Contemporary European History (2024), page 1 of 14
doi:10.1017/S0960777323000644

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Ideology and the Application of Law in SS Courts: A Case Study of Legal Practice in the Third Reich

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This article provides an empirical study of the inner workings of an institution at the ideological heart of the Nazi state, the SS courts, and analyses how they applied SS law in cases involving unlawful sexual conduct, and how they evaluated the racial characteristics of SS men standing trial. The article demonstrates (1) that the SS courts promoted what has been referred to as an 'unlimited', radical ideology. However, the analysis will also reveal how the SS courts during the war (2) gradually climbed down from a position of ideological purity when faced with realities at the front; and (3) despite their ideological core features, in several ways operated as a legal-rational bureaucracy. Towards the end of the article, the ramifications of these findings will be discussed in light of literature concerning the role of law and ideology in the Nazi state and the Third Reich's complicated relationship with modernism.

Introduction

In January 1942, a platoon commander in the Waffen-SS propaganda unit Standarte Kurt Eggers reported that he had heard, on third hand, that a Danish SS soldier was known in Denmark to be homosexual. The platoon commander informed his superiors that he was investigating the matter, thus indicating the importance of such an issue, even in a situation of all-out war.[1] Indeed, being homosexual in the SS could prove fatal. The death penalty for homosexuality in the SS and police was introduced in 1941, and although a uniform and consistent practice never developed in this area, execution was a possible outcome.[2] In September 1944, for example, a sergeant of the Waffen-SS Division Nordland was accused of homosexual activity. Allegedly, he had masturbated with a comrade and on four occasions made advances to other men. Even though the accused's superiors declared him a decent and brave soldier, who had been awarded the Iron Cross second and first classes, he was sentenced to death and executed.[3] Rumours and accusations of homosexuality were, in other words, an extremely serious matter for any member of the SS. The reason was that the SS legal code was deeply ideological and not what we would normally associate with a legal-rational authority.[4]

[1] Bundesarchiv Militärarchiv, Freiburg, RS4/42, Kurt Eggers, Report of 28 Jan. 1942, *Neuafbau des 5. Zuges*.
[2] Geoffrey J. Giles, 'The Denial of Homosexuality: Same-Sex Incidents in Himmler's SS and Police', *Journal of the History of Sexuality* 11, no. 1/2 (2002): 257–66. This was earlier than in the German army where the death penalty for homosexuality was introduced in 1943: see Regina Mühlhäuser, 'Sex, Race, Violence, Volksgemeinschaft: German Soldiers' Sexual Encounters with Local Women and Men during the War and the Occupation in the Soviet Union, 1941–1945', in *Beyond the Racial State: Rethinking Nazi Germany*, eds. Devin O. Pendas, Mark Roseman and Richard Wetzell (Cambridge: Cambridge University Press, 2017), 442.
[3] See Claus Bundgård Christensen, Niels Bo Poulsen and Peter Scharff Smith, *Under hagekors og Dannebrog. Danskere i Waffen-SS* (Copenhagen: Aschehoug, 1998), 321.
[4] Max Weber, *Economy and Society, Economy and Society, 1–2* (Berkeley: University of California Press, 1978), 215ff.

As explained by Heineman, 'the persecution of sexual minorities and the efforts to control reproduction were not marginal but central to National Socialist racial theory and practice'.[5] In the SS, gender and sexuality were core areas within a comprehensive ideology that rested on a mixture of mainstream Nazism and particular SS notions of the family. This included elaborate plans for continuous reproduction to secure the future of the Germanic race, along with a violent homophobic fear that Nazi male communities like 'the SS and the Hitler Youth could become hothouses for homosexuality'.[6] Accordingly, women and families served an important role in 'balancing' the SS men's interaction with other males. Himmler's vision for the SS was that of a family community, where the members were glued together by a joint awareness of being Germany's new nobility and of elite racial stock.[7] The SS was to become 'a knighthood from which you cannot leave, into which you are accepted by blood and in which you remain with body and soul, as long as you live'.[8] In this 'total institution' an SS man should devote himself to the political struggle, be a soldier and father children, while the women should be in charge of the household and give birth to as many Germanic children as possible. The focus on reproducing race and increasing the birth rate even meant that Himmler was willing to do away with the traditional monogamous family structure within the SS. Himmler was convinced that SS men should be able to marry more than one woman.[9] In the eyes of the SS, anything that challenged this understanding of gender, race and sexuality was a threat to the Germanic race, its fighting power and its future. This explains the view of the SS on homosexuality, as well as the prohibition against sexual intercourse with women of other races, which we shall return to below.[10]

By focusing on gender, sexuality and race, in this article we direct our attention to some of the most ideological parts of SS law. Our primary empirical case is the attempt by the SS to enforce a complete ban on sexual relations between SS men and women of other races in Eastern Europe and at the Eastern front during the war. As we shall see, we find that the SS courts to some degree had to abandon a position of ideological purity when faced with realities at the front. Furthermore, we find that when doing so it was of great importance to these courts and the SS judges that a certain level of clarity and equality before the law vis-à-vis SS soldiers was maintained. The latter reflect how significant elements of traditional bureaucratic procedures and legal-rational law-making was at work in the SS court system, alongside its obvious ideological priorities, which, as we demonstrate with further empirical examples, included evaluating the racial characteristics of the men who were subject to juridical action. This again highlights central elements found in the long-standing discussion about the Third Reich's 'profound, and profoundly paradoxical, relationship with modernism'.[11] We will return to this point in the final section in connection with a broader discussion of how to understand SS law and the way it was practised during the war.

The article is structured as follows. First, we discuss the general role of courts and legislation in the Third Reich, whereafter we introduce the legal system of the SS. Following that, we dive into the relationship between sex, gender, race and SS law before focusing on the SS prohibition on sexual intercourse with women of other races, and thereafter the courts' evaluation of the racial qualities of the

[5] Elizabeth D. Heineman, 'Sexuality and Nazism: The Doubly Unspeakable?', *Journal of the History of Sexuality* 11, no. 1/2 (2002): 65.

[6] Harry Oosterhuis quoted from Heinemann, 'Sexuality', 40.

[7] Gudrun Schwarz, *Eine Frau an seiner Seite. Ehefrauen in der 'SS-Sippengemeinschaft* (Hamburg: Hamburger Edition, 1997); Amy Carney, *Marriage and Fatherhood in the Nazi SS* (Toronto: University of Toronto Press, 2018).

[8] Quoted from Schwarz, *Eine Frau*, 19.

[9] Ibid., 89–97.

[10] Regarding homosexuality and the SS, see Giles, 'The Denial', as well as Daniel Siemens, *Stormtroopers: A New History of Hitler's Brownshirts* (New Haven: Yale University Press, 2017), 172ff. Regarding homosexuality and the early Nazi movement in general, see Andrew Wackerfuss, *Stormtrooper Families: Homosexuality and Community in the Early Nazi Movement* (New York: Harrington Park Press, 2015).

[11] Robert Griffin, *Modernism and Fascism: The Sense of a Beginning under Mussolini and Hitler* (London: Palgrave, 2007), 250. For a recent discussion of the problem, see Devin O. Pendas, Mark Roseman and Richard F. Wetzell, 'Introduction', in *Beyond the Racial State: Rethinking Nazi Germany*, eds. Devin O. Pendas, Mark Roseman and Richard Wetzell (Cambridge: Cambridge University Press, 2017), 1–27.

https://doi.org/10.1017/S0960777323000644 Published online by Cambridge University Press

accused SS men. Finally, we discuss possible ways of interpreting our case and engage with a broader literature on modernism and the Third Reich, as well as Nazi law and ideology, in an attempt to further our understanding of SS law in the racial state.

The primary sources used in this article mostly derive from a large-scale data collection carried out by the three authors in the years 2010–15 in connection with a study of the Waffen-SS.[12] During this period, we conducted archival studies in more than twenty archives in sixteen different countries. When it comes to the SS courts and the SS judiciary at the Eastern front, certain archival groups are especially relevant, including the NS 7 *SS- und Polizeigerichtsbarkeit* in the Bundesarchiv in Berlin. However, material on SS courts at the front and in the occupied territories in Eastern Europe is scattered among many archives, including substantial holdings in the military archives in Prague and the national archives in Oslo. Furthermore, letters and memoirs which escaped the German censorship sometimes contain interesting first-hand accounts of legal practice in the SS, and these have been consulted through collectors as well as in archives in numerous countries.[13]

Courts and Legislation in the Third Reich

The Third Reich took over the laws and legal system of the democratic Weimar Republic, which were to a significant degree rooted in the Bismarck years. This included a bench of conservative judges, who did their job with 'hesitant loyalty' to the democratic republic.[14] Nevertheless, right from the beginning in 1933, the Third Reich did away with basic Rule of Law principles upheld by the previous system. The regime used prolonged extrajudicial incarceration of opponents, and the principle of 'no punishment without law' (*Nulla poena sine lege*) was completely abolished.[15] Already in April 1933 the Law of the Restoration of Professional Services along with the Law Concerning Admission to the Legal Profession removed unwanted groups, such as Jews, from their positions as lawyers and later judges.[16] Furthermore, in 1935 a new feature of the penal law was introduced which required judges to interpret the law ideologically according to the 'sound perception of the people' (the *Volk*).[17]

Following this Nazification of the legal system, Hitler generally continued to respect the courts' independence and, except in a few cases, judges were not directly instructed to make specific decisions.[18] The majority of judges, lawyers and counsels for the prosecution, however, willingly supported the new system, and by 1938, more than half of all German judges and counsels for the prosecution had joined the NSDAP.[19] Nonetheless, the Nazis were not satisfied with what they saw as a slow and elaborate working legal system. Hence, in April 1934, the notorious *Volksgerichtshof* was established and manned with Nazi judges and jurisdiction in political cases.[20] At the same time, existing law was interpreted ideologically. In January 1935, leading Nazi lawyer Hans Frank stated that National

[12] Published in Danish as Claus Bundgård Christensen, Niels Bo Poulsen and Peter Scharff Smith, *Waffen-SS. Europas nazistiske soldater* (Copenhagen: Gyldendal, 2015). In 2023 a new, abridged and updated version of the book was published in English: *War, Genocide and Cultural Memory: The Waffen-SS, 1933 to Today* (London: Anthem Press).

[13] Ibid.

[14] Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998), 1ff. See also Hans Petter Graver, 'Judicial Independence Under Authoritarian Rule: An Institutional Approach to the Legal Tradition of the West', *Hague Journal on the Rule Law* 10 (2018), 317–39.

[15] See Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven: Yale University Press, 2004), 68–73, 113, 166.

[16] John J. Michalczyk, 'A Judicial System Without Jews and Without Justice', in *Nazi Law: From Nuremberg to Nuremberg*, ed. John J. Michalczyk (London: Bloomsbury, 2019), 8f.

[17] Carolyn Benson and Julian Fink, 'Legal Oughts, Normative Transmission, and the Nazi Use of Analogy', *Jurisprudence* 3, no. 2 (2012): 445–63.

[18] Graver, 'Judicial Independence Under Authoritarian Rule', 332f.

[19] Wachsmann, *Hitler's Prisons*, 71.

[20] Ibid., 117; Stolleis, *The Law Under the Swastika*, 2.

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Socialism was the foundation of the interpretation of all legal sources, and the party programme and Hitler's word were particularly decisive.[21] This point was spelled out on several occasions, and it was generally accepted that the Führer was the 'highest law giver and supreme judge' in the Third Reich.[22]

Although the old state institutions to a very large degree provided 'passive facilitators' and 'active supporters' of regime policies, the emerging SS institutions were to prove much more radical.[23] Traditional police work was definitively replaced by an ideological administration of criminal and security matters when the *Reichssicherheitshauptamt*, a combined SS and police administration, was formed in September 1939.[24] The *Reichssicherheitshauptamt* constituted a policy authority that 'was not an instrument for preventing crimes or persecuting criminals', but which 'aimed to establish a total racist order and to exterminate the regime's enemies'.[25] In that sense, the (mostly) ideologically willing ordinary German courts, the special courts like the *Volksgerichtshof* and the SS police institutions formed an ideological entity which provided the Nazi regime with almost unrestrained power.

The SS Legal System

From the early 1930s, Himmler began developing regulations, which applied to all members of the organisation and contained detailed ideological directions on how SS men should behave and lead their lives. However, SS members were still subjected to ordinary German courts in penal and civil law cases, and in wartime, members of the armed SS would be subjected to the *Wehrmacht*'s military justice – which caused problems in Poland in 1939.[26] Shortly after, however, Himmler succeeded in extracting the Waffen-SS from the *Wehrmacht* jurisdiction and setting up an independent SS judiciary. Parts of the existing research literature suggest that the SS got its own legal system and independent judiciary because of the atrocities committed in Poland, but this was not the case.[27] The plans had been underway for some time, and the wish of the SS to establish its own jurisdiction can be traced back to autumn 1934. In the fall of 1938, Hitler supported these plans, and in 1939 he gave his fundamental approval.[28] In October 1939, after the invasion and defeat of Poland had initiated the Nazi war of extermination, this resulted in the founding of an SS and police legal authority (*SS- und Polizeigericht*), which was given jurisdiction over the majority of the SS troops.[29]

The special SS and police jurisdiction created a new legal system entirely under Himmler's control. This legal code not only covered ordinary offences against civil or martial law, such as murder, violence, theft, insubordination and desertion; it also specified the death penalty for homosexuality (from November 1941) and criminalised sexual intercourse with Jews and other 'racially alien elements'. The SS and police jurisdiction merged the *Wehrmacht*'s legal system – which was only

[21] Ibid., 14.

[22] Herlinde Pauer-Studer and David J. Velleman, *Konrad Morgen: The Conscience of a Nazi Judge* (London: Palgrave Macmillan, 2015), 68.

[23] Konrad H. Jarausch, 'The Conundrum of Complicity: German Professionals and the Final Solution', in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, eds. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn Books, 2015), 23f.

[24] Michael Wildt, *Generation des Unbedingten: das Führungskorps des Reichssicherheitshauptamtes* (Hamburg: Hamburger Edition, 2002).

[25] Michael Wildt, 'The Spirit of the Reich Security Main Office (RSHA)', *Totalitarian Movements and Political Religions,* 6, 3 (2005), 333–49, 341.

[26] Christopher Theel, 'Parzifal unter den Gangstern? Die SS- und Polizeigerichtsbarkeit in Polen 1939–1945', in *Die Waffen-SS. Neue Forschungen*, eds. Jan E. Schulte, Peter Lieb and Bernd Wegener (Paderborn: Verlag Ferdinand Schöningh, 2014), 66ff.

[27] George H. Stein, *The Waffen SS: Hitler's Elite Guard at War, 1939–1945* (Ithaca: Cornell University Press, 1984), 30.

[28] Theel, 'Parzifal unter den Gangstern?', 61ff. Longerich traces this development back to 1937 (not to 1934). See Heinrich Longerich, *Heinrich Himmler. Biographie* (New York, Pantheon Books, 2009), 501. See also Bernd Wegner, *The Waffen-SS Organisation, Ideology and Function* (Oxford: Basil Blackwell, 1990), 321.

[29] See Bundesarchiv Berlin, NS7/2 (107ff.). Letter of 20 Nov. 1939. Erlass from RF-SS on *Verordnung über eine Sondergerichtsbarkeit*, promulgated on 17 Oct. and in force from 30 Oct. 1939.

https://doi.org/10.1017/S0960777323000644 Published online by Cambridge University Press

marginally amended – and the hitherto internal SS code.[30] This meant that, like the *Wehrmacht*'s courts martial, the SS and police judiciary could pass sentences in all civil cases concerning crimes committed by their personnel during their service.[31] In principle, all aspects of a SS soldier's life could be subject to legal sanctions, if he acted in violation of SS ideology.

When judging a soldier's deeds, rules and regulations were generally interpreted in an ideological manner. In the spring of 1942, the head of the SS courts explained:

> The new type of SS judge combines ideological reliability and professionalism. In his judgement and determination, he is not restrained by formalities. Even where no SS and police penal law exists, he will find means and ways to ascertain that National Socialist ideology, SS norms, and the sound judgement of the people will be prioritized.[32]

This to some extent mirrored what took place in the ordinary German courts and the state bureaucracy in the general sense that there too law was to be interpreted not only according to traditional legal standards but also according to Nazi ideology and the best interest of the *Volk*.[33]

The term *Rassenschande* demonstrates how military justice and SS ideology became ingrained. In Nazi legal terminology, *Rassenschande* meant bringing disgrace on the German race by contaminating the blood through intercourse with a Jew. Since this was unknown to the *Wehrmacht*'s martial law, that system was of little use to the SS in this respect. Therefore, the SS chose to interpret 'discipline' as the duty of the SS soldier to obey the Nazi *Weltanschauung*. This way, the SS courts could construe *Rassenschande* as a violation of military discipline, which was ultimately punishable by death.[34]

The individual SS courts where sentences were passed were at the bottom of the SS legal system. Typically, these courts were collocated with police stations in major cities and units in the field.[35] By the end of 1943, there were a total of thirty-one SS courts in Germany and the occupied areas, including Kraków, Oslo, Copenhagen, Paris, Riga and Zagreb.[36] In areas of military operations such as the Eastern Front, there were courts with regional designations such as *Gericht 101* (*Russland Nord*), as well as local courts with individual corps, divisions and sometimes brigades within the Waffen-SS.[37] At divisional level, typically, the commanding general officer was the proceedings officer. Furthermore, in 1940, a supreme SS and police court – the *Oberstes SS- und Polizei-Gericht* – was set up in Munich with a view to securing uniform case law.[38] The top-most figure in this system was Himmler himself – a function he persistently exercised by interfering in an astonishingly large number of individual cases.

[30] Wegner, *The Waffen-SS Organisation*, 320; Longerich, *Heinrich Himmler*, 462. See also Bianca Vieregge, *Die Gerichtsbarkeit einer 'Elite': Nationalsozialistische Rechtssprechung am Beispiel der SS- und Polizei-Gerichtsbarkeit* (Berlin: Berliner Wissenschafts-Verlag, 2002), 7ff. Non-military cases can be ruled by civil courts of justice.

[31] Vieregge, *Die Gerichtsbarkeit einer 'Elite'*, 30ff.

[32] Bundesarchiv Berlin, NS7/4, Bericht über die Dienstbesprechung der dienstältesten SS-Richter in Danzig und Zoppot vom 30. April bis 2. Mai 1942. Christopher Theel mentions this theme in Schulte et al. See Theel, 'Parzifal unter den Gangstern?', 64.

[33] Ernst Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship* (Oxford: Oxford University Press, 2017); Pauer-Studer and Velleman, *Konrad Morgen*. Robert D. Rachlin, 'Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror', in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, eds. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn Books, 2015), 63–88.

[34] Vieregge, *Die Gerichtsbarkeit einer 'Elite'*, 106ff.

[35] See Bundesarchiv Berlin, NS7/1, Personal- und Organisationsbefehle des Hauptamtes SS-Gericht, 1940–45. For a description of the system, see also organigram in Vieregge, *Die Gerichtsbarkeit einer 'Elite'*. 255, 251ff.

[36] Bundesarchiv Berlin, NS7/6, Einsetzung von Inspektionsrichtern, Munich, 21 Dec. 1943.

[37] Bundesarchiv Berlin, NS7/1, Personal- und Organisationsbefehle des Hauptamtes SS-Gericht, 1940–45; Vieregge, *Die Gerichtsbarkeit einer 'Elite'*, 52.

[38] Ibid., 47ff.

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Sex, Gender and SS Law

Matters concerning sex, gender and family life were central to Nazi ideology in general and SS ideology and SS law in particular.[39] The ideological starting point was racial, which entailed that a Germanic SS man should have as many children as possible with a Germanic spouse, and that Germanic blood should never be mixed with that of alleged sub-humans. This was partly reflected in 'positive' policy initiatives inciting SS men to marry, have children and establish Aryan families.[40] This included, for example, the promise made to some Scandinavian volunteers that they would receive farmland in Eastern Europe where they could establish Nordic families and simultaneously contribute to the consolidation of Nazi rule. It also included an elaborate scheme that aimed to time the leave of SS soldiers and their wife's period so that they would be at home when the chance of conception was optimum.[41] In 1943, for example, it was directed that all Waffen-SS units stationed in Germany were to make sure that the wives could visit their husbands for five or six days in order to facilitate the production of Aryan children.[42] Himmler was also in favour of Germanic SS men having extramarital relations to make sure they did not die on the field of battle without having produced offspring,[43] and he was for example interested in the idea that German SS men should marry Norwegian women, whom he considered especially Aryan.[44]

However, SS ideology and SS law also included 'negative' policies in the form of sanctions within this area. The available punishments included the death penalty since, in the eyes of the SS, the future of the *Volk* and the Germanic race was at stake. This was the case with homosexuality, which challenged basic Nazi notions of a chivalrous and martial male ethos, and a family ideal where the women should bear sound Germanic children and take care of domestic activities. In that sense, homosexuality unsettled the Nazi vision of biological gender roles and endangered the proliferation of the Germanic race. Male homosexuality was already criminalised in the Prussian state, and this rule was incorporated into the Imperial criminal code of 1871.[45] Nevertheless, the Nazi *Machtergreifung* marked the beginning of a much more radical persecution of homosexuals.[46] The SS was particularly homophobic,[47] and on 15 November 1941, Hitler issued a decree on 'sanitation of the SS and the police'. This stated that if an SS man committed 'sodomy' with another man or let himself be used for such purpose, he had to be executed. This was to apply to all, regardless of age.[48] As demonstrated by Giles, a uniform legal practice never developed in this area, but many executions were carried out.[49] Furthermore, homosexual behaviour could be seen as an aggravating factor in connection with other transgressions. When Danish authorities on one occasion inquired whether a Danish SS soldier who had been sentenced to death for desertion could be pardoned,

[39] Christensen et al., *War, Genocide and Cultural Memory: The Waffen-SS, 1933 to Today* (London: Anthem Press, 2023). See also Claudia Koonz, *Mothers in the Fatherland: Women, the Family and Nazi Politics* (New York: St. Martin's Press, 1987) and Maren Röger, *Kriegsbeziehungen. Intimität, Gewalt und Prostitution im besetzten Polen 1939 bis 1945* (Frankfurt am Main: S. Fischer Verlage, 2015).

[40] Carney, *Marriage*.

[41] Christensen et al., *War, Genocide and Cultural Memory*, 121.

[42] Bundesarchiv Berlin, BAB, NS19/3594, Reichsführer-SS, Planmäßiger Urlaub, 25 Aug. 1943.

[43] Longerich, *Heinrich Himmler*, 476ff. Schwarz, *Eine Frau*, 89ff.

[44] Terje Emberland and Matthew Kott, *Nordmenn i det storgermanske prosjekt* (Oslo: H. Aschehaug, 2012)

[45] Melainie Murphy, 'Homosexuality and the Law in the Third Reich', in Michalczyk, *Nazi Law*, 110. See also Harry Oosterhuis, 'Medicine, Male Bonding and Homosexuality in Nazi Germany', *Journal of Contemporary History* 32, no. 2, (1997): 187–205. Burkhard Jellonnek, *Homosexuelle unter dem Hakenkreuz: Die Verfolgung von Homosexuelle im Dritten Reich* (Paderborn: Ferdinand Schöningh, 1990).

[46] Anna M. Sigmund, *'Das Geschlechtsleben bestimmen wir': Sexualität im Dritten Reich* (München: Heyne Verlag, 2009), 179. Heinemann, 'Sexuality', 55ff.

[47] Ibid., 40f.

[48] Bundesarchiv Berlin, NS7/3, Sammlung von Erlassen des Hauptamtes SS-Gericht, 1940–41, 108. See also Bundesarchiv Berlin, NS7/5, Zwölfter Sammelerlass, 1 Aug. 1942, 33.

[49] Giles, 'The Denial'. For concrete examples, see Bundesarchiv Berlin, NS7/1084, SS- und Polizeigericht XVII Rusland-Mitte, Verschiedenes, 1942–44. See also Vieregge, *Die Gerichtsbarkeit einer 'Elite'*, 119ff.

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the SS responded that it was impossible since he was also homosexual.[50] Other outcomes were also possible, especially late in the war, and in the winter of 1945, Himmler overturned several death sentences to send the soldiers to the front.[51] In this respect the SS followed the path of the *Wehrmacht*, which due to manpower shortages had begun to shorten prison sentences for homosexuality already in 1943.[52]

Another area which saw several negative sanctions was that of sexual intercourse with women of other races (*andersrassigen Frauen*). As opposed to homosexuality, intercourse between male soldiers and racially 'inferior' women could produce offspring, and in the eyes of the SS, this would lead to 'racial contamination'. According to the SS, the problem associated with 'racial contamination' was twofold: If the child thus conceived was raised in the Third Reich, it would eventually transfer inferior 'alien blood' to the Germanic race. If, on the other hand, the child remained part of the ethnic group it belonged to on its mother's side, its valuable Germanic blood would ultimately strengthen another race. However, as we shall see, it proved very difficult for Himmler and the SS courts to put this prohibition into practice during the war.

The Prohibition of Sexual Intercourse with Women of Other Races

From the point of view of the SS leadership, the risk of 'racial contamination' increased as the Nazi empire spread eastwards. In the Balkans, the Soviet Union and the rest of Eastern Europe, the inhabitants were generally considered sub-humans by the Nazi. Even the groups of ethnic Germans in these areas (*Volksdeutsche* in Nazi terminology) were seen as backwards and partially 'polluted' by 'alien' blood.[53] Already in April 1939, after the inclusion of the Slav Czechs in Germany, a prohibition against sexual intercourse with women of other races was therefore instituted in the SS.[54] Violations of this ban were to be prosecuted, and the minimum penalty was eviction from the SS.[55] Other German agencies active in the occupied territories, such as the *Wehrmacht*, were also prone to regiment with whom their subordinates had sexual intercourse or married, but never to the same extent as the SS. Nor was the matter regulated as zealously or sanctioned as sternly as in the SS.[56]

Following the campaign in Poland, a number of cases of intercourse between SS men and Polish women were discussed at the highest levels, as the SS courts were unsure how to handle these cases. Hence, on 12 December 1940, the head of *Hauptamt SS-Gericht* (the main office of the SS court of justice), Paul Scharfe, requested a clarification of Himmler's opinion on the matter of sexual relations with Polish women.[57] The answer intimated that Himmler had discussed the matter with Hitler, and the result was that incidents of this kind were to be prosecuted.[58] In other words, ideological authority was to prevail in this matter, according to Himmler.

Nonetheless, there was still some uncertainty as to which soldiers the ban applied to. In September 1941, the commander of *Standarte Nordwest* wrote to *Gericht des Kommando-Stabes RF-SS* asking whether Dutch and Flemish Waffen-SS volunteers were also to be prosecuted in such cases. This was a reasonable question, legally speaking, as SS law was on some occasions applied with certain reservations to 'Germanic' volunteers, given their special status within the SS. Far from all 'Germanic' SS soldiers were SS members, partly due to them being non-German citizens, partly because they had been admitted to units such as *Standarte Nordwest* and a number of national legions with 'lower' racial standards than other Waffen-SS units. Finally, the SS leadership was also aware that

[50] Christensen et al., *Under hagekors og Dannebrog*, 321.
[51] Giles, 'The Denial', 257–87.
[52] Mühlhäuser, 'Sex', 472.
[53] John Connelly, 'Nazis and Slavs: From Racial Theory to Racist Practice', *Central European History* 32, no. 1 (1999): 1–33.
[54] See e.g. Bundesarchiv Berlin, NS7/265, sundry letters with reference to this ban of 19 Apr. 1939, and Longerich, *Heinrich Himmler*, 461.
[55] Volker Koop, *Dem Führer ein Kind schenken: die SS-Organisation Lebensborn* (Cologne: Böhlau Verlag, 2007), 184.
[56] Röger, *Kriegsbeziehungen*.
[57] Bundesarchiv Berlin, NS7/265, Various letters on Geschlectsverkehr mit Polinnen, 1–5.
[58] Ibid.

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these volunteers sometimes lacked the cultural Nazi upbringing and understanding of their German counterparts.[59] Lately, the *Standarte Nordwest* commander explained, there had been several incidents of intercourse between Polish women and members of his unit, and he therefore requested clarification.[60] On 25 October, Himmler's personal SS judge, Horst Bender (*Der SS-Richter beim Reichsführer-SS und Chef der Deutschen* Polizei), answered that the prohibition did indeed apply to Germanic volunteers as well and thus to *Standarte Nordwest*. However, Himmler had decided that in cases of first-time violation, the sanction should be disciplinary only.[61] Uncertainty also existed as to which ethnic groups the ban covered, i.e. which women the SS men should avoid sexual encounters with. On 13 October 1941, the 2nd SS Brigade approached Himmler's command staff for guidance in a case concerning intercourse with a Russian woman. The Brigade wished to ascertain that the ban did not only cover Czech and Polish women but Russian women as well.[62]

The intercourse problem worried the leadership, not only because of fear of 'racial contamination', but also because emotional involvement might lead to sympathies for a population that was to be oppressed. This was underscored in a notice in the *Verordnungsblatt der Waffen-SS* (Waffen-SS orders) that informed of SS men who had regular correspondence with *fremdvölkischen Arbeiterinnen* (female workers of a foreign ethnicity), whom they had met at the front, and where there had been more than one occurrence where marriage had been promised.[63]

There is no doubt that the ban on intercourse with women of other races was a key issue to Himmler. On 24 October, he wrote to Justice Horst Bender, expressing a wish to be informed of 'every single case of SS men's association with female Russians, Ukrainians etc.'.[64] The following day, Bender forwarded this wish to *Hauptamt SS-Gericht*. In the letter, the designation 'Russian, Ukrainian woman' was struck out, and a clarification was added in handwriting: 'Females in the occupied areas, who are not *Volksdeutsche*'.[65] The following month, the order was approved and expanded, and it was made clear that Himmler demanded an investigation of all known cases of sexual intercourse between SS men and non-*Volksdeutsche* women in the occupied areas of Russia. Himmler wanted to have these cases submitted to him personally to make the decision in every single case. In order to evaluate the racial aspects, he asked to receive photos of the accused as well as of the woman in every single case.[66]

As early as winter 1941, it appeared that, although the central authorities desired to display diligence in this ideologically very important matter, realities at the front were not easily controlled.[67] Initial reports of contraventions in Waffen-SS units confirmed that in this particular area there was a schism between ideological theory, on the one side, and practice at the front, on the other. For example, after an inspection tour to SS hospitals and convalescence homes in the area of *HSSPF Ukraine/Russland Süd*, the head physician of the SS, Professor Dr Karl Gebhardt, informed his boss and old friend, Himmler, that the main activity there was treatment of skin and venereal

[59] Christensen et al., *War, Genocide and Cultural Memory*, chapter 8. See also Bundesarchiv Berlin, NS7/87, SS-Hauptamt to SS-Gericht, Strafverfahren gegen nichtdeutsche Angehörige der Waffen SS oder Polizei, 11 Mar. 1941.

[60] Bundesarchiv Berlin, NS7/265, Geschlectsverkehr mit Frauen anderrassiger Bevölkerung, 1940–41, 1944–45, 7, letter from an *SS-Oberführer* and commander of the *SS-Freiwilligen-Standarte Nordwest* to *Gericht des Kommando-Stabes RF-SS*, 23 Sept. 1941.

[61] Bundesarchiv Berlin, NS7/265, *SS-Richter beim RF-SS* to commander of the *Standarte Nordwest*, 25 Oct. 1941. See also Bundesarchiv Berlin, NS7/4, Hauptamt SS-Gericht, Zehnter Sammelerlass, Munich 15 Jan. 1942, 18.

[62] Bundesarchiv Berlin, NS7/265, 10, telegram from 2nd SS Brigade to *Kdo Stab RF-SS* of 13 Oct. 1941, 4.30 p.m.

[63] Verordnungsblatt der Waffen-SS, vol. 3, no. 22, 15 Nov. 1942, item 406, 97.

[64] Bundesarchiv Berlin, NS7/265, 17, letter from Himmler to *SS-Richter Bender*, 24 Oct. 1941.

[65] Bundesarchiv Berlin NS7/265, 18, Bender to *Hauptamt SS-Gericht*, 25 Oct. 1941. Many SS men under suspicion defended themselves by arguing that they had believed that the woman in question was actually *Volksdeutsch*. On this, see Röger, *Kriegsbeziehungen*, 141f.

[66] Bundesarchiv Berlin, NS7/265, 23, betr.: Geschlechtsverkehr von Angehörigen der SS und Polizei mit einer andersrassigen Bevölkerung, 12 Nov. 1941.

[67] Bundesarchiv Berlin, NS7/3, Sammlung von Erlassen des Hauptamtes SS-Gericht, 1940–41, 109. Letter on *Geschlechtsverkehr von Angehörigen der SS und Polizei mit andersrassigen Frauen* of 9 Dec. 1941.

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diseases.[68] Furthermore, violations had mostly been met with disciplinary sanctions. Even far away from the Eastern Front – where 'lenient' court practices could be excused by every man being needed at the front line – the SS juridical system seemed to turn a blind eye to this type of transgression. When two Norwegian SS soldiers undergoing training at the Fallingbostel military camp north of Hannover, on new year's eve 1941–2, used a military vehicle to tour the local pubs together with two Czech women, the SS court in Berlin primarily focused on the damage done to the car during the men's drunk driving, which had injured one of the women.[69] The driver was sentenced to two months of imprisonment, soon converted to six weeks of mild detention (*Gelinden Arrest*).

An aspect rarely addressed by the SS court and left unmentioned by Himmler in his frequent demands for 'racially responsible' sexual behaviour, was that sexual intercourse in Eastern Europe very often came in the form of rape or forced prostitution. In addition, much of the violence carried out by SS men (and other perpetrators) at the Eastern Front was sexualised. In some cases, the victims were killed afterwards.[70] From the perspective of the killers, concluding sexual acts with Slavic or Jewish women by killing them had the double benefit that no children would be born, while evidence of the intercourse was eradicated. We do not know how widespread such practices were, but sexual violence was seldom treated in the SS court system.[71]

In the summer of 1942, Himmler ordered the ban on intercourse with women of other races to be emphasised and that such offences should always be treated as criminal acts. Once again, Himmler wished to be informed of every case in order that he personally should make the decision.[72] In his deliberations on the matter, Himmler mentioned that brothels were part of the solution to tackle the problem of the soldiers' sex drive.[73] Another instrument employed by the SS was ideological schooling, and pep talks about the selection of proper sexual partners.[74] Despite such measures, a vast number of cases kept rolling into the SS courts.[75] In May 1943, the problem reached a level where it was decided to discuss the issue of intercourse with women of other races thoroughly at an SS judges meeting.[76]

The SS Judges Meeting in Munich

On 7 May 1943, a meeting among SS judges took place in Munich. The resulting memo left little doubt about the realities at the front insofar as sexual intercourse between soldiers and local women was concerned. For example, as described by the convening SS judges, 'in the Leibstandarte intercourse with women of another race happens over and over again. This is a result of having many women collaborators of another race working in supply and similar units. In many places this has developed into a kind of concubine-like relations'.[77] According to the memo, the commanding officer had even told his men that the ban did not apply to them, and that 'it had been conceived by people who had merely a theoretical understanding of things'.[78] *Division Das Reich* saw a similar situation

[68] Ibid., 449.

[69] Riksarkivet, Oslo, RAFA 3182, SS und Polizeigericht Nord, St.L.62/42, case material dated 4 Aug. 1942.

[70] Heinemann, 'Sexuality'. Mühlhäuser, 'Sex', 457ff. Specifically related to the Waffen-SS, see Bundesarchiv Berlin, NS19/3717, Letter dated 2 Aug. 1943 from OKW to RSHA. Hans-Peter Klausch, Antifaschisten in SS-Uniform (Bremen: Edition Temmen, 1993), 86ff. Gosudarstvennyi arkhiv Rossiiskoy Federatsyi, Moscow, F.7021/O.148/D.148.

[71] While a number of sentences against men committing rape in Western or Southern Europe (for example, France) can be found in the SS court material, the authors are not aware of any pertaining to Eastern European women of Slavic origin.

[72] Vojensky ustredni archiv, Prague, N.1, SS-Pz-Div. LAH, box 4, Circular from SS-Führungshauptamt, 10 July 1942. Betr. Geschlectsverkehr von Angehörigen der SS und Polizei mit Frauen einer andersrassigen Bevölkerung.

[73] Bundesarchiv Berlin, NS19/1913, Letter from Himmler to HSSPF June Ost 30, 1942. NS19/4009, Rede des Reichsführers-SS am 23 Nov. 1942 – SS-Junkerschule Tölz.

[74] Bundesarchiv Militärarchiv, Freiburg, RS 5/988. RS 2-2/14, Ia order of the day, 28 Mar. 1943. Mühlhäuser, 'Sex', 456.

[75] See for instance letters in VAP, SS-Rekr. Depot 'Dep.' K.2 and K.3.

[76] Bundesarchiv Berlin, NS7/13, Richtertagung in München am 7 May 1943 – Bericht und Vermerke zu diversen Besprechungspunkten. Vermerk dated 13 May 1943, 7–9.

[77] Ibid.

[78] Ibid. See also Röger, *Kriegsbeziehungen*, 216.

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and had decided not to prosecute violations of the ban. The SS police division too was pragmatic in this matter and, according to the court in Kiev, a staggering 50 per cent of the SS and police personnel in its area of jurisdiction had violated the prohibition. From the *SS-gericht Russland Mitte* it was reported that the SS leadership, in the form of *Höhere SS- und Polizeiführer von dem Bach-Zelewski,* '*drückt alle Augen zu*' (i.e. turned a blind eye towards the matter).[79] The court in Kraków furthermore explained that in the *Gouvernement Générale*, Himmler's order was impracticable. *Standartenführer* Dr Günther Reineke declared that the order was purely academic and had to be cancelled.[80]

Having gathered and discussed the evidence, the SS judges suggested that, as far as this matter was concerned, the ideological aims would have to yield to realities at the front. Himmler, however, did not want to give in entirely and, as a compromise, he introduced some relaxation of the rules. On 8 September 1943, he wrote to the chief of police and security that he was favourably disposed towards abrogating the ban concerning Estonians and Latvians, but that it would have to continue to apply to Lithuanians because of their racial inferiority.[81] This decision reflected that at this point of the war the SS had raised Waffen-SS units consisting of Estonians and Latvians, and especially the Estonians' 'racial qualities' had impressed Himmler.[82] However, this change of rules only encompassed a fragment of the female population in the occupied eastern territories, and the sources do not indicate that practice at the front changed significantly.[83]

Indeed, it was not the only time that the ideological ambitions of SS law had to yield to some extent when confronted with the realities. In Himmler's opinion, such pragmatism was most likely a matter of putting some of his ideological ambitions on hold temporarily, not about abandoning them entirely. For example, in June 1937, Himmler decided to suspend punishment for contravention of the racial SS marriage rules, and in 1940, he declared that no final decisions would be made in such matters until the end of the war.[84] The plan, in other words, was to return to previous racial standards in a post-war Third Reich.[85] Regardless, the fact remains that the application of SS law changed in some of the areas concerning sex, race and the family. In that sense, throughout the war, there was a certain tension within SS law, especially with regard to its application.[86]

SS Men, Race and Court Rulings

Another very interesting window into the role of ideology in the practice of SS law is the way that soldiers who stood trial were often judged according to their racial characteristics. In January 1942, for example, Himmler received a petition from an SS man who had been sentenced to death. On that occasion the *Hauptamt SS Gericht* was reminded that such cases could only be processed when the material included 'detailed character references' concerning the accused's parents and other family members, including photos of the parents.[87] This method – visual observation of racial features – was also employed by Himmler when assessing the racial value of a future spouse,[88] when deciding whether or not to have an SS men executed, as well as in cases of desertion. In January 1944 the

[79] Bundesarchiv Berlin, NS7/13, Richtertagung in München am 7 May 1943 – Bericht und Vermerke zu diversen Besprechungspunkten. Vermerk dated 13 May 1943.

[80] Ibid.

[81] Bundesarchiv Berlin, NS19/382, Politische und militarische Entwicklung in Estland und Letland.

[82] Christensen et al., *War, Genocide and Cultural Memory*, 199ff.

[83] In the comprehensive court material studied by the authors there is hardly any evidence that soldiers were sentenced for having had sexual relationships with women of 'other races' after 1941. For one exception, see Bundesarchiv Militärarchiv, Freiburg, RS4/1062, SS-kav.Div. Reiter Reg. 3. Dated 8 July 1943.

[84] Longerich, *Heinrich Himmler*, 338.

[85] Schwarz, *Eine Frau*, 23, note 27.

[86] See also Carney, *Marriage*, 180 and Mühlhäuser, 'Sex', 474.

[87] Bundesarchiv Berlin, NS7/53, Letter from Der SS-Richter beim RFSS to Hauptamt SS_Gericht, betr.: Vorbereitung der Entscheidung des RF-SS über Gnadengesuche bei Todesstrafen, 18 Jan. 1942.

[88] Longerich, *Heinrich Himmler*, 365–95.

https://doi.org/10.1017/S0960777323000644 Published online by Cambridge University Press

SS authorities decreed that in cases of desertion, the decision of whether or not to cease the payment of allowances to the culprit's wife and children should depend upon whether these could be classified as 'racially good families, viz. racially suitable children'.[89]

That the expansion of the Waffen-SS to include hundreds of thousands of men, who from the perspective of the SS were racially inferior, created political as well as juridical challenges becomes clear from a case during fall 1944. A soldier from a regiment of Soviet Moslems in the service of the Waffen-SS wanted to marry a German girl, and it was inquired whether to grant him permission. The files demonstrate that this was far from the first such case, and that previous cases, like this one, had resulted in German women becoming pregnant through their relationship with SS-soldiers of an 'alien race'. The SS authorities on the one hand stood firm on the fact that neither conception of children nor marriage was acceptable in such instances. On the other hand, they found it hard to punish the act, as both parties had acted in good faith. How could the girl possibly know that she interacted with a person of 'inferior race' when he was wearing an SS uniform, the SS reasoned. Thus, as in previous cases, the couple should be informed 'in a gentle manner not insulting the [SS] volunteer' that marriage could not be granted, and that it would in any case be unfortunate to produce 'a bastard' as such children 'always becomes less valuable' than their parents. Lecturing the couple in this way would also, it was argued, induce the girl to interrupt her pregnancy.[90]

It is clear from looking at SS court records that Germanic volunteers were given a relatively lenient treatment due to their supposed racial qualities. A striking example concerns a Norwegian SS-soldier, who failed to report to the Waffen-SS after a sick leave ended in mid-1944. Despite dragging out his return for a full three months, the SS court treated the case as AWOL, not desertion. In the judgement (of nine months detention) it was stressed that the accused had done 'his bit at the front in the European fight for freedom' yet, being a Norwegian, he lacked the soldierly upbringing of a German citizen. A similarly lenient attitude was nowhere to be found when fifty Italian SS soldiers serving in Waffen-SS Division *Reichsführer-SS* in summer 1944 stood accused of desertion. The matter was handled without individual considerations, and on 1 July 1944, Himmler's legal advisor, SS-Standartenführer Bender, informed the division that the men should be executed.[91]

Ideology and Rationality in the Third Reich: Understanding SS Law in the Racial State

In this article, we build on a literature that highlights the role of ideology in the Third Reich, Nazism's ambiguous relationships with modernity, as well as the complex character of Nazi laws and legal practice. It is from such a perspective that we have approached the data drawn from the SS courts. Taken together, we argue that our empirical findings reveal three important things concerning the use, application, and authority of SS law in this area. On the one hand, our data and analysis clearly demonstrate how the SS courts to a significant extent applied and promoted what Wildt has termed an 'unlimited', radical ideology.[92] This is hardly surprising, and fully in line with previous research. Race was at the core of SS ideology, and this was reflected in the prohibition against sexual intercourse with women of other races, the prescription of the death penalty for homosexuality, and in the way the SS courts assessed racial standards. Yet, as noted by Föllmer, the Third Reich 'thrived on ambivalence', and Nazi ideology was constantly translated into 'self-understandings, gender roles, and bodily practices' in different ways.[93] This observation is in line with recent debates about the Third Reich as a 'racial state' which have questioned 'the consensus over the power and coherence of Nazi racial ideology'.[94]

[89] Rossiiskii Gosudarstvenni Voennyi Arkhiv, F.1372/O.3/D.796, Amtsbefehl 2/44, 15 Jan. 1944.
[90] Bundesarchiv Berlin, NS48/28 Letter dated 3 Oct. 1944 from Oststelle to Rasse- und Siedlungshapuptamt. Ibid.: letter dated 10 Nov. 1944.
[91] Ibid., 154.
[92] Michael Wildt, *An Uncompromising Generation: The Nazi Leadership of the Reich Security Main Office* (Madison: University of Wisconsin Press, 2009), 436; Wildt, 'The Spirit of the Reich Security Main Office'.
[93] Moritz Föllmer, 'The Subjective Dimension of Nazism', *The Historical Journal* 56, no. 4 (2013): 1107, 1118.
[94] Pendas et al., 'Introduction', 5.

https://doi.org/10.1017/S0960777323000644 Published online by Cambridge University Press

As explained by Roseman and Wetzell, 'race was a moving target, subject to constant redefinition; it could be used as a label that was applied to policies of very different sorts, deployed for purposes of inclusion as much as exclusion'.[95]

As we demonstrated elsewhere, changing circumstances more than once led Himmler and the SS to revise their notions of which ethnicities were 'worthy' of being Waffen-SS soldiers as well as who were allowed to have sex with German women.[96] Similarly, the fate of the SS ban on sexual intercourse with women of other races demonstrates how the ideological ambitions had to be modified when law in the books became law in practice. In this particular matter the SS courts had to gradually climb down from a position of ideological purity when they were faced with realities at the front in the form of increasing numbers of SS men breaking the law. Indeed, several SS officers and generals simply disregarded the ban and, in that sense, the ideological intentions of the leadership and the SS law had to yield. Although SS law arguably was seen by Himmler primarily as an ideological tool of discipline, its application in practice became much more pragmatic in a number of cases, and this is what we find in the present study. In the end, Himmler had to allow his very own SS men to perform acts which he himself saw as detrimental to the Germanic race. Yet, the racial element never disappeared and continued to inform SS court decisions.

Finally, and perhaps most interestingly, the empirical data analysed here also reveals how the SS court system, despite its ideological core, to a significant extent also operated as a legal-rational bureaucracy. The intensive discussions within the SS court system, the thorough gathering of evidence of actual practice and violations of the ban as well as the SS judges meeting in Munich demonstrate the workings of a partly legal-rational bureaucracy bent on creating a certain level of clarity in substantial law and a certain level of equality before the law vis-à-vis SS soldiers. This arguably calls for a broader discussion of the role of law in the SS and in the Third Reich. How and in what way was law used and applied within the Nazi machinery in general and within its ideological centre in the form of the SS in particular?

Our data and analysis suggest that the way the SS courts and SS judges adjudicated and managed the ideological ban on sex with women of other races was to some extent based on what Weber would have termed a legal form of authority. Our case reveals a strong wish to uphold basic legal-rational aims concerning the transparency of law and consistency within SS case law. Traditionally, in a Weberian sense, the Third Reich and its reliance on Nazi ideology would be portrayed not as a legal and rational form of authority but rather as a state relying on charismatic authority. But in SS law, and the way it was practised by the SS courts, these forms of authority – charismatic and rational – arguably blended, despite their seemingly oppositional character. As explained by Weber, 'charismatic authority is sharply opposed to rational, and particularly bureaucratic, authority'.[97] Indeed, this is likely one of the reasons why the Third Reich has often been described as anti-modern – a proposition challenged by more recent studies.[98] As explained by Griffin, 'the task of making sense of the relationship of modernism to fascism "as a whole" is far from straight-forward' and certainly not simply a matter of opposition.[99] Similarly, what we find in our data reveals a much more complex relationship and mirrors what Dobry highlighted in his extensive criticism of Kershaw's biography of Hitler. According to Dobry, in the state apparatus of the Third Reich 'the charismatic was

[95] Ibid., 21. For a demonstration of the fluidity and flexibility of Nazi race thinking see John Conelly, 'Nazis and Slavs: From Racial Theory to Racist Practice', *Central European History* 32, no. 1 (1999): 1–33.

[96] Christensen et al., *War, Genocide and Cultural Memory*, esp. chapters 8–10.

[97] Weber, *Economy and Society*, 244.

[98] See Michel Dobry, 'Hitler, Charisma and Structure: Reflections on Historical Methodology', *Totalitarian Movements and Political Religions* 7, no. 2 (2006): 157–71. As explained by Payne, 'many commentators hold National Socialism to have been antimodern', which probably helps to explain why the rational elements of Nazism have sometimes been downplayed. George Payne, *A History of Fascism 1914–1945* (Madison: University of Wisconsin Press, 1995), 204.

[99] Griffin, *Modernism and Fascism*, 18. See also Robert Griffin, *The Nature of Fascism* (London: Routledge, 1991), 47; Payne, *A History of Fascism*, 202ff.; Pendas et al., 'Introduction'.

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able to combine with the legal-rational, despite their logical incompatibility'.[100] The type of law that was produced by this combination of seemingly incompatible modes of authority is arguably an understudied form of law which we suggest could be termed *legal-charismatic*.

The judges' meeting in Munich demonstrates a significant interest among the SS judges in substantial law and law in practice from a legal-rational point of view. Viewed through a Weberian lens, we find in the SS legal system not only predominant and clear signs of charismatic authority, but also elements relating to the qualities that Weber associated with rational legal authority: SS law was regular, had a specific sphere of competence and was exercised within a strict hierarchy; the judges had received technical training and laws were written and administered within a bureaucratic structure.[101] Furthermore, the judges had no ownership of this system, and they could be disciplined by it.[102]

In other words, SS judges were clearly preoccupied with generality and universality of rules and decisions – in their jurisprudence and also with regard to the difficult question concerning sexual intercourse with women of other races. And in doing so, they arguably had to accept a somewhat more *substantial rational* than *formal rational* legal method, where conditions and realities at the front were taken into account.[103] As a result, a pragmatic solution was reached, ideological concerns were to some degree downgraded, and an attempt was made to create a more or less uniform legal practice, without changing the formal legal rules as such, and of course without challenging the profoundly racist nature of the SS. In doing so, the SS court system created a system of legal authority which rested on a peculiar fusion of legal-rational and charismatic hegemony – an application of law that we label *legal-charismatic law*. By doing so, the SS was capable of maintaining a bureaucratic mode of operation, thereby offering its core members a sense of legality and fairness in its legal practices while simultaneously upholding a framework of charismatic rule – in the form of the Führer's intent (*Führerwille*) as the only justification of the unprecedented crimes committed by the very same members during the Nazi regime.

Bauman has previously underlined the strong rational element in the bureaucracy of the Third Reich and in the execution of the Holocaust – i.e. in the SS and thereby at the heart of the prerogative state.[104] Later this modernisation approach was picked up and elaborated on by others, and it became a central school in studies of Nazism and the Holocaust.[105] But Bauman clearly underestimated the role of ideology in his analysis.[106] With our term, *legal-charismatic law* and authority, we instead highlight the peculiar fusion of rationality and ideology that we find in the administration and application of SS law. One could argue that Fraenkel, the father of understanding the role of law in the Third Reich, tried to solve this particular paradox – the simultaneous presence of rational and charismatic forms of law and authority – essentially by trying to keep them apart through his invention of the dual state theory, where the normative state maintained a core of legal-rational authority, while the prerogative state became one of Nazi ideology.[107] Traditionally, however, the literature applying Fraenkel's dual state model would place the SS and similar institutions firmly within the prerogative state. If doing so, our study seems to contradict the theory of the dual state. However, if one understands

[100] Dobry, 'Hitler, Charisma and Structure', 162. Although Kershaw has a very different view of Nazi authority (which Dobry criticises), Dobry gives credit to Kershaw for acknowledging that civil servants in the Third Reich 'worked hard to turn ideological irrationality into bureaucratic regulations for discrimination' (ibid., 163).

[101] Weber, *Economy and Society*, 217ff.

[102] Ibid., 221.

[103] Weber, *Economy and Society*, 656f. As explained by Weber, *substantial rational* legal thought 'means that the decision of legal problems is influenced by norms different from those obtained through logic generalization of abstract interpretations of meaning. The norms to which substantive rationality accords predominance include ethical imperatives […] and political maxims', Weber, *Economy and Society*, 657.

[104] Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1993).

[105] Pendas et al., 'Introduction', 4.

[106] For a critique and discussion of Bauman's *Modernity and the Holocaust*, see Smith, 'Dehumanization, Social Contact and Techniques of Othering: Combining the Lessons from Holocaust Studies and Prison Research', in *Punishing the Other: The Social Production of Immorality Revisited*, ed. Anna M. Eriksson (London: Routledge, 2015).

[107] Fraenkel, *The Dual State*.

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the normative and the prerogative state as not referring to specific institutions of the Nazi Party and the Nazi state but rather as specific forms of using and applying law that could be found alongside each other inside the institutions of the Third Reich, then our study supports Fraenkel. In that sense, we arguably demonstrate how elements of both the normative and the prerogative state were visible and alive in SS law.

It seems likely, and this could be a subject for future research, that the *legal-charismatic law* we find in the SS can be traced back to the vehement attacks on liberalism seen in the German legal scholarly debates of the 1920s and 30s.[108] Especially interesting in this regard is Carl Schmitt's notion of political theology and his opposition to the liberal state and the Enlightenment rejection of 'the exception in every form'.[109] For Schmitt, modern jurisprudence was not an antithesis to theology. On the contrary. He considered these two disciplines to be very similar, both with 'scriptures' containing 'positive revelations and directives'.[110] This view arguably allowed for what others have termed a 'sacralisation' of politics:[111] a state of affairs where politics – and thereby also law – can take on a religious character, which several have argued was the case in the fascist and Nazi regimes of the twentieth century.[112] It makes sense that we should find a combination of charismatic and legal authority in such a state, and therefore one could maintain that the legal-charismatic form of law described here is essentially based on a form of political theology – a form of governance and authority where ideology and rationality merge to potentially create a radically violent modern state capable of combining bureaucratic efficiency with extreme radicalisation within a detailed moral framework.

[108] Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law.* (Oxford: Oxford University Press, 2018), 100f.

[109] Carl Schmitt, *Political Theology*: *Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 1985), 37.

[110] Ibid., 38.

[111] Ragnar M. Bergem, *Politisk teologi* (Oslo: Dreyers Forlag, 2019), 180.

[112] Ibid., 12.

Cite this article: Smith PS, Poulsen NB, Christensen CB (2024). Ideology and the Application of Law in SS Courts: A Case Study of Legal Practice in the Third Reich. *Contemporary European History* 1–14. https://doi.org/10.1017/S0960777323000644