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THE LEGAL REGIMENTATION OF CULTURE IN NATIONAL SOCIALIST GERMANY

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Dr. Timasheff depicts the sad plight of culture and art in Germany under restrictions "constitutionally" authorized by the Reichstag. His grim picture of a juristic strait-jacket encircling individual action should serve to remind us of the imperishable value of the Bill of Rights and make firm our constant purpose to contest its impairment in these chaotic times.
—EDITORIAL NOTE.

1. *The Social Background of the Regimentation*

IN LIBERAL society, as the rule, culture is free from legal regimentation. An indeterminate number of persons, not especially designated by any agency, produce, reproduce, rework and propagate cultural values; their activity is judged by "the public", that is to say, by the unorganized mass, and on its acceptance or rejection of the cultural product depends the success or failure of the cultural agents in their competition. The law interferes in *individual cases* only, to prevent harm or imminent danger to personal or economic rights, or, in emergency situations, especially in the course of wars, to the essential conditions of the further existence of the State and of its successful protection.

This is, obviously, the description rather of an "ideal type"[1] than of actuality: there has never been a society which would have completely complied with the liberal ideal. But approximations are possible, and to their number certainly belongs the United States. The First Amendment to the Federal Constitution is a binding "declaration of national policy in favor of the public discussion of all public questions". The limit of free discussion is somewhat controversial; but there is no doubt that "the most essential demand of free speech is the rejection of 'bad intention' as the test of criminal utterance". The principle of "imminent

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1. This is a term introduced to sociology by Max Weber. Ideal or constructed types never conform exactly to specific historical instances, but permit an *understanding* of them, stressing the essential and recurrent elements in concrete phenomena which, in their complexity, never recur.

danger" stressed in the formula above is best actualized when courts consider that "a speaker is guilty of solicitation or incitement to a crime (potentially advocated by the speech) only if he would have been indictable for the crime itself, had it been committed, either as accessory or principal."[2]

Departures from the ideal situation are undeniable. During World War No. 1 and immediately after, there have been numerous prosecutions, involving speeches, newspaper articles, pamphlets and books, and in some decisions the principle of "imminent danger" has been replaced by the doctrine of "indirect causation".[3] On the other hand, in a few specified fields, there is a tendency to eliminate the liberal mechanism of the free acceptance or rejection of culture products by public opinion, and to replace it by censorship[4] or similar devices.[5] But attempts to positively interfere with culture production, imposing on it specified patterns, are almost unthinkable in modern American society[6] and quite recently the

2. Chafee, *Freedom of Speech in War Time* (1918-19) 32 HARV. L. REV. 934, 953, 963; reprinted in CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

3. A speech has been found punishable under the Federal Espionage Act and its Amendment of May 16, 1918, "if the natural and reasonable effect of what it said is to encourage resistance to law, and the words are used in an endeavor to persuade to resistance". Masses Pub. Co. v. Patten, 246 Fed. 24, 38 (1917). In general, courts "have treated opinions and statements as facts and then condemned them as false because they differed from the Presidential speech or the Resolution of Congress declaring war", Chafee, *supra* note 5, at 965. It would be highly deplorable if the mistakes of World War No. 1 were repeated during World War No. 2.

4. Official film censorship exists in seven States: Kansas, Louisiana, Maryland, New York, Ohio, Pennsylvania, and Virginia. Censorship of moving pictures before exhibition has been held valid under a free speech clause, since "the exhibition of moving pictures is a business pure and simply . . . not to be regarded as a part of the press of the country, or as organ of public opinion". Mutual Film Co. v. Industrial Commission of Ohio, 236 U. S. 230, 241 (1915). The very necessity of official censorship is questionable in view of the much more effective regulation by the Hays Office (established in 1934) the activity of which is based on the principle of the free rejection of objectionable culture products by so large groups that their production and distribution becomes unprofitable. On film censorship see Kadin, *Administrative Censorship* (1939) 19 B. U. L. REV. 561 *et seq;* CHAFEE *loc. cit. supra* note 2.

5. In the radio broadcast business a kind of indirect censorship is exerted through a licensing system and a scrutiny of past conduct of the applicants; however, just as in respect of moving pictures, self-regulation through the National Association of Broadcasters has become increasingly important; the Association endeavors to solidify the industry behind a Code of Ethics. Kadin, *supra* note 4, at 577, 582.

6. The recent cases of the investigation, by a Committee of the Senate, of the alleged attempts of the government to impose war propaganda on the film industry, and of the letter, from Mayor LaGuardia, to leading clergymen, suggesting the outline of a sermon centering on the theme of religious freedom. Some clergymen denounced the letter as an "unspeakable insult to the clergy." Mayor LaGuardia quite correctly explained that "nobody

Supreme Court has reaffirmed its allegiance to the basic principle of cultural freedom, essential for liberal society.[7]

The principle of non-interference of law and political agencies in culture production and distribution exists only in liberal society and is as exceptional in human history as is liberal society. In pre-liberal or patrimonial society the indeterminacy of the cultural agents and the mechanism of selection through competition existed as they do in liberal society; but, the state, through law or by means of patrimonial administration, interfered in the cultural process eliminating *whole trends* of cultural activity qualified as subversive or destructive for the proper mentality of the population. The typical instrument of interference was censorship, negative by nature; no positive imposition of desirable trends was attempted.

A still greater departure from the cultural order of liberal society is the order prevailing in modern totalitarian society, in both its varieties—communist and fascist. In this society positive interference is added to the negative; the State, by means of law or otherwise, imposes definite trends on cultural activity and thus shapes the mentality of its subjects. Accordingly, when on March 13, 1933, a Ministry of Propaganda was created in Germany, it was declared to be "competent to deal with all measures of mental influence upon the nation". To the Chamber of Culture, created by the law of September 22, 1933, has been assigned the task of fostering the advance of German culture in the spirit of responsibility to the people and the State. In the official memorandum attached to this law it was declared that culture is a concern of the state and that it is the task of the state to fight harmful forces and to further those expressing positive values.

The corollary of the principle of state leadership in culture is determination by the state of the individuals who are to be permitted to participate in cultural activity; the selection of cultural agents by the state, and no longer by the public, is the focal point in the legal regimentation of culture. This does not mean that the selective process through competition would be completely abolished. On June 28, 1933, addressing newspaper publishers, Hitler declared that he did not want to create a state press, but wished to leave a living field for private initiative. On

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forced them to use the outline"; that is just the difference between cultural freedom and strangulation of culture.

7. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted . . . by the courageous exercise of the right of free discussion". Thornhill v. Alabama, 310 U. S. 88, 95 (1940).

October 4, 1933, the Minister for Propaganda explained that the Press should be uniform in will but multiform in the expression of it. A specialist in the field of cultural law said that the fulfillment of the tasks of journalists continued to call for competition between newspapers, and that the efficiency principle remained in force.[8]

The regimentation of culture through the official designation of cultural agents and trends may take different forms. Cultural agencies may be transformed into state agencies—cultural agents then become State officials, and cultural activity becomes bureaucratic routine. This system is largely practiced in Communist society, but not in Fascist society of which National Socialist society is but a sub-species. The Fascist State avoids assuming the role of an economic or cultural agency; it maintains that it is above all conflicting interests and ascribes to itself the function of arbitrator in the name of the collective interest, which, in Fascist doctrine, is placed above private interest. It is willingly admitted that the new order restricts cultural freedom because of political considerations, but it is always added that in liberal society cultural freedom is restricted by the dominance of economic considerations.[9] The difference in the *kind* of restriction is intentionally overlooked by National Socialists who, in this regard, closely follow the Marxist pattern.[10]

The rule that the State does not itself become a cultural agency is not without a few exceptions. The German State, represented by the Ministry of Post and Telegraph, is the owner of all broadcasting stations; moreover, it has acquired all shares of the *Deutsche Rundfunk Gesellschaft m.b.h.* which has been given the monopoly of organizing radio programs; it has also acquired the majority of shares in all leading film corporations. However, the form of private enterprise has been kept even in these fields, and outside them cultural activity continues to be carried on by private

8. Richter, *Das neue Presserecht,* in DEUTSCHES KULTURRECHT (Hamburg, 1936) 172.

9. Goebbels, *Speech of May 1, 1939,* BÜHNE (1939) 234 *et seq.*

10. In liberal society, the dependency of culture on economic forces is essentially mitigated by competition between these forces and still permits the expression of minority trends, whereas in totalitarian society the dependency of culture on political forces precludes the possibility of such expression. However, Marxists and National Socialists contend that, in liberal society, the dependency of culture on economic forces is not only direct, but also indirect, through the mechanism of the State which the plutocracy dominates.

Typical in this direction is BEARD, ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913) according to whom the Constitution primarily represents the triumph of the money power over democratic agrarianism and individualism; this thesis is "proved" through painstaking investigation of the investments of the leaders. A telling rebuke has been given by Judge Holmes: "I shall believe . . ," he wrote, "that they wanted to make a nation and invested (bet) on the belief that they would make one, not that they wanted a powerful government because they had invested." 2 HOLMES-POLLOCK, LETTERS (1941) 222.

concerns and individuals. This requires the use of legal forms in the organization of their relationships, a practice which is made easier by the fact that Germany has shown the world the miracle of the rule of law under unlimited autocracy. Already as early as under Frederic the Great there was evolved a system of courts which rendered decisions according to law, free from outside pressure, and a system of highly efficient administrative boards endowed with a fine legal tradition. This was fundamental for the inculcation in the population of a respect for law equal to that of the British. However, the German attitude towards law was always predominantly formal: a proposition must be followed as law, irrespectively of its content, if only it has been promulgated in due form. This attitude was equally well expressed in German jurisprudence and in the practice of German courts. Its existence permitted a smooth transition from one regime to another and especially the simultaneous maintenance of the principle of the rule of law and of the transformation of law into an instrument to be used for the realization of the National Socialist philosophy of life.[11]

2. *The Forms of the Legal Regimentation*

For the legal regimentation of immaterial culture the new regime uses the technique of the "gradual concretization" of legal norms.[12] The summit of the pyramid is formed by the "Enabling Act" of March 24, 1933,[13] which gave the cabinet the power to change any law, the constitution itself included. On the basis of this law was enacted the already mentioned law of September 22, 1933, as well as a few others concerning immaterial culture.[14] These laws conferred on the presidents of the

11. Pridat-Guzatis, *Grundlinien eines National Sozialistischen Rundfunkrechts,* DEUTSCHES KULTURRECHT 88.

12. This procedure which is typical for German law has been ascribed universal significance by MERKL, DIE LEHRE VON DER RECHTSKRAFT ENTWICKELT AUS DEM RECHTSBEGRIFF (Leipzig-Wien 1923); KELSEN, ALLGEMEINE STATSLEHRE (Berlin 1925); *cf.* TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW (1939) 313-321.

13. This sweeping law was enacted on the basis of the Weimar Constitution according to which any alteration of the Constitution may be passed by the *Reichstag,* provided that at least two thirds of its members be present, and the alteration be voted by at least two thirds of those present. The Enabling Act was voted by 441 votes to 91. The Weimar Constitution (as well as the Constitution of the German Empire of 1871) belonged to the number of "flexible" i.e. easily changeable Constitutions. Continental specialists in Constitutional Law used to stress the contrast between this flexibility and the rigidity of the American Constitution.

14. The most important ones are the following: (1) the Press Law of October 4, 1933; (2) the Film Law of February 16, 1934; the Theater Law of May 15, 1934, and (4) the Music Law of February 5, 1935. (These laws can be found under the dates of their promulgation in REICHSGESETZBLATT.) Equally important is the decree of November 1, 1933.

chambers the power to issue decrees and ordinances still more regimenting culture and enabling subordinate agencies in their turn to develop concretization still further.

The delegation of powers has been amply used by agencies large and small. Innumerable rules have been issued under the title of decrees, ordinances, orders, proclamations, instructions, etc. It is noteworthy that the president of the Chamber of Radio at first declared his intention to abstain from issuing decrees and ordinances and to replace them by "official directions" to be voluntarily followed.[15] However, this form of regimentation proved inconvenient, and, beginning with 1935, decrees and ordinances concerning the radio have been issued.

The laws as well as the decrees of the President of the Chamber of Culture are published in the *Reichsanzeiger*.[16] On June 6, 1934, the Chamber designated the *Voelkisher Beobachter* as the paper where all its official announcements were to be published; however, many ordinances and other acts of individual chambers have been published only in their special journals.[17]

The material thus published forms the main source of information on the legal regimentation of culture. Knowledge gained by its study is necessarily incomplete. "It would be a mistake", we read in one of the official publications, "to judge of the activity of the Chamber of Culture on the basis of decrees and ordinances. They form merely the skeleton of the guild structure, whereas the results of the activity depend primarily on the spirit in which they are interpreted".[18] This is, of course, correct, but still this material gives insight into the *legal framework* in which culture has to develop in National Socialist Germany.

This framework does not include any element of judicial supervision of administrative acts, even in cases when they interfere with individual rights. Consequently, if the definition of Holmes is accepted that the

15. 8 ARCHIV FÜR FUNKRECHT 143-144.

16. They are reprinted in GESETZGEBUNG DES KABINETTS ADOLPH HITLER (32 volumes have appeared up to September 1, 1939 comprising the Laws of Germany since January 30, 1933) where they may be easily found. In some cases official memoranda have been attached; they are legally relevant, as German courts and administrative boards are used to see in them "the authentic interpretation of the will of the legislator" which they consider binding.

17. The journals are DER AUTOR (Chamber of Literature); DEUTSCHE PRESSE (Chamber of the Press); ARCHIV FÜR FUNKRECHT, later RUNDFUNKARCHIV (Chamber of the Radio); BÜHNE (Chamber of the Theater); DEUTSCHER FILM (Chamber of the Film). The Chamber of Art publishes the MITTEILUNGSBLATT DER REICHSKAMMER DER BILDENDEN KÜNSTE. (Semi-official publications, containing statutory laws and provisions.)

18. 8 ARCHIV FÜR FUNKRECHT 368-369.

law is that which courts do or probably will do, there is no law at all in the National Socialist regimentation of culture.[19] However, it is obvious that such a definition of law cannot be used for continental European law, especially for German law.[20] The possibility of the judicial supervision of administrative acts was always limited in Germany and naturally continues to be so under Nationalist Socialist rule. The following case is illuminative for an understanding of the situation.

The Chamber of Music imposed a fine of RM.1000 on one of its members for the unauthorized use of a pseudonym. The member brought suit in the district administrative court of Berlin. On March 18, 1937, the court rejected the suit stating that administrative courts were competent only in cases where their jurisdiction was explicitly established by a statute and that in this particular case no such statute existed.

The plaintiff appealed to the Supreme Administrative Court of Prussia. He claimed that the principle of legal security demanded the judicial examination of the legality of the ordinance of the Chamber of Music; if there was no statute, rules concerning similar cases ought to be applied by analogy.

On July 26, 1937, the Supreme Court rendered a decision rejecting the appeal of the plaintiff. The decision stressed the point that it was one of the fundamental principles of Prussian administrative law that administrative acts could be attacked only in cases explicitly foreseen and allowed by law; if the law was silent a recourse to the courts was impossible.[21]

19. *Cf.* The following statement by DICEY, LAW ON THE CONSTITUTION (8th ed.) 130: "The restrictions placed on the action of the legislature under the French Constitution are not in reality law, since they are not rules which in the last resort will be enforced by the courts".

20. Relative to continental European law the *differentia specifica* of law is not the possibility of recourse to courts, but rather a precise delimitation of jurisdictions, standardization of procedure and predetermination of sanctions, provided that the given regulation of human behavior is enforced by one of the branches of government—judicial or administrative.

21. 10 ARCHIV FÜR FUNKRECHT 507. The legal situation in Germany (independently of the National Socialist regime) contrasts with that prevailing in this country. Whereas the limits of judicial revision of administrative acts are controversial, nobody, in this country, doubts that "there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceeding . . . was conducted regularly". Judge Brandeis' language in St. Jos. Stock Yards v. U. S., 298 U. S. 38, 84 (1930). The tendency is perhaps to go too far in this direction, so that the Supreme Court had to explain that "courts are not the only agency of government that must be assumed to have capacity to govern". U. S. v. Butler, 297 U. S. 87 (1936). According to Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 336, "our desire to have courts determine questions of law is related to the belief in their possession of expertness with regard to such questions". Confronting the situation in the United States and in National Socialist Germany, one is

Were culture absolutely independent of economics, no judicial decisions could be found concerning culture, with the exception of those denying judicial competence. But culture is not entirely independent; in National Socialist Germany, cultural agencies are also economic enterprises, subject to civil law, and thus an opportunity is opened for the courts to supervise some aspects of culture managements. The most representative case of this kind is known in Germany as the "Berlin case".

Five companies producing phonograph records brought suit against the German Broadcasting Company, requiring that the Company pay them one million RM. for having used their records for the last few years and that it desist from using them until an agreement with the five companies should be reached. May 28, 1935, the district court of Berlin denied the suit on very complicated grounds of the law on musical property; however, it sentenced the Broadcasting Co. to pay a part of the judicial expenses. Both parties appealed to the *Kammergericht*—the Broadcasting Company in order to be freed from any payment. The brief of the Company comprised a statement relevant to this study. It asserted that the Company participated in the sovereignty of the Reich and that therefore litigations with it could be decided only by administrative boards and not by courts. On February 27, 1936, the *Kammergericht* upheld the decision of the lower court. According to the revised charter of the Company, declared the Court, all shares belonged to the Reich. However, the Company remained a limited liability stock company; it continued to be an enterprise and had not become an administrative board or a corporation of public law; this meant that, in the opinion of the government, the activity of the company continued to belong mainly to the realm of private law and as long as no change in this respect had been made by means of legislation a law suit against the Company was admissible.

On November 14, 1936, the Supreme Court of Germany overruled the decision of the *Kammergericht*, but upheld *in abstracto* the competence of judicial courts. According to the Supreme Court the distinction between public and private law had been the foundation of judicial activity for many decades; new legal principles had arisen as the result of the events of January 30, 1933, but this did not affect the particular situation; the *Kammergericht* had quite correctly pointed to legal institutions of the period of the World War when the form of limited liability companies was frequently used in the public interest.[22]

forced to understand that expertness is not the only reason: courts are preferable because of their, at least relative, independence of political agencies and because of the fact that "taught tradition" induces the judges to act as protectors of individual freedom.

22. 9 ARCHIV FÜR FUNKRECHT 142, 314; 10 ARCHIV FÜR FUNKRECHT 6 *et seq.*

The decision of the Supreme Court alarmed the lawyers of the Chamber of Culture; a special issue of the *Rundfunkarchiv* was devoted to refutation of the rulings of the Supreme Court. However, no measures were taken to overrule it and the conclusion may be drawn from this case that the possibility of judicial supervision depends on the status of the agencies involved: if they are organized as companies subject to private law they come under the jurisdiction of regular courts, whereas, if they are organized as corporations of public law they are under the jurisdiction of administrative courts, but this again only if a statute explicitly establishes this jurisdiction.

3. *The Guild of Culture*

Culture is free and cannot be commandeered, say National Socialist leaders; but cultural leadership belongs to the State.[23] This leadership is secured by the enactment and enforcement of the new "cultural law", the fundamental principles of which may be formulated as follows:

1) A legal monopoly of cultural activity is given to the members of the Guild of Culture.[24]

2) Membership in the Guild is obtained through registration in special rolls, which are under close supervision of the leadership.

3) The registration may be cancelled, which means a cancellation of the right to carry on the corresponding activity.

The term "guild" may be used in regard to the unorganized mass of persons to whom the monopoly of cultural activity belongs. As an organization, the Guild becomes the Chamber of Culture, with numerous subdivisions—central, provincial and local.[25]

According to the fundamental law of September 22, 1933, the President of the Chamber of Culture is the Minister of Propaganda. He is its only legal representative; he may delegate part of his powers to vice-presidents (whom he appoints). A purely advisory body, the Senate of Culture, also belongs to the summit of the pyramid. It is composed of "prominent

23. Memorandum to the Theater Law.

24. The German term is *Kulturstand;* its component, *Stand,* enters also in the combination *Ständestaat* which designates preliberal society. However, it is obvious that the Guild of Culture (as well as the Food Guild established by the law of September 13, 1933) does not correspond to the estates of pre-liberal society. The latter were "horizontal" divisions of society, for the individual estates were "higher" or "lower", whereas the Guilds in contemporary Germany are "vertical" divisions, entrusted with different tasks, but equal in rights and social prestige.

25. Tatarin-Tarnheyden, *Das Reichkulturkammergesetz und seine Bedeutung,* JURISTISCHE WOCHENSCHRIFT (1933) 555, correctly points out that corporate organization is not an end in itself, but a means to the end of the co-ordination of the actions of members.

persons who have rendered outstanding services to the nation and the culture". About one hundred persons have been appointed to it, representing the various branches of culture and, within these, the various social roles. The members do not receive any remuneration for their services. The Senate convenes four times a year to watch "that the cultural consciousness of the nation be respected; the whole might of the party stands behind it".[26]

The Chamber of Culture is composed of seven individual chambers: 1) literature, 2) press, 3) radio, 4) theater, 5) music, 6) arts, and 7) film.[27] Each chamber is headed by a president, appointed by the president of the Chamber of Culture, and comprizes a bureau (*"Präsidialrat"*) and an advisory council, consisting of representatives of the respective fields of culture; all these persons are appointed and can be dismissed by the President of the Chamber.[28]

The Chamber of Culture and each of the individual chambers are organized as corporations of public law. The concept of a corporation of public law, says Schrieber, is controversial, as it belongs to the older law; it has been accepted for convenience in order to assign to the chambers rights and duties in the most adequate form. Actually, he continues, the chambers are corporate bodies which are granted the right of self-government and are ascribed special functions relative to leadership and education.[29] This characterization is obviously wrong: none of the elements of self-government (free elections to the governing bodies, and the existence of an independent sphere of action) is present in the structure.

The chambers have the following functions: 1) furthering the advance of German culture, 2) regulating the social and economic aspects of the corresponding occupations and 3) integrating the various trends which exist in the respective fields. The presidents, both of the Chamber of

26. Decree of November 1, 1933; inaugural speech of Goebbels, November 15, 1935 (reported the next day by all the German daily papers).

27. A preliminary Film Chamber was created by the law of July 14, 1933; the law of September 22, 1933, incorporated it in the Chamber of Culture. It is obvious that the seven chambers do not completely cover the field of culture. Schrieber explains that education and science have not been included, because since olden time they were protected and fostered by the State. The discussion in the text is limited to the fields co-ordinated by the seven chambers, Schrieber, *infra* note 29, at 21.

28. Decree of November 1, 1933, art. 13 and 14.

29. Schrieber, *Das geltende Reichskulturrecht,* DEUTSCHES KULTURRECHT 19. He considers the decrees and ordinances of the chambers as forming "autonomous law" (on this concept see my *Introduction,* quoted in note 4, 308). Schrieber's definition is wrong for the same reason that his definition of the juridical nature of the chamber is wrong.

Culture and of the individual chambers, are granted the right to issue 1) by-laws organizing the chambers and 2) ordinances regulating the corresponding fields of activity; the right to restrict the creation or the expansion of enterprizes is especially mentioned. No compensation is given to those who may suffer losses through restrictions thus imposed on individual enterprizes. The presidents of the chambers are allowed to impose fees on the members and are granted far-reaching punitive powers.[30]

Each chamber consists of a certain number of functional associations (*Fachschaften*) and/or functional groups (*Fachgruppen*). The difference is that associations possess legal personality whereas functional groups are merely sections within the chambers, without legal individuality.[31] The first form is of historical origin and does not completely correspond to present conditions, hence the tendency to replace associations by groups. For instance, on June 16, 1935, in the Chamber of Art, all functional associations except those of art dealers and art publishers were replaced by functional groups.[32]

Whereas functional groups are created and disbanded by orders of the presidents of the Chambers, the legal status of the functional associations is somewhat different. An association is formed by the interested persons and has to apply for integration into the chamber. The president of the Chamber must satisfy this request if, in his opinion, the association is capable of carrying out the functions imposed by law on such organizations. One should not infer, however, that any association applying for integration will be accepted as this would lead to the existence of many associations working for the organization of the same field of cultural activity. Therefore if, in a given field, an association has already been integrated and another one applies for integration, the president must reject the application.[33]

The provincial organization corresponds fairly closely to the central one. In each of the 36 provinces into which German is actually divided,[34] the head of the regional propaganda department of the party is at the same time the head of the provincial office of the ministry of propaganda and the provincial manager of culture (*Kulturwalter*). The main function

30. Decree of November 1, 1933, art. 3, 19, 25, and 28.

31. Schrieber, *supra* note 29, at 20-21.

32. Honig, *Die Berufsausübung des bildenden Künstlers,* DEUTSCHES KULTURRECHT 44.

33. Schrieber, *supra* note 29, at 20-21.

34. These provinces are the *Reichsgaue* headed by the *Gauleiters;* this division has actually superseded the historical division of Germany into states or lands.

of these managers is to secure a uniform and true National Socialist cultural policy.[35]

Individual chambers, functional associations and functional groups are also represented in the provinces; however, it is not obligatory that each of these organizations be represented by a special office in each province; one office may be created for two or more provinces, and the requirement is only that the boundaries between the areas covered by such offices do not intersect the boundaries of the provinces. The provincial organizations of the chambers and their sections are subordinate both to 1) the provincial manager of culture and 2) the respective central organization in Berlin. This creates a double subordination which might be a cause of jurisdictional conflicts. This problem has been solved in the following way: the presidents of the individual chambers are not allowed to issue binding orders to the provincial managers of culture, but the latter have to follow the former's general ordinances. Any questions arising out of individual acts of the managers of culture must be submitted to the president of the Chamber of Culture.[36] Finally, in many cases there exist local organizations. Their structure may be illustrated by that of the theaters.

All members of the functional association "stage", in each theater, form the "Union of the Theater". This union is headed by a chairman appointed at the beginning of every season by the leader of the association in agreement with the provincial manager of culture and with the manager of the enterprize. The chairman appoints an advisory committee in agreement with the functional groups of the union. The chairman settles conflicts between the functional groups. Conflicts between the chairman and the advisory council or the manager of the enterprise are settled by the provincial leader of the association of the stage.[37]

4. *Circumscription and Distribution of Cultural Agents*

The circle of persons who must belong to the Guild of Culture is determined through the gradual concretization of a general statement to be found in the fundamental law of the Guild. This statement reads as follows:

"All persons taking part in the production, reworking, diffusion, preservation or marketing of cultural goods must be members of the Chamber

35. In the preamble it is explained that the decision had been reached as a part of the process of the unification of the State and the Party.

36. Directions of the Chamber of Culture, November 12, 1934.

37. BÜHNE (1936) 532; BÜHNE (1937) 236.

of Culture; cultural goods are 1) all products of art, insofar as they are made public, and 2) all other products of intellectual activity, if they are made public through the press, film or radio".[38]

It is obvious that the concept of publicity is essential for the legal definition of culture. Authorities hold it to be well established by numerous decisions of the Reichsgericht that "public" is that which can be perceived by an indeterminate number of persons. Playing music before a private audience is not a public activity, but teaching music is, for the teacher offers his services to indeterminate persons. One who writes a novel or a play need not belong to the chamber, but he must do so if he wants to have his works published.[39]

Very soon after the creation of the Chamber of Culture the presidents of the individual chambers began to issue ordinances defining in a very detailed manner the vocations which make membership in the chamber compulsory. Thus, for instance, the president of the chamber of art ordered the incorporation into the chamber of all architects, sculptors, painters, decorators, landscape architects, art craftsmen, art dealers, auctioneers and publishers. Later on additional ordinances were issued incorporating persons omitted in the original regulations.

In many cases legal definitions were given to particular professions and vocations. Thus, for instance, the profession of a journalist was defined as that of "contributing by word, news report or picture to the intellectual content of a newspaper or of a political periodical".[40]

A number of ordinances have been issued to regulate borderline cases. Thus, cultural activity in some field may be incidentally undertaken by persons whose main vocation lies in another field. Such persons may be exempt from compulsory participation in the Chamber. Exemptions may be granted by individual acts or by general rules; they may be revoked at any time.[41]

The problem has frequently arisen as to what extent have the auxiliary forces of the cultural professions to be incorporated in the chambers. According to an ordinance of the Chamber of Art, persons whose activity is purely commercial, technical, mechanical or clerical do not belong in the Chamber. According to an ordinance of the Chamber of the Theater, persons whose functions are only correspondence or reception of visitors are not obliged to belong to the Chamber.[42] On the other hand, publishers

38. Decree of November 1, 1933, art. 4 and 5.
39. Schrieber, *supra* note 29, at 21-22.
40. Press Law, art. 1.
41. Decree of November 1, 1933, art. 9; Schrieber, *supra* note 29, at 22.
42. 3 MITTEILUNGSBLATT, *supra* note 17, at Nos. 7, 11; BÜHNE (1938) 388.

of newspapers and periodicals have to belong to the Chamber of the Press, and book store owners and organizers of circulating libraries—to the Chamber of Literature. It seems that the line of demarcation is not very clearly defined.

This last proposition finds confirmation in a number of ordinances which draw a line of demarcation between the Guild of Culture and the other Guilds created in Germany, and, furthermore, between the individual chambers of culture.

The most difficult task was apparently the delimitation with the Labor Front which, according to its fundamental law (of January 20, 1934) has to comprise all gainfully occupied persons. Accordingly, many cultural agents joined the Labor Front individually and thus came to belong to two organizations. A joint declaration of the President of the Chamber of Culture and of the Leader of the Labor Front, of February 12, 1934, changed this situation. Members of the Chamber of Culture were no longer allowed individual membership in the Labor Front as the Chamber as such was a corporate member of the Labor Front, all of its members thus also being indirect members of the Front.[43] However, additional agreements were necessary in order to determine the status of different groups of workers, such as, for instance, of musicians playing in bands of the Labor Front.[44]

There were also jurisdictional conflicts between the Chamber of Culture and the Economic Chamber. A decree of the President of the Chamber of Culture forbade its members to be members of the Economic Chamber and to pay dues to it.[45] However, a decree issued later ordered the enterprises belonging to the Chamber of Culture to also join the Economic Chamber.[46]

Several jurisdictional problems seem to have not been settled. The most dfficult one concerns the legal status of state officials (especially that of school teachers and University professors) who at the same time write or contribute to papers. The difficulty is that they come under the jurisdiction of the Minister of Education and their incorporation into the Chamber of Culture would mean double subordination.[47]

The delimitation between the individual chambers mainly concerns the Chamber of the Theater which comes into conflict with the Chambers of Music, Radio, Film and the Press. For a time the Chamber of Music

43. 10 ARCHIV FÜR FUNKRECHT 108-109.
44. Ordinance of the Chamber of Music, March 1, 1934.
45. Decree of the Chamber of Culture, September 1, 1935.
46. BÜHNE (1936) 185.
47. Wismann, *Der Aufbau der Reichsschrifttumskammer*, in DEUTSCHES KULTURRECHT 62.

tried to prevent concerts given by members of the Chamber of the Theater, while this latter declared that every conductor or singer belonging to its membership was entitled to exercise his vocation in concerts without acquiring membership in the Chamber of Music. The Presidents of the Chambers of the Theater and of Film agreed that actors of the stage, when working in a film, were not required to become members of the Film Chamber, and vice-versa; in both cases the respective chambers were to be notified. The Presidents of the Chambers of the Theater and of Radio decided that those engaged before the microphone in an activity pertaining to the jurisdiction of the Chamber of the Theater had to acquire membership in the latter.[48] However, this agreement was overruled by the President of the Chamber of Culture who decided that membership in the Radio Chamber was sufficient for those persons whose main profession was the radio.[49] The question of the incorporation of persons who simultaneously contribute to newspapers or magazines and write books has remained controversial.[50]

It results from the cases discussed that the following principles govern the distribution of cultural agents between the individual groups:

1) Double membership is to be avoided.

2) In borderline cases the main profession is given priority.

3) The chamber in the jurisdiction of which incidental cultural acts are performed is to be notified.

4) Corporations have to register both in the Chamber of Culture and in the Economic Chamber.

5. *The Legal Status of the Members of the Guild of Culture*

The position of an individual cultural agent in the complicated network of cultural agencies is determined by the following principles:

1) There is no direct membership in the Chamber of Culture or in the individual chambers; indirect membership is acquired at the same time as membership in one of the functional associations or groups. However, in exceptional cases (especially if there is no appropriate association or group), direct membership in an individual chamber is possible.[51]

2) Membership depends on registration in a roll held by the provincial organization of the association or group. The legal function of the regis-

48 BÜHNE (1936) 27; DEUTSCHER FILM 4, 62; 9 ARCHIV FÜR FUNKRECHT 49.

49. Decree of the Chamber of Culture, March 11, 1938.

50. Wismann, *supra* note 47, at 62.

51. Decree of November 1, 1933, art. 15.

tration is not the same for different cultural vocations. It is constitutive in the majority of cases, but declarative in regard to persons active in the theater[52] and those working in musical or artistic institutions or teaching art[53]; in regard to these vocations, membership is assumed by the law, and the registration is actually a procedure for sifting and eliminating unfit members. On the other hand, the registration does not open the door for all forms of professional activity; in many cases an additional authorization is necessary.[54]

3) The requirements for the registration of an applicant (without which the exercise of a cultural profession is impossible) are reliability and ability[55]. Reliability may be denied if there is evidence that the applicant was convicted of a criminal offense or was declared bankrupt.[56] Additionally, all Jews, in the sense of the Nuremberg laws, have been declared unreliable.[57] During the last two years before the outbreak of the war, Aryan descent was stressed by the individual chambers, which repeatedly published ordinances requiring proof of this from their members.

As regards ability, the individual chambers have gradually established a system of examinations in order to eliminate "pseudo-culture". Such examinations were introduced in 1934 by the chamber of music and in 1935 by the chambers of film and of art.[58]

In certain professions conditions for registration are more drastic. The most severe are for journalists whose Aryan parentage must be proved as far back as 1800. German citizenship and legal majority is required. Moreover, registration is refused to individuals who have previously violated directions given to journalists by the new press law, or who have proved to be harmful individuals (Schädlinge) in their political or professional life. However, the mere fact of former membership in a political party other than the National Socialist is not a sufficient reason for rejection, though former activity in the Marxist press forever precludes membership in the Chamber of the Press.[59]

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52. Theater Law, art. 6.

53. Law of May 15, 1934.

54. They concern especially journalists and managers of theatrical performances.

55. Decree of November 1, 1933, art. 10.

56. Schrieber, *supra* note 29, at 24.

57. Goebbels, *supra* note 16 said: "Today the Chamber of Culture does no longer comprise any Jews."

58. See section 7, *infra*

59. Decree of December 19, 1933. It contains a curious didactic statement which reads as follows: "Decisive are the consciousness of responsibility to the state and people and personal integrity. Nobody has to fear anything from the application of this law who con-

4) Membership in the Chamber of Culture is open only to persons who actually exercise the corresponding profession or have reasonable expectation to exercise it in the near future. After 18 months of consecutive unemployment, members are "liberated" from the duty of belonging to the Chamber; however, their names are kept on a special register, and, getting a contract, they are automatically reinstated in their membership. Unemployed actors tried to retain their membership by paying the dues, but this right was explicitly denied them by the President of the Chamber.[60]

5) Only persons registered in the Chamber may call themselves journalists, musicians, actors, and so forth. On the other hand, they are not allowed to mention their membership in the chamber in advertisements or signboards, for the excellent reason that there cannot be active cultural agents who are not members.[61] Members of the Guild may enter into contractual relations concerning cultural activity only with fellow members. A theater manager was fined for having signed a contract with a girl who was not yet a member of the chamber, though meaning to join.[62] The Chamber of the Film has required evidence of membership of all participants before permitting the distribution of a film.[63]

6) The Chambers of Music and of the Theater have strictly regulated the use of pseudonyms. They must be made known to the chambers. Foreign pseudonyms and those sounding foreign are banned. Those members who have used such pseudonyms for many years in the past may be permitted to add them to their last name or to the new pseudonym[64]. It proved difficult to enforce these ordinances, and an additional ordinance was issued on June 4, 1936, prohibiting persons organizing concerts or other musical performances to do business with individuals using unauthorized pseudonyms. The legality of this ordinance is under doubt.[65]

7) The members of the chambers have to follow the instructions of their presidents. These instructions may be enforced by disciplinary means, namely, reprimand, fine, or cancellation of registration.[66] In general such powers may be used against members violating an ordinance or making false statements to the chamber; reprimand may be also

forms to these requisites". A musician may be refused registration if the applicant has other sources of income and if, besides, there is no need of additional musicians. Music Law, art. 6.

60. BÜHNE (1938) 75.

61. Decree of November 9, 1935.

62. BÜHNE (1936) 532.

63. BIGOT, LA CHAMBRE DE CULTURE ALLEMANDE (Paris, 1937) 89.

64. 10 ARCHIV FÜR FUNKRECHT 491.

65. *Id.* at 494.

66. Decree of November 1, 1933, art. 28.

ordered in other cases, and fine may be imposed also on persons who are not members of the chamber, but who illegally exercise professions coming under the jurisdiction of the corresponding chamber.[67] The upper limit of a disciplinary fine is RM. 100,000.[68] The cancellation of registration may take place, if it becomes apparent that the person is unreliable. Practice shows that, among others, such acts as repeated delay in paying dues or engaging in activity outside of Germany without permission may be conducive to cancellation.[69]

8) Naturally, members may voluntarily resign from the chamber. This obviously means complete cessation of the corresponding cultural activity.[70]

6. *Substantive Rules*

The number of substantive rules[71] imposed on the cultural agents of modern Germany is not very great. This does not mean that more freedom is allowed than might have been expected, but only that, in addition to direct legal regimentation, indirect motivation by law is extensively used: people are told what the government expects them to do, and they act accordingly under the sanction of cancellation of registration.[72]

The survey of the substantive rules will be based on the official classification of cultural acts into three categories: disapproved, neutral and recommended,[73] and the obligations thus correspondingly imposed on cultural agents.

I. In regard to "disapproved acts" the legal obligation bears the character of *non facere*. The imposition of such obligation may take various forms.

1) The simplest is that of unconditional prohibition. Such prohibitions concern, first of all, the content of cultural activity and are usually

67. Schrieber, *supra* note 29, at 28.

68. Decree of April 19, 1932.

69. 7 ARCHIV FÜR FUNKRECHT 91-92.

70. Schrieber, *supra* note 29, at 24.

71. For the contradistinction between substantive and procedural rules, see Kocourek, *Substance and Procedure* (1941) 10 FORDHAM L. REV. 157 *et seq.*

72. The following statement of the Minister of Propaganda was made October 4, 1933: "It is possible that this government would be mistaken in individual decisions; but it is impossible that after this government there could be any better one. Therefore, for every nationally thinking and responsible citizen there is no other way than to cover the decisions of this government and to care for their material enforcement".

73. The classification of the forms of regulation is based on a conceptual scheme first established by BIERLING, JURISTISCHE PRINZIPIENLEHRE (Freiburg-Leipzig 1894) and later substantially developed by the Russian jurists, Petrazhitski and Taranovsky; see also SOROKIN, 2 SOCIAL AND CULTURAL DYNAMICS (1937) 523 *et seq.*

imposed on cultural agents. The most important concern literature. "In a quite inconspicuous way", the association of bookdealers has established a list of undesirable books and has notified its members that the sale of such works would be considered a symptom of unreliability with all legal consequences that ensue therefrom. Circulating libraries have been "purged" in the same manner.[74]

It is noteworthy that the system of "self-censorship" did not prove to be quite efficient; this may be inferred from the fact that on April 24, 1935 the Chamber of Culture issued an ordinance prohibiting the sale or lending of "works incompatible with the cultural will of National Socialism" and placed such works on a special list.[75]

Among other direct prohibitions the following ought to be mentioned: prohibition to submit works of art and literature to criticism,[76] prohibition to review books containing subversive propaganda,[77] and prohibition to advertise by radio.[78] In one particular case prohibition applies directly to the recipients of cultural acts, that is to say, to the public. Early in 1937, criminal prosecution was started against persons listening to the Moscow radio. Two sentences of higher courts have qualified listening to such broadcasts as high treason, if this was carried on with the intent of fostering communism.[79] This was confirmed by the law of November 24, 1937, and as result the Chamber of Radio prohibited the marking of the Moscow broadcasting station on radio dials.[80]

Secondly, prohibitions concern the organization of cultural activity. The most important of these place a check on the creation of new or the expansion of old enterprises; this applies to musical enterprises, motion picture theaters, new service bureaus, the wholesale newspaper trade, and newspapers.[81] The Film Chamber made the creation of new film enter-

74. Wismann, *supra* note 47, at 59.

75. BIGOT, *supra* note 63, at 70-71.

76. See III, 1 *infra.*

77. Larson, *The German Press Chamber,* PUBLIC OPINION QUARTERLY (October 1937) 78.

78. 9 ARCHIV FÜR FUNKRECHT 13.

79. Court of Appeals, Hamburg, April 14, 1937; the People's Court, July 26, 1937 (This is a Court created by the law of April 24, 1934, for the trial of political offenses); See DEUTSCHE JUSTIZ (1938) 828.

80. REICHSFUNKARCHIV (1938) 263. A decree of the War Cabinet of September 1, 1939, made any listening to foreign broadcasts a criminal offense. According to a report of the *Deutsches Nachrichtenbureau* of June 5, 1941, between April 1940, and March 1941, 1,496 persons were arrested and 1,231 of them convicted. Twenty-six persons received jail sentences up to four months. Fines up to 300 marks were imposed upon 1,200. One man was sentenced to death. He, however, not only listened to foreign broadcasts but distributed the reports he heard on mimeographed sheets. NEW YORK TIMES, June 6, 1941.

81. Ordinances (of different chambers) of January 6, 1934; May 2, 1934; September 4, 1934; and January 14, 1935.

prises dependent on a special permission to be granted only if the need for such enterprises is sufficiently proved and if there are guarantees that the enterprise will be efficiently conducted.[82] This form of regimentation has given rise to a jurisdictional conflict between the Chamber of Culture and private cartels. A decision of the Cartel Court of July 11, 1934 established the rule that private cartels could not make use of the law on the Chamber of Culture to impose restrictions on their members; that they could do so only within the framework of the economic legislation; and that individual measures of this kind came under private law and were to be supervised by competent authorities.[83]

Of much lesser importance is the prohibition to show more than one film in a program,[84] as well as the prohibition of non-remunerated performances, "in the interests of the unemployed members of the Guild". Exceptions are naturally allowed in regard to performances organized by the National Socialist party.[85]

Finally, there is the prohibition by the Chambers of Literature and the Press to request complimentary copies of books or newspapers in order to augment or organize libraries; the ordinance of the Chamber of Literature explicitly states that this harmful practice has been used by state, party and private agencies frequently enough to endanger the economic security of the publishing houses.[86]

2) A more complicated form of prohibition is that of describing an undesirable activity in general terms, making the cultural agent the judge in each concrete case, but with sanctions impending if the latter's judgment is not approved by the leaders of culture. This is the technique employed in regard to the Press. Journalists have to avoid 1) any confusion of private and public interests; 2) all that is apt to undermine the strength of the Reich or of the German army, to harm German culture or to wound religious susceptibilities, and 3) all that is contrary to the accepted moral standards.[87] Whether individual statements belong to the above mentioned classes is first to be judged by the persons concerned, and then to be reviewed by the cultural leadership.

3) The third form of prohibition consists in the imposition of a legal obligation to abstain from exercising cultural acts the content of which has been *in concreto* disapproved by the cultural leadership through one

82. Ordinance of August 6, 1937.

83. 8 ARCHIV FÜR FUNKRECHT 53, 77.

84. Ordinance of the Temporary Film Chamber of August 7, 1933.

85. Ordinance of the Chamber of Music, June 29, 1934; of the Chamber of the Theater, August 17, 1934.

86. Ordinance of the Chamber of Literature, January 21, 1935.

87. Press Law, art. 13 and 14.

of the special agencies of the censorship type; a subsidiary obligation, also of the *non facere* type, is imposed, namely that of abstaining from the public exercise of acts which *in abstracto* come under the jurisdiction of the censorship, before such approval has been given. The legal obligation comprises also a *facere* part: that of submitting to censorship specified products of cultural activity. It is obvious, however, that the function of the above described segment of the legal regimentation of culture is primarily negative, just as it is also in the two previously discussed cases. The aim of the law is not to cover certain works by censorship, but to prevent undesirable mental influences.

The system in its most elaborate form is applied in the film industry. Film censorship existed in Weimar, Germany, but the Film law has substantially widened the scope of supervision. Any film which is against National Socialist or religious or moral or artistic sentiment (Empfindung) is forbidden. Advertising through films is also submitted to censorship. It is explicitly forbidden to mention that a film has been previously barred, even if the version was quite different. The law created the office of an "Imperial Film Dramatist" to whom all scripts must be submitted before they can be produced. His functions were described as follows: 1) to help the film industry in everything pertaining to playwriting; 2) to carry out preliminary investigations to determine whether the script of a film is compatible with the law; 3) to help reworking films barred by censorship, and 4) to prevent authors from touching on subjects which would make the film incompatible with the spirit of the time.[88]

It is noteworthy that the rules concerning the preliminary examination of the scripts could not be enforced. The memorandum to the law of December 13, 1934, recognizes that the German film industry proved unable to intelligently avail itself of the help and advice of the Imperial Film Dramatist and has continued to produce films of bad taste. The law itself was a retreat: the obligation to submit the script to preliminary examination was abolished and the application for advice became optional.

A further disappointment for the government in the field of the film industry is evident from the law of June 28, 1935, which authorized the Ministry for Propaganda to prohibit the production of films which had been passed by the censorship boards; this decree was given retroactive power.

The principle of censorship has been also introduced into the field of the theater: according to the Theater Law a play may be forbidden for

88. Film Law, art. 2, 14, and 15.

reasons similar to those concerning motion pictures.[89]

In the field of music the association of composers created an examination board which was to determine whether "a certain work is actually a piece of music".[90]

Finally, the Chamber of Literature created an "advisory board" for popular literature "to help publishers select manuscripts for publication". A similar body has been established for the preliminary examination of astrological works (*sic!*)[91]

The technique of censorship is usually preventive; however, it can be made retroactive and as such has been used by the National Socialist legislation. A decree of July 3, 1935, abolished the validity of all film permits granted before January 30, 1933, and ordered the re-examination of all old films. Still more drastic has been the decree of May 31, 1938, according to which "products of degenerate art" exposed in museums and other collections accessible to the public were made subject to confiscation without compensation.[92]

4) The last form of prohibition, quite analogous to that discussed above, is that of making certain acts dependent on permission. The legal obligations are 1) to abstain from specified acts before having received permission and 2) to abstain from them altogether if permission had been refused. This is a form used especially in regard to co-operation between German and foreign cultural agents. Such co-operation is, *in abstracto*, considered undesirable, but may be permitted in individual cases. By the decree of the Chamber of Culture of March 1, 1934, artists and speakers may go abroad only having received permission from the President of the corresponding chamber. By a decree of June 30, 1936, the system of permissions has been applied to all contracts involving royalties to foreigners.

II. The second fundamental type of regimentation is that of regulating "neutral" acts, that is to say, acts which, as such, are considered neither undesirable nor recommended. The legal obligations resulting from this form of regimentation are essentially conditional: *if* one chooses to act, one is obliged to carry out this act in the required form and in no other.

89. Theater Law, art. 15.

90. *Wachenfeld, "Das neue Musikrecht"*, DEUTSCHES KULTURRECHT 39.

91. Wismann, *supra* note 47, at 60.

92. Interpreting this decree, Hitler said: "He who wants to be an artist in this century, must belong to this century; there is no longer any room for cultural Neanderthalians, anyway in National Socialist Germany", 3 MITTEILUNGSBLATT, *supra* note 17, at Nos. 8, 1. Five thousand paintings and twelve thousand drawings have been removed from the museums in execution of this decree. 3 MITTEILUNGSBLATT, *id.* at No. 4, 3.

1) There are two sub-types of this form of regimentation. The first consists in introducing non-contractual elements in contractual relationships.[93] This has taken place, first, as regards the relationship between film distributors and the owners of motion picture theaters. A series of ordinances, beginning September 3, 1935, has imposed on them a model contract based on the principle of remunerating the distributor by a legally determined percentage of the gross income of the theater and restricting the liberty of the theater owners as to choice of films and the length of time they are to be shown. There have been attempts to avoid this form of regimentation[94] and consequently new restrictions were imposed to make evasion impossible.

A model contract has been elaborated by the Chamber of Literature. According to this contract the author is to turn in his manuscript in a readable form. The publisher is to acknowledge receipt directly and to at once proceed to its examination. The contract provides for royalties amounting to no less than 12.5% of the sale. The publisher can stipulate the right to publish the next five works of the author, or all works the author might produce during the following three years. All conflicts are to be settled by the president of the Chamber of Literature, etc.[95]

A similar contract has been drawn up for architects.

The actors' contract has not been completely shaped, but actors have been granted the right of paid vacations.[96]

In certain cases contracts between cultural agents and the public have been subjected to regimentation; thus for instance, the fees of circulating libraries have been fixed and the sale of theater tickets has been carefully regulated.[97]

2) The other sub-type of the regimentation of "neutral acts" consists in imposing on the cultural agents the obligation to maintain a definite standard in their cultural activity, without creating corresponding rights for other cultural agents or the public. The main obligations of this type are: to keep strictly to true customs and standards when presenting Bavarian dances or folk-songs;[98] to refrain from using loud speakers if they imperfectly reproduce sounds;[99] to ensure high standards when

93. That there was such a tendency already in mature liberal society was first established by DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL (Paris 1893).

94. The most curious practice has been that of leasing newsreels only in combination with certain rather unsuccessful films. See: 3 DEUTSCHER FILM 116.

95. Ordinance of the Chamber of Literature, June 6, 1935.

96. Ordinance of the Chamber of Art, July 28, 1936.

97. Ordinance of the Chamber of the Theater, May 7, 1938.

98. Ordinance of the Chamber of Music, February 18, 1935.

99. Decree of the Minister of Interior Affairs, January 25, 1939.

organizing artistic competitions and art exhibitions; for architects, landscape architects, art craftsman, etc. to have due regard for beauty when exercising their professions.[100]

Numerous ordinances concerning various external features of films belong to the same category. The name of the star must not appear in larger letters than the title of the film; only a few names of the individuals who have technically co-operated in the production may figure in announcements on the screen; etc.[101]

III. Finally, certain types of behavior are directly imposed by the legal regimentation of cultural activity. Depending on the character of the required behavior, the legal obligation assumes either the type of *facere,* or that of *pati.*

1) The number of cases when specified acts are positively required from cultural agents may appear surprisingly small. However, as has been explained by German experts, the scope of preventive measures is such that their positive or regulating effect becomes significant: the elimination of all trends but the desirable one is as effective as the direct imposition of the latter.[102]

It is in the field of the theater that the imposition of recommended action has been used the most: according to art. 5 of the theater law of May 15, 1934, specified plays of high value may be compulsorily included in the repertoire of any theater, provided that this not result in excessive costs. In the field of art and literature the prohibition of criticism has been combined with the imposition of the pattern of "art consideration" (*Betrachtung*); such consideration must not be so much evaluation, but rather description and appreciation. It must be fully signed.[103] In the field of music, special obligations have been imposed on local bands: their repertoire must consist mainly of German and especially local dance music and songs.[104]

Motion picture theaters must show in every presentation at least one "cultural film" officially recognized to be of high value; film distributors are obliged to lease such films on regular conditions.[105]

2) The second sub-type of the imposition of recommended actions

100. Ordinances of the Chamber of Art, March 23, 1934; May 16, 1934; September 1, 1934; September 28, 1934; October 1, 1934; December 18, 1934; April 10, 1935; June 16, 1935.

101. Ordinances of the Film Chamber, August 12, 1933; March 7, 1934; April 15, 1935.

102. Richter, *supra* note 8, at 66.

103. Decree of the Chamber of Culture, November 27, 1936.

104. Ordinance of the Chamber of Music, October 18, 1935.

105. Ordinances of the Film Chamber, July 17, 1934; July 21, 1938. The classification of films into acceptable, valuable, and highly valuable is effected by the censorship board.

creates obligations of the *pati* type. As concerns cultural agents, they must bear (without compensation) the consequence of orders suppressing newspapers (by an ordinance of April 24, 1935, the President of the Press Chamber is permitted to close down a newspaper if he finds that there are too many appearing in any one locality), of orders closing publishing establishments if it is found that they publish undesirable newspapers.

Much more significant is the obligation of the *pati* type imposed on all German citizens, namely the obligation to participate in official manifestations diffused by means of the radio. The legal situation is as follows:

In 1935, the Chamber of Radio stated that people should distinguish between superfluous noises disturbing the neighborhood and the collective reception of broadcasts in which everyone ought to participate; in this latter case no one had the right to complain.[106] Nevertheless, on January 20, 1938, the district court of Berlin convicted a man of disorderly conduct (*grober Unfug*) who, before leaving his apartment, had opened all the windows and turned on his radio at full blast. The court convicted this man despite his declaration that he had acted in accordance with directives of his superiors in the party who knew that a speech of the Fuehrer was about to be broadcast. The court found that the man could have invited people living in the same house to enter his apartment and to listen to the broadcast.[107]

There was no appeal, but the decision was severely criticized in the press. The journal of the ministry of Justice wrote that the decision merited censure because the very aim of official broadcasts was the participation of the nation in political acts and its permeation by the national idea.[108] The journal of the Chamber of Radio explained that cases concerning broadcasts of political importance could not be judged like others. As the defendant invoked the directives of the Party, the court should have taken this into consideration. The idea of the court that the neighbors might have been invited—could not be approved.[109]

7. *Procedural Rules*

The patrimonial and authoritative character of the regimentation given to culture in National Socialist Germany is unfavorable to the development of formal procedures within the system: the leader orders, the people have to obey without arguments. Imposing rigid rules on the film

106. 8 ARCHIV FÜR FUNKRECHT 219.
107. REICHSFUNKARCHIV (1938) 70.
108. DEUTSCHE JUSTIZ (1939) 498.
109. REICHSFUNKARCHIV (1938) 71.

industry, the President of the Chamber said: "All members of the chamber must understand the necessity of the regulation and to actively cooperate in its enforcement. Therefore, it is to be expected that trivial claims and controversies will be avoided."[110]

As purely administrative, the acts of the presidents of chambers never receive the force of a *res judicata*. According to the decree of November 1, 1933, the president of the Chamber of Culture is authorized to repeal the decisions of the individual chambers and to act in their place. He can do so on his own initiative or as a result of applications of third parties. However, the procedure remains unofficial. The president of the Chamber of Culture can finally settle the case or return it to the individual chamber for further consideration in accordance with his instructions.[111]

Like all administrative acts, the orders of the presidents of the chambers must be enforced by the police. This takes place most commonly in regard to persons who exercise cultural activity without acquiring membership in the chamber. In such case, the police have to close the enterprise (for instance, a printing office), and to prevent the violator from continuing his activity.[112]

However, there are situations in which vestiges of formal procedures may be noticed. The first concerns registration. The general idea is that the application for registration may be rejected only if there are facts testifying to the inability or unreliability of the applicant. Facts must be established, and this is conducive to the formulation of rules of evidence. Such rules are to be established by the chambers which, in general, rely on evidence acceptable in courts: The defendant must be given the opportunity to explain his case; declarations of third parties and documents may be used; recourse to courts is possible in order to impose oath on persons possessing relevant information.[113] In cases when registration is not constitutive, but declarative, a more substantial procedure is to be followed. Thus, before registration, architects, sculptors and painters have to submit to examinations organized by the provincial managers of culture. If the applicant passes, the president of the chamber orders enrollment. If the manager of culture or the president are inclined to reject the application the case is to be investigated by a special committee

110. 3 DEUTSCHER FILM 149-150.

111. Decree of November 1, 1933, art. 22. Schrieber, *supra* note 29, at 28-29.

112. Schrieber, *supra* note 29, at 32.

113. *Id.* at 24. Quoting the sentence concerning the defendant, BRADY, THE SPIRIT AND STRUCTURE OF GERMAN FASCISM (1937) 92, wrongly translates it as follows: "It is inadmissable that the accused be heard".

which reports to the president for final decision; if the decision is negative, the person is forbidden to continue his activity. Recourse to the President of the Chamber of Culture is possible, but does not suspend the execution of the decision.[114]

Another case concerns "unbearable hardship" created by ordinances. The same president of the Film Chamber who expressed the hope that there would be no recriminations, declared later that he was willing to consider exceptions in difficult cases and established a system of committees to investigate these and to report their findings to him.[115]

A further case is that of examinations. Several chambers have given them a somewhat formal structure and have instituted appeal to supreme examination boards in Berlin. The importance of this deviation from the principle of irrevocable decision should not be exaggerated. Thus, according to the ordinance of the President of the Radio Chamber, appeals to the supreme examination board may be made only in quite exceptional cases. Any one who fails to pass an examination may apply to the commissar who was in charge of it; this application would be passed on favorably only if the commissar establishes that some infringement of the rules had taken place. In such cases, however, the commissar would naturally have reported to the supreme board, so that complaint of the applicants was almost superfluous.[116]

Appeal to a supreme film censorship board from the decisions of the regular censorship board is also possible.[117]

Finally, there is the procedure to be used before punishment is imposed on a member, especially if this punishment is ejection from the chamber. For such cases some chambers have introduced "courts of honor". Such is the case in the Chamber of Art, where district courts consisting of a chairman and three members, and a supreme court consisting of a chairman and four members have been established. However, it depends on the provincial manager of culture to decide whether the court is requested to proceed with the investigation, and neither the provincial manager nor the president of the chamber are bound by the findings of the court.[118]

The court of honor, established by the decree of January 18, 1934, for the press, holds an exceptional position. In addition to the general jurisdiction of courts of honor these courts have to decide disputes concerning

114. Ordinances of the Chamber of Arts, April 7, 1935 and June 16, 1935.
115. Ordinance of July 15, 1935.
116. 8 ARCHIV FÜR FUNKRECHT 395.
117. Film Law, art. 16-23.
118. Ordinance of the Chamber of Art, April 1, 1935.

some phases of employment agreements, as for instance, whether the dismissal of a journalist by the editor has been carried out in accordance with the law. In contradistinction to the other courts these courts actually impose punishment; however, the president of the Chamber of Culture is authorized to overrule any judgment and to decide the case himself.[119]

8. *The Efficacy of the Regimentation*

The efficacy of a system of legal rules may be judged from two standpoints: 1) to what extent it attains its substantive end (material efficacy), and 2) to what extent human behavior is actually moulded by the rules (formal efficacy).

The formal efficacy of the described system of legal rules is beyond doubt: no cultural activity is possible outside of the official organization, and within the system subordination is almost complete. It has been stated that the number of films prohibited by censorship was decreasing because of "the complete cooperation of producers with the political leadership."[120] The number of disciplinary punishments inflicted seems to have been very small; it is significant that for years the official journal of one of the chambers had only one case it always cited when it wished to instill fear in potential offenders. The threat of expulsion makes the new German *Kulturrecht* almost *lex perfecta.*

As regards material efficacy it is naturally impossible to discuss the quality of cultural activity under regimentation,—that is a problem to be judged by later generations. A more modest problem, which is perhaps susceptible of solution is that of the extent of change in the culture mentality of the German people. There are a few symptoms showing that the change has not been so complete as desired by the cultural leadership. Thus, for instance, persons who had followed the rules concerning the germanization of pseudonyms often could no longer find engagements.[121] The social significance of this fact may be easily deciphered: organizers of cultural performances know what the public wants, and their preference for people bearing foreign pseudonyms shows that the German public does not want to be completely restricted to German culture.

Significant is also the fact that at the outbreak of the war the President of the Chamber of Culture had to issue a decree ordering that the "lack of

119. Press Law, art. 27-35. It is noteworthy that the principal of *res judicata* has been definitely abolished by the law of September 16, 1939, by which the *Führer* has been granted the right to set aside any decision of any German court. DEUTSCHE JUSTIZ (1939) 1565-66.

120. 3 DEUTSCHER FILM 284.

121. 10 ARCHIV FÜR FUNKRECHT 493.

style" still prevalent in German culture should be immediately overcome. He ordered also that plays "contrary to the feelings of the nation" should cease to be performed. It follows, *a contrario,* that up to September 1, 1939, plays not quite agreeable to the leadership continued to be shown and this could have only been due to the demand of the public. A few days later it was acknowledged that the outbreak of the war finally purified Germany from American jazz music which had continued to dominate up to that time.[122] When, on March 8, 1941, American motion pictures were altogether forbidden, a well informed observer stated that prior to this date picture theaters had always been crowded when American films were being shown and that pictures of American actors continued to be displayed on the walls of these theaters.[123]

All these symptoms point in the same direction: the German people accepts the system secluding them from universal culture not *auctoritate rationis,* but *ratione auctoritatis.*

122. BÜHNE (1939) 419.
123. *N. Y. Times,* March 9, 1941.