" and the "will of all".[133] To Rousseau the "general will" of the people reflects the common interest (which also includes private interests) and belongs to the domain of the state. On its part the state, to Rousseau, is sovereign because it is subject to the demands of social justice. The general will considers the common interest, while the former takes private interest into account and is no more than the sum of particular wills. It is not the number of voices that generalizes the will, but the common interest

130 *Die Juridiese Relevansie van Christelike Geregtigheid* (unpublished LL.D thesis, P.U for C.H.E., 1978).
131 *Die Aard en die Rol van die Reg*, 27.
132 Ibid., 28. Not in a secular sense but according to the Biblical meaning.
133 Although Rousseau felt the need for distinguishing between the various social entities in society, he was not able to formulate a normative sociology of law and politics.
134 See A.W.G. Raath, *From Plato to Analytical Positivism. A Study Guide for Philosophy of Law* (Bloemfontein: University of the Free State, 2004), 174.

uniting them. Thus, for Rousseau, the state is sovereign only as far as it is the embodiment of social justice, and the extent to which the sovereignty of the general will can be predicated of any particular state depends on the degree of closeness with which it approximates to this idea. Only the general will is infallible and always right and this means that it is always directed at the common good. If we accept that the state is a moral entity that is capable of will, and if we say that its will – the general will – is always right, and if we distinguish between this will and the will of all considered as the sum of particular will, then the statement that the general will is infallible does not commit us to the statement that every law that is passed by Parliament is necessarily the law that is most conducive to the public advantage.

Irrespective of the voluntaristic and humanistic elements in Rousseau's legal theory, the distinction between political and legal covenants in principle seems to be a useful one. It seems that even Rousseau realized that when one association or party is so strong or numerous that its will inevitably prevails over those of other citizens, the result is not expressive in any way of the general will of the state, but only of a particular will (particular, that is, in relation to the general will of the state), even if it is general in relation to the members of the association or party. Uncoupling of state and nation and delimiting their spheres of operation seems one of the most important prerequisites in the discourse on the rule of law and the subjecting of the state to the requirements of law.

The muddled use of the concept "nation" in South African public law discourse makes the German experience of the relativising of the rule of law a valuable and timely lesson. Another fundamental lesson from the German experience is that the absence of a normative vision of the state and the absolutising of the nation – whether organical (German) or mechanical (South African) - has serious implications for guaranteeing social justice in the public sphere. In this context the idea of office and stewardship (*asher al bayrith*), demanding of public officials that they act as stewards in furthering public and private interests in the public sphere – the message conveyed to the state, the government and all officials making and executing public policy is clearly expressed in the speech of Pharaoh to Joseph: "Thou shalt be over my house and according to thy word shall all my people be ruled" (Genesis 43: 40).