CARL SCHMITT

STATE, MOVEMENT, PEOPLE

THE TRIADIC STRUCTURE OF THE POLITICAL UNITY

(1933)

THE QUESTION OF LEGALITY

(1950)

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PREFACE

It is said that Plato's dialogue THE STATESMAN is first and foremost a logical exercise in the art of definition through differentiation meant to improve the power of reasoning. So, too, Carl Schmitt's STATE, MOVEMENT, PEOPLE may be said to be first and foremost an exercise in the technique of mass persuasion. It was meant to facilitate the understanding and the retention by all and sundry of the social and political significance of some of the acts performed and decisions taken particularly with regard to the legislative and the judicial spheres in the life of Germany between 30 January and 1 December 1933, a period also known as the legal revolution, or rather, of two legal revolutions, as Carl Schmitt himself would say forty-five years later. The technical formula behind this essay may be described briefly as: a. continuous repetition to reach saturation, past the audience's expected ceiling of endurance; b. simple wording so that the ordinary man (Goebbels preferred the term 'woodcutter') could understand, and yet, c. the content should be interesting enough so as to make everybody else give it careful attention. Whereas, in the end, Plato could not help turning the exercise into an opportunity to reflect on the nature of the statesman as an ideal type, Carl Schmitt in turn could not help making the most of the third aspect of the formula of persuasion in an attempt to dispel illusions and draw distinctions as clearly as the circumstances allowed.

The continuous interest in this writing of his, the longest in that year, is sustained by his conceptual analysis of the transition from liberal democracy to totalitarianism under the conditions of legality, and in which the legal state, or as we prefer to call it nowadays, 'the rule of law', is the intermediate form. The latter, dominated by the basic principle of security, calculability and measurability, transforms all notions, concepts and institutions, and I quote, 'under the pretext of working out legal concepts within normatively predetermined abstractions'. Thus, Carl Schmitt

MOTTO:' The way of the new mankind goes from humanity through nationality to bestiality.' - F. Grillparzer (1791-1872)

goes on, 'every obligation in order to become a legal duty must have a content that is normatively measurable and subject to verification by a judge' (p.39). One may easily recognize here the aspirations of the European Union, to say nothing of the basic principle of the constitutional governance of the United States. (Remember the Year 2000 Presidential Elections?) It is a concern that is carried over into the 21st century; the so-called information technology and its corollary, the free-market globalization, are the ostensible factors that press it on in this century, with the alacrity of the innocent and self-righteous. It is in this spirit that earlier in the year 2000, in THE FINANCIAL TIMES, one of the Young Cyber-Turks was underlining the dichotomy, which he tried to convince whomever would heed him that existed between the permanent revolution of radical change, and which for him meant freedom, progress and democracy, on the one hand, and on the other, the stagnation and the despondency which he attributed to and equated with authoritarianism and autocracy.There, it was someone trying to promote his global internet business, and create optimum conditions for its acceptance, by juggling with normatively predetermined abstractions and present them as justificatory legal concepts; in other words, one was treated with advertizing as ideology. On the other side, the nostalgia for totalitarianism finds expression in the complaints about the absence of a definite goal that would mobilize energies and give them direction. Such complaints coming from a German foreign minister, an ethnic German born in post-WWII Hungary, or the President of a state like South Africa, heave many a sigh of revolutionary romantic regret, and even make cabinet ministers hang their heads in embarrassement.

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Although by December 1933, Carl Schmitt had been holding the highest functions which he would ever enjoy as a jurist under Hitler's regime, neither then nor later did he become 'the crown jurist of the Third Reich', as his former disciple Waldemar Gurian was to call him in 1934, from the safety of Switzerland. (Ironically, his only contribution to National Socialism, substantive though unintentional, was to

have pointed the way by which any mass movement with enough strong will and determination could come into power constitutionally in the Weimar Republic, and change its structure altogether. He did that in his 1928 book, VERFASSUNGSLEHRE [Constitutional Theory] by showing the weaknesses of the Weimar Constitution, and in particular of Article 76, which allowed a temporary two-thirds majority in parliament 'to revise the constitution'.) It was Hans Frank, Hitler's personal lawyer and future governor of Poland, who was imagining that role for himself as he dreamt of compiling for Hitler a code of laws after the fashion of the one produced under the orders and with the contribution of Napoleon, not realizing that Hitler needed no code of laws, since he himself was the law in virtue of the dictum that might makes right. Eventually, tired of Frank's hallucinations, Hitler would dispatch him to Cracow, in that impossible job of governor, under the permanent challenge of the SS.

In the Introduction to THE IDEA OF REPRESENTATION (Washington, DC, 1988), I said that Carl Schmitt might be counted among those who had thought that they could influence Hitler's thinking in the direction of a constructive solution of Germany's internal crisis (p.11). A closer reading of some of his writings of that period has since convinced me of the contrary, namely, that from the very beginning he had been aware of the nefarious role Hitler would play in Germany's history if roped in, but considered it to be limited to Hitler's lifespan, quite correctly as events would confirm. Indeed, on a personal level, Carl Schmitt had the choice either to emigrate or go into internal exile, or stay on and make the most of his professorship as long as possible, treading on eggs and living with Damocles' sword hanging over him unrelentingly. He was for certain the adventurer he later claimed to have been, confronted by the unpredictability of the new rule and faced with the chance of experiencing at first hand the dismantling of a social and political order of which he himself had been a part. He took that chance, and in the bargain, managed to survive it, without in the interval harming anybody in particular but himself. As a matter of fact, the unpredictability of political life, and the social instability which was feeding it, had made adventurism a

trait of everyday life in Europe from the time of WWI, if not earlier. (On the other hand, in America, where it had been endemic from the beginnings of its European colonization, adventurism was just normal, and so it was not experienced as a symptom of the unravelling social fabric.)

Born in 1888, in a more stable age of the Second Reich, Carl Schmitt started in life as a civil servant of that Empire in 1910, after he had received his law degree from the University of Strassburg. Then, during the 1914 war, and more exactly in 1916, he earned a doctoral degree from the same university that enabled him to turn to teaching instead. The period of disintegration of the federal structure of Germany that made itself felt even before the end of the Great War offered him unlimited opportunities, in his new position, to contribute to the efforts of institutional reconstruction. He joined in the long-standing battle between jurists in Germany, which coincided with the rapid development of capitalism and industrialization in the conditions of a multitude of sovereign states of various sizes, some of which had managed to expand at the expense of others in the aftermath of victorious military alliances. That battle reflected conflicting attempts to produce corresponding institutions that would most satisfactorily reflect the policy of federalization under Prussian hegemony, given the fact that as a result of alliances and annexations, Prussia had become the largest of the German monarchies after the Austrian Empire in the second half of the 19th century. The conflict between tradition and modernity, between the morality of the Enlightenment, with its human dignity and social justice, and the morality of business, and in legal terms, between substantive justice and formal legality, further split the lawyers. Brought up in the welfare ideology of the monarchical bureaucracy, Carl Schmitt came to experience the institutional crisis that led to the collapse of the imperial framework, and in those conditions, declared himself in favour of the reduction to a minimum of legal procedures in the cause of a decision (i.e. settlement) that was both expeditious and better adapted to the concrete case, through concrete evaluation of circumstances, as against the application of general norms to particular cases. For him the foundation of the law was sociological, and given the abnormal conditions of the times, that position

amply allowed him to perceive the inconsistency in the coexistence of the customary law, historicist and half-mystical, battered by the positivists' ram, with the jurisprudence of interests, characteristic of the parliamentarian legislative state. Against the disruptive tendencies at work in his country's build-up, and which affected the very notions of law and justice, Carl Schmitt looked back to the endeavours of the German reformers at the turn of the 19th century, when the French military advancement and occupation brought about an unprecedented, unprompted political unity of all social groups, a phenomenon that had a short-lived recurrence in the first few months of what was to become WWI. He studied the theories of a later reformist, Lorenz von Stein, and the natural law of the Catholic scholars, in his search of objective standards and non-formal criteria that could serve as source for judicial decisions, a basis for political unity, and for a comprehensive rational legislation. At the same time, it was his realism that made Carl Schmitt aware of the subversive character of the amorphous norms behind public law, the irrational character of the facts of life, alongside of the continuous balancing of interests and other phenomena that turn law into a continuously transformable technical apparatus, devoid of sacredness of content, and focussing on those ends that are inherent in or favoured by certain forms of political authority. At the same time, it may be said that he took advantage of the growth of various currents in the rationalization of legal thinking and the flights into the irrational, a consequence of the increasing reification of the legal technique, which paralleled the irrationalization of religion and the demands of popular justice. He made a career out of combating them during the Weimar Republic.

Carl Schmitt was not a democrat because for him the law in a democracy was the ephemeral will of the people as it made itself manifest at a given moment, or in his own words, it is the will of a majority at a certain moment - lex est, quod populus jubet (LEGALITÄT UND LEGITIMITÄT, 1932, p.27). Furthermore, it was his conviction that no democracy might survive which was not grounded in the premise that the people was good and its will was enough motivation: it suffices that the people wills (il suffit qu'il

veut), and also that parliamentarian democracy in order to be genuine needed to reflect in its laws the will of all the people as a whole. That also makes obvious why he could not be a parliamentarianist in the conditions of the pluralism of antagonistic political organizations vying to optimize their advantages at the expense of the others. On the other hand, he had already said what he wanted to say about political leadership in his writing of 1931, DER HÜTTER DER VERFASSUNG [The Defender of the Constitution], where the plebiscitary Reich president was presented as the pivot of the country's political unity when parliament had fallen victim to inter-party factionalism and conflicts of interest, and lost its legislative power, although he had never imagined Hitler to fill that role.

So, from Strassburg to Munich, to Berlin, to Greiswald, and then to Bonn University (1922-1928), Carl Schmitt returned to Berlin where he taught at the Graduate School of Business Administration [Handels Hochschule] between 1929 and 1932. He won his notoriety as an international authority on constitutional law with the publication of his opus magnum, VERFASSUNGSLEHRE, in 1928. It was in that quality of specialist in constitutional law that he appeared as a legal counsel for the Reich in the trial of Prussia vs. the Reich, before the Federal High Court in Leipzig, in the autumn of 1932. In the same year, the University of Cologne made him an offer for a professorship at that institution, starting from the spring term 1933, which offer Hans Kelsen, a member of the faculty there, hoped he, Schmitt, would accept. (If, in the present essay, Kelsen is mentioned by name, it is because he had already managed to be out of danger, so to speak, by moving to Switzerland. On the other hand, their sword-crossing in matters related to the nature of law and of justice was much older than the advent of Hitler, and had been well known in the juridical circles. It had nothing to do with the advance of the National-Socialist movement, which after all, would take positivism to new heights.) I suspect that at the time Carl Schmitt found the move to Cologne salutary, as it took him away from the wheeling-and-dealing at the centre of political power in Berlin where not long before he had favoured the suppression of the terrorist formations and a military take-over.

He was almost forty-five years old, and already counted a long and respectable list of publications ranging from belles-lettres and political philosophy to jurisprudence, when on his way to Rome where he intended to spend Easter 1933, an official invitation from the Reich Vice-Chancellor von Papen reached him in Munich, instructing him to return to Berlin where his expertise had been deemed useful in the formulation of the government legislation concerning the relations between the states (Länder) and the Reich. Indeed, none of his ideas did ultimately find their way in Frick's legislation: but his name was put in the records to lend respectability to the measures of integration and centralization that in fact had been worked out in the inner sanctum of the Chancellery and the Ministry of the Interior. The humiliation must have been so complete that he never admitted it openly. Seemingly, it increased his animosity towards von Papen who had involved him in the affair. As a matter of fact, von Papen, alongside Schleicher, whose adviser he, Carl Schmitt, had been until recently, and Hindenburg are the three peeves in the present essays. They are far from being forgiven for their political weakness and their self-assumed roles in bringing Hitler to power. On the other hand, another three people seem to have been instrumental in his return to Berlin as full professor of public law, this time at Berlin University, only after one term at Cologne; in his appointment to the Prussian State Council in July of the same year, and in his nomination to the newly founded Akademie für Deutsches Recht, to the editorial board of the organ of the National-Socialist jurists DAS DEUTSCHE RECHT [German Law], and at the head of higher education instructors' section of the National-Socialist Federation of German Jurists, in the autumn of 1933. The three people were Johannes Popitz, the Prussian Minister of Finance who had kept his office from the time of the Weimar Republic and would hold it honorifically until his arrest in July 1944 in connection with the underground resistance, and who had been a friend and colleague of Carl Schmitt's from earlier days; Hans Frank, State Secretary for Justice in the Third Reich, who had a sincere admiration for Schmitt's intellect and scholarship from his years as a law student in Munich, and finally, Hermann Göring, Minister President of Prussia,

who liked to collect and cultivate personalities for no other reason than to reinforce his own sense and image of respectability. The role of Martin Heidegger, then Rector of Freiburg University, on the other hand, was merely episodic, urging Carl Schmitt to join the NSDAP by sending him a letter in that sense from Freiburg on 22 April 1933. On May Day 1933, Carl Schmitt took his application to the local NSDAP quarters in Cologne. That gesture had only an administrative value, in fact, as it came after the 7 April law for the purging of the civil service, and in Germany, university professors were civil servants. Later, in 1937, when he received his card, he found out that he had become the 2,098,860th member of the National-Socialist Party. (Goebbels had been making fun of all those who joined the NSDAP after Hitler had been reconfirmed in power in March 1933, calling them 'the fallen soldiers of the month of March' [die Märzgefallene].) In the long run, the connection with Göring proved the most valuable when the period of transition came to an end, and the war-oriented reorganization of the country became primarily the task of the SS. Frank took back the Party functions which he had once bestowed on Schmitt, in order to ingratiate himself with Himmler, but Göring stood his ground and refused to kick him out of the State Council and the University. That did not mean that he was also exempted from surveillance by the Gestapo for the rest of the regime, or at least not until he was drawn into the Volkssturm and sent to defend Berlin against the Russian onslaught. (It was the Home Guard, made up of all able-bodied men between 16 and 60 years of age, that was organized at the end of 1944 by Bormann and the Party, as Hitler's last mass levy.) Captured by the Russians, he was released after intensive interrogation: either they were satisfied with Schmitt's explanation, in the terms of Melville's story of BENITO CERENO, of his own standing in Nazi Germany, or because he was deemed too old to be taken to Russia as a war prisoner. Nor is it clear until now why in September 1945, he was arrested by the Americans, had his library confiscated (as potentially incriminating evidence?), and kept in custody in various prisons for the next two years. He kept those vicissitudes mostly to himself, and considered them enough payment for having been an adventurer in the

Third Reich to turn down the occasion of eating another humble pie, the additional gratuitious humiliation that was the process of 'denazification' carried on by the occupied to placate the occupier.

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All texts written by people of independent thinking in the conditions of any kind of censorship likely to imperil their lives need to be read at different levels: the most superficial, which corresponds to what publicly the particular author is expected to say, or put differently, what the others should be made to think that one thinks; then, what one really thinks, although quite often denying it, or even ostensibly affirming the contrary, and a third level, where the interlocutor, or the reader, is led to draw the conclusions on his own from the contradictions and the inconsistencies left in the text, as well as from omissions or even erroneous references. Training in logical thinking and thorough knowledge of the conditions in which the author produced the particular work become necessary to get a correct reading of the author's mind. That always remind me of Fra Tommaso Campanella, Galileo's great friend, who would often write in the margins of the poems he was composing in the dungeons of the Spanish kings and of the Roman Inquisition: 'who reads, understands'.

As far as the main text presented here is concerned, its esoterism, so to speak, is unexpectedly thin, revealing a beginner at the game. The subtlety would grow with time, as it may be perceived, for instance, in his article of 1938, entitled 'Neutrality According to International Law and National Totality,' (ET, 1999). Notwithstanding, and as already said, the continued interest in the present essays goes beyond their historical moment. It is sustained by Carl Schmitt's continued interest primarily in the legal institutions of liberal democracy, and their transformation in the conditions of the legal state and of totalitarianism. Were Hitler and Himmler not precursors of present-day genetics, as the alchemists had been of modern chemistry? Did not Lenin and Stalin want to transform Russia in the most industrially developed country of the world by emulating their own image of America, as the present leaders from

Khrushchyov on have been trying so hard? The 'fall of the Wall' in 1989 did not put an end to the trend, and even less reversed it, and some of the contributing factors are quite new: cybernetics and the so-called 'information revolution', alongside of the huge, hardly imaginable, amounts of money that are moved round the world; they give it the global dimension of which Lenin was dreaming. As monarchies with their paternalism gave way to the nation-state, the protective function went out of the window to be replaced by the endemic social conflict of individual freedom, known also as social progress or social Darwinism, class-struggle and what have you. To aleviate internal crises, welfare measures would be taken as paliatives, but no serious attempt has ever been made to secure the protection of the subject: individual rights became an issue for the law courts to decide in each particular case. Growth of population, geographic and social mobility and the chronic shortage of genuine political talent have rendered the protective function unfeasable in the modern times. Hence individual ingenuity has become the supreme moral value of existence in the age of technology which does indeed promote the administration of things, first formulated by Saint-Simon, at the expense of the government of people. Totalitarianism, after all is the political end-product of the perpetual antagonism between technology as a stance and the longing for creature comforts in each and everyone, the suicidal included. As it eliminates social differentiations, it also does away with such notions as subject, person and personality:media commentators, for instance, talk of 'lives' that are saved and not of people, that is persons. Furthermore, it reduces the human species to a primary, or one may rather call it, universal status of biological material for the achievement of rationally followed and calculated ends, among which one should count depopulation. The developments in the spheres of molecular biology and genetic engineering, the use of live human cells to activate artificially made circuits show that the thinking behind them is grounded in this conviction. The advocates of animal rights bring their contribution to the devaluation of humankind in the moral sphere and nullify social institutions. Going hand in hand with the continuous improvement of the arsenal for mass destruction, they all allow full scope to the perfectioning of dreams

and aspirations that have tormented the luminaries of the Western world since the 17th century, if not earlier, and more recently, those of the other parts of the world in direct and persistent contact with the West. One may say that it will come to pass, yet unlike previous dissolutions of social structures, the one in operation in the name of technology risks by its globalization to render the planet Earth uninhabitable for any form of life. The moronic dream of escaping to a friendlier planet in a space machine may only be a consolation for the dimwits. Although in full swing, this trend is not inevitable, whatever the technologists and the 'virtual realists' might say in their attempts to convince the others of the contrary, in the world-wide confidence game that we are all playing.

Taking into consideration the fact that the first congress of the National-Socialist jurists had only taken place some three months earlier (September 1933), and given the new party functions bestowed on him by Frank, already mentioned, Carl Schmitt was expected not only to indulge the biases of his new masters but also to make a more substantial contribution to the cause. As concerns the former, he obliged by flattery, neo-romantic flights, curt declarations that discouraged doubt and eliminated argumentation, Machiavellian hints and insinuations about the negativity of cultural differences, of intellectual occupations and their subversive value, all splattered so awkwardly that only someone completely devoid of any sense of humour could hold them against him. His political incorrectness, on the other hand, looms large in the very title of the essay: he chose to use the term 'movement', although he was aware that Hitler was against it when referring to the NSDAP. On the other hand, if flattery may be taken for an expression of impotence and inferiority on the part of the flatterer, though leg-pulling could not be excluded in this particular case, the fact that Carl Schmitt felt the need of invoking higher authorities to validate some of his concepts only points to the precariousness of his position as theoretician of the new, changed political conditions. Thus, to prove the correctness of his idea that the law of 24 March 1933 was in fact the provisional constitution of the Reich, he felt the need to stress that it was shared by a jurist higher up in the Nazi hierarchy, a Secretary of State

in the Reich Ministry of the Interior (p. 6n). Apparently, that became necessary in order to countervail the criticism levelled at his notion by another law professor, Otto Koellreuter, then at Jena, who had printed it in DEUTSCHE JURISTENSZEITUNG, earlier in April.

As already said, the ostensive purpose of STATE, MOVEMENT, PEOPLE, however, was to help weaken resistances to and win acceptance for the new power of command assumed by a determined Hitler, as de facto and de jure leader not only of the movement but of the country, as well. Perhaps it is not too far-fetched to say that Carl Schmitt carried out his job in a way not unlike Shakespeare, who had helped to consolidate the Tudors by attacking their defeated predecessors, the Yorkists, and singing the praises of those before them, the Lancastrians. In other words, he undertook to attack the weaknesses, structural and ideational, of the Weimar Republic (a thing which he had been doing throughout those years, anyhow), and sang the praises of an idealised state of civil servants and soldiers, which he rolled back into the 19th century. In the process, however, he came to testify to the replacement of an entire legal system, however wobbly and full of warts, by the arbitrariness of regulations issued and commanding obedience in the name of such loose a fiction as ethnic identity by the will of a single man whose decisions were free of any of the norms previously in force. Hence Schmitt's emphasis on the singularity and unattachment to precedent or tradition of the new order with which he begins the essay: 'all public law of the present German State rests on its own ground' (p. 3), repeated on page 5: 'the law of the present-day National-Socialist State does not rest on a basis that is essentially alien and hostile to it, but on a basis of its own', and once more on page 8.

In fact, the new power of command, legitimized by the consent of an elected assembly, meant that as far as their validity was concerned, the ordinances flowing from it were on a par with the legal system that preceded it and with which it had entered into competition without being able to eliminate its basis by simply declaring it alien. Furthermore, by using the word 'provisional' to qualify the outcome of the power of command, Carl Schmitt pointed to another fact, namely that the ordinances, regulations and decisions

issued from the new centre of command and the authorities under its control and supervision could not create real 'law', despite the plebiscitary gestures that went with some of them, and which after all were a fiction. By not feeling bound to any fixed forms, the new power of command not only was assured of the advantages of an unprecedented flexibility, but also was able, as Max Weber would have said, to transfer the intrafamilial manner of settling conflicts to the body politic, while the form of the relations within the latter was turned into a matter of expediency: selection and personal ties replaced elections and the people were relieved of their political rights and responsibilities in exchange for obedience. It took Carl Schmitt several months more to be able to produce the legal fiction that the will of one man is law. He did it by resorting to no other authority than that of Heraclitus (c540–c480 BC), the pre-Socratic Greek thinker who in one of his fragments (110) had been saying that obedience to the will of one man was also law.

In the present essay, though, he would limit himself to the binary opposition between the administrative legality, normativist and functionalist in its conception and mode of implementation, on the one hand, and substantive or 'popular' justice, characteristic of periods of transition, on the other. The contrast between formal and empirical, positivist and substantive would give way conceptually to the one man's decisionism a little later, in his next longer writing of 1934, ÜBER DIE DREI ARTEN DES RECHTS-WISSENSCHAFLICHEN [On the Three Ways of Conceiving the Law]. However, at the end of 1933, the legal norms of Weimar and the Second Reich, tradition, the pseudo-mystical medievalism and the revolutionary romanticism, alongside the ordinances issued by the new rule still kept vying with each other, interfere with, obstruct, alter and even cancel one another, perpetuating the atmosphere of unpredictability and undermining resistances. The controlled anarchy of mutual surveillance gave the leader his justification.

The main point of Chapter I of the essay is that legality may become its own legitimation, if the transfer of power is carried out according to the laws in force at the time of the transfer, which lend it the needed legitimation. One may speak of a legal revolution in two senses: one, that the

transfer has been carried out in conformity with the laws in force at the time, and the other, that the previous legal order and system of justice are cast off, allowing only the dispositions of the new power-holders to fill the vacuum. This is important to remember, because it differs from the legitimacy of a new order that emerges from the outcome of a civil war, as it happened in Russia after the collapse of the tzarist order, and some twenty years later, in Spain, and after another decade, in China. Whatever the unintended consequences for the population at large, both in Russia and in China, the latter remains the source of legitimation for all the regimes that followed, including the present, even if as in Russia, one has been flying the tzarist commercial flag, and playing one of Glinka's operatic hymns as a provisional national anthem for a while.

Chapter II of Carl Schmitt's essay sketches the outline of the new system, that is, the workings of the new power of command which shifts the centre of political power from the state/society intercourse to the movement that has emerged through the fissure between the two, and so from outside the traditional sphere of power. It is a dynamic model in which the movement, rising between the state (the administrative machine and the army) and the people (those who do not belong either to the administrative machine or the army), subjects both to its interests, disenfranchizing the people (i.e. the civil society), and turning both the state bureaucracy and the army into its willing tools. The movement dominates and penetrates both, and draws its cadres from the ranks of the people. For the sake of manageability, it reserves for itself the monopoly of political power: it is up to the leader to decide what is political and what is not (in the same way as it is he alone who decides who is a Jew and who is not). Worth noticing here is the stress which Carl Schmitt lies on the neutralization and depoliticization of the civil society as a precondition for the ascent of a movement to the power of command. Although Hitler borrowed a lot from the institutions of the one-party Soviet system (as a matter of fact, the influence and the borrowings have been mutual), once in power, he avoided the Soviet internationalism and its universalization of the political, that is, seeing everything exclusively in terms of friend and enemy. Such a stance would have ill

accommodated his biological doctrine of racial identity and his policy of coordination.

Chapter III is ostensibly meant to underline the superiority of the triadic model over the binary one, that of the Weimar liberal democracy, the failed attempt to revive the revolute aspirations of the 1848 revolutionaries, and against the bureaucratic state of the 19th-century Prussian monarchy. In fact, it demonstrates the vulnerability of liberal democracy when imposed upon the unstable conditions of a different era. The legal state is what results when the former society tries to create the security and the predictability that were not its strongest points even at the best of times. Victim of its own prejudices, the 20th-century liberal democracy, which wanted to be everything to everybody, not only was unable to provide protection and security for all and sundry but has become the breeding field for forces and interest groups intent only on carrying off the prize in juridically unassailable conditions. The very loose fabric, ridden with inconsistencies, ambiguities, confusions and omissions, civic irresponsibility, and a tolerance verging on helplessness, not only puts up a poor defence but invites its ransack by forces previously excluded. In such conditions, judges, and one may add, scientists, as irresponsible as the politicians that hide behind them, are hardly the rescuers of the society.

The leadership principle as the cornerstone of political unity of a country was not a new idea, and not in the least Hitler's. It had emerged in German political thinking time and again whenever conflicts of interest and party factionalism paralysed the ability of taking all-embracing decisions and following them through. It derived from the power principle of the hereditary charismatic monarch. In the last years of WWI, it found its most vocal theoretician in Max Weber who put forth the notion of a plebiscitary president with his own cabinet, as a unitary solution against the many-headed domination system of the federation of states that at the end of WWI had emerged quite unscathed from the collapse of the empire. Carl Schmitt's own idea of political leadership, mentioned earlier in the Preface, is a reformulation of Weber's concept that takes into consideration the changes that had occurred in Germany's political landscape in the interval. Nonetheless, when faced

with Hitler's leadership, the apparent main topic of the last chapter of the essay, Carl Schmitt had a hard time to distinguish it from the charismatic dictatorship of a demagogue who has the courage to handle differences differently and to carry through necessary differentiations (p. 36). Hitler had concocted his idea of leadership in the struggle for power within his own party, of which the beer-hall putsch was a part, and it was from there that he transposed it upon the state, borrowing the hierarchical principle of the army and of the civil service. It did away with election altogether, replacing it by the principle of selection and of the ultimate responsibility of the leader at the apex, surrounded by a circle of cronies, his paladins, whom he co-opted and dismissed at pleasure. The Council of the Leader, informally known as the inner circle, had still another function, not mentioned by Carl Schmitt. It sustained in the leader that sense of responsibility, that in fact he was wanting, by surrendering that of its members and deferring to his decisions and otherwise clining to his every word. For Hitler, the perfect confidence trickster, the recurrent validation of his leadership by his willing subordinates was a vital necessity, even in the conditions of the positivist state machine which the German Reich grew into during the war. The political leadership which Carl Schmitt had in mind was in fact replaced by the simplified bureaucratic notion of the authority to issue orders, and which in turn presupposed regimentation. Its accessibility was left open: everybody might become a leader. Which reminds one of the Napoleonic dictum that every soldier carried a field marshal's baton in his knapsack.

Not to repeat what he had already said in Chapter I and to avoid running the gauntlet by a frank opinion of Hitler's leadership and its direction, Carl Schmitt turned to a discussion of the concept of supervision, presented as the opposite of political leadership, and as the core concept of the administrative state, where control, commissions of inquiry and supervision make up for the absence of political leaders. On the other hand, in order to learn what Carl Schmitt really thought of Hitler's brand of leadership and its consequences for any particular country, one needs to take his hints in section 3 of the same chapter, and read Plato's dialogue THE STATESMAN, particularly the

characterization of the steerman, consistently prone to shipwreck the vessel entrusted to him, and Taine's analysis of Napoleon's rule, which represents the first volume of his study, THE MODERN REGIME (ET 1890-1894), which itself is the third and last part of his ample work in six volumes, entitled THE ORIGINS OF CONTEMPORARY FRANCE. Both kinds of leader bode ill for those who happen to be ruled by them. Carl Schmitt's irony that rests in the stress which he lays on Napoleon's nationality is likely to be lost on the present-day English speaking readers, unaware as they are that in Germany people never forgot that Hitler was an Austrian (and jokes on that theme were circulating widely), with an inbuilt hostility not only to the Jews but also to the Germans themselves, fed as it was by his chronic inferiority complexes, as much as Napoleon, the Italian adventurer and future Emperor of the French, had in his turn been anti-French: ' I shall do to the French all the harm that I shall be capable of'. Napoleon was saying that while a student at a military college in France, with all expenses paid by the French state.

While Carl Schmitt had been seeking a unifying principle in the sphere of ideas and religious beliefs at a time when the very notion of natural law had been discredited, the ever-present fear of being sucked by the maelstrom of Bolshevik Soviet rule, the demise of parliamentarianism and the reappearance of what Max Weber named the jack-in-the-box-like career politicians without a calling who were striving for immediate advantages for themselves and their supporters, willing to sweep away moral and legal obstacles that might have cast a shadow over illusions of recognition, security and just deserts, all these pointed into the opposite direction, towards the biological. It was Hitler's merit to grasp it, and make the most of the lowest common denominators, the instinct and the affect, in the name of racial identity. Out with such distinctions as class, culture and wealth: only inherited and inheritable biochemical traits should be made to count. At the time when the essay was written, 'race' had not yet been established as a legal concept, and personally, Carl Schmitt was seemingly reluctant to add it to the inventory in circulation. He only used the word 'race' twice in the whole text: once, with reference to Hitler's and Frank's

speeches at the Nazi jurists' congress, and a second time, in his own quasi-lyrical encomyum, which after all, is a close definition of the emotional state of homo hitlericus:' Down, inside, to the deepest and most instinctive stirrings of his emotions, and likewise, in the tiniest fibre of his brain, man stands in the reality of this belongingness of people and race' (p. 51). Beyond that, he, Carl Schmitt, was not prepared to go. On the other hand, he had not the same reticence with regard to 'ethnic identity', which in the Nazi propaganda had become but a fiction, meant to stand for the opposite of the Bolsheviks' internationalism. It is equated in the essay with a sense of belongingness 'to the law-creating community of kith and kin' (p. 51). At the same time, Schmitt seemed anxious to point out that it was the only guarantee against arbitrariness and tyrannical conduct in the leader, as well as in the judge! (The string of events that marked that year since Hitler's appointment as Chancellor on 30 January had already shown its unreliability, as it allowed free rein to arbitrariness and cruelty in decision-making.) Nonetheless, Carl Schmitt could not help giving a short practical lesson about the new meaning of ethnic identity, letting the reader to draw his own conclusions: one may easily infer from the last two paragraphs of the essay that the Nazi fiction was based on the exploitation and manipulation of individual awareness of differences, whether in matters of culture and tradition, custom or expression, with only limiting consequences as regards the belief in a common ethnicity, and for that reason, not conducive to group-formation. It could be used only to justify the expulsion of the undesirable under the pretext of their being different from the community and its various walks. It was used as a substitute for the Marxist class-conflict and provided the Nazi leadership with the cover for its discretionary use of the Soviet experience to its own advantage while avoiding some of the Soviets' original pitfalls. It is Carl Schmitt's conclusion that 'without the principle of ethnic identity, the German National-Socialist state cannot exist.... Again, with all its institutions, it would be immediately handed over to its liberal or Marxist enemies, now haughtily critical, now obsequiously assimilationist' (p.48). Which is what happened after WWII, when the Western sectors of Germany were returned to the

Weimar system, while the Eastern zone reverted to Soviet socialism, almost as a matter of course. Carl Schmitt's diagnostic is also confirmed by the new German communist party's reorganization after the reunification as the Party of Democratic Socialism.

The more recent attempts to link the award of international loans and grants to various countries with the imposition of pre-packaged liberal democratic reforms only betrays the inability of the money brokers to grasp the realities of the present-day world and offer adequate suggestions for political problems in need of solution, when and if asked to do so. It is an inability which they refuse to admit even to themselves, and which is a growing source of mutual contempt and hostility, that often turns into an inept game of cops and robbers, in which the roles are interchangeable, and social and economic destabilization is the only noticeable result. In this intercourse, the vocabulary used and some of the principles quoted have been borrowed from the first few decades of the last century but only in order to disguise old habits and propensities, and lend an air as it were of global legitimacy to what is only a chronic poverty of ideas and lack of imagination that neither side seems able or willing to overcome. Thus, to take an example, the mere word 'democracy' is nowadays used indiscriminately as the great 'parole of legitimation' of any dubious undertaking at local, national or international levels. Terms are emptied of any ideational content and are cultivated merely for their pure emotional value to disorient, mystify and induce resignation, or the opposite.

SIMONA DRAGHICI

EDITOR'S NOTE. In the texts that follow, the notes marked by asterisks are the author's while the numbered are the English editor's; moreover, the index covers only Carl Schmitt's texts. The inconsistencies in capitalization reflect a lack of editorial consensus which might be reached by the time of a second printing. Needless to say that without the help of the Library of Congress staff this book would have never been completed.

BIBLIOGRAPHICAL NOTE

Whoever is interested in the question of legitimacy may access the subject catalogue of the Library of Congress: the number of titles on the matter that has been published the world over in the last three decades is impressive. Here, however, I shall limit myself to quoting those texts by Carl Schmitt that cast additional light on the problems raised here and are available in English translation. They are listed in chronological order:

POLITICAL ROMANTICISM (1919), tr. Guy Oakes, MIT, Cambridge Mass., 1986.

THE CRISIS OF PARLIAMENTARY DEMOCRACY (1923), tr. Ellen Kennedy, MIT, Cambridge Mass., 1985.

THE IDEA OF REPRESENTATION (1923), tr. E.M. Codd, ed. S. Draghici, Plutarch Press, Washington DC, 1988.

'The Age of Neutralization and Depoliticization' (1931), tr. John P. McCormick, in TELOS No. 96 (Summer 1993), pp. 130-142.

FOUR ARTICLES (1931-1938), ed. and tr. S.Draghici, Plutarch Press, Washington DC, 1999.

THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBES: MEANING AND FAILURE OF A POLITICAL SYMBOL (1938), trs. George Schwab and Erna Hilfstein, Greenwood Press, Wesport Conn., 1996.

'The Legal World Revolution' (1978), tr. G.L. Ulmen, in TELOS No. 72 (Summer 1987), pp. 73-89.

There are more works by Carl Schmitt, relevant to the problems under discussion but which are not yet available in English translation, among them

DER HÜTER DER VERFASSUNG (1931), 2nd ed., Duncker & Humblot, Berlin, 1969, *and*

LEGALITÄT UND LEGITIMITÄT (1932), 2nd ed., Duncker & Humblot, Berlin, 1968.

Moreover, in 1988, Messrs Duncker & Humblot of Berlin reprinted the 1940 edition of

POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENF-VERSAILLES 1923-1939, *thus making available an important collection of Schmitt's articles on the period, and so expanding the perspective opened by the*

other collection of his shorter writings and from which 'The Question of Legality' has been translated here, namely

VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954, Duncker & Humblot, Berlin, 1958, *with several reprints.*

Besides, the two American monographs:

CARL SCHMITT: THEORIST FOR THE REICH by Joseph W. Bendersky, Princeton U. Press, Princeton, 1983, *and*

THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936 by George Schwab, 2nd ed., Greenwood Press, Wesport Conn., 1989

may help one find one's way through the intricacies of German politics before and during Hitler's coming to power. Besides, they both contain useful bibliographies.

For a slighly earlier period, one may consult:

MAX WEBER AND GERMAN POLITICS by Wolfgang J. Mommsen, tr. Michael S. Steinberg, Univ. of Chicago Press, Chicago, 1984,

while the age of Prussia's modern reformers may be gleaned with painless profit from

THE AGE OF GERMAN LIBERATION, 1795-1815 by Friedrich Meinecke, ed. and tr. Peter Paret, Univ. of California, Berkeley, 1977.

STATE, MOVEMENT, PEOPLE

THE TRIADIC STRUCTURE OF THE POLITICAL UNITY

(1933)

I

THE PRESENT CONSTITUTIONAL SITUATION

1. All public law of the present German State rests on its *own* ground. Some individual provisions of the Weimar Constitution are still in force, yet no more than the large mass of pre-revolutionary regulations, and so only to the extent they do not contradict the new juridical conditions. However, they do not serve as the groundwork and constitutional legitimation of the present State. Their continuous validity rests on *an assumption* in part explicit (as for instance, with regard to the conditional stipulations, to be talked of shortly, of the provisional constitution – the so-called law of empowerment[1] of 24 March 1933), and partly implicit in the new public law. Either substantially, by its contents, or formally, by its legal constitutional force, the Weimar Constitution cannot be the foundation of a National-Socialist State.

The Weimar Constitution is no longer in force. All the principles and regulations that were essential to that constitution both from the ideological and the organizational standpoints are set aside along with all their premises. Even before the so-called empowerment law of 24 March 1933, a decree issued by the Reich President on 12 March 1933 had solemnly abolished and removed their spirit and their foundation together with the black-red-gold flag of the Weimar system (Article 3 of the Weimar Constitution[2]). Likewise, one could not wait for the empowerment of a system which by its own weakness and neutrality was in no way capable of recognizing even a mortal enemy of the German people, in order to abolish the Communist Party,[3] the enemy of the State and of the people. Such a judicial measure as the law of the Reich of 14 July 1933 against the reconstitution of political parties (*Reichgesetzblatt* I, p. 479)[4] and the law of 13 October 1933 to ensure legal peace (*RGBl.* I, p. 723)[5] eradicate the Weimar Constitution both ideologically and as far as its organizational consequences

are concerned. That constitution is no longer identical with itself when the whole ideal, liberal-democratic world has collapsed, when for instance, there are no longer any indiscriminate party formations, any political freedom of propaganda, of opinion, of conscience, of action, and even of ideological efforts hostile to the State, leading to suicidal neutrality, when there is no longer any equalization or rather the absence of discrimination between the enemy of the State and the friend of the State, between the comrade of the people and the alien. The new world of the National-Socialist law cannot be understood in any other way, and even less, find justification or a basis in the concepts and the forms of the Weimar system. From the point of view of the National-Socialist State, every attempt to justify or to refute the present legal situation on the basis of the Weimar Constitution is for that very reason a senseless game, or else, an expression of the political effort to realign the public law in force now and the *auctoritas rei constitutae*[6], which belongs to the present-day State, with the order of the ideas of the former law, and in that way, either to paralyse it or at least to treat it as relative.

Even from the point of view of the so-called formal authority of constitutional law, the provisions of the Weimar Constitution are wanting. The provisional constitution of 24 March 1933 (the so-called law of empowerment), as well as the law of 14 July on the plebiscite[7], surpasses the framework of every regulation conceivable in terms of the Weimar Constitution. The conditional stipulations of the provisional constitution of 24 March 1933 (rights of the Reich President, and in addition, of the Reichstag[8] and the Reichsrat[9], as institutions) have not the edge over the law of 14 July 1933 on the plebiscite. With the help of this law, other laws may take effect that would go beyond the conditional stipulations of the provisional constitution of 24 March 1933.

Several jurists, who obviously cannot get used to the reality of the National-Socialist State, have tried to present the new basic laws of this State as deviations from the Weimar Constitution, deviations which should be measured exclusively against the so-called 'law of empowerment', either in generous terms, as 'admissible', or critically, as 'inadmissible'. This is a concession which internally is

impossible, unsustainable. The text of the Weimar Constitution cannot be treated as continuously valid in the conditions of the new public and constitutional law of the National-Socialist State. From that it might then be deduced that the National-Socialist public law (like the 1924 law regarding the Dawes Plan[10]) has only the value of a temporary, interim measure against the background of the earlier constitution, and that a simple bill passed by the Reichstag might again abolish the new constitutional legislation entirely, and return to the Weimar Constitution.* How can one distinguish the 'pure text' of a constitution from its contents and its formal validity, and how is it possible to say with juridical logic that a constitutional law, admittedly new in its contents, is valid, and that the contents of the Weimar Constitution is still in force? I mention this manner of looking at things only in order to give an example of the confusion which appears as soon as one gives up the clear and simple viewpoint that the law of the present-day National-Socialist State does not rest on a basis that is essentially alien and hostile to it, but on a basis of its own.

But what then is the meaning of the Reich law of 24 March 1933 that changed the constitution, yet was passed with the required majority of two thirds of votes, in accordance with the dispositions of Article 76 of the Weimar Constitution[11]? This so-called law of empowerment was passed by the Reichstag solely as the enactment of the will of the people, made manifest through the parliamentary elections of 5 March 1933. When looked at with the criteria of jurisprudence, the elections were in fact a popular referendum, a plebiscite[12] by which the German people has acknowledged Adolf Hitler, the leader of the National-Socialist Movement, as the political leader of the German people. The local elections of 12 March confirmed once more the same will of the people. The Reichstag and the Reichsrat would act from then on exclusively as the executive bodies of the people's will. Nevertheless, the

* See, for instance, Medicus' remarks on the Reich law of 23 March 1933 in *Deutsches Recht* [German Jurisprudence] by Pfundtner-Neubert, Berlin, 1933, and Scheuner in *Leipziger Zeitschrift*, August 1933, p. 903.

mental habits of the so-called positivist jurists give them grounds to find in this law the juridical foundation of today's State. The phrase 'law of empowerment' further reinforces the propensity for this error. Because of that, it is necessary to recognize that the expression 'law of empowerment' is a juridically imprecise albeit erroneous description. It would be better to avoid the expression altogether, the more so, as it does not appear either in the title of the law (Law for Removing the Distress of People and Reich) or in its text: it has only been attached to the law from the outside. As a matter of fact, this 'empowerment law' is *a provisional constitutional law of the new Germany.**

The provisional constitution of 24 March 1933 has all the characteristic features of a *transitional measure.* If this is correct under the aspect of a law transforming the constitution in conformity with Article 76 of the Weimar Constitution, that does not mean that one may still nowadays consider the Weimar Constitution as the foundation of the present-day State structure, but only that the law represents *a bridge from the old to the new State, from the old base to the new base.* Practically, it is of great importance that this transition should take place legally. As it will be recalled further on, legality is one of the ways by which the Civil Service and the administrative machinery of the State function, and for that reason it was important both politically and juridically. Besides, it is not without merit that a system surrenders on its own, in conformity with its own legality, and affixes its seal on its own end. But that is only the abdication and the death statement of the old law, and not the substantial definition of the new. Neither the base, nor the boundary or any essential interpretative opinion, that might bind the present-day State,

* I presented this interpretation immediately after the publication of the law (on 31 March 1933, for the first time, at the Conference of the German Society for the Promotion of Political Sciences, at Weimar). It seems that in the meantime it has caught on. It has assumed a special significance for that matter when the Reich State Secretary for the Interior, Dr. Pfundtner, adopted the same standpoint, and described the law as a 'provisional constitution' (lecture delivered at the Administrative Academy of Berlin, on 4 July 1933, Fascicle 1 of the Public Administration in the New Reich, Berlin, 1933).

can be deduced from the old era which has resigned. For the law in force nowadays, the 'empowerment' of 24 March 1933 is nothing but a kind of republican analogy to the explicit release from the oath of loyalty uttered by a monarch when renouncing the throne or abdicating. On this point, that legalization is in its juridical and political meaning what the legalistic mentality of a legislative liberal-democratic State is for the principle of loyalty in a State of monarchical servants.[13]

The German revolution was legal, that is to say, formally correct in keeping with the former constitution. That happened thanks to discipline and the German sense of order. In rest, its legality is meaningful only in terms of the legality of the former Weimar Constitution, that is of a system that has been *superseded.* It would be juridically false and politically an act of sabotage to derive from that kind of legality a continuous validity of superseded juridical ideas, institutions or norms, and together with it, a permanent submission to the letter and the spirit of the Weimar Constitution. The sound law of the German revolution does not rest on the fact that, through their consent, several dozens of deputies were willing by their fifteen per cent to make up the difference which exists between the simple and the two-thirds majority. The law of the present-day German State does not hang on the conditions, limitations, or just the mental reservations under which that group has given its consent. It would be absurd both politically and morally, as well as juridically, that empowerment be here granted by powerlessness, and in that way, seize power again for a system that has become impotent. What is alive cannot be legitimated by means of what is dead, and force has no need to legitimize itself by means of powerlessness.

At the 1933 Party Congress in Nuremberg, Rudolf Hess, our Leader's deputy, has said that the Party Congress [Parteitag] is a 'parliament' [Reichstag] of the Third Reich, and that hits the nail on its head. But the notion of 'parliament' is not meant in the sense given to that institution by the Weimar Constitution. And when the Leader's deputy utters the following sentence: 'All the power comes from the people,' this is essentially different from what was meant by the liberal-democratic Weimar Constitution when

it used the same words in its Article 1.[14] All our public law, including all the provisions taken over from the Weimar Constitution and subsequently valid, rests on an entirely new foundation. The basic features of the new State structure will be dealt with further on (in Chapter II). Here one must only make clear *the own law* of our new State from the beginning, against all the false juridical constructions which would lead the National-Socialist State back into the tracks and the ways of the old and superseded thinking about the State.

2. The constitutional provisions valid today stipulate for a coexistence of more supreme offices of the Reich, as well as more possibilities of legislation.

a) The following are to be counted as supreme *offices of the Reich*: the Reich President, the Reich Chancellor, the Reich Government,[15] the Reichstag, the Reichsrat.* The question of the mutual relation of the many Reich offices cannot be resolved by means of the Weimar Constitution. The valid regulatory principle for the classification of the supreme offices of the Reich is that the Reich Chancellor is the political leader of the German people, politically united in the German Reich. The primary importance of the

* The Economic Council of the Reich [Reichswirtschaftsrat], as well as the office of the representative of the Reich President, may be set aside. Notwithstanding the law of 5 April 1933 (RGBl. I, p. 165), the Economic Council of the Reich is a transitional body with an unclear purport as long as its lot has not been decided through the elaboration of a social constitution of professional organizations. As regards the representation of the Reich President, according to the law of 17 December 1932 on the representation of the Reich President (RGBl. I, p. 547), in every case of impediment, even the shortest, on the part of the Reich President, he must be represented not by the Reich Chancellor but by the President of the Supreme Court of the Reich. As it is known, this measure was taken at a particularly gloomy time for the multi-party State of Weimar. Its sense and aim lie in the fact that in such a pluralistic system, the parties, fighting among themselves, had no unitary political will, and at the most, could all converge only upon a political zero point. In the National-Socialist State, which is founded on the leader principle [Fuehrerprinzip], a regulation like that, emerging from such motives, is absurd. Therefore, even without its expressed abolition, the law of 17 December 1932, in my opinion, is as little valid as the other constitutional provisions of the Weimar system that no longer correspond to the present law. Were a special repeal of this law considered necessary, which perhaps would not be excessive, for psychological reasons in our period of transition, it is however not indispensable either constitutionally or juridically.[16]

political leadership is a fundamental principle of the present-day public law. The rights of the Reich President are guaranteed. But gone is the abnormal situation of the last few years of the Weimar system, in which the Reich President was constrained to abandon the specificity of his high office, and function as stand-in for a political leadership.[17] The office has in a way resumed the 'constitutional' position of the head of an authoritarian State, *qui règne et ne gouverne pas*.[18] Nowadays, it is self-understood not only *de facto* but also *de jure*, that the Reich Chancellor Adolf Hitler holds a position in conformity with the State law, that is, not comparable to the position of any of the preceding chancellors, either in relation to the Reich President or to the other members of the Reich government. The political 'leadership' exercised by Adolf Hitler is something more than and different from a 'simple determination of directives,' according to Article 56 of the Weimar Constitution.[19]

b) Besides the coexistence of the said offices, there is the coexistence of *varied legislative possibilities*.[20] The normal way of today's legislation is that of the decree of the Reich Government (Article 1 of the provisional constitution of 24 March 1933).[21] Moreover, the Reich Government has the possibility to question the people by way of the ballot, precisely about laws and regulations (the law of 14 July 1933). The legislative possibilities recovered from the Weimar Constitution (such as the voting by the Reichstag in virtue of Article 68,[22] and the plebiscite in virtue of Article 73[23]) are still equally valid. Finally, the right of the Reich President to issue decrees with the force of Reich laws, according to Article 48, paragraph 2,[24] is still effective, and to be exercised in particular cases.

In the face of this variety of legislative possibilities, the question remains of their hierarchical order and their mutual relationship. Here, too, the question cannot be solved through formalist and sophistical interpretations of the words of the Weimar Constitution. The public law of the National-Socialist State must rather enhance the awareness of the fact that the absolute priority of the political leadership is a positively effective basic law of today's State. As a consequence of the application of this fundamental law, the liberal constitutional separation of the executive from the legislative is cancelled, and the government assumes a

true, formal, legislative right (which, by the way, is expressedly acknowledged in Article 1 of the provisional constitution of 24 March 1933); in addition to all this, every legislative initiative is in principle a matter for the government. An appeal of the Leader to the Reichstag is still of consequence, and through it, perhaps, to the Reich legislation in such an event.[25] On the other hand, it is not possible either *de facto* or *de jure* to convene the Reichstag against the will of the Leader (in virtue of the alleged right of one third of the members, in conformity with Article 24[26]), and there to present a so-called bill of initiative. Even the referendum, and the popular legislative procedure of the Weimar Constitution give way to the new right of the Reich Government to popular consultation.

The subsequent question of the relation between a law of the Reich Government and a law brought forth by popular consultation may equally be answered on the grounds of accepted National-Socialist principles. The Reich Government acknowledges the authority of the people's will which it has called upon, and as a consequence, considers it binding. In no way does it assume the right simply to abolish a law of the Reich, based on popular consultation, by means of a new Government law. It is another matter altogether, if in a completely changed situation, the popular law no longer corresponds to the facts and becomes meaningless. In that case, it is up to the political leadership to decide the form in which a new and necessary measure is to be taken, and which of the means available in that case - new popular consultation, the reorganization of the Reichstag, a Reichstag resolution, a Government law - may be used to that end.[27]

The new elections for the Reichstag, which by a decree of the Reich President of 14 October 1933 (*RHBl.* I, p.729) were set for 12 November 1933, are meant *only as an integral part of the great plebiscite* of the same day on which the German people will assume a foremost position in the politics of the Reich government, and make itself heard. Previously, in the Weimar system, the so-called elections had long lost their true elective character. As it has been repeatedly remarked, they had become a *plebiscitary option* of the masses of voters between five or six incompatible programmes and ideologies, an option that split the German

people into as many incompatible parties.[28] The danger of such a pluralistic division of Germany into several totalitarian parties has been quelled in the one-party State of the National-Socialist Germany. Thus, the election has become a response of the people to the appeal launched by the political leadership. That character of appeal of the reorganized Reichstag and its connection with the plebiscite became evident on 12 November.

II

THE TRIADIC STRUCTURE OF THE POLITICAL UNITY

1. The political unity of the present-day State is a *three-part summation of State, Movement and People.* It is radically different from the liberal-democratic State schema that has come to us from the nineteenth century, and not only with respect to its ideological presuppositions and its general principles, but also in the essential structural and organizational lines of the concrete edifice of the State. Every essential concept and every important institution is affected by this difference.

The new State structure is marked by the fact that the political unity of the people, and thereby, all the regulation of its public life appear to be ordered into three distinct series. The three series do not run parallel one to the other, but one of them, the Movement, which carries the State and the People, penetrates and leads the other two. Three formations move side by side, in their own order, meet in certain decisive points, particularly at the apex, have distinctly different contacts and direct links with each other, which however are not allowed to cancel the distinctions, and as a whole, effected by the carrying series, all shape the constitution of the political unity. Each has moulded itself from a variety of viewpoints and, if I may say so, of different materials, but all, even if in various ways, are swept along by the public legal order.

Each one of the three words: State, Movement, People, may be used alone to denote *the whole* of the

political unity. At the same time, however, it indicates yet *another particular aspect and a specific element of this whole.* In this way, the State may be regarded strictly as the *politically static part*; the Movement, as the *dynamic political element*, and the People, as the *apolitical side*, growing under the protection and in the shade of the political decisions. But it would be false to make sophistically out of them alternating and mutually exclusive opposites, and play off the State against the Movement, or the Movement against the State, the People against the State, or the State against the People, the People against the Movement, or the Movement against the People. This would correspond to the liberal splitting, of which more will be said later on, and the political sense of which is the abolition, or at least, the relativization of the political whole. The Movement, in particular, is as much the State as it is the People, and neither the present-day State (in the sense of political unity) nor the German people of today (the subject of the political entity which is the 'German Reich') would be imaginable without the Movement.

Hence the following three series:

a) The State apparatus and the Civil Service, consisting of the army and the civil servants. This is still often described (in keeping with a traditional way of speaking) as *the* State, but it is an organization of command, administration, and justice in the narrowest sense only, whereas in its broadest sense, the term 'State' will be always used, as already said, in its traditional meaning of the whole political unity of a people.

b) A Party carrying State and People, and recruited from all the strata of the People, but self-contained and led hierarchically, because it requires a specially strict organization and a firm leadership. A Party in whose political body the Movement finds its specific form. The sociologists have named it 'order', 'elite' or something like that, in order to differentiate it from the political party of the liberal State (which in principle is not tightly organized, but relies on 'free recruitment'). Still, one may keep holding on to the usual name of 'party', because nowadays a misunderstanding is little to be feared. This also corresponds to the wording of the law of 14 July 1933 (*RGBl.* I, p. 479) against the reconstitution of the parties: 'The National Socialist Workers'

Party constitutes the only political Party in Germany.'[29]

c) A sphere of the People, left to *auto-administration*, that comprises the professional *economic and social order*, as well as the *communal auto-administration* (based on the local neighbourhood). Even a corporative State (*stato corporativo*) of the Fascist State [Korporationsstaat des faschistischen Staates], which rejects the principle of an autonomous territorial administration and tolerates only types of technical or 'functional' autonomous administration, a system of trade unions and associations, a 'popular social order' [volkstümliche Sozialordnung] (this phrase has been coined by Werner Sombart) might fill the space of a *non-statal, public and legal auto-administration* and introduce an *autonomy* that might be possible within the general frame of the political leadership, a corporatism or a union of various kinds of association, in the political life of the People.

This new triadic image of the whole political unity is recognizable in the State of the German National-Socialist Movement, as it is in the Fascist State, albeit in a different manner. Generally, it is characteristic of the twentieth-century State. Even in the Bolshevik State of the Soviet Union, a triadic structure had been attempted, of State, Party and Trade-Unions as a total encompassing of the political and social realities. The triadic structure becomes apparent not only wherever one seeks to surmount the liberal-democratic system and proceed to a new State, corresponding to the social and political realities of the twentieth century. It also corresponds to the great traditions of the German theory of the State, initiated by Hegel. Only in the second half of the nineteenth century, however, it was ousted from the consciousness of the German people under the influence of liberal and alien theoreticians and writers. Hence, this triadic outline should appear wholly convincing as a first clean draft of the present-day State structure. In no way is it affected by the objection that it deals only with the idealization of the Italian Fascist situation.

In what relationship the three series and their organizations stand to one another is a constructive and organizational question in itself. Likewise, the mutual relationship between the three corresponding constitutions is in itself a question of the theory of law and State. But the

phrase 'Party that carries State and People' already conveys that *the political leadership* must rest on this series sequel, whence the other two orders come second to it, whose position is in the middle of our outline, and are penetrated, moulded and led by it in an authoritative way. As organization of the 'Movement', the politically leading Party carries both the State 'apparatus' and the social and economic order as also the whole of the political unity. From this surges the central significance of the statal and legal concept of the political leadership, which has already been mentioned several times, and will be enlarged on, further.

Abstractly and generally speaking, the mutual relationship of the three series may be quite different in different political entities at different times. To give an example, it was characteristic of the Hegelian civil-service State of the Prussian-German type, which was a historical reality approximately between 1815 and 1848, under an already relativized monarchy, *after* the pure absolutism and *before* the constitutional recognition of the bourgeois-parliamentary legislative bodies, that a State civil service of high cultural and moral standing, and incorruptible, was already exercising the functions of the stratum in charge of the State. Whereas in other States, the civil service would be conceived only as a bureaucratic tool of the powers in charge of the State. Then, the additional question may be raised, of the relation between the civil attribute and the military attribute of the State, between the administrative power and the power of command within the ranking order of the State. Still, a great many methods have emerged, of mutual influence, leadership or domination. They are applied either publicly and visibly, or internally and invisibly, either in virtue of norms specified in advance, or freely, according to circumstances and expediency, and develop into all kinds of institutions. To pursue this subsequent problem is the task of a concrete 'theory of the State' of the twentieth century. I do not say: of a 'general theory of the State', because as Paul Ritterbusch has recognized, the category 'general' in the theory of the State is a typical concern of the liberal nineteenth century. It emerged from the normativist efforts to dissolve the concrete State and the concrete People into 'generalities' (general education, general law

theory, finally, general theory of knowledge) and in this way, to destroy their political essence.

2. One needs always to remember that the concept of 'State', as well as that of 'People', has been transformed by this triad, and that the traditional way of representation, derived from the historical conditions of the nineteenth century, can no longer grasp the new reality. As statal civil service and officialdom, the State loses the *monopoly of the political* which it acquired in the seventeenth century and in the eighteenth. Instead, it has come to be recognized as just a part of the political unity, and precisely a part that depends on the organization which *carries the State*. Therefore, the essence of the State officialdom and public administration no longer identifies itself alone with the political whole, nor with a self-sufficient 'authority'. *Nowadays the political cannot any longer be determined by the State, rather the State must be determined by the political.* As a result, ever since the nineteenth century the *Constitution* developed for this State and the *legality* deriving from it have moved from the centre of the community to another position of the political life. The more formal and mechanical the legality becomes, the more manifestly it is at variance with the law, however sound the latter is in its contents. It received that secondary significance, relative because instrumental, befitting it. It became *the functioning mode of the State administrative machinery*. This legality identifies as little with the law of the people as does the State machinery with the political unity of the people. To the law, in substantive sense, belongs the priority in securing political unity. Only on the basis of uncontested political decisions, which in this sense are positive, may the law then spread to all the sectors of the public life in a free and autonomous expansion.

The theory of the State and of the law of the last two generations of jurists had felt the opposition between the law and State legality – which fully corresponds to the incongruence between the people's political unity and the State administrative machinery – and had given it expression on the one hand by holding firmly to the position that by 'law' it should be understood every 'juridical norm', and on the other, and at the same time, by formalizing and mechanically rendering jurisprudence into law, and the law

in turn into the decision of the majority of the legislative body, that is to say, the parliament. One does not refer here to the familiar distinction between popular justice and lawyers' justice [Juristenrecht], as much as to the abstract, conceptual exacerbation of the conflict into the 'general' theory of the law and of the State. A doctrine, which is interesting for its internal logic, would take into consideration only the civil servant, that is to say, justice and the administration of justice, and not the 'citizen', as the true and proper addressee of the legal norm. As a result, it could ultimately consider justice in general only as 'the embodiment of the rules of State activity'. In a passage that is quite characteristic of the consequential manner of the liberal-constitutional thinking (and at the same time, of its relationship with the German language), it is said: 'Even the legal obligations of the legal maxims (in the narrow sense of the term), that statute the subjects and set norms of punishment and execution, have as their contents the State administration with respect to the executive activity of punishment and execution carried out and completed by means of the State organs' (Kelsen, *Hauptprobleme der Staatsrechtlehre* [Main Issues of the Theory of State Law], p. 252). In this way, every law becomes 'State law' in a particular sense, and the other way round: every State activity becomes 'law', that is to say, implementation of the norm by that part of the State administrative machine which is bound to norms. This has nothing to do with law or justice in an objectively substantive sense, but is typical of the political system of the liberal depoliticization. Hereby, the liberal normativism simulates a 'dominion of the legal norm', which in reality is only the dominion of a system of legality over the administrative machine, a system in turn ruled by non-statal and politically irresponsible forces. This positivist and 'functionalist' way of thinking, which denies any substance to the law, acknowledges the law only as a calculable link of the restrictive machinery of the State, that is to say, as working mode of the competent authorities and courts. Alongside it, as already said, the so-called material concept of the law would continue to exist in the legal praxis. The law was 'legal norm', and every legal norm, even of customary law, was 'law'. Unlike the mere administrative decree, it was addressed not only to the 'civil

servant' (subject to a special relation of forces), but also to the 'citizen' (subject only to the 'general' power of the State). Thus, formerly, there were in fact two diverse and disconnected representations of law and jurisprudence, two addressees of the norms and two notions of the law, and therefore, two other kinds of law, cancelling one another.

In the triadic organization of the political unity, the notions of 'State' and 'People' assume another position, and a meaning altogether different from that within the binary system of the liberal democracy (described in Chapter III). Here, too, the binary way of thinking works with antithetical divisions such as the State against the people, and people against the State, government against people, and people against government. In the National-Socialist State, the leading political body, carrying State and People, has the task to prevent and overcome all the antitheses of this kind. For that reason, the People is no longer simply a sum total of non-governing voters. The civil servant finds himself no longer in opposition to the citizen calling himself 'free', as in the monarchical, constitutional State, and whose freedom, essentially unconnected with the State, was a liberal polemical legal concept in the fight against the 'unfree' soldier and career[30] civil servant. The Civil Service is no longer compelled, as in the system of party-pluralism between 1919 and 1932, to organize itself as an interest group and to refer to the 'well-earned rights', individually worked out for each civil servant, instead of quoting the idea and the institution of the German Civil Service. The civil servant is now a comrade of the people in a political unity based on ethnic identity, and as Party comrade, a member of the organization carrying State and People, and this organization has filled the decisive executive posts of the State administrative body with political leaders from the Movement, carrier of State and People.[31]

The spheres of popular and professional auto-admininstration are penetrated by the Movement in a corresponding manner. Indeed, so much so, that one comes to recognize here the autonomous structure of a sphere by far more depoliticized and different from the organism of the civil service and the officialdom that was only relatively depoliticized by virtue of its static character. This 'depoliticization', however, has nothing to do with the

earlier political misuse of the allegedly 'apolitical' business of the autonomous administration, but rests entirely on the *political decision* of the political leadership. It is one of the fundamental notions of the politically uptodate German generation that *to determine whether a matter or a field are apolitical is precisely a political decision in a specific way.* Both the 'objectivity' of the civil service, and particularly the 'independence' of the judges, as well as the apolitical character of the traditional sphere of popular auto-administration are possible, with all the advantages and the security of the apolitical, only if both submit to the political leadership and the political decisions of the Movement, carrying State and People. Consequently and in a specific sense, that is the *political* element of the community, the dynamic engine opposite the static element of the administrative machine directed by regulations and the political decisions that lie in it, and also the political guarantor of the depoliticized communal or professional auto-administration.*

3. The new regulation of the relations between the Reich and the provinces [Länder] emerges from the new overall structure. The law of 7 April 1933 on the Reich Governors has secured the precedence of the political leadership of the Reich over the provinces, and submitted the latter to the political leadership of the subleaders subordinate to the Reich leader.[32] In this way, both the traditional concept of the federal monarchical-dynastic State of the nineteenth century and the multi-party federal State, resulting from the inner weakness and corruption of the Weimar system, are outdated. Making use of a brief and synthetical formula of the State law, one may say that *the combination of the federal idea with the State idea* - either in the form of a confederation, or in the form of a federal State - *was for a century the real danger to Germany's political unity.* Actually, every federal organization implies

* The question, to which series of this triadic structure the *churches* belong, is not under consideration. As long as the church does not lay any totalitarian political claim, it may find its place in the third series, that is to say, the sphere of autonomous administration; but if it lays the political claim to totality, that would mean that it claims to assign to the State, the Movement, and the People their position on its own, and to discriminate *on its own* between the friend and the enemy of the People.

a guarantee of the territorial and political *status quo.* This must benefit the very *statal* character of the *individual* member-State as a political unity, and in this way, render the statal unity of the *whole* German people relative, not only in a confederation, but also in a formation built up as a federal State. For this reason, in case of conflict, some skilful advocacy would not find it difficult to contrive 'a law for its own policy' by referring to the 'federal basis' or to the 'essence and concept' of the federal State. The written statements and the summings up of the Leipzig trial of the Braun-Severing-Hirtsiefer Prussian government and of the Held Bavarian government, respectively, and the pronouncement of the Supre Court of 25 October 1932 contained fine examples and evidence of such 'endless stipulation of federalism'.* The true value of the achievement, which the law on the Reich Governors is, becomes evident only against this background of the pre-National-Socialist world of ideas of the multi-party federal State, although given the fast process of development of the German unity nowadays, perhaps it might appear already out of date.[33]

Indeed, after this law, it is no longer possible to designate the provinces as States, unless the concept of State transforms itself essentially once more, as it did once, previously, after 1871. Perhaps one might try to remove the 'political' trait from the concept of State, and thoroughly 'depoliticize' the province-States, as sovereignty, its characteristic feature, was removed after 1871, in order to preserve the provinces as States. Considering the changeability of words and concepts, it would not be unthinkable to designate lands or provinces as 'States', just as the political unity of the 'United States of America' is made of 'States'. The term 'State' would then convey a certain autonomous structure and decentralization within a political unity. But today it is more important to make sure beyond any doubt that the territorial structures inside the Reich submit absolutely and unreservedly to the political leadership of the Reich, and that they cannot claim a right to their own policy under any form, above all under the

* According to the Reich Commissioner for Justice, State Minister Dr. Frank at the Reich Congress of the Party in 1933, in *Juristische Wochenschrift*, 1933, p. 2091.

until now extremely dangerous pretext of the 'apolitical character' of an issue. For our present-day German notions, the idea of a 'depoliticized State' is as impossible as that of a 'demilitarized army'. Indeed, the German provinces enjoy certain powers that belong to the 'authority of the State'. Thus, they do *have* State authority; but under no circumstances are they 'States'. German State is only the German Reich. The Reich is a composite formation of largely autonomous lands or provinces, but it is not a 'federal State'. The noxious concept of the nineteenth century, which conceptually clamps together federation and State and so makes a non-State of the Reich, must disappear from internal German law. Whether the term 'federalism' should be maintained is purely a practical question of terminology. As long as there is the danger that confederation and federal State might be regarded as equivalent, in virtue of the old thinking habits of the nineteenth century, it would be better to avoid this word which is so much misused. Let us not forget what is said in Adolf Hitler's book *My Struggle* about 'federalism as mask'.[34]

The developments started with the law of 7 April 1933 on the Reich Governors have not come to an end. The Leader's statements at this year's Party Congress in Nuremberg are known. The political unity of the German people does not rest upon the German lands or the German tribes, but upon the the self-contained unity of the German People and of the National-Socialist Movement, carrier of State and People. There is no longer any constitutional guarantee of the territory or the existence of today's provinces. Nor can it be by any chance inferred in a roundabout way from the proviso for the institution of the Reichsrat, included in the constitutional law of 24 March 1933.[35]

The present German lands or provinces, as well as those that might be formed, are structures of a particular kind and of a type utterly autonomous. They are neither States nor bodies of communal auto-administration. I would like to limit the notion of communal auto-determination *strictly to the auto-administration of local neighbourhoods* (rural and urban, department, and rural district), because one is dealing with territorial corporations, and in rest, to relate the auto-administration to professional and similar organizations whose place in the overall framework of the

National-Socialist fabric is marked out closer to the series 'People'.

4. An entirely new sequence of questions concerns the legal relations between the *State* and the *Movement*. Despite some isolated similarities between the National-Socialist State and the Italian Fascist State, a great difference has come to the fore regarding the relationship between the Party and the civil service, the Party and the army, the Party and the head of State. Since the law of 14 December 1929, the Fascist Party is indeed 'an organ of the State' (*un organo dello Stato*), but not an unmediated public or State organ. Such a State organ (*organo statale*) is only a certain organ of the Party, namely the Grand Council of Fascism (*il Gran Cosiglio del Fascismo*; see Santi Romano: *Corso di diritto costituzionale*, 4th ed., 1933, p. 127).[36] The National Socialist German Workers' Party, as carrier of the idea of the State, is equally and indissolubly linked to the State. But neither the Party organization as a whole, nor a certain authority as such have the character of an unmediated 'State organ' today, 1 December 1933. It goes without saying that the National-Socialist Party is in no way a 'party' in the sense of the now superseded pluralistic-party system. It is the leading body that carries the State and the People. The law of 14 July 1933 against the reconstitution of parties secures this unique and exclusive preferential position for it against all attempts to revive the previous confessional, class, or other kinds of pluralism. According to the law to secure the unity of Party and State of 1 December 1933 (*RGBl.* I, p. 1016), the Party is a corporation of public law, and in fact, in another and superior way than any of the many corporations of public law, which are under State control. The Leader's Deputy and the Chief of Staff of the SA[37] become members of the Reich Cabinet in order to guarantee the closest cooperation of the services of the Party and the SA with the public bodies. With regard to their special and lofty duties, the members of the Party and the SA are subordinate to a special jurisdiction of the Party and the SA. The link with the State is based mainly on *personal ties*, with which the heads of the different organizational series bind each other not in a capricious, casual manner, but on the real foundation of the general framework of the political unity. These personal ties have

already to some extent acquired an institutional character: the Leader of the National-Socialist Movement is the Chancellor of the German Reich; his paladins and subleaders occupy other offices of political leadership, such as Reich Minister, Minister President of Prussia, Reich Governors, Ministers of Prussia, Bavaria, and so on. In addition to these personal ties, there may be typical means of contact between the State and the Party, certain possibilities to influence, particularly of a personal kind (rights to propose, nominate and recommend for regional or local Party offices). All further ties and delimitations – even the fundamental *compatibility* of Party office with State and auto-administrative posts, or the opposite, that is, their fundamental *incompatibility* – are a question of expediency. But the organizational basic lines are set by the State, Movement, People triad, consistently in agreement with the logic that State, Movement, People *are distinct but not divided, linked but not fused.*

The link between State and Party cannot be grasped by means of notions used until now when talking about State and non-State, party and non-party. All the *interferences by the courts*, based on such alternatives, in State and Party matters (interventions corresponding to the liberal ideal of the incessant legal quarrels that take place to establish the truth) are in conflict with the triadic State structure. It will be necessary to ensure a clear delimitation of the various spheres by means of well-tried practices, such as that of the so-called *conflict inquiry* [*Konfliktserhebung*], and to preserve the courts from the dangers of the political sphere, in the interest of their independence. Because it seems likely that the open and the hidden enemies of the new State will make use of the old political means to represent some issue as 'a purely legal matter' in order to drag the State and the Movement into court, and in that way – through the equalization of the parties inherent in the logic of trial procedure – to put on an act that they are on a par with the State and the Movement. A right to verification, as the courts have assumed in relation to the laws of the Reich (Ruling of the Fifth Civil Senate of the Reich Court of 4 November 1925, *RGZ*,[38] Vol. 111, p. 320f), is out of the question as far as the government laws of the Reich Government are concerned. First of all, because these

legislative powers of the Reich Government have a constitutional character, secondly, this legislation by the Government is at the same time a matter of acts of a government which through the right to legislate has restored the true concept of 'government',[39] and thirdly, such an interference by the courts could be justified only by the dual view of State and non-State (to be dwelt upon in Chapter III), which is incompatible with the new triadic overall structure of the political unity.

Hence, nowadays, it would be dangerous and misleading to keep using the old distinctions between law and politics and to put such alternative questions of statal and non-statal, public or private, judicial or political. We are confronted by a completely new problem of State law. The National-Socialist Party is neither a State in the sense of the old State, nor is it non-statal and private, in the sense of the old juxtaposition of the State sphere and the State-free sphere. Nor can the criteria of responsibility, particularly of the collective responsibility for abuse of office (Article 131 of the Weimar Constitution, §839 of the German Civil Code)[40] be applied to the Party or to the SA. The courts are just as little permitted on any pretext to interfere in the internal problems and decisions of the Party organization, and violate its leader-principle from without. The internal organization and discipline of the Party, carrier of State and People, are its own business. It must develop its own standards on its own strictest responsibility. The Party offices, on which this duty is incumbent, have to make use of a function on which no more and no less than the destiny of the Party depends, and with it also the destiny of the political unity of the German people. No other authority, and least of all a bourgeois judicially moulded procedural court, can take from the Party or the SA this colossal task which also amasses all the risk of the political. Concerning this matter, it is entirely self-reliant.

III

THE BINARY STATE CONSTRUCTION OF LIBERAL DEMOCRACY AND THE GERMAN STATE OF THE CIVIL SERVICE

1. The new triadic State structure of the twentieth century has long superseded the binary statal constitutional schema of the liberal democracy of the nineteenth century. The bourgeois legal State of the 1800's was ruled by that duality right into the specificity of its legislative, administrative and judiciary organizations, and even into the last ramifications of seemingly quite abstract theories and conceptualizations. This is expressed 'ideologically' (a specific and typical term of the liberal nineteenth century) in the well-known and much-cherished antitheses, exchangeable and negotiable, now 'oscillating', now alternative, between law and force, law and State, law and politics, intellect and power, intellect and State, individual and community, State and society, and so on and so forth. Still, the binary division has a very concrete constructive and organizational significance. It has succeeded in creating a 'practical arrangement' of its own, to borrow a pithy expression of the Reich Commissioner for Justice, Dr. Frank (*Juristische Wochenschrift*, 1933, p. 2091), commensurate with its intellect. The subsequent effects both of the liberal 'ideology' and of the binary State structure have until the present day dominated the legal thinking, as well as the manner of speaking of the jurists brought up in the liberal system. The liberals call a 'legal state' only the dually built State. A differently built State 'has no constitution', is not a 'constitutional State', and naturally, is not a 'legal State' either, it is not 'free', but an 'autocracy', a 'dictatorship', a 'despotism', and so on. The vocabulary of this political struggle is quite extensive on this point, but in fact, it is always the same in its political exploitation of a certain concept of 'law' and of 'legal State'. Hence, it is necessary to become aware not only of the ideological contradiction but also of the State structure erected on it,

and of its institutional and conceptual constructs. Otherwise, the liberal outlook first forces the Movement into the State, and then by way of the 'legal State', the State into a 'law' opposed to the State, that is to say, into the liberal system of the nineteenth century.[41]

The duality rests on the contrast between the *State* and the free *individual person*, between statal *power* and individual *freedom*, between *State* and State-free *society*, between *politics* and the apolitical *private sphere*, therefore irresponsible and uncontrolled. This division explains the typically binary constitutional schema of the bourgeois legal State, the constitution of which, as it is known, consists of a basic legal part, namely, basic rights and freedoms of the society composed of free individuals, free in the sense of not statal and not 'constituted', and of an organizational part that establishes norms constitutive of and holding together the State. The part consisting of the liberal basic rights is no constitution in the organizational sense. On the contrary, it designates a non-constituted self-organizing sphere of *freedom*. Against it stands the organizational part of the statal constitution, the constitution of the *State*, that is to say, the commitment, delimitation and restriction of the political power of the State. The so-called 'precedence of the law' over all the other kinds of statal activity aims at the political subjection of the State to the allegedly apolitical society, because in that ranking system, the law is essentially a decision of parliament, but parliament is the representation of the non-statal society against the State. The universally recognized organizational principle of the so-called division of powers into three parts, the legislative, the executive, and the judiciary, had the same political sense, namely, to divide the State power in such a way as to allow the non-statal society to rule and effectively 'control' the State 'executive', that is, the reality of the State command. Everything was set to regulate and control the political power of the State and to shield the freedom of the sphere of society from the 'encroachments' of the State. A judiciary independent of the State was expected to lend legal and procedural safeguards to the protection against the State. In that constitutional system, the judiciary had organizationally an interesting *intermediary position* between the command mechanism of the State and the State-free

social sphere of society. On the one side, it was a State officialdom, and on the other, it was independent of the official directives coming from State superiors. For that reason, it was a suitable tool for politically influencing the State and holding it in the palm of one's hand, in the name of the 'law'.

The basic rights and freedoms of the statal and constitutional system of liberal democracy as such are essentially rights of the private individual person. Solely on those grounds may they be considered 'apolitical'. Therefore, they are neither a State-building principle nor a constitution, but only principles that bear upon the State constitution, and which should lend the State meaning and purpose, its justification and its limits. The liberal statal and constitutional structure thus *reckons with a simple and direct confrontation between the State and the private individual.* Only starting from this confrontation, it is a natural and sensible attempt to erect a whole edifice out of the protective legal means and institutions, in order to protect the helpless and defenceless, poor and isolated individual person from the powerful Leviathan, the 'State'.[42] Most of the legal safeguards of the so-called legal State have sense only with regard to the protection of the poor individual. It justifies thereby that the protection against the State will always be shaped by justice and will result increasingly into the ruling of a court judicially independent of the State.

But all this becomes quite absurd as soon as *strong collective formations or organizations* occupy the non-statal and apolitical sphere of freedom, and those non-statal (but by no means apolitical) 'auto-organizations' will on the one hand compress the individual persons ever tighter and more forcefully, and on the other, challenge the State under various legal titles (such as people, society, free citizenry, productive proletariat, public opinion, a.s.o.). Then the political powers take cover in every conceivable way behind the rampart for safeguarding the individual freedom of apolitical individual persons in need of protection. Non-statal but, as already said, entirely political formations then dominate both the will of the State (by way of legislation) and also (through societal constraint and the force of the 'purely private law') the individual person whom they mediate. These become the true and real vehicles of the

political decisions, and wielders of the statal instruments of power, but they will master it from the non-'public' individual sphere, free of State and constitution, and in this way, evade any political risk and responsibility. In the State constitution of the liberal-democratic legal State, they can legally never appear *what* they are in the political and the social reality, because the liberal binary schema has no place for them. Every attempt to insert them makes the liberal-democratic State and its system burst. Consequently, if such formations succeed in seizing the positions and the means of State power by way of the political parties dominated by them – and that is the typical development –, then they look after *their* interests in the name of the State authority and of the law. They enjoy all the advantages of the State power without relinquishing the advantages of the sphere of freedom, politically irresponsible and uncontrolled, because ostensibly apolitical.

The pluralist system of a multi-party State may exist behind the veil of the liberal-democratic freedom and of the bourgeois legal State as it has been typical of the fourteen years of the Weimar Constitution. A number of political parties of the most varied kinds, trade-unions and powerful economic associations, churches and religious societies, solid and even self-contained organizations of national, confessional or other kinds would come to an agreement in secret on the exercise of the State power and on the repartition of the national income. As it may said of the ideal democracy, that it rests on a 'daily plebiscite',[43] in the same way, it may be said of such a pluralistic system that it is integrated and able to exist only by the 'daily compromise' of heterogeneous powers and alliances, a compromise that is 'always a commitment of the better to the worse', as appropriately once said by a National-Socialist (Karl Fiehler, *Nazionalsozialistische Gemeindepolitik* [The Local Policy of National-Socialism], Munich, 1932, p. 12). In virtue of its internal logic, the constitutional law of such a system must be a purely instrumental, technical weapon which everyone wields against everyone else, the alien and the enemy of the State against the comrade of the people, as well, so that all the participants in this system are compelled to an inevitable abuse of all the legal resources. Groups and resources, that remain in a minority and do not manage to join a majority

coalition or strike a deal by compromising, are obliged out of necessity to defend their goals and principles, however illiberal or antiliberal, against the State by means of liberal-democratic arguments and methods. All the concepts and institutions of such a system cannot but become false and absurd. In 1932, I observed that the power of the governments of the Weimar coalition did not rest on their legality but on the political exploitation of the political advantages of the legal holding of power. All the political factors, majority or minority formations, government as well as opposition, national or international parties, loyal or inimical to the nation, recklessly take advantage of all the legal possibilities and of all the positions of power they occupy in such a statal and constitutional system, because the constitution had become simply a functionalist, neutral means, and the survival of the political unity of the people, a mere waste product of the 'daily compromise'. The binary structure of the ensuing 'legal State', resting on the opposition between the State and the individual, is and remains utterly inadequate and incommensurable to the very reality of a social and political life that is ruled by politically powerful non-statal or suprastatal organizations. It is capable of distinguishing only between legality and illegality but neither between right and wrong nor between friend and enemy.

Two illustrations of the discrepancy between every liberal-democratic constitution and the reality of the social and political life of today may render this situation relevant.

a) Full as it is of internal contradictions, the second main part (that on basic rights) of the Weimar Constitution cancels itself out, and the first, organizational part, as well. The Weimar Constitution had been worked out dually, in accordance with the liberal-democratic schema. But under the title 'Fundamental Rights and Obligations of the Germans', the second part includes the liberal freedoms of the individual person only in the smallest degree. Besides, this part of the Constitution likes to render justice to the reality of today's social life. As a result, numerous other dispositions of this 'basic rights part' guarantee and firmly fix things that are in contradiction with a liberal-democratic constitutional construction, such as public-law institutions

and claims of churches and religious societies (Article 137f),[44] the public-law institution of the career civil service (Article 129),[45] and likewise, the public-law institution of communal auto-administration (Article 127).[46] Moreover, workers' unions and employers' associations are also acknowledged in this part of the Constitution (Article 165),[47] although they have so far preferred technically to remain private-law organizations or even not legally-qualifying formations. That such strong collective forces have come to be 'acknowledged' in a State constitution, and in spite of all that, still want and juridically can remain private-law associations is symptomatic of the confusion in the essentials of such a State. But, nonetheless, the remaining public-law institutions, featured in the so-called part of basic rights - churches, corporations and the career civil service - would not be able in any way in such a system to stop making the widest use of the various political parties, on the one hand, and on the other and at the same time, of the other private-law supports and relief organizations. Not only political parties but also a powerful private-law confederation of countless religious and cultural associations and clubs, some integrated, some permitted, and some at least tolerated, linked up with and leaned upon the churches. Corporate bodies and local associations knew how to manage economically, with the help of all kinds of legal persons endowed with civil and commercial rights, and evade State control. Big private-law unions of civil servants came into being alongside of the public-law institution of the civil service. Ultimately, that pluralistic State consisted only of cross-sections and an aggregation and amalgamation, that was based on principle, of public and private interests and functions. In such a system, one may simultaneously be a Reichstag deputy, a Reichsrat delegate, a State official, a church dignitary, a party leader, and a member of the supervisory board of various societies, and many other things. Indeed, this remarkable system functions on the whole only by means of such transversal connections. In that way, everything was reconciled with everything else and Germany was 'the realm of unlimited compatibilities'. Behind the duality of the liberal-democratic constitutional schema, an anarchical pluralism of social forces would grow rankly, into a chaotic jumble of the statal

and non-statal, the public and the private, the political and the fictitiously apolitical.

b) Another graphic illustration of the inadequacy of the binary constitutional schema is offered by the story of the plan for an *economic constitution* which was also firmly 'anchored', so to speak, in Article 165, at the end of the basic-rights part of the Weimar Constitution.[48] In a liberal-democratic binary system, an economic constitution is an impossibility. Either it is achieved indeed, and in that case, it unhinges the whole binary system, or it is a practically insignificant, additional construct, with devices similar to those of the provisional Economic Council of the Reich, introduced by the decree of 4 May 1920, and which has remained without any significant practical result. It was not so much the deliberate ill will of all the interested parties of the pluralistic system, as much as the consequence of the internal logic of the Weimar liberal-democratic State, that the repeated attempts to introduce a real and definite economic council of the Reich would fail dismally. A social or economic constitution is possible only in a triadically assembled State.[49]

2. Not only are we today aware of the internal contradictions of such a pluralistic system that occurs behind the legality of the liberal-democratic constitutional system, but we experience already beyond it that our triadic State structure, when compared to the liberal-democratic duality (of State and society, or State and the apolitical sphere of freedom), is the self-evident premise of political honesty and decency. Moreover, the duality seems to us a disguise and concealment of forces and powers, non-statal but certainly not apolitical, rather suprastatal, also often inimical to the State, forces which under the protection of 'liberal freedom' can play their role of a politically decisive magnitude, in secret, anonimously, invisibly and irresponsibly.

Today, we recognize those magnitudes and organizations, genuine carriers of the State, through all the disguise of freedom and equality, even in the earlier political formations and institutions. Because the past receives its light from the present and every knowing mind is a contemporary mind. Thus, we see now that many a time and in certain States, the church, for instance, with its clergy or a

governing order, would assume the role of State-carrying organization. In other cases, this function might be exercised by a secret order like the freemasonry. In maritime and mercantile States, the economy or a certain professional organization with its own jurisdiction would more often take charge of the public order of the political unity. Many cross-connections are conceivable. But given the present-day condition of our political awareness, we will always come back to that triadic structure and to the question of the State-carrying organization, while we take the liberal-democratic constitutional schema of State and the individual, organizational norms and freedoms for a façade only. Thus, both the action and the task of Germany's National-Socialist Movement appear ever greater and awe-inspiring. It openly stands by its historical responsibility, and with all publicity, takes on the gigantic performance of an organization that carries the State and the People.

As concerns the evolution of the German theory of the State particularly, it is clear that the historical peculiarities of the German civil service and of the army, as also of the organization of the National-Socialist Party, and likewise, of the social and economic spheres are especially great and incomparable in Germany. Similarly, and as already mentioned, the German theory of the State until the middle of the nineteenth century, that is, to the victory of the liberal mode of thinking and of an unscientific positivism had had no knowledge of the binary schema of the contrast between State and society. According to Hegel (*The Philosophy of Right* §250f), for instance, the 'corporations' constitute the transition from the bourgeois society to the State.[50] For him, the State is not a bureaucratic machine, on the one side, and a free bourgeois society, on the other, at all. Likewise, in 1865, in his administrative theory (I, p. 266),[51] Lorenz von Stein emphasized alongside of the government administration, as the office of authority, the auto-administration of districts, communities and corporations, and the associations assigned by him to the sphere of the public law, as integral part of public life. Afterwards, certainly, these insights into the structure of the State were lost in the so-called 'theory of society', and since about 1890, only the blindness and the unconnectedness of the so-called positivism prevailed. A professor of State law, an

alien to the German nation, could dismiss the work of a Lorenz von Stein as 'muddling cleverness'. But behind the façade of the binary liberal constitutional State, of which the positivist theory of public law is part, the German State remained a State of soldiers and civil servants, thus an administrative State, even in the liberal nineteenth century. On this historical fact rests the ultimate and true meaning of the familiar words uttered by Otto Mayer: 'The constitutional law wears out, whereas the administrative law abides.' These words express the superiority of the monarchical officialdom, representing the executive power, over the liberal constitutional system more to the point than their author himself had perhaps wanted to believe.

Above all, it was decisive that the German army and civil service in most of the German States, and particularly in Prussia, the leading German State, had alone for a century carried out the *function of the State-carrying stratum*. The State power machine and the State-carrying organization were concurrent. The German officialdom has never become a mere bureaucratic 'machine' in the sense current in the Western liberal democracies. About this officialdom Otto Mayer rightly remarks that it was 'truly and above all, a cultured career civil service that filled all the authoritative positions, and was no tool but a free-standing power inside the State'. That is the historical reality which had found a theoretical and philosophical system in Hegel's philosophy of the State, in his theory of the State as realm of objective reason. Under the pretext of positivism, the German theory of public law, though, had indeed abstained just as soon from any scientific attempt to penetrate and explain this situation. Only in the teachings of the German historians and of the economists of the past generation, such as, for instance, Adolf Wagner[52] and Gustav Schmoller, was the great German concept of the State preserved while the jurists betrayed it. Even if 'historically' relativized, there remains the living consciousness that the State of the cultivated, uncorrupted German civil service stands 'above the bourgeois society'. It was in that way that a socially and culturally political State of the civil service became possible. But that was not enough to sustain intellectually a State that was threatened from the inside as well as from the outside. Within half a century, with its

almost exclusively legal training, our German civil service has withered intellectually and politically in a supposed 'positivism'. Hence, it has become incapable of carrying out the decisive tasks of a politically *leading* stratum.

As long as the German State of soldiers and civil servants was a reality, and as a consequence, the State could be regarded as a sphere of 'objective morality and reason' that stood over society, it was possible to have a socially and culturally political State of civil servants, which at any rate, was not a simple tool in the hands of foreign 'societal' forces, whether open or secretive, visible or invisible. The reality of such a State of soldiers and civil servants, however, would continuously hit out at the prevailing system of norms and all the principles of the liberal-democratic constitution, well, at the whole 'constitutionalism' of the nineteenth century. The extraordinary political success scored by Bismarck between 1866 and and 1871[53] might blind one to the fact that from 1848 on, the German State of civil servants had been intellectually on the defensive. The German doctrine of State and law was neither the mixture of rhetoric and sophistry with which the Prussian conservatives were supplied by Friedrich Julius Stahl - his real name is Joll Jolson -, nor the cynical positivism of a Laband. Notwithstanding all the obvious contradictions, they would all ultimately become the forerunners of the advancing political forces and powers of liberal democracy in the name of the 'legal State' and of Marxism, following directly in its steps.

Indeed, not even the liberal-democratic Weimar Constitution and the fourteen years' rule of a pluralistic party system could completely destroy the great tradition of the German State of civil servants. Likewise, it had become apparent already before the World War that the German civil service, spread over more than twenty individual States, was no longer in the position to fulfil alone both the offices of an objective and neutral administrative machinery and those of a politically ruling stratum in charge of the State. It was natural that the civil service would always seek its true worth rather in the matter-of-fact professional reliability and calculability of an exemplary administrative and judiciary activity than in the responsibility of political decisions. Because of its objectivity, neutrality and

positivism, it was no longer by itself capable of recognizing the State enemy, or what was more, of defeating him, with clear political determination. It became ensnared in a positivistic legal constraint which in the end was reduced to the legality of a positivistic legislative State, and the foundation of which, the law, had too little to do with 'justice' in the practical and substantive sense. Then, that law was indeed only the compromise reached by a heterogeneous coalition. Thus the claim of the parliamentary parties to political leadership met no serious resistance. During the World War, a group of politicians from the parliamentary parties could infiltrate the German State without any credentials of political achievement, accepted only because of the need to fill the void of political leadership somehow. Between 1919 and 1932, after the collapse of the monarchical State of civil servants and in the multi-party State of the Weimar Constitution, the German civil service found its justification only in a negotiated settlement and a kind of neutral position of referee between the organized party interests. It stood no longer *above* society but rather *between* the layers of society. In that way, however, it got caught in the game of the pluralistic system. In order to survive in the long run, it had to become playmate and political accomplice in the traffic of mutual concessions, and as a result, had to renounce its essence, and expand the pluralistic system by another magnitude. Finally, the best-intended 'neutral accommodation', even if morally superior to a system of internally corrupted parties, could be only a poor and insufficient substitute for the missing political leadership. Neither the neutral civil service nor the pluralistic party system and its parliamentary operation have accomplished their statal tasks, and produced a political leadership from their ranks. In this, they have failed utterly.

Not until the experiences of 1932, would this realization also profit the great majority of the German people. The Prussian coup of 20 July 1932 has removed the government of the Weimar system from Prussia and taken from its hands the Prussian State, a strong power complex and command mechanism.[54] But neither of the ostensibly 'authoritarian' governments of von Papen (between July 1932 and November 1932) and of Schleicher (between November 1932 and January 1933), leaning only on the

Military [Reichswehr] and on the machinery of the Prussian State power, could fill the political vacuum, created by the absence of a political leadership. In his work, published in 1932 and entitled *Der Verfassungskompromiß von Weimar, das Experiment der Präsidialregierung und die nationalsozialistische Staatsidee* [The Constitutional Compromise of Weimar: the Experiment of the Presidential Government and the National-Socialist Idea of State], Paul Ritterbusch has shown the desperation at that stage in the evolution of pluralism, from the standpoint of the theory of State and law. The Supreme Court's decision of 25 October 1932 admittedly did not restore the Weimar system, nor could it give the Reich government what it needed and what it did not dare to seize.[55] That decision also refused to recognize the enemy of the State for enemy of the State and help to render him harmless. Not until 30 January 1933, when the Reich President appointed the leader of the National-Socialist Movement, Adolf Hitler, Chancellor of the Reich, did the German Reich recover a political leadership, and the German State found the strength to crush Marxism, its enemy.

On this 30 January, the Hegelian State of civil servants of the nineteenth century, characterized by the identity of the civil service and the stratum in charge of the State, was replaced by another State construction. Therefore, on that day, one could say: 'Hegel died'. But that does not mean that the great work of the philosopher of the German State has become meaningless, and that the idea of a political leadership standing above the selfishness of societal interests has been abandoned. That which in Hegel's massive mental constructs is timelessly great and German, remains effective in the new form. Only the forms of the Hegelian State of civil servants, that corresponded to the internal situation of the State in the nineteenth century, are eliminated, and are replaced by other formations corresponding to our reality of today.

Today, the German Reich, the political unity of the German people, may be grasped only with the help of the triad of State, Movement and People. The enormous political task of the National-Socialist Party can be recognized only in this way. The German career civil servant is freed from a hybrid position grown obscure and unsustainable, and is spared the risk of being debased, in the liberal-democratic

way, to the level of a blind tool of non-statal, societal powers, that is to say, politically irresponsible, invisible. On the other hand, the task of the Movement does not exhaust itself in supplying new blood to the stiffened body of a State of civil servants, and then just resign when it fades into the 'State'. The three great 'flywheels', as the Minister President of Prussia Göring once called them, must discriminate but not divide, unite but not fuse, run one next to the other, each according to its inner law, and all in unison with the political whole.[56]

IV

LEADERSHIP AND ETHNIC IDENTITY AS BASIC CONCEPTS OF THE NATIONAL-SOCIALIST LAW

1. National-Socialism does not think abstractly and stereotypically. It is an enemy of every normativist and functionalist concoction. It secures and cultivates every true national substance wherever it encounters it: in country, kin or kith.[57] It has established the law on inherited peasant estates [Erbhofrecht]; it has saved the peasantry;[58] it has cleansed the German civil service of alien elements, thus restoring its station.[59] It has the courage to handle differences differently and to carry through necessary differentiations. So wherever it makes sense it will acknowledge the jurisdiction of a drumhead court martial, as it has reintroduced it for the army, through the law of 12 May 1933 (*RGBl.* I, p. 264), on the basis of the regulations of the old army criminal court.[60] Likewise, with regard to certain organizations of the Party, such as SA and SS, a special kind of discipline in the ranks may be conceivable through the jurisdiction of improved courts martial![61] The scope of the authority of the summary court martial will expand on its own, with the formation of genuine ranks. In a different way, but with the same sense of its own concrete growth, National-Socialism may administer justice in the sphere of communal auto-administration, with objective

differentiations between village, country-town, industrial town, big city and metropolis, without being embarrassed by the false notions of equality of a liberal-democratic schema.

a) The acceptance of the manysidedness of spontaneous life might lead again without delay to an unfortunate pluralistic splitting of the German people into denominations, tribes, classes, estates and interest groups, unless a *strong State* uplifts and guarantees the whole of the political unity over the multitude of forms. Every political unity needs a coherent internal logic of its institutions and normative systems. It needs a unitary idea of form to give a general shape to all the spheres of public life. In this sense also, there is no normal State which is not total at the same time. However numerous the viewpoints of the regulations and the institutions of the various spheres of life, a consistent main principle must be recognized firmly as much. Every uncertainty and every split become a crevice for the insertion of formations first neutral, then inimical to the State, and an unravelling spot of the pluralistic splintering and disintegration. A strong State is the premise of a sound life, characteristic of its different ranks. The strength of the National-Socialist State resides in the fact that it is dominated and imbued from top to bottom and in every atom of its being by the idea of leadership. This principle, by means of which the Movement has grown great, must be applied both to the State administration and to the various spheres of auto-administration, naturally taking into account the modifications required by the specificity of the matter. It would not be permissible, though, to exclude from the idea of leadership any important sphere of public life.[62]

The nineteenth-century German State of the soldiers and the civil servants, so strong externally, committed the serious political error of allowing another organizational principle to arise in the communal auto-administration, a principle different from that of the State 'executive' (that is, of the State itself, as it was then called). The local representation, resulting from elections, would not necessarily be by itself the basis for a split within the State, given the essential dissimilarity between local community and the State. But the elected local representation was perceived as the true carrier and representative of the local community,

precisely because it was elected, and as a result, a formal principle that contravened the monarchical State was acknowledged for the community. Thus the local autonomy became a spot by which the liberal-democratic parliamentary principle broke into the monarchical-authoritarian State of the civil servants. As early as 1810, Baron vom Stein came to realize that he 'had not paid sufficient attention to the difference between constitution and administration'. Under the typical pretext that it concerned itself with the affairs of the 'apolitical' auto-administration, the liberal bourgeoisie would create a sphere of public law for itself, that would elude the State, and so be 'free of the State', and in which other political ideals would count, as well as other formal and informal principles than those of the State. Afterwards, under the cover of the German law, such notions as the 'idea of association', 'freedom of auto-administration', 'private business', a legal doctrine, aware of its aim and purpose, eliminated the leader-principle from the essence of the Prussian State. The theory of the equality of all human associations, particularly with regard to the community and the State, quite efficiently backed the conquest of the Prussian State by means of an organizational principle radically foreign to it.

It is true that the German State of soldiers and the civil servants offered a tenacious resistance to the apparently irresistible progress of liberal ideas. It worked out an exemplary organizational interpenetration of State administration and local auto-administration, of which the Prussian *Landrat*[63] is the most famous illustration. Still, the three-class electoral law, which was in force with regard to local elections,[64] hindered the ultimate effects of a sound liberal democracy. Nevertheless, one should not mistakenly think that the State was not intellectually on a par with its advancing adversary, now national-liberal, now liberal-conservative, now advocating the idea of association, now communal liberal. Here, too, though, as shown above (Chapter III, 2), it kept fighting on the defensive. In the long run, it was defeated as a result. It is not necessary to go to great lengths to show that matters must stand differently in today's State and administrative law. In a total State, a local parliament cannot organize political demonstrations of protest, as was the case, for instance,

with the 1898 descriptive resolution of the Berlin Municipal Council, which claimed to be entirely 'apolitical', a 'purely auto-administrative matter', a 'simple act of piety', to lay a wreath on the tomb of the revolutionaries of March 1848 (Decision of the Chief Administration Court [*OVG*] of 9 July 1898), or the quarrel over flags between the State and the town at Potsdam,* which was decided in favour of the town by the judgment of the Supreme Court of the German Reich on 9 July 1928 (Lammers-Simons, I, p. 276).

b) The organizational application of the doctrine of leadership requires in a negative way at first that all the methods reflecting the liberal-democratic mentality in their essence must be discontinued. The *election* from below, with all the residues of the customary electioneering, comes to an end. (As shown above, the new elections of 12 November 1933 for the Reichstag can be understood only as a component of a popular consultation).[65] Nor even the old *voting procedures*, with the help of which a majority, formed through a coalition after a sort, turns a minority into a majority and makes of the division a weapon to outvote and vote down the others,[65] cannot continue or repeat itself in a one-party State. Finally, the typically liberal divisions and dualisms between the *legislative* and the *executive*, and at the local organizational level, between the *deliberative* organs and the *administrative* or managerial organs have lost their meaning. The legislative competence of the Reich Government is a first, path-breaking instance of the removal of those artificial divisions. Everywhere, the system of *repartition and discharging of responsibilities* must be replaced by the clear *responsibility of the leader* who has acknowledged the mandate, and the election must be replaced by selection.

The new idea of leader is of a particular and decisive importance for the National-Socialist State, and has as its natural complement, the institution of a *Council of the*

* Likewise, in the Hapsburg monarchy, the State-disruptive forces, particularly the nationalities fighting the statal entity, used the local auto-administration as a gateway of incursion. Thus, it happened that the mayor of a provincial capital forbade the army to march along certain streets in the city. See *Verw. Archiv* [Administrative Archives], xix (1911), p. 448, for a passage which also contains a fine illustration of the meaning and essence of the 'legal state'.

Leader [Führerrat]. It stands by the side of the Leader, with advice, suggestions and opinions; it assists and supports him; it keeps him in live contact with his following and with the people, but cannot relieve the Leader of any responsibility. It is neither an organization of intimidation, control and transfer of responsibilities, nor must it represent an internal dualism (that is, popular representation against the government, local representation against local governing body), and even less a pluralism. Whence, the council of the Leader cannot be *elected* from the outside or from below, but must be *selected* by the Leader, according to distinct principles of selection that first of all take into account the link with the Party organization carrying State and People. In this way, it also becomes possible to give far-reaching consideration to the particular conditions and needs, local and regional, as well as practical, and of the various estates. Leader and council of the Leader are kinds of formation just as simple as they are resilient in their concrete application to the most diverse fields of life. They have found their initial, clear and exemplary form in the Council of the Prussian State, the great constructive work of the Prussian Minister President Göring. In the Prussian law on the provincial council of 17 June 1933 (*Großer Senat* [Full Senate], p. 254), the idea is already transferred from the sphere of government to that of the administration. Today, it must win general acceptance and be universally recognized as a principle.[87]

2. In view of the fundamental significance of the idea of leader, it becomes all the more necessary to draw a clear, and also a theoretical, differentiation concerning the *concept of leadership*, the core concept of the National-Socialist State law, and to safeguard it in its peculiarity. In order to grasp the full meaning of the concept, and avoid the danger of falsifications and confusions, it is essential first of all to distinguish it clearly from other concepts, seemingly related. Because such concepts, which are quite necessary and indispensable in their spheres, but are also already impregnated by another spirit, have been employed deliberately in order to make them absorb the idea of leader, and in this way, to immobilize its real force. It is generally known that it is characteristic of the single-minded liberal democracy to see its ideal in the political

'absence of leaders'. But it has not yet reached the scientific consciousness of most of the German jurists that for almost a century, a system of specific conceptual constructs had been at work to eliminate the idea of leader and that the lever of such concepts will be placed at the ready above all there where they should have a politically destructive and virtually shattering effect.

The legal State thinking, dominated by the basic principle of security, calculability and measurability, transformed all the notions, concepts and institutions, under the pretext of working out legal concepts within normatively predetermined abstractions. It would be said, for instance, that every obligation, if it were to be a *legal duty* and juridically relevant, must always have a content that is normatively measurable, and as a result, subject to verification by a judge. In this simple way, another kind of duties, inaccesible to the individualistic liberal legal thinking, is expelled from legal life, and the monopoly of the legal scientificity is gained by quite a distinct political ideology (which is neither particularly juridical nor particularly scientific). Through this interpretation, the *allegiance* of the followers, for instance, of the civil service, of the comrades of the people, vital to the law of the leader-State, and which is a legal duty in the full sense of the word, has been reduced to a 'simply moral' or 'simply political' matter, and deprived of its legal kernel. At the Leipzig trial of the dismissed Prussian Cabinet of the Weimar system versus the German Reich, that order of ideas celebrated its triumph.[88] The allegiance of the provinces to the Reich, which needless to say, is a legal obligation with a political content, was destroyed in its essence with the help of such a liberal separation of law from politics, and ironically treated by a particularly typical representative of the Weimar system as something 'sentimental'. In that interpretation, to place the National-Socialists and the Communists politically on a par meant 'law'. To distinguish the communist organization, a dangerous and deadly enemy of the German State, from a German national movement meant but a violation of 'the equality before the law', and a 'political' judgment contrary to a 'legal' or 'juridical' assessment. The anti-statal kernel of the liberal antithesis between law and politics became obvious there. Indeed, in its pronouncement of 25 October

1932, the Supreme Court of the German Reich sought to remain strictly 'legal and neutral' even in this respect and to evade a ruling. This is made clear in the following extract, which is word for word, sentence for sentence, characteristic of the motives of decision in the famous pronouncement:

> 'The possibility of interpreting such attacks as infringement of duty on the part of the Province cannot for that matter be excluded even when the minister did not act in his official capacity but as a private citizen or party member. But the examination of Minister Severing's statements, even when it was carried out in the light of the then entire situation, established that the border of the required reticence was not transgressed in a manner by which a violation of duty by the Province against the Reich may be detected therein.'

Another example is the concept of *supervision* [Aufsicht], which in the half a century of liberalistic praxis, developed into a notion antithetical to the concept of political leadership. It is self-understood that even nowadays there are still a great many ways in which the word 'supervision' is used (office supervision of the civil servants, school supervision, ecclesiastic supervision, a.s.o.), and as such, its sphere of validity remains unchallenged. Likewise, in every kind of leadership, one may still discover some 'supervision'. Notwithstanding, it is necessary to draw clear distinctions between the particular spheres of validity of supervision, and to resist the confusion which centres the concept of true leadership on the concept of supervision.

Bismarck's federal constitution of 18 April 1871 was the constitution of a hegemonic federation; Prussia had the hegemony, that is to say, the political leadership. That was uncontested and uncontestable. But it was not explicitly written in the text of the constitution, and since the concept of political leadership eluded the mode of thinking of liberal positivism, this decisive concept of the law of the German federal State was indeed of little interest to the theory of the State law. One would lay oneself open to the accusation of being 'political' and 'unscientific', were one to render justice to the truth and the reality of the structure of a

federal State wholly and absolutely erected on a hegemonic foundation. So the central concept of that constitution of the Reich was left out. On the other hand, the concept of *Reich supervision* found an all the more extensive treatment and development. And it is a logical consequence of this kind of theorizing that the last systematic work on the constitutional law of Bismarck's constitution, the book by H. Triepel, *Die Reichsaufsicht* [The Supervision of the Reich] (1917) dealt with it under the aspect of Reich supervision. That a German scholar such as H. Triepel, who had often proven his own sense of the political reality against the normativist distortions of the State law, came to lay particular stress on this aspect, points to the power of suggestion of the habits of the liberal constitutional thinking and to the internal logic of such ways of thinking that shifted from leadership to supervision, and for which even the execution of federal orders by force was only a case of 'Reich supervision'.

With the advent of the Weimar Constitution, the trend in favour of the concept of supervision would develop further and perfect itself. The Weimar Constitution is a particularly typical document of the bourgeois legal State, and its ideological groundwork encloses the liberal divisions of law and politics, law and force, intellect and force, a.s.o., but above all, it has removed the Prussian hegemony altogether, and thereby has completely eliminated that last leading element from what was maintained of the federal constitutional organization. By the fact that this Constitution also replaced the former Federal Council [Bundesrat] by a Supreme Court, which it allowed to settle federal constitutional disputes, as well as those between the Reich and the Provinces by judicial procedure (Article 19),[69] it made available to all the interested Reich-disruptive forces – the political party pluralism as much as the one-State particularism – a new political weapon for the elimination of the idea of political leadership, namely the lawsuit in the Supreme Court. Among the authors of the Weimar Constitution, there were still some restraints against those methods. With the increasing difficulties of the internal political situation, the needs for political leadership made themselves felt even more sharply in the practical life of the State. But the prevailing normativism of the then

constitutional science and the absence of any true theory of the State zealously contributed to the juridical transformation of internal politics. That condition too culminated in a concept of supervision. As its last word, the old theory of supervision coined the phrase *constitutional supervision* (in the article by Johannes Heckel on the decision of the Supreme Court of 25 October 1932, *Archiv des öffentliches Rechts* [Archive of Public Law], Vol. 23, p. 211). After the concept of 'Reich supervision' in the federal State law of Bismarck's constitution had been made into a suitable means for the normativist relativization of the political leadership, the completely normativized concept of 'constitutional supervision' became a reality at the end of the Weimar system. In the phrase 'Reich supervision' one still at least could recognize the Reich as the subject of the supervision. Other conceptual constructs, such as school supervision, local supervision, at least include the object of supervision. On the contrary, in the phrase 'constitutional supervision' neither a subject nor an object come to light, but only the criterion of supervision: the constitution. And this concept, otherwise well intended, had to serve as the theoretical basis of the deciding political authority of every federal system, *ultima ratio*[70] of the political unity of a federal Reich, that is to say, the execution of federal orders by force! In this way, the destruction of the political leadership reached the highest degree.

Three factors characterize the elaboration and the development of the concept of supervision in the legal State into a true counterconcept, in opposition to the principle of political leadership. The first, its *normative bias*. That is to say, the concept of supervision is linked to the introduction of a criterion for this supervision, regulated in advance, in keeping with the facts of the case, hence measurable and verifiable. All the relations between the supervising and the supervised were submitted to this predetermined regulation that ignored every concrete situation. Likewise, the vague notions of such a system of supervision, and even the concept of discretionary judgment, are ruled by this trend. They too have to find the limits, and in actuality a judicially verified limit, in the 'excess of judgment' and in the 'misuse of judgment'. Even the 'prohibition of arbitrariness', which will be interpreted into all these concepts of supervision,

has the political purport to impose the fiction of the calculable measurability on the basis of previous standardization and the regularization of all mutual relations of supervision.

The second characteristic feature in the formation of a concept of supervision antagonistic to the leadership is the tendency to *place on an equal footing the subject and the object of supervision.* It ensues easily, with logical consistency, from the just-mentioned normativism of the theory of supervision. Because as soon as the criterion of supervision, supposedly calculable and verifiable, is established, one may assume from the fiction, that it was already decided and stipulated in advance, what the 'intervention' (this word, so loaded with political polemic, is characteristic of an allegedly purely 'judicial' thinking), guided by supervision, can permit itself, and what the supervised must allow himself to expect. Hence the subject of supervision may any time refer to the norm as the sole authoritative criterion against the supervision. In that case, it becomes apparent that in reality he must above all be subjected not to the supervising instance or to a political leader, but only to an allegedly objective normative content verifiable by an onlooking third party. It becomes further apparent that even the supervisor is subject to the same norm, and consequently, it can be no question at all of leadership and submission, but on both sides, only of an 'objective' interpretation of the norm and of the 'impartial' delimitation of jurisdiction. Consequently, the terms 'supervising guidance' are wrong, as well, and must be replaced by 'the objective validity of norms' and 'the application of norms'.

The third peculiarity of this concept of supervision, opposed to that of leadership ensues with the same logic from the two preceding characteristics. If it is a measurable norm and both parties to the relation of supervision are on the same footing in their submission to the norm, it is unavoidable that only an equally 'objective' onlooking third party, that is, an independent judicial instance, should sit in judgment over both parties as the organ of the objective norm. Such a concept of supervision inevitably requires a *judicial instance and the settlement by trial of all differences between the object of supervision and the supervisor.*

Ultimately, from all these superimposed and extremely varied aspects of the concept of supervision, there appears a judicial instance which has the last word through more or less judicial proceedings. The ideas of protection and security, essentially necessary to the liberal concept of the legal State, when taken to their logical conclusion, transform the administrative tribunals for the adjudication of disputes related to the law of communal supervision into authorities for the supervision of the State supervision. The administrative criminal courts of the civil service law, which should be strict drumhead courts martial, are transformed into mere protective mechanisms of the law of administrative supervision. The Supreme or the Constitutional Courts have been transformed into an organ for the political supervision of the government confined to constitutional supervision. The result is always *administration of the law instead of political leadership*. A trial judge is not a political leader and the methods of today's legal controversy are no model for the creation of a leader-State. In a crucial political case, normalization and decision by trial mean only a commitment of the leader to the benefit of the disobedient. The equalization of the parties only means the equalization of the enemy of the State and People with the comrades of the State and People. A decision reached by an independent judge means only the submission of leader and follower to a politically irresponsible non-leader.

3. *To lead is not to command, to dictate, to govern bureaucratically from the centre, or any other kind of rule you like.* There are many forms of dominion and order, even of fair and reasonable dominion and order that are no leadership [Führung]. The domination of India or Egypt by the English may be justified on many grounds, but it is something altogether different from a leadership of the Indians or of the Egyptians by the English. The exploitation of the former German colonies by the so-called mandatary powers, in conformity with Article 22 of the Covenant of the League of Nations, passes off in humanitarian garb as 'guardianship' and 'education', but is not leadership, either. Nor are most cases of *dictatorship*, perhaps necessary and salutary, expressions of leadership in our sense. However, we must be wary of obscuring and weakening a concept, specifically German and National-Socialist by assimilation

with foreign categories.

There are various images and similes that should make apparent the relationship between dominator and dominated, governing and governed, and it seems to me even more correct from the viewpoint of the legal science to become aware of the factual meaning of these various designations rather than to speak with the help of certain conceptual clichés about a 'special' power relation which unqestionably finds its limits both in the predetermined norm and in 'private life'. The Roman-Catholic Church has given to its power of domination over its faithful the image of a shepherd and his flock, which it cast into an idea of its theological dogma. Essential in this image is that the shepherd remains absolutely *transcendent* to the flock. That is not our concept of 'leadership'. A famous passage in Plato's *Statesman* draws various comparisons worth considering to describe the statesman. Turn by turn, he is compared with a physician, a shepherd and a steersman, ultimately to retain the image of the steersman.[71] As 'gubernator,'[72] it has entered all the languages influenced by Latin, those of the Romance and Anglo-Saxon peoples, and has become the word for 'government' [Regierung], such as *gouvernement, governo, government*, or as the 'gubernium' of the former Hapsburg monarchy. The story of this 'gubernator' contains a good illustration of the way a graphic comparison may become a technical legal concept. Another characteristic image is that of horse and horseman, which the great French historian Hippolyte Taine used for Napoleon's rule over the French people.[73] It justified the imperatorial stature of that Italian soldier who seized the State of the French nation, in a splendid manner, because it gives the more profound explanation of the internal pressure under which that rule stood: to normalize itself hastily inside and outside through the ever renewed military successes, and at the same time, through recurrent legitimations (plebiscites, Papal crowning, marriage to a Hapsburg princess) and institutionalizations (a new nobility).[74]

In essence, none of these images comes upon what should be understood by political leadership in the essentially German sense of the word. This concept of leadership comes wholly from the concrete, substantive thinking of the National-Socialist Movement. It is

symptomatic that every image fails entirely and every fortuitous image is more of a picture or simile than the very leadership in question. Our concept is neither necessarily nor appropriately an intermediary image or a representative simile. Neither does it come from baroque allegories and representations nor from a Cartesian *idée générale*.[75] It is a concept of the immediately present and of a real *presence*. For that reason and as a positive requirement, it also implies an *absolute ethnic identity between leader and following*. Both the continuous and infallible contact between leader and following, and their mutual loyalty, are based upon ethnic identity. Only ethnic identity can prevent the power of the leader from becoming tyrannical and arbitrary. It alone justifies the difference from any rule of an alien-transmitted will, however intelligent and advantageous it might be.

4. The *ethnic identity* of the German people, united in itself, is thus the most unavoidable [unumgänglichste] premise and foundation of the political leadership of the German People. That was no mere abstract postulate when at the Congress of the National-Socialist German Jurists at Leipzig in 1933, the idea of race was time and again highlighted in the Leader's forceful closing speech, in the riveting addresses of the Leader of the German Legal Front, Dr. Hans Frank, and in the distinguished specialized reports, as for instance, that of H. Nicolai. Without the principle of ethnic identity, the German National-Socialist State cannot exist, and its legal life would be unimaginable. Again, with all its institutions, it would be immediately handed over to its liberal or Marxist enemies, now haughtily critical, now obsequiously assimilationist.

The legal scientists of the new German jurisprudence need in particular to become aware of the *systematic* force of this concept of ethnic identity that pervades all the judicial deliberations. The fiction of the normativist commitment of the judge to a law has nowadays become theoretically and practically unsustainable in many essential spheres of the life of legal practice. On the whole, the law cannot any more find the calculability and reliability which were part of the definition of the law in the doctrine of the legal State. The reliability and calculability are not inherent in normalization but in the presupposedly normal situation.

The so-called *general clauses and the vague concepts* have invaded all the spheres of legal life, even the criminal law, from all sides, and in countless circumlocutions: 'faith and fidelity', 'good manners', 'important motive', 'unreasonable harshness', 'reasonableness', 'particular plight', 'disproportionate disadvantage', 'prevailing interests', 'prohibition of abuse', 'prohibition of arbitrariness', 'claim for payment of interest' – these are only a few examples of the dissolution of the legalistic normativism.[76] Such general clauses had in the long run become unavoidable and indispensable. They wholly determined the overall picture of our administration of justice regarding both private and public law. A recently published work (1933) by Law Professor Hedemann of Jena, *Die Feucht in die Generalklauseln* [Escape into General Clauses], produces a great picture of the enormous spread of these clauses. In earnest terms, he warns of the danger of a complete dissolution of the law into normatively vague and incalculable generalities. But I do not believe that the big problem of the general clauses will go away with it. The disintegration and vagueness of all the concepts seem to me by far more advanced than Hedemann presents it, especially when considering the available literature of all the branches of jurisprudence. Even 'effective' and 'immediate possession' may be recognized as vague concepts not by some Talmudist but by a highly regarded German law professor as Philipp Heck of Tübingen. In the theory and practice of law, we have reached the point where the epistemological question is raised with all the practical seriousness: to what extent a word or a concept of the legislator can in a truly calculable way bind the people who apply the law? We have made the experience that every word and every concept soon become contentious, uncertain, vague and unsteady whenever in an oscillating situation they are seized by minds and interests differently conditioned.[77] Particularly all our administrative law is pervaded by such vague concepts, not norm- but situation-related (such as 'public order and safety', 'endangering', 'hardship', 'proportionality', a.s.o.), and also concepts such as 'due discretion', 'arbitrariness', 'prohibition of arbitrariness' are so incalculable in case of conflict that they themselves may turn into the worst arbitrariness.

Looked at from that point of view, there are only 'vague' legal concepts nowadays. Nobody wants to maintain,

though, that it would be possible to return to the ancient faith in a safely calculable legal normalization of all conceivable cases, with all their facts matching wholly in advance. The fiction and the illusion of a law that would cover all the cases and all the situations matching the facts and subsuming them in advance cannot be revived.[78] The idea of a complete codification or regularization is hardly feasable nowadays. 'A return to a strict positivism is out of the question', says Philipp Heck (*Jur. Woch.*, 1933, p. 1449), and he is right. Thus, the whole application of the laws stands between Scylla and Charybdis. The road forward seems to lead away from the shore and ever farther from the firm land of legal safety and constraints of the law, which at the same time is also the land of the judge's independence. The road back to a formalistic legal superstition recognized as meaningless and long outdated historically is not worth considering either.

There is only one road. The National-Socialist State has been treading it with great firmness, and the Secretary of State *Freisler* has given it the clearest formulation in the call: 'no reform of justice but reform of jurists'.[79] If an independent administration of justice must continue to exist, even though a mechanical and automatic commitment of the judge to predetermined regularizations is not possible, then it all depends precisely on the *breed* and *type* of our judges and civil servants. Never has the question '***quis judicabit***'[80] had any such crucial importance as today. Neither in the liberal-democratic system were ethical and moral requirements missing, as concerned the judge's 'creative personality'. But that remained empty declamation, because the 'personality' was referred to only in general terms, in order to avoid distinguishing between the ethnically identical and the aliens. It did not mean the concrete German people but only 'persons', serving in this way the liberal individualism. The true substance of 'personality' must be secured with all firmness, and this is inherent in the commitment to the people and the ethnical identity of every man entrusted with the exposition, interpretation and application of the German law. Out of the positive necessities of the scientific legal work, the idea of the ethnic identity will pervade and dominate all our public law.[81] That is valid for the career civil service, as much as for the legal profession essentially

interested in the creation and the shaping of the law, as well as for all the cases in which comrades of the people become active in the management of public affairs, the administration of justice and in jurisprudence. Above all, this will guarantee a fruitful collaboration in the constitution of different new 'councils of leaders'.

We not only feel but also know from the most rigorous scientific insight that all justice is the law of a certain people.[82] It is an epistemological truth that only whoever is capable of seeing the facts accurately, of listening to statements intently, of understanding words correctly, and of weighing impressions about people and things properly joins in the law-creating community of kith and kin in his own modest way and belongs to it existentially. Down, inside, to the deepest and most instinctive stirrings of his emotions, and likewise, in the tiniest fibre of his brain, man stands in the reality of this belongingness of people and race. He is not objective whoever with a clear objective conscience believes that he can be so because he has exerted himself hard enough to be objective. An alien wants to behave critically and also to apply himself shrewdly, wants to read books and to write books, he thinks and understands differently because he *is differently disposed*, and remains, in every crucial train of thought, in the existential condition of his own kind. That is the objective reality of 'objectivity'.

As long as one could be confident that the judge and even the administrative official were only a function of the normativist legality, only the familiar 'law-applying automaton', a simple 'concretization of abstract norms', could one ignore the truth that all human thinking is bound to existence as every standardization and interpretation of facts are bound to the situation. Montesquieu's famous sentence that the judge is 'only the mouth that utters the words of the law', '*la bouche qui prononce les paroles de la loi*', was even in the eighteenth century interpreted in a mechanical way.[83] For our present-day susceptibility, this sentence already points to the sphere of the living human being, filled with organic, biological and ethnic differences. Today we have become more receptive, we see even the diversity of the mouths, if I may say so, which utter the ostensibly same words and sentences. We hear how these

same words are 'pronounced' very differently. We know that the same vocable in the mouths of different peoples not only sounds differently but also means something else in thought and fact, and that in matters of legal interpretation and in the recording of the facts of the case, small deflections have quite astonishing, remote effects. Nevertheless, we must and will hold onto the legally secured position of the German civil servant as much as onto the independence of the judge, in particular. Hence out of necessity, we demand their commitment without which all the guarantees and freedoms, all the independence of the judges, and above all, that 'creativity' would be but anarchy and an especially noxious source of political dangers. We seek a commitment which is deeper, more reliable and more embued with life than the deceptive attachment to the distorted letter of thousands of paragraphs of the law. Where else can it rest but in ourselves, and in our kin. Even here, in view of the inseparable connection of the commitment to the law, the civil service and the judge's independence, all the questions and answers flow into the exigency of an ethnic identity without which a total leader-State could not stand its ground a single day.

THE QUESTION OF LEGALITY

(1950)

The Reverend Oratorian Father Laberthonnière, who died in 1932, has left behind the voluminous work of a lifetime, which is being edited by his friend Louis Canet. Between 1933 and 1948, six impressive volumes have been published. Quite recently, another book of his has been added to them, and which is of particular interest to us, namely, a Critique of the Notion of the Sovereignty of the Law.* Father Laberthonnière critically examines the widespread notions of the supremacy of the law prevailing in moral theology, philosophy, and in jurisprudence, and which go back to and reach their acme in a well-known saying of Artistotles', namely that 'not men but the law' must rule. To this, the learned Oratorian opposes the assertion that men stand directly behind every earthly law and that they use the law as a means of their power.

In his criticism, Father Laberthonnière goes very far. 'La maxime: c'est la loi, ne diffère en rien au fond de la maxime: c'est la guerre' [the saying: "it is the law" does not differ in any way from the saying; "it is the war"]. This connection made between law and war is in fact surprising and sounds quite radical. The knowledge on which it is based can be grasped only as the bitter fruit of the experiences of the civil war. This formulation by the Oratorian Father should serve as an opportunity to reflect on some historical, moral, juridical and sociological experiences of the last few decades.

* *Oeuvres de Laberthonnière*, published under the care of Louis Canet. Sicut ministrator. *Critique de la notion de souveraineté de la loi.* Introduction and notes by Marie-Madeleine d'Hendecourt. Paris, Librarie philosophique J. Vrin, 6 Place de la Sorbonne, 1947.

I

Why did the German civil service follow Hitler? The problem of culpability need not be stirred anew nor other attempts at exculpation be made by raising this question. We address the general and practical problem of legality which is highly topical and by no means of concern only to the German civil service. We are not dealing here with individual cases, but rather with the overall sociological situation of a broad circle of people. On the other hand, within this circle which counts hundreds of thousand people, there is in particular the matter of a leading and commanding layer, namely, the ministerial bureaucracy, the product of the higher civil service.

Many higher- and lower-ranking civil servants had sympathized with Hitler and his movement from before 1933, more exactly, since his big electoral success of 1930. The motives of the sympathizers were numerous and diverse. Partly, they rested on the national watchwords disseminated by Hitler, and partly, on status and class interests. The German civil service, in general, and the higher- and highest-ranking civil servants, in particular, feared no harm from Hitler to their overall social and economic existence. This overall existence, however, had a twofold foundation: the traditional German State of the civil service with its well earned rights, and an influential higher, ministerial bureaucracy. Both, that is, the well-earned rights of the civil servants and the strong position of the higher, ministerial bureaucracy, had attained an astonishingly high point in the last years of the Weimar Constitution. The Weimar Constitution had explicitly guaranteed the well-earned rights of the civil servants. Through the practice of decrees, in virtue of Article 48 of the Constitution, the higher ministerial bureaucracy had become legislative. The decree had ousted the law. The legislation was 'motorized' through simplifications and precipitations. Every motorization of the legislative procedure, however, meant a power increase for the bureaux in which the decrees were worked out.

The majority of the civil servants feared no harm

from Hitler either to their well-earned rights or to the position of power of the German civil service as a whole. Many believed his repeated assurances and even held him for the rescuer of the principles of the traditional German career civil service. All of them feared an open civil war and saw in Hitler's protestations of legality a shield against the civil war. At that time only very few suspected the danger which a totalitarian party system must represent for the traditional German State of the civil service. Hitler too did everything to maintain this unsuspectingness. His eulogies of the German civil service in his book *My Struggle*, the programme for a restoration of the German career civil service and the organization of the NS association of the civil servants, all served that aim. Decisive, though, were the solemn declarations of legality, in particular the famous oath of legality at the Scheringer trial in 1930.[1] Already at that time the issue of legality had turned up to be the key to the problem of statal power in Germany. Likewise, in the notion of legality one finds the true answer to our question: why did the German civil service follow Hitler?

Because in the eyes of the German civil service Hitler's seizure of power was not illegal. Nor was it so for the large majority of the German people, and equally so for the foreign governments which continued to maintain their diplomatic relations without considering it necessary to proceed to a new recognition, according to international law, which would have been necessary in a case of illegality. Likewise, there was no German government in opposition to Hitler. Such a government materialized neither on German soil nor as government in emigration. The so-called empowerment law of 24 March 1933 removed all the misgivings and had the effect of a great general and sweeping legislation, and in fact, retrospectively, both for the events of February and March 1933 and for all the actions to come. The factual and sweeping legalizing effect of that law of empowerment was therefore so comprehensive because Hitler and his following were confirmed in their effective possession of power by a constitutional amendment voted by Parliament. Thus every legal way to a cancellation of the seizure of power was blocked. Only the feeble hope was left that perhaps the Reich President Hindenburg might still be in the position to dismiss Hitler and appoint another Reich

chancellor. But where the fear of a civil war had been such a strong motive to submit to Hitler, the hope of Hitler's dismissal by Hindenburg did not make much sense, because everybody knew that the attempt to remove Hitler would have unleashed an even more dangerous civil war.

It has been established in the judgment of the Nuremberg International Military Tribunal of 1 October 1947 that 'in 1934, the whole power was in Hitler's hands'. This statement is of the greatest importance for our problem. Thereupon, it follows for every positive idea of legality that Hitler's power was by far more than just legal in itself, it was also the source of all positive legality.

The law of 26 January 1937 concerning the German civil servants concealed its totalitarian poison,[2] particularly in the general reservation of §71 on party-politics, under detailed definitions and guarantees of the legal position of the German civil servants, in accordance with the traditional principles of the career civil service. Starting with the end of August 1939, the last remnants of a moral resistance on the part of the German civil service vanished as a result of the war. Firstly, because of the self-understood invocation of the necessities of a total war, and secondly, because the concentration of all statal power in Hitler's hands reached its maximum degree at the time. Legislation, administration and justice functioned with new simplifications and precipitations, always unrestrained, as command machines. In the last years of the war, a new concept came into being in the sphere of food supply: the 'disposition' [Anordnung], the essential feature of which rested in the fact that if the ruling represented a motorized law, the 'disposition' [Anordnung] was a motorized ruling. The general motorization is characteristic of the unmixed functionalism of this machinery.

Oddly enough in 1942, a fit of the need for legitimation suddenly seized Hitler himself, in fact not only in the sense of his own positivistically absolute legality, but also as a kind of democratic legitimacy. At that time, it was revealed in two strange explanations. A clarification of the Reichstag of 26 April 1942 (*RGBl.* I, p. 247) acknowledged that in time of war Hitler had the right to interfere in the well-earned rights of the civil servants (as if in such a total war and in such a system no other demands for rights had

been granted but only those of the civil servants). An explanation of 10 May 1943 by Hitler himself renewed the empowerment law of 24 March 1933. Both explanations are simply incredible in the confusion of their inner contradictions. They prove all the more clearly that ultimately Hitler himself was interested in a certain legitimation even more than the machine functioning according to the concept of the positivist law, and which obeyed him as the holder of State power and the only source of legality.

II

Our analysis keeps running into the notion of legality which lies at the core of the problem. There lies the key to an understanding of Hitler's regime, at least to the extent it deals with the specifically statal aspect of his power. Beyond that, it tackles a wholly important question of modern development. Here we are talking not of the lawfulness or the unlawfulness of countless isolated orders, but about the problem of the functioning of a regime as a whole. It is a highly topical sociological problem which deserves fully to be treated with all objectivity.

In order to do just that we must become aware of an extraordinary difficulty. It resides in the fact that the word 'legality' acquires a distinctive, rather specific meaning in a modern, thoroughly organized State entity. It is only from this point of view that one can grasp the history of the German civil service since 1918. The legality in question here does not mean a merely external, purely formal, purely juridical accompaniment. It does not refer to the question of law and justice under the aspect of their contents, either. It is also to be distinguished from legitimacy, whether in a conservative or a revolutionary sense. Nowadays, the words 'legal' and 'legality' can mean everything that the word 'lex' somehow conveys; and this word *lex* has an altogether different content at different times, and in different countries, in different constitutions and for different organizational forms of legislation and administration of justice. Hence we must seek to some extent to overcome the almost Babylonian confusion of speech that prevails here.

In a modern system, that is to say, an industrialized,

thoroughly organized system, endowed with a division of labour and highly specialized, legality means a specific working and functioning method of the public body. The manner in which affairs are decided, the routine and the habits of departments, the somewhat calculable functioning, the concern to retain this kind of life and the need of a 'cover' against an account-demanding authority: all that belongs to the complex of legality from a bureaucratic-functionlist point of view. If a sociologist like Max Weber says: 'The bureaucracy is our fate', we must add: 'legality is the working mode of this bureaucracy'.

In those countries in which the State bureaucracy has not, or not yet, the monopoly of the administration of public tasks, one can hardly grasp the transformation of the law into the working mode of an operating public body and perhaps would not understand the change in the meaning of the word 'legal' at all. It would be hard to make our reasoning clear to an Englishman or an American without any sociological training. In the Anglo-Saxon usage, the word 'legal' has the same sense as 'lawful' or 'juridical'. Of course, there are antitheses between lawful and moral, lawful and politically possible and habitual, but the sharpest antithesis between lawful and legal, which is the basis of our analysis, cannot be expressed in English. On the contrary, in France, the homeland of State legislation and of the great statal codifications, the statal administrative machine has since 1799 survived half a dozen regime changes. There, the most clean-cut formulations of a purely formalist-functional legality came into being as a consequence, in opposition to substantive law and historical legitimation. As early as 1829, Lamennais had with all precision formulated the antithesis between legality and legitimacy. Even before the 1848 revolution, would the word be preached: legality kills (*la légalité tue*). In no time, this sentence became a familiar saying in France and in the French language. It can hardly be translated into English, which may be explained only by the fact that the English of the nineteenth century had distanced themselves more than the French from the line of fire of the European civil war. Immediately after 1848, the then President Louis Napoleon issued proclamations in which he urged: 'to get out of legality in order to attain the law' (*de sortir de la légalité, pour rentrer dans le droit*). From

around 1900, the opposition in France has been speaking of a 'legal country' [*pays légal*] which it represents, in contra-distinction to 'real country' [*pays réel*].

France is the country of legists. She has got a strong statal centralist tradition but also an important free advocateship and magistracy which do not regard themselves merely as part of the State administration of justice. In this way, it becomes clear why it was in France that the separation of law and legality had been first and most sharply felt and had been formulated most pregnantly. Likewise, the phrases of the Rev. Father Laberthonnière, with which we started, could emerge with such clarity only in France. In Germany, on the other hand, one became critically aware of the antithesis much later, after its most massive effects had been taken into consideration.

For centuries, the German State had been a State of civil servants. Nevertheless, until the collapse of 1918, the purely statal functionalism was hidden despite the prevailing legal positivism, by a thick veil of a double tradition, namely that of the monarchically dynastic legitimacy and the federalist decentralization.The dynastic legitimacy fell in November 1918. The economic-industrial development went the way of an increasing centralization. Finally, only the statal legality remained as the sole lawful foundation of State functioning. Legality would become, as Max Weber said, the only apparent form of legitimacy.

III

It is said about the Germans that they are a people that are touching by their need for legality. They have also and often been reproached that they were incapable of offering any right resistance to the powers that be. They have presumably shown a special ability to combine submission to the powers at the time with an inner sense of freedom. Whether Luther or Kant or anybody else should be held responsible for it need not be looked into here. For the rest, there can be no doubt that the Germans are in a particularly high degree a people of civil servants with a cast of mind common to a statal civil service. To that may

be added a stronger sense of a technicized discipline for specialization and the delimitation of responsibilities and for the ideal functioning without a hitch.

Perhaps. But the transformation of law into legality as a mere functioning mode of the work of the statal administration and the corresponding relationship with the individual human beings who are dependent on such an administration is no longer a specifically German problem. Everywhere rules the juridical positivism and that means the acceptance of the sentence that the law will be set by whomever simply asserts himself *de facto*. Juridical positivism is but the transformation of law into a setting of settings. At the same time, it is the acceptance of the 'normative force of the factual', an interesting kind of force which was not discovered only in Germany and only in 1933. Still nowadays, at the beginning of December 1949, the English delegate at the UNO explained with reference to the recognition of China's new communist government that recognition according to international law is to be based only on factual reality. The rightfulness of the genesis is no characteristic trait of the power of a State. The German Supreme Court had said that after the collapse of November 1918, with regard to the then workers' and soldiers' councils. But that is a platitude, a topos of the juridical manuals and commentaries. A State machine which functions effectively is in itself the carrier of the State power and the source of all positive law.

This transformation of law into legality is a consequence of positivism. It is unavoidable as soon as a political community distances itself from the Church. Sociologically speaking, it is an aspect of the evolution of the industrial-technical age. In the history of philosophy, it belongs to the transformation of substantive thinking into functional thinking, a transformation which until recently has been extolled to us as a marvellous scientific and cultural progress. The frightful image which results from a complete functionalization of mankind has been the subject of an impressive recent article in the journal *Universitas* in Tübingen, written by its publisher Serge Maiwald. But already more than thirty years before it, Max Weber, the great German sociologist, had made a diagnosis and a prognosis that proved to be correct. We have already quoted his

words about bureaucracy as fate. As another illustration of his marvellous prognosis we quote from his posthumous work *Economy and Society* (1921, pp. 511-512): 'Whatever form law and legal practice might assume under these influences, it is the unavoidable fate in all circumstances and as a consequence of the technical and economic development that each law in force will expand as a rational technical machine, capable of being adjusted any time, and be devoid of any sacred content. Admittedly, this fate may be concealed by the ability to conform to the existing law on general grounds and in many ways, but in reality it cannot be deflected.'[3] True, these sentences of Max Weber may not be easily understood, but even so they are not an oracle but a sociological prognosis.

The transformation of law into legality was directly followed by the transformation of legality into a weapon of civil war. Neither was that a German invention. It was Lenin who proclaimed it with full awareness and sharpness. His paper of 1920, entitled 'Left-Wing Communism - An Infantile Disorder' is such a confirming document that any discussion of the problem of legality becomes anachronistic unless its words are taken into consideration. Lenin says: 'But revolutionaries who are incapable of combining illegal forms of struggle with *every* [the emphasis is Lenin's] form of legal struggle are poor revolutionaries indeed.'[4]

That is it. Renowned philosophers and writers of Leninism and Stalinism have made these theses of Lenin's the object of their exegeses with the result that all legality becomes a tactical tool, whereas for them there is only one kind of historical legitimacy, that of the communist revolution. For them, that legimacy justifies every measure and every legal and illegal terror.

With this observation we have reached our point of departure, the words of Father Laberthonnière that the maxim 'law is law' basically means the same thing as 'war is war'. That becomes even clearer when we say 'civil war is civil war'. With great sadness Father Laberthonnière reminds us of the long rows of revolutionary tribunals, extraordinary, special, people's, chambers and instances, which have been busy in the course of history and in the hands of which the law has been a tool of persecution and of vengeance. Then, while shuddering intensely, we hear his

amazing statement: I do not compare the victims, I compare only the judges.

NOTES

1 In the English-language literature, this law is routinely translated as the 'Enabling Law'. As there was no question of enabling or disabling anyone, but of surrendering the power of making laws for the whole country to Hitler's government, it has been thought more correct to translate '*Ermächtigung*' by 'empowerment' throughout.
Besides, '*Macht*', the root of the German term, has the words 'might', 'force', 'power', as English equivalents. As for the Law proper, it contained five sections: 1 and 5 gave the federal government the power to enact laws for four years without the cooperation of the Parliament (Reichstag); section 3 provided that the laws enacted by the Government were to be drafted by the Chancellor and were to come into effect on the day after their publication in the Official Gazette of the Reich; finally, sections 2 and 4 stated that in its legislation, the Government had the power to deviate from the Constitution, and also to conclude treaties with foreign states, the only reservations being those that concerned the institutions of the two federal chambers.

2 Article 3 of the Weimar Constitution laid down that the colours of the Reich were black-red-gold, and the mercantile flag was black-white-red with the Reich's colours in the inside upper right angle. Black-red-gold were the colours flown by the liberal student movement in the years 1848-1849, whereas those of the North Germanic Confederation, and eventually of Bismarck's new German Empire had been black-white-red, a combination of the Prussian black-and-white, and the Hanseatic white-and-red flags.

3 This qualification of the mortal enemy was all the more necessary as Carl Schmitt had been known as an advocate of the suppression of both the Communist and the National Socialist movements and their affiliates.

4 The law enacted by the German Government, under the signatures of the Reich Chancellor, of the Reich Minister of the Interior and the Reich Minister of Justice, contained only two articles, as follows: '1. The National Socialist German Workers' Party constitutes the only political party in Germany. 2. Whoever undertakes to maintain the organizational structure of another political party or to form a new political party will be punished with penal servitude up to three years or with imprisonment up to three years, unless the action is subject to a greater penality, according to other regulations.'
The *Reichgesetzblatt* was the Official Gazette of the Reich. It will appear in the abbreviated form, *RGBl.*, in the rest of the text.

5 Likewise translated as 'the law on the guarantee of juridical peace', it was a Reich Government law which promulgated the death penalty or forced labour for fifteen years or in perpetuity, or even a more severe punishment to whomever undertook to kill, incited to, or plotted the murder of a judge, or a prosecutor, an assessor, a witness or a civil servant employed by the criminal political police, the railway, forest and municipal police, the security service or a member of the armed forces, of the SA and other paramilitary organizations protecting the Party, a Party official or a member of the German flying club. Furthermore, a similar sentence was to be meted to whomever compiled and disseminated any document falsely justifying high-treason acts, and to whomever tried to introduce it inside the German borders and disseminate it, fully aware of its contents, as well as to whomever inside the country sympathized with a highly treasonous act committed abroad. On the other hand, all those who attempted to introduce and disseminate documents of an anti-national purport into the country, with a view to organizing political parties, inciting, provoking and making false declarations, were punishable up to five years of hard labour.

6 Latin legal phrase, meaning 'the authority of a constituted matter', that is, a matter that becomes authoritative in virtue of the fact that it is established by law.

7 By the law on popular consultation, the Reich Government, whenever it suited it, assumed the right to demand the approval of the people for measures, laws or changes in the Constitution, undertaken by the Government. As Chancellor and Leader, title under which he combined his Party's leadership with the office of the Reich President in 1934, Hitler resorted to plebiscites to obtain popular confirmation of his policy and various decisions, and consequently, as a legitimating means, but shunned referenda, by which he would have surrendered the decision to the people and so deprived himself of control. Three important laws came out of the Reich Chancellery on 14 July 1933. Besides the law on plebiscites and that on the reconstitution of political parties (see note 4 above), the law was promulgated on the compulsory sterilization for individuals affected by hereditary illnesses or other incurable deficiencies.

8 The German term for parliament or national assembly has been left untranslated in both texts. One reason was an attempt to avoid translating '*Reich*' by 'Empire' and so lend the word the significance which it had before the Emperor's abdication in November 1918. Moreover, with the dissolution of the political parties, it changed into a drastically different forum, of the National-Socialist Party

alone, that was convened at Hitler's pleasure, as a quasi-plebiscitary organ.

9 Left untranslated in the text, the *Reichsrat* was the creation of the Weimar Republic, meant somehow to continue the tradition of the Federal Council in Bismarck's Reich. Secondary in importance to the Reichstag, it consisted of representatives of the states which counted a total of sixty-six votes among them. Officially, the members of the provincial governments were the chief delegates of their states in the Reichsrat, but for the routine work of the assembly they were allowed to appoint their own high officials to represent them instead. During the Weimar Republic, every law was expected to be passed by the Reichsrat which could be overrided by the Reichstag, though, in case of opposition. With the elimination of all statal attributes of the provinces by Hitler in January 1934, the Reichsrat lost its reason for existence, and was dissolved by a law of 14 February 1934

10 Adopted in April 1924, the Dawes Plan, named after its initiator, American lawyer and financier Charles Gates Dawes (1865-1951) who a year later became US Vice President, it was designed to balance Germany's budget, stabilize its currency, and enable her to pay the imposed war reparations without setting any final total amount and term of payment.

11 Article 76 referred to the possibility of revising the Constitution by legislative means, that is, in the presence of two thirds of the total legal number of the deputies of the Reichstag, by means of a majority of two thirds of their votes. On the other hand, a popular initiative for any constitutional revision had to rally the majority consent of a popular referendum. Furthermore, the Reichstag could overrule the Reichsrat's veto in the matter, and have the Reich President promulgate the amendment within a fortnight, unless the Reichsrat demanded a referendum.

12 Despite a monster electoral campaign, Hitler's movement garnered only an additional five and a half million votes, totalling 43.9 per cent of the overall number of votes cast. He needed his Nationalist allies to get the bare majority of seats in the Reichstag (288 plus 52 in a house of 647 seats). The 5 March 1933 elections were the last multi-party elections, as Hitler then embarked upon his all-out offensive against his political opponents and allies alike.

13 The filling of a power vacuum in a country's governance is enough justification in a secularized world for whomever undertakes it successfully. If the Weimar Republic emerged in the power vacuum created by the Emperor's abdication, the assumption of the legislative power by

Hitler could be justified by analogy with that voluntary transfer. Moreover, in circumstances in which normative positivism prevails, the legality of the act as such is its legitimation.

14 Article I of the Weimar Constitution consisted of two sections: '(1) The German Reich is a republic, and (2) The political power comes from the people.' From its first statement, the Constitution reflected the difficulties encountered while attempting to placate all the conflicting trends. Hence the inherent contradiction: the Empire (Reich) is a republic!

15 After the March 1933 elections, the Reich Government changed its composition from a political coalition cabinet to a legislative government of experts selected and appointed by the Chancellor who also could dismiss them at will. Eventually, his much reshuffled cabinet met for the last time on 4 February 1938!

16 There was no follow-up of that law as no new Constitution was ever to be written in the twelve years of National-Socialist rule. On the other hand, the 'gloomy situation' refers to the short spell when Hindenburg, the Reich President had been refusing to entrust Hitler with the formation of a cabinet in the aftermath of the November 1932 elections. The law of 17 December 1932 was a National-Socialist sponsored bill meant to prevent the then Chancellor Schleicher to assume the President's powers in case of latter's incapacitation, or in the event of his death. As Schleicher had been released from any political office and Hitler himself had become Chancellor, that law was an obvious impediment to his assumption of presidential powers, and was soon to be replaced by a Government law of Hitler's own making.

17 Reference to the formula of government by presidential decree which was practised in Germany in the last two years of the Weimar Republic, when the Reichstag turned dysfunctional, reluctant or unable to expedite necessary legislation, particularly in order to solve the financial crisis. Although he disliked Hitler personally, it was the latter's assurances that he would not be burdened with the problems incumbent on the chancellor that made President Hindenburg relent and appoint him chancellor. It seems to have been one of the very few promises which Hitler ever kept.

18 French sentence meaning 'who reigns but does not govern', it had a wide circulation in the liberal nineteenth century. According to Carl Schmitt, it was a translation of the Latin sentence *Rex regnat sed non gubernat*, which round 1600, was directed against Sigismund III Vasa (1587-1632), King of Poland. (See Carl Schmitt, *Politische Theologie II*, Ch. 2, sec. 2, Berlin, 1970.)

19 Article 56 of the Weimar Constitution defined the office of Reich chancellor as the duty to trace out the guiding lines of policy for which he assumed responsibility before the Reichstag. In addition, it stated that each minister had to manage the affairs of the department in his charge fully independently, within the limits of those directives, and for which he was accountable to the Reichstag.

20 Indeed, the range of legislative possibilities would surpass anybody's imagination. It may be said that any order issued in the name of any public body eventually acquired the power of law, as soon as it was made public in written form and met with no objection from the interested public administrative departments.

21 That is: 'The laws of the Reich may be enacted according to the procedure stipulated by the Reich Constitution, but equally by the Reich Government. This disposition applies to the laws defined by Article 82 §2 and Article 87 of the Weimar Constitution'.

22 Article 68 contained two clauses: the first stated that the right to originate legislation belonged to the Reich government and to the members of the Reichstag, and the second affirmed that bills of the Reich were passed by the Reichstag.

23 Article 73 listed four cases in which a referendum could be called: a. when the Reich President so decided within a month from the passage of a bill by the Reichstag and before its publication; b. when the publication of a bill was adjourned by the motion of at least one third of the members of the Reichstag, and a demand was made for its submission to a referendum by twenty per cent of the electorate; c. when ten per cent of the electorate presented a popular initiative, which needed to be brief and had first to be submitted by the government to the Reichstag for its opinion (in the case in which the Reichstag enacted the draft without amendments, no referendum for the popular initiative was deemed necessary), and finally, d. in connection with the legislation for the budget, taxes and wages, when the Reich President alone had the right to call a referendum. The procedure for referenda and popular initiatives was established by another law of the Reich. Everything was indeed quite complicated, and unpredictable as far as the results were concerned. That makes it easy to understand Hitler's preference for plebiscites which only confirmed his decisions whenever he needed confirmation either as self-assurance or more likely for propagandistic effects in the international arena.

24 Paragraph 2 referred to the necessary measures which the Reich President could take in case security and public order were seriously impaired or compromised within the

German Reich, in order to restore them. Included among the measures were the use of armed forces and the partial or total suspension of the basic rights guaranteed by other articles of the Constitution.

25 In other words, the one-party Reichstag elected in November 1933 had no legislative initiative of its own. It only could formulate the decisions submitted by the Reich chancellor at his pleasure, and without any debate, into Reichstag resolutions. Besides, the Reichstag convened only at the chancellor's pleasure on its new and provisional premises, the Kroll Opera House, after the 27 February 1933 fire at the Reichstag building.

26 Article 24 of the Weimar Constitution stipulated quite the opposite, namely, that the Reichstag was to convene each year on the first Wednesday of the month of November at the seat of the Reich government. It could be convened sooner by its Chairman, at the request of the Reich President or of at least one third of the deputies.

27 Hitler kept all his options open, so to speak, not only in matters of decision-making but also in the implementation of decisions: the Weimar Constitution was never abrogated officially, and other laws of the imperial era remained valid. Various, often contradictory, decrees and regulations were added to them, while local authorities, party or administrative, produced their own regulations and commands, vying in their eagerness to anticipate the Leader's will. All this accumulation of rules and regulations generated and perpetuated a fog of apprehension and uncertainty, on the one hand, while on the other, it enhanced the self-satisfaction of the various categories of 'legislators' who enjoyed and indulged their undreamt-of power, whether real or merely imaginary.

28 Reference to his article 'Further Development of the Total State in Germany', published originally in the February 1933 issue of *Europäische Revue*. See in particular pp. 24-27 of the English translation included in Carl Schmitt: *Four Articles, 1932-1938*, Washington DC, 1999.

29 See note 4 above.

30 English-speaking historians and translators tend to render the German term *Berufsbeamten* as 'professional civil servants', which sounds rather pleonastic, given the fact that all civil servants *were* professionals, because in Germany at least, they had to submit to special examinations and training for the positions for which they applied. What in principle is important in their case is that they were entitled to tenure, and like the career diplomats in the USA, were not political appointees. Hence, the preference to use the English terms 'career civil servants' wherever that applies in both translations included in this book.

31 Refers to the main transformation worked in the

mentality and the structure of the German civil service by the law of 7 April 1933, known as the law for the re-establishment of the civil service, that led to the removal of any left-wing or even Republican-leaning civil servant, and also of any civil servant of Jewih descent. Until Hindenburg's death, exceptions were made for those in the latter category who had lost a parent or a sibling in the war or were themselves war veterans. That law was strengthened by other two of 30 June and 20 July 1933 which also regulated admission to the Bar, and applied to educators at all levels, and to law enforcement bodies.

32 The emphasis is on direct and mechanical subordination according to a principle of ranking leadership, so to speak. The provincial governors were, according to the law of 7 April 1933, the Reich Chancellor's delegates charged to supervise the implementation of the laws of the Reich and of the Leader's orders in the provinces or the group of provinces allotted to them. As vice-chancellors to the provinces, their authority was all inclusive at the expense of the last attributes of statehood of the provinces. In virtue of that law, Hitler appointed himself governor of Prussia, at the expense of von Papen, but entrusted the functions of that office to his henchman Hermann Göring, as Minister President of Prussia. Known as the 'second law of the coordination of the provinces with the Reich', it marks the second stage in the streamlining process of concentration of state power in the hands of the Leader. The process had been started with the 31 March law of coordination, which had called the National-Socialist governments of the confederate states to legislate in tune with and by taking the example of the Reich government, and disregard the constitutions and the procedures peculiar to the respective states. It had also provided for the dissolution of all the elected provincial parliaments, and of all district, city, and village councils, and for their reorganization on the basis of the results of the Reich elections of 5 March 1933. The new, selected provincial assemblies would be short-lived, though, because another Government law of 13 October 1933 would suspend them indefinitely, and increase the power of the governors.

33 On 31 January 1934, that is, after the publication of this book, a new law on the reorganization of the Reich fully abolished any constitutional and administrative particularity of the provinces, and their parliamentary representation, and suppressed the nationalities, forbidding any official distinctions such as, for instance, between Saxons and Franconians, Swabians, Rhinelanders, etc.: they were all Germans. The same law deprived the big cities of their autonomy, replacing their councils by mayors and

commisioners appointed by the Reich Government.

34 That is the title of chapter X in the second volume of Hitler's *Mein Kampf*. There are several English translations available. In the 1939 printing of Reynal and Hitchcock of New York, the only available to me at this time, it runs between pp. 816-845.

35 The law of 24 March 1933, which was passed in terms of the Weimar Constitution, that is, with two thirds of the votes, both of the Reichstag and the Reichsrat, brought no specific alterations to the two institutions as defined by that constitution. That also meant that the states with their territorial sovereignty were at least theoretically not affected by the law, which brought about a crisis within the new Reich government. Apparently, it was the Reich Minister of the Interior Wilhelm Frick who undertook to solve it through the gradual coordination of the states into the provinces of a centralized entity and the ultimate dissolution of the Reichsrat in 1934.

36 It was that Grand Council of Fascism, which in a meeting on the night of 24-25 July 1943, subjected Mussolini to scorching criticism for his conduct and repudiated him, thus facilitating his dismissal by the King and his arrest. None of that could have happened in the National-Socialist Germany.

37 That is to say, Rudolf Hess, as deputy leader of the Party, in charge of the Party's affairs, and Ernst Röhm, as Chief of Staff of the Sturm Abteilung (Self-Defence Section), better known as 'Storm Troops'. As far as Röhm was concerned, that appointment was seen as the correction of an ommission that had long been a grievance with the SA. The largest paramilitary formation of the National-Socialist Party, the SA had acted as the Party's instrument of mass terrorism, but after 30 January 1933 saw its role changed into the embodyment of the revolution from below. In fact Hitler had already been making plans to do away with Röhm and reduce the impact of the SA in the public arena in favour of the discipline of the Army. After the 30 June -4 July 1934 purge, the SA was superseded by the SS (Schutz Staffeln - Echelons of Protection) which won its independence from the SA on the occasion.

38 The initials stand for 'Reichsgericht für Zivilsachen', which translates as 'the Reich Court for Civil Law Cases'.

39 More about the notion of government may be found in Chapter IV, pp. 46-48, farther on.

40 Article 131 of the Weimar Constitution stated that if a civil servant infringed his professional obligations towards a third party, while on public duty, it was the state or the corporation which employed the civil servant that in principle was liable for the violation, yet that liability did not exclude its normal pursuit in a court of law.

41 That is apparently what Soviet Russia and Communist China have been fearing most from the economic overtures by the West since the ostensible end of the cold war.

42 Allusion to the symbol used for the state, or what he called the civil and religious commonwealth, by Thomas Hobbes (1588-1679), the English political philosopher of the Civil War.

43 That is the definition of the nation formulated by Ernest Renan (1823-1892) French historian and philologist, in the polemic between German and French scholars regarding Alsatia, in the aftermath of the Franco-Prussian war (1870-1871) that ended in France's defeat and the annexation of Alsace-Lorraine by Prussian Germany.

44 The first section of that law asserted the absence of a state church; its second section guaranteed the freedom of religious association without limitations, while the seventh section assimilated such associations which commonly pursued philosophical ideals to religious denominations. Furthermore, those denominations which had already been enjoying the status of public-law corporations were allowed to keep that status, whereas new applicants could obtain that status only if they were capable of giving sufficient proof of durability.

45 That article referred to the inviolability of the well-earned rights of the civil servants whose tenure was affirmed, unless the law provided otherwise, and who could seek satisfaction for abuse and other grievances in courts of law.

46 Article 127 contained one section only, which stated that the communities and unions of communities had a right to auto-administration within the limits of the law.

47 Article 165, containing six sections, started with an appeal to workers and employees to cooperate with the employers on an equal footing with regard to wages, working conditions and the overall economic development of the productive forces. Moreover, the Constitution recognized the workers' and employers' associations and their contracts.

48 It is in this article (which with the rest of the Constitution was made public on 11 August 1919, the era of workers' and soldiers' councils) that mention was made of district labour councils which were to be organized according to economic regions, and of a Reich labour council meant to represent workers' and employees' interests. They were to function alongside of district economic councils and a national economic council that would have brought together employers and employees and all the socially and economically significant professional groups in order to carry out economic tasks and cooperate in the application of the laws of socialization. The Reich Economic Council had been meant to serve as an advisory

office to the Reich government, and to make recommendations for social and economic laws to the Reichstag, either through the government, or directly, through one of its representatives. All those councils were also intended to be given the power of administration and control in their particular spheres. Nevertheless, like many other things, they seem to have been left without any practical consequence, because the political unity which they presupposed was not there, in the first place. See also what Carl Schmitt says in the footnote on page 6 above. A Reich Economic Council, however, was created on a provisional basis, although the distribution of its seats turned into a highly controversial and rather insoluble task. In practice, the political parties proved better agents of the interests of employers and employees alike.

49 No social or economic constitution was ever worked out in the twelve years of the National-Socialist system, but only piecemeal government legislation and Party measures which led to the creation of the German Labour Front that eventually concentrated on National-Socialist indoctrination and the organization of the workers' leisure time, and which financed its activities from the assets of the former trade-unions and welfare institutions of the state and of the outlawed parties. On the other hand, a Reich government law of 19 May 1933 created 'labour trustees' to be named by the provincial governments, with the task to determine wage contracts.

50 The section in question from Hegel's text reads in English translation as follows: 'In virtue of the substantiality of its natural and family life, the agricultural class has directly within itself the concrete universal in which it lives. The class of civil servants is universal in character and so has the universal explicitly as its ground and as the aim of its activity. The class between them, the business class, is essentially concentrated on the particular, and hence it is to it that corporations are specially appropriate.' (Quoted from the T.M. Knox's translation of 1942.)

51 Unidentifiable.

52 One need not mistake Adolf Wagner (1835-1917) German economic historian and social thinker, whose major work, *Die Grundlegung der politischen Ökonomie* (The Foundations of Political Economy), published in 1876, stimulated the search for a better conceptual understanding of the modern state, for his much younger namesake, Adolf Wagner (1890-1944), a National-Socialist Party member since 1923 and future Governor of Bavaria.

53 That is, the period between the Prussian military victory over Austria at Sadowa, that turned Prussia into the major German power at the expense of the Hapsburg Empire, and the French defeat in the Franco-Prussian war, that led to

the unification of Germany.

54 On 20 July 1932, the head of the federal government, Franz von Papen, informed the Prussian government that it felt necessary to take over the governmental powers in Prussia because its caretaking government, largely Social Democrat, had not shown enough anti-communist zeal. More likely that was an excuse for assuming control of the Prussian police, the largest armed force in the federation, second only to the Army, and so prevent the National-Socialists from taking it over.

55 The Court did not declare the taking over of the Prussian administration by the federal government unconstitutional, but ruled that the latter could not assume the representation of Prussia in the Reichsrat without for that matter changing the federal structure of Germany. As a result, the old cabinet of Otto Braun returned to Berlin just to oversee Prussia's vote in the Reichsrat, while von Papen's commissioners occupied the Prussian government offices, from which they proceeded to clean the administration of social-democratic and republican elements, with consequences contrary to von Papen's original intentions. In that way, they facilitated the National-Socialist country-wide campaign of infiltration.

56 This imagery is pure gibberish, which unfortunately has survived Hitlerite Germany, as its kind has become the stock-in-trade of presidents and heads of governments and their representatives alike, everywhere in the world. Carl Schmitt finds it convenient to cover the obvious conclusions to be drawn from his previous statements, namely that the Party was swerving the civil service from its traditional purpose and procedures to those of the Party which was replacing the State.

57 The German words *Stamm* and *Stand*, which literally mean 'trunk' and 'standing', respectively, form an alliterative phrase, that in its generalized usage, long preceded Hitler's regime. By that time, it had no more sense than the English 'kith and kin'. Considering the National-Socialist efforts to produce a Germanic heritage of their own, with a general appeal, however hollow it might appear to some, it occurred to me, that by using the Anglo-Saxon terms in this translation, some of the nuance of that trend would be preserved.

58 The law of 29 September 1933 declared all farms of 7.5 to 10 hectares indivisible and unsaleable, in order to preserve the peasants, tillers of the German soil and the progenitors of pure German blood, as the foundation of national vitality. Only such farmers were entitled to call themselves German peasants. As those farms could be neither sold nor mortgaged, the measure ceased to benefit the owners during the period of recovery that followed.

59 Reference to the law of 7 April 1933 mentioned above, see note 31. It also underlines the National-Socialist intention of reducing all the organizational principles of the civil service to that of ethnic identity - a law of nature - and as such the ultimate guarantee of its effectiveness. Some three centuries earlier, Thomas Hobbes dared to express his doubts on the issue in his *De Cive* (The Citizen), chapter V of any English edition.

60 To that a new army law was added on 20 July 1933 which ended the jurisdiction of the civil courts over the military, and abolished the republican practice of electing representatives of the rank and file to those courts.

61 The way in which the SA was reined in, so to speak, six months later could not be foreseen from the scant legislation on the jurisdiction of public bodies available at the time. After the fact, a government law of 3 July 1934 justified the killings as legal measures taken in defence of the state in an emergency. The Army, at least, was apparently satisfied with that explanation because it failed to launch any protest against the summary execution of two of its most prominent generals during the purge.

62 In the 21 July 1933 issue of the Cologne newspaper, *Kölnischer Zeitung*, the news were published that the body of students at the local university had proclaimed Professor Dr. Carl Schmitt 'intellectual leader'.

63 As title, 'County Councillor' dated from 1702, and was given to those reliable officers of Prussia's central government, which were selected from the local nobility, and whose function was not only the collection of taxes and the general administration of the army, but also the conduct of economic policies in their respective counties.

64 In virtue of the 1850 Constitution, the municipal councils were elected by the three-class suffrage. That meant that the voters were divided into three classes according to the amount of direct taxes which they paid (the total revenue of each community was devided into three, as well): the first class of voters were those whose payments in direct taxes amounted the first third of the total revenue, and they were relatively few; the second class of voters were those who together paid the second third, and they were more numerous, while the third class included the largest number who paid very small taxes or none at all. Each class, though, elected the same number of councillors, who as electors would then all together choose one deputy for the Prussian Landtag (Diet) by open ballot.

65 The single-list elections for the Reichstag of 12 November 1933 were coupled with a national plebiscite on Germany's withdrawal from the League of Nations, an action already completed. The unusual thing about that plebiscite, though, was the way it was formulated: 'You German man, you

German woman, do you approve of the politics of your Government and are you ready to acquiesce in it, and solemnly profess your faith in it?' Its aim was not only to wring out a declaration of trust but also an oath of fidelity of sorts. The official figures for the country-wide participation in the two events were 95.2 per cent for the Reichstag elections and 96.3 per cent for the plebiscite.

66 The German play upon words in this sentence cannot be reproduced in English, so here it is in the original: '...eine irgendwie zusammenkoalierte Mehrheit eine Minderheit majorisierte und aus der Abstimmung ein Machtmittel der Überstimmung und der Niederstimmung machte'.

67 Carl Schmitt had been made a member of that council by Minister President Hermann Göring at the suggestion of Schmitt's friend and colleague, Johannes Popitz. Notwithstanding, it met only once, though it was never officially dissolved. Nor was the initiative taken over by any other province, for that matter.

68 When, on 20 July 1932, the federal government ousted the Prussian government, the latter turned to the Federal Supreme Court in Leipzig for arbitration. For the Court's decision see note 55 above.

69 Mentioned above (see note 9), the Federal Council (Bundesrat) had been the creation of Bismarck, and enacted in the Constitution of 1871. It brought together the North and the South German states to solve any conflictual issues either among themselves or with the Imperial Administration and to decide any constitutional amendments. It came to an end with the dissolution of the Empire in November 1918.

70 Latin expression meaning 'the last resort'.

71 Actually it is not the steerman that is the most satisfactory approximation of a statesman in Plato's dialogue, but the weaver, because like him, the statesman has to bring together diverse natures into a uniform texture and on the loom of time, to weave the living fabric of a single society from the warp and the woof of human qualities (310e-311e).

72 Latin word for 'steerman', as *gubernare* means to steer.

73 As a matter of fact Taine likens Napoleon to a 'condottiere'. See H. Taine, *The Origins of Contemporary France*: *The Modern Regime* (Les Origines de la France Contemporaine: Le Régime Moderne), vol. I, ch. 1 of any edition, French or English.

74 As Carl Schmitt remarks in 'The Question of Legality', p. 56, at times Hitler himself felt the need of legitimizing his own power. Setting aside the public processions and acclamations, the first main gesture in that direction was the ceremony of the opening of the new Reichstag in the garrison church of Potsdam on 21 March 1933, and in which

President Hindenburg symbolically mediated between the historical glory and greatness of Prussian monarchy, and the young forces of the Reich embodied in the new chancellor, Adolf Hitler.

75 In French in the original.

76 The trend is not a specifically German practice: it may be encountered in the Western world as a whole, as an ever-renewed attempt to make the law reflect the shifting social interests and beliefs. The most notorious recent example that comes to mind is the American-coined 'hate crime', although as the moral philosopher Georg Simmel (1858-1918) used to say, one may hate someone or something thoroughly and do nothing about it. The danger here is that by association merely expressed feelings may be considered crimes, even in the absence of any action that might be directly connected with them.

77 A pertinent example was the US President's televized defence of 1998 against the Senate's accusations of improper behaviour. It was based on and made full and successful use of this principle, that is, of exploiting the vagueness inherent in abstract legal notions in order to reduce them to nothingness. Ultimately, the whole trial was turned into a farce at the expense of the tax-payers' money and of America's prestige abroad.

78 Nonetheless, it was attempted, using ethnic identity as the moral grounds for a continuous flow of enactments which were formulated in the manner of the military criminal code, and were meant to regulate individual behaviour. In that way, the aimed-at correspondence between the content of the regulation and individual conduct was attained.

79 The jurists as judges, prosecutors, members of the Bar, legal counsels, law professors, etc. were either civil servants or subject to the regulations applicable to the Civil Service as a whole. Here Carl Schmitt quotes Roland Freisler(1893-1945) who made that declaration in his quality of chief personnel officer in the Prussian Ministry of Justice. During WWI, Freisler had been taken prisoner by the Russians. He became a Bolshevik commissar there, and returned to Germany as a communist, read law, and became a lawyer. Then, in 1925, he joined the National Socialist German Workers' Party. By 1934, he was already promoted to the office of State Secretary in the Reich Ministry of Justice. Then, in August 1942, he was appointed President of the People's Court which was to try among others the conspirators of the 20 July 1944 plot against Hitler. Hitler called him 'our Vishinsky', while one of his victims, James von Moltke, appreciated his talent of debater. Freisler died before he could pronounce the sentence against the plotters, when a falling beam crushed

him under during an air raid over Berlin. I have lingered on these details in order to point to the ease with which one could switch from one ideology to the other, where the only essential shift was from proletarian internationalism to ethnic identity. Carl Schmitt's stress on the latter as the single most important characteristic of the National-Socialist system (p. 48) should be interpreted in this light.

80 Latin expression meaning 'who is to judge'. This question was raised by Thomas Hobbes (1588-1679) in chapter 26, page 133 of the Latin version of his *Leviathan*, after he had decided that it was power and not truth that made the law (autoritas, non veritas facit legem).

81 Which would not do away with positive law but on the contrary facilitate its further development on a simplified, biological basis.

82 That is to say, each nation has its own law and system of justice.

83 The quotation is unidentifiable. I am tempted to consider it just an indirect invitation to those concerned to read Montesquieu's *Spirit of the Laws*, particularly the first thirteen books, and reflect on the contemporary situation in Germany in the light of the French thinker's remarks.

THE QUESTION OF LEGALITY

1 Lieutenant Wilhelm Scheringer was one of the three young Reichswehr officers of the garrison at Ulm put on trial at the Federal High Court in Leipzig for making propaganda for the NSDAP inside the Army. Hitler was invited to testify on the third day of the trial, 25 September 1930. Joachim Fest has in part reconstituted Hitler's oath on the occasion, in which by conjuring up the God Almighty, he assured the judge that if he came to power legally, he would set up state tribunals within his legal government, empowered to pass judgment on those responsible for the misfortunes of the nation, with the possibility of a few heads rolling legally, as a result.

2 The law of 26 January 1937, also known as the Civil Service Act, declared the civil servant directly responsible to Hitler as 'executor' of the will of the State carried by the Party. It also made the civil servants responsible for reporting activities hostile to the State to his permanent under-secretary or to the head of the Reich Chancellery, Minister Lammers. Swearing an oath to Hitler as the representative of the State carried by the Party was also made compulsory by that law, as well as the exclusion from the Civil Service of all those who at the time of appointment had been excluded from or been rejected by the Party.

3 The quotation has been translated as it is reproduced by Carl Schmitt in his text. No attempt has been made to harmonize it with the text as it appears in the English translation of *Economy and Society*, vol. II, p. 895, New York, 1968.

4 See Lenin, *Collected Works*, 14th ed., vol. 31, pp. 96–97, Moscow, 1966.

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About the Editor

SIMONA DRAGHICI is a European-American social scientist who among other things holds a PhD degree in sociology from the University of Texas at Austin. Her interests in the comparative study of social institutions have led her more recently to the analysis of the recurrent phenomenon of civilizational decline.