Totalitarianisms and the establishment of objective legal order

Professor **Dan Claudiu DĂNIȘOR**[1]
Assistant professor **Mădălina Cristina DĂNIȘOR**[2]

Abstract

The order of liberal political systems is the result of the dialectic between objective and subjective. It is based on the understanding of freedom as a formal, constitutive condition of society. Totalitarianism denies this dialectic, while altering at the same time the objective and the subjective meanings of order. This is why they cannot be valid legal orders, either in the objective sense, or in the subjective sense. The purpose of our study is to analyze the arguments that support the idea that the "concrete" orders of totalitarian regimes cannot be considered objective legal orders. The arguments are structured in four directions of analysis: 1. basing totalitarian order on legitimacy eliminates the need for legality; 2. totalitarian order is not a system of norms, but one of forces; 3. in totalitarian orders the distinction between norm and measure is no longer made; 4. the rules generated by totalitarian order are no longer the result of any institutionalization. The conclusion that emerges from these arguments is that in totalitarian systems objective law does not exist validly. If the Nazi and the communist languages still retain the term "law", totalitarian thinking destroys the very concept of law.

Keywords: *totalitarianism, nazism, communism, liberalism, legal order, legality, legitimacy, validity.*

JEL Classification: K10, K38

1. Order

How do we recognize a society? Is any group of people a society? Or, in order to be a society, must such a group meet any additional requirements? Intuition tells us that society is not just a random gathering of individuals. If we look at a mass of people gathered on a lawn, we cannot, just because they are there, qualify them as a society. So as to operate this qualification, that gathering of people must first of all meet a requirement of perpetuation over time. Society, unlike a mere gathering of individuals, "perpetuates" itself. As Rawls argued, a society must be considered "a fair system of social cooperation over time from one generation to the next"[3] [our emphasis].

The second requirement that the group of individuals must meet to become a society, already present in Rawls's statement quoted above and also accessible to elementary intuition, is that a "system of cooperation" must be established within the "mass" of individuals. From this point of view, there is no "mass" society. A

[1] Dan Claudiu Dănișor - Faculty of Law, University of Craiova, Romania, dcdanisor@yahoo.fr.
[2] Mădălina Cristina Dănișor - Faculty of Law, University of Craiova; researchers at the Center for Fundamental Legal Research, Romania, madalinaputinei@yahoo.com.
[3] J. Rawls, *Justice as Fairness. A restatement*, The Belknap Press of Harvard University Press, Cambridge, 2003, p. 5.

human group reduced to a "mass" is no longer a society. Totalitarianism created such groups, which raises the question of their qualification as societies.

To be in the presence of a society, the fact of coexistence must overlap another phenomenon, which will give the group the definitive character of society. It is more than just a wish to live together. It is about understanding the need for cooperation in order to live. Society is more than a group in which people *coexist*. Coexistence means only sharing some objective elements: several people, a living space, etc. It creates a community that is "natural", in the sense that people do not add anything to the natural group yet, because their grouping is based on the *natural* fact of birth, on the *natural* fact of living on a soil, on the *natural* fact of meeting together the primary needs of life (finding food, protection from predators, etc.), conditions fulfilled by all animal groups, not just the human ones. If we want *human* society to be different from the *animal* group, we must understand that society is more than a natural community. Humans must add "something" to the natural community to overcome the status of animal group. Even if, for the moment, we do not analyze what this "something" is, we can still draw a conclusion: society is a "creation"; humans add "something" to the animal group, natural coexistence; they *create*. This "something" can be generically called "order". Society is a "created order". In this particular sense, it *is not natural.*

The raw material from which order is built are those human creations that stabilize and perpetuate inter-individual relations: *norms*. Society differs from the natural animal group in that it is a *created normative order*. People's society is not a "community", but the *normative binder* that "binds" people. This "binder" is not natural, in the sense that it did not exist within the natural group, the one based on birth, therefore on blood relations, on a territory, etc. If man went beyond animality, this happened because he *created law* and thus, society; a society that is no longer a mere natural community. When people return to the natural community, they fall back into the phase of zoological existence, as happened in the Middle Ages (which Marx rightly described as the "animal history of mankind", "its zoology"[4]) or during the period of Nazism, when people are brought back to a blood community.

Law cannot disappear without people turning into animals. In this particular sense, man is by nature a juridical being. To be human, he must create some form of law. Only the existence of a created normative order (and in this sense artificial) assures us that we live in a society and not in a group of predators or a herd of their victims.

The cooperation system within society, as opposed to the coexistence system within the natural group, must be "fair", "just". It is no longer based on any natural "superiority", resulting from birth or force, but on a normative order, which redistributes "forces" and creates "superiorities", namely hierarchy. In society, justice is a constitutive element of the group. It is order in action. Justice re-produces order. The instrument of this just re-production of order, of just

[4] K. Marx, *Critique of Hegel's Philosophy of Right* (1843), Cambridge University Press, 1970. Ed. Joseph O'Malley; Translated: Annette Jolin and Joseph O'Malley; Part 5: The Estates §§ 304-307.

cooperation relations within a social system, is law. Law is not reduced to a set of means by which people satisfy their natural needs, but a system which creates a fundamentally new need: the need to live in an order created by people themselves. For the already socially integrated human, this need seems to be of the same nature as space and time for thinking: an *a priori* condition of existence.

We cannot conceive the existence of people in society in the absence of order. Order "forms" society, gives it "form". When we say that order is "formal", we first understand that order is a *formal* condition of society. Its existence transforms the group into society, responding to "the essential condition of any society, i.e. stability. Order, independently of the elements it synthesizes, order for the sake of order is, according to Hauriou, 'what separates us from a catastrophe'. One must understand by this that a principle, whatever it may be, by reference to which all individual relations are ordered, is indispensable for the maintenance of society"[5].

Order, as a formal condition of society, must be understood as the opposite of *disorder*, not the opposite of *freedom*. A disordered group is *not* a society. As long as we want to maintain society, the need for order is impossible to deny. As opposed to disorder, order is a "neutral" concept, which expresses the very simple idea that social life is possible only if we accept a certain order. "The ethical value of this order is not, provisionally, investigated, for only its existence, devoid of any significance, matters for the common good, when only its formal value is taken into account"[6]. This means that "what is essential *for the social organism* is first of all the existence [of order]"[7] [our emphasis]. For the individual, however, order must have an ethical value. People are concerned with the kind of order society is. Order can be a guarantee or a threat to their freedom. When the concept of order is constructed through opposition to freedom, order becomes *subjective*. Subjective order is what separates us from slavery or dictatorship. The dialectic between the objective meaning of order, which separates us from disorder, and the subjective one, which ensures that we maintain our freedom, is a very complex one. We will try below to analyze these three meanings of order.

1.1 Order understood as objective order

A political society, even when it is considered the result of a "contract"[8], is different from the associations based on particular criteria (economic, religious, etc.). The difference resides in that the latter are voluntary associations, while, as Rawls wrote "a political society is not, and cannot be, an association. We don't enter it voluntarily. Rather we simply find ourselves in a particular political society

[5] G. Burdeau, *Traité de science politique*, Tome I, Le pouvoir politique, Paris, L.G.D.J., 1980, pp. 104-105.
[6] Idem.
[7] Idem.
[8] Which is not concluded "in reality", but represents only a reasonable "justification" for the simultaneous existence of the subjects' order and freedom.

at a certain moment of historical time. We might think our presence in it, our being here, is not free"[9]. Belonging to a political society is, in this sense, "mandatory"[10], which does not mean that individuals cannot be free within certain forms of political society, but only that a political society has an objective existence, independently of the will of the subjects.

"But every existence finds its good in the preservation of its nature and of its properties: therefore, society, as a collective being, has its own good, which consists in the preservation of its unity"[11]. To preserve its unity means for a society not to break the coherence of order. Of course, the individual perceives social order as being accomplished *for him* and, implicitly, this is true, but the *immediate* recipient of social order is not man, but the community[12], society. Therefore, the immediate social purpose is, in this view, a purpose of society, which tends towards the fulfillment of social existence, not towards ensuring individual well-being, safety or happiness. Society as objective order cannot have as *immediate* purpose the individualities that make its elements. If this were to happen, it would be a reversal of the natural order of things, for a complex organism that would live first and foremost for the good of its parts, and not of itself, would obviously be a nonsense. But society is a complex organism in relation to the individual.

In this view, law can have no other *immediate* function than the defense of the *coherence* of society, transposed in various forms of *order*: public order, public morals, public security, national security, state security, etc. This prevalence of order transposes an elementary intuition, which tells us that in society individuals cannot do whatever they want. We intuitively understand that if society is an *order*, then society *orders*: it commands a certain type of behavior necessary for the "orderly" existence. Disorder is, for this reason, intuitively felt as antisocial. The production and defense of order, so as to eliminate disorder, by imposing some rules, is, "naturally", the first function of law. This is why jurists naturally favor continuity, stability, and coherence. If politicians and people pursuing their particular interests tend to periodically break the coherence of social orders, jurists see themselves as the former's "doctors" and their technique is "to remove the void, anticipate crises, ensure continuity or even remedy, after a blow, the ruptures of the institutional fabric"[13]. Law is, from this standpoint, an antidote to disorder.

1.2 Order understood as *subjective* order

The perspective must be changed when order is seen from the point of view of the subjects. From this perspective, order is shaped by opposing it to

---

[9] J. Rawls, *op. cit*., p. 4.

[10] In order to understand the notion of compulsory membership as a central notion of defining political relations, see D.C. Dănișor, *Drept constituțional și instituții politice*, vol. II – Statul, Simbol, Craiova, 2018, pp. 60-64.

[11] R.P. Marie-Benoit Schwalm, *La société, l'Etat*, Flammarion, Paris, 1937, p. 24.

[12] G. Burdeau, op. cit. (Traité de science politique), t. I, p. 234.

[13] Y.-M. Bercé, *Conclusion : vide du pouvoir. Nouvelle légitimité*, in Histoire, économie et société, 1991, 10e année, n°1. Le concept de révolution, p. 24.

freedom, not disorder, because order is *imposed* on the subjects, and the way in which it is imposed can affect their freedom. The opposition criterion that defines, this time, the concept of order is changing. It is located at the level of *action*, not at the level of *existence*, as the one used before. What this action authorizes or prohibits so as to impose order does not make *us* indifferent, because our freedom is defined according to this ethical content. The *action of imposing order* is the one that can be judged as ethical or unethical. Objective law, as an expression of order defined in opposition to disorder, had the immediate purpose of maintaining society. It was necessarily, first of all, based on the "reality" of a neutral order, on everyone's acceptance of a common norm. But this order, which was objective and neutral from the point of view of society, must have, from the point of view of the subjects, an *ethical content. For the subjects*, in the process of moving from the *neutral existence of order* to the *action for its imposition*, order is *substantiated*. This simply means that *for us* the imposition of order must have some limits. These limits are legally configured as *subjective rights*.

When viewed as order that is defined by relating to freedom, society must be not only "ordered", but ordered in a "just" way. And a society ordered in a "just" way assumes that its law is effectively based on a public conception of justice. From this second perspective, the juridical privileging of the continuity of social evolution is translated by the firm structuring of the system on the basis of stabilization principles, which have a twofold purpose: guaranteeing rights in the context of the change of political majorities and of the laws created by them and mitigating the tendencies of radicalization of particular social claims, radicalization that is usually done in the name of the prevalence of a specific conception about the good society over its alternatives, stated *a priori*. Order is thus neutral in a second sense: it must be equidistant from the conceptions of the good society that are present within a society at a certain moment, from the social structures that promote these conceptions and from the particular interests, legally transposed into rights. This neutrality gives content to a second meaning of the formal character of order: order is a formal balance that allows the peaceful coexistence of several conceptions about the good society and the coexistence of the rights whose exercise may lead to conflicts. The neutrality and formalism of order, this time, are transposed into the priority of the just over the good and the interest, even when it is "general".

1.3 Order as dialectic between objective order and subjective order - understanding freedom as a formal condition of society

From the above analyses it is clear that the way in which most people are willing, almost naturally, to consider the necessity of order as a priority over guaranteeing rights, makes the legal system prone to authoritarianism and even totalitarianism. Most people (and many jurists) find it natural for society to have as a purpose the community (the organic whole) and much more difficult to accept that individual freedoms and rights can be its purpose. In their opinion, the

prevalence of one's freedom and rights would lead to "disorder", to "anarchy". The fear of disorder is what makes them support order and the authority that imposes it, especially in times of crisis, that is, when the regulators of social systems are largely outdated, society seeming to go inexorably towards anarchy. Therefore, people are more likely to conceive order as a guarantee of security against disorder, rather than realize that it is also a limit to freedom.

To balance this tendency, modern liberal democracies consider freedom as a *formal* condition of society. This means that there is no society unless it is made up of free people. From a legal perspective, this freedom understood as a formal condition of society means that society exists as society only if people have *rights*. If people, or some people, no longer have rights, then there is no society. Thus, a different dialectic is established between objective order and subjective order. Objective order must be *formal* and *neutral*, as well as the law that shapes it, while subjective order, i.e. viewed from the perspective of the subjects, as an order of the coexistence of subjective rights, must be *substantial* and *ethical*. So that objective order will not be defined as a limitation of freedom, but only as an elimination of disorder, objective law must remain respectful of subjective rights. This is the sense in which we must understand the fundamental intuition that tells us that "individuals have rights, and there are things no person or group may do to them (without violating their rights)"[14]. Laws cannot restrict subjective rights or their exercise so as to simply impose an objective order, but only to guarantee other subjective rights. According to this fundamental intuition, the ethical character of order is defined as the limitation of the action of objective law on subjective rights. It follows that a social order which does not guarantee the freedom of the subjects and subjective rights cannot validly create objective legal rules.

The dialectic between objective order and subjective order creates different relations between the law and the freedom of the subjects with respect to those resulting from the elementary intuition of the need for order. Freedom is no longer what the law allows, but it is what the law has no right to impede. If freedom is a constitutive element of society and there is no society unless it is made up of free people, then freedom does not result from order, but order results from the exercise of freedom. In this view, the definition of freedom as the right to do whatever the laws allow, "does not explain what the laws do not have the right to prohibit. This is precisely what freedom is. Freedom is nothing but what individuals have the right to do and society has no right to hinder"[15].

Freedom is not only a limit for the exercise of political authority, but a limit imposed on society itself, the social group as such. The group, the community, cannot deprive a man of freedom without thereby losing the character of society. Benjamin Constant formulated this idea very suggestively: "By freedom I mean the *triumph of individuality*, both on the authority that would like to govern through despotism, and on the masses [...] When the authority commits such acts, it

[14] R. Nozick, *Anarchy, State, and Utopia*, Blackwell Publishing, 2008, p. ix.
[15] B. Constant, cited by P. Lemieux, *Du libéralisme à l'anarcho-capitalisme*, iBooks after the edition published by P.U.F., Paris, 1983, 3 – La liberté engendre l'ordre – Liberté et autorité.

does not matter at all from what source it claims that it originates, individual or nation; if it were the whole nation, less the citizen it oppresses, it would not be more legitimate by it"[16] (our emphasis). The human group remains legitimate, therefore "social", only if it does not oppress its members in the name of the good of the "community", of the "common" good.

Practicing this type of oppression of the individual in the name of a collective good superior to individual existences is the reason for which we believe that totalitarian regimes are not based on truly "social" groups, but on "masses" of individuals. A society can only be a society if its order is just, if it ensures a formal balance between objective order and subjective order (in this statement the term "formal" is understood as "which forms"). The "formal" balance of the just society is the one that *forms* society, gives it the form of a society. The formal relations between objective order and subjective order are *constitutive* for a just society. Any human group that tries to unbalance these formal relations can no longer be considered a society. The "concrete" orders of totalitarian political systems have done this. Under these circumstances, the question is whether they can "constitute" legal orders.

2. Totalitarian orders cannot constitute objective legal orders

The ease with which people support the prevalence of order and the difficulty of considering freedom as constitutive for society have been the basis of the totalitarianisms of the last century. This collective mentality facilitated the construction of a Nazi "state" and "law" and pushed the Marxist regimes (which in theory should have built a society without state and law, so an original kind of collectivist anarchism) towards totalitarianism. "The authoritarian, anti-liberal and anxious structure of people is what allowed [totalitarian] propaganda to gain mass adherence"[17]. This "seduction" of the masses by the totalitarian doctrines was facilitated, of course, by objective factors, especially by the shaking of the positions of social classes, in particular of the middle class, because of the World War I and then because of the great economic crisis of 1929-1933, but we believe that the anti-liberal mindset of the masses was decisive. In the case of German Nazism, as Erich Fromm wrote, "what mattered was that hundreds of thousands of petty bourgeois, who in the normal course of development had little chance to gain money or power, as members of the Nazi bureaucracy now got a large slice of the wealth and prestige they forced the upper classes to share with them. [...] Certain socio-economic changes, notably the decline of the middle class and the rising power of monopolistic capital, had a deep psychological effect. These effects were increased or systematized by a political ideology. [...] and the psychic forces thus aroused became effective in a direction that was opposite to the original economic interests of that class. [...] Hitler's personality, his teachings, and the Nazi system

[16] *Œuvre politiques de Benjamin Constant*, avec introduction, notes et index par Charles Louandre, Paris, Charpentier et C^{ie}, 1874, Première partie, I – De la souveraineté du peuple, pp. 4-5.
[17] W. Reich, *La psychologie de masse du fascisme*, Paris, Payot, 1972, p. 54 and 57.

express an extreme form of the character structure which we have called "authoritarian" and that by this very fact he made a powerful appeal to those parts of the population which were – more or less – of the same character structure"[18]. The force of attraction of Hitlerism is due to the fact that it is an elementary political philosophy, much easier to assimilate than the elaborate principles of political liberalism, because it addresses primary feelings. As Emmanuel Levinas wrote, "rather than contamination or madness, Hitlerism is a revival of elementary feelings"[19], the revenge of instincts over reason.

The same thing happened in the case of the slip of Marxist collectivist anarchism towards Stalinist totalitarianism. On the one hand, the proletarian masses were afraid of extreme freedom, because it resembled absolute disorder too much, which made them, like the Germans, want authority, because they saw it only as an antidote to disorder. On the other hand, it was much easier for the proletarians to "want" a state system "of their own", which would eliminate the "enemy" possessing classes, than to "rationalize" a stateless system, as the classics of Marxism had predicted, which would have involved an exemplary form of personal responsibility. The proletarians thus avoided assuming the extreme responsibility that necessarily results from extreme freedom. "Freed" from "enemies", they transferred *responsibility* to the communist bureaucracy and, in addition, aspired to a place within it, a place that the old system of class privileges had denied them. Under these circumstances, the communist state was forced by the psychology of the masses to become an "administrative" state. On the other hand, the nature of the Marxist doctrine inevitably oriented it towards this type of state. A national-socialist theorist of law predicted this phenomenon well. Thus, Carl Schmitt wrote in 1932: "That in particular an "economic state" cannot possibly also work as a legislative state and must become an administrative state is already almost universally known today[20]. But the Marxist state was just such an "economic state", because the ideology that underpinned it was an economic theory, which was not sufficiently developed as a political theory to truly form the basis of a revolutionary state type as compared to modern patterns. Marxism was not a theory *of* the state, but a theory *against* the state, not the bourgeois one, but the state in general. It was thus inapplicable as a *constitutive* theory of a new (revolutionary) form of state. For this reason, Stalinism renounced, pragmatically if not ideologically, the Marxist idea of overcoming the political state and transformed the state of the Soviets into a state dominated by bureaucracy, an administrative one and, given the particular relations of the state with the communist party, into a state dominated by the party nomenclature.

Of course, the Nazi and communist regimes were different in many respects. But they have in common the fact that they are built on the ideological

[18] E. Fromm, *The Fear of Freedom*, Routledge London 1942, p. 189-190.
[19] E. Levinas, *Quelques réflexions sur la philosophie de l'hitlerism*, Esprit novembre 1934, available online at https://esprit.presse.fr/ article/levinas-emmanuel/quelques-reflexions-sur-la-philosophie-de-l-hitlerisme-32136, consulted on 10.01.2020.
[20] C. Schmitt, *Legality and Legitimity*, Duke University Press, 2004, p. 6.

basis of the denial of liberalism. From the perspective of the type of order attempted by these totalitarianisms (the only aspect of totalitarianisms that concerns us here), the opposition to liberalism is translated by denying the "formal" and "built" order, typical of the modern liberal state governed by the rule of law, and the assertion of another type of order, the "concrete" or "real" order. As Olivier Jouanjan rightly stated, "the thought of concrete order [...] can truly be called a *totalitarian* legal thinking *as genus* and *Nazi as species*[21]. The other "species" of the real, concrete thinking of order was the Soviet legal doctrine, inspired (perhaps) by the Marxist classics, but strongly affirmed in the U.S.S.R. only after the second juridical revolution, the Stalinist one. The question that arises is whether such "concrete" or "real" orders can truly constitute *objective legal orders*.

On the other hand, the two forms of totalitarianism denied or emptied of content the two foundations of a *subjective legal order*: the autonomy of the holder of rights and obligations and the subjective rights. The question is, from this point of view, whether the "concrete" or "real" orders of totalitarian regimes may constitute *subjective legal orders*. In the following, we will try to answer the first of these two questions, and the answer to the second will make the object of a subsequent study.

2.1 Totalitarian order is directly based on legitimacy and eliminates the need for legality

To start from the criticism of liberal legal formalism and reach a new "political" theory of law, the conceptions of concrete order rewrote the way in which legal positivism, dominant at the time, understood "formal" and "neutral" order, based on the idea, false in reality, that this type of legal theory separates not only methodologically, but really, law from morals and politics. Carl Schmitt is representative in this regard of the Nazi theory. In *Legality and Legitimacy* (completed in 1932, when Schmitt had not formally joined Nazism yet), he attacked the liberal order of what he called a "legislative state" for three main reasons: formalism, neutrality, and apoliticism. Thus, Schmitt argued that "«legality» here has the meaning and purpose of making superfluous and negating the legitimacy of either the monarch or the people's plebiscitarian will as well as of every authority and governing power, whether in a form that provides its own foundation or one claiming to be something higher. I accept, therefore, Otto Kirchheimer's formulation in an essay about legality and legitimacy that the legitimacy of parliamentary democracy «resides only in its legality», and today «obviously legal restrictions are equated with legitimacy». Linguistic usage today has certainly already proceeded so far that it perceives the legal as something

[21] O. Jouanjan, «Pensée de l'ordre concret» et ordre du discours «juridique» nazi: sur Carl Schmitt, in Y. Ch. Zarka, Carl Schmitt ou le mythe du politiques, PUF, Paris, Débats philosophiques, 2009, p. 119.

«merely formal» and in opposition to the legitimate"[22]. Relying exclusively on legality, the parliamentary state would have faded away, as it has no "reality", being a mere "formalism and functionalism without substance or reference points"[23].

Legitimacy must be, as opposed to legality, "concrete". It has, in the oppositional view of Nazism, the function of eliminating the *need for legality*. Law, in its positivist sense, of a system of norms "set" by the state, of a formal legal system, should be "exceeded". A type of "law" *directly based on legitimacy* should be placed instead. Schmitt thus opposes the legitimacy of legality, even stating that "this is currently [1923] the decisive contradiction, rather than that between the legitimacy of monarchy, aristocracy, oligarchy, or democracy, which mostly only obscures and confuses [the situation][24]. Legitimacy is, in the Nazi conception, essentially plebiscitary. Only the "authentic" community (i.e. not the "built", "artificial" one of liberal democracies), the "real", "racial" community, a "natural", "blood" community can legitimize a "real" political power. And this community erases, in the Nazi optics, "the dualism between to be and to have to be, between the order of norms and the order of life"[25]. Of course, the annihilation of dualism is done in favor of the natural order of the living community and to the detriment of formal legality, which should consequently disappear. Concrete order is *natural*, in the sense that *social hierarchies and superiorities* are not *built* by people, through norms that *make equal* what *they think should be* equal, and rank people through laws voted by people, which *make different* what *they think should be* different, but they are objective, created by nature itself, by the *fact* of birth and by the *fact* of belonging to a certain living community, facts that cannot be changed by any law. No law can change *what it is* because people think it *has to be* different. The only law is the natural law. In other words, the "living" community does not need laws created by people. Legal order would, in this view, consist of the same type of laws as the laws of physics, that is, of laws which reflect only *what it is* and which people can never change. In reality, these are not laws, but facts. Their rules are *adequate*, not *normative*. An order made up of such "laws" cannot be *legal*.

The Soviet legal theory reproduces, almost step by step, the same type of reasoning, even if the concepts used seem different and evolutionary. A first period is that in which, following the classical Marxist theory, the Soviet legal theory predicts that law must disappear. It should be replaced by scientific planning based on the *objective laws of economic development.* "The law of the Soviet state, Pashukanis wrote, is the plan"[26]. If "the organized and planned production and distribution" replaced "market exchanges", [...] "the legal form of ownership

[22] C. Schmitt, *op. cit.*, pp. 9-10.
[23] *Idem*, p. 10.
[24] *Idem*, p. 6.
[25] «Gemeinschaft und Rechtstellung», DRW, 1936, pp. 34-35, cited by O. Jouanjan, *op. cit.*, 2009, p. 90.
[26] In *Selected Writings on Marxism and Law*, P. Beirne and R. Sharler eds, Londres et New York, 1980, p. 308.

would also be completely exhausted historically. [...] And the legal form in general would be [...] sentenced to death"[27]. As in the case of Nazi order, Soviet order is an order that must transcend the formal legality of the liberal state, the laws created by people, and replace them with laws of economy, because economy, and not politics, is the one in which the essence of the social group is expressed. But as long as the "evolved communism" is not completely edified, and the "exchanges based on monetary equivalent subsist in the sphere of distribution", the socialist society will be forced to "close for the moment "within the horizon drawn by bourgeois law", as Marx himself predicted"[28]. This tension between *post-juridical* socialist order and the *concrete* needs of the exchange of goods, which subsists and forces the planned economy to adopt the forms of bourgeois legality, seems to have been resolved by Stalin in 1936, when he asserted that "we need legal stability more than ever"[29].

The Soviet legal theory immediately enters a second stage of evolution, in which jurists turn towards the only possible source of legitimacy as an alternative to the objective laws of economy: the will of the people. Vyshinsky then viciously attacks Pashukanis, who would practice some kind of "juridical nihilism", and asserts that Soviet law "is the embodiment of the will of the people in the form of laws". Popular legitimacy replaces juridical nihilism as an alternative to the formal legality of the bourgeois state. But formal legality, typical of modern law, is surpassed in both stages of the Soviet legal theory. Like the Nazis, the Soviets no longer need legal formalism.

2.2 Totalitarian concrete order is not a system of norms

The formal order of liberal modernity is an order formed by people, by applying just principles that are conceived by people, while overcoming their natural instincts and using reason. The central principle of justice of this construction is equality, an equality which never results from instinct, for instinct "commands" people to be different, not to be equal. Equality as a principle of fair organization of society was built in the modern era against the "objective" social stratification practiced by pre-modern regimes. If for the latter this objective social stratification was *political*, it was the basis of the difference between who commands and who obeys, in modern states the objective social stratification, although it still exists, has no *political* significance anymore, it is just *social*. This is the real meaning of the separation of the political from the social, and because of this separation modernity succeeds in overcoming feudalism. The latter created hierarchy in society by politicizing fixed decoupages. One remained politically what one was by birth. The possibility of exceeding one's status was so rare that it

[27] E. B. Pasukanis, *La Théorie générale du droit et le marxisme* (1929), Traduction de J.-M. Brohm, Paris, Etudes et Documentation Internationales, 1971, p. 119.
[28] *Idem*, p. 31.
[29] Rapport présenté au VIII^{e} Congrès – Congrès Extraordinaire – des Soviets de l'URSS le 25 novembre 1936, repris dans *Questions du léninisme*, 1939.

could be considered an *escape*. Modernity does not revolt, therefore, against the hierarchy of society. It is a protest only against the impossibility of overcoming by effort the condition acquired by birth. *Social mobility* is the claim of modern revolutions.

Modern man can *become*. Modern revolutions do not claim *material* equality, as socialist revolutions will, but *dynamic* equality. This equality means *equal opportunities*. All people must have the same chances of asserting themselves, using their talent, workforce, abilities of any kind. Modern equality is, therefore, an *equality of positioning yourself in a hierarchy*, not a status identity. Unlike pre-modern societies, in modern societies positioning in the social hierarchy depends on the merit of each individual, not on birth or other conditions that are not under the control of individuals. Modern society is thus a *meritocracy*, a society that relies on the competition for social positions. A competition based on equal opportunities, which takes place in all areas of social life. No social sphere should be outside the competition game: political positions are won through electoral competition, administrative positions through contests, economic prosperity through competition within free markets, etc. Modernity believes in the perfectibility of people and their desire and ability to climb the ladder of social hierarchy. Life is for the moderns a struggle for affirmation. Nothing is given, everything is earned, even reason. Under these circumstances, modern constitutionalism is naturally based on competition. For this kind of philosophy of state organization, it matters less what each public power can do, it matters more how the political forces compete with each other to acquire power and how the powers compete with each other to exercise the competences of the state, controlling each other and, thus, limiting each other. Modern constitutions are a kind of *laws of political competition.*

Totalitarianisms attack precisely these foundations of modernity. First of all, the "built" character of social order. Thus, for Nazism, society is a "living" community in the sense that it is created by nature, like any living organism, and not by humans. The difference between the objectivity of the feudal social organization and the Nazi one is that the former is based on "classes" or "states", while the latter on "races". The organization principle is the same: objective, "natural" hierarchy. The Nazis believe that *races* naturally rank themselves. This natural hierarchy according to race is rendered *political*: some races are made to rule, and others to obey, just as in feudalism with classes or states. Race superiority is not only comparative, but it ranks. Race differences should confer the "position as a member of the Community", which for the Nazis should have replaced the notion of "legal personality" in legal language. This meant that rights no longer belonged to "persons", but to "social positions in the community".

The Soviet legal theory in turn attacks the "built" character of legal order. First, because law is a class instrument for the Marxists, it reflects the social hierarchies resulting from the objective division of society into classes. It exists only as long as class differences subsist, and should disappear with the disappearance of classes. But the socialist revolution produces this effect only after

a period of dictatorship of the proletariat. In this stage of evolution of the regimes resulting from socialist revolutions, law is the instrument of the new ruling class, the proletariat. As with the Nazis, social order results from an objective political hierarchy, based on principles equivalent to the pre-modern ones, *class hierarchy.* Communist society would have been an egalitarian society, but the socialist states are not egalitarian at all. They postulate class hierarchy, becoming seemingly egalitarian only after all the possessing classes are "absorbed" into the working class, through the proletarization of their members, when the working class becomes one with the whole people. Equality means only unity, non-differentiation, and is only established after the destruction of class pluralism and, consequently, political pluralism. The communist state would no longer be "political" because there is no separation in it that would be "political".

Consequently, this also represents the second level on which the "built" character of legal order is challenged by the Soviet doctrine, once law ceased to be political, it would contain only "technical" rules. The "technical" character of the new Soviet law opposes the "normative" character. Technical rules are not normative rules, they are not rules creating new behavioral requirements for the subjects. Accordingly, Soviet formal law does not include any "norm" in the proper sense, for norms exist *in reality*, they are not built by people, the law created by people merely organizing social cooperation for the application of pre-existing normative rules. Norms are "discovered" in the "dialectic of social existence", which is placed above the formal laws, which include only technical rules. The Supreme Tribunal of the U.S.S.R. decided, according to this logic, that it "is not subordinated to law" and that "the decisions of the party force the judges to follow the dialectic and to apply exactly those rules that respond to the needs of the present moment", authorizing them to go beyond the law "if it remains behind in the rapid tempo of life"[30]. If by law one can only understand a set of technical rules, which do not create any norms, and the norms are the result of objective social evolution, the logic of the Soviet judges is flawless.

Secondly, Nazism attacks social mobility. If modernity postulates that people can pass from one state to another by their own will, Nazism postulates that race differences cannot be erased. Any "conversion" is impossible. Thus C. Schmitt stated in 1936: "Not even such a terrible and disturbing change of mask as the one which lies at the basis of the whole existence [of the converted Jew[31]] can truly deceive us"[32]. The Jew remains a Jew, maintaining with the Aryan race, when he wants to appear as a German, only "a *parasitic, tactical and mercantile relation*"[33]. Race cannot be "acquired" and, consequently, neither can the social position defined in relation to race be changed, that is, from a legal standpoint, the

[30] Quotation from Ph. de Lara, *Prendre le droit soviétique au sérieux*, in Revue internationale de droit comparé. Vol. 65 N°4, 2013, pp. 884-885.

[31] In Schmitt's truly scathing text "The German science of law in its fight against the Jewish spirit" of 1936 it is about Stahl-Jolson; C. Schmitt, *La science allemande du droit dans sa lutte contre l'esprit juif* (1936), Presses Universitaires de France, «Cités» 2003/2 n° 14, pp. 177-178.

[32] C. Schmitt, *op. cit*., 1936, pp. 177-178.

[33] *Idem*.

"allocation" of rights according to the "position as a member of the community" cannot be changed. Race must be kept "pure", which implies the elimination of "impurities", i.e. those who do not have that race objectively. Therefore, for the Nazis, an organic, "living" community can only be defined in its "hand-to-hand fighting with the enemy"[34], with those of another race. But it is not about competition, as in liberal theories, but about war, the elimination of the adversary. The totalitarianism of Marxist origin seems at first glance different, but in reality it is not. Marxist societies are not actually mobile. They are based on class decoupages that can only be overcome by the violent abolition of classes, not by the will of individuals.

Thirdly, Nazism attacks pluralism and the equal opportunities that underpin it, especially in the field of political competition, as incompatible with the organic unity of the people. Thus for C. Schmitt the fundamental alternative is the following: "recognition of the substantive characteristics and capacities of the German people or retention and extension of functionalist value neutrality, with the fiction of an indiscriminate equal chance for all contents, goals, and drives"[35]. The option for the racial unity of the people clarifies things: "A constitution that would not dare to reach a decision on this question; one that forgoes imposing a *substantive order*, but chooses instead to give warring factions, intellectual circles, and political programs the illusion of gaining satisfaction legally, of achieving their party goals and elimination their enemies [...] is no longer even possible" [our emphasis][36]. Liberal pluralism and its equal opportunities are thus made incompatible with the concrete, substantial order of the state legitimized by a people constituted as a racial community. The legal consequence is that "concrete" order is no longer a system of norms, but a system of forces.

The totalitarian political party is only called a political party, because, by eliminating partisan pluralism, Nazism empties the notion of political party. Even before Hitler got the power, Schmitt argued that the only legitimacy belonged to "firmly anchored power organizations that encompass their members totally in respect to their world-view and their economic and other perspectives"[37], that is totalitarian "political" parties. This type of "political" organization "transforms all jurisdictions, those of the state generally, the federal system, the localities, the system of social welfare law, and others, into point in their power constellations"[38], i.e. granted according to the position occupied in the party nomenclature. The totalitarian party absorbs the state, "defining the will of the state"[39], and all the powers of civil society. It internalizes the entire political and social power. The party is the "social whole", which is *presented* from different angles, "first as «state», then as «solely social power» and «mere party»", thus managing to

[34] O. Jouanjan, op. cit. («Pensée de l'ordre concret »...), p. 90.
[35] C. Schmitt, op. cit. (Legality and Legitimity), pp. 93-94.
[36] *Idem*, p. 94.
[37] *Idem*, p. 87.
[38] *Ibid*.
[39] *Ibid*.

"enjoying the advantages of influence on state without the responsibility and the risk of the *political*"[40] (our emphasis). Schmitt is obviously programmatic. He theorizes the violent overthrow of the legality of the parliamentary state and the annihilation of the competing political parties, of partisan pluralism, because it is incompatible with the organic unity of the people. Thus, he argues that "if they [political parties] become caught up in the logic of a system of legality that is a treat to their type of existence, they must [...] make good on a right to resistance in some form"[41], that is, to overthrow, through a form of violence against the laws, the existing political regime. And in order to be able to exercise sovereignty in full, without having to respect the constraining forms of legality, they must maintain a state of "deliberate incoherence", which allows them to "invalidate the parliamentary legislative state and its concept of legality", thus this "intermediary condition"[42] ("exceptional" from the perspective of the constitutional forms of the legal-parliamentary state) allows them to exercise sovereignty in a "real" way, because, in the Nazi legal theory, the sovereign is in reality only the one who decides in exceptional situations. For the Nazis, concrete order means the elimination of legality and the exercise of power without any limit and without any responsibility. In conclusion, Nazi "concrete" order is not a system of norms, but only a system of forces.

2.3 In totalitarian concrete orders, the difference between norm and measure is erased

The parliamentary state governed by the rule of law assumes that the executive and the administration can act only in accordance with the law. These state bodies are functionally specialized: they apply the laws. Which means that the administrative action can intervene if a law authorizes it and that the administrations can neither add to the law nor act against it. Practically, this type of rule of law eliminates the possibility for the executive and the administrations to take "measures", to take actions that are not based on a legal norm, but only on considerations of opportunity. It is what is called the "legality principle" of the acts of the administration. As mentioned above, the Nazi state, as well as the Soviet one, were necessarily administrative states, not parliamentary ones.

In this type of state, the executive acquires its own normative power. Totalitarian states transformed into *lawmaking* acts this *administrative* normative autonomy, which usually, as long as the state remains an administrative state governed by the *rule of law*, should have been normative *administrative* acts. In Germany, this evolution began before the establishment of the Nazi regime and is the consequence of forcing the constitutional provision of art. 48, §2 of the Weimar Constitution, which was initially designed to respond to situations of military emergency, but which ended up being used for the confiscation of the legislative

[40] *Idem*, p. 88.
[41] *Idem*, p. 87.
[42] *Idem*, p. 88.

power by the executive. Under this provision, the President could take the necessary *measures* to restore public order and security and suspend the exercise of certain rights or freedoms. This text "will give rise to a parallel legislative practice, which allowed the circumvention of parliament, considered too slow, too divided or, starting with 1930, dysfunctional. Most jurists of the time will then speak of a power to issue a decree-law (*gesetzvertretende Rechtsverordnung* - literally: an ordinance having the power of a law) to designate this hybrid instrument, midway between law and measure, and to describe the blurring of the boundaries between the elaboration of laws and their concrete implementation"[43].

In the first stage, the Nazis pushed things further, apparently still retaining the logic of the administrative state, but redefining it as a state "whose specific expression is the administrative decree that is *determined only in accordance with circumstances*, in reference to the *concrete situation*, and motivated entirely by considerations of *factual-practical purposefulness*" [our emphasis][44]. Nazism thus attacks a fundamental characteristic of modern laws: generality. The measure, which pertains to the essence of the administrative state, is not determined by considerations that *ideally* concern all situations of a certain type, it does not use the *normative* construction of the *ideal-type*, although the Nazi legal theory is in many respects marked by Weber, but it makes the normativity used by the administrative state – the measure – only a primary reaction to the reality of facts. The measure is a constraint that has no ideal. Nazism thus destroys any utopia without putting anything instead, except for pure constraint. What gives the "measure" in society is no longer a general standard according to which the conduct of people is "tailored". On the contrary, the state "measures" every time according to circumstances and opportunity. The ideal-type utopia made the constraint predictable and acceptable. In contrast, the measure is at the same time unpredictable and careless with regard to individual legitimacy. The normative character of a modern legal order comes from the *normative* use of ideal-types, because they are created "by *unilaterally* emphasizing one or more points of view and thus linking a multitude of isolated, diffuse and discreet phenomena, [...] that we *order* according to the previous points of view, chosen unilaterally, so as to *build* a picture of homogeneous thought"[45] (our emphasis). When the norm becomes general because it uses an ideal-type, it *does not* use a generalization obtained by "extracting" from reality the common features of the behaviors of all or most individuals, but a generalization obtained by "utopian rationalization"[46], which consists in "assembling the more or less scattered features, in underlining, exaggerating, so that in the end they substitute a coherent whole for the confusion of the real". The norm is thus general because it is based on the utopian belief that

---

[43] A. Simard, *«Presentation» de «Légalité et légitimité» de Carl Schmitt*, section «L'échec constitutionnel», in IBooks, C. Schmitt, *Légalité et légitimité*, Presses de l'Université de Montréal, 2015.

[44] C. Schmitt, op. cit. (Legality and Legitimity), p. 5.

[45] M. Weber, *Essais sur la théorie de la science*, Paris, Plon, 1965, p. 81.

[46] J. Grosclaude, *«Introduction» to Max Weber's Sociologie du droit*, Paris, PUF, 1986, cited according to the digitized edition.

all people must and can behave according to an ideal type of conduct. Utopia is intrinsic to legal norms. Therefore, norms remain valid even if people do not often behave in reality according to the ideal-type. The effectiveness of norms is always relative. Instead, the measure, which replaces the norm in the Nazi conception, must always be effective and, therefore, it must be appropriate to the concrete reality, not to a utopian ideal. Nazism destroys any illusions about people: they are incapable of producing order while tending towards utopian ideals.

The impersonal character of norms is the second essential feature of modern laws that Nazism denies. To achieve the concrete, perfectly efficient order, people must be constrained in a concrete and personal way. Therefore, the command only makes sense if it is clear who is specifically being aimed at. Schmitt thus indicates that "both the governmental and the administrative states perceive a distinctive quality in concrete commands, which are directly executable or easily obeyed"[47]. The "concrete measure" that replaces the "abstract law" is valid only if it can be concretely and *effectively* imposed on each member of the community, if it is enforceable. It leaves no room for maneuver, for autonomy. Nazi law recognizes "already in decisionism the immediately executable directive as a legal value in itself"[48], i.e. it is based on the fact that the specific nature of the legal form is the autonomy of the concrete decision in respect of the abstract norm. However, a set of autonomous "measures" in relation to any general and impersonal norm can in no way constitute a legal order.

In the second stage, the erasure of the difference between the norm and the measure goes beyond, in the Nazi view, the last trace of formalism preserved by the administrative state. At this stage, the power to create law, which is totally reduced to a set of "measures", is "embodied" in the Führer. At this stage, the measure completely annihilates legality, as it is no longer the result of any form of institutionalization.

2.4 The rules generated by totalitarian concrete order are no longer the result of any institutionalization

In terms of the means of exercising political power, modernity differs from antiquity in that it invents representative government. It was not possible for the ancients to know the representative government because of the fundamental principle of their political organization: the *organic unity of the polis*. Representative government "is a discovery of the moderns"[49]. Modernity makes this form of political organization the quintessence of the way of exercising freedom in the public space.

But it is not the "reality" of representation that is decisive in order to delimit the exercise of power in modern societies from that of pre-modern societies, but the *institutionalization* of power, that is, the separation of a "form" of

[47] C. Schmitt, Legality and Legitimity, *op. cit.*, p. 9.
[48] *Idem*, p. 9.
[49] B. Constant, De la liberté des Anciens comparée à celle des Modernes, iBooks.

exercising the political power of the community from the "concrete reality", from the "substance" of the power of that community. The participation in the exercise of power is, therefore mediated, institutionalized in the modern era. For this reason most constitutions of this era have expressly stipulated that sovereignty is exercised only by representation or delegation and the plebiscite was excluded.

The concrete order of the Nazis, based, like that of the ancients, on an organicist conception, could not admit representation. It was based on plebiscitary legitimacy. Since the forms of organization of the legal-parliamentary state still existed, something had to be put in place of representation. This "something" is the "embodiment". As in Hegelian philosophy, in which the Idea became a subject and then determined itself in the concrete reality, the Nazi organic community embodies itself in the person of the Führer: "The Führer *embodies* [...] the will of the whole [...]. He cannot in any way be separated from the community [...]. The lived law of the community acquired flesh and blood in him [...] (our emphasis)[50]. Such an elimination of representation and its replacement with the theory of the "embodiment" of all competences in the person of the Führer could only lead to the idea that he was the only one who could "make" the law and, moreover, he "was" the law, a view formalized by a reputed German philosopher, Martin Heidegger, in the following terms: "The Führer himself and only himself is [...] the law"[51]. In other words, if we eliminate the philosophical scenery, the leader is no longer an institution, and the law is no longer the result of any institutionalization, not even that resulting from the establishment of an exceptional situation, which allowed the "real" exercise of sovereignty within the legal-parliamentary state, still formally existing, but the result of the will of the Leader: "The Führer protects law against the most excruciating abuse when, at the moment of danger, by virtue of his capacity as Leader, he *directly* formulates law, like a supreme judge" (our emphasis)[52]. Because in practice the state formally continues to exist, deinstitutionalization, which allows the leader to order anything, takes on a particular form: the state becomes *an organ of the Führer*[53]. The return to the "zoology of the Middle Ages", to the unbuilt, uninstitutionalized community, is obvious. As in any animal group, the strongest commands. The difference between man and animal disappears and, with it, any trace of legal order.

---

[50] K. Larenz, *Deutsche Rechtsemeuerung und Rechtsphilosophie*, Tübingen, Mohr, 1934, p. 44, cited from O. Jouanjan, *Remarques sur les doctrines nationales-socialistes de l'État*, in Politix, vol. 8, no 32, 1995, Le pouvoir des légistes, p. 109.

[51] Appel aux étudiants allemands, in M. Heidegger, Écrits politiques 1933-1966, Paris, Gallimard, 1995, p. 118.

[52] «Das Führer schützt das Recht» (1934), in Positionen und Begriffe, Berlin, Duncker & Humblot, 1988, p.199 sq., cited from O. Jouanjan, *Doctrine et idéologie. Logique dune science juridique nazie*, in G. Koubi (dir.), *Doctrines et doctrine en droit public*, Presses de l'Université des sciences sociales de Toulouse, 1997, p. 67.

[53] See C. Schmitt, *État, mouvement, peuple - L'organisation triadique de l'unité politique*, (translation into French by A. Pilleul of the work Staat, Bewegung, Volk, 3e éd., Hambourg, Hanseatische Verlagsanstalt, 1934), Paris, Kimé, 1997.

3. Conclusions

The general conclusion that we believe becomes clear from the above considerations is that totalitarian orders are not legal orders. Totalitarianisms, denying the "built" and "formal" character of liberal legal order, objectifying order, making it "concrete", eliminates the need for "legality". Consequently, the orders "built" by them are no longer systems of norms, but systems of forces and can no longer constitute objective legal orders, but only systems of "measures". The institutionalization of the political power is, under these circumstances, impossible, the power becoming "personal" again, being necessarily embodied in a "leader". Totalitarianisms do not accidentally lead to the establishment of personal dictatorships; this evolution is required by the very nature of the system. In totalitarian systems, law does not exist. If the Nazi and the communist languages still retain the *term* "law", the *concept of law* is destroyed because it is incompatible with the fundamentals of totalitarian thinking.

Bibliography

1. Beirne, P.; Sharler, R., eds., *Selected Writings on Marxism and Law*, London and New York, 1980.
2. Bercé, Y.-M., *Conclusion: vide du pouvoir. Nouvelle légitimité*, in Histoire, économie et société, 1991, 10e année, n°1. Le concept de révolution.
3. Burdeau, G., *Traité de science politique*, Tome I, Le pouvoir politique, Paris, L.G.D.J., 1980.
4. Constant, B., De la liberté des Anciens comparée à celle des Modernes (1819), iBooks.
5. Constant, B., *Œuvre politiques de Benjamin Constant*, avec introduction, notes et index par Charles Louandre, Paris, Charpentier et Cie, 1874.
6. Dănișor, D.C., *Drept constituțional și instituții politice*, vol. II – Statul, Simbol, Craiova, 2018.
7. Fromm, E., *The Fear of Freedom*, Routledge, London, 1942.
8. Grosclaude, J., «Introduction» to Max Weber's Sociologie du droit, Paris, PUF, 1986.
9. Heidegger, M., *Écrits politiques 1933-1966*, Paris, Gallimard, 1995.
10. Jouanjan, O., «Pensée de l'ordre concret» et ordre du discours «juridique» nazi: sur Carl Schmitt, in Y. Ch. Zarka, Carl Schmitt ou le mythe du politiques, PUF, Paris, Débats philosophiques, 2009.
11. Jouanjan, O., *Doctrine et idéologie. Logique dune science juridique nazie*, in G. Koubi (dir.), *Doctrines et doctrine en droit public*, Presses de l'Université des sciences sociales de Toulouse, 1997.
12. Jouanjan, O., *Remarques sur les doctrines nationales-socialistes de l'État*, in Politix, vol. 8, no 32, 1995, Le pouvoir des légistes.
13. Lara, Ph. de, *Prendre le droit soviétique au sérieux*, in „Revue internationale de droit comparé", Vol. 65 N°4, 2013.
14. Lemieux, P., *Du libéralisme à l'anarcho-capitalisme*, iBooks after the edition published by P.U.F., Paris, 1983.
15. Levinas, E., Quelques réflexions sur la philosophie de l'hitlerism, Esprit novembre, 1934.

16. Marie-Benoit Schwalm, R.P., *La société, l'Etat*, Flammarion, Paris, 1937.
17. Marx, K., *Critique of Hegel's Philosophy of Right* (1843), Cambridge University Press, 1970. Ed. Joseph O'Malley; Translated: Annette Jolin and Joseph O'Malley.
18. Nozick, R., *Anarchy, State, and Utopia*, Blackwell Publishing, 2008.
19. Pasukanis, E. B., *La Théorie générale du droit et le marxisme* (1929), Traduction de J.-M. Brohm, Paris, Etudes et Documentation Internationales, 1971.
20. Rapport présenté au VIII^{e} Congrès – Congrès Extraordinaire – des Soviets de l'URSS le 25 novembre 1936, repris dans *Questions du léninisme*, 1939.
21. Rawls, J., *Justice as Fairness. A restatement*, The Belknap Press of Harvard University Press, Cambridge, 2003.
22. Reich, W., La psychologie de masse du fascisme, Paris, Payot, 1972.
23. Schmitt, C., État, mouvement, peuple - L'organisation triadique de l'unité politique, Paris, Kimé, 1997.
24. Schmitt, C., *La science allemande du droit dans sa lutte contre l'esprit juif* (1936), Presses Universitaires de France, « Cités » 2003/2 n° 14.
25. Schmitt, C., *Legality and Legitimity*, Duke University Press, 2004.
26. Simard, A., *«Presentation» de «Légalité et légitimité» de Carl Schmitt*, section «L'échec constitutionnel», in IBooks, C. Schmitt, *Légalité et légitimité*, Presses de l'Université de Montréal, 2015.
27. Weber, M., Essais sur la théorie de la science, Paris, Plon, 1965.