State, Movement, People, Part 1

Carl Schmitt

5,666 words

Part 1 of 4

Translated with notes by Simona Draghici

Editor's Note:

Carl Schmitt published *State, Movement, People* (*Staat, Bewegung, Volk*) near the end of 1933. Like many of his most important works, it is short and pithy (less than 25,000 words). *State, Movement, People*, unlike most of Schmitt's writings, is directed to a broad literate audience, not specialists in political philosophy and legal theory. Schmitt's goal is to explain and legitimize the new political order imposed by the National Socialist regime.–Greg Johnson

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The Weimar Constitution is no longer in force.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 22 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 paralyze 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.[11] 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?[12] 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[13] 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 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*.[14]

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, 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.[15]

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 percent 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.[16] 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 proper 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,[17] the Reichstag, the Reichsrat.[18] 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 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.[19] The office has in a way resumed the "constitutional" position of the head of an authoritarian state, *qui regne et ne gouverne* [20] 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."[21]

b) Besides the coexistence of the said offices, there is the coexistence of *varied legislative possibilities*. [22] 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).[23] 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,[24] and the plebiscite in virtue of Article 73[25]) 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,[26] 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.[27] 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[28]), 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.[29]

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 programs and ideologies, an option that split the German people into as many incompatible parties.[30] 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.

Source: Carl Schmitt, *State, Movement, People: The Triadic Structure of the Political Unity*, ed. and trans. Simona Draghici (Corvallis, Oregon: Plutarch Press, 2001).

State, Movement, People, Part 2

Carl Schmitt

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Carl Schmitt, 1888–1985

Part 2 of 4

Translated with notes by Simona Draghici

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 appears 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 molded 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 an especially 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."[1]

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 neighborhood). 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 realties. 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, molded, 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* 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 center 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 around: 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 civil servant.[2] 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.[3]

The spheres of popular and professional auto- administration 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 up-to-date 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.[4]

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.[5] 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 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 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 skillful 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 Supreme Court of 25 October 1932 contained fine examples and evidence of such "endless stipulation of federalism."[6] 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.

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 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." The 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 *Mein Kampf* about "federalism as mask."[7]

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 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.[8]

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 neighborhoods* (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).[9] 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[10] 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, vol. Ill, pp. 320f[11]), 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"[12] and thirdly, such an interference by the courts could be justified only by the dual view of state and non-state (to dwelt upon in Chapter III), which is incompatible with the new triadic overall structure 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 collective responsibility for abuse of office (Article 131 of the Weimar Constitution, §839 of the German Civil Code)[13] 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-molded 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.

State, Movement, People, Part 3

Carl Schmitt

5,569 words 

Part 3 of 4

Translated with notes by Simona Draghici

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 1800s 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.[1]

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 politicly 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 "political." 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 defenseless, poor and isolated individual person from the powerful Leviathan, the "state."[2] 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 political) "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,"[3] 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),[4] the public-law institution of the career civil service (Article 129),[5] and likewise, the public-law institution of communal auto-administration (Article 127).[6] Moreover, workers' unions and employers' associations are so acknowledged in this part of the Constitution (Article 165),[7] 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 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 baslc-rights part of the Weimar Constitution.[8] In 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 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.[9]

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 political 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, anonymously, 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 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 facade 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 dear 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.[10] 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),[11] 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 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 facade 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. 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[12] 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 1871[13] 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. [14] 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 national-Sozialistische 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.[15] 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 tunelessly 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.[16]

State, Movement, People, Part 4

Carl Schmitt

7,776 words 

Part 4 of 4

Translated with notes by Simona Draghici

IV. Leadership and Ethnic Identity as Basic Concepts of 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.[1] It has established the law on inherited peasant estates [*Erbhofrecht*]; it has saved the peasantry;[2] it has cleansed the German civil service of alien elements, thus restoring its station.[3] 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.[4] 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.[5] 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 many-sidedness 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.[6]

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*[7] is the most famous illustration. Still the three-class electoral law, which was in force with regard to local elections,[8] 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, loo, 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,[9] which was decided in favor 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).[10] 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,[11] 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 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.[12]

2. In view of the fundamental significance of the idea of leader, it becomes all the more necessary to draw a dear, 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, inaccessible 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.[13] 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 “equality before the law,” and a “political” judgment contrary to a “legal” or “juridical” assessment. The anti-state 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 [Auf-*sicht*], 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 centers 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 favor 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),[14] 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 offentliches 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*[15] 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 readied the highest degree.

Three factors characterize the elaboration and the development of the concept of supervision in the legal state into a true counter concept, 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 conceits 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 center, 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 unquestionably 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 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.[16] As "*gubernator*,"[17] 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.[18] 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).[19]

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*.[20] 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 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 *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.[21] 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 Causes], 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.[22] 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.[23] The idea of a complete codification or regularization is hardly feasible 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.”[24] 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”*[25] 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.[26] 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.[27] 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 l^oks, 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. [28] 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 imbued 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.